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## Transforming legal education through emotions

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## **Transforming legal education through emotions**

### **ABSTRACT**

Law has traditionally viewed emotions as the enemies of rationality and reason, irrational and potentially dangerous forces which must be suppressed or disregarded. This separation and enmity has been mirrored within undergraduate legal education in England and Wales, with its rigid focus on seemingly impartial and objective analysis and notions such as the ubiquitous ‘thinking like a lawyer’. This paper will argue that attempts to disregard or suppress emotions within the law school are both misguided and destined to fail. It will explore the integral part emotions play within effective legal learning, the development of legal skills, and the wellbeing of both law students and legal academics. It will also consider how developments in legal scholarship and the evolving climate of higher education generally offer the potential, but also pitfalls, for the future acknowledgment and incorporation of emotions within undergraduate legal education in England and Wales. Bodies of literature relating to not only legal education, but also education generally, psychology and philosophy will be drawn on to demonstrate that emotions have a potentially transformative power within legal education, requiring them to be acknowledged and utilised within a more holistic, integrated form of law degree.

### **INTRODUCTION**

The law has traditionally set itself apart from its often messy subject-matter by holding itself out as a bastion of reason and rationality.<sup>1</sup> In doing so, it has treated emotions<sup>2</sup> as separate

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<sup>1</sup> T. A. Maroney ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 13 *Law and Human Behaviour* 119.

<sup>2</sup> The terminology used within discourse on emotions is complex and contested. In this paper, the term ‘emotions’ will be used to encapsulate the whole range of emotions that may be experienced within legal education, in accordance with one of its common usages in relevant literature (see, for example, P. Goldie *The Emotions. A Philosophical Exploration* (Oxford, Clarendon Press, 2002). The term ‘emotion’ will be used to refer to a specific affective state (for example, anger or happiness) appropriate to the context of its usage. In other words, as denoting a particular ‘emotional episode’ (K. Oatley, D. Keltner and J. M. Jenkins

from, and largely irrelevant to, legal matters.<sup>3</sup> Thus setting the context for their treatment within legal education. In philosophical terms, natural law theory viewed law as a branch of the natural sciences, focusing on the extraction of stable and universal governing principles rather than the possible influence of short-term, tempestuous emotions.<sup>4</sup> The development of legal positivism only served to increase the focus on law as a form of rational, reasoned science with its separation of the descriptive from the normative and its emphasis on the work of establishing legal principles as a ‘neutral, non-evaluative exercise’.<sup>5</sup> This philosophical focus on objective, scientific legal exploration has significantly influenced the development of the traditionally dominant paradigms within undergraduate legal education in England and Wales.<sup>6</sup>

Although legal philosophy has largely ignored emotions, when applying the law in practice, the presence and influence of emotions has been harder to disregard. Law’s role in regulating individuals’ behaviour brings it into contact with the full gamut of human passions.<sup>7</sup> The ‘loss of control’ defence in relation to manslaughter<sup>8</sup> and the use of Victim Personal

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*Understanding Emotions*, 2<sup>nd</sup> edn (London: Blackwell Publishing, 2006) at p.29). The term ‘emotional’ will be used to refer to the presence or application of emotion within a specific situation or experience.

<sup>3</sup> See, for example, R. Grossi ‘Understanding law and emotion’ (2015) 7 *Emotion Review* 55; J. Conaghan *Law and Gender* (Oxford: Oxford University Press, 2013); S. A. Bandes and J. A. Blumenthal ‘Emotion and the Law’ (2012), 8 *Annual Review of Law and Social Science* 161; R. Feldman *The Role of Science in Law* (Oxford: Oxford University Press, 2009) and S. A. Bandes ‘Introduction’ in S. A. Bandes (ed) *The Passions of Law* (New York and London: New York University Press, 1999, pp.1-15).

<sup>4</sup> Feldman above n.3 at p.52; H. L. Feldman ‘Foreword: Law, psychology and the emotions’ (2000) 74 *Chicago-Kent Law Review*, 1423 at p.1424.

<sup>5</sup> Conaghan above n.3 at p.161; see also Grossi above n.3 at p.56.

<sup>6</sup> For a discussion of the importance of science in the context of US legal education see M. Nussbaum ‘Use and Abuse of Philosophy in Legal Education’ (1993) 45 *Stanford Law Review* 1627 who states (at p.1629) ‘The conception of legal education that still dominates the legal academy today is a conception borrowed from the sciences’.

<sup>7</sup> For examples, see Bandes above n.2 and E A Posner ‘Law and the Emotions’, (2001) 89 *The Georgetown Law Journal* 1977.

<sup>8</sup> Coroners and Justice Act 2009, s 54.

Statements<sup>9</sup> are both examples reflecting a certain acknowledgment of emotion within the sphere of criminal law. However, such instances are relatively rare and ‘vigilant policing’ is used to avoid emotion infringing significantly into both civil and criminal legal matters.<sup>10</sup>

This desire to suppress or disregard emotions where possible is perhaps seen most clearly in the role of the judiciary and the jury in court cases. The judiciary is required to operate in an emotionless sphere, adjudicating disputes ‘without fear or favour, affection or ill will’.<sup>11</sup>

Juries are cautioned that they should ‘put emotion aside’ in their deliberations.<sup>12</sup>

This paper will begin by focusing on how the law’s overall conceptualisation of emotions as irrational, and therefore irrelevant, has influenced the development of undergraduate legal education in England and Wales. In particular, it will consider how the traditionally dominant paradigms within the law school (the doctrinal tradition and the liberal tradition)<sup>13</sup>

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<sup>9</sup> Ministry of Justice *Code of Practice for Victims of Crime* (London: HMSO, 2015).

<sup>10</sup> Maroney above n.1 at p.120; see also Conaghan above n.3 at p.224; E. Spain *The Role of Emotion in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge: Cambridge University Press, 2011); J. E. Stannard ‘Sticks, Stones and Words: Emotional Harm and the English Criminal Law’ (2010) 74 *Journal of Criminal Law* 533; B. H. Bornstein and R. L. Wiener ‘Emotion and the Law: A Field Whose Time Has Come’ in B. H. Bornstein and R. L. Wiener (eds) *Nebraska Symposium on Motivation. Emotion and the Law. Psychological Perspectives* (New York, Dordrecht, Heidelberg, London, Springer, 2010) pp.1-12. For a discussion of the difficulties of incorporating authentic emotion into US criminal law see C Sanger ‘The Role and Reality of Emotions in Law’ (2001) 8 *William & Mary Journal of Women and the Law*, 107.

<sup>11</sup> HM Courts and Tribunals Judiciary (2015) *Oaths*, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/oaths> (accessed 27<sup>th</sup> April 2016); see also S. R. Anleu, S. B. Blix and K. Mack, ‘Researching Emotion in Courts and the Judiciary: A Tale of Two Projects’ (2015) 7 *Emotion Review* 145; N R Feigenson ‘Sympathy and Legal Judgment: A Psychological Analysis’ (1997) 65 *Tennessee Law Review* 1 at p.15; see also K. Abrams and H. Keren ‘Who’s Afraid of Law and the Emotions?’ (2010) 94 *Minnesota Law Review* 1997; T. D. Barton ‘Therapeutic Jurisprudence, Preventative Law and Creative Problem-Solving. An Essay on Harnessing Emotion and Human Connection’ 5 *Psychology, Public Policy and Law* 921.

<sup>12</sup> Judicial Studies Board (2010) *Crown Court Bench Book. Directing the Jury*, [http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook\\_criminal\\_2010.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf) (accessed 27<sup>th</sup> April 2016)

<sup>13</sup> On the importance of the doctrinal tradition within legal education see, for example T. Hutchinson, and N. Duncan ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review*, 83; G. Jones ‘Traditional Legal Scholarship: A Personal View’ in P. Birks (ed) *Pressing Problems in the Law Volume 2 What are Law Schools For* (Oxford, Oxford University Press, 1996). On the importance of the liberal tradition within legal education see, for example, J. Guth and C. Ashford ‘The Legal Education and Training Review: regulating socio-legal and liberal legal education’ (2014) 48 *The Law Teacher* 5; A. Bradney *Conversations, Choices and Chances the Liberal Law School in the Twenty-First Century* (Oxford and Portland,

have perpetuated this approach. Drawing on recent scientific and educational developments, this paper will argue that emotions have a significant and inescapable role to play in different facets of the law school. Defining transformation as ‘the action of changing in form, shape or appearance’<sup>14</sup> it will suggest that utilising emotions, rather than disregarding or suppressing them, will have transformative effects in relation to the learning of law, the development of legal skills and in the promotion of law student and legal academic wellbeing. Such a transformation into a more holistic and well-balanced form of education would offer positive and long-lasting effects for the law degree and its stakeholders.

## **CARTESIAN DUALISM IN THE DOCTRINAL AND LIBERAL TRADITIONS**

Somewhat ironically, given the subject-matter of this paper, the gradual transformation of legal education in the nineteenth century had the effect of ensuring emotion was suppressed or disregarded within the law degree. Sugarman discusses the development of the ‘textbook tradition’ of legal education (which can be broadly equated with the doctrinal tradition) and argues it sought to carve out an identity for university law schools by focusing on the development of a set of coherent, orderly legal principles which demonstrated law to be a ‘simple, unified, coherent whole’.<sup>15</sup>

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Oregon, Hart Publishing, 2003); B. Hepple ‘The Renewal of the Liberal Law Degree’ (1996) 55 *Cambridge Law Journal* 470.

<sup>14</sup> Oxford English Dictionary, <http://www.oed.com.libezproxy.open.ac.uk/view/Entry/204743?redirectedFrom=transformation#eid> (accessed 10<sup>th</sup> October 2016)

<sup>15</sup> D. Sugarman ‘Legal Theory, the Common Law Mind and the Making of the Textbook Tradition’ in W. Twining (ed) *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) at p.34; see also S. Bartie ‘The Lingering Core of Legal Scholarship’, (2010) 30 *Legal Studies* 345; S. Collini *Public Moralists. Political and Intellectual Life in Britain 1850-1930* (Oxford: Clarendon Press, 1991).

The impetus for this emphasis on law's internal consistency and logic was both ideological and practical.<sup>16</sup> The ideological impetus arose from the development in liberal thought by thinkers such as J. S. Mills.<sup>17</sup> This characterised law as an instrument to create the boundaries between an individual's rights and their infringements upon those of others.<sup>18</sup> The pragmatic impetus for the development of the doctrinal tradition stemmed from the need to improve the quality and status of legal education in England and Wales following the 1846 Select Committee on Legal Education's conclusion 'that no Legal Education, worthy of the name, of a public nature, is at this moment to be had in either country'.<sup>19</sup> Focusing on the extraction of legal principle offered the potential for legal academics to carve out their own niche, positioning them as offering a valuable service to the legal profession (and others). Perhaps unsurprisingly, following the Select Committee's indictment, innovations within US legal education such as the 'case method' and 'Socratic method' were also increasingly influential in legal education in England and Wales towards the end of the nineteenth century (originating from Harvard University under Christopher Columbus Langdell as Dean from 1870 to 1895).<sup>20</sup> These methods of study focused heavily on law as scientific process of thinking:

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<sup>16</sup> D. Sugarman 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science. The Rule of Law: Albert Venn Dicey, Victorian Jurist by Richard A. Cosgrove' (1983) 46 *The Modern Law Review* 102.

<sup>17</sup> J. S. Mills *On Liberty* (Hadleigh: Broadview Press, 1999).

<sup>18</sup> Sugarman above n.16 at p.108; see also the reference to property ownership and exchange as underpinning classical legal thought in Feldman above n.4 at p.1425.

<sup>19</sup> Select Committee on Legal Education (1846) *Report from the Select Committee on Legal Education, together with the minutes of evidence, appendix and index*, The House of Commons; see also Sugarman above n.16 at p.106; Collini above n.16 at p.266.

<sup>20</sup> M. H. Hoeflich 'The Americanization of British legal education in the nineteenth century' (1987) 8 *The Journal of Legal History* 244; R. Stevens *Law School Legal Education in America from the 1850s to the 1980s* (Chapel Hill and London: The University of North Carolina Press, 1983).

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the evertangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.<sup>21</sup>

The doctrinal tradition therefore offered a seemingly neutral and objective, non-emotive, method of analysing and synthesising the law and extracting autonomous legal principles from the jumble of the common law.<sup>22</sup> Since its evolution, and especially in recent years, these purported characteristics have been heavily critiqued, particularly in relation to their claims to neutrality and objectivity.<sup>23</sup> The status of this tradition within the contemporary law school is also widely debated.<sup>24</sup> Nevertheless, although the issue of whether or not the

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<sup>21</sup> C. C. Langdell *A Selection of Cases on the Law of Contracts* (2<sup>nd</sup> edn) (Boston: Little, Brown: 1879) at p.viii.

<sup>22</sup> Bartie above n.16 at p.348; P. Thomas (2000) *Learning about law lecturing* (Warwick, National Centre for Legal Education, 2000) at p.2; W. Twining 'Pericles and the Plumber' in W. Twining (ed) *Law in Context: Enlarging a Discipline* (Oxford: Oxford University Press, 1997); A. Bradney 'Ivory towers and satanic mills: Choices for university law schools' (1992) 17 *Studies in Higher Education* 5.

<sup>23</sup> See, for example, Conaghan above n.3 at p. 185; R. Van Gestel and H. Micklitz *Revitalizing Doctrinal Legal Research in Europe: What about Methodology?* (2011) European University Institute Working Papers Law 2011/05; P. Eastaerl 'Teaching about the nexus between law and society: From pedagogy to andragogy' (2008) 18 *Legal Education Review* 163; C. McCrudden 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632; R. Cotterrell 'Subverting Orthodoxy, Making Law Central: A View of Sociological Studies' (2002) 29 *Journal of Law and Society* 632; P. Leyland and T. Woods, T 'From Homogeneity to Pluralism: The Textbook Tradition Revisited' (1999) 33 *The Law Teacher* 18; A. Bradney 'Law as a Parasitic Discipline' (1998) 25 *Journal of Law and Society* 71; O. W. Holmes 'The Path of the Law' (1897) 10 *Harvard Law Review* [http://www.constitution.org/lrev/owh/path\\_law.htm](http://www.constitution.org/lrev/owh/path_law.htm) (accessed 1st July 2015). M. Salter and J. Mason list a total of 42 "main objections" to the use of the doctrinal approach (with 20 points in its favour) (M. Salter and J. Mason *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (London, Pearson Education, 2007 at pp.109-118).

<sup>24</sup> See, for example, A. Sanders (2015) 'Poor thinking, poor outcome? The Future of the Law Degree after the Legal Education and Training Review and the Case for Socio-Legalism' in H. Sommerlad, S. Harris-Short, S. Vaughan and R. Young (eds) *The Futures of Legal Education and the Legal Profession* (Oxford and Portland, Oregon: Hart Publishing, 2015); Hutchinson and Duncan above n.13; Bartie above n.16; F. Cownie *Legal Academics Culture and Identities* (Oxford and Portland, Oregon: Hart Publishing, 2004); D. W. Vick 'Interdisciplinarity and the Discipline of Law' (2004) 31 *Journal of Law and Society* 163; Bradney above n.24.

doctrinal tradition is the dominant approach to undergraduate legal education remains contentious, it is clear that it does still play a significant role within it.<sup>25</sup>

The traditional dominance and continuing significance of the doctrinal tradition has arguably led to a continuing disregard for, and suppression of, emotions within undergraduate legal education in England and Wales. Its focus on ‘so-called “science”’<sup>26</sup> demonstrates the desire of the law to preserve reason in its purest form without attempting to sully it with the messy and complicated tapestry of emotions to which it perceives itself as bringing order and rationality. The perceived neutrality and objectivity involved appear to leave no room for emotions within the doctrinal tradition.<sup>27</sup> There is no acknowledgment of the inter-relationship between reason and emotions or understanding of the ways in which emotions permeate the law:

Legal reasoning, although often portrayed as rational, does not - indeed, cannot - transcend passion or emotion. Instead, it is driven by a different set of emotional variables, albeit an ancient set so ingrained in the law that its contingent nature has become invisible.<sup>28</sup>

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<sup>25</sup> J. Webb ‘The “Ambitious Modesty” of Harold Arthur’s Humane Professionalism’ (2006) 44 *Osgoode Hall Law Journal* 119 at p.119; Sanders above n.25; R. Banakar ‘Having one’s cake and eating it: The paradox of contextualisation in socio-legal research’ (2011) 7 *International Journal of Law in Context* 487; Bartie above n.15; Vick above n.25. For discussion in the US context see J. M. Krannitch, J. R. Holbrook and J. J. McAdams ‘Beyond “thinking like a lawyer” and the traditional legal paradigm: Towards a comprehensive view of legal education’ (2009) 86 *Denver University Law Review* 381; R. K. Stropus ‘Mend it, bend it, and extend it: the fate of traditional law school methodology in the 21st century’ (1996) 27 *Loyola University of Chicago Law Journal* 449.

<sup>26</sup> O. Kahn-Freund ‘Reflections on Legal Education’ (1966) 29 *Modern Law Review* 121 at p.121.

<sup>27</sup> Given this perception, it is perhaps unsurprising that there is little writing discussing emotions from a doctrinalist viewpoint. However, there is some literature on the impact of legal education on emotions more generally, which implicitly at least implicates the doctrinal tradition. This includes the classic polemic - D. Kennedy ‘Legal Education and the Reproduction of Hierarchy’ (1982) 32 *Journal of Legal Education* 591; P. Goodrich ‘Of Blackstone’s Tower: Metaphors of Distance and Histories of the English Law School’ in P. Birks (ed) *Pressing Problems in the Law Volume 2 What are Law Schools for?* (Oxford, Oxford University Press, 1996); C. Stanley ‘Training for the Hierarchy? Reflections on the British Experience of Legal Education’ (1998) 22 *The Law Teacher* 78.

<sup>28</sup> S. Bandes ‘Empathy, Narrative, and Victim Impact Statements’ (1996) 63(2) *The University of Chicago Law Review* 361 at p.369.



Having defined itself largely through its relationship with the common law and its practitioners, the doctrinal tradition is often today associated with a vocationally-orientated form of legal education<sup>29</sup> and a mastery of its principles is seemingly viewed as synonymous with the expression ‘thinking like a lawyer’.<sup>30</sup> It can therefore be contrasted with the liberal tradition of undergraduate legal education in England and Wales which, although diffuse in nature<sup>31</sup>, can be characterised as:

...One which does not focus on education for a particular purpose other than education itself. It is not aimed at preparing students for a particular job or profession and is not concerned with notions such as employability. It is, however, concerned with pursuing knowledge for knowledge’s sake and developing skills of knowledge acquisition through research, critical thought and debate.<sup>32</sup>

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<sup>29</sup> Sanders above n.25 at p.143; Hutchinson and Duncan above n.14 at p.84; Bartie above n.16 at p.345; N. Savage and G. Watts ‘A House of Intellect for the Professions’ in P. Birks (ed) *Pressing Problems in the Law Volume 2 What are Law Schools For* (Oxford, Oxford University Press, 1996); Stropus above n.26; H. Edwards ‘The Growing Disjuncture Between Legal Education and the Legal Profession’ (1992) 91 *Michigan Law Review* 34; Collini above n.16 at p.301.

<sup>30</sup> T. Hutchinson ‘Doctrinal research. Researching the jury’ in D. Watkins and M. Burton (eds) *Research Methods in Law* (2<sup>nd</sup> edn) (London and New York: Routledge, 2013); Krannitch et al above n.26 at p.381; C. James ‘Lawyers’ wellbeing and professional legal education’ (2008) 42 *The Law Teacher* 85 at p.91; Stropus above n.25 at p.450.

<sup>31</sup> It has been suggested that the term ‘liberal education’ can mean ‘all things to all men’ (S. Rothblatt, *Tradition and Change in English Legal Education. An Essay in History and Culture* (London, Faber and Faber, 1976) at p.195); see also: Guth and Ashford above n.14 at p.6; Bradney above n.14 at p.31-32; S.J. Clark ‘Law School as Liberal Education’ (2013) 63 *Journal of Legal Education* 235; K. Green and H. Lim ‘A Lib-Lib Pact: Silences in Legal Education’ (1987) 21 *The Law Teacher* 256 at p.256.

<sup>32</sup> Guth and Ashford above n.14 at p.6; Clark above n.32; A. Bradney ‘English university law schools, the age of austerity and human flourishing’ (2011) 18 *International Journal of the Legal Profession* 59; R. Burrige and J. Webb ‘The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School’ (2007) 10 *Legal Ethics* 72; Collier ‘The Liberal Law School, the Restructured University and the Paradox of Socio-Legal Studies’ (2005) 68 *Modern Law Review*, 475; R. Brownsword ‘Law Schools for Lawyers, Citizens and People’ in F. Cownie (ed) *The Law School: Global Issues, Local Questions* (Aldershot, Ashgate Publishing, 1999); M. Nussbaum *Cultivating Humanity A Classical Defense of Reform in Liberal Education* (Cambridge, Massachusetts, Harvard University Press, 1997); A. Bradney ‘Raising the Drawbridge: Defending University Law Schools’ (1995) 1 *Web Journal of Current Legal Issues*; J. H. Newman *The Idea of a University Defined & Illustrated I. In nine discourses delivered to the Catholics of Dublin II. In occasional lectures and essays addressed to the members of the Catholic University* (London, Routledge, 1994).

The liberal tradition of undergraduate legal education arguably provides an intellectual breadth that is missing from the traditional doctrinal tradition, allowing for the inclusion of socio-legal and other forms of legal scholarship.<sup>33</sup> Its focus on intellectual development as the end goal of undergraduate study and on universities as ‘like art galleries, being concerned with things that are good in themselves’<sup>34</sup> moves away from defining the law degree as preparation for the legal profession,<sup>35</sup> although a number of commentators have advocated some form of compromise between vocational and more liberal ends.<sup>36</sup> Overall, there is more emphasis on the development of a ‘good citizen’ or a ‘better person’.<sup>37</sup> These are terms which Burrige and Webb define as involving the creation of ‘rational participants in the life of the community’.<sup>38</sup>

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<sup>33</sup> Cotterrell above n.25 at p.634; R. Brownsword ‘Where are all the law schools going?’ (1996) 30 *The Law Teacher* 1 at p.7; L. Mosesson ‘Are we asking the right questions?’ (1990) 20 *The Law Teacher* 16 at p.18.

<sup>34</sup> Bradney (1995) above n.33; see also Burrige and Webb above n.33 and R. Burrige and J. Webb ‘The values of common law legal education reprised’ (2008) 42 *The Law Teacher* 263 at p.264 in relation to constructivist and experiential forms of learning.

<sup>35</sup> An example of this approach is given in the report of the Lord Chancellor’s Advisory Committee on Legal Education and Conduct (ACLEC) which states that a law degree ‘should stand as an independent legal education in the discipline of law, not tied to any specific vocation’; see also A. Jakab ‘Dilemmas of Legal Education: A Comparative Overview’ (2007) 57 *Journal of Legal Education* 253 at p.253; Bradney above n.14 at p.43; Mosesson above n.34 at p.20; J. Webb above n.26; H. W. Arthurs ‘Half a League Onward: The Report of the Lord Chancellor’s Advisory Committee on Legal Education and Conduct’ (1997) 31 *The Law Teacher* 1.

<sup>36</sup> See, for example, P. Birks ‘The Academic and the Practitioner’ (1998) 18 *Legal Studies* 397; W. Twining ‘Thinking About Law Schools: Rutland Reviewed’ (1998) 25 *Journal of Law and Society* 1; Hepple above n.14; W. Twining *Blackstone’s Tower. The English Law School* (London, Stevens & Sons/Sweet & Maxwell, 1994); J. Webb ‘Looking to the Future: The Academy and the Profession’ (1990) 24 *The Law Teacher* 120.

<sup>37</sup> Burrige and Webb above n.33 at p.264. The distinction between the two phrases does not appear to have been explored in detail in the literature on liberal legal education.

<sup>38</sup> Burrige and Webb above n.33 at p.264. This is mirrored by other commentators such as Johnstone who refers to the law degree as preparing students for a useful role within society (G. Johnstone ‘Liberal Ideals and Vocational Aims in University Legal Education’ (1999) 3 *Web Journal of Current Legal Issues*) and Brownsword’s reference to ‘intelligent participation in the politico-legal life of the community’ (Brownsword above n.33 at p.29). In contrast, commentators such as Bradney (above n.14) and Nussbaum (above n.33) appear to focus more on the development of critical thinking faculties to enable the individual to develop ‘adhere to the principles of sceptical enquiry and individual responsibility’ (Bradney above n.14 at p.56).

However, although this emphasis on the development of the citizen (or person) goes beyond the narrower focus of the doctrinal tradition, its focus still remains upon those qualities that have traditionally been prized as intellectual, namely, reason and rationality.<sup>39</sup> The emphasis is on the fostering of ‘cognitive qualities for analysis, reflection and self-discovery’.<sup>40</sup> There is little acknowledgment that this could or should involve emotions. It is the development of the intellect which is perceived as having transformative value, not the utilisation of emotions.<sup>41</sup>

In this respect, both the doctrinal and liberal traditions mirror the form of Cartesian dualism<sup>42</sup> which has been dominant in Western society for centuries.<sup>43</sup> This perceives emotions and reason as occupying entirely separate domains and prizes reason above (and arguably at the

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<sup>39</sup> The conflation of reason with intellect arguably illustrates what Schlag memorably described as “The enchantment of reason” (see P. Schlag *The Enchantment of Reason* (Durham and London, Duke University Press, 1998).

<sup>40</sup> W. W. Pue ‘Legal Education’s Mission’ (2008) 43 *The Law Teacher* 270 at p.273.

<sup>41</sup> Johnstone (above n.39) argues that liberal legal education’s focus on certain intellectual capacities can, in fact, prioritise these at the expense of other qualities such as ‘an ability to relate to oneself and others as persons’. There is significant evidence that emotions have been largely disregarded in the liberal tradition of education generally, see for example, T. Hyland ‘Mindfulness-based interventions and the affective domain of education’ (2014) 40 *Educational Studies* 277; K. Lynch ‘Carelessness: A hidden doxa in higher education’ (2010) 9 *Arts & Humanities in Higher Education* 54; B. Grummell, D. Devine and K. Lynch ‘The Care-less Manager: Gender, Care and New Managerialism in Higher Education’ (2009) 21 *Gender and Education* 191. A notable exception in relation to legal education is provided by Webb in his 2006 article which proposes a constructivist, emotionally-engaged approach to learning that would enable law students to assess their own feelings, motivations and values in a way which allows them to tailor their education to their own needs and engage in deeper forms of learning (above n.26).

<sup>42</sup> R. Descartes (Translator S. H. Voss) *The Passions of the Soul* (Indianapolis: Hackett Publishing, 1989). This dualism between cognition and affect can also be traced back to Platonic concepts of the division of the soul (Plato *Republic* (Indianapolis, Hackett Publishing Company, 1974); K. R. Scherer ‘On the rationality of emotions: or, When are emotions rational?’ (2011) 50 *Social Science Information*, 330; A. Coplan ‘Feeling without Thinking: Lessons from the Ancients on Emotions and Virtue-Acquisition’ (2010) 41 *Metaphilosophy* 132.

<sup>43</sup> V. Hey and C. Leathwood ‘Passionate Attachments: Higher Education, Policy, Knowledge, Emotion and Social Justice’ (2009) 22 *Higher Education Policy* 101 at p.105; P. Schutz, J. Y. Hong, D. I. Cross and J. N. Osbon ‘Reflections on Investigating Emotion in Educational Activity Settings’ (2006) 18 *Educational Psychology Review* 343 at p.351; Oatley et al above n.2 at p.58; R. C. Solomon ‘The Philosophy of Emotions’ in M. Lewis and J. M. Haviland-Jones (eds) *Handbook of Emotions*, 2<sup>nd</sup> edn (New York and London, The Guilford Press, 2000) at p.3.

expense of) emotions.<sup>44</sup> Solomon characterises it using a ‘master and slave’ metaphor – the irrational and potentially dangerous impulses of emotions must be suppressed and controlled by the ‘wisdom of reason’.<sup>45</sup> The doctrinal tradition’s focus on the creation and analysis of a ‘scientific’ set of legal principles and the liberal tradition’s emphasis on a particular set of intellectual characteristics both demonstrate the same approach to emotions, largely denying them a place within legal education.<sup>46</sup> This is perhaps justifiable if emotions can be shown to be entirely divorced from rationality, reason and other prized legal and intellectual concepts. However, if it can be demonstrated that emotions are in fact an integral and inescapable part of the academic endeavour, then this approach is arguably inadequate and misguided and fails to harness their transformative potential.

## **RETHINKING EMOTIONS, REASON AND LEGAL SCHOLARSHIP**

In recent years, scientific work on emotions has progressed beyond the traditional philosophical notions which have proved so enduring and has begun to view emotions as intertwined with (or even a part of) cognitive functions such as reasoning and rationality.<sup>47</sup>

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<sup>44</sup> This mirrors the wider divide between the cognitive and affective domains which has traditionally been accepted by scientists (Grossi above n.3 at p.55; Scherer above n.43 at p.332; L. Pessoa ‘On the relationship between emotion and cognition’ (2008) 9 *Nature Reviews Neuroscience* 148 at p.148).

<sup>45</sup> Solomon above n.44 at p.3. See also A. Damasio *Descartes’ Error* (London, Vintage, 2006) at p.128.

<sup>46</sup> This is well demonstrated by the paucity of literature in this area. In the first book-length treatment of legal education and the affective domain, editors Maharg and Maughan note that the topic is ‘relatively invisible’ in literature on legal education (P. Maharg and C. Maughan ‘Introduction’ in P. Maharg and C. Maughan (eds) *Affect and Legal Education. Emotion in Learning and Teaching the Law* (Aldershot, Ashgate Publishing, 2011) pp.1-10 at p.1).

<sup>47</sup> See, for example, A. Coplan, ‘Feeling without Thinking: Lessons from the Ancients on Emotions and Virtue-Acquisition’ (2010) 41 *Metaphilosophy* 132; A. Kappas ‘Appraisals are direct, immediate, intuitive, and unwitting ... and some are reflective ....’ (2006) 20 *Cognition and Emotion* 952; A. Damasio *Descartes’ Error* (London: Vintage, 2006); Oatley et al above n.2; R. Debes ‘Neither here nor there: The cognitive nature of emotion’ (2002) 146 *Philosophical Studies* 1; M. Nussbaum *Upheavals of thought: The intelligence of emotions* (Cambridge, Cambridge University Press, 2001); J. R. Averill ‘Intelligence, Emotion and Creativity. From Trichotomy to Trinity’ in R. Bar-On and J. D. A. Parker (eds) *Handbook of Emotional Intelligence: The Theory and Practice of Development Evaluation, Education and Implementation – at Home, School and in the*

For example, appraisal theories of emotions suggest that emotions are triggered by perceptions of stimuli within the environment and an evaluation of the impact of these on the person's wellbeing, thus making them inextricably linked to cognitive processes.<sup>48</sup> Emotions have been characterised as 'dynamic processes that are integral to decision-making'<sup>49</sup> with reason being impoverished and impaired if they are suppressed or disregarded<sup>50</sup> Bandes and Blumenthal capture this transformative view of emotions well, arguing that they:

... Influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate.<sup>51</sup>

Within legal scholarship, recent years have also seen considerable shifts 'involving a bewildering diversity of subject-matters, perspectives, objectives and methods'.<sup>52</sup> The most significant of these, in the context of England and Wales, is the growth of socio-legal studies.<sup>53</sup> This can be viewed as encompassing a multi-disciplinary approach across not only

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*Workplace* (San Francisco, Jossey Bass, 2000) pp.277-298; R. S. Lazarus 'On the Primacy of Cognition' (1984) 39 *American Psychologist* 124.

<sup>48</sup> Appraisal theories were originated by Magda Arnold (M. B. Arnold *Emotion and Personality. Volume 1 Psychological Aspects* (London, Cassell & Company 1960)). For discussion of the various forms which have since developed see, for example, A. Moors 'Flavours of Appraisal Theories of Emotion' (2014) 6 *Emotion Review* 303; P. C. Ellsworth 'Appraisal Theory: Old and New Questions' (2013) 5 *Emotion Review* 125; Oatley et al above n.2 at pp.165-190.

<sup>49</sup> Bandes and Blumenthal above n.3 at p.164.

<sup>50</sup> A. P. Harris and M. M. Schultz 'A(nother) Critique of Pure Reason': Toward Civic Virtue in Legal Education' (1993) 45 *Stanford Law Review* 1773.

<sup>51</sup> Bandes and Blumenthal above n.3 at p.163-164.

<sup>52</sup> Twining (1994) above n.36 at p.123.

<sup>53</sup> For empirical work on this issue see M. M. Siems and D. Mac Sithigh 'Mapping Legal Research' (2012) 71 *Cambridge Law Journal* 651; H. Genn, M. Partington and S. Wheeler *Law in the Real World: Improving our*

the social sciences, but increasingly the humanities and sciences (as exemplified by law and literature scholarship and work on law and neuroscience).<sup>54</sup> The insights generated by this approach have arguably led to developments both in the content and breadth of legal research and in the way law is taught.<sup>55</sup> However, there is little evidence that such plurality has sought to challenge the traditional dichotomy between law and emotions overall. The changing landscape of legal education still largely refuses to acknowledge or utilise emotions.<sup>56</sup>

One potentially significant challenge to this ingrained approach can be found in the emerging field of “law and emotion” scholarship, which explores the role of emotions within a wide

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*Understanding of How Law Works* (Nuffield Foundation, 2006); Cownie above n.25 at pp.56-58. In the Australian context see Hutchinson and Duncan above n.14.

<sup>54</sup> For broad definitions of socio-legal studies, see, for example, Twining above n.22 at p.23; Economic and Social Research Council *Review of Socio-Legal Studies* (1993); A. Sherr and J. Webb ‘Law Students, the External Market and Socialization: Do We Make Them Turn to the City?’ (1989) 16 *Journal of Law and Society* 225 at p.226. In contrast, some earlier definitions focused more specifically on the relationship between law and the social sciences (D. R. Harris ‘The Development of Socio-Legal Studies in the United Kingdom’ (1983) 3 *Legal Studies* 315 at p.315).

<sup>55</sup> In terms of legal research, the Law Sub-Panel to the 2014 Research Excellence Framework commented on the “trend towards methodological diversity and interdisciplinarity as evidence of the growing sophistication of legal scholarship as a body of knowledge and understanding with wide-ranging insights, impacts and implications for the social world” (Research Excellence Framework 2014 *Overview report by Main Panel C and Sub-panels* 16-26, <http://www.ref.ac.uk/media/ref/content/expanel/member/Main%20Panel%20C%20overview%20report.pdf> (accessed 28<sup>th</sup> June 2016) at p.72); see also Siems and Mac Sithigh above n.54; Genn, Partington and Wheeler above n.54; F. Cownie and A. Bradney ‘Gothic Horror? A Response to Margaret Thornton’ (2005) 14 *Social & Legal Studies* 277 at pp.282-283; Cownie above n.25 at pp.56-58. In terms of teaching, there appears to be little empirical evidence available, but Cownie’s survey of legal academics (above n.25 at pp.56-58) referred to both research and teaching styles and Guth and Ashford (above n.14 at p.10) suggest that the current Joint Statement on the academic stage of training and its identification of foundation subjects demonstrates a continuing belief that subjects can be divided between those which are doctrinal and those which are socio-legal in nature.

<sup>56</sup> There is some discussion in literature on empirical legal research of the role of both the researcher(s) and participant(s) emotions and feelings, but this is limited (see, for example, H. McCosker, A. Barnard and R. Gerber, R. ‘Undertaking Sensitive Research: Issues and Strategies for Meeting the Safety Needs of all Participants’ (2001) 2 *Qualitative Social Research*, Art. 22, <http://www.qualitativeveresearch.net/index.php/fqs/article/view/983/2142> (accessed 5th June 2015)).

range of legal topics, from criminal justice to the work of the legal profession.<sup>57</sup>

Nevertheless, literature specifically on emotions and legal education remains relatively sparse in this field.<sup>58</sup>

It is arguable that the most influential critiques of the disregard for emotions in legal education can be found in critical legal and feminist scholarship within the United States ('US'). In terms of critical legal studies, a classic example is Kennedy's polemic on US legal education which describes a passivizing initiation into the hierarchies of the law where '...it will appear that emoting will only isolate and incapacitate you'.<sup>59</sup> In terms of feminist legal scholarship, Sturm has described women in US law schools as akin to a miner's canary, suggesting that 'when they fail to thrive in particular institutions, their experience is often a signal of a more general or systemic problem that affects a much larger group'.<sup>60</sup> Particular attention has been focused on the impact of the impersonal, adversarial nature of law schools and, again in the US context, there has been a significant critique of the emotional impact of

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<sup>57</sup> Spain above n.10 and Stannard above n.10 are relevant examples in relation to criminal justice. In relation to the legal profession, see C. Westaby "'Feeling like a sponge": The emotional labour produced by solicitors in their interactions with clients seeking asylum' (2010) 17 *International Journal of the Legal Profession* 153; L. C. Harris 'The Emotional Labour of Barristers: An Exploration of Emotional Labour by Status Professionals' (2002) 39 *Journal of Management Studies* 553. For a useful, if somewhat dated, taxonomy of the field of law and emotion scholarship see Maroney above n.1.

<sup>58</sup> See n.47 above. Bromberger, writing in an Australian context, suggests that what literature there is largely focuses on the negative impact of legal education on law student wellbeing (see N. Bromberger 'Enhancing Law Student Learning – the Nurturing Teacher' (2010) 20 *Legal Education Review* 45. However, even this topic is relatively unexplored in the UK.

<sup>59</sup> D. Kennedy above n.28 at p.594. For other critiques see Goodrich above n.28; Stanley above n.28.C. Stanley 'Training for.

<sup>60</sup> S. P. Sturm 'From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy and the Legal Profession' (1998) 4 *Duke Journal of Gender Law and Policy* 119. For other critiques see S. P. Sturm and L. Guinier 'The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity' (2007) 60 *Vanderbilt Law Review* 515; Harris and Schultz above n.51; S. H. Williams 'Legal Education, feminist epistemology, and the Socratic method' (1993) 45 *Stanford Law Review* 1571; C. Menkel-Meadow 'Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"' (1988) 38 *Journal of Legal Education* 61.

conventional forms of teaching, particularly the Socratic method.<sup>61</sup> A body of work has also developed out of the therapeutic jurisprudence movement in the US which argues for the centrality of emotions and wellbeing within clinical legal education.<sup>62</sup> For example, Baker suggests that:

The opportunity that exists by way of therapeutic jurisprudence to expose students in legal education to a humane, sensitive, empathetic and common decency approach to lawyering is one that should not be undervalued or overlooked.<sup>63</sup>

This work provides useful insights and a recognition of the potential role of emotions, as well as hints of a transformative potential. However, such scholarship has arguably not yet developed into an in-depth analysis of its role within legal education and there has been little (if any) attempt to construct a full and cohesive normative theoretical framework for its acknowledgment and utilisation. Therefore, it is necessary to draw on a range of work from both education and psychology, as well as the existing literature on legal education, in order to fully examine the transformational potential of emotion within learning, skills development and wellbeing. This produces a wide view of the topic, in a way which is commensurate with this paper's overall argument for a more holistic, integrative form of legal education.

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<sup>61</sup> See, for example, D. L. Rhode 'Missing Questions: Feminist Perspectives on Legal Education' (1993) 45 *Stanford Law Review* 1547; for a survey of feminist critiques see D. D. Garner 'Socratic Misogyny? Analysing feminist criticisms of Socratic teaching in legal education' (2000) 4 *Brigham Young University Law Review* 1597.

<sup>62</sup> See, for example, D. B. Wexler 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17; G. Baker 'Do you hear the knocking at the door? A "therapeutic" approach to enriching clinical legal education comes calling' (2006) 28 *Whittier Law Review* 379; K. K. Gould and M. L. Perlin "'Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching' (2000) 24 *Seattle University Law Review* 339; M. Berkheiser 'Fraiser Meets CLEA. Therapeutic Jurisprudence and Law School Clinics' (1999) 5 *Psychology, Public Policy, and Law* 1147.

<sup>63</sup> Baker above n.63 at p.382.



## THE ROLE OF EMOTIONS WITHIN LEGAL LEARNING

In recent years, student learning (as distinct from student instruction or education) has become the ultimate goal of educational policy and theory.<sup>64</sup> Within higher education generally, this is reflected in the dominance of a broadly constructivist approach to teaching which is commonly associated with teachers acting as facilitators and providing a student-centred, scaffolded approach to topics.<sup>65</sup> Although learning theories have (at least until recently) been somewhat neglected within legal education<sup>66</sup>, the introduction of concepts such as problem-based learning suggest that the law school is following the constructivist trend of higher education as a whole.<sup>67</sup>

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<sup>64</sup> A. Armitage, R. Bryant, R. Dunnill, K. Flanagan, D. Hayes, A. Hudson, J. Kent, S. Lawes and M. Renwick *Teaching and Training in Post-Compulsory Education* (Maidenhead, Open University Press, 2007); P. Ramsden *Learning to Teach in Higher Education* (Abingdon and New York, Routledge Falmer, 2003) at p.7; P. Jarvis 'Teaching in a Changing World' in P. Jarvis, J. Holford and C. Griffin (eds) *The Theory and Practice of Learning*, 2<sup>nd</sup> edn (London and Sterling, Kogan Page, 2003).

<sup>65</sup> P. A. Ertmer and J. N. Timothy 'Behaviorism, cognitivism, constructivism: Comparing critical features from an instrumental design perspective' (2013) 26 *Performance Improvement Quarterly* 43 at p.58; B. Kotzee 'Seven posers in the constructivist classroom' (2010) 8 *London Review of Education* 177 at p.177; A. Pritchard *Ways of Learning. Learning Theories and Learning Styles in the Classroom*, 2<sup>nd</sup> edn (London and New York, Routledge, 2009) at p.247; K. C. Powell and C. J. Kalina 'Cognitive and social constructivism: Developing tools for an effective classroom' (2009) 130 *Education* 141 at p.147; H. Ertl and S. Wright 'Reviewing the literature on the student learning experience in higher education' (2008) 6 *London Review of Education* 195 at p.203; J. Cullen, K. Hadjivassiliou, E. Hamilton, J. Kelleher, E. Sommerlad and E. Stern *Review of current pedagogic research and practice in the fields of post-compulsory education and lifelong learning. Final report for ESRC by the Tavistock Institute* (The Tavistock Institute, 2002) <http://www.tlrp.org/pub/acadpub.html> (accessed 9th December 2015) at p.45.

<sup>66</sup> F. Cownie 'The importance of theory in law teaching' (2000) 7 *International Journal of the Legal Profession* 225 at p.31; see also Ferris (2009) who argues that an understanding of educational theory is becoming increasingly vital (G. Ferris 'The legal educational continuum that is visible through a glass Dewey' (2009) 43 *The Law Teacher* 102 at p.108) and J. Gray, 'Thawing out the Law School: Why We Need Legal Education Theory' (2012) 37 *Alternative Law Journal* 171.

<sup>67</sup> For recent discussions on problem-based learning, see R. Grimes 'Problem-based learning and legal education – a case study in integrated experiential study' (2015) 13 *REDU: Revista de Docencia Universitaria* 361; C. Sylvester 'More questions than answers? A review of the effectiveness of inquiry-based learning in higher education' (2015) 10 *Journal of Commonwealth Law and Legal Education* 21.

Constructivist learning theories do not view knowledge as an independent entity which can be mapped onto the individual. Instead, they argue that ‘humans *create* meaning as opposed to *acquiring* it’ [italics in original].<sup>68</sup> It is the learner’s experience, and their perception of these experiences, which have value in an educational setting.<sup>69</sup> This is in direct opposition to more traditional behaviourist and cognitivist views which rest on the assumption that there is an objective reality and independent truths which human beings (through learning) are striving to uncover.<sup>70</sup> Although the link between constructivist learning theories and emotions is relatively under-theorised<sup>71</sup>, some commentators have argued strongly that students’ experience and creation of meaning has both cognitive and emotional elements, with Gates suggesting that ‘the constructionist model views the emotional not in opposition to the rational, but rather in partnership with the rational. To think and act rationally, one must feel’.<sup>72</sup> This ties in closely with the recent scientific work on emotions discussed above, which views emotions and cognition as inseparable. There is little (if any) literature on the role of emotions in constructivist learning theory which relates specifically to the law school. However, if the approach taken is broadly constructivist in nature, it appears that this implicitly includes an element of acknowledgment of emotions.

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<sup>68</sup> Ertmer and Timothy above n.66 at p.56.

<sup>69</sup> Kotzee above n.66 pp.178-179; P. Boghossian ‘Behaviorism, Constructivism, and Socratic Pedagogy’ (2006) 38 *Educational Philosophy and Theory* 713.

<sup>70</sup> Ertmer and Timothy above n.66 at p.54; P. T. Wangerin ‘Objective, multiplistic and relative truth in developmental psychology and legal education’ (1988) 62 *Tulane Law Review* 1237.

<sup>71</sup> F. Pons, M. de Rosnay and F. Cuisinier ‘Cognition and Emotion’ in V. G. Aukrust (ed) *Learning and Cognition in Education* (Oxford, Elsevier Limited, 2011); M. H. Immordino-Yang and A. Damasio ‘We Feel, Therefore We Learn: The Relevance of Affective and Social Neuroscience to Education’ (2011) 5 *LEARNING Landscapes* 115; D. H. Jonassen ‘Objectivism Versus Constructivism: Do We Need a New Philosophical Paradigm?’ (1991) 39 *Educational Technology Research and Development* 5.

<sup>72</sup> G. S. Gates ‘The socialization of feelings in undergraduate education: A study of emotional management (2000) 34 *College Student Journal* 485 at p.502; see also Garrison, J. ‘Toward a pragmatic social constructivism’ in M. Larochelle, N. Bednarz and J. Garrison (eds) *Constructivism and Education* (Cambridge, Cambridge University Press, 1998).

In particular, law students' experiences, and therefore their learning, will be shaped by the emotions they feel towards the law, the law school and the subject-matter of individual pieces of legislation and cases. Allowing, or even encouraging, them to draw on these emotions to construct learning experiences could be a very powerful tool within the law degree, making it a more meaningful and engaging form of education. For example, via the use of narratives or storytelling within the curriculum.<sup>73</sup> Such methods are in contrast to the transmissional, didactic style that has been more traditionally associated with the law degree, leading Allot to argue that:

With the power to communicate so much, we choose instead to have the students learn law as if it had the intellectual, spiritual and moral content of knitting patterns.<sup>74</sup>

Even if a constructivist approach is not chosen, it is arguable that virtually all learning theories include a role for emotions in some way. Perhaps the sole exception to this are behaviourist theories, which focus solely on the measurable outputs and explain the learning process 'in purely mechanistic terms'.<sup>75</sup> Although elements of behaviourism are retained in

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<sup>73</sup> See, for example, D. Watkins 'The Role of Narratives in Legal Education' (2011) 32(2) *Liverpool Law Review* 112; M. Blissenden 'Using storytelling as a teaching model in law school: The experience in an Australian context' (2007) 41(3) *The International Journal of Legal Education* 260. In relation to storytelling, Blissenden argues that 'Such an approach not only enriches the classroom learning environment but also provides an opportunity for students to develop social and interpersonal skills...' (p.265).

<sup>74</sup> P. Allott "Glum Law" (1987) *Times Higher Education Supplement*, 21 August at p.9.

<sup>75</sup> L. B. Curzon *Teaching in Further Education: An Outline of Principles and Practice*, 3<sup>rd</sup> edn (London and New York, Continuum, 2004) at p.36; see also Armitage above n.65 at p.72; E. Bredo 'The Social Construction of Learning' in G. D. Pyhe (ed) *Handbook of Academic Learning* (London, Academic Press Ltd, 1997) pp.3-45 at p.16.

the law curriculum (for example, in learning cases by rote). In higher education generally such theories are no longer viewed as sufficient or dominant in themselves.<sup>76</sup> Another key group of learning theories can be termed as cognitivist, focusing on conceptualizing the learning process by identifying the mental activity involved at each stage of it.<sup>77</sup> These have little explicit engagement with emotions, but their close links to constructivist learning theories and focus on cognition both once again imply a role for it. If emotions and cognition are intertwined then both must be involved within law students' mental and physiological activity when they actively engage with the learning experience.

Amongst the writings on legal education, there is a small body of work which seeks to promote the use of humanist learning theories.<sup>78</sup> It is this group of theories which arguably has the most active engagement with emotions as a part of learning.<sup>79</sup> This is particularly noticeable within adult education with the use of andragogy, a humanist-based theory which views learning as 'an internal process controlled by the learners and engaging their whole being – including intellectual, emotional and physiological functions'.<sup>80</sup> Although humanist

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<sup>76</sup> Pritchard above n.66 at p.14; K. Illeris 'Introduction' in K. Illeris (ed) *Contemporary Theories of Learning* (Abingdon, Routledge, 2009) at p.3; Boghossian above n.70 at p.713.

<sup>77</sup> Ertmer and Timothy above n.66 at p.51; K. Yilmaz 'The Cognitive Perspective on Learning: Its Theoretical Underpinnings and Implications for Classroom Practices' (2011) 84 *The Clearing House: A Journal of Educational Strategies, Issues and Ideas* 204; Bredo above n.76 at p.29.

<sup>78</sup> See, for example, H. Vanistendael 'Designing a Humanistic Legal Education' (2009) 3 *European Journal of Legal Education* 59; P. Maharg 'Rogers, constructivism and jurisprudence: educational critique and the legal curriculum' (2000) 7 *International Journal of the Legal Profession* 189.

<sup>79</sup> This is epitomised by the work of a key contributor to the humanist tradition, Carl Rogers, in particular in his works C. R. Rogers 'Personal thoughts on teaching and learning' (1957) 3 *Merrill-Palmer Quarterly* 243; C. R. Rogers, C. R. (1983) *Freedom to Learn for the 80's*, New York, Macmillan; see also D. Postle 'Putting Heart Back into Learning' in D. Boud, R. Cohen, and D. Walker (eds) *Using Experience for Learning* (Bristol, PA: Society for Research in Higher Education, 1993); J. Heron *Feeling and Personhood. Psychology in Another Key* (London, Sage Publications, 1992).

<sup>80</sup> M. Knowles *The Modern Practice of Adult Education: From Pedagogy to Andragogy* (Engelwood Cliffs, Cambridge Adult Education, 1984) at p.55-56; see also A. McIntosh 'Humanist Learning Theories' in A.

theories have often been linked with self-improvement, rather than more formal types of education<sup>81</sup>, their inclusion in the literature on legal learning does indicate an increasing willingness for there to be a more explicit recognition of the role of emotions. What is striking about such humanist theories is their compelling presentation of emotions as a transformational force. In recent empirical work with a group of humanities students, adopting humanist and constructivist approaches, Naude et al found that they:

...Promoted increased personal involvement in learning, broadened thought processes and actions, and resulted in change and development on emotional, cognitive, and behavioural levels.<sup>82</sup>

Outside the specific writing on learning theories, there is a much larger body of literature which demonstrates the wider inter-relationship between learning and emotions. This is encapsulated well by Pekrun and Linnenbrink-Garcia who begin their edited collection on emotions and education by stating that:

The classroom is an emotional place. The countless hours students spend attending class, completing projects, taking exams, and building social relationships translate into progress towards crucial life goals—holding a degree in education has never been of more personal, social, or financial significance than it is today. Accordingly, it is no wonder that educational settings abound with emotions. In these

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McKintosh-Scott, J. Gidman and E. Mason-Whitehead (eds) *Key Concepts in Healthcare Education*, (London, Sage Publications Ltd, 2010).

<sup>81</sup> J. Gregory 'Experiential learning' in P. Jarvis (ed) *The Theory and Practice of Teaching*, 2<sup>nd</sup> edn (Abingdon and New York, Routledge, 2006) pp. 114-29 at p.115.

<sup>82</sup> Naude, L., van den Burgh, T. J. and Kruger, I. S. "'Learning to Like Learning": An appreciative inquiry into emotions in education' (2014) 17 *Social Psychology Education* 211 at p.211.

settings, emotions such as enjoyment of learning, curiosity, interest, hope, pride, anger, anxiety, shame, confusion, frustration, or boredom are frequent, pervasive, manifold, and often intense.<sup>83</sup>

The most comprehensive discussion about the transformational role of emotions has arguably developed in relation to compulsory schooling. This is particularly in relation to the development, implementation and evaluation of social and emotional learning programmes. These are programmes which aim to assist their participants in acquiring and applying appropriate social and emotional competencies, including the ability to ‘understand and manage emotions’, ‘establish and maintain positive relationships’ and ‘make responsible decisions’.<sup>84</sup> The literature on such social and emotional learning programmes highlights both the links between their usage and academic achievement and also the necessity for social and emotional skills to be developed to equip students for adult life.<sup>85</sup> In relation to academic achievement, in a meta-analysis of 213 US school-based programmes, an average gain in academic achievement of 11% was noted.<sup>86</sup>

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<sup>83</sup> R. Pekrun and L. Linnenbrink-Garcia ‘Introduction to Emotions in Education’ in R. Pekrun and L. Linnenbrink-Garcia (eds) *International Handbook of Emotions in Education* (London and New York, Routledge, 2014) at p.1.

<sup>84</sup> Collaborative for Academic, Social and Emotional Learning (2015) *What is Social and Emotional Learning?* <http://www.casel.org/social-and-emotional-learning/> (accessed 30<sup>th</sup> December 2015); see also M. J. Elias *Academic and Social-Emotional Learning. Educational Practices Series – 11* (Chicago, International Academy of Education and International Bureau of Education, 2003).

<sup>85</sup> Collaborative for Academic, Social and Emotional Learning (2015b) *Outcomes Associated with the Five Competencies*, <http://www.casel.org/social-and-emotional-learning/outcomes> (accessed 30<sup>th</sup> December 2015).

<sup>86</sup> J. A. Durlak, R. P. Weissberg, A. B. Dymnicki, R. D. Taylor and K. B. Schellinger ‘The impact of enhancing students’ social and emotional learning: A meta-analysis of school-based universal interventions’ (2011) 82 *Child Development* 405 at p.417; see also J. Payton, R. P. Weissberg, J. A. Durlak, A. B. Dymnicki, R. D. Taylor, K. B. Schellinger and M. Pachan *The positive impact of social and emotional learning for kindergarten to eight-grade students. Findings from three scientific reviews* (Chicago, IL: Collaborative for Academic, Social, and Emotional Learning, 2008); National Institute for Health Clinical Excellence (2008) *Promoting children’s social and emotional wellbeing in primary education*, NICE public health guidance 12, <https://www.nice.org.uk/guidance/ph12/chapter/Introduction> (accessed 31st December 2015).

In the United Kingdom, from 2003 onwards a government-backed<sup>87</sup> Social and Emotional Aspects of Learning Programme (known as ‘SEAL’) was introduced in the majority of primary and secondary schools.<sup>88</sup> This programme was based on the premise that ‘emotional and social processes are fundamentally inseparable from cognitive processes’.<sup>89</sup> Overall, the findings from evaluations of SEAL demonstrate a ‘very mixed picture’ in relation to its implementation.<sup>90</sup> In particular, a lack of consistency, influenced by staff attitudes and available time and resources were identified as key.<sup>91</sup> The importance of taking a ‘whole school’ approach is emphasised, together with use of the ‘SAFE’ principles (which require learning to be sequenced, active, focused and explicit).<sup>92</sup> In a review of SEAL, Bannerjee et al note:

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<sup>87</sup> Following the 2010 general election this support seems to have been withdrawn, although SEAL remains widely used see Casey, J. (2011) A Critical Literature Review. Should the Social and Emotional Aspects of Learning (SEAL) Programme continue to be used in schools, as a mechanism for promoting attainment?, [http://sealcommunity.org/files/member\\_resources/SEAL%20evidence%20review.pdf](http://sealcommunity.org/files/member_resources/SEAL%20evidence%20review.pdf) (accessed 25<sup>th</sup> July 2016) at p.5-6; T. Bywater and J. Sharples ‘Effective evidence-based interventions for emotional well-being: lessons for policy and practice’ (2012) 27 *Research Papers in Education* 389 at p.393.

<sup>88</sup> R. Bannerjee, K. Weare and W. Farr ‘Working with “Social and Emotional Aspects of Learning” (SEAL): associations with school ethos, pupil social experiences, attendance and attainment’ (2014) 40 *British Educational Research Journal* 718 at p.721; T. Bywater and J. Sharples above n.88 at p.392.

<sup>89</sup> K. Weare and G. Gray (2003) *What Works in Developing Children’s Emotional and Social Competence and Wellbeing?*, Research Report RR456, Department for Education and Skills, <http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/RR456.pdf> (accessed 15<sup>th</sup> December 2015).

<sup>90</sup> N. Humphrey, A. Lendrum and M. Wigelsworth *Social and emotional aspects of learning (SEAL) programme in secondary schools: National evaluation* (Research Report RR049, Department for Education, 2010) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181718/DFE-RR049.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181718/DFE-RR049.pdf) (accessed 15<sup>th</sup> December 2015) at p.90.

<sup>91</sup> Humphrey et al above n.91 at p.91.

<sup>92</sup> Bannerjee et al above n.89 at p.719; see also Humphrey et al above n.91 at p.102; P. Smith, L. O’Donnell, C. Easton and P. Rudd (2007) *Secondary social, emotional and behavioural skills pilot evaluation*, Research Report RR003, Department for Children, Schools and Families, [http://eprints.whiterose.ac.uk/73993/1/Secondary\\_SEBS\\_Pilot\\_Evaluation\\_Research\\_Report.pdf](http://eprints.whiterose.ac.uk/73993/1/Secondary_SEBS_Pilot_Evaluation_Research_Report.pdf) (accessed 15<sup>th</sup> December 2015); S. Hallam, J. Rhamie and J. Shaw (2006) *Evaluation of the Primary Behaviour and Attendance Pilot*, Research Report 717, Department for Education and Skills, <http://sealcommunity.org/files/resources/Evaluation%20of%20the%20primary%20behaviour%20and%20attendance%20pilot.pdf> (accessed 11<sup>th</sup> December 2015).

It is striking, though, that our analyses revealed a particular association between ratings of the schools' effectiveness in integrating SEAL with broader learning on the one hand, and achievement on the other.<sup>93</sup>

This demonstrates that the potentially transformative role of emotions is mediated by practical factors, particularly a lack of commitment and resources. Nevertheless, it does not suggest that these hurdles are insurmountable. Indeed, the findings that social and emotional learning should be integrated into the wider school curriculum to be successful is one which again points to the importance of a more holistic approach, one supported by constructivist and humanist learning theories.

Given the level of interest, and the practical applications of emotions in education, to be found within compulsory schooling, it is perhaps unsurprising that there is also an 'increasing interest' in the role of emotions within higher education.<sup>94</sup> This is in contrast to the academy's previous portrayal of itself as an emotionless site of reason and rationality.<sup>95</sup> Some manifestations of this interest within higher education have been contentious, with Ecclestone arguing that a focus on therapeutic interventions, designed to boost students' self-esteem, has actually disempowered students by labelling them in a manner which discourages personal autonomy and challenge.<sup>96</sup> This view appears to be based on the assumption that all

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<sup>93</sup> Bannerjee et al above n.89 at p.735.

<sup>94</sup> C. Leathwood and V. Hey 'Gender/ed discourses and emotional sub-texts: theorising emotion in UK higher education' (2009) 14 *Teaching in Higher Education* 429 at p.429.

<sup>95</sup> Leathwood and Hey above n.95 at p.429; see also Lynch above n.42.

<sup>96</sup> K. Ecclestone 'Emotionally-vulnerable subjects and new inequalities: the educational implications of an "epistemology of the emotions"' (2011) 21 *International Studies in Sociology of Education* 91; K. Ecclestone,



social and emotional learning is focused on self-esteem, rather than acknowledging the broader role of emotions in a variety of aspects of learning. Indeed, Ecclestone herself acknowledges that ‘the impossibility of separating the pursuit of rational autonomy from the emotions (and sometimes passions) that inspire or maintain autonomy and that are often invested in presenting and defending it’.<sup>97</sup> It is therefore arguable that the key debate within higher education is now over how emotions should be theorized, not whether or not they should be a part of it. Beard et al suggest that:

The question is not whether emotion should be introduced into the curriculum; our argument is that the affective and embodied are already aspects of all pedagogical encounters but that in higher education, in particular, emotion is rarely acknowledged and is under- or mis-theorised.<sup>98</sup>

Their research once again re-inforces the importance of the affective (including emotions) in engaging students with learning in a meaningful way that can be transformative for individuals.<sup>99</sup>

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D. Hayes and F. Furedi ‘Knowing me, knowing you: The rise of therapeutic professionalism in the education of adults’ (2005) 37 *Studies in the Education of Adults* 182; Ecclestone ‘Learning or Therapy? The Demoralisation of Education’ (2004) 52 *British Journal of Educational Studies* 112; K. Ecclestone ‘Developing Self-Esteem and Emotional Well-Being – Inclusion or Intrusion?’ (2004) 16 *Adult Learning* 11; see also F. Furedi ‘The Silent Ascendancy of Therapeutic Culture in Britain (2002) 39 *Society* 16.

<sup>97</sup> Ecclestone (2011) above n.97 at p.94.

<sup>98</sup> C. Beard, S. Clegg and K. Smith ‘Acknowledging the affective in higher education’ (2007) 33 *British Educational Research Journal* 235 at p.236.

<sup>99</sup> Beard et al above n.99; Naude et al above n.83.

Within legal education, although tentative first steps may have been taken towards an acknowledgment of emotions,<sup>100</sup> the sparsity of literature and debate on its role overall arguably still reflects tendency to deny the presence of emotions in the law curriculum and view them as a wholly pastoral consideration.<sup>101</sup> The nature of law as a discipline and the notion of ‘thinking like a lawyer’ can also lead to perceptions of legal education as requiring a peculiarly emotionless approach.<sup>102</sup> The weight of scientific evidence demonstrating the inseparable nature of cognition and emotions, the wider evidence indicating the impact of emotions on learning, together with the increasingly pluralistic nature of law and legal study all suggest that these arguments are becoming increasingly unsustainable. Indeed, this has been recognized by a number of commentators who call for the acknowledgment of a much wider range of skills and abilities to be recognized in legal education.<sup>103</sup> Thus paving the way for an acknowledgment of the transformative role of emotions within the law school.

## **EMOTIONAL COMPETENCIES, LEGAL SKILLS AND IDEOLOGICAL INFLUENCES**

The focus of educational literature generally on the affective domain has largely been on the transformative power of emotions in relation to individual student learning. However, it also

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<sup>100</sup> See the papers in Maharg and Maughan (2011) above n.48 and the discussions of humanist theory above n.67.

<sup>101</sup> Wangerin (1988) above n.71 at p.24.

<sup>102</sup> Wangerin (1988) above n.71 at p.24.

<sup>103</sup> There is a largely US-based body of work which seeks to argue for legal education to acknowledge less traditional forms of intelligence (referred to as multiple intelligences), see for example, K. A. Dauphinais ‘Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift’ (2005) 11 *Washington and Lee Race and Ethnic Ancestry Law Review* (2005) 1; C. James ‘Seeing things as we are. Emotional intelligence and clinical legal education’ (2005) 9 *International Journal of Clinical Legal Education* 123; L. Weinstein ‘Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam’ (2002) 8 *Clinical Law Review* 247; M. A. Silver ‘Emotional Intelligence and Legal Education’ (1999) 5 *Psychology, Public Policy and Law* 1173.

arguably has a broader transformative potential at a discipline-wide level when considering the increasing role played by skills and competencies within universities and law schools.

Skills have become an increasingly important part of university education in recent years.<sup>104</sup>

As higher education generally has evolved from an elite to a mass system, where attending university now ‘merely marks a stage in life’, there has been a corresponding evolution in the manner and extent to which skills are incorporated within the formal curriculum.<sup>105</sup> The growth in neo-liberal ideology, which has had a profound impact on universities and those that are involved in them, has also contributed to the increasing prioritisation of skills development.<sup>106</sup> Its ‘vision of society as a marketplace’ has led to universities both being

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<sup>104</sup> T. Chamorro-Premuzic, A. Arteche, A. J. Bremner, C. Greven and A. Furnham ‘Soft skills in higher education: importance and improvement ratings as a function of individual differences and academic performance’ (2010) 30 *Educational Psychology: An International Journal of Experimental Educational Psychology* 221 at p.222; S. C. Barrie ‘Understanding what we mean by the generic attributes of graduates’ (2006) 51 *High Education* 215; N. Bennett, E. Dunne and C. Carre ‘Patterns of core and generic skill provision in higher education’ (1971) 37 *Higher Education* 71.

<sup>105</sup> A. Smith and F. Webster ‘Changing Ideas of the University’ in A. Smith and F. Webster (eds) *The Postmodern University? Contested Visions of Higher Education in Society* (Buckingham and Philadelphia, Society for Research into Higher Education and the Open University Press, 1997) at p.2. The 1963 report of the Committee on Higher Education (commonly known as ‘the Robbins Report’) indicated that in 1962 7% of the population remained in education at the age of 19 (Committee on Higher Education (1963) *Higher Education Report*, Cmnd 2154). Between 2009 and 2012, 44% of all 18 to 24 year olds were in full time education (Department for Business, Innovation & Skills (2014) *Analysis of young people in full time education and employment: April – June 2014*, <https://www.gov.uk/government/statistics/young-people-in-full-time-education-and-employment-april-to-june-2014> (accessed 9th October 2015)).

<sup>106</sup> For discussion of the impact of neo-liberalism on law schools in UK and Australia see, for example R. Collier ‘“Love law, love life” Neoliberalism, Wellbeing and Gender in the Legal Profession – the Case of Law School’ (2014) 17 *Legal Ethics* 202; M. Thornton ‘Legal Education in the Corporate University’ (2014) 10 *The Annual Review of Law and Social Science* 19; R. Collier ‘Privatizing the University and the New Political Economy of Socio-Legal Studies: Remaking the (Legal) Academic Subject’ (2013) 40 *Journal of Law and Society* 450;; M. Thornton ‘The new knowledge economy and the transformation of the law discipline’ (2012) 19 *International Journal of the Legal Profession* 265; M. Thornton *Privatising the public university: The case of law* (Abingdon and New York, Routledge, 2011); K. Lynch ‘Neoliberalism and Marketisation: The Implications for Higher Education’ (2006) 5 *European Education Research Journal* 1; R. Collier ‘The Liberal Law School, the Restructured University and the Paradox of Socio-Legal Studies’ (2005) 68 *Modern Law Review* 475; M. Thornton ‘Gothic Horror in the Legal Academy’ (2005) 14 *Social & Legal Studies* 267; M. Thornton ‘Among the Ruins: Law in the Neo-Liberal Academy’ (2001a) 20 *Windsor Yearbook of Access to Justice* 3; M. Thornton ‘The demise of diversity in legal education: Globalisation and the new knowledge economy’ (2001b) 8 *International Journal of the Legal Profession* 37;

expected to meet the demands of students as consumers and also to provide graduates with a high level of skills to enable them to become productive workers in the new knowledge economy.<sup>107</sup> As far back as 1997, the National Committee of Inquiry into Higher Education (commonly known as ‘the Dearing Report’) was tasked in its terms of reference to take account of the fact that ‘learning should be increasingly responsive to employment needs and include the development of general skills, widely valued in employment’<sup>108</sup> More recently, the introduction of the Teaching Excellence Framework has an explicit aim of increasing graduates’ ‘future productivity’ and delivering ‘better outcomes and values’ for not only students, but also ‘employers and the tax payers who underwrite the system’.<sup>109</sup>

These influences have also arguably shaped the type of skills that are now required in higher education. In addition to the subject-specific and broader intellectual skills which are traditionally associated with liberal forms of higher education, there is an increasing emphasis on so-called ‘soft skills’.<sup>110</sup> In other words, the ‘generic skills and competencies

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<sup>107</sup> R. Joshee ‘Neoliberalism versus social justice: A view from Canada’ in R. K. Hopson, C. C. Yeakey and F. M. Boakary (eds) *Power, Voice and the Public Good: Schooling and Education in Global Societies* (Bingley, Emerald Group Publishing Limited, 2008) at p.56; see also S. E. F. Bessant, Z. P. Robinson and R. M. Ormerod ‘Neoliberalism, new public management and the sustainable development agenda of higher education: history, contradictions and synergies’ (2015) 21 *Environmental Education Research* 417; M. Ball ‘Learning, labour and employability’ (2009) 41 *Studies in the Education of Adults* 39.

<sup>108</sup> National Committee of Inquiry into Higher Education (1997) *Higher Education in the Learning Society*, <http://www.educationengland.org.uk/documents/dearing1997/dearing1997.html> (accessed 1st September 2015) at p.3.

<sup>109</sup> Department for Business, Innovation and Skills (2016) *Success as a Knowledge Economy. Teaching Excellence, Social Mobility and Student Choice*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/523546/bis-16-265-success-as-a-knowledge-economy-web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523546/bis-16-265-success-as-a-knowledge-economy-web.pdf) (accessed 1<sup>st</sup> December 2016) at p.8.

<sup>110</sup> A notable example of this is included in the Department for Business, Innovation and Skills’ 2016 White Paper on higher education where it uses the term ‘teaching’ ‘to include learning environments, student support, course design, career preparation and ‘soft skills’, as well as what happens in the lecture theatre or lab’ (Department for Business, Innovation and Skills (2016) *Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/523546/bis-16-265-success-as-a-knowledge-economy-web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523546/bis-16-265-success-as-a-knowledge-economy-web.pdf) (accessed 28th June 2016)).

required of graduates in the workplace' ranging from interpersonal skills to competencies in time management and negotiation.<sup>111</sup> These are now increasingly prominent, although there have been a number of obstacles to their implementation at both institutional and individual level.<sup>112</sup>

It appears that law schools in the UK have followed a general pattern of increased student numbers in relation to their undergraduate programmes.<sup>113</sup> There is also a considerable focus on skills to be found in the recent Quality Assurance Agency for Higher Education ("QAA") Law Benchmark, which emphasises the need for skills to be developed in conjunction with the knowledge-based aspects of the curriculum.<sup>114</sup> Of particular interest in relation to the role of emotions in the law school is the discussion on skills in the report of the Legal Education and Training Review ('LETR').<sup>115</sup> This states that 'the affective and moral dimensions are

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<sup>111</sup> J. Andrews and H. Higson 'Graduate Employability, "Soft Skills" Versus "Hard" Business Knowledge: A European Study' (2008) 33 *Higher Education in Europe* 411 at p.419; see also Chamorro-Premuzic et al above n.103 at p.222; Bennett et al above n.105 at p.78.

<sup>112</sup> G. Baker and D. Henson 'Promoting employability skills development in a research-intensive university' (2010) 52 *Education + Training* 62; R. Boden and M. Nedeva 'Employing discourse: universities and graduate "employability"' (2010) 25 *Journal of Education Policy* 37; S. Cranmer 'Enhancing Graduate Employability: Best Intentions and Mixed Outcomes' (2006) 31 *Studies in Higher Education* 169; I. Drummond, I. Nixon and J. Wiltshire 'Personal transferable skills in higher education: the problems of implementing good practice' (1998) 6 *Quality Assurance in Education* 19.

<sup>113</sup> In 1965 it was reported that a total of 23 law schools in the UK were offering full degrees (Wilson, J. F. (1966) "Survey of Legal Education in the United Kingdom", *Journal of the Society of Public Teachers of Law (N. S.)*, Vol. 9, pp.1-144 at p.13). By 1975 this had risen to 30 universities and 19 polytechnics and other institutions maintained by local authorities (Wilson, J. F. and Marsh, F. B. (1975) "A Second Survey of Legal Education in the United Kingdom", *Journal of the Society of Public Teachers of Law (N. S.)*, Vol. 13, pp.239-331 at p.243). In 2013 it was reported that there were over 600 Qualifying Law Degree courses being across the UK and the Republic of Ireland (Legal Education and Training Review (2013) *Setting Standards. The Future of Legal Services Education and Training Regulation in England and Wales*, [https://www.barstandardsboard.org.uk/media/1671699/letr\\_report\\_all\\_sections.pdf](https://www.barstandardsboard.org.uk/media/1671699/letr_report_all_sections.pdf) (accessed 3rd July 2015) at para. 2.11).

<sup>114</sup> Quality Assurance Agency (2015) *Subject Benchmark Statement Law*, <http://www.qaa.ac.uk/publications/information-and-guidance/PubID=2966#.VhtqPexVhBc> (accessed 26th July 2016) at p.8.

<sup>115</sup> Legal Education and Training Review above n.114.

critical to professional practice’ and includes ‘emotional intelligence’ as one of the core professional competencies relating to the affective dimension.<sup>116</sup> This is particularly highlighted in relation to client handling where a summary of the qualitative data emphasises its importance:

At its broadest it was called common sense, or psychology, and described as an aspect of both professional ethics and commercial (or sometimes “social”) awareness. More specifically, it involved elements of being able to see things from the client’s point of view, emotional intelligence, engendering trust, managing the client’s expectations, the ability to deal with difficult or vulnerable people, and displaying courtesy.<sup>117</sup>

The QAA’s benchmarking statement also refers to the importance of students’ ‘self-management’ and ‘engagement with their own personal and professional development, and academic integrity’ which suggests a potential place for emotional intelligence, or some other form of emotional component (although the definition of self-management in the statement focuses largely on the idea of reflective learning).<sup>118</sup>

The acknowledgment of such emotion-based skills and competencies again speaks to their importance, and even necessity, in developing both a legal education and a legal profession that are fit for purpose in the current ‘knowledge economy’.<sup>119</sup>

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<sup>116</sup> Legal Education and Training Review above n.114 at paras. 4.83 and table 4.3.

<sup>117</sup> Legal Education and Training Review above n.114 at para. 2.93.

<sup>118</sup> Quality Assurance Agency above n.115 at p.7.

<sup>119</sup> The ‘knowledge economy’ has been described as requiring skilled workers who can adapt to the needs of the economy and maximise its profitability (Levidow, L. ‘Marketizing higher education: neoliberal strategies and

Although there are many ways of incorporating emotional elements and competencies into legal skills without drawing specifically on emotional intelligence, it does appear that most work on emotional competency as a ‘soft skill’ draws on this concept. There are several different models of emotional intelligence and each is closely associated with a range of competencies.<sup>120</sup> Perhaps the best known model is that of Goleman whose model originally included 25 different competencies, in five different clusters – self-awareness, self-regulation, motivation, empathy and social skills.<sup>121</sup> (Goleman, 1998; Boyatzis et al, 2000: 345). This has since evolved into three clusters – self-awareness, self-management (which includes motivation) and social awareness (which includes empathy and social skills).<sup>122</sup> The competencies are wide-ranging, from ‘organizational awareness’ to ‘trustworthiness’ and ‘conscientiousness’.<sup>123</sup>

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counter-strategies’ in Robins, K. and Webster, F. (eds) *The Virtual University? Knowledge, Markets and Management* (Oxford, Oxford University Press, 2002, pp. 227–248 at p.229; see also Holborow, M. ‘Neoliberalism, human capital and the skills agenda in higher education – the Irish case’ (2012) 10 *Journal for Critical Education Policy Studies* 93 at p.94 and Barrie above n.105 at p.216.

<sup>120</sup> The two models commonly referred to are proposed by Salovey and Mayer (see, for example, P. Salovey and J. D. Mayer ‘Emotional Intelligence’ (1990) 9 *Imagination, Cognition and Personality* 185) and Goleman (see, for example, D. Goleman *Emotional Intelligence* (London, Bloomsbury, 1996)) although a number of others exist (see, for example, R. Bar-On ‘Emotional and Social Intelligence: Insights from the Emotional Quotient Inventory’ in R. Bar-On and J. D. A. Parker (eds) *Handbook of Emotional Intelligence: The Theory and Practice of Development Evaluation, Education and Implementation – at Home, School and in the Workplace* (San Francisco, Jossey Bass, 2000) pp.3363-389).

<sup>121</sup> D. Goleman *Working with Emotional Intelligence* (London, Bloomsbury, 1998).

<sup>122</sup> R. E. Boyatzis, D. Goleman and K. Rhee ‘Clustering Competence in Emotional Intelligence: Insights from the Emotional Competence Inventory’ in R. Bar-On and J. D. A. Parker (eds) *Handbook of Emotional Intelligence: The Theory and Practice of Development Evaluation, Education and Implementation – at Home, School and in the Workplace* (San Francisco, Jossey Bass, 2000) pp.343-362 at p.355.

<sup>123</sup> Boyatzis et al above n.123 at p.355.

Emotional intelligence remains a contentious concept in scientific terms, largely because of its use of the term ‘intelligence’.<sup>124</sup> However, in higher education generally it has been argued that the competencies it focuses on are important soft skills for undergraduates to develop to support their studies and aid their subsequent employability.<sup>125</sup> In relation to legal education, in the US a number of commentators have argued for the explicit inclusion of emotional intelligence within the law degree.<sup>126</sup> In her ground-breaking 1999 article, Silver argues that ‘Legal education should prepare students for the emotional dimensions of lawyering. We fail our students if we fail to prepare them for the impact of their emotional lives, as well as those of their clients, on the practice of law’.<sup>127</sup> In the Australian context, James’s research into graduates of the University of Newcastle Law School (in Australia) who were practicing as lawyers demonstrated a ‘very relevant’ correlation between high levels of emotional intelligence and greater job satisfaction at work.<sup>128</sup> For those students not seeking to practice law, it is also clear that emotional skills and competencies have significant

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<sup>124</sup> See, for example, K. A. Murphy and L. Sideman ‘The Two EIs’ in K. A. Murphy (ed) *A Critique of Emotional Intelligence. What Are the Problems and How Can They Be Fixed?* (London, Lawrence Erlbaum Associates, 2006); L. Waterhouse ‘Multiple Intelligences, the Mozart Effect and Emotional Intelligence: A Critical Review’ (2006) 41 *Educational Psychologist* 207; L. Waterhouse ‘Inadequate Evidence for Multiple Intelligences, the Mozart Effect and Emotional Intelligence Theories’ (2006) 41 *Educational Psychologist* 247.

<sup>125</sup> See, for example, R. Maguire, A. Egan, P. Hyland and P. Maguire ‘Engaging students emotionally: the role of emotional intelligence in predicting cognitive and affective engagement in higher education’ (2016) *Higher Education Research & Development* 1; M. L. Pertegel-Felices, J. L. Castejon-Costa and A. Jimeno-Morenilla ‘Differences between the personal, social and emotional profiles of teaching and computer engineering professionals and students’ (2014) 39 *Studies in Higher Education* 1185; L. Dacre Pool and P. Qualter ‘Emotional self-efficacy, graduate employability, and career satisfaction: Testing the associations’ (2013) 65 *Australian Journal of Psychology* 214; D. Nelis, I. Kotsou, J. Quoidback, M. Hansenne, F. Weytens, P. Dupuis and M. Mikolajczak ‘Increasing emotional competence improves psychological and physical well-being, social relationships, and employability’ (2011) 11 *Emotion* 354.

<sup>126</sup> J E. Montgomery ‘Incorporating emotional intelligence concepts into legal education: Strengthening the professionalism of law students’ (2008) 39 *University of Toledo Law Review* 323; P. C. Davis and A. B. Francois ‘Making law students healthy, skillful and wise’ (2005) 56 *New York Law School Review* 487; P. J. Cain ‘A First Step Toward Introducing Emotional Intelligence into the Law School Curriculum: The “Emotional Intelligence and the Clinical Student” class’ (2003) 14 *Legal Education Review* 1.

<sup>127</sup> Silver above n.103 at p.1174; see also James above n.31 at p.95; see also James above n.104.

<sup>128</sup> C. James ‘Lawyer dissatisfaction, emotional wellbeing and clinical legal education’ (2008) 18 *Legal Education Review* 123 at p.132.



value, for example, in the UK context, Finch and Fafinski discuss the role of mootings in developing general employability skills which (with strong echoes of Goleman's model of emotional intelligence) include 'an individual's ability to regulate their own behaviour in the workplace' and 'a person's ability to get along with other people'.<sup>129</sup>

Despite this interest elsewhere, there has been little, if any, UK-based research on the role and levels of emotional intelligence amongst law students. This arguably stems from a lack of consensus over at which stage of legal education skills such as client handling should be taught, and which skills should be included in the undergraduate law degree.<sup>130</sup> For example, the LETR reports concerns raised by the Bar that a focus on 'wishy washy' skills would detract attention from the undergraduate law degree's focus on academic knowledge and skills.<sup>131</sup> In 1997 Harris and Jones, based on their survey of 76 UK law schools, reported that whilst there was agreement on the inclusion of certain skills, such as case analysis, there was 'much less of a consensus' in relation to vocational skills.<sup>132</sup> A subsequent survey in 2004 indicated a 'diversity of practice' amongst the 58 law schools who responded, but overall the results suggested that vocational skills were becoming more prominent, particularly within the new universities.<sup>133</sup>

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<sup>129</sup> E. Finch and S. Fafinski *Employability Skills for Law Students* (Oxford, Oxford University Press, 2014) at pp.62-63; Boyatizis et al above n. 121; Goleman above n.120.

<sup>130</sup> Legal Education and Training Review above n.114 at para. 2.97.

<sup>131</sup> Legal Education and Training Review above n.114 at para. 2.103.

<sup>132</sup> P. Harris and M. Jones 'A survey of law schools in the United Kingdom, 1996' (1997) 31 *The Law Teacher* 38 at p.49.

<sup>133</sup> P. Harris and S. Beinart 'A survey of law schools in the United Kingdom, 2005' (2005) 39 *The Law Teacher* 299 at pp.309-310.

Arguably, the main reason that the role of vocational skills remains contentious is because it feeds into one of the enduring key debates in legal education, whether the law degree is liberal or vocational in purpose. A number of commentators have argued that the development of forms of transferable skills is compatible with the liberal view of law as a freestanding discipline.<sup>134</sup> In contrast, Bradney has argued, in relation to professional legal skills training that ‘training as an end is inimical to the pursuit and acquisition of knowledge’.<sup>135</sup> There are also concerns that such an emphasis on skills feeds into a neo-liberal narrative which could result in the law school becoming a ‘trade school’ focusing on ‘technocratic, skills-based courses’, thus threatening the plurality of approaches to law and legal education that have been developed.<sup>136</sup> In other words, learning in the law school becomes a product, rather than a process that has value in itself. Once again, this is contentious, as the impact of neo-liberalism on legal education has arguably been mixed, with much greater focus on performativity and accountability, but also greater freedom to engage with a wide range of approaches to law and legal education.<sup>137</sup>

When navigating the impact of neo-liberalism in the law school, Rigg argues that:

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<sup>134</sup> See, in relation to higher education generally, D. Bridges ‘Transferable skills: A philosophical perspective’ (1993) 18 *Studies in Higher Education* 43. In relation to legal education, see S. K. Ragavan ‘Acquiring skills for a globalised world through a peer mentoring scheme: a UK law school experience’ (2012) 46 *The Law Teacher* 15; J. Bell ‘Key skills in the law curriculum and self-assessment’ (2000) 34 *The Law Teacher* 175.

<sup>135</sup> A. Bradney ‘The place for teaching professional legal skills in UK university law schools’ (1987) 5 *Journal of Professional Legal Education* 125 at p.130.

<sup>136</sup> Thornton (2001a) above n.107 at p.10.

<sup>137</sup> See n.106 above and Cownie and Bradney above n.56.

The real difficulty lies in charting a course between the liberal ideal and the vocational reality which upholds the integrity of the subject matter and forecloses any potential “dumbing down” criticism.<sup>138</sup>

This may prove particularly difficult in relation to the undergraduate law degree, as there is evidence that law students take a significantly more instrumental approach to their studies than those in other disciplines.<sup>139</sup> However, this is a difficulty in terms of vocational or ‘soft skills’ as a whole, not something peculiar to emotional skills and competencies. Therefore, although the balance of the curriculum needs careful thought, there is no reason why emotion should be precluded from the course being charted and every reason to incorporate them as part of a valuable set of skills and competencies. This aligns well with a more holistic approach to legal education overall, one which acknowledges the relevance of emotions in relation to skills, but also in relation to learning, wellbeing and teaching.

It is arguable that one way to incorporate emotions into the law school curriculum, which bridges the gap between the vocational and the liberal, is through the use of clinical legal education. For example, Brayne et al suggest that its use goes beyond a narrow preparation for practice and facilitates students’ active learning in a much broader sense, including

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<sup>138</sup> D. Rigg ‘Embedding employability in assessment: searching for the balance between academic learning and skills development in law: a case study’ (2013) 47 *The Law Teacher* 404 at p.410.

<sup>139</sup> M. Hardee (2016) *The cohort study of the career expectations of students on qualifying law degrees in England and Wales*, [http://ials.sas.ac.uk/lern/docs/LERN\\_Hardee.pdf](http://ials.sas.ac.uk/lern/docs/LERN_Hardee.pdf) (accessed 28th June 2016); M. Hardee (2012) *Career Expectations of Students on Qualifying Law Degrees in England and Wales*, The Higher Education Academy, [https://www.heacademy.ac.uk/resources/detail/disciplines/law/Hardee\\_InterimReport\\_2014FINAL](https://www.heacademy.ac.uk/resources/detail/disciplines/law/Hardee_InterimReport_2014FINAL) (accessed 5th February 2016); Purcell, K. and Pitcher, J. *Great expectations: the new diversity of graduate skills and aspirations* (Institute for Employment Research/Association of Graduate Careers Advisory Services/Higher Education Central Services Unit, 1996); D. Halpern *Entry into the Legal Professions The Law Student Cohort Study Years 1 and 2 Research Study No.15* (London, The Law Society, 1994).

developing intellectual knowledge and critical and contextual understanding, presenting potentially dry information in a way which is accessible and engaging.<sup>140</sup> It has also generated a body of literature both in relation to both skills generally and the role of the affective domain, including emotions.<sup>141</sup> However, the extent to which clinical legal education in the UK has in practice become integrated into the wider law curriculum is questionable and it is not a part of all law schools' offering.<sup>142</sup>

## THE EMOTIONAL WELLBEING OF LAW STUDENTS

A further area in which the role of emotions is arguably inseparable from the workings of the law school is in relation to the emotional wellbeing of its students. There is considerable debate over the definition of 'wellbeing';<sup>143</sup> however, the key definitions given in recent

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<sup>140</sup> H. Brayne, N. Duncan and R. Grimes *Clinical Legal Education. Active Learning in your Law School* (London, Blackstone Press, 1998).

<sup>141</sup> See n.63 above; see also D. Nicolson 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16 *Legal Ethics* 36; S. L. Brooks 'Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Education' (2006) 17 *St Thomas Law Journal* 513; S. L. Brooks 'Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities' (2006) 13 *Clinical Law Review* 213.

<sup>142</sup> J. Hall and K. Kerrigan 'Clinic and the wider law curriculum' (2011) 16 *International Journal of Clinical Legal Education* 25.

<sup>143</sup> R. Dodge, A. Daly, J. Huyton and L. Sanders 'The challenge of defining wellbeing' (2012) 2 *International Journal of Wellbeing* 222. At its broadest, it can include physical, psychological and spiritual health and social connectedness and there is evidence that all of these elements are linked, see for example, N. K. Skread and S. L. Rogers 'Do law students stand apart from other university students in their quest for mental health: A comparative study on wellbeing and associated behaviours in law and psychology students' (2015) 42-43 *International Journal of Law and Psychiatry* 81; N. K. Skread and S. L. Rogers 'Stress, anxiety and depression in law students: How student behaviours affect student wellbeing' (2014) 30 *Monash University Law Review* 564 at p.41; K. Galloway, R. Bradshaw, N. Dunbar and J. Fellows (2011) 'Approaches to Student Support in the First Year of Law School' (2011) 21 *Legal Education Review* 235 at p.247; M. Tani and P. Vines 'Law students' attitudes to education: Pointers to depression in the legal academy and the profession?' (2009) 19 *Legal Education Review* 3 at p.25; N. Kelk, G. Luscombe, S. Medlow and I. Hickie *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers* (Sydney, Brain & Mind Research Institute, 2009) at p.3; K. S. Sheldon and L. S. Krieger 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Study of Self-Determination Theory' (2007) 33 *Personality and Social Psychology Bulletin* 883 at p.885; S. M. Siptroth 'Forming the Human Person: Can the Seminary Model Save

literature do largely appear (implicitly or explicitly) to include emotions as a key component of it. For example, one of the early pioneers in the field of psychological wellbeing, Bradburn, refers to the importance of positive and negative affect in his description.<sup>144</sup> More recently, the Office for National Statistics has proposed a definition which includes the ‘individual’s feelings of satisfaction with life, whether they feel their life is worthwhile and their positive and negative emotions’.<sup>145</sup> In a meta-analysis of literature on wellbeing, Eger and Maridal refer to the emotional state of ‘happiness’ as one of two components required for wellbeing (the other being “life satisfaction”).<sup>146</sup>

Somewhat surprisingly, to date, there is very little information on law student wellbeing which specifically relates to legal education in England and Wales, although there is evidence of increasing levels of psychological distress amongst university students generally.<sup>147</sup>

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the Legal Profession?’ (2007) 1 *Brigham Young University Education and Law Journal* 181 at p.181; B. A. Glesner ‘Fear and Loathing in the Law Schools’ (1991) 23 *Connecticut Law Review* 627 at p.631.

<sup>144</sup> N. Bradburn *The structure of psychological well-being* (Chicago, Aldine, 1969).

<sup>145</sup> J. Beaumont (2011) *Measuring national well-being - Discussion paper on domains and measures*, Office for National Statistics, [http://www.ons.gov.uk/ons/dcp171766\\_240726.pdf](http://www.ons.gov.uk/ons/dcp171766_240726.pdf) (accessed 2nd February 2016) at p.5.

<sup>146</sup> R. J. Eger and J. H. Maridal ‘A statistical meta-analysis of the wellbeing literature’ (2015) 5 *International Journal of Wellbeing* 45 at p.46.

<sup>147</sup> Although a number of UK studies specifically in relation to legal education appear to be underway, at the time of writing, only two published pieces of relevance could be located. The most recent is C. Strevens and C. Wilson ‘Law Student Wellbeing in the UK: A Call for Curriculum Intervention’ 11(1) *Journal of Commonwealth Law and Legal Education* 44 which focuses on the use of self-determination theory. An earlier piece is a study by P. Childs (2004) *Autonomy and the Ability to Learn Project Report*, [www.ukcle.ac.uk](http://www.ukcle.ac.uk) (accessed 5<sup>th</sup> November 2015). However, the limited number of participants (24) and restricted focus make it of little value in considering emotional wellbeing in the law school more widely. For studies on student wellbeing generally see A. Macaskill ‘The Mental Health of University Students in the United Kingdom’ (2013) 41 *British Journal of Guidance and Counselling* 426; W. E. Ansari, C. Stock, the UK Student Health Group, S. Snelgrove, X. Hu, S. Parke, S. Davies, J. John, H. Adetunje, M. Stoate, P. Deeny, C. Phillips and A. Mabhala ‘Feeling Healthy? A Survey of Physical and Psychological Wellbeing of Students from Seven Universities in the UK’ (2011) 8, *International Journal of Environmental Research and Public Health* 1308; Royal College of Psychiatrists (2011) *Mental Health of Students in Higher Education*, College Report CR166, <http://www.rpsych.ac.uk/files/pdfversion/CR166.pdf> (accessed 13th January 2016); M. Yorke and B. Longden (2008) ‘The first year experience of higher education in the UK’, The Higher Education Academy, [https://www.heacademy.ac.uk/sites/default/files/fyefinalreport\\_0.pdf](https://www.heacademy.ac.uk/sites/default/files/fyefinalreport_0.pdf) (accessed 8th January 2016).

However, there are substantial bodies of work, relating specifically to legal education, in both the US and Australia which can be considered. This does lead to the important caveat that commensurability between jurisdictions should not be presumed given the more vocational nature of legal education within these countries.<sup>148</sup> However, conversely, it would be wrong to ignore the possible implications for the UK of such findings, whose significance is encapsulated well in Dresser's comment (in the US context) that:

Students entering law school expect to be intellectually challenged, but few realize that they are also beginning an emotionally hazardous journey.<sup>149</sup>

In the US, a number of studies have taken place since the 1960's,<sup>150</sup> leading Shanfield and Benjamin to conclude as early as 1985 that 'there is general agreement among legal educators that the stress of legal education is high'.<sup>151</sup> More recently, Sheldon and Krieger's 2004 study of subjective wellbeing followed a sample of first year law students at Florida State University and also a cohort of first year students at a second, unnamed US law school.<sup>152</sup> The overall conclusion was that the students involved appeared 'quite happy and healthy at

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<sup>148</sup> A. Bradney 'Can There Be Commensurability in Comparative Legal Education?' (2007) 1 *Canadian Legal Education Annual Review* 67.

<sup>149</sup> L. Dresser 'Promoting Psychological Health in Law Students' (2005) 24 *Legal Reference Services Quarterly* 41 at p.42.

<sup>150</sup> See, for example, M. Hedegard 'The Impact of Legal Education: An In-Depth Examination of Career-relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students' (1979) 4 *American Bar Foundation Research Journal* 791; N. Solkoff 'The Use of Personality and Attitude Tests in Predicting the Academic Success of Medical and Law Students' (1968) 43 *Journal of Medical Education* 1250.

<sup>151</sup> S. Shanfield and G. A. H. Benjamin 'Psychological Distress Among Medical and Law Students' (1985) 35 *Journal of Legal Education* 65 at p.65; see also G. A. H. Benjamin, A. Kaszniak, B. Sales and S. B. Shanfield 'The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers' (1986) 11 *Law & Social Inquiry* 225.

<sup>152</sup> K. M. Sheldon and L. S. Krieger 'Does law school undermine law students? Examining changes in goals, values, and well-being' (2004) 22 *Behavioral Sciences and the Law* 261.

the beginning of their career'.<sup>153</sup> However, they then experienced 'declining happiness and well-being' during their first year at law school.<sup>154</sup> This included 'large reductions in positive affect, life satisfaction, and overall SWB [subjective wellbeing], and large increases in negative affect, depression, and physical symptoms'.<sup>155</sup>

In Australia, interest in law student wellbeing appears to have been ignited in part by the US studies referred to above and also due to the tragic suicide of Christian Jepson, a young lawyer and former law student, whose parents set up the Christian Jepson Memorial Foundation to raise awareness of mental health issues amongst law students and the legal profession.<sup>156</sup> The first detailed study into depression and psychological distress amongst both law students and the legal profession was conducted across 13 universities and nearly 2,000 members of the legal profession and concluded 'that law students and members of the legal profession exhibit higher levels of psychological distress and depression than do community members of a similar age and sex'.<sup>157</sup> When discussing their findings, Kelk et al did note that this did not equate with law students being 'severely dysfunctional' due to the

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<sup>153</sup> Sheldon and Krieger above n.153 at p.271.

<sup>154</sup> Sheldon and Krieger above n.153 at p.275.

<sup>155</sup> Sheldon and Krieger above n.151 at p.272. Sheldon and Krieger's 2007 study (above n.143) was a longitudinal three year study, again with cohorts from two US law schools which indicated similar results and demonstrated a decline in subjective wellbeing during the students' time at law school. For similar findings in Canada see M. E. Pritchard and D. N. McIntosh (2003) 'What predicts adjustment among law students? A longitudinal panel study' (2003) 143 *The Journal of Social Psychology* 727.

<sup>156</sup> Council of Australian Law Deans (2013) *Promoting Law-Student Well-being. Good Practice Guidelines for Law Schools*, <http://www.cald.asn.au/assets/lists/Resources/Promoting%20Law%20Student%20Well-Being%20Good%20Practice%20Guidelines%20for%20Law%20Schools.pdf> (accessed 7<sup>th</sup> January 2016); see also See also <http://www.tjmf.org.au/>.

<sup>157</sup> Kelk above n.144 at p.42. The questionnaire administered identified that 35.4% of the law students surveyed reported suffering high or very high levels of psychological distress in the last 30 days, compared to 13% of 18 to 34 year olds overall in the Australian population (p.12). 46.9% of law students surveyed also reported that they had experienced depression, although 39.4% stated that they would not seek help from a professional if they were depressed (p14 and 20). Of those students who had suffered depression, 80.6% viewed their study as a contributing factor (the next highest factor was work at 54%) (p.34).

general levels of psychological distress and depression amongst Australian young people. However, it did show them to be more distressed than the norm.<sup>158</sup> This finding is supported in more recent studies which also indicated significant instances of depression amongst law students.<sup>159</sup>

The studies referred to above indicate that it is the specific law school experience which contributes to psychological distress, rather than simply the pressures of being a university student generally.<sup>160</sup> Such studies have largely compared law students with either medical students or the general population.<sup>161</sup> A further Australian study took a different approach and included a range of law, non-law, undergraduate and post-graduate students at the University of Melbourne, spanning six disciplines in total.<sup>162</sup> The findings confirmed that law students did experience significant levels of psychological distress with around 30% in the 'moderate to higher severity categories' at a point in the semester where there were no significant assessment demands.<sup>163</sup> However, the study did not find that law students demonstrated higher levels of psychological distress than other students overall, with similar levels reported amongst undergraduate engineering and post-graduate science, nursing and

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<sup>158</sup> Kelk above n.144 at p.42.

<sup>159</sup> A. Bergin and K. Pakenham 'Law Student Stress: Relationships Between Academic Demands, Social Isolation, Career Pressure, Study/Life Imbalance and Adjustment Outcomes in Law Students' (2015) 22 *Psychiatry, Psychology and Law* 388; A. Lester, L. England and N. Antolak-Saper 'Health and Wellbeing in the First Year. The Law School Experience' (2011) 36 *Alternative Law Journal* 47.

<sup>160</sup> See Bergin and Pakenham above n.164, Lester et al above n.164, Kelk et al above n.144, Sheldon and Krieger above n.153; Pritchard and McIntosh above n.157 and Benjamin et al above n.152.

<sup>161</sup> W. Larcombe, S. Finch and R. Sore 'Who's Distressed? Not Only Law Students: Psychological Distress Levels in University Students across Diverse Fields of Study' (2015) 37 *Sydney Law Review* 243 at p.243.

<sup>162</sup> Larcombe et al above n.166 at p.265.

<sup>163</sup> Larcombe et al above n.166 at p.256.



psychology students.<sup>164</sup> Conversely, in their study of 188 undergraduate students from both the law and psychology schools of the University of Western Australia, Skread and Rogers found that ‘that law students experience higher levels of stress, anxiety and depression than university students in other disciplines, particularly psychology’.<sup>165</sup>

Although the studies discussed above leave the issue of how far it is the law school experience itself which is potentially damaging to student wellbeing open to question, there is evidence of a number of factors relating to legal education which do contribute to issues in students’ emotional and wider psychological wellbeing. One factor is the academic pressures, teaching and workloads involved, with students seemingly taking an individualistic approach to competing for honours, status and sought-after professional opportunities (arguably, in part at least, a consequence of the neo-liberal focus on learning as a form of product).<sup>166</sup> Another is the apparent lack of autonomy as students feel the need to comply with the demands and culture of the law school and, arguably, the requirement to ‘think like a lawyer’.<sup>167</sup>

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<sup>164</sup> Larcombe et al above n.166 at p.264. The suggestion has also been made that the evidence is based on self-report by law students who may be trying to comply with cultural norms which view the law as requiring hard work and stress (P. Glenn ‘Some Thoughts About Developing Constructive Approaches to Lawyer and Law Student Distress’ (1995) 10 *Journal of Law & Health* 69 at p.69.

<sup>165</sup> Skread and Rogers above n.144 at p.89.

<sup>166</sup> N. K. Skread and S. L. Rogers ‘Stress, anxiety and depression in law students: How student behaviours affect student wellbeing’ (2014) 30 *Monash University Law Review* 564 at p.566; Dresser above n.150 at p.46; J. Allen and P. Baron ‘Buttercup goes to law school. Student wellbeing in stressed law schools’ (2004) 29 *Alternative Law Journal* 285.

<sup>167</sup> A. Huggins ‘Autonomy Supportive Curriculum Design: A Salient Factor in Promoting Law Students’ Wellbeing’ (2012) 35 *University of New South Wales Law Journal* 683; Tani and Vine above n.142 at p.31; Sheldon and Krieger above n.142 at p.895; L. S. Krieger ‘Institutional Denial About the Dark Side of Law School and Fresh Empirical Guidance for Constructively Breaking the Silence’ (2002) 52 *Journal of Legal Education* 112. M. Fitzgerald ‘Rites of passage. The impact of teaching methods on first year law students’ (2008) 42(1) *The International Journal of Legal Education* 60 found similar issues arising in the Canadian setting, leading her to conclude that each law professor needed to ‘recognize and own their own unique contribution toward helping each lawyer a caring, compassionate, contributing and happy human being’ (p.82)

Both this focus on a particular form of legal analysis, and the adversarial model of legal education which often accompanies it, have been touched on above. Towness O'Brien et al, in the Australian context, suggest that the consequence of this is that students are discouraged from engaging with the messier, emotionally-involved aspects of the law, focusing instead on abstract problem-solving.<sup>168</sup> It has even been argued that the impact of 'thinking like a lawyer' is sufficiently embedded in law schools to generate a shift in law students' thinking styles. Towness O'Brien et al comment that:

We believe there is sufficient evidence to support the hypothesis that a change towards, or a reinforcement of, rational thinking styles can occur in law school. In our experience, emphasizing the rational mode while neglecting the experiential mode of thinking is consonant with the approach to law that teachers often refer to as *thinking like a lawyer*. [original authors' italics]<sup>169</sup>

A rational way of thinking is 'conscious and deliberative', involving a focus on analysis, logic and reasoning whereas an experiential way of thinking is founded on 'effortless intuition' with a holistic, emotionally-orientated focus.<sup>170</sup>

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<sup>168</sup> M. Towness O'Brien, S. Tang and K. Hall 'No time to loose: Negative impact on law student wellbeing may begin in year one' (2011) 2 *The International Journal of the First Year in Higher Education* 49 at p.51; J. Jolly-Ryan 'Promoting Mental Health in Law School: What Law Schools Can Do for Law Students to Help Them Become Happy, Mentally Healthy Lawyers' (2009) 48 *University of Louisville Law Review* 95 at p.106; Dresser above n.148 at p.50; Sturm (1998) above n.60. For a discussion of attempts to reform this system in the US context, see Sturm (2007) above n.61.

<sup>169</sup> Towness O'Brien et al above n.172 at p.56-57; see also M. Towness O'Brien, S. Tang and K. Hall 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149.

<sup>170</sup> Towness O'Brien above n.174 at p.155; The study by Towness O'Brien et al of over 300 law students applied three psychometric instruments to assess the students' thinking style and found 'significant differences' between the scores at the start and end of the first year, with scores on the rational thinking scale becoming 'significantly higher' and scores on the experiential thinking scale becoming 'significantly lower' (p.163).

Towness O'Brien et al suggest that higher levels of experiential thinking may enable students to more successfully encounter new motivations, beliefs and goals and navigate the competitive law school environment without succumbing to the pressures to conform that can generate cognitive dissonance and psychological distress.<sup>171</sup> Unfortunately, if emotions are not seen as important or relevant, in the competitive environment of the law school for students it will be perceived as a hindrance that is to be overcome, with a shift to more apparently rational ways of thinking.

Another, inter-related factor which has been found to impact on students' emotional wellbeing is the role played by intrinsic and extrinsic motivation in regulating psychological health.<sup>172</sup> A number of commentators in both the US and Australia have identified a shift within law students away from intrinsic motivations, values and goals for study, such as personal growth and intellectual curiosity, and towards extrinsic motivations, values and goals, such as money and status.<sup>173</sup> How this correlates with the findings that law students are more instrumental than other students in their choice of degree is not yet clear.

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However, students who were higher than the average in rational thinking, but lower than the average in experiential thinking demonstrated 'a significant increase in depressive symptoms' over the course of the first year and a 'clear association' was identified between lower levels of depressive symptoms and higher levels of experiential thinking (p.165).

<sup>171</sup> Towness O'Brien above n.174 at p.167.

<sup>172</sup> See, for example, Krieger above n.172. For a psychological explanation see R. M. Ryan and E. L. Deci 'Self-determination theory and the facilitation of intrinsic motivation, social development, and well-being' (2000) 55 *American Psychologist* 68.

<sup>173</sup> K. S. Sheldon and L. S. Krieger 'Walking the talk: Value importance, value enactment, and well-being' (2014) 38 *Motivation and Emotion* 609; K. Hall 'Do we really want to know? Recognising the importance of student psychological wellbeing in Australian law schools' (2009) 9 *Queensland University of Technology, Law and Justice Journal* 1; Sheldon and Krieger above n.144; Sheldon and Krieger above n.153; Allen and Baron above n.171; Krieger above n.172; L. S. Krieger 'Psychological Insights: Why Our Students and Graduates Suffer And What We Might Do About it' (2002) 1 *Journal of the Association of Legal Writing Directors* 258.

The final factor often referred to as influencing law student wellbeing is a lack of social connectedness, an issue closely related to each of the other elements discussed, which appears to sometimes be identified as a cause of psychological distress and sometimes as a consequence of it.<sup>174</sup> There have been suggestions that law students are more focused on networking opportunities than other, find it harder to form relationships within larger intakes and bigger class sizes and may isolate themselves from their usual support network.<sup>175</sup>

Although the negative effects of legal education within other jurisdictions may be exacerbated by their more vocational approach to the law degree<sup>176</sup>, the above findings and the evidence of a general increase in mental health issues in the wider UK student population all suggest that the role of emotions within the law school must be re-examined. The very fact that in the UK there is the potential for a significant number of law students to experience a decline in wellbeing and an increase in psychological distress is in itself a compelling reason to argue that there is a need for emotional and other facets of wellbeing to be more widely acknowledged as an issue within legal education. However, in addition,

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<sup>174</sup> Bergin and Pakenham above n.164 at p.400; Skread and Rogers (2014) above n.144 at p.585; W. Larcombe, L. Tumbaga, I. Malkin, P. Nicholson and O. Tokatlidis 'Does an Improved Experience of Law School Protect Students against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students' (2013) 35 *Sydney Law Review* 407 at p.429; Galloway et al above n.144 at p.247; Tani and Vine above n.144 at p31; A. Iijima 'Lessons Learned: Legal Education and Law Student Dysfunction' (1998) 48 *Journal of Legal Education* 524 at p.527. In the UK context, social connectedness has been identified as being of particular significance to law students during the first few weeks of their time at university – S. Brooman and S. Darwent 'Measuring the beginning: a quantitative study of the transition to higher education' (2014) 39(9) *Studies in Higher Education* 1523 at p.1538.

<sup>175</sup> Tani and Vine above n.144 at p.25; Larcombe et al above n.166 at p.245.

<sup>176</sup> In the US, the law degree is viewed overall as a 'professional education' but there is debate over how successfully it fulfils this mission, with different law schools taking different approaches (J. A. McMorrow, J. 'Comparative Legal Education: An Introduction to US Legal Education and Preparation for the Practice of Law' (2009) 6 *Jurist Review* 20 at p.22; R. W. Gordon 'Legal Education in the U.S.: Origin and Development' (2002) 7(2) *Issues of Democracy* 6). The Australian law school appears to have greater similarities with England and Wales in this regard, although there is still a clear vocational element (Council of Australian Law Deans (2013) *Studying Law in Australia*, [http://www.cald.asn.au/slia/legal\\_education.cfm](http://www.cald.asn.au/slia/legal_education.cfm) (accessed 7th March 2016).

these issues can create further, negative consequences, including inhibiting learning,<sup>177</sup> promoting disengagement<sup>178</sup> and causing long-term damage to those whose wellbeing is affected.<sup>179</sup>

The impact of students' emotional wellbeing on their engagement and learning means that it is impossible to dismiss this issue as a purely pastoral one, with Glesner arguing that 'even if one sees our responsibility as solely to impart a body of knowledge, then one must necessarily address those factors within our control that impede that goal, including the psychological climate of the law school'.<sup>180</sup> There is evidence that people learn best when in a moderate state of arousal.<sup>181</sup> Although there may be some situations where a certain level of stress can enhance learning, it has been proven that high levels of stress and stress over a longer duration can inhibit the neural plasticity of the brain (which enables people to learn) and result in memory impairment.<sup>182</sup> In addition, it has been demonstrated that such stress results in students disengaging from their work as they begin to practice avoidance techniques (putting off or avoiding learning) and their lack of confidence in their ability to complete set tasks become a self-fulfilling prophecy, leading to a lack of effort and an increasingly negative perception of their legal studies.<sup>183</sup>

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<sup>177</sup> Galloway et al above n.144 at p.246; Bromberger above n.59 at p.47.

<sup>178</sup>Bromberger above n.59 at p.58; Dresser above n.150 at p.46-47; Glesner above n.144 at p.636.

<sup>179</sup> S. Grover 'Personal Integration and Outsider Status as Factors in Law Student Well-Being' (2008) 47 *Washburn Law Journal* 419.

<sup>180</sup> Glesner above n.144 at p.641.

<sup>181</sup> Bromberger above n.59 at p.48; K. B. Rager 'I feel, therefore I learn: The role of emotion in self-directed learning' (2009) 23 *New Horizons in Adult Education and Human Resource Development* 22; L. Cozolino and S. Sprokay 'Neuroscience and Adult Learning' (2006) 110 *New Directions in Adult Continuing Education* 11.

<sup>182</sup> Cozolino and Sprokay above n.186; M. Joels, Z. Pu, O. Wiegert, M. S. Oitzl and H. J. Krugers 'Learning under stress: How does it work?' (2006) 10 *Neuroscience & Biobehavioral Reviews* 152 at p.152.

<sup>183</sup> Bromberger above n.59 at p.48-50; Dresser above n.150 at p.46-47; S. L. Do and A. L. Schallert 'Emotions and Classroom Talk: Toward a Model of the Role of Affect in Students' Experiences of Classroom Discussions'

The impacts discussed above mean that the high levels of stress identified in law students throughout their studies are likely to have a direct impact on their academic performance.<sup>184</sup> Iijima suggests that ‘because emotional state and academic performance are so closely related, and because law school contributes to emotional dysfunction, students may get caught in a downward spiral of emotional and academic problems’.<sup>185</sup> She argues that interventions focused solely on academic support will not be able to resolve this issue, because of the emotional aspects involved.<sup>186</sup> In addition, such psychological distress is likely to have more long term impacts.<sup>187</sup> For those students seeking to enter the legal profession, links have been made (in the US context) to burnout, mental disorders and substance abuse issues within the profession.<sup>188</sup> It has also been argued that students are leaving law school without the emotional skills required to succeed either in the legal profession or elsewhere.<sup>189</sup> A focus on extrinsic motivations, goals and values amongst law students has been linked with the reinforcement of negative habits (such as a lack of social contact)<sup>190</sup> and the suppression of true personalities, potentially even leading to the

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(2004) 96 *Journal of Educational Psychology* 619; Sheldon and Krieger above n.153 at p.282; Glesner above n.144 at p.636 .

<sup>184</sup> Bromberger above n.59 at p.48; Dresser above n.150 at p.50.

<sup>185</sup> Iijima above n.182 at p.527.

<sup>186</sup> Iijima above n.182 at p.527

<sup>187</sup> Allen and Baron above n.171 at p.288; in relation to higher education generally, see also E. R. Kahu, ‘Framing student engagement in higher education’ (2013) 38 *Studies in Higher Education* 758.

<sup>188</sup> J. Jolly-Ryan ‘Promoting Mental Health in Law School: What Law Schools Can Do for Law Students to Help Them Become Happy, Mentally Healthy Lawyers’ (2009) 48 *University of Louisville Law Review* 95; Kutulakis, P. ‘Stress and Competence: From Law Student to Professional’ (1992) 21 *Capital University Law Review* 835.

<sup>189</sup> James above n.31; James above n.104; Dresser above n.150.

<sup>190</sup> Krieger above n.178 at p.261; Siptroth above n.144 at p.181; Sheldon and Krieger above n.153 at p.262. Kelk et al above n.144 at p.49 al suggest that the competitive style adopted in law schools is unlikely to be appropriate if applied to everyday life.

‘disintegration or fragmentation of the whole person’.<sup>191</sup> By acknowledging and utilising emotions, law schools could foster a much greater awareness of such negative consequences and a far more supportive academic environment which transforms legal education into a tool to actively promote, rather than damaging, emotional wellbeing amongst students.

## **LEGAL ACADEMICS AND EMOTIONS: TEACHING, RESEARCH AND ADMINISTRATION**

To fully explore the transformative potential of emotions, it is insufficient to consider only law student wellbeing, as emotions are also key to the work of legal academics – both in relation to their own work and wellbeing and also because of the emotional engagement which forms part of the student/lecturer interaction.<sup>192</sup> The work of legal academics can be categorised into three broad areas, teaching, administration and research.<sup>193</sup> Each of these areas arguably involves emotions and also has the potential to impact on wellbeing and the culture of the law school.

In relation to teaching, despite a traditional disregard for the emotional dimension of teaching, there is now a considerable body of work on compulsory education demonstrating

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<sup>191</sup> Grover above n.18 at p.422; see also Krieger above n.172 at p.125.

<sup>192</sup> A. D. Rowe, J. Fitness and L. N. Wood ‘University student and lecturer perceptions of positive emotions in learning’ (2015) 28(1) *International Journal of Qualitative Studies in Education* 1’ V. Sagayadevan and S. Jeyaraj ‘The Role of Emotional Engagement in Lecturer-Student Interaction and the Impact on Academic Outcomes of Student Achievement and Learning’ (2012) 12(3) *Journal of the Scholarship of Teaching and Learning* 1.

<sup>193</sup> J. Guth ‘The case for time turners – the practicalities of being a new law lecturer’ (2009) 43 *The Law Teacher* 185 at p.185; Cownie above n.26 at p.122 and p.143; M. L. Bellas ‘Emotional Labor in Academia: The Case of Professors’ (1999) 561 *The Annals of the American Academy of Political and Social Science* 96 at p.96.

that teaching is an innately emotional occupation.<sup>194</sup> Hargreaves summarises this well when he comments that:

Good teachers are not just well-oiled machines. They are emotional, passionate beings who connect with their students and fill their work and their classes with pleasure, creativity, challenge and joy.<sup>195</sup>

A significant part of the role of emotions in teaching is in the way teachers can influence and manage the emotions of their students, either through specific social and emotional learning programmes or through their classroom management and the experience they provide for their students.<sup>196</sup> However, there is also increasing discussion of the role of teachers' own emotions within their work and wellbeing. For example, in relation to compulsory schooling, Nias identifies three ways in which affect, including emotions, is 'of fundamental importance in teaching and to teachers'.<sup>197</sup> Firstly, because of the inter-relation between emotions and cognition, secondly, because teachers' feelings are engaged in their job and, thirdly, because

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<sup>194</sup> See, for example, T. Hyland 'Mindfulness-based interventions and the affective domain of education' (2014) 40 *Educational Studies* 277; U. Edgington 'Performativity and affectivity: Lesson observations in England's Further Education colleges' (2013) 23 *Management in Education* 138; G. Phye, P. Schutz and R. Pekrun (eds) *Emotion in Education* (Burlington, San Diego and London, Elsevier, 2007); R. Sutton and K. Wheatley 'Teachers; Emotions and Teaching: A Review of the Literature and Directions for Future Research' (2003) 15 *Educational Psychology Review* 327; J. Nias 'Thinking about feeling: The emotions of teaching' (1996) 26 *Cambridge Journal of Education* 293.

<sup>195</sup> A. Hargreaves 'The emotional practice of teaching' (1998) 14 *Teaching and Teacher Education* 835 at p.835.

<sup>196</sup> See, for example, A. Curci, T. Lanciano and E. Soletti 'Emotions in the Classroom: The Role of Teachers' Emotional Intelligence Ability in Predicting Students' Achievement' (2014) 127 *The American Journal of Psychology* 431; S. Titsworth, T. P. McKenna, J. P. Mazer and M. M. Quinlan 'The Bright Side of Emotion in the Classroom: Do Teachers' Behaviors Predict Students' Enjoyment, Hope and Pride?' (2013) 62 *Communication Education* 191; S. Titsworth, M. M. Quinlan and J. P. Mazer 'Emotion in Teaching and Learning: Development and Validation of the Classroom Emotions Scale' (2010) 59 *Communication Education* 432; J. Rosiek 'Emotional scaffolding: An exploration of the teacher knowledge at the intersection of student emotion and the subject matter' (2003) 54 *Journal of Teacher Education* 399.

<sup>197</sup> Nias above n.201 at p.293.



of the way both emotions and cognition are intimately associated with social and cultural factors which shape teachers' views of themselves which, in turn, influences the social and cultural context within which they work.<sup>198</sup> These elements have been echoed by other commentators. For example, Sutton and Wheatley suggest that emotions can impact on teachers' cognitive functioning, with negative emotions causing them to become distracted from their educational goals<sup>199</sup> Hargreaves argues that teaching is an 'emotional practice' which 'activates, colors, and expresses teachers own feelings, and the actions in which those feelings are embedded'.<sup>200</sup>

In relation to higher education, the more limited literature available also supports the importance of emotions within teaching.<sup>201</sup> For example, in their study of 97 higher education teachers in Finland, Postareff and Lindblom-Ylänne found that, in interviews regarding teaching issues, where the role of emotions was not explicitly raised as an issue, 92 of the teachers 'described emotions in some way' during their interviews (2011: 803).<sup>202</sup> There is also some evidence to suggest that there is a relationship between 'high-quality teaching, or developed understandings of teaching, and positive emotions related to

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<sup>198</sup> Nias above n.201.

<sup>199</sup> Sutton and Wheatley above n.199 at p.336; see also K. E. O'Connor "'You choose to care": Teachers, emotions and professional identity' (2008) 24 *Teaching and Teacher Education* 117; Phye et al above n.199; A. Hargreaves 'Mixed emotions: Teachers' perceptions of their interactions with students' (2000) 16 *Teaching and Teacher Education* 811.

<sup>200</sup> Hargreaves above n.200 at p.839; see also D. K. Meyer and J. C. Turner 'Scaffolding emotions in classrooms' in G. Phye, P. Schutz and R. Pekrun (eds) *Emotion in Education* (Burlington, San Diego and London, Elsevier, 2007); M. Zembylas 'Emotional ecology: The intersection of emotional knowledge and pedagogical content knowledge in teaching' (2007) 23 *Teaching and Teacher Education* 355.

<sup>201</sup> Bromberger above n.59; Cozolino and Sprokay above n.186; Leathwood and Hey above n.95.

<sup>202</sup> L. Postareff and S. Lindblom-Ylänne 'Emotions and confidence within teaching in higher education' (2011) 36 *Studies in Higher Education* 799.

teaching’<sup>203</sup> as well as indications that students themselves perceive there as being an emotional element within examples of excellent teaching, for example, through the demonstration of passion and empathy.<sup>204</sup>

Although there is very little literature specifically on emotions and teaching within law schools, it is arguable that much of the discussion above on compulsory and higher education equally applies within this setting. There are certainly small indications that this is the case, for example, in the Australian context, Bromberger argues for a form of emotionally-aware, nurturing law teaching which best facilitates student learning<sup>205</sup> and at James Cook University in Australia work has been done on integrating pastoral care into the curriculum.<sup>206</sup> In the US context, Juergens argues that legal academics have an important role to play in modelling the types of behaviour that will demonstrate to their students how to handle both ‘the emotional and rational aspects of lawyers’ work’.<sup>207</sup> In the UK context, Guth refers to the importance of mentoring law students<sup>208</sup> and Nicolson discusses the value of guided reflection on values and ethics in a law clinic setting.<sup>209</sup> Brooman and Darwent have also discussed the use of reflective diaries and academic self-awareness literature with

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<sup>203</sup> Postareff and Lindblom-Ylänne above n.207 at p.808; see also K. Trigwell ‘Relations between teachers’ emotions in teaching and their approaches to teaching in higher education’ (2012) 40 *Instructional Science* 607.

<sup>204</sup> F. Su and M. Wood ‘What makes a good university lecturer? Students’ perceptions of teaching excellence’ (2012) 4 *Journal of Applied Research in Higher Education* 142; S. Moore and N. Kuol ‘Matters of the Heart: Exploring the emotional dimensions of educational experience in recollected accounts of excellent teaching’ (2007) 12 *International Journal for Academic Development* 87.

<sup>205</sup> Bromberger above n.59.

<sup>206</sup> Galloway above n.144.

<sup>207</sup> A. Juergens ‘Practising what we teach: The importance of emotion and community connection in law work and law teaching’ (2005) 11 *Clinical Law Review* 413.

<sup>208</sup> Guth above n.200.

<sup>209</sup> Nicolson above n.142.

first year law students, suggesting these can provide them with insights into the psychological impacts of studying law and methods of identifying and handling the stresses involved<sup>210</sup> It seems that, in harnessing the transformative potential of emotions within the law school, both teaching and learning are inextricably linked and vital.

Alongside teaching, research and administration form the nexus of academic life both generally and within the law school. It is arguable that the neo-liberalisation of higher education has led to research in particular become increasingly important in terms of how law schools measure academic performance and outputs, with Collier suggesting that ‘it is now beyond question that the performance and research productivity of all legal academic staff has become crucial to the status, financial health and, perhaps, the very future of the law school itself’.<sup>211</sup> As a result, there is an increasing acknowledgment that both the research and administration required in legal education have an emotional impact on legal academics, both in terms of the shifting focus of the law school as a whole and the pressures neo-liberalism engenders on individual legal academics. Thus institutional and wider market and policy-driven shifts in legal education have a direct emotional impact on the work of the legal academy. This clearly links into the themes of learning as a product and the emphasis on vocationalism and skills and competencies discussed above.

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<sup>210</sup> S. Brooman and S. Darwent ‘A positive view of first-year undergraduate reflective diaries: focusing on what students can do’ (2012a) 13(4) *Reflective Practice* 517; S. Brooman and S. Darwent ‘“Yes, as the articles suggest, I have considered dropping out”: self-awareness literature and the first year student’ 37(1) *Studies in Higher Education* 19.

<sup>211</sup> R. Collier ‘The changing university and the (legal) academic career – rethinking the relationship between women, men and the ‘private life’ of the law school’ (2002) 22 *Legal Studies* 1 at p.15.

With regard to the impact of the shifting focus of the law school, it is arguable that a focus on measurable outputs has relegated pastoral care to an ancillary role, leading to it becoming devalued and ignored, often with an expectation that female legal academics will take on such roles.<sup>212</sup> In relation to the pressures on individual academics, Lynch argues (discussing higher education generally) that the neo-liberal focus on performance has led to ‘a type of Orwellian surveillance of one’s everyday work by the university institution that is paralleled in one’s person life with a reflexive surveillance of the self’.<sup>213</sup> In other words, people internalize the institutional and/or external focus on measurable, market driven outputs and measure themselves against that criterion in a way which leads to ‘feelings of personal inauthenticity’.<sup>214</sup> This can have significant emotional consequences for individual academics who are subject to a range of emotions, including shame, aggression and anxiety.<sup>215</sup> As well as the negative emotions engendered by neo-liberalism, Rowland also refers to the stifling of more positive emotions, in particular the ‘intellectual love’ which an academic feels for their subject.<sup>216</sup> He suggests that an increased focus on accountability has undermined this love by forcing academics to focus on measurable outputs and performance as well as damaging the collegiality generated by a shared, intellectual focus.<sup>217</sup>

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<sup>212</sup> Thornton (2011) above n.108; Cownie above n.26 at p.146; C. Wells ‘Women law professors – negotiating and transcending gender identities at work’ (2002) 10 *Feminist Legal Studies* 1 at p.16; Collier above n.218 at p.20; Thornton (2001a) above n.108 at p.17.

<sup>213</sup> Lynch above n.107 at p.11; see also P. Baron ‘Thriving in the Legal Academy’ (2007) 17 *Legal Education Review* 27 at p.40; S. J. Ball ‘The teacher’s soul and the terrors of performativity’ (2003) 18 *Journal of Education Policy* 215 at p.216.

<sup>214</sup> Lynch above n.107 at p.11.

<sup>215</sup> Collier (2013) above n.107 at p.460; R. Burrows ‘Living with the h-index: metric assemblages in the contemporary Academy’ (2012) 60 *Sociological Review* 355 at p.355; Leathwood and Hey above n.95 at p.437.

<sup>216</sup> S. Rowland ‘Collegiality and intellectual love’ (2008) 29 *British Journal of Sociology of Education* 353 at p.353.

<sup>217</sup> Rowland above n.223 at p.356.

Grummell et al argue that the type of academic prized in the new conditions of higher education is one who is ‘care-less.’<sup>218</sup> In other words, one who has the freedom to attend conferences nationally and internationally and work whatever hours are required without commitments to family and friends.<sup>219</sup> Lynch, in support of this view, argues that the origins of this ‘carelessness’ in fact stems from the notion of Cartesian dualism (as discussed above) which separates reason from emotions and prizes rationality in a way which fails to acknowledge the importance of ‘relationality’ within academics lives.<sup>220</sup> She suggests this notion previously formed an implicit part of liberal notions of higher education, but that under the dominant, neo-liberal ideology it is now ‘not only accepted, it is expected and morally endorsed’.<sup>221</sup> Such expectations at the level of both individual law schools, and within higher education institutions as a whole, may have extremely significant consequences for individual legal academics.

Given the emotional engagement and pressures involved in all aspects of academic life, it is perhaps unsurprising that, to date, literature on academic wellbeing has focused largely on ‘surviving’, rather than ‘thriving’.<sup>222</sup> Kinman and Wray’s ‘Survey of Stress and Well-Being Among Staff in Higher Education’ conducted for the University and College Union found that nearly three quarters of the sample surveyed strongly agreed or agreed with the statement

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<sup>218</sup> Grummell et al above n.42 at p.192.

<sup>219</sup> Collier above n.218 at p.11.

<sup>220</sup> Lynch above n.42 at p.59.

<sup>221</sup> Lynch above n.42 at p.59.

<sup>222</sup> Baron above n.220 at p.35.

“I find my job stressful” and over a half had high or very high general levels of stress.<sup>223</sup>

Overall, Kinman and Wray concluded that:

On all but one of the Health and Safety Executive stressor categories, UCU members in higher education reported lower well-being than the average for those working in the target group industries (including education). The biggest ‘well-being gaps’ related to work demands, change management, management support and role clarity.<sup>224</sup>

It is arguable that one of the causes of such high levels of stress amongst academics in higher education generally is the element of emotional labour involved in the work. Emotional labour is ‘the management of feeling to create a publically observable facial and bodily display’.<sup>225</sup> The originator of the concept, Hochschild, categorises this either as ‘surface acting’, where a person deliberately and knowingly will mislead others about what they are actually feeling and ‘deep acting’, where a person also ‘deceives oneself’ by altering their actual feelings.<sup>226</sup> Hochschild views both these forms of acting as having negative consequences in estranging people from their true feelings and relinquishing their sense of personal wholeness in a way which can lead to inauthenticity and burnout.<sup>227</sup>

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<sup>223</sup> G. Kinman, and S. Wray (2013) *Higher Stress. A Survey of Stress and Well-being Among Staff in Higher Education, University and College Union*, [http://www.ucu.org.uk/media/pdf/4/5/HE\\_stress\\_report\\_July\\_2013.pdf](http://www.ucu.org.uk/media/pdf/4/5/HE_stress_report_July_2013.pdf) (accessed 12th February 2016) at p.3. Out of 24,030 surveyed, 14,667 primarily worked in higher education) (p.10); for a US-based discussion of stressors in higher education see J. Watts and N. Robertson ‘Burnout in university teaching staff: a systematic literature review’ (2011) 53 *Educational Research* 33.

<sup>224</sup> Kinman and Wray above n.230 at p.3.

<sup>225</sup> A. R. Hochschild *The managed heart: Commercialization of human feeling* (Berkeley, University of California Press, 2003) at p.7.

<sup>226</sup> Hochschild above n.232 at p.34.

<sup>227</sup> Hochschild above n.232 at p.183 and 187.

Although teaching and academic life arguably don't fit within Hochschild's original conception (which required the employer to exercise a degree of control over the employee's emotional activities), the idea has since been applied to both teaching and academic life.<sup>228</sup> Small scale studies in the UK<sup>229</sup>, the US<sup>230</sup> and China<sup>231</sup> support the idea that academics have to engage in both 'shallow' and 'deep' acting. For example, Guth (discussing her first year as a law lecturer) states that 'lecturing is undoubtedly a performance. I am not a natural performer'.<sup>232</sup> Whilst Thomas, in his guide to law lecturing, suggests that such presenting in public 'demands considerable entertainment skills'.<sup>233</sup> Although the impact of this form of emotional labour is unclear, its presence illustrates another facet of the role of emotions within undergraduate legal education.<sup>234</sup> Harnessing these emotions and exploring their impact could lead to significant transformation amongst legal academics, which could in turn be reflected within the wider law school culture and ethos and have a significant impact on the work and wellbeing of law students.

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<sup>228</sup> Hochschild above n.232 at p.154; P. Schutz, J. Y. Hong, D. I. Cross and J. N. Osbon, J. N. 'Reflections on Investigating Emotion in Educational Activity Settings' (2006) 18 *Educational Psychology Review* 343 at p.357; M. L. Bellas 'Emotional Labor in Academia: The Case of Professors' (1999) 561 *The Annals of the American Academy of Political and Social Science* 96 at p.97.

<sup>229</sup> E. Ogbanna and L. C. Harris 'Work Intensification and Emotional Labour Among UK University Lecturers: An Exploratory Study' (2004) 25(7) *Organizational Studies* 1185.

<sup>230</sup> Gates above n.73.

<sup>231</sup> Q. Zhang and W. Zhu 'Exploring Emotion in Teaching: Emotional Labor, Burnout, and Satisfaction in Chinese Higher Education' (2008) 57 *Communication Education* 105.

<sup>232</sup> Guth above n.200 at p.189.

<sup>233</sup> P. Thomas *Learning about law lecturing* (Warwick, National Centre for Legal Education, 2000) at p.33; see also H. James 'Supporting new law teachers – a study to determine needs' (2009) 43 *The Law Teacher* 200 at p.206.

<sup>234</sup> In relation to academics generally, Constanti and Gibbs argue emotional labour can be detrimental and exploitative (P. Constanti and P. Gibbs 'Higher education teachers and emotional labour' (2004) 18 *International Journal of Educational Management* 243 at p.248. However, Hargreaves argues that, in relation to teaching, there may also be positive aspects (Hargreaves above n.206 at p.814).

## CONCLUSIONS, THEORETICAL DIRECTIONS AND PRACTICAL APPLICATIONS

This paper has sought to demonstrate the wide variety of ways in which emotions have transformative potential within undergraduate legal education. Each of these ways arguably deserves further detailed research and discussion, but drawing them together demonstrates vividly the fact that emotions play an inescapable and vital role within legal education as a whole. Traditionally, law schools have attempted to disregard emotions, following the well-trodden legal paths of objectivity and rationality which the law so prizes in its philosophical traditions, practical applications and in the adjudication of disputes.<sup>235</sup> In doing so, both the doctrinal and liberal traditions fit comfortably into traditional scientific notions of emotions as a range of irrational, potentially dangerous impulses which must be suppressed and overruled with reason.<sup>236</sup> While the increasing growth of socio-legal studies and other approaches to law have developed it into a more pluralistic discipline for study, those fields which acknowledge and encompass emotions (in particular, “law and emotion” scholarship and feminist legal studies) have arguably had relatively little influence on the law degree to date.<sup>237</sup>

In Maharg’s aptly named book, *Transforming Legal Education*, he argues that:

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<sup>235</sup> Grossi above n.3; Maroney above n.2 at p.119; Bandes above n.3.

<sup>236</sup> Conaghan above n.3; Bradney above n.14; Solomon above n.44, p.3; Feigensen above n.13; Descartes above n.43; Kennedy above n.28.

<sup>237</sup> Maharg and Maughan above n.47 at p.1.



We need curricula that take account of the blurring of the domains of academic and everyday work and leisure, authority and purpose, market and individual choice, knowledge-in-itself and knowledge-for-others.<sup>238</sup>

It is arguable that, in the post-LETR landscape, this need is more pressing than ever in a period of uncertainty and change for legal education. One of the ways in which to address this issue and develop legal education into a more cohesive and effective whole is to ensure that emotions are acknowledged and utilised, harnessing their transformative potential. The scientific evidence demonstrates that emotions are intertwined with (or possibly even a part of) cognition in a way which makes them inseparable from any cognitive activity.<sup>239</sup>

Emotions therefore have a fundamental role to play in law student learning,<sup>240</sup> in employability and skills development,<sup>241</sup> in the emotional wellbeing of law students<sup>242</sup> and in relation to both the work and wellbeing of legal academics.<sup>243</sup> Suppressing and disregarding emotions cannot exclude them from these domains. Instead, such an approach is, at best, misguided and, at worst, harmful and damaging to those involved in legal education. In contrast, harnessing the transformative power of emotions would enable all those involved to

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<sup>238</sup> Maharg, P. *Transforming Legal Education. Learning and Teaching the Law in the Early Twenty-First Century* (Aldershot and Burlington, Ashgate Publishing, 2007).

<sup>240</sup> Pekrun and Linnenbrink-Garcia above n.83; Bannerjee et al above n.88; Weare and Gray above n.89.

<sup>241</sup> Chamorro-Premuzic above n.104; Goleman above n.121; Salovey and Mayer above n.120; National Committee of Inquiry into Higher Education above n.108. In relation to legal education specifically, see the Legal Education and Training Review above n.113.

<sup>242</sup> See, for example, Macaskill above n.147; Kelk et al above n.143; Sheldon and Krieger above n.144; Huggins above n.172; Towness O'Brien et al above n.173; Towness O'Brien et al above n.174; Tani and Vine above n.143; Krieger above n.171; Galloway et al above n.143; Bromberger above n.59; Dresser above n.149; Glesner above n.143.

<sup>243</sup> Kinman and Wray above n.230; Hargreaves above n.202; Nias above n.201; Postareff and Lindblom-Ylänne above n.210; Collier (2013) above n.106; Bromberger above n.59; Lynch above n.107 at p.11; Thornton (2011) above n.107; Grummell et al above n.42; Rowland above n.223; Zhang and Zhu above n.238; Hochschild above n.232; Gates above n.73.

reap the benefits of a more psychologically healthy and supportive environment where emotions are not merely relegated to a pastoral issue.

In terms of existing theoretical frameworks, there remains much work to be done in investigating the role of emotion within each facet of undergraduate legal education in more depth. In particular, it is necessary to consider how the ideological drivers within higher education and wider institutional, market and policy pressures at present impact on emotions potentially transformative role. Clegg and David argue that ‘the project of the ‘personal’ and ‘personalisation’ cannot be read as ideologically neutral’.<sup>244</sup> Some commentators have suggested that neo-liberalism has replicated the tradition of Cartesian dualism, separating emotions and reason and prizing the latter<sup>245</sup> However, others argue that certain forms of emotional competency are viewed as valuable in neo-liberal ideology, for example, through ‘self-reflection and self-improvement’ activities.<sup>246</sup> The aim of these appears to be to utilize emotions in generating attachment and commitment to neo-liberal goals and also to enhance economic productivity by developing skills which add to the human capital available, rather than it being used or valued as a way to develop and nurture relationships, or in a manner which acknowledges emotions as more than irrational impulses which can be manipulated for political and economic means.<sup>247</sup>

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<sup>244</sup> S. Clegg and M. David ‘Passion, pedagogies and the project of the personal in higher education’ (2006) 1 *Twenty-First Century Society* 149 at p.158.

In relation to the learning process, Hey and Leathwood illustrate this problematic conceptualisation of emotions by referring to the focus on the need to support ‘non-traditional’ students.<sup>248</sup> Whilst this can be situated within the feminist tradition of education, which in turn draws on humanist and critical theories, there is also the danger that widening participation and retention initiatives and personal development planning may involve treating such students as a homogenous mass to be moulded to the needs of the neo-liberal market through a focus on employability.<sup>249</sup> This is a balance that needs to be acknowledged in relation to both learning and skills when considering what role emotions have within the law school, although the ideological complexity involved should not denigrate its powerful potential in both of these areas. Indeed, the fact that the skills-focus of the neo-liberal academy and the broader philosophical traditions which acknowledge and utilise emotions are aligned in promoting the importance of emotions in legal education illustrates how compelling the evidence is for their inclusion.

In terms of future directions for theoretical development, it is suggested that the feminist, critical and humanist traditions need to be drawn upon to develop a richer conception of emotions than the market-driven acknowledgment of neo-liberalism could alone.<sup>250</sup> Both at individual and collective levels, these traditions see emotion as integral to all facets of human existence and, as such, a vital part of legal education. They therefore offer the potential for a

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<sup>250</sup> P. J. Burke ‘Re/imagining higher education pedagogies: gender, emotion and difference’ (2015) 20(4) *Teaching in Higher Education* 388 at p.391; Leathwood and Hey above n.95 at p.433; Clegg and David above n.251 at p.158.

more holistic, ‘whole law school’ approach to emotions, which builds on the findings within compulsory schooling of the need for an integrated ‘whole school’ approach.<sup>251</sup>

With regard to future practical directions, a range of suggestions have been put forward in relation to enhancing students’ emotional wellbeing and learning, particularly in the Australian context. A significant amount of these focus on the first year of law school, in particular, the transition that students face when starting their legal education. The key suggestion is that an orientation process should be put in place which explicitly includes discussion of emotional wellbeing and fosters an ethos which challenges the traditional ‘norms’ of law school. For example, Galloway et al discuss the need to ‘scaffold student capacity for dealing with their academic and personal development’ by creating a supportive social environment where trust and open dialogue are encouraged with lecturers working in partnership with their students.<sup>252</sup> This approach arguably requires both students and legal academics to have an understanding and appreciation of the role of emotion in order to facilitate such collaboration and co-operation. In the UK context, Brooman and Derwent’s support for a longer transition phrase, which provides a broader range of opportunities for students to develop both social connections, but also a sense of self-efficacy, appears to support this approach of embedding notions of emotional wellbeing, and an understanding of emotions more generally, from the very start of the law school experience.<sup>253</sup>

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<sup>251</sup> In relation to compulsory schooling, see Bannerjee et al above n.89 at 732; Durlak et al above n.87 at p.418. In relation to legal education, see Larcombe above n.181 at p.432; J. Duffy, R. Field and M. Shirley ‘Engaging law students to promote psychological health’ (2011) 36 *Alternative Law Journal* 250; Galloway et al above n.144 at p.247; L. S. Krieger ‘Human Nature As a New Guiding Philosophy for Legal Education and the Profession’ (2008) 47 *Washburn Law Journal* 247; Glesner above n.144 at p.645.

<sup>252</sup> Galloway et al above n.143.

<sup>253</sup> Brooman and Darwent above n.182.

By introducing emotions as an integral component of the law school from day one, it would pave the way to embed approaches to teaching and learning which acknowledge and utilise emotion throughout the law degree. This could draw upon pedagogies developed, or situated, within the critical, feminist and humanist traditions, including the use of narratives and storytelling, the development of collaborative and experiential learning techniques and the inclusion of relational forms of teaching and scaffolding, as well as an emphasis on self-reflection.<sup>254</sup> Such pedagogies could be supplemented by the introduction of peer mentoring and buddy schemes and the possible development of programmes considering alternative approaches to law which acknowledge the importance of emotions, such as therapeutic jurisprudence.<sup>255</sup> The continuing expansion of clinical legal education also offers potential for explicit engagement with emotions, both in terms of the emotional competencies required and the emotional experiences involved.<sup>256</sup> This demonstrates that there are a wide range of initiatives which can be undertaken at individual, curricular and faculty levels to promote an appreciation of emotion and harness its transformative power.

There is clear evidence that emotions are inseparable from the processes and people involved in the law school. Disregarding and suppressing emotions can be damaging to both wellbeing and learning and fails to utilise the growing importance of emotional competencies as an integral part of the higher education's skills agenda. Acknowledging and utilising the role of emotions is the first step towards developing a richer, more holistic form of

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<sup>254</sup> Watkins above n.74; Blissenden above n.74; Bergin and Pakenham above n164 at p.402; Skread and Rogers above n.144 at p.576; Galloway et al above n.143 at p.247; Tani and Vine above n.144 at p.32; Dresser above n.150 at p.59-60; Brooman and Darwent above n217.

<sup>255</sup> G. Baker 'Rediscovering Therapeutic Jurisprudence in Overlooked Areas of the Law — How Exposing Its Presence in the Environmental Justice Movement Can Legitimize the Paradigm And Make the Case For Its Inclusion into All Aspects of Legal Education and the Practice of Law' (2008) 9 *Florida Coastal Law Review*, 215.

<sup>256</sup> See footnote 142 above.

undergraduate legal education which, despite having significant theoretical and practical challenges, also offers exciting and beneficial possibilities. Emotions cannot be ignored within the law school, it is up to legal academics to begin to listen, and respond, to what they can teach us.