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Clinical legal education in the United Kingdom: Origins, growth and the technological innovations and challenges of its future

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A. Introduction

This essay will begin by exploring the increasingly important role of clinical legal education („CLE“) within the United Kingdom („UK“). In doing so, after providing an initial definition of CLE, it will situate its development within the wider international context, as well as exploring the challenges currently posed to CLE by broader changes in UK higher education, in particular its growing marketization.

In considering the future of CLE in the UK, this essay will focus on the potential offered by the increasing prevalence of information technology within society and its utilisation as a way of communicating legal advice and information. This can involve both the use of online methods of communication within CLE, for example, via emails and online video conferencing, and also the development of new products which provide innovative routes to promote access to justice, such as downloadable apps. The example of The Open University in the UK will be used to demonstrate how information technology can be harnessed within CLE, drawing on its current

development of an online pro bono¹ project, Open Justice, which includes the provision of an online law clinic staffed by students and housed within an optional pro bono module attracting academic credit.

The final part of this essay will offer a critique of the use of technology within CLE, focusing in particular on the example of an online law clinic. It will use

¹ The phrase pro bono derives from *pro bono publico*-- „for the public good“. A definition of pro bono activity is provided by the *Joint Pro Bono Protocol for Legal Work* agreed by the Law Society, Bar Council and Chartered Institution of Legal Executives representing the major branches of the English legal profession. This states (at section 1.1) that “when we refer to Pro Bono Legal Work we mean legal advice or representation provided by lawyers in the public interest including to individuals, charities and community groups who cannot afford to pay for that advice or representation and where public and alternative means of funding are not available.”

existing work on the importance of the affective domain² within law to reflect on how both inter-personal dynamics and intra-personal traits may impact on the way in which the technology is utilised and the engagement with such innovations by those providing, and those receiving, advice through online mediums.

Overall, the discussions in this essay will demonstrate that CLE has developed to become a well-established and increasingly important part of the UK legal landscape. This can be further enhanced and developed through harnessing appropriate and innovative technologies, but only when attention is also paid to the human face of online legal work and the demands and opportunities it affords for individuals involved in it.

B. The past and present of CLE in the UK

I. Defining CLE in the context of UK law schools

The types of activity included under the umbrella of CLE in the UK context are varied and it is impossible to provide neat definitional parameters. It is worth noting that the English word *clinic* is derived from the Greek *klinikos*, which can be translated as „from the bed“. As Giddings points out, this shows the inspiration that CLE has taken from medical education which emphasises the importance of applying theoretical knowledge in a practical setting.³ As such, he offers the following useful definition of CLE:

² The term affective domain is used here to refer to the emotions and feelings of individuals involved in CLE, drawing on the definition by Shuman and Scherer in Pekrun and Linnenbrink-Garcia, *International Handbook of Emotions in Education*, 2014, 18; see also Boekaerts in Pekrun and Schutz, *Emotion in Education*, 2007, p.37.

³ Giddings, *Promoting Justice through Clinical Legal Education*, 2013, p.14.

„Clinical legal education involves an intensive small group or solo learning experience in which each student takes responsibility for legal or law-related work for a client (whether real or simulated).“⁴

Giddings emphasises the key pedagogical principle that CLE involves students being active in the learning process and having the opportunity to reflect and learn from their experience⁵. In doing so it goes beyond skills training and calls on students to engage with the law as an open ended subject and to scrutinise wide ranging social and legal issues which facilitates professional ethical development in a practical context.⁶

Whilst reflective student practice can be considered a hall mark of CLE, there is a broad range of student activity that fits under this pedagogical umbrella to the extent that Kemp *et al* argue that argue that „CLE can mean different things in different contexts“.⁷ Drummond and McKeever point out that a common type of activity is for students to provide legal advice to members of the public under supervision.⁸ However, even here the range of activities are considerably varied. Kerrigan and Murray show that law clinics can range from in-house advice and representation clinics, which can provide a similar service to the client that they would expect if they went to a law firm for advice, to advice- only services which assist the client in identifying the legal issue and provide a referral service to other agencies.⁹ In addition to in-house activities, students may take part in placements or externships or specialist projects such as the Innocence Pro-

⁴ Giddings, footnote 3, p.14.

⁵ For a wider discussion of the relevance of reflective learning see Kolb, *Experiential Learning: Experience as the Source of Learning and Development*, 2nd ed, 2014.

⁶ Drummond and McKeever, *Access to Justice through University Law Clinics*, 2015, p. 12.

⁷ Kemp, Munk and Gower, *Clinical Legal Education and Experiential Learning: Looking to the Future*, 2016, p.2.

⁸ Drummond and McKeever, footnote 5, p.12.

⁹ Kerrigan and Murray, *A Student Guide to Legal Education and Pro Bono*, 2011, pp.1-2.

ject¹⁰, or Free Representation Unit¹¹. Kerrigan and Murray also argue that Public Legal Education („PLE“) activities such as Streetlaw¹², which are designed to enhance public awareness of legal issues, should also be included in the definition, despite being at first sight distinct from traditional legal practice, as although not involving the delivery of individual legal advice it does involve „working to a specific brief and interacting with the public in relation to legal rights and responsibilities“. ¹³

Thus it can be seen that CLE refers to a wide variety of student activity within UK law schools but has a commonality in its pedagogical approach giving primacy to active participation and reflective learning. As Giddings' definition illustrates, inherent within this approach is the aspiration to develop the reflective abilities and professional ethics of learners exposed to CLE activities. In addition to the above educational purposes, CLE also arguably has a role to play in developing a culture of commitment to pro bono and social justice legal work amongst the next generation of lawyers.¹⁴ However, pro bono and CLE are conceptually distinct in that their primary aims are different. Pro bono activities seek to provide free legal services whereas the primary focus of CLE activities are the educational benefit it provides to students.

II. The History of CLE

The origins of CLE are commonly traced back to the publication of a journal article in 1933 by Jerome Frank, „Why Not a Clinical Lawyer-School?“ where the Yale Research Associate argued that the law schools should move away from the academic based case law approach, which remains the orthodoxy in

¹⁰ <https://www.innocenceproject.org/>, [Stand: 27.05.2017].

¹¹ <http://www.thefru.org.uk/>, [Stand: 27.05.2017].

¹² <http://streetlaw.org>, [Stand: 27.05.2017].

¹³ Kerrigan and Murray, footnote 9, p.7.

¹⁴ Rhode, *Fordham Law Rev.*, 1999, 2415.

common law jurisdictions, towards a practical model inspired by medical school clinical teaching.¹⁵ This movement had gained momentum by the 1950s, with grants from The Ford Foundation which supported the widespread development of CLE in US law schools. This growth led to the current situation of the vast majority of US law schools incorporating clinical programmes¹⁶, the existence of the Clinical Legal Association („CLEA“) and an active academic journal: the *Clinical Law Review*.¹⁷

Although the growth of the CLE movement in the US was given a boost by the capital support of the Ford Foundation, Drummond and McKeever¹⁸ argue that the motivations for the growth in CLE were as much to do with the constitutional imperative of providing legal services for the poor as for educational purposes. The development of CLE in Australian law schools followed a similar pattern in that it focused on community legal centres and providing a service to the poor that would not otherwise be available. Arguably it is this mode of historical development that at least contributes to the current CLE movement with its focus on public service in addition to its educational rationale.¹⁹

The development of CLE in the UK differed in that, aside from a handful of Universities offering CLE in the 1970s and 1980s²⁰, engagement with clinical methods was sporadic. Kent University and the University of Warwick were

¹⁵ Frank, *Univ. Penn. Law Rev.*, 1933, 907.

¹⁶ Note that the American Bar Association has a mandatory requirement that all law schools provide opportunities for students to access law clinics or field placements Standard 303 ABA(2015). There is no equivalent requirement for UK undergraduates.

¹⁷ Kemp *et al*, footnote 7.

¹⁸ Drummond and McKeever, footnote 6;

¹⁹ For a wider discussion of the development of CLE in Australia see Giddings, footnote 3.

²⁰ It should be noted that the routes to qualification as a lawyer in the UK can be contrasted to the US route to qualification, which has no equivalent of a vocational stage of training. The US route consists of an undergraduate degree followed by a three year J.D. degree and a subsequent requirement to pass the bar exam.

early pioneers opening a clinic in 1973 and 1976 respectively but only four law school clinics were operating in the 1980s: Warwick, Northumbria, Birmingham and London's Southbank University. The CLE movement developed greater traction in the next decade with an increase in the number of CLE offerings²¹ resulting in the formation of a national support body for legal clinicians: The Clinical Legal Education Organisation („CLEO“).²² That the resurgence in interest clinical methodology stems from as recently as the 1990s could partly be due to the fact that in the UK, until the 1980s, the existence of extensive provision of state funded legal services meant the imperative to provide legal services for the poor did not yet exist. The recent cuts to state funded provision for legal services²³ have heralded an era of increased unmet legal needs, especially amongst economically marginalised groups. As such this has led to a renewed focus on what the role UK law schools can play in attempting to meet this need. Overall, Bloch argues that CLE has grown into a truly global movement which has a concern for legal reform and social justice.²⁴

III. Current CLE practice in UK law schools

CLE is now a significant feature of UK law school practice. The most recent comprehensive survey of clinical activity was conducted by Carney *et al* in

²¹ Grimes, *IJCLE*, 2000, 1.

²² CLEO remains active in supporting the development of CLE and pro bono work in the UK and works with Northumbria Law School to publish the *International Journal of Clinical Legal Education*.

²³ The UK has seen a marked retrenchment in the scale of legal services provision over recent decades. The legal aid system has gone from being recognised as one of the most generous to one that, with the passing of the Legal Aid, Punishment and Sentencing of Offenders Act 2012, has undergone a considerable reduction in scale and scope. For a wider discussion of the impact of legal aid reforms to access to justice see Sommerlad, Sanderson, *Journal of Social Welfare and Family Law*, 2013, 305.

²⁴ Bloch, *The Global Clinical Movement: Educating Lawyers for Social Justice*, 2011. The Global Alliance for Justice Education brings together clinical practitioners from around the world and The European Network of Clinical Legal Education includes many CLE practitioners from civil law jurisdictions.

2014 on behalf Law Works.²⁵ They achieved responses from 80 UK law schools, which amounts to 73% of the total number. Of those that responded 96% reported involvement in pro bono or CLE activity which equates to at least 70% of the total number of UK law schools, a marginal increase from the previous survey in 2010 but a considerable one in comparison to the first survey in 1995. Carney *et al* estimate that this equates to approximately 10 000 law students taking part in CLE activities across the UK.²⁶ The 2014 survey illustrates the increasing variety of activity taking place across the CLE sector. PLE activities, including Streetlaw, amounted to the most frequently occurring form of activity, with 67 out of the 80 law responding law schools reporting engagement in this area. This is to be expected given that these type of activities can be less resource intensive to supervise and therefore cheaper to provide than law clinics which tend to require higher level of professionally qualified supervision. Nevertheless, law clinics were the second most popular type of activity with 45 law schools engaging in generalist advice work and 35 in specialist advice work. Of the specialist advice clinics, the four most popular types of law were Employment, Family, Welfare and Housing, the popularity of which can be seen in the context of declining levels of state-supported legal advice in these areas. Other work included the Innocence Project and court and tribunal representation in addition to miscellaneous work such as mentoring and form filling assistance.²⁷

The report illustrated that CLE activity was increasingly incorporated into the academic curriculum as part of degree programme with 25% of law schools

²⁵ Law Works is the Law Society's pro bono charity, formerly known as the Solicitors' Pro Bono Society. The Law Society is the professional body for Solicitors operating in the English legal system. .

²⁶ Carney, Dignan, Grimes, Kelly and Parker, 2014, <https://www.lawworks.org.uk/sites/default/files/LawWorks-student-pro-bono-report%202014.pdf>, [Stand: 27.05.2017].

²⁷ Carney *et al*, footnote 26, p.4.

providing academic credit for their CLE programmes compared to only 10% in 2010.²⁸ This is perhaps reflective of wider trends in the higher education sector including the drive to deliver employability skills as part of undergraduate degree programmes, in addition to the increased market competition between providers.

Thus the current landscape within UK law schools includes varied and vibrant CLE provision which has seen a marked increase since the Universities of Kent and Warwick began their pioneering experimentation with clinical legal education in the 1970s. The final section of part B will offer some brief reflections on some of the challenges and opportunities facing CLE in the face of the UK's dynamic legal education landscape.

IV. CLE and the marketization of higher education

The sustained growth of CLE provision within the UK over recent years leaves it in a strong position but also facing numerous challenges. In particular, the aspirations of CLE practitioners to deliver both a rich educative experience and contribute to wider aims of promoting access to justice have to be seen in the context of the environment in which law schools operate. The UK higher education sector has experienced increasing levels of marketization over recent decades which has had a significant impact on law schools.²⁹ UK law schools now operate in an environment that has been subjected to progressive marketization with the advent of comparative league tables for research quality and the introduction of some of the most expensive tuition fees in Europe. This has combined with reductions in public funding to result in an increasingly consumerist student population and higher education institutions which have to

²⁸ Carney *et al*, footnote 26, p.5.

²⁹ Thornton, *Privatising the Public University: The Case of Law*, 2012.

seek competitive advantage wherever possible.³⁰ Recent developments look set to exacerbate this trend as the implications of the UK's imminent withdrawal from the European Union is likely to make the University funding environment increasingly competitive³¹ and reliant on student fee income. The introduction of the Teaching Excellence Framework³² (TEF) provides an additional metric to measure University performance and thus increase competition between providers.

These changes provide both challenges and opportunities for clinical practitioners in the UK. The increased emphasis on the quality of teaching heralded by TEF is arguably likely to increase universities interest in the provision of CLE, given the pedagogic benefits and consequent levels of students satisfaction associated with experiential learning. However Drummond and McKeever point to the fact that the social justice mission of CLE may be pushed out in the rising tide of marketization.³³

In addition to student fee income, universities in the UK receive funding via the Research Excellence Framework (REF)³⁴. The most recent exercise took place in 2014 and the panel noted that although it welcomed legal education research the quality of the outputs were uneven.³⁵ As Drummond and McKeever argue this can present a challenge to investment in research into CLE methods and

³⁰ Thornton, footnote 29, p.7; Drummond and McKeever, footnote 6, p.13.

³¹ <https://www.theguardian.com/education/2016/dec/01/brexit-significant-risk-universities-income>, [Stand: 27.05.2017].

³² <http://www.hefce.ac.uk/lt/tef/>, [Stand: 27.05.2017].

³³ Drummond and McKeever, footnote 6, p.13.

³⁴ This exercise rates the comparative quality of the research outputs of universities and research funding is distributed proportionately according to these rankings.

³⁵ REF, 2014, <http://www.ref.ac.uk/media/ref/content/expanel/member/Main%20Panel%20C%20overview%20report.pdf>, 71, [Stand: 27.05.2017].

practices, if university authorities take the view that the requisite standard cannot be met in this field.³⁶

However, arguably, there is ample opportunity CLE practitioners to experiment in innovative methods of legal service delivery which can produce quality research outputs that will help develop policy on the future shape of legal service provision. The organic development of CLE provision and the increasing levels of collaboration with local partners seems to provide fertile ground for the development of innovative evidence based practice. One such area of innovation that CLE practitioners have the opportunity to respond to is that led by the increased use of information technology in the provision of justice. The potential role that UK CLE practitioners can play in responding to these and other technological innovations within the UK's legal system will be explored further in part C below.

C. Technological innovation in the justice system

I. The international rise of information technology and ODR

Information technology is increasingly a key component of our lives - the forecast for the number of smart phone users in the UK by the end of 2017 is 44.9 million.³⁷ Google and other search engines are regularly used to find information and locate services. In 2016 the internet was used daily by 41.8 million adults in the UK, 77% of adults purchased goods or service online and 89% of households had access to the internet.³⁸ The most popular devices to access

³⁶ Drummond and McKeever, footnote 6, p.14.

³⁷ <https://www.statista.com/statistics/270821/smartphone-user-in-the-united-kingdom-uk/>, [Stand: 27.05.2017].

³⁸ Office for National Statistics, 2016, www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinterne

the internet were mobile or smart phones with 71% of people using them. The popularity of those devices is the ability to connect on the move.³⁹ Technology allows people to access information, communicate at a distance and at a time to suit them.

The use of information technology has also become an increasingly significant factor in the delivery of legal education, legal services and in the adjudication of civil disputes. Smith and Patterson show that this is an area with potential to provide innovative solutions to increase access to legal advice.⁴⁰

Technology is starting to drive the administration of justice with virtual courts and online dispute resolution („ODR“) providing alternative methods of resolving legal issues. ODR is a process where legal disputes are resolved via web based systems and there are a number of different versions of this. For example, in The Netherlands, the Dutch government is pioneering the use of ODR with the Rechtwijger.nl project (translated as ‘signpost to justice’, ‘roadmap to justice’ or ‘conflict resolution guide’). This launched in 2014, helping people with divorce related issues and was extended in 2015 to include landlord- tenant, consumer conflicts and employment issues.

II. Technological innovations in the UK justice system

Within the UK, the impact of the reduction in legal aid and the rise of litigants in person has led to a re-think in how justice is delivered.

„To serve the needs of a 21st Century society, the justice system must be *digital by default* and design.... The creation of online justice cannot therefore simply

tansocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2016, [Stand: 27.05.2017].

³⁹ Office for National Statistics, footnote 39 p.4.

⁴⁰ Smith and Patterson, Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution, 2015.

be a matter of digitising what might be called the frontline processes. It must go further than that. It must properly embrace what is described as Online Dispute Resolution.⁴¹

In England and Wales there are some existing examples of ODR.⁴² The Ministry of Justice launched Money Claim Online („MCOl“) in 2002, a form of ODR which allows claimants and defendants to make or respond to a money claim online. A MCOl is for fixed amounts of money less than £100,000 against no more than two defendants in England and Wales. If the claim is disputed it will proceed to hearing before a District Judge.⁴³

The importance of digital engagement was further outlined by the publication of the 2016 Civil Courts Structure Review by Lord Briggs („the Briggs Report“). The focus has been on designing a new process that incorporates the experiences of other jurisdictions but is more transformative. The Briggs Report proposes a new online court to be used by litigants which will become a compulsory form of civil dispute resolution for certain types of claim. The value and types of claims the online court will adjudicate on are significant. Lord Briggs recommends the online court should deal with claims up to £25,000 but it should be a gradual implementation process, starting with claims below £10,000, and at the beginning be limited to specified money claims, for example, contractual claims for remedying defects. This would exclude

⁴¹ Ryder, *The Modernisation of Access to Justice in Times of Austerity*, 5th Annual Ryder lecture, the University of Bolton, 2016.

⁴² The English and Welsh largely share a legal system, whereas in Scotland and Northern Ireland the legal systems are significantly different, although CLE is thriving across all four countries.

⁴³ The guidance for making a claim is 27 pages long and is complicated for a lay person to follow. It is available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/520203/money-claim-online-user-guide.pdf, [Stand: 27.05.2017]. If, the claimant secures judgment and the defendant fails to pay the debt the claimant can only also request a warrant online.

unspecified money claims, for example personal injury, professional negligence cases, and non-monetary claims such as injunctions, specific performance and possession of homes. However, it is expected in the future unspecified money claims will fall within the remit of the court.

The recoverable costs regime will be the same as used in the Small Claims Track⁴⁴ but in addition there will be a fixed cost payment for advice at the start to determine the merits of a case. It is not intended that lawyers will be excluded from the online court, but limiting it to fixed recoverable costs potentially significantly reduces the role of lawyers are likely to play in the process.

One of the other interesting aspects of the report is the recommended introduction of legally qualified Case Officers who will be responsible for managing and resolving online disputes through either mediation or early neutral evaluation. The introduction of Case Officers provides new career opportunities for law students, but it also highlights that law students need to be prepared for the changing role of legal professionals and that legal education has to adapt to reflect the realities of an online justice system. CLE will need to respond to the changes that are beginning in the justice system by utilising technology in its delivery and working and ensuring that law students can meet the resulting challenges and harness the opportunities provided the next section will consider the role of technological innovation within CLE, using the example of The Open University to highlight the potential in this area.

⁴⁴ The Civil Procedure Rules Part 27: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27>, [Stand: 27.05.2017]. The Practice Direction part 7.2 states the amount paid for legal advice and assistance in small claims is a sum not exceeding £260.00.

III. CLE and technological innovation

„The future of legal service is neither Grisham or Rumpole. Nor is it wigs, wood panelled court rooms, leather bound tomes, or arcane legal jargon. It will not even be the now dominant model of lawyering, which is face-to-face, consultative professional services by advisers who meet clients in their offices, whether glitzy or dusty, and dispense tailored counsel. To meet the needs of clients, we will need to dispense with much of our current cottage industry and re-invent the way in which legal services are delivered.“⁴⁵

As examined in part C, section I, and emphasised by Susskind, in the future the internet and information technology will be critical within legal services and dispute resolution. CLE has an important role to play in this technological engagement, with Walker *et al* arguing that law schools can become effective knowledge centres in society in a technological age by focusing not only traditional CLE activities but on using the internet to create and develop resources that address societal need.⁴⁶ Law students should be encouraged to think of new ways to be the producers of knowledge in a digital age to help address legal problems.

CLE teaches a variety of skills and offers the ability to incorporate digital skills and literacy into its curriculum in a way which prepares students for future legal practice:

„.....the digital lawyer will be employing a broader range of skills and an outlook that reflects not simply what the new technologies do but the manner in which they do it.“⁴⁷

⁴⁵ Susskind, *Tomorrow's Lawyers*, 2013, p.xv.

⁴⁶ Walker, Durwin, Hwang, Langlais, Boyd, *Chi.-Kent Law Rev.*, 2013, 879.

⁴⁷ Katsh E, *Pitt. L Rev.*, 1994, 55. 1141- 1175 p.1169

It is not just about teaching students „computer skills“ but about gaining an understanding of the way in which technology works and an appreciation of the issues that may arise when using technology.⁴⁸

The incorporation of technology within the CLE curriculum also provides scope for students to consider how it could be used to address access to justice. For example, in the US, Rostain *et al* discuss how students at Georgetown University Law Center developed a ‘Same-Sex Marriage Adviser app that could be used across fifty states in America. The purpose of the app is to help users decide whether they are able to get married or cohabit in the state in which they live and what impact it might have on their legal rights. Similar projects are happening at Chicago-Kent College of Law, New York School and Vermont Law School.⁴⁹

IV. Harnessing technology in UK CLE

Despite wider technological developments, Kerrigan and Murray show that traditionally CLE in the UK has involved universities providing law clinics on a number of different areas of law in a face-to-face setting.⁵⁰ Some law schools locate their law clinic in the law faculty, whereas others choose to share premises with community groups or other advice centres. Kerrigan and Murray do not discuss delivering CLE online and in the UK there are no law faculties currently providing an online law clinic.⁵¹ However, despite this lack of technological innovation to date, the first online law clinic within the UK is scheduled to open in 2017 as part of The Open University’s Open Justice project,

⁴⁸ Goodenough and Lauritsen, 2013, p.70.

⁴⁹ Rostain, Skalbeck and Mulcahy, *Chi.-Kent Law Rev.*, 2013, p.745.

⁵⁰ Kerrigan and Murray, footnote 9, pp.1-2.

⁵¹ The University of Cumbria was piloting an online law clinic but that does not appear to be still operating as their website states that students have the opportunity to work on law cases in a Street law project and at a local business centre. Other universities offer email advice, and or skype interviews including Strathclyde University.

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involving the creation of a CLE model that embraces technology and gives law students the opportunity to develop important digital literacy skills.⁵²

The planned online law clinic will provide advice on contract, tort and consumer issues and, as the project develops, will be expanded to other areas of law. Prospective clients will complete an online web form which will outline their legal issue, students will conduct virtual interviews using web based technology and prepare letters of advice sent via email in a bespoke case management system. All documents and matters that relate to the client will be stored online. There will be no „physical“ law clinic it will be a „virtual“ law clinic.

The online nature of the law clinic will allow it to offer a service that clients can access at a time of their choosing, from any location in the UK, with no physical barriers and no costs of attendance. It aims to replicate the flexibility The Open University provides in higher education to CLE and put technology at the forefront of its offering. However, in preparing to launch the clinic, it has also been necessary to consider how both students and clients will interact with, and in, the online environment. In essence, how to avoid losing the “human face”⁵³ of law. This will be explored further in part D.

⁵² The Open University is the largest UK University and a leading expert in flexible higher education. Its law degree is the most popular in the UK and it currently has 7,000 students studying on it. The Open University provides distance learning combining online delivery with face to face or online interaction and personalised tutor support (www.open.ac.uk, [Stand: 27.05.2017]) The majority of Open University students are part time combining study with work and or caring responsibilities. They are geographically spread across the UK with a small number of students overseas.

⁵³ The term “human face” is used by Tyler and Raines who refer to it as challenging “the idea that technology is inherently depersonalizing,” CRQ, 2006, 333, 337

D. Preserving the human face of law in an online environment

I. Relational approaches to law and “soft skills”

In the online law clinic, students will be required to engage with clients in online settings (or via other non-face-to-face forms of communication), work together in virtual teams and provide advice, support and assistance in ways which utilise technology. It thus foreshadows the type of legal profession predicted by Susskind⁵⁴ and the ways in which legal practice will increasingly interact with ODR and online courts.⁵⁵ However, there is something of a paradox in that, while law is increasingly looking towards technologically-based solutions for dispute resolution, at the same time the fundamentally relational nature of legal practice is also being more widely acknowledged.⁵⁶

This concept of relationality can be defined in terms of a theoretical approach which suggests that:

„Because people are all inter-connected, one's actions that affect a colleague, client, adversary, neighbor, or community will eventually have some direct or indirect impact on someone else in the organization.“⁵⁷

In other words, this approach views it as necessary to focus on mutual benefit in transactions with others, because a purely individualistic self-interested approach is both ineffective and misguided – anything you do for purely for yourself will affect others, which will in turn, at some point in the future, impact

⁵⁴ Susskind, footnote 46.

⁵⁵ As noted above, there will still remain a role, although potentially reduced, for lawyers. Case Officers will have an increasing role to play and the judiciary will retain a role as final arbiter if no settlement is reached.

⁵⁶ See, for example, Wald, Pearce, *Geo. J. Legal Ethics*, 2016, 601, 605.

⁵⁷ Wald, Pearce, footnote 57, p.616.

on you.⁵⁸ Therefore, in a legal setting, a lawyer taking a relational approach must develop a dialogue and mutual engagement with their client to understand their true interests and objectives⁵⁹ as well as being aware of the wider „web of relationships“ of adversaries, colleagues, family and friends both the client, and the lawyer, will form a part of.⁶⁰

This concept of the legal profession as relational has also been used in a somewhat wider sense within models of legal practice (particularly within the US), to embody a form of lawyering that is fundamentally all about creating and developing positive relationships and enhancing wellbeing.⁶¹ This approach, it is argued, provides a form of antidote to the adversarialism of common law jurisdictions and positions lawyers as creative, emotionally intelligent problem-solvers⁶² whose focus is on “a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter”.⁶³ These models have tended to move away from a focus on the intersection between self-interest and mutual benefit and instead assume a more altruistic, intrinsic motivation on the part of lawyers.⁶⁴

Interestingly, at the same time as such innovative models have developed, the more commercialised, profit-driven and mainstream legal sectors within both the US and UK, as well as elsewhere, have also begun to acknowledge the

⁵⁸ Wald, Pearce, footnote 57, p.616.

⁵⁹ Wald, Pearce, footnote 57, p.617; Stier, *J. Legal Educ.*, 1992, 303.

⁶⁰ See, for example, Brooks, *Rev Jur. U. P. R.*, 2009, 23, 32.

⁶¹ Brooks, *U. Balt. L. Rev.*, 2011, 395; Brooks, footnote 61; There are many interesting models of legal education and practice which incorporate specifically relational aspects, for a good summary of these see Daicoff, *Santa Clara L. Rev.*, 2012, 795 and Daicoff, *Pepp. Dis. Rev. L. J.*, 2006, 1; see also Wright, *Lawyers as Changemakers*, 2016.

⁶² Menkel Meadow, *Temp. L. Rev.*, 1999, 785; Daicoff, 2012, footnote 62.

⁶³ Daicoff, 2006, footnote 62, p.5.

⁶⁴ See, for example, Brooks' reference to “peace keepers and good citizens” (footnote 61, p.42) and Daicoff's characterisation of law as a “healing profession” (2006, footnote 62, p.1), see also Silver, *The Affective Assistance of Counsel. Practicing Law as a Healing Profession*, 2007.

benefit of developing their client care provision and prioritising the creation of positive relationships with clients, albeit with an emphasis on preserving reputation and client retention to maximise profitability.⁶⁵ A recent report by UK legal consultants, Peppermint Technology, suggests that:

„With enhanced competition widely forecast, a key battleground is likely to be customer service. Firms that successfully differentiate themselves on the quality of their end-to-end offering will be the survivors of the future. Meanwhile, firms that are strong on the black-letter law, but weak on customer satisfaction, could have no clients to impress with their good results.“⁶⁶

Each of these drives towards a more relational approach, whether for altruistic or materialistic motives, has arguably generated some similar results. Namely, a greater focus on lawyers' possessing so-called soft skills⁶⁷, those skills which are not subject or content-related, but instead are required for workplace success.⁶⁸ In particular, lawyers are expected to have strong inter-personal skills and be able to deal with others effectively. For example, the statement of competencies required to practice as a solicitor in England and Wales has four over-arching themes, one of which is „working with other people“.⁶⁹ This includes developing and sustaining „effective and professional relations” with clients and others and being able to communicate appropriately both orally and

⁶⁵ Goulandris, *IJTL*, 2015, 272; Palihawadana, *Barnes, The Service Industries Journal*, 2004, 101.

⁶⁶ Peppermint Consulting, 2016, 7.

⁶⁷ It should be noted that this term has been used as a commonly accepted phrase, however, the term “soft” arguably wrongly diminishes the importance of affect.

⁶⁸ See, for example, Charmorro-Premuzic, *Arteche, Bremner, Greven and Furnham J. Educ. Psychol.*, 2010, 221, 221; Andrews and Higson, *Higher Education in Europe*, 2008, 411, 419.

⁶⁹ SRA, 2016, <https://www.sra.org.uk/solicitors/competence-statement.page>, [Stand: 27.05.2017].

in writing.⁷⁰ The intra-personal traits of lawyers have also become increasingly emphasised too, often around notions of self-management, from time-keeping to decision-making and behaving ethically.⁷¹ Many of these skills imply an acknowledgment and understanding of the affective domain which has previously been seen as largely antithetical to the law and legal practice.⁷² For example, interpreting a client's emotions during an interview is arguably key to understanding their needs and in determining how to respond to them.⁷³

In the UK context, this is highlighted by the 2013 Legal Education and Training Review report, commissioned by key stakeholders in the legal profession in England and Wales, which argued that “the affective and moral dimensions are critical to professional practice”.⁷⁴ It highlighted “emotional intelligence” as a key legal competency and also referred to empathy with clients and resilience to cope with change and uncertainty.⁷⁵ The former, narrow traditions of the legal profession and its focus on a wholly analytical manner of “thinking like a lawyer”⁷⁶ whilst disregarding the personal elements involved have been significantly weakened. Instead, the importance of the human side of legal practice has become clear and visible.

Nevertheless, much of the work on such soft skills within the legal profession has assumed a face-to-face interaction between the legal practitioner (or law student) and their colleagues and clients. For example, Binder *et al*'s seminal

⁷⁰ SRA, footnote 71.

⁷¹ Finch and Fafinski, *Employability Skills for Law Students*, 2016, 13.

⁷² For discussion of the traditional divide between law and emotion see Abrams and Keren, *Minn. L. Rev.*, 2010, 1997; Maroney, *Law & Hum. Behav.*, 2006, 119; For discussion of its importance in legal practice, see Brooks, footnote 62; Silver, footnote 65.

⁷³ Kelton, *Clev. St. L. Rev.*, 2015, 459; Gerdy, *Neb. Law Rev.*, 2008, 1.

⁷⁴ LETR, 2013, para. 4.83 <http://www.letr.org.uk/>, [Stand: 27.05.2017].

⁷⁵ LETR, footnote 75, para. 4.83 and table 2.3.

⁷⁶ Krannitch, Holbrook and McAdams, *Denver, U. L. Rev.*, 2009: 381, 381; James, *L. Teach.*, 2008, 85, 91.

work on a client-centered approach to legal practice emphasises the importance of „non-verbal cues“, such as a client’s body language, in interviewing situations.⁷⁷ The literature on the legal profession is much sparser on how to translate such skills and an understanding of the affective domain into online and technology-driven settings. This is unfortunate when there is evidence from other disciplines that feelings and emotions have an equally significant role to play in such environments as they would in a face-to-face scenario,⁷⁸ requiring lawyers (and law students) to have the ability to adapt their processes and techniques to ensure that the benefits of a relational approach can be maintained as technology develops. The challenges and opportunities involved in preserving this will be considered further in the next section of this essay.

II. Challenges and opportunities in the online law clinic

For students in an online law clinic, arguably one of the first challenges that arises is the need to ensure that clients are willing and able to access their services. Despite technology having become an integral part of many peoples’ lives, a recent report by the UK government suggested that one in ten UK adults had still never used the internet.⁷⁹ For those lacking basic digital capability, the key reasons were found to be not only issues with access (such as a lack of internet connection) and a lack of digital skills, but also issues of motivation and confidence.⁸⁰ Others who have basic digital capability may „lack the confidence and knowledge to make the most of the digital economy, whether at work or

⁷⁷ Binder, Bergman, Price, Tremblay, *Lawyers as Counsellors: A Client-Centred Approach*, 2nd Ed, 2004, 52-54.

⁷⁸ See, for example, Arguedos, Daradoumis, Xhafa, *Comput. Human Behav.*, 2016, 517; Ayoko, Konrad, Boyle, *EMJ*, 2012, 156; Cheshin et al, *Org. Behav. Hum. Decis. Process.*, 2011, 2.

⁷⁹ Department for Culture, Media and Sport (DCMS), 2017, <https://www.gov.uk/government/publications/uk-digital-strategy/2-digital-skills-and-inclusion-giving-everyone-access-to-the-digital-skills-they-need>, [Stand: 27.05.2017].

⁸⁰ DCMS, footnote 80.

beyond”.⁸¹ A 2015 report found that levels of digital skills declined amongst those aged 45 and over and were lowest in the 65 plus age band.⁸² The level amongst social grades A, B, C1 was also found to be significantly higher than amongst C2, D and E’s.⁸³ In other words, digital literacy is lowest amongst some of the most vulnerable groups in society. These are groups who, another recent study has shown, are likely to suffer legal issues, with the unemployed, lone parents, those on means-tested state benefits and those with a “long-standing, limiting illness or disability” amongst those particularly likely to experience more than one legal problem.⁸⁴ In other words, those who may need to access legal help and guidance the most may face the biggest practical and affective barriers to doing so in an online environment.

There is no simple solution to this issue. At a national level, both government and charitable initiatives and those of larger employees and companies are being encouraged, for example, through the creation of a Digital Skills Partnership in the UK.⁸⁵ In relation specifically to ODR, the approach of existing providers appears to be focused on ensuring a user-friendly platform with comprehensive instructions for use, for example, the Rechtwijger.nl project provides a pdf document for its debt platform and an instructional video for its

⁸¹ DCMS, footnote 80.

⁸² Ipsos MORI, 2015, <https://www.gov.uk/government/publications/uk-digital-strategy/2-digital-skills-and-inclusion-giving-everyone-access-to-the-digital-skills-they-need>, [Stand: 27.05.2017].

⁸³ Ipsos MORI, footnote 83. Social grades A, B and C1 relate to individuals in professional, managerial and administrative forms of work. Social grades C2, D and E relate to individuals who are manual, casual or low grade workers, state pensioners or unemployed (<http://www.nrs.co.uk/nrs-print/lifestyle-and-classification-data/social-grade/>, [Stand: 27.05.2017].)

⁸⁴ Ministry of Justice 2017, www.gov.uk/government/uploads/system/attachment_data/file/596491/key-findings-from-legal-problem-resolution-survey-2014-to-2015.pdf,4, [Stand: 27.05.2017].

⁸⁵ DCMS, footnote 80.

divorce platform.⁸⁶ For individual law clinics, it may be that there is a form of self-selection at work as if your clinic is promoted via social media, you may be more likely to reach prospective clients who have a certain level of digital skills. However, these may not be the clients most in need of your services or from whom the richest experiential learning can evolve.

It is arguable that students working within online law clinics will have to develop a range of soft skills and a broader affective understanding to assist prospective clients in navigating the technology. This may well include utilising forms of empathetic understanding – putting themselves in the client’s shoes⁸⁷ – to recreate the client journey through the webpages and plot not only the client’s technological journey, but also their emotional one. For example, do they feel nervous and intimidated? Excited and eager? Barkai and Fine have suggested that, in a face-to-face environment, any visit to a lawyer’s office, regardless of the subject-matter, will engender emotive responses in clients.⁸⁸ This will arguably be exacerbated where potentially new and previously unexperienced technologies are involved. Interestingly, in a small empirical study relating to online counselling, it was found that several participants did experience technical barriers beyond their control which did disrupt the establishment of the client-counsellor relationship, but others experienced very few problems.⁸⁹ For any online law clinic it will be necessary to carefully monitor these issues.

Of course, the discussion above assumes it is the online law clinic’s clients who may struggle to engage online. The question of whether a new generation of students can be treated as “digital natives” – people who have grown up

⁸⁶ <http://www.hiil.org/project/?itemID=2641>, [Stand: 27.05.2017].

⁸⁷ Definitions of empathy are highly contested and this is just one a number of definitions (Batson in Decety and Ickes, *The Social Neuroscience of Empathy*, Ch.3).

⁸⁸ Barkai and Fine, 1983, *Southwest. Uni. Law Rev.*, 505, 510.

⁸⁹ Haberstroh, Duffey, Evans, Gee, Trepal, J. *Ment. Health Couns.*, 2007, 269, 247.

surrounded by digital technology and who have fully adapted to its use in all areas of life⁹⁰ - is a contentious one. Certainly, in the UK context it would seem unwise to make any assumptions on this, in light of the increasing diversity in ages and backgrounds of many law students.⁹¹ It is possible that students may also lack confidence in interacting in an online environment and may themselves require a significant level of support and guidance in this arena.⁹² Research has found that negative emotional responses from students can adversely affect their attitudes, behaviours and their learning outcomes in a variety of settings.⁹³ Alepis suggests that students operating in an online environment, outside the classroom, and without a teacher present, may find these negative consequences exacerbated.⁹⁴ Arguedas *et al* (2016) suggest that such negative emotions require mental or behavioral adjustment, whereas positive emotions urge students to explore the computer-based environment and direct the actions that they take in it.⁹⁵

Therefore, those supervising within the online law clinic will need to be aware of student levels of capability and confidence, for example, via some form of diagnostic tool at the start of students' online work (the approach planned at The Open University) and be prepared to scaffold appropriate technological support, guidance and training into students' experiential learning experience to ensure that it is not inhibited or diminished.

⁹⁰ Kennedy, Judd, Churchward, Gray, Krause, *Australasian J. Educ.*, 2008, 108; Prensky, *On the Horizon*, 2001, 1.

⁹¹ Thomas, L. *Teach.*, 2006, 239, 245; LETR, footnote 75, paras. 6.6 and 6.7.

⁹² Castillo-Merino and Serendell-Lopez, *Comput Human Behav.*, 2014, 476, 476 link this directly to student motivation, which in term impacts on student efficacy.

⁹³ Finch, Peacock, Lazdowski, Hwang, *IJME*, 2015, 23, 25; Alepis, *Expert Syst. Appl.*, 2011, 9840, 9840; Bromberger, *The Legal Educ. Rev.*, 2010, 45.

⁹⁴ Alepis, footnote 95, p.9840.

⁹⁵ Aguedas, Daradoumis, Xhafa, footnote 79, p.517.

For students working with the online law clinic, they are likely to be collaborating in some form of small group on the project. By way of illustration, at The Open University, students will work on client files in groups of three or four. This in itself requires a range of soft skills and a certain level of affective understanding, bringing a range of opportunities and challenges that must be tailored to the online environment. It may be that students are working within a wholly virtual team. In other words, a team „whose members are geographically and temporally dispersed and work remotely, often dependent on electronic technology“.⁹⁶ Students may be communicating largely, or even solely, via email, online forums and video conferencing technology. The importance of affect in this team setting should not be under-estimated. Fineman *et al* suggest that:

„Virtual workplaces are sites where people bond, trust, love, get angry, frustrated, make friends, create enemies, shape their identities, confront their loneliness, feel oppressed or liberated.“⁹⁷

They argue that such virtual workplaces offer huge potential for emotion to be constructed and expressed in novel ways and for new protocols for communication to be developed.⁹⁸ To assist in this, students may need to be encouraged to set ground rules for their work together and think about appropriate processes for communicating with each other. It may also be necessary to consider the broader ways in which this type of virtual team interaction can be fostered through legal education, for example, via the use of chat room or video game

⁹⁶ Ayoko, Konrad, Boyle, footnote 79, p.157. These are also sometimes described as “e-teams” (Zacarro, Bader, *Organ. Dyn.*, 2003, 377, 377).

⁹⁷ Fineman, Maitlis, Panteli, *Hum. Relat.* 2007, 555, 555; see also Friedman, Anderson, Brett, Olekalns, Goates, Lisco, *J. Appl. Psychol.*, 2004, 369, who suggests there is some evidence that people are less emotionally inhibited in online settings than they would be in face-to-face formats (p.374)

⁹⁸ Fineman, Maitlis, Panteli, *Hum. Relat.* 2007, 555, 556.

simulations.⁹⁹ The role of the online clinic supervisor will also have to be carefully thought-out. Hart and Mcleod argue that effective communication is essential to forge relationships within virtual teams, but emphasise that this needs effective facilitation, for example, by ensuring that time is made for regular contact and that tasks provided clearly foster interaction.¹⁰⁰

This focus on communication as key is mirrored in much of the literature on ODR and affect, which considers how users (who, in the case of the online law clinic, will be clients) are able to communicate effectively in an environment which has been described as „socially impoverished“. ¹⁰¹ This label has been given because of the online setting’s lack of the social cues which are often drawn upon in face-to-face settings. For example, interviewing a client in person you may notice their hands shaking or sweating or observe facial expressions in detail.¹⁰² Some of this has potential to be replicated in an online setting, where some form of video conferencing is used so that the students and client can see each other and make use of some visual cues. Where more reliance is placed on text-based communications, such as emails, the issues are likely to be exacerbated.¹⁰³ Tone and emotion can be harder to convey and interpret, jokes may be taken seriously and smiling, eye contact and verbal cues such as pitch and volume are all lacking.¹⁰⁴ Drawing on Fineman *et al’s* argument, it could be suggested that novel ways can be found to combat these (for example, through

⁹⁹ Goldberg, Pepp. Disp. Resol. L. J., 2014, 1, 23. The Open University are currently piloting the use of virtual reality software in such situations.

¹⁰⁰ Hart, Mcleod, Organ. Dyn., 2003, 352.

¹⁰¹ Nadler, Negotiation Journal, 2001, 333, 337.

¹⁰² Keltner, footnote 74.

¹⁰³ Fineman, Maitlis, Panteli, footnote 98, p.557; Nadler, footnote 102.

¹⁰⁴ Poblet, Cassanovas, Int’l Rev. Law Comp. Tech., 2007, 145, 149; Nadler, footnote 102. Despite these concerns over issues with communication online, empirical findings on the topic are mixed - Tyler and Raines, footnote 54.

the use of emoticons).¹⁰⁵ Nevertheless, it remains an issue that students (and supervisors) must be aware of and deal with explicitly.

A related concept, which is included in a number of articles relating to ODR and affect, is that of how to develop trust in an online setting.¹⁰⁶ In many ways, the issue of trust encompasses most of the issues raised so far in the online clinic setting. Ebner and Zeleznikow, mirroring the earlier discussion on potential technological barriers for both clients and students, refer to the need for clients to trust the technology involved, stating „ODR must convince users that they can trust that the technology used will be benevolently designed or at least neutral.“¹⁰⁷

Ebner and Zeleznikow and others also refer to the idea of trust between the parties, suggesting that building a rapport to facilitate open and constructive communication can be difficult in the online environment.¹⁰⁸ Whilst an online law clinic is unlikely to involve any form of mediation or ODR at present, this arguably reflects the concerns raised regarding both communication within a virtual team and between students and clients. Similar issues of trust could also be seen to apply to the use of technology through apps and other platforms intended to widen access for justice. As Poblet and Cassanovas state:

„If we consider ODR as a communicative process involving individuals engaged in interactive decision-making, we will need to admit that emotions are

¹⁰⁵ Fineman, Maitlis, Panteli, footnote 98, p.557. Although their use arguably implies a shared understanding between those who are interacting online, which may not be present in unfamiliar technological settings.

¹⁰⁶ Ebner, Zeleznikow, *J. Pub. Law Pol.*, 2015, 143; Goldberg, footnote 100; Nadler, footnote 102.

¹⁰⁷ Ebner, Zeleznikow, footnote 107, p.155.

¹⁰⁸ Ebner, Zeleznikow, footnote 107, p.155.

an essential component of the individuals' attitudes towards the disputing process, regardless of the specific tool used".¹⁰⁹

To explore, discuss and ultimately resolve these issues, earn trust, preserve the benefits of a relational approach and achieve the goal of broadening access to justice, all those involved in both online law clinics and ODR, as well as those working in CLE and pro bono more widely, will need to begin from the starting point the affective domain has an important role to play in the utilisation and enhancement of technology: The human face of the law should not be forgotten, as ultimately the law involves very human issues and, potentially, very human costs.

E. Conclusion

This essay has demonstrated the development of CLE within the UK, which has led to it becoming a strong and well-established part of the legal education landscape, despite the challenges brought by the marketisation of higher education. However, to meet the needs of students and contribute to social justice, CLE cannot remain static. In 2001 Barry *et al*¹¹⁰ segmented CLE into three waves, the third wave being the future of CLE, which considered how CLE could adapt to the digital age. They recognised then the importance of technology and how it could transform the delivery of CLE. The examples given in this article demonstrate that technological innovations have huge potential to develop the scope of CLE. Online CLE is still in its infancy but rapid change will take place in the coming years, reflecting the pace of technological change and wider developments that are occurring within justice systems.

¹⁰⁹ Poblet and Cassanovas, footnote 105, p.148.

¹¹⁰ Barry, Dubin, Joy, *Clinical L. Rev.*, 2001, 1

„Aside from influencing the place of clinical education in the new millennium, technological advances will affect the forms of clinical education by making possible new and different teaching and service opportunities and clinical models“¹¹¹

Such technological innovations will impact on in all aspects of CLE and also the wider legal profession. However, alongside the opportunities, there will also be challenges involved. The future lawyer may have to be a digital lawyer, but, despite being potentially geographically remote, they will still be required to interact with clients, members of their virtual team and others. They will still require the inter and intra-personal skills to develop a relational approach to their work. Technological innovation does not preclude the use of such approaches, but it does require new ways of thinking and working if the benefits are to be translated into the online environment and the human face of CLE preserved

¹¹¹ Barry, Dubin, Joy, footnote 112, p.53