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Clinical Pathways to Ethically Substantive Autonomy

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There is no shortage of support for the idea that ethics should be incorporated into the academic and professional curriculum. There is a difference, however, between, on the one hand, teaching professionals about ethics, and, on the other, demanding that they give ethical expression to the range of professional skills they are expected to apply daily in their work. If this expression is not to be perfunctory, ethical judgement must be genuinely integrated into the professional skill set. The mark of integration in this regard is the capacity for *autonomous* judgement. Ethical autonomy cannot be achieved by a mechanical, rule-bound and circumstance-specific checklist of ethical *do's and don'ts*, and it is only partially achieved by a move from mechanistic rules to 'outcome based' processes.¹ Rather, professional ethical autonomy presupposes not only a *formal* understanding of the requirements of an ethical code of conduct, but a genuine engagement with the *substantive* values and techniques that enable practitioners to interpret and apply principles confidently over a range of circumstances. It is not then, that ethical skill is not valued by the legal profession or legal education, or that the shortfall of ethical skill goes unacknowledged, it is rather that the language of professional ethics struggles to break free from the cautious circularity that is the mark of its formal expression. To require a professional to 'act in their client's interests', or 'act in accordance

¹ The new SRA Handbook emphasises a move to 'outcomes focused regulation'. In this document the SRA say:

"Responsibility for meeting the requirements in the Handbook, and for operating effective systems and processes, lies with you. In the SRA Code of Conduct (the Code) in particular, we have stripped out a lot of the detail of the previous Code to empower you to implement the right systems and controls for your clients and type of practice. You will have more flexibility in how you achieve the right outcomes for your clients, which will require greater judgement on your part."

This reference to greater judgement [on the part of the practising lawyer] is clearly an acknowledgement that autonomy is now necessary in ethical skill application. This is to be welcomed, or point is simply that no amount of contingent examples of ethical rule application can impart the attribute of autonomy to a learner. (See S.3.2)@ <http://www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page>

with the expectations of the profession' or act 'fairly and effectively' are *formal*, infinitely ambiguous and entirely safe suggestions; to offer a *substantive* account of what, specifically, those interests might be, or what expectations we *should* have, are rather more contentious. Fears of dogma and a narrowing of discretion do, of course, accompany the idea of a search for ethical substance, and caution is to be expected in response to it. Notwithstanding these anxieties, there would appear to be no coherent alternative to the aspiration to substantive autonomy, and this must remain the goal of teaching legal ethics. In light of this, the problem facing educationalists is then perhaps expressed more diplomatically in terms of how ethical skill might be substantively developed, imparted, and integrated into a genuinely comprehensive conception of professional skill.

Clinical education can go a long way to solving this problem: exposure to the practical tasks of lawyering is the surest and best way of raising consciousness in this regard: 'Hands-on' is good - and consciousness-raising is a step in the direction of autonomy, but raw experience and elevated awareness is not enough. We know that our most influential theories of learning tells us that it is in the process of *reflection* upon problem solving that the practitioner begins to take autonomous control of skill development.² Reflection, however, requires *content* and *direction*, and in this paper, with the aid of three models of skill integration inspired by Nigel Duncan's detailed analysis and video reconstruction of the ethical and technical skill deficiencies brought to light by *R v Griffiths*,³ we attempt to specify what might be understood in this regard: Reflective *content* refers to the discrete interests and values that compete to produce tension in what we will refer to the 'matrix' of concerns that feature in *all* forms of dispute resolution; reflective *direction* points to an engagement with the resources and techniques that can empower critical and autonomous judgment. In the context of a clinical process broadly structured by the insights of Wenger and by Rest's model of ethical skill,⁴ guided reflection so specified thus serves

² See David A. Kolb, *Experiential learning : experience as the source of learning and development* . (Englewood Cliffs, N.J, London : Prentice-Hall) 1984

³ See *R v Griffiths* [2006] All ER (D) 19. See also Nigel Duncan "Preparing for the Challenge of a Corrupt Environment" (elfa-afde.eu/app/download/5788681553/n.duncan.pdf) . See video at www.teachinglegalethics.org under 'resource library' - 'teaching materials', then scroll down to 'Nigel Duncan'.

as an *interface* between on the one hand, indeterminate ethical *form*, and, on the other, the *substantive* ethical wisdom to be found in the repository of values that underpin the very idea of the legal enterprise.

The Matrix of Technical and Ethical Skill: Three Models of Integration

When we introduce the idea of ethical behaviour into the concept of professional skill we face a logical problem of greater complexity than might first be imagined. Skill-sets can be compiled and evaluated simply as linear sets of practical means in relation to a given end (task or enterprise). If engineering, for example, a range of basic and discrete craft skills might be specified and enumerated as a series: measuring, cutting, milling, filing, welding and so on; the set might be enlarged as other basic skills, or other more advanced skills are added *on to* the linear series. Here the idea of a linear series of skills will be contrasted with a systematic or organically integrated set of skills. The linear analogy is probably an oversimplification even in basic engineering – it is probably true to say that an integrated set of basic skills in combination is minimally required to perform any engineering task, and so the distinction we seek to establish is perhaps a matter of degree. But the problem about ‘adding on’ or rather, ‘adding *in*’ ethical skills to an accepted linear set of professional skills or competences, is that ethical skill in the form of autonomous moral judgment does not merely enlarge the set of skills and thus increase the range of tasks that might be undertaken. Rather, the ethical dimensional of skill application radically and qualitatively changes not only the *nature* of skill application, but the *criteria* by which we might judge the successful (competent and skilful) completion of the task in hand. In fact, adding *in* ethical autonomy to the lawyers skill set might profoundly affect the understanding of the goals of the entire legal enterprise. That is to say, we cannot conceive of skill acquisition for lawyers in linear terms, but rather must approach the issue of skills in a holistic way: ethical judgement cannot be ‘added in’ or ‘bolted on’ to a skill-set it must be suitably *integrated*. In relieving the pressure of this abstraction we offer three familiar scenarios that highlight certain ethical constants (judgments about interests and values) that constitute a matrix of concerns common to all lawyer/client interactions. There are five such: (a) the interest of the client, (b), the provisions of relevant legislation – statute, common law principle - practice guidelines, (c) the requirements of the professional ethical code, (d), the orthodoxly accepted set of

⁴ See fn. 18 *infra*

clerical, technical and administrative skills expected of practising lawyers, (e), the underlying social or moral purpose of the legislation. The three scenarios present these concerns in a way that shows that our understanding of what is to count as ‘skilful execution’ and ‘successful outcome’ varies in relation to our conception of what constitutes a suitably professional model of skill integration and application.⁵ The models are drawn from reality, but it is their hypothetical or ‘ideal-typical’ validity that is important in what follows. The first model (See the video reconstruction of stages 1, 2 and 3 of *R v Griffiths*)⁶ provides a convenient illustration of what we have called the ‘the automatically integrated’ model.

(i) ‘Automatically’ integrated model

What we refer to as an ‘automatically integrated’ model occurs where *prima facie* it appears that the client interest, the range of orthodox technical skills, and the quality of ethical judgement required to tie their application together are all automatically entwined. A good example of this is provided by the role play corrective to *R v Griffiths* constructed by Nigel Duncan (See video at www.teachinglegalethics.org). Here, an estate agent approaches a solicitor with a view to processing the purchase of a property appearing on the market at a remarkably low price. The solicitor is aware that the vendors had recently been convicted of drug dealing and money-laundering and immediately perceived a connection between the low selling price of £43,000 (against a market value of approximately £150,000) and the attempt to dispose of assets prior to potential confiscation under the Proceeds of Crime Act 2002.⁷ Despite what actually occurred,⁸ the solicitor’s statutory duty in this situation could not be clearer: it is to report any such suspicion. Similarly, it seems a straightforward matter for the solicitor to point out to the prospective purchaser that it simply would not be in their interest to acquire criminal property in this regard. It would be inevitably confiscated and very possibly the

⁵ By ‘skill integration’ we are trying to convey the message that Julia Black expresses such that ‘*ethics is what raises competence to professionalism*’. Julia Black “Legal Education and Training and its Interaction with Regulation”. (Paper to the LETR Symposium, Manchester, July 2012 (forthcoming)).

⁶ *R v Griffiths* [2006] EWCA Crim 2155,. See video at www.teachinglegalethics.org under ‘resource library’ - ‘teaching materials’ then scroll down to ‘Nigel Duncan’. See fn 3 *supra*

⁷ See: Proceeds of Crime Act 2002, s.330 (1) ‘Failing to make a required disclosure’.

⁸ See Nigel Duncan “Preparing for the Challenge of a Corrupt Environment” (Op.Cit. fn 3 *supra*)

discrepancy between the selling price and the actual market value might be recovered from the client. If this course of action is followed, the happy coincidence of (a) the interests of the client, (b) the provisions of the statute, (c) the maxims of the professional code (d) the technical and administrative competence skills of the lawyer, and (e) the underlying purpose of the legislation, come together to produce an *automatically* balanced and cohesive solution to the situation. It would require (as it did in the actual events leading to the prosecution of the solicitor and the client) a determined effort *not* to act skilfully and diligently in serving cohesively interests (a) - (e). Thus *R v Griffiths* provides an invaluable general model which, when analysed, serves as an interface to a more focused level of reflection: the student or future practitioner takes the first step to ethical autonomy when he or she *becomes aware* of the matrix of concerns that lie between (a) – (e). Guided reflection can bring these concerns systematically to the fore. This contributes not only to elevated ethical awareness, but allows the student or practitioner to push beyond the *formal* identification of the problem of skill integration towards the kind of knowledge and techniques required to advance substantive solutions to it. Models two and three below present this ‘matrix of concerns’ in more problematic permutation.

(ii) ‘*Problematically*’ integrated model

R v Griffiths provided a convenient illustration of an integrated solution and a valuable model to aid our analysis of a problem, but most lawyer/client interactions involve ‘problematically integrated’ situations: A good example of this kind of interaction occurs in cases where legal advice and skilful manipulation of financial arrangements is required to effect, say, a tax burden reduction. Here, ‘the client interest’ (‘easing’ the tax burden) and the technical skills of the tax lawyer or accountant might appear to conflict with the apparent clarity of the ethically redistributive and progressive intentions of the statute. But the economic and psychological models that form the rationale *behind* the legislative intention are highly contentious.⁹ In addition, what might emerge as an expression of the client interest is ethically and philosophically uncertain (for example, the client might genuinely be appalled by the leniency of the law in this regard and insist on

⁹ One need only refer to the immense controversy arising from proponents and critics of supply-side economic's and in particular, the issue of the ‘Laffer Curve’ See, for example, Arthur Laffer, “The Laffer Curve: Past Present and Future” (Heritage Foundation June 1, 2004) <http://www.heritage.org/research/reports/2004/06/the-laffer-curve-past-present-and-future>

paying more tax than is legally required) . Here, then the integration of the matrix concerns (a) – (e) is disrupted and made problematic.

(iii) Unintegrated model

A third model (drawn from reality, but which could plausibly be mooted hypothetically) is a situation where the ‘client interest’ and what counts as the ‘technical skill’ of the lawyer are entirely antithetical to the universally understood and accepted moral intentions of the legislation: i.e., and e.g., ingeniously defending torture at Guantánamo Bay for the benefit of providing legal immunity for the U.S. military.¹⁰ If we assume, ideal-typically, a civilised legislative intention and a principled ‘client interest’ in a democratic society,¹¹ we have an example of an entirely *unintegrated* application of technical skill and ethical judgment: The ‘skill’ required of lawyers in this situation is what ethical common sense would regard as the capacity to subvert or nullify the legislative and democratic purpose of the law to serve the immoral and unconstitutional interests of the ‘client’. A fully rational reconstruction of this interaction from an ideal-typically ‘integrated’ perspective could not, we argue, regard *this* permutation of technical competence, client interest and ethical judgment as unproblematically to be regarded as ‘skilful’.¹²

An Interface Between Ethical Form and Ethical Substance

When we speak about an integrated approach to legal education in this sense of producing a cognitive grasp of the relations between skill, interests, legislative intent, and ethical judgment what we are striving to do is express a maximally comprehensive notion of high professional competence. We noted in our introductory remarks that mechanistic and rule-bound regimes, and a pathologically cautious formalism fall short of our aspirations in this regard. Ethical skill can sensibly be understood only as a capacity for

¹⁰ See Richard B Builder & Detlev F Vagts, “Speaking Law to Power: Lawyers and Torture” (2004) *American Society of International Law* , at pp 689-695. The advice provided was that the President as Commander-in-Chief has constitutional authority to disregard treaty or statutory prohibitions on the use of torture or other coercive interrogation techniques in conducting the “war on terror”.

¹¹ The question here, of course, is who is the client? The government and the military are archetypal public bodies and in it could be(should be) argued law have no interests antithetical to the public interest. See in particular “The Meaning of Public Authority Under the Human Rights Act” - Seventh Report of Session 2003–04” in relation to s. 6(3)(b) of the HRA 1998.

¹² This resonates with Julia Black’s aphorism. See fn. 4 *supra*

autonomous, reflective and accomplished ethical judgement - and pure form cannot facilitate this autonomy. Endlessly insisting on the need for reflection will not magically produce the level of accomplishment we desire, rather we must openly and honestly specify the *content and direction* of reflection. By the same token, if the educational task is to develop an understanding of ethical skill, impart it, and ensure that it becomes integrated into a genuinely comprehensive conception of professional skill, we need to do more than compile wish-lists of virtues that we would hope to find evenly distributed throughout the profession. Such lists are not to be criticised on the basis of their formalism *per se*, formal articulation of any problem is not only methodologically unavoidable, in the context of ethical endeavour it is also vitally important to us in creating as Potter points out, a *universal* focus of hope.¹³

Lists of desirable virtues thus provide an initial formal orientation: Rowe *et al* recently and rightly suggest that our understanding of 'professionalism' ought to include a recognition of 'the broader implications of work'. This involves:¹⁴

- considering the interests and values of clients and others
- providing high quality services at fair cost
- maintaining independence of judgement
- embodying honour integrity and fair play
- being truthful and candid
- exhibiting diligence and punctuality
- showing courtesy and respect towards others
- complying with rules and expectations of the profession.
- Managing law practice effectively and efficiently
- engaging in professional self-development

¹³ See Potter 2005: 24

¹⁴ M. Rowe *et al* "Professionalism in Pre-Practice Legal Education: An Insight Into the Universal Nature of Professionalism and the Developemnt of Professional Identity." *The Law Teacher* (2012 Vol 46 No.2) pp.123-124

- nurturing quality of life

Additionally, ‘professionals’ should support the aims of the legal profession by:

- providing access to justice
- upholding the vitality and effectiveness of the legal system
- promoting justice fairness and morality
- and encouraging diversity.

They go on to say that traditional law teaching does little to address these values and attributes which could be said “to be at the core of lawyers’ professional identity”.¹⁵

There is nothing in this list that anyone would wish to disagree with; but we should by now be aware that it is the purity of the form – quite literally, the absence of substance – that lies behind this guarantee of unanimous approval. Thus despite the unanimity, as Rowe *et al*, point out, little is done, effectively, to promote these virtues. There is no paradox, however, once we acknowledge that this failure lies in the inability of legal ethical discourse to break free from these formalist constraints. Ironically, Rowe’s list of virtues provide a good illustration of the problem. This is not to criticise *tout court* what is listed; the analytical process, as noted, renders this formal first step logically unavoidable in identifying the practical problem and providing a systematic orientation to its separable dimensions. Its separable dimensions concern, formally, what might be involved in successfully serving ‘the interests and values of clients’ and ‘others’; of providing ‘high quality’ at a ‘fair cost’; of encouraging ‘independence of judgement’; ‘honour integrity and fair play’; of meeting ‘expectations of the profession’; ‘professional self-development’; ‘quality of life’ and so on. But the enumeration of these dimensions of the problem is not a solution to the problem, nor even an identification of what is required to synthesise a solution to the problem. What is enumerated here is infinitely interpretable: a list of ‘blanks’ that must urgently be ‘filled in’ by substantive information. It seems that these empty formal shells cry out for *substantive* ethical content, but that we are condemned to proceed in circles, trying to fathom what, concretely, it means to

¹⁵ Ibid. Rowe *Law Teacher* p. 123,4

teach lawyers to be ‘fair’, ‘effective’, ‘honourable’ and what is entailed by making them aware of the ‘broader implications of their work’.

Progress beyond this formalism - progress towards professional ethical skill seen as substantive ethical autonomy – demands of us that we engage with what we are now naturally conditioned to avoid: ‘value-judgments’, ‘essentially contested concepts’ or ‘metaphysical’ notions. We live, as Alisdair MacIntyre¹⁶ pointed out, in an age of Emotivism: a world where philosophical orthodoxy - and the post-rational *rejection* of the orthodoxy - *both* regard the engagement with concrete value as not a proper topic of rational or ‘scientific’ discussion. Hope, however, lies in the fact that law, in a profound sense, *accepts* this moral impasse and attempts to fashion and stabilize justificatory norms as a response to the potential for disagreement inevitably arising from it. Given this, there is no reason why we should not find answers to what is skilful, fair, effective and honourable within the *practice* of law by looking at the values that underpin the practical wisdom of the very *idea* of law. We find this suggestion increasingly in contemporary policy discourse concerned with the future of the profession,¹⁷ but we also find it throughout the history of philosophy – from Aristotle to Aquinas, from Kant to Hume, and in the under-utilized genius of Lon L.Fuller. It is the idea that specific and particular problems relating to ethical *means* might be resolved by examining the generality of our ultimate ends.

A Clinical Context for Guided Reflection

Our aim has been to articulate the nature of the interface that is required to connect the formal and unspecified acknowledgement of the importance of ethical skill with the substantive values required to bring about an autonomous understanding of them. This interface consists in what we have identified as the context and direction of guided reflection provided by familiarity with the ‘matrix of concerns’ that points practitioners towards underlying values. This guided reflection must operate within a suitable structure of clinical learning, and Donald Nicholson¹⁸ has done

¹⁶ Alisdair MacIntyre *After Virtue: A Study in Moral Theory* (2nd. Edition, Duckworth, London) 1982, pp.6-10.

¹⁷ See fn. 23 *infra*

¹⁸ See Nicholson, Donald J *Teaching Ethics Clinically*, (Teaching Ethics Clinically Without Breaking the Bank,) (2012)., - www.teachinglegalethics.org - and more generally “Making Lawyers

much to forge a widespread acceptance of the general model which is shaped by the various insights of Wenger, Rest, and Merrit.¹⁹ Wenger's notion of a 'community of practice' is perhaps the central structural consideration in modern educational theory. Learning occurs through a combination of the influence of the cultural environment and the process of negotiating meaning through participation and reification within this environment. But an ethically pristine 'community of practice' does not arise spontaneously and automatically, ready to guide inexorably and productively towards autonomy. It should, of course, as Nicholson insists, *encourage* the kind of developmental virtues outlined in Rest's model: the moral sensitivity, capable judgement, active commitment and courage required by 'altru-ethical' professionalism.²⁰ But these virtues *must* function as much as the ability to *resist* institutional norms and pressures as to act in conformity with them; this is obvious, for a community can just as easily discourage and repress moral development as it can promote and sustain it. Thus autonomous ethical judgement must work from within and upon the community if it is to provide what Merrit refers to as a 'sustaining social contribution to character,'²¹ and this points us to substantive foundations and to the notion of a source of autonomous ethical insight *prior to* community. To be sure, there is a dialectic at work here, but not a paradox: reflection leads to autonomy, but reflection must be guided by substantive insight. This is best explained by augmenting Wenger and modifying Rest by introducing what Vigotsky refers to as the 'zone of proximal development'.²² This high-tec phrase simply denotes

Moral : Ethical Codes and Moral Character" (*Legal Studies* Vol .25, No. 4, 2005) pp. 601-626

¹⁹ Etienne Wenger, *Communities of Practice : Learning Meaning and Identity* (Cambridge University Press, Cambridge, 1998); Rest, J. 'Background: Theory and Research'. In *Moral Development in the Professions* J.R.Rest & D.Narvaez Eds .(Hillsdale, NJ: Erlbaum. 1994) pp.1-26; Maria Merrit "Virtue Ethics and Situationist Personality Psychology" *Ethical Theory and Moral Practice* (3, 365 – 383, 2000)

²⁰ See fn. 16 *supra*

²¹ See Maria Merrit "Virtue Ethics and Situationist Personality Psychology" *Ethical Theory and Moral Practice* (3, 365 – 383, 2000)

²² See L. S Vygotsky *Mind in society: The Development of Higher Psychological Processes*. (Cambridge, MA: Harvard University Press, 1978.) p.86). Saul McLeod, says: The *zone of proximal development* ... has been defined as "the distance between the actual developmental level as determined

that part of the process wherein a learner is empowered to achieve something by being provided with guidance without which they would have been unable to progress. *Subsequent* to this intervention and guidance, the zone of *proximal* development (proximate to the guidance or guide) becomes the zone of *actual* development. For our purposes, and in the context of ethical learning, the zone of *actual* development can be understood as progress towards the skills of ethical autonomy.

The Ethical Dynamism of Law

When ethical reflection becomes focused it goes in search of substantive principle, when it finds it, substantive principle informs clinical judgement; we begin to move from ethical awareness in the simple practical involvement with a task to the beginnings of an autonomous understanding of the task and what is required for its comprehensive resolution. The *formally* irreproachable values of ethical professionalism attain a concrete and dynamic importance when through an *interface* they connect with the repository of the ethically substantive. We have suggested that critical engagement with the ‘matrix of concern’s points us in the direction of a repository of values that expansively *underpin the idea of law itself*. This is undoubtedly the right direction, as those charged with charting the future of the profession now seem to accept,²³ and this sounds a lot like a job for ‘Jurisprudence’. One can expect antipathies to the colonization of legal ethics by Jurisprudence, and unease about the association between dogma

by independent problem solving and the level of potential development as determined through problem solving under adult guidance, or in collaboration with more capable peers” See S.A. McLeod *The Zone of Proximal Development*. <http://www.simplypsychology.org/Zone-of-Proximal-Development.html>

²³ In paragraphs 87 -89 of the LETR Discussion Paper 02/2012 at p. 30 we find: “Both the ACLEC Report and the more recent Economides and Rogers Report (2009), in their recommendations to bring ethics into the initial or academic stage of training for solicitors, have raised uncertainties about what that implies. Are we talking about individual professional ethics, *per se*, are we addressing the institutional ethical roles of the professions, judges and lawyers as a collectivity, or are we primarily concerned with the ‘system ethics’ and values of law itself? This is reflected in Boon’s (2011) definition of legal ethics as...

The study of the relationship between morality and Law, the values underpinning the legal system, and the regulation of the legal services market, including the institutions, professional roles and ethics of the judiciary and legal professions.

If we accept that definition, all of these options are possible...”

and ethical substance, to intensify at this stage of the discussion. But this should not tempt us to evade or obscure the fact that the discipline of legal ethics appears to acknowledge that progress beyond mechanism and formalism must do more to connect the concept of professionalism with the theoretical relationship between legality and morality. This is the relationship that underpins the respect for individual worth implicit (and explicit) in the commitment to the Rule of Law. This is not to suggest that *legal* validity – even from the Idealist’s perspective – is to be regarded as synonymous with *moral* validity, nor is it to assume that professional legal ethics is simply another word for Jurisprudence and/or Moral Philosophy. In fact, to be effective, legal ethics must be circumscribed and differentiated as a discipline from the purely philosophical sciences. However, it must answer the questions it appears centrally to set itself – especially about its rationale and method – and if in so doing, it must inevitably draw on the philosophical sciences, it must acknowledge its debt to them.

In approaching our concluding remarks on this problem, however, it is worth noting that one very important substantive value is presented to us as a *fait accompli* requiring no philosophical effort of analysis whatsoever, namely the constitutional and moral issue of access to justice. It is in the context of a much reduced legal aid budget that our clinical students will encounter the general public and their legal needs. Whatever ‘justice’ might be, ‘access to it’ in a world of commodified legal services and limited funding generally means ‘being able to hire a skilled legal representative’ or be provided with one free of charge. On the premise that ‘access to justice’ in a constitutional system of laws (i.e. all such systems) means ideally, access to *all* who require it, or, realistically, as much of it as can feasibly be provided, and that a failure in this regard is unethical and unconstitutional, ‘legal professionals’ are ‘ethically underdeveloped’ to the extent to which they are unaware of this substantive failure. From here we can make a further connection to another aspect of our wish-list of virtues noted above by Rowe *et al* : namely, the *ethical* requirement for practitioners to ‘recogni[e] the broader implications of [their] work’. Reflection on these ‘broader implications’ leads to a wider remit for ‘considering the ‘interest and values of clients’ and ‘others’. Here, ironically, ‘others’ will increasingly denote persons who are unable to attain the status of being someone’s ‘client’. Thus, these days, ‘Access to Justice’ becomes automatically integrated into the notion of clinical legal education, and this substantive connection with formal ethical requirements appears to require no deeply theoretical justification: it is simply accepted as a mark of well-rounded

ethical professionalism.

This natural current of sympathy is to be welcomed, but it should not lead us to believe that autonomous ethical judgement in the professions descends automatically upon all practitioners in all historical circumstances. Autonomy requires constant critical and deliberate reflection. Interestingly, however, the more closely we examine the jurisprudential rationale for maintaining access to justice and related constitutional and social entitlements, the more our fears about dogma and rigidity in engaging with substantive concerns are allayed. That is, what jurisprudential reflection on foundational values leads us to is not so much a list of conveniently concrete principles, but rather, insight into the method of their dynamic creation.

Our view is that the more clinical law students and practitioners come to understand the nature of rules, the more they understand what surrounds their ethical interpretation and application, and this surely must signal the start of the journey from the mechanical and formal grasp of the problem, towards the level of autonomous accomplishment required to deal with the problem professionally. There is, to be sure, a great deal that is unedifying in the traditional debates between Legal Positivism and Natural Law, but there is much to be learned from the challenge to law's validity arising from the unavoidably 'open texture' of rules. It is this 'open texture' that fuels the perennial search for principles which are required to give semantic context and form to rules that will be, or might be, accorded the status of law. Positivists and Idealists might differ as to how, in preserving the distinction between law and morality, these principles might be incorporated as such in the form of procedurally recognisable sources, but what emerges from the debate is an acknowledgement, reluctant or otherwise, of the *dynamic* nature of the recognition of sources. The educational, doctrinal, professional, procedural, and political problems of law are irreducibly ethical not simply because law is a form of normativity that demands pre-eminence and compliance, but because implicit in its every utterance is a claim to legitimacy. If the acquisition of legal skills requires an understanding of the values that underpin the legal enterprise, an encounter with the *philosophical method* that seeks to identify these values must necessarily be seen to be of great *practical* importance.

Hart's debate with Fuller²⁴ about the 'inner morality of law' is as accessible as any, and this famous exchange devotes scrupulous

²⁴ H.L.A Hart "Positivism and the Separation of Law and Morals" *Harvard Law Review*, Vol. 71, (1958). 593-629 at p. 607. See, importantly Fuller's

critical attention to whether or not we can detect substantive ethical principle embedded in the very idea of a rule - regardless of its content. Once we invite Dworkin into this discussion the formal stability of the Black Letter gives way to a much more imaginative structure of creative interpretation where moral good sense reveals itself as legal substance in its own right. Dworkin's famous example in *Riggs v Palmer* of the ethical integrity required to make coherent sense of seemingly straightforward probate rules is as valuable to our understanding as it is simple. We might point out to students that (in the USA) probate 'law' is to be ignored and the principle that, 'a person should not profit from wrong doing', is to override it where appropriate.²⁵ *Mechanical* knowledge of this particular judgement – or several similar to it – would surely be of practical and technical value, but it is not, of course, an indication that one has achieved a level of autonomous ethical maturity. Understanding from this illustration that the entire process of adjudication is structured by the constant search for cohesion between ethical principle and rules of general applicability, is, however, a step towards it, and it offers to clinical educationalists a clue as to how progress might be encouraged in this regard.

Bringing together the *content* of our model of the 'matrix of concerns' and establishing the *direction* of philosophical analysis exemplified in the debate between Hart, Fuller and Dworkin offers a simple but perfectly coherent example of we understand by an *interface* of guided reflection: it is a phase of experiential learning that can lead the clinical student to grasp the *method* by which mechanical and formal ethical requirements can be connected synthetically with substantive values. The interface could be said to amount to creating 'a zone of proximal development'. That can enable us to break the bonds of formalism in our educational literature and discourses. 'Knowing the law' is an indispensable element of technical skill, but once it is revealed and accepted that there is an ethical dynamism and a creativity necessarily inherent in bringing legal rules into legitimate existence, then, the search for ethical principle, or the search for coherent principle overall,

methodological comments in reply: Lon L. Fuller "Positivism and Fidelity to Law: A Reply to Professor Hart" *Harvard Law Review*, Vol. 71 No.4, 1958, pp. 630-672.

²⁵ See Ronald Dworkin *Taking Rights Seriously* (Cambridge, MA: Harvard University Press)1977; also *Law's Empire* (Cambridge, MA: Belknap Press 1986

becomes an integral part of the professional understanding of the nature of legal practice.