

With this being the last edition of the year it is appropriate to look back and be grateful that despite all the challenges experienced by the *Digest*, the Centre for Legal Education and the Australasian Law Teachers Association as regards relocation and change of personnel, we maintained the timetable of publishing three editions this year. Another change is that of the name of our publishers – University of Western Sydney to Western Sydney University. Such is progress.

There is also a need for a correction to the last edition's editorial when the new President of ALTA was mis-named – it is of course Mark (not Brian) Hickford, the Pro-Vice Chancellor and Dean of the Faculty of Law at Victoria University in Wellington, New Zealand. This is the appropriate time to welcome the new Chairperson of the ALTA General Executive, Professor Stephen Bottomley, Dean of the College of Law, Australian National University. We also express our appreciation to the Association of Law Teachers in the United Kingdom for their continued support of the *Digest* this year. This means that for a successive second year the electronic version of the *Digest* is distributed to the majority of law teachers in Australia and the United Kingdom.

The two books which have been selected for review are: *Legal Education, Simulation in Theory and Practice*, edited by Caroline Strevens, Richard Grimes and Edward Phillips and the Second Edition of *Inside Lawyers' Ethics* by Christine Parker and Adrian Evans.

So to the articles digested in this edition. Under the heading of *Course Content*, Bentley and Squelch are concerned with the need for an emphasis on internationalisation, to respond not only to the needs of employers but also prepare graduates with the attributes that will equip them for the world of work.

Under the heading of *Curriculum*, Rubinson sets out in detail the law curriculum of a hypothetical new law school, the Holmes School of Law, based on the ideas articulated by Oliver Wendel Holmes and other 20th century legal realists.

Ethics is the selected category for the article by Prentice which recognises that many ethics courses are philosophy based, others are focused on building character, whilst many are a combination of the two. The author emphasises the importance of teaching behavioural ethics within the context of sharpening a student's moral reasoning and reinforcing their character.

Individual Subjects incorporates the concerns of Douglas and Taylor for students to understand the limitations of the law to redress injustice, proposing that engagement of students in criminal legal casework can help them to understand the possibilities of responding to forms of injustice.

Legal Education Generally embraces two articles. The first by Francis examines the manner by which legal education and the wider profession have been challenged to meet the social mobility aspirations of students and government. The second by Lee explores the landscape of the 'new normal' in legal education which examines the link between entering law school students' credentials and critical thinking skills.

Skills is the subject heading for an article by Preston, Stewart and Moulding who attempt to clarify the meaning of 'thinking like a lawyer' within the context of metacognition, or the process of thinking about one's thinking. They rationalise metacognitive skills within the context of law, and present an empirical study of metacognitive skills of newly admitted, highly qualified law students.

Students covers three articles. The first by Hansen and Anderson argues that contemporary conditions in higher education pose fresh challenges to law schools seeking to apply anti-plagiarism rules. This incorporates a section which discusses strategies for addressing law student plagiarism. The second by Palmer claims that the millennial generation (those born between 1980 and 1995) which has now arrived at law school merits a new interdisciplinary approach to legal education. In the third, Park and Farag endeavour to present a teaching method whereby the legal educator can gain the complete attention of all the students in a business law lecture room. It is argued that this can be gained by the introduction of a method of active learning incorporating the use of a personal response system ('clickers') as an alternative to the traditional lecture.

Darling-Hammond and Holmquist's first article under *Teachers* focuses on how low income and female students are able, against all the odds, to succeed in law school due to the inspirational teaching of transformative law teachers. In the final article, Robson considers the challenge faced by law academics of enhancing reciprocal synergies between teaching and scholarship explaining that a major drawback to resolving the question is that empirical scholarship indicates that such a relationship is largely inconclusive.

As always, at the end of reading all these articles, one reaches the conclusion that law academics are always seeking to extend the boundaries of their teaching skills and knowledge.

Emeritus Professor David Barker AM
Editor

D Bentley and J Squelch

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There is much agreement among legal academics and practitioners that law schools need to deliver law programs that take cognisance of global developments and the increasing emphasis on internationalisation. It is further recognised that law graduates need to be prepared for work across multiple jurisdictions and in a wide range of employment contexts that extend beyond local private legal practice.

Globalisation has resulted in significant growth in the import and export of legal services. It has also given impetus to the growth of the 'global law firm' (that is, firms that are located and operating in multiple international jurisdictions) and legal activities and services requiring law firms and practitioners to work in and across different jurisdictions. This has necessitated a shift from law firms, including often the small local law firms, working within the parochial confines of national law and single jurisdictions, to law firms working across multiple jurisdictions and within a much broader international legal context and framework.

With the growth and diversity of global law firms and international legal trade and investment comes greater mobility of people and the opportunity to work, permanently or episodically, in different countries and across different jurisdictions. Law graduates today do not expect to have one job or one career: 'We now deal with students who expect to move countries a few times, seeing themselves as part of a global elite in a worldwide market for talent'. Law graduates need to be 'comfortable in multiple jurisdictions, often simultaneously' and 'almost every lawyer must be prepared to face some transnational issues, regardless of that lawyer's field of practice'.

In terms of preparing law graduates for global legal practice, it is important to understand employers' perspectives on what they expect from graduates. The information sought from employers of law graduates should inform the development of a law curriculum that prepares graduates for the workplace. Just as employers have to respond to the impact of globalisation and constantly changing workplace environment, so too do universities have to respond to the needs of employers and to prepare graduates with the necessary knowledge, skills and attributes that will equip them for the world of work.

Traditionally universities have been places of highly intellectual, theoretical learning and research, with the emphasis on discovery, innovation and knowledge generation. While they retain a strong emphasis on knowledge generation, innovation and research, universities have come to play a more significant vocational role in contributing to the social and economic development of a country through a greater emphasis on educating and training a skilled workforce.

Universities have become more complex and multifaceted organisations, and they have become far more international in terms of staff, students and programs. Universities no longer operate in isolation; they are more connected to business, governments and the community, and serve more diverse needs and interests.

In responding to the changing role of universities, there has been an increasing emphasis on graduate employability, and the kinds of knowledge and skills graduates require to meet the demands of an ever-changing society. Although there are different interpretations attached to employability, typically graduate employability is viewed as 'being in possession of the understandings, skills and personal attributes necessary to perform adequately in a graduate level job'. Employability is therefore more than suitability for entry-level employment; it is about equipping graduates with the skills and attributes for maintaining ongoing employment in a constantly changing environment. Employability implies something about the 'capacity of the graduate to function in a job, and is not to be confused with the acquisition of a job, whether a "graduate job" or otherwise'.

Yorke notes the concept of employability is complex and argues that it is evidenced by 'the application of a mix of personal qualities and beliefs, understandings, skilful practices and the ability to reflect productively on experience'. It is not simply ticking off a list of generic skills. The focus on employability and preparing graduates for the workplace is reflected in university 'graduate attributes', which is a more recent development in university teaching policies. Graduate attributes are generally broad statements that describe the desirable kinds of knowledge, skills and attributes that graduates will have acquired on completion of a program of study. Universities each have their own set of graduate attributes although there are commonalities. Examples of statements from university 'employability' graduate attributes include the following: 'ensur[ing] our students and graduates are work, career and future ready'; [graduates are] 'work-ready'; and 'graduates

will be prepared for successfully engaging in the routine work or professional practice of their discipline'. In addition, university graduate attributes typically include a combination of discipline content specific attributes and the kinds of professional skills that are germane to employability. The most common skills include communication, problem solving, critical thinking and working as teams.

Relevant to the internationalisation theme of this article, more universities are including graduate attributes in their programs of study stating that graduates will, for example, 'recognise and apply international perspectives'; '[be] competent in culturally diverse and international environments'; '[be] active global citizens'; or '[be] capable of applying their discipline in local, national and international contexts'.

Although legal academic education has traditionally been theoretical and content driven, with the emphasis on the acquisition by law students of substantive knowledge, there has been a trend in recent decades towards including more skills-based learning, formerly the purview of professional practical legal training. This trend has been aided by the introduction of national standards on quality education and curriculum development, such as the Australian Qualifications Framework (AQF), which sets out the knowledge, skills and attributes expected for each level of qualification.

While there may be ongoing debate about the inclusion of professional skills or 'employability' skills in the law curriculum, what they are and how this might best be achieved, the reality is that the AQF has firmly placed employability skills on the curriculum map. The AQF sets out the learning outcomes for each level and type of qualification. These learning outcomes are constructed as a taxonomy of what graduates are expected to know, understand and be able to do as a result of learning.

It is an important part of the process of curriculum development to identify and articulate graduate skills and attributes that are both meaningful and ascertainable. However, skills and attributes relating to employability presume an understanding of the kinds of skills and attributes that graduates need that are relevant to the workplace. Although such skills and attributes are identified in the literature and the AQF, employers are an indispensable participant both in curriculum design and the education process. They help to specify more specifically the skills needed and existing educational gaps or deficiencies.

The Office of Learning and Teaching Project, 'Internationalising the Australian Law Curriculum for Enhanced Global Legal Education and Practice', was undertaken in 2011 and 2012. The main aim of this Curriculum Priority Project was to provide a framework for designing an internationalised law curriculum that would prepare graduates for global legal practice. It was considered important for employers to identify those skills and attributes necessary to work as a law graduate in an international context. A small-scale investigation was therefore undertaken to engage with employers in the legal profession. In particular, the aim was to seek employers' views on the knowledge, skills and attributes that are essential for law graduates working in a global, multi-jurisdictional environment, and the implications for internationalising the Australian law curriculum.

The small-scale investigation involved a number of roundtable discussions with employers. These roundtables were conducted in Perth, Sydney, Canberra and Hong Kong. Five roundtables were conducted between June 2011 and February 2012 and included a total of 70 participants from private legal practice, professional associations and accrediting bodies, government organisations, legal human resources, companies and academia. Participants were specifically selected from various organisations and were invited to participate in the roundtables. This 'purposeful sampling' was undertaken to ensure that the roundtables included key stakeholders that were representative of employers and who would be able to provide rich and relevant input.

The roundtable discussions were one and a half to two hours in duration. Although the roundtables were not considered to be in depth qualitative research focus group interviews, they nonetheless generated rich discussion and meaningful data that gave rise to consistent views and expectations about the knowledge, skills and attributes expected of law graduates.

Following a preliminary literature review on the research topic, a semi-structured interview schedule was developed that was used to facilitate the roundtable discussions. It was intended that the discussions should be free flowing and as interactive as possible, with opportunity to explore and discuss issues as they emerged. Extensive notes were taken during and immediately following the roundtable discussions and interviews. The following questions formed the basis of the roundtable discussions: (1) To what extent are recent law graduates equipped to work in a global environment?; (2) What generic and specific skills and attributes do law graduates require in order to work in multiple jurisdictions?; and (3) What core areas of legal knowledge are essential

for developing an integrated international law curriculum that will equip law graduates to work in a global environment?

The data gathered from the roundtables and interviews was analysed using the qualitative analysis technique of category construction described by Merriam.

The research data from the employer roundtable discussions was analysed and categorised into two broad themes: (1) substantive legal knowledge, encompassing the categories of foundational discipline knowledge and international-specific knowledge, and (2) professional skills and attributes made up of communication and presentation skills, problem solving, legal research, relationship building, and adaptability and resilience. The categories articulate the key findings in relation to employers' perceptions that emerged from the roundtable data.

The first two categories that emerged from the data on legal knowledge relate to foundational knowledge and international-specific knowledge. Both these categories are concerned with substantive legal knowledge. The first category concerns itself with participants' views on core areas of legal knowledge, while the second category deals with the specific issues that were raised in relation to teaching international and comparative perspectives. However, it is telling that given the context of the roundtable discussions and the validation in different settings, substantive legal knowledge was seen as critical for global practice. The participants were in agreement that graduates need to have a thorough and deep understanding of the broad fundamental concepts and principles of law rather than a detailed technical, rules-based approach that did not necessarily lead to a deeper understanding of 'first principles' and an ability to translate and apply these principles in diverse situations.

A broad, principled approach was seen by participants as fundamental in preparing lawyers for practice across jurisdictions. It is well supported in the literature.

Although the 'Priestley Eleven' was raised, participants did not express any particular views on this, and considered the Priestley Eleven to contain an appropriate set of subjects, which did not impede the development of the skills required for global legal practice. Participants, however, all reiterated the importance of contract law and tort law in any common law jurisdiction. Equity, private international law, and comparative law were also cited as important units and some participants strongly suggested that statutory interpretation should be a core subject, given increased regulation in most jurisdictions. From an employer's perspective, the curriculum framework and structure are less important in preparing students for global legal practice than a deep and intelligent understanding of the law and how to use that knowledge in a range of settings, including across jurisdictions.

It was interesting that overwhelmingly the participants did not expect graduates to have specialised knowledge in areas of international law. Participants were of the view that graduates would specialise in international aspects of law (eg. International Trade Law) through further studies and, importantly, during the course of their employment as they gained more experience and took on more specialised cross-jurisdictional work. However, as noted above, private international law was considered to be an important subject and was recommended by participants as a mandatory unit. A number of participants also noted that a unit in comparative international law would be a useful area of study that would help graduates work across different jurisdictions.

Roundtable participants were also in agreement that an 'international perspective' and 'global sensitivities' could be embedded and integrated across the curriculum, especially within subjects that lend themselves to international and comparative perspectives. This approach was preferred to offering a separate add-on 'transnational law' unit, which generally includes aspects of private and public international law as well as other elements of international law.

There is therefore a most useful prompt for law schools that want to prepare law graduates to practice across jurisdictions. The roundtable participants highlighted the importance of developing an 'international perspective' and 'global sensitivities'. They stressed that, in their view, this might best occur through integrating and embedding international, comparative and cross-cultural perspectives and sensitivities as part of the knowledge development of law students. It is a theme that provides a catalyst for future research.

The most common skills and attributes that were identified and discussed by the participants in the roundtables are grouped and discussed under the following five categories: communication and presentation; problem solving; legal research; relationship building; and adaptability and resilience. These are by no means the only skills and attributes relevant for law graduates; the five categories merely reflect the substance of the roundtable discussions.

The roundtable participants did not identify specific skills and attributes that were uniquely relevant to working in a global context. Rather, as one participant commented, if a law graduate

working in Perth law firm has the intellectual capacity, excellent professional skills and the ability to be flexible, multi-task, adapt to new situations and work effectively in teams then they should be able to work in any jurisdiction. Moreover, participants noted that an increased emphasis on generic professional skills in the curriculum means that law schools can prepare their students equally for both domestic and international work.

As noted by roundtable participants, law graduates irrespective of the jurisdiction require a high level of communication skills given the nature of legal work, and for engaging in activities such as negotiation, mediation, interviewing and advocacy. Implicit in the discussion by roundtable participants was the assertion that the level of skill becomes more important when the communication takes place across cultures and needs to integrate cross-cultural understanding.

Flowing from this, the issue of being able to communicate in a second language was raised in the roundtables, especially for law graduates working in jurisdictions in which having a second language may be essential. In terms of communication competencies, participants also added that graduates needed to be 'culturally literate'. Participants observed that many graduates lack cultural and general business awareness and acumen. Cultural and business awareness was considered by the roundtable participants an important dimension of being able to communicate effectively in an international context.

Problem solving and legal reasoning skills, including the skills of critical thinking, analysis, interpretation, synthesis and evaluation, were strongly emphasised by all participants. Participants placed emphasis on students having these intellectual skills to enable them to work through complex legal issues and problems. Participants were of the view that by their nature, cross-jurisdictional problems add another layer of complexity to purely domestic problems.

Participants noted the importance of graduates being able to examine a problem from different perspectives, to identify a range of solutions and to be able to 'make judgements' about the most appropriate course of action. The participants also commented that graduates need to be able to work with and manage large volumes of complex material and information, which they need to be able to organise, interpret, synthesise, and communicate efficiently and effectively.

Being able to deal with complex legal problems, including problems that may involve multiple jurisdictions, was identified by the participants as requiring what is sometimes called an ability to 'think like a lawyer' and engage in legal analysis. Legal analysis and 'thinking like a lawyer' combine theory and practice, and require the use of the 'legal methods' of finding and applying the law. Participants suggested that this is not an intuitive process; rather, it is a skill that needs to be taught and practised, and there are few better ways to do so than through practice on cross-jurisdictional issues.

There was wide agreement amongst the roundtable participants that graduates need to have good legal research skills, which are associated with effective communication skills and legal problem solving skills as a basic requirement for the global practice. Participants expressed the view that some graduates did not have good research skills; they expressed concern that this was perhaps not receiving enough attention in law programs and was 'a skill being lost'. Participants also expressed concern that law programs may not include legal research and writing as a mandatory core unit.

Participants also raised the issue of technology, which has become an indispensable tool in legal research and work. It was noted that graduates today, with the help of technology, seem to have little difficulty in finding and accessing resources but were not necessarily discerning in their use and application of technology.

The impact of globalisation and the importance of extending legal research to include international legal research find some support in the literature. Magallanes for instance points out that 'the proliferation of international laws has led many lawyers to work in fields that require the domestic incorporation and application of such laws' and therefore 'students should be familiar with the skills required to undertake such tasks'.

Another strong theme to emerge from the roundtable discussions was the importance of developing skills in relationship building. This encompasses the ability to work effectively in teams and to network with people. Participants noted the importance of graduates being able to develop effective client-lawyer relationships as well as work with and interact with a wide range of people within and external to the legal profession.

A recurring theme to emerge from the roundtable discussions was the need for graduates working in a legal environment generally, and in a global practice environment specifically, to be adaptable, resilient and responsive to change. The legal environment can be highly competitive, pressurised and stressful, and working across cultures and jurisdictions can take this to the next level. Moreover, the nature of the work requires graduates to be able to 'think on their feet', to 'learn

fast' and to 'multi-task'. Therefore resilience is increasingly recognised as an important attribute for law graduates as it better equips graduates to manage their mental well-being, to deal with and manage stress, to cope with change and competing demands, to manage demanding workloads, and to 'bounce-back' when faced with adversity.

Law schools have a responsibility to engage in the continuous development and improvement of law curricula in response to changes in society, the workplace and, especially, in the legal education and practice environment. Engaging with employers of law graduates, nationally and internationally, and having a better understanding of employers' perspectives, needs and expectations and what practising lawyers actually do can enrich the process of curriculum development and renewal.

CURRICULUM The Holmes School of Law: a proposal to reform legal education through realism

R Rubinson

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This article proposes the formation of a new law school, the Holmes School of Law. The curriculum of the Holmes School would draw upon legal realism, particularly as articulated by Oliver Wendell Holmes. The proposed curriculum would focus on educating students about 'law in fact' – how law is actually experienced. It rejects the idea that legal education should be about reading cases written by judges who not only bring their own biases and cultural understandings of their role, but who also ignore law as experienced, which, in the end, is what law is. This disconnect is especially troubling because virtually all legal education ignores law as experienced by low-income people.

The mission of a newly established Holmes School of Law is to teach law.

Course Descriptions – A Selection

Adjudication: 8 Credits

An examination of different fora where matters are adjudicated. Students will observe where the bulk of adjudication takes place, including the Two Minute Hearing Court to Evict Tenants; the Default Judgment Foreclosure Court and the 'processes' it employs; Administrative Court for Prolonged and Fruitless Review of Unjustified Denials of Government Benefits; the Court for Incarceration through Plea Bargains and Sham Waivers of a Constitutional 'Right' to a Jury Trial; judicial process 'adjudicating' the welfare of children, as compared to adjudication of matters involving large business entities; and the inapplicability of 'rules of civil procedure' to 'summary proceedings' that overwhelmingly impact indigent litigants. The course may also examine, by way of contrast, fora whose degrees of process and resource allocation vastly exceed the volume of cases they adjudicate, such as federal courts.

The Judicial Opinion: 1/10 Credit

This course, offered during orientation, explores the limited role judicial opinions play in understanding law; the overwhelming correlation between judges' political and policy affiliations in predicting judicial outcomes; how endless citations of precedent and legal analysis in opinions function as an ex post facto means to justify foregone conclusions; and judicial opinions as a means for presenting a veneer of rationality and scientific precision. As part of this course, students will choose a judicial opinion of at least 60 pages and draft a full explanation of, and basis for, the decision in three pages or less. NOTE: This course fulfils the legal analysis requirement.

The Supreme Court I: 1/10 Credit

This course examines judicial opinions by the High Court. Topics include the reality that the current Justices have rarely, if ever, represented individual clients in practice; the extraordinary attention lavished by academics and other legal commentators on the Court's hyper-technical arguments and dense thickets of citations and logical forms to justify pre-existing conclusions; the ability to predict decisions across a wide range of substantive areas based on a judge's ideology without knowing a single precedent or reading a single brief; an examination of whether the rule that the Supreme Court is the only court in which 'Court' must be capitalised at all times is analogous to the capitalisation of the names of Supreme Deities.

The Supreme Court II: 8 Credits

This course focuses on the circumstances faced by litigants in selected matters decided by the Court. The topics covered will vary based upon available opportunities for observation or participation, but may include witnessing an execution in order to assess the Court's decisions regarding whether capital punishment is cruel and unusual; visiting homeless shelters and soup kitchens to explore the Court's jurisprudence on due process – specifically how it has not been extended to ensure the right to food, shelter, or other means of subsistence; residing in

an urban neighbourhood riddled by handgun violence to assess the role that handguns play in contemporary society in contrast to the role of well-regulated militias in rural America in 1791; attempting to exercise First Amendment rights as an individual compared with multinational legal entities that are not human beings and which possess massive aggregations of capital; assessing how the First Amendment promotes the ‘marketplace of ideas’ when entry into the marketplace can only be secured by wealthy individuals who have resources to buy ideas sold in the marketplace.

Property: 3 Credits

This course examines the impact of property law on the mass of individuals whose property ‘interests’ are as tenants and owners of modest homes at risk of foreclosure or who are homeless and thus do not have one stick, let alone a ‘bundle’ of them. Most of the course entails interviewing individuals whose homes have been foreclosed, who have been evicted, or who are homeless, and explores the extent to which low and minimum wage jobs cannot secure livable and affordable housing. There will be no more than 30 minutes devoted to government subsidies for mortgage interest, lower tax rates for capital gains, or exploration of the ‘rights’ of owners of parcels of land named Blackacre and Whiteacre.

The Unrepresented Client: 6 Credits

This course will be co-taught by low-income litigants who have claims adjudicated with minimal process and without representation. Topics to be covered: the overwhelmingly high percentage of litigants who are not represented in various proceedings and whose cases constitute the majority of adjudicated matters; the instructors’ experience as low-income litigants in the judicial system; whether an ‘adversary system’ is truly ‘adversarial’ when there is only one lawyer; how favouritism impedes the ability of *pro se* litigants to obtain favourable outcomes; self-representation in a variety of settings, such as courts and administrative agencies, in which litigants who know nothing about court practices and processes face judges, lawyers, and clerks who possess intimate knowledge of informal and formal court procedures.

Professional Responsibility: 3 Credits

This course explores ethical issues facing the profession. Topics include: the co-option of the norms of ‘zealous advocacy’ to justify over-the-top (and lucrative) representation of legal fictions like corporations; how rhetoric about the central role that lawyers play in the administration of justice mask professional self-interest; and lawyers’ long history of proclaiming the importance of representing low- and moderate-income litigants while doing nothing about it.

Constitutional Criminal Procedure: 3 Credits

This course explores the application of the Sixth Amendment to the representation of indigent criminal defendants. The course will briefly touch upon the constitutional provisions pertaining to criminal prosecutions. It will then focus exclusively on plea bargaining and the ‘procedures’ implemented by all criminal courts that cannot accommodate any result other than plea bargaining. The course will also survey the overwhelming caseloads of public defenders; the characterisation of adjudication in the criminal courts as ‘meet ‘em and plead ‘em’, ‘cattle herding’, and ‘McJustice’, and the law of ineffective assistance of counsel, particularly the evolving jurisprudence on whether sleeping lawyers in capital cases have provided effective assistance of counsel. Other topics: the criminalisation of poverty and racialisation of criminal prosecutions.

Law and Commerce: 1 Credit

This course provides an overview of the ways attorneys can generate substantial compensation by representing large organisations. The course will only briefly address the ‘substantive’ areas of law on which such representation typically focuses, such as taxation and business organisations. The course will instead explore why less lucrative areas of legal services, such as representing low-income litigants who otherwise could not afford representation, pay too little to service the debt students incur to afford law school tuition.

Gender, Race, Socioeconomics, and Intersectionality: 3 Credits

This course explores how individual experience defines one’s interpretation of ‘law’, while the leading interpreters of ‘law’ maintain that their conclusions are driven by ‘strict interpretation’ and plain meaning of the ‘law’. The course is supplemented by work from social psychologists who have demonstrated how humans assume that their life circumstances are the same as everyone else’s, and how affluent individuals are certain that their own affluence is due to merit and not privilege or luck.

Legal Education: 3 Credits

An exploration of how legal education, with the exception of the Holmes School of Law, has nothing to do with law. This course will focus on the usefulness of pre-digested hypotheticals when no client has ever presented an attorney with a fact pattern or ‘Statement of Facts’; assessing whether the ‘case method’ reflects the realities of adjudication, especially where freedom and safety are at stake, such as in criminal prosecution and child abuse and neglect proceedings, and the misleading perception that elite law schools produce more ‘competent’ practitioners.

The founding principles of the Holmes School of Law are drawn from ideas articulated by Oliver Wendell Holmes and other legal realists who wrote primarily in the early 20th Century. Holmes challenged the logical foundation of ‘law’ and, by extension, traditional legal education. He argued that judicial decisions are not, and could not be, products of logic, but rather products of submerged judgements and policy preferences. Although legal scholars still hold Holmes in high esteem, the full consequences of his ideas remain too *outré* for mainstream conceptions of law.

Holmes’s famous essay *The Path of the Law* captures the essence of his critique:

The language of judicial decision is mainly the language of logic ... [b]ut certainty generally is illusion ... Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form ... [Such a conclusion, however,] is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.

The following Chinese proverb echoes Holmes’s sentiment: ‘A judge decides for ten reasons, nine of which nobody knows.’

Succeeding realists explored the extraordinary technical skill brought to bear in efforts to present conclusions in logical dress.

Hairs can be split in numerous ways. The splitting might seem ‘objective’ or ‘true’ but, according to Holmes, the splitting is a means to justify a conclusion rather than a means to reach a conclusion.

In place of its traditional definition, Holmes offers an alternative. According to Holmes, law is ‘[t]he prophecies of what the courts will do in fact, and nothing more ...’ ‘Courts in fact’ are what courts do in fact; they are situated within a factual matrix. Moreover, facts are textured and variegated, having little to do with the misleadingly stripped down ‘statement of facts’ in judicial opinions, which are tellingly situated as an introduction to the main event – the interpretation of ‘law’.

Holmes further identifies what is not law. Law is not the law of contracts, criminal law, property law, or family law. Law is not treatises; and contrary to what children learn in grammar school, law is not what the legislative branch legislates, the executive branch executes, or the judicial branch judges. Law is not appellate opinions, despite being subject to laser-like scrutiny. An opinion alone, without the facts that gave rise to the decision, is thus ‘hopelessly oversimplified’. All of these things collectively are what Richard Posner has called ‘law’s traditional preoccupations’, which are, not coincidentally, the ‘traditional preoccupations’ of legal education.

For Holmes, law is the lived experience of a civil defendant in a debt collection case, or a criminal defendant facing drug charges, or a tenant seeking to avoid eviction, or a mother seeking to retain custody of her child. These, for sure, fall superficially into the respective laws of contracts, criminal law, property law, and family law. But the ‘law’ – rules, procedures, cases – that ‘define’ these areas do not tell us much. Or, at least, they tell us much less than an inside-out perspective with ‘law’ as merely one piece of the picture – and a pretty unimportant one at that.

Law also pervades lives in ways that have nothing to do with courts or adjudication. For example, masses of forms, legal regulations, interviews, and hours of waiting in line confront low-income people at every turn. For those who live in poverty, Stephen Wexler characterises law as a persistent intrusion in, if not an integral element of, their lives:

Poor people do not have legal problems like those of the private plaintiffs and defendants in law school casebooks ... Poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms ... [P]oor people are always bumping into sharp legal things.

These experiences are law.

Getting a handle on this Holmesian view of law is no easy task, as Holmes himself seemed to recognise. Louis Brandeis suggested to Holmes that he study ‘some domain of fact’ such as ‘the textile industries in Massachusetts and after reading the reports sufficiently ...’, he should ‘go to Lawrence and get a human notion of how it really is.’ By Brandeis’s estimation, Lawrence,

Massachusetts – the site of a massive textile industry in which a largely female, poor, immigrant population worked and lived in deplorable conditions and conducted a strike of historic significance to the labour movement – was a good place to go to capture the lived experience that constitutes law. Holmes’s ambivalence about taking the trip, however, was palpable: the trip ‘would be good for ... the performance of my duties’ but would be a ‘bore’.

Subsequent realists expanded upon Holmes’s dangerous idea. Karl N. Llewellyn emphasised the contingencies of real life that affect a litigant’s ability to recover under a rule of ‘law’.

In a different vein, Felix Cohen drew upon Holmes’s conception of law as a social act. For instance, Cohen argued that judicial opinions are based on human activity rather than the development of precedent, and noted that a judicial decision ‘is an intersection of social forces: behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.’

In the end, then, the fundamental premise of ‘realism’, and, by extension, of the Holmes School of Law, is that law is about how the mass of people live in the world. Conventional law school curricula do not define law in this way, and this is to maintain legitimacy as an ‘objective’ analysis driven by the rigorous application of logic. Such realities of law are too messy and too subversive of popular conceptions of ‘the rule of law’ to comport with law schools’ focus on logic. The Holmes School of Law thus seeks to determine (1) what law is in all its messiness, social contexts, and assumptions – its reality ‘on the ground’; and (2) what law is to the vast majority of litigants who have few or no resources.

The Holmes School of Law builds upon critiques of ‘law’ and legal education that extend back over a century. This Proposal examines how the Holmes School’s curriculum fits into prior critiques of legal education, how its premises differ from other calls for reform, and how it will implement its signature pedagogy to achieve its goals.

Well over 100 years ago, Christopher Columbus Langdell developed the ‘case method’ – the law school pedagogy that has remained the bedrock of legal education ever since. The case method assumes that cases are the lifeblood of ‘law’, and that ‘thinking like a lawyer’ entails developing or ‘synthesising’ rules from cases to produce certain results.

Jerome Frank offered an early and still idiosyncratic critique of the case method by attacking the very idea that the ‘case’ method deals with ‘cases’. The case method, according to Frank, is really the opinion method. An ‘opinion’ says nothing about decision making or why a judge reached a particular decision. The case method fails for many reasons: (1) it ‘disclos[es] merely a fractional part of how decisions come into being’; (2) it encourages within a lawyer and law student ‘a treacherously false sense of certainty in advising clients’; (3) it ‘is hopelessly oversimplified’; and (4) it fails to take into account ‘the slippery character of ‘the facts’ of a case.

A more widely articulated critique not only rejects the value of examining cases, opinions, and decisions, but rather advocates for focusing on ‘practice’. This critique leads directly into the motivation behind the clinical education movement.

Despite these longstanding critiques, clinical education only came into its own in the 1960s, when it ‘solidified ... its foothold in the academy’.

There is a longstanding tension between ‘theory’ and ‘practice’, ‘doctrinal’ and ‘clinical’.

Studies of legal education, including the ‘MacCrate Report’ and the Carnegie Report, attempt to resolve the tension between conceptions of law school as a professional school teaching students how to be lawyers, and as an ‘academic institution’ devoted to scientific and ‘theoretical’ inquiry about law. These efforts see both views as complementary, and propose integrating them to create more comprehensive legal education. For example, the authors of the Carnegie Report frame their project as ‘seeking to unite the two sides of legal knowledge: formal knowledge and the knowledge of practice’. The goal of legal education thus should be ‘to bring the teaching and learning of legal doctrine into more fruitful dialogue with the pedagogies of practice’ and ‘to bridge the gap between analytical and practical legal knowledge’.

The Holmes School of Law, in contrast, would reject the purported dichotomy between the ‘theoretical’ and ‘practical’. Rather, the Holmes School would examine what happens when people encounter rules (regulatory, statutory, or constitutional), procedures (whether formal or informal), court forms, clerks, social workers, and lawyers, and explores legal claims that are not asserted because potential litigants do not know they have them. What exactly are ‘practical skills’ and ‘theory’ when neither has meaning in actual experience; when ‘process’ accorded litigants is wildly divergent and, at times, chaotic and virtually non-existent; when any ‘theory’ is, in the end, based on personal experience, which likely has nothing to do with ‘on the ground’ interactions with law? Answering these questions, or recognising that these questions are worth asking, or, even admitting that these questions exist, is a core goal of the Holmes School of Law.

So if law were to be considered ‘law in fact’, what would law school look like? It would largely entail examining the experience of litigants who are represented, litigants who are not represented, and litigants who are represented but have lawyers with overwhelming caseloads, who are poorly prepared, or who are just not very good. If law schools studied ‘law in fact’, they would undertake to understand how many claims are not claimed because the claimants do not have the knowledge or resources to claim them. The study of ‘law in fact’ would also examine geographic differences among urban and rural courts, differences based on ‘jurisdiction’ – such as among federal courts, state courts, family courts, small claims courts, and ‘rent courts,’ differences among governmental yet non-judicial fora such as administrative tribunals, and differences among extra-judicial or non-judicial processes such as arbitration and mediation. It would compare appellate courts with trial courts. More generally, the study of ‘law in fact’ would look at the law’s impact or non-impact on actual human beings.

By jettisoning traditional law school pedagogy, the Holmes School takes Holmes’s dangerous idea to its logical conclusion which, in turn, leads to what Daniel Dennett has called, in a different context, ‘universal acid’: ‘Universal acid is so corrosive that it will eat through anything! ... It eats through just about every traditional concept, and leaves in its wake a revolutionised world-view...’ Holmes’s ‘universal acid’ would, if applied or even taken seriously, ‘eat through’ settled notions of ‘law’. Holmes’s dangerous idea is more than a ‘paradigm shift’. It does not shift traditional legal tenets; it eliminates them.

A rare example of a realist who accepted the challenge of implementing this worldview was Felix Cohen in *Transcendental Nonsense and the Functional Approach*. Cohen undertook to see, learn about, and teach law through a Holmesian lens. He defined jurisprudence as the study of human behaviour.

Cohen, however, continued to grasp at the rational and the systematic. He sought to maintain the legitimacy of law through science, albeit with a Holmesian twist.

In contrast, the Holmes School curriculum and pedagogy does not aspire to be particularly scientific or systematic. It requires the minimisation of ‘concepts’ and systematic ways of thinking that shape and mislead. Rather, the signature pedagogy of the Holmes School is experiential. It encourages lawyers and law students to go and see places, to grapple with context, confront and recognise contradictions.

No doubt many would disagree with the principles of the Holmes School.

For some critics, the Proposal merely seeks to indoctrinate students to a leftist agenda that is anathema to a neutral institution of higher learning.

This argument, however, misses the point. Indeed, it is the ‘conventional’ law school curriculum that embodies fundamental political and ideological premises. First year classes omit any reference to what the vast majority of Americans experience was law, which reveals law schools’ assumptions concerning what is or is not with knowing. Its premises, however, are masked by a veneer of ‘rigour’, ‘logic’, and ‘thinking like a lawyer’, which effectively keeps its biases well hidden.

Finally, the rhetoric of the profession has acknowledged and excoriated time and time again the profound deficiencies in the average citizen’s access to justice. This endless repetition, despite sounding grand, has had pernicious consequences; it has transformed an immediate crisis into an ongoing ‘problem’ calling for an eventual solution. The Holmes School reintroduces the centrality and immediacy of this crisis that individuals of all political stripes recognise exists.

This proposal makes sober good sense and offers as close a reflection of the world of law as it is, and, sadly, how it will likely be in the future. For this reason, it will never fully see the light of day. Even if not, however, it reflects the reality of law.

ETHICS Teaching behavioural ethics

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There are many ways to make unethical choices and probably just as many ways (or even more) to try to teach people how not to make unethical choices. Many ethics courses are philosophy based, others focus on building character, and many are a combination of the two. Sharpening one’s moral reasoning and reinforcing one’s character are certainly beneficial courses of action for those who wish to be better people and those who wish to teach others how to act more ethically. They are likely essential for people to reach their full potential as ethical beings.

Because the empirical evidence indicates that the potential of these two traditional approaches to transform human behaviour is generally limited, however, many people interested in researching

and teaching ethics have recently focused on a new field called *behavioural ethics*. This is the body of research that focuses on how and why people make the decisions that they do in the ethical realm.

I teach behavioural ethics in a three-hour course that is one-third business ethics and two-thirds business law. It is, therefore, the equivalent of a single one-hour ethics course. I have experimented with different approaches – teaching behavioural ethics in a block at the beginning, in a block at the end, and also just scattered throughout the semester. My experience is that the behavioural ethics material has been best received when I taught it in a block at the end of the course. By the time we get to the ethics material, I have in several ways attempted to pave the way for a smooth transition into the material, including by giving the students several surveys early in the semester that I will ultimately use to demonstrate that their own reactions correspond to the psychological studies I will discuss later in the semester.

For example, one of the most important points I hope to get through to students is that they probably are not as ethical as they think they are. *Humility* should be the word of the day in ethics classes. So, in written surveys, I ask half of the class to answer ‘true’ or ‘false’ to this statement: ‘I am satisfied with my moral character.’ And I ask the other half to answer similarly to this statement: ‘I am more ethical than my fellow students.’

Surveys show that 92 per cent of Americans are satisfied with their own moral character and that 75–80 per cent of Americans think themselves (against all statistical odds) more ethical than their peers. Semester after semester, I receive similar results in my surveys. It is one thing for me to report to the students later in the semester that the average American is overly optimistic about his or her ethicality. It is a more persuasive thing to demonstrate to a classroom full of students that they have shown themselves to be similarly ill calibrated.

Another key point that I try to get across ultimately is that when it seems to people that they are reasoning through to a choice of the moral course of action, often they are simply rationalising a conclusion that the emotional parts of their brains have already reached.

I also spend some time during this class period helping the students to construct a vision of the kind of moral person they wish to grow up to be. It is never too early for people to begin to construct their moral identity.

After lengthy discussion, most students become receptive to the view that many of their moral judgements are not cognitively based.

Among the emotions that help people act ethically are the inner-directed emotions of guilt (which they tend to feel when they act immorally) and shame (which they tend to feel when others discover that they have acted immorally). Outer-directed emotions include anger and disgust, which people tend to feel toward others who violate accepted moral standards.

It is critical for students to understand the role of emotions in moral judgements, especially because the judgements that emotions produce are not always correct. While anyone would be foolish to simply ignore those feelings people get in the pits of their stomachs when they are considering breaking a rule, Matousek notes that ‘the moral sense, though hardwired, is not always right.’ Kelly is emphatic that ‘the fact that something is disgusting is not even remotely a reliable indicator of moral foul play.’ Only if students are aware that their emotional responses may lead them to inaccurate judgements and inappropriate actions can they guard against this widespread tendency. Thoughtful analysis and decision making is not always second nature to people, but it can be practiced and implemented.

Behavioural ethics research reveals not only how people make ethical (and unethical) decisions, but also how they think they make these decisions, which turns out not to be at all how they actually make them. That people’s decision-making processes are relatively opaque to them presents a problem for those who wish to act ethically.

If there is one major finding in business ethics research over the past decade, it is that most people want to, and do, think of themselves as ethical people and yet simultaneously often lie a little and cheat a little to advantage themselves in ways that are inconsistent with their mental vision of themselves.

How is it that people can simultaneously do bad things, yet think of themselves as good people? Their accomplice is their brain, which manipulates frames of reference, compartmentalises thoughts and actions, conjures up rationalisations, manufactures memories, and otherwise shades perceived reality in self-serving ways.

Consider the *self-serving bias*, which is the tendency people have to gather, process, and even remember information in such a way as to serve their perceived self-interest and to support their pre-existing beliefs. In a February 2013 lecture, I suggested that a person’s views on gay marriage

might well change if his or her child came out of the closet, sliding from the very unethical end of the scale toward the other end. Within a month of that lecture, Senator Rob Portman (R-Ohio) announced that he had switched from opposing gay marriage to supporting it because his son had announced that he was gay. When we think about Senator Portman's changed factual world, people are not surprised that he changed his ethical beliefs regarding gay marriage.

Subtle differences in the environment can cause people to act either more or less ethically (depending). And they likely will not even notice the difference.

Time Pressure. Consider a very simple situational factor – time pressure. In a very interesting study, psychologists told seminary students that they needed to go across campus to give a talk to a group of visitors, perhaps about the parable of the Good Samaritan. As they crossed campus to give the talk, the students happened upon a fellow lying by the sidewalk in obvious distress – in need of a Good Samaritan. If they were not under time pressure, almost all the seminary students stopped to help this fellow (who had, of course, been placed there by the experimenters). If students were placed in a 'low-hurry' condition, only 63 per cent offered help. If they were put in a 'medium hurry' condition, only 45 per cent helped. And if asked to really hurry and put in a 'high-hurry' condition, only 10 per cent stopped to help.

Transparency. Or consider another situational factor – transparency. Studies by Francesca Gino and colleagues indicate that conditions creating what she calls 'illusory anonymity' will increase cheating. In one study, the experimenters gave two similar groups of people tasks to perform and then allowed them to self-report their results and claim rewards. One of the rooms was dimly lit. About 24 per cent of the participants in the well-lit room cheated, whereas almost 61 per cent of the participants in the dimly lit room cheated. Other studies by Gino and colleagues showed that the illusion of anonymity conferred by wearing sunglasses also increased morally questionable behaviour.

It is clear that people will act more ethically when they are being observed. They will also act more ethically, as the Gino sunglasses study demonstrates, if they have the feeling that they are being observed.

I noted above that changes in emotions can change people's moral judgements; they can also change people's moral actions. Indeed, a raft of psychological factors often affect people's decision making, including their decision making about moral and ethical issues.

I often supplement my discussion with viewings of the free ethics education videos I helped create, which are available at ethicsunwrapped.utexas.edu website (also easily accessible through YouTube), that illustrate these concepts. For those I do not discuss in class, I typically assign the students to watch the relevant videos at the ethicsunwrapped website.

Obedience to Authority. Many successful students realise that they are 'pleasers', so they can understand how strong the motive to please authority can be. A description (perhaps through a video) of the 'Milgram experiment' is a good place to start. Many students are already familiar with at least the rough outlines of this experiment, which Milgram used to study whether Americans might be as obedient to authority as the German people seemed to be under Hitler. The question addressed was whether subjects would deliver apparently painful electric shocks to another person who had missed a question in a supposed test of whether negative reinforcement through electric shocks would improve memory, just because some guy in a lab coat told them to. Although people predicted before the experiment was run that very few American subjects would show excessive obedience to authority, in actuality all of Milgram's subject delivered seemingly painful shocks and more than 60 per cent delivered the maximum shock.

People are conditioned from childhood to please authority figures – parents, teachers, and the police officer down the block. It is well for societal order that people are generally interested in being obedient to authority, but if that causes them to suspend their own independent ethical judgement, problems can obviously result.

Sometimes people suspend their own ethical standards in order to please authority as a matter of conscious self-interest. The authority figure has their future in his or her hands, and so they ignore their own ethical standards in order to advance their careers.

Conformity Bias. It is likely an evolutionarily sound strategy for people to take their cues for behaviour from those around them, but they can take this too far, especially when they suspend their own independent ethical judgement and defer to the crowd. Students are usually interested in the famous Solomon Asch study, in which he asked people which line out of three lines of varying lengths, was the same length as a fourth line nearby. The answer was easy. Virtually everyone got it right, except under one of Asch's experimental conditions in which several confederates gave an obviously wrong answer that prompted 65 per cent or so of subjects in the experiment to give at least one obviously wrong answer just to fit in with the crowd.

Overconfidence. Remember the Milgram study? In a class at the Harvard Business School, the professor described the experiment and then asked students how far they thought they would go in administering shocks when told to do so by a guy in a lab coat and how far they thought the average person in their class would go. *Every single student* in the class thought he or she would stop at a lower voltage than the average member of the class. I have surveyed groups I have taught and received exactly the same response. These results highlight how confident, indeed how overly confident, people are regarding their moral character.

Framing. Psychologists often say that they can dramatically change people's answers to questions simply by reframing them. That is likely true. Just by relabelling a hamburger as '75% fat-free,' one can induce consumers to prefer it and even to believe that it tastes better than an identical hamburger labelled '25% fat.'

Incrementalism. Cynthia Cooper, whistleblower in the WorldCom fraud, has accurately observed that typically '[p]eople don't wake up and say, "I think I'll become a criminal today". Instead, it's often a slippery slope and we lose our footing one step at a time.' Often, it turns out, people make business mistakes and then, unable to admit to them, start making larger and larger ethical mistakes as a consequence. I have repeatedly pointed to evidence that people often lie a little bit and cheat a little bit. It is incrementalism that often turns these small slipups into major ethical blunders. Ultimately, the slippery slope is a powerful phenomenon and one that students can easily relate to.

The Tangible and the Abstract. Decision making is naturally impacted more by vivid, tangible, contemporaneous factors than by factors that are removed in time and space. People are more moved by relatively minor injuries to their family, friends, neighbours, and even pets than to the starvation of millions abroad. This perspective on decision making can cause problems that have ethical dimensions.

The mind's ability to believe what it wants to believe ('I have solid moral character that will carry me through difficult ethical dilemmas') is very strong and very persistent, which is why I usually take a third run at convincing the students that it is harder for them to live up to their own ethical standards than they might imagine. This lesson is heavily based on research by Tenbrunsel, Diekmann, Wade-Benzoni, and Bazerman.

A key notion here is that people are of two minds. Think of an angel on one shoulder whispering into one ear telling people to do as they should. And think of a devil on the other shoulder whispering into the other ear telling them to do as they want.

Tenbrunsel and colleagues offer a temporal explanation for how people are able to think these contradictory thoughts.

When people predict how they will act when they face an ethical issue in the future, they naturally tend to think that they will handle it ethically. After all, they are confident (or, more likely, overconfident) in their character. Most people are largely, if not completely, unaware of their 'bounded ethicality', of how obedience to authority, the conformity bias, the self-serving bias, framing, incrementalism, and all the other factors mentioned earlier make it difficult to be as ethical as they wish to be.

In addition, as they think about how they will act, they are focusing on the ethical dimension of the issue. They do not realise that when it is time to act, they might not clearly see the ethical dimension of the issue as they focus on pleasing the boss or fitting in with the team or meeting a sales quota, or how they might frame the question as a business issue rather than an ethical issue.

To illustrate yet again how students will likely be overconfident in how ethically they will act, I talk about a fascinating series of studies by Epley and Dunning. The authors note that '[r]esearchers have repeatedly demonstrated that people on average tend to think they are more charitable, cooperative, considerate, fair, kind, loyal, and sincere than the typical person but less belligerent, deceitful, gullible, lazy, impolite, mean, and unethical – just to name a few.' The authors then performed four experiments that produced consistent results – people are generally good at predicting how generous, cooperative, and kind other people will be in given situations but consistently overestimate how generous, cooperative, and kind they themselves will be.

In order for people to be able to simultaneously think of themselves as ethical people and yet lie a little and cheat a little, they must be able to remember their actions selectively. In reality, their minds reconstruct their memories. Importantly, selective memories allow people to maintain higher self-esteem than is justified by the facts.

So, people tend to predict that they will act ethically and to remember that they have generally done so. But in between prediction and memory, when it is time to actually act, people often act in ways that are not as ethical as they predicted they would act (and likely not as ethical as they will

ultimately remember that they did act). Why this disconnect? The main reason is that the ‘want’ self comes to the fore. When it is time to act, people often are not thinking of the ethical dimensions of a choice. That aspect has faded into the background, and they are thinking of pleasing the boss, getting along with the team, making the production quota, etc., so that they can get what they want— the job, the promotion, the raise.

It can be depressing to learn how hard it can be for people to live up to their own ethical standards. Students must be reminded that to be the best tax accountants they can be, they will have to study tax law the rest of their lives. To be the best financial analyst they can be, they will have to study the latest valuation techniques for the rest of their lives. And to be the most ethical person they can be, they will have to give that aspect of their professional career continuous attention as well.

Fortunately, behavioural ethics has some lessons to teach that can give people a chance to better live up to the mental image that they have of themselves as ethical beings. Behavioural ethics can help people strive toward (though probably never meet) their goal of being their ‘best selves’.

I am decidedly not the heroic type, and I do not urge my students to be, at least not in the general run of things. I do not ask them to grow up to be police officers, firefighters, or soldiers where they might regularly risk their lives to save others. I do not ask them to emulate Mother Teresa and spend their entire lives in the service of others. But I do ask them to try to live up to their own moral standards and to consider that they may have more power to effect change than they think.

Behavioural ethics helps to explain why good people do bad things, why people in general find it difficult to be as ethical as they would like to be. As they study behavioural ethics, students should repeatedly be reminded that ‘explaining is not excusing; understanding is not forgiving.’ Yes, psychological factors, organisational and societal pressures, and various situational factors make it difficult for even well-intentioned people to realise their own ethical aspirations, but we must all try.

INDIVIDUAL SUBJECTS

Understanding the power of law: engaging students in criminal law casework

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In recent years there has been intense focus on the law student experience, particularly in relation to first year law students and their transition from high school to university. Both in Australia and overseas, a number of empirical studies have been conducted into law students’ perceptions of the law and lawyering, and their values and career aspirations. In many studies of clinical legal programs there has been a focus on developing ethical lawyering practices and on conceptions of social justice. Together these studies, at least indirectly, reveal much about students’ understanding of law and power.

In his persuasive and early critique of legal education, Duncan Kennedy argued that law students attend law school with the notion that being a lawyer means something more socially constructive than just doing a highly respectable job; it includes a deep belief that, in its essence, law is a progressive force. Recent Australian studies of the career expectations of first year students affirm this view. In a survey of 371 students enrolled in a Bachelor of Laws (LLB) at Monash University, Castan and her colleagues found that the majority of students they surveyed expected they would work as lawyers on graduation (rather than in another field) and that a law degree would allow them to ‘benefit the socially disadvantaged’ and ‘fight against injustice’. However those surveyed also identified some of the benefits of a law career as ‘high social status’ and ‘high salaries’. Another study conducted with LLB students at the University of New South Wales (UNSW) found that practice in human rights law and criminal law were the primary career aspirations for a high proportion of students in the first year of the LLB program, however by final year it seemed that interest in these areas had ebbed significantly. By the later years commercial law was the primary area of interest for the largest group of UNSW LLB students.

These empirical studies reveal that a considerable number of students commence a law degree with a strong sense of idealism and an assumption that the law can ‘fight against injustice’, but towards the end of the degree their perception of the law has shifted in favour of the, arguably, more prestigious field of commercial law. If students are persuaded that the study of law will lead them to power, surely as legal educators we should be encouraging our students to critique (or at least acknowledge) these assumptions. We suggest that clinical legal education, especially in the form of clinics in criminal law, is well-suited to fostering the critical thinking skills needed by students to help them test their own assumptions about the power of law.

The legal education literature is rich with overarching statements about the unwieldy power of law. The law has been described as ‘the single most powerful social force preserving and legitimating the prevailing distribution of power in our society’.

While we do not disagree with this line of scholarly analysis about the power of law, we think it is vital that students also understand the *limitations* of the law to redress injustice. This article, and indeed the student clinic we describe below, is informed by the work of feminist legal theorist Carol Smart.

In her key early work, *Feminism and the Power of the Law*, Smart recognised that the idea that the law has the power to right wrongs is pervasive. In considering law’s power she focuses on the discursive power of law and shows how law works to impose legal definitions on everyday life. For example she considers how the legal definition of rape, which is focussed on consent, can take precedence over a woman’s view of her experience. We suggest this approach is helpful in understanding other contexts where law imposes its definitional boundaries, potentially closing down opportunities to consider other responses. For example a person who is charged with trespass because they are sleeping rough may be defined in law as criminal, while a social worker may see homelessness. Smart expressed concern that the central focus on law, especially by feminists, might result in the disqualification of other knowledge, which led to her to recommend that law should be decentred. As Currie and Kline observe, Smart concentrates on the task of ‘deconstructing the discursive power of law’ in order to demystify and decentre it. In this way Smart argues that an approach of decentring law opens up space to consider other non-legal strategies as a response to oppression. While Smart was primarily focussed on the oppression of women, her theory is helpful in considering other forms of oppression that may result from, for example, poverty, race or mental illness. Smart accepted that law cannot be ignored, indeed she found feminists have to engage with it, but she found it must also be challenged. She also accepted that law, while powerful, does not ‘stand in one place, have one direction, or have one consequence’ and that law will not always offer the solution.

By decentring the law, students can be encouraged to question whether law (in the sense of a legal remedy) or some other response (eg health or social work) may be more empowering for a client or also required. A critical appreciation of both the capacities and limits of the law will help reveal to students what Smart referred to as the law’s ‘over-inflated view of itself’ and encourage students to critically analyse their own role as future lawyers in either facilitating or challenging systemic injustice.

Much has been written about how clinical legal education can inculcate an understanding of social justice amongst law students, and revive that original notion of the law being a tool for responding to injustice. Clinics have been found to assist students to develop empathy and emotional maturity through their interaction with clients, as well as teaching professional ethics. In addition to pedagogical benefits, clinics can play a ‘distinctive bridging role’ in legal education by bringing together law schools, the legal profession and their local communities.

Community legal centres (CLCs) in Queensland have generally refused to undertake criminal law casework on the basis that this area of law is the preserve of state-funded Legal Aid. However the case of *Dietrich v R* effectively led to the narrowing of the type of case that should have legal representation. Subsequent cases have found that the principle outlined in *Dietrich’s* case does not apply to appeals or to those cases where the outcome is likely to be something other than imprisonment. Appeals against sentence and conviction are extremely complex and their determination relies almost entirely on the provision by the appellant of a written outline of argument that demonstrates familiarity with legal principles and relevant case-law. This is very difficult, if not impossible, for many unrepresented litigants.

Legal Aid Queensland (LAQ) is the largest criminal law firm in Queensland, providing legal representation to individuals in both summary and indictable criminal law matters. LAQ also provides assistance to convicted persons seeking to appeal their conviction and/or sentence in both State and Commonwealth matters. To be successful in applying for a grant of aid, an individual applicant must generally satisfy a two-pronged test: first, an applicant must not have the means to afford private legal representation (the means test) and, second, the applicant’s legal case must display sufficient legal merit (the merit test).

In the 2011–2012 financial year, approximately 30 per cent of applications to Legal Aid to provide representation for an appeal against sentence and/or conviction were unsuccessful. In the 2011–2012 financial year, approximately 27 per cent of criminal cases heard by the Queensland Court of Appeal were unrepresented. The number of individuals who are unrepresented at the Queensland Court of Appeal in relation to criminal matters continues to rise and it is well known

that unrepresented litigants place significant burdens on the court. Without funding for legal aid, and with CLCs having neither the skills nor resources to assist (either through employed staff or by marshalling the pro bono resources of the private profession), these individuals have no choice but to either self-represent in the appellate jurisdiction or relinquish their attempts to bring an appeal. There is some evidence to suggest that continuing to engage with the criminal justice process when unrepresented can become too much for prisoners who become fatigued and who ultimately give up.

The Criminal Law Matters Clinic (CLMC) was devised by the University of Queensland (UQ) Law School in consultation with Caxton Legal Centre, Queensland's largest generalist CLC. The main aim of the CLMC was to assist unrepresented appellants to prepare their outline of argument for appeal. It was expected that other criminal matters might also arise in the context of assisting clients with their appeals, and that students would be able to assist with these other matters. The original idea for the CLMC was conceived by Professor Heather Douglas, whose practice and academic work includes criminal law and procedure.

Six students were selected to participate in the CLMC in 2012 and 2013 (12 in total) from within the internal application process for the UQ Law School's clinical law elective program. The elective is currently overseen by the UQ Pro Bono Centre as it aligns with the Centre's objective of creating opportunities for law students to participate in the delivery of pro bono legal services in Queensland. The inaugural 2012 intake attracted a strong number of applicants, and this was repeated with the second intake in semester 2, 2013. The CLMC was the most popular clinical offering in 2013 with 28 students nominating it as either their first or second clinical preference.

There were a number of features of this particular clinic that set it apart from other clinical offerings at UQ. First, of the nine clinics currently offered to UQ students, eight are in civil law. The CLMC is the only clinic with a criminal law focus, satisfying student demand for greater variety in the content of clinical offerings. Second, the CLMC had broad stakeholder support at the outset. Practitioners in private criminal law practice in Brisbane, the Caxton Legal Centre, LAQ, the Office of the Director of Public Prosecutions, the District and Supreme Courts of Appeal and the Court Registrars were all consulted prior to commencement of the clinic. This was particularly helpful in relation to clinic promotion and client referrals. Third, the successful receipt of a university grant meant that additional funds were available to provide comprehensive legal supervision for clinic students. The supervision of the students each week was shared between Professor Heather Douglas from UQ and a solicitor from private practice specialising in criminal law. The students were awarded a pass/fail result rather than a grade.

Like other clinical offerings at UQ, the CLMC ran for 13 weeks over two full academic semesters. For the first week students received an induction and overview of criminal appellate procedure. Students also received an organisational induction at Caxton Legal Centre about relevant policies and procedures. Early in the clinic students were introduced to the social worker who worked at Caxton Legal Centre. This approach was informed by Carol Smart's call to decent law. Students were encouraged at the outset to question whether law was necessarily the only or the best way to characterise or understand a client's issue. In including this introduction the CLMC supervisors hoped to encourage students to realise that there were limitations to their role as 'lawyers' and that sometimes there were non-legal staff better equipped to deal with certain issues. It was hoped that students would comprehend the need for a therapeutic approach to lawyering that considered prevention and ongoing support rather than seeing lawyers as an immediate and only solution. As well as various primary legal materials including cases on sentencing and model outlines of argument, students were asked to read two articles in preparation for the clinic. Both of the recommended articles encouraged students to think beyond legal approaches to clients' concerns.

The students undertook a range of activities and tasks during the clinic, including visiting prisons to take client instructions; conducting legal research; drafting letters of advice and information, and letters relating to charge negotiation; preparing outlines of argument for sentencing appeals; preparing outlines of plea material for self-represented litigants; preparing letters to prosecutions in relation to charge negotiation; attending at the Court of Appeal and Magistrates Courts to observe their clients' proceedings; and engaging with non-legal services such as mental health and social work services.

The students ultimately prepared outlines for seven appeals against sentence, two in 2012 and five in 2013. Students usually worked in pairs to prepare outlines, but in more complex matters teams grew to three or four people working on the same matter.

Of the seven outlines of argument prepared, *R v Andrews* was a successful appeal and resulted in the reduction of Andrews' non-parole period from 15 months to nine months. While four other

completed appeal matters were unsuccessful, they resulted in written reasons that were made publicly available. The work of students thus contributed to the development of Queensland jurisprudence on the appropriate approach to sentencing in cases involving Indigenous people with mental health issues, and on sentencing in the context of recidivist fraud offenders, in drug matters and in relation to the offence of causing harm to a child by failing to provide appropriate medical treatment. Preparing appeal outlines for appellants and sentencing submissions provided students with a very good opportunity to think about how clients' narratives of their personal backgrounds, the events related to the offending and the application of the law can be built into a coherent narrative for the court.

Student reflections about power were captured in three ways. First, two formal evaluation forms were completed by students at the end of each clinic. One was a standard UQ electronic course evaluation and the other was a customised evaluation developed specifically for the clinic. In both evaluation forms students were asked a series of questions including one question asking them to identify the most worthwhile aspects of the clinic. The students were asked to ensure that the responses were not identifiable. There was a 100 per cent response rate. Second, as part of the course assessment students were required to submit two written reflections about their time in the clinic. The first reflection was due mid-semester and the final reflection was due at the end of semester. The course profile and UQ course induction provided guidance for students about the value of reflective practice, including its role in producing adult learners who reflect on their experience for the purposes of self-evaluation and improvement, the development of critical legal thinking skills and the identification of assumptions.

Finally, a rich source of students' reflections about power came from informal debriefs and group discussions that took place every week. For the clinic supervisors it was important that students be encouraged to decentre law and thus reflect on the limitations of law as a way of understanding problems confronted by clients and identifying possible solutions. Students made a range of observations about their clients' structural disadvantage throughout the course, both in their verbal debriefs with clinical supervisors and with each other in a peer-learning context. As Buhler observes, 'images of suffering clients and stories about traumatic events experienced by clients ... routinely appear within the discourse of the clinical classroom'. This environment makes the debriefing discussions extremely important so that students can discuss their emotional responses and also to consider how their clients' suffering can be understood in a wider social and political framework.

Students began to view individual marginalisation as a consequence of systemic disadvantage encompassing poverty, low education, poor access to healthcare and often a history of trauma or family violence or abuse. Students articulated an awareness of the law's role in perpetuating disadvantage, but also its inability to comprehensively solve the multifaceted nature of problems which defined the lived experience of their clients.

Students explained that they had learned that the various powers conferred upon law enforcement authorities and the discretionary exercise of those powers may, in some circumstances, lead to the commission of an offence. For example a student commented: 'the majority of clients attributed at least part of their offending to the conduct of police which had, at least in some way, exacerbated the situation'.

Students also displayed an awareness of systemic failures within the criminal justice system to provide appropriate services and resources for clients with compounded social disadvantage. For example one student commented: that 'the court system, embodying procedures which are not designed to accommodate social disadvantage, struggles to ensure access to justice for persons with a mental health disorder'.

Students also exhibited a good understanding of their privileged position as university-educated individuals, able to both access and understand the law. They displayed an awareness of the power of the law and of lawyers in both creating and responding to disadvantage. One student commented that the clinic 'definitely gave me a great perspective of the difference lawyers can make at a community level'.

It is hoped that the analysis presented in this article will encourage legal clinicians to have regard to the work of Smart when engaging students in a critique about the power of law. A student clinic focused on criminal law provides a context that can, of course, help to teach students legal and practice skills, and build on their understanding of the nature of substantive law and the nature of legal ethics; it can also engage students in a consideration of the power and limits of law.

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Legal education and the wider profession have been challenged to meet the social mobility aspirations of students and government. Graduates now assume a significant element of the burden of funding higher education and the business-university nexus occupies a central place within mainstream political discourse. Within this context, student employability has been stressed to ensure that universities produce graduates with the skills and attributes that industry requires and individual graduates are positioned as strongly as possible within a competitive labour market.

Legal employability and social mobility initiatives have each been held out as critical in enhancing the ability of individual students to secure access to the profession, irrespective of socio-economic background and based solely on their skills and attributes, and there has been an increasingly high-profile emphasis on these activities within the sector.

Legal work experience is an important lens through which to interrogate ‘employability’. It has been framed as a crucial way in which ‘employability’ can be enhanced. Moreover, it has been identified by the Legal Education and Training Review (LETR) and the Social Mobility Foundation as a key site of reform to address social mobility concerns in the profession.

Legal employability has never been more significant for students or their law schools. Although there is literature which reflects on what the relationship between legal education and the profession ought to be, the enhanced significance of employability for legal education has received little critical attention to date.

While any number of graduates may, in theory, be employable, a much smaller number are likely to be employed. This is, of course, exacerbated during a period in which youth unemployment is rising, and the numbers of entry-level positions in the profession are restricted. Moreover, reductions in the scope of and eligibility for legal aid raise not just access-to-justice concerns but also call into question the sustainability of the sector and the criminal Bar. These issues create a difficult context for the legal profession’s capacity to deliver social mobility in terms of access to and progress within its ranks.

It has been argued that social mobility problems within professions are linked to the lingering effects of occupational closure. Professions occupied a prominent role in society in part because they could control the numbers and types of entrants to the profession. However, there have been dramatic improvements in terms of socio-demographic diversity within the legal profession since the 1970s, and the profession’s collective control over entry has weakened. Over the past twenty years, the legal profession has become more diverse than ever before, with strong progress made, in particular, by women. Yet, despite these welcome developments, concerns continue to be raised. Social class and ethnicity remain powerful factors and Sommerlad has argued that, notwithstanding the increasingly bureaucratic processes of recruitment, personalist ties and instinctive assumptions about merit continue to reinforce socio-economic privilege.

Employability has been an influential agenda within higher education since the late 1990s. Pegg et al assert that it will continue to be a crucial part of higher education ‘in an era of increased costs, higher fees and loans and increased competition for initial and continuing employment locally and nationally’.

The focus on ‘employability’ has been overwhelmingly skills based – this is what is needed to enhance employability because these are the skills that employers say they require.

Students understandably want to secure employment, and employers (law firms and chambers) want to employ individuals with the skills and attributes that they require. The employability agenda, premised as it is with equipping graduates with the requisite skills, achievements, and understandings for the labour market, in principle, addresses these concerns.

Employability should be understood in the context of an increasingly competitive and complex labour market, which requires graduates to differentiate themselves. Brown and Hesketh argue that the ‘official’ story of employability and graduate recruitment messages which focus on skills, knowledge, and attributes pay insufficient attention to the absolute and relative meanings of employability – the ‘duality of employability’. They offer a more ambiguous and uncertain definition – the ‘relative chances of getting and maintaining different kinds of employment’ and remind us that ‘it is possible to be employable and not in employment’. Understanding these relative chances requires us to interrogate the ways in which individuals are differentially positioned in the graduate labour market and what aspects of their personal capital are prioritised.

Drawing on Bourdieu's concepts of habitus and of cultural capital enables us to understand how that prior positioning – in terms of background, education, family, and so on – shapes an individual's position within the social field. The habitus is the durable ways of 'speaking, walking and thereby of feeling and thinking' required to demonstrate that an actor is 'objectively compatible' with the properties of a social field. Those without the appropriate habitus have their possibilities for action severely constrained.

In order to address these core questions about legal employability, this article draws on the findings of the 'Legal Work Experience' study, conducted with Hilary Sommerlad and supported by UK Centre for Legal Education (UKCLE). 'Legal work experience' refers principally to two key types: informally arranged work experience for anything from one day to a number of weeks (from as early as Year 10 onwards) and formal vacation schemes, typically aimed at undergraduate law students to support firms' recruitment strategies.

The study was designed to enhance our understanding as to the role that legal work experience plays in mediating access to the legal profession and to consider the different ways in which it is constructed and experienced by students and employers. It drew on a mixture of survey and qualitative methods with students and employers.

Questionnaires were distributed to LLB students in the autumn of their second and third years, with focus groups in the spring of their third year, from a pre- 1992 and a post-1992 university. The profile of the student sample broadly mirrors that of the national cohort.

The primary focus in their second year was on the students' informally arranged work experience and the ways in which that positioned them for the formal vacation schemes. The third-year survey explored changes in their understanding of legal work experience and its role in the recruitment process.

Data from employers was derived from a survey of 50 firms (26+ partner firms in the principal legal markets served by the participating institutions). Detailed interviews were then undertaken with an illustrative sample of 16 graduate recruitment managers and partners from elite corporate multinationals to 19 partner regional practices.

In the context of the law firms' construction of an employable graduate identity, A-levels feature heavily. In the work experience study, all surveyed firms were 'extremely unlikely' to consider grades below BBC and interviewees generally spoke in terms of straight As, or ABB at the outside. Of those students surveyed, 62.3 per cent of post-92 students and seven per cent of pre-1992 students had grades below BBC. Yet, we should be cautious about the context in which the generally better educational credentials of those with more traditional backgrounds have been achieved. As Morley argues, 'socio-economic privilege appears to be transferred onto the production and codification of qualifications and competencies, [ensuring that] social gifts are treated as natural gifts.'

Firms were explicit in underlining that they viewed 'such academics' as a starting point, and looked for other means of distinction. As one employer in Brown and Hesketh's study put it: 'paper qualifications are the first tick in the box and then we move onto the real selection.' The successful students were those who had understood the need for distinction and who had the cultural capital and intellectual ability to demonstrate it.

In their study of graduate recruitment Morley et al identified specific areas of distinction: 'a range of soft skills with considerable attention paid to interpersonal and communication skills.' Thus, in the work experience study, the well-rounded personality was valued, as firms felt that it evidenced the ability to operate successfully within a firm, particularly in terms of client interactions: 'personable geniuses'. However their conception of a well-rounded personality and the ways in which students demonstrate this, also underline the difficulties that face many non-traditional students in seeking to negotiate the professional field, which fundamentally does not expect to see 'the likes of [them]'. What, I argue, the data suggests is not a process of formal exclusion but, rather, the discomfort that Bourdieu identifies for those lacking the appropriate habitus for a particular social field.

Firms see university as an ideal opportunity for students to engage in a range of extra-curricular activities which would enable them to demonstrate their well-rounded personality. Hinchliffe and Jolly confirm that 'employers [generally] were often suspicious of graduates who had used their student experience in a narrow way'.

Work experience is important not only because it forms part of the narrative of an employable graduate identity, but it is presented as a key neutral strategy through which to enhance employability and address social mobility concerns. The data presented here highlight the difficulties that students from non-traditional backgrounds face in securing these opportunities.

The firms said that previous informal work experience signals that the applicant has thought seriously about their career. It is part of the picture of whom firms expect to see.

The expectation was that students would have friends and family through which they could secure legal work experience.

The recruiters stressed that they recognised the challenges involved in securing conventional legal work experience without contacts, and again, some were open to a story being told about its absence on a CV. However, such a candidate remains a departure from whom they expect to see. Lehmann also notes that, for the working-class students in his study, 'it was the internships in medicine and dentistry, the law firm volunteer placements and the international study and work experiences that they desired but that were out of their reach.'

By their third year, most students surveyed had continued to secure informally arranged work experience and thus, it could potentially be a valuable resource to draw upon in personal development planning (PDP) activities. Just over half of the sample by this stage had secured at least one period of informally arranged legal work experience. However, the students in the pre-92 institution were far more likely to have attempted to secure legal work experience – 80 per cent in contrast to 47.4 per cent. In second year, the most common reason for not having undertaken work experience was 'didn't know how to arrange it', and the post-92 students were twice as likely as the pre-1992 students to give this as their reason. 'Didn't think of it' and 'too nervous' to apply were also responses which the post-92 students were more likely to record.

Students with connections to the profession through either family or friends were twice as likely to have secured work experience at an early stage (year 10/11) than those without such connections. Overall, students were more likely to have had work experience than not, except those students whose fathers worked in 'routine and semi-routine occupations'. In her analysis of North American law and business schools, Schleef identifies the inevitability, or 'default' nature of participation in professional education among privileged middle-class students. Brown also highlights what he describes as 'parentocracy', where the 'education [or professional opportunities] a child receives ... conform[s] to the wealth and wishes of the parents, rather than the abilities and efforts of pupils.'

Appearance and dress is part of the evaluation as to whether applicants understand what is required of them in a professional environment and possess an intuitive and 'practical mastery ... of their situation'. Critically however, this reflexive project of the self is framed as an individual's responsibility and ignores the importance of social and cultural background in supporting an individual's capacity to successfully engage in this project.

There is an economic rationality to firms' expectations of their recruits to look the part of the 'city lawyer' to reinforce client confidence, and to hire lawyers who are sufficiently attuned to their environment to make appropriate adjustments, whether that is in terms of their execution of work tasks, appearance or even knowing that drinking with clients is not the same as drinking with their friends. The difficulty is that those from more disadvantaged backgrounds may find it difficult to engage in reflexivity from a position of marginalisation. Earlier and frequent exposure to informal periods of work experience and longer-term engagement in professional classes is likely to assist prospective graduates in developing this understanding, and the absence of such opportunities to develop professional self-awareness 'may further disadvantage such lower status groups in social and economic terms'.

Of course, higher education does have a clear relationship with graduate employment. While large numbers of law students progress to careers in a range of other sectors, the legal profession remains the largest single sector and it is one to which most students aspire (at the outset at least). Mid-way through their second year, 63.8 per cent wanted to be solicitors with 17.8 per cent aiming for the Bar. Although the broad orientation towards a career in the legal profession was sustained into their third year, there were some shifts. Thus, although those aiming to become solicitors had dropped overall to 57.3 per cent, the growing awareness of the competitive marketplace appeared to affect each cohort differently. For the pre-92 students this appeared to indicate consideration of the solicitor route than the Bar, whereas for post-92 students it meant other career options entirely.

Some law schools have embedded professional skills and employability modules directly into the undergraduate curriculum. Such modules potentially help students develop their knowledge and understanding of what is required.

Work-placement modules, which involve students securing clinical experience as a core part of their degree, is another strategy which seeks to address employability and social mobility concerns directly within a programme. Learning through experiences can be an effective way to develop knowledge and skills. However, in terms of the transformation of the employability of students from all backgrounds, the value of what is learnt will depend on the work to which they are exposed, the

ability of the students to identify what they are learning and, ultimately, the preparedness of the profession to recognise any distinction that such initiatives may bring.

The differentiation in the legal education sector, characteristic of an expanded higher education sector, is critical to the construction of legal employability. This is borne out by the regard in which legal recruiters hold the status of degrees awarded by different law schools. Thus, the Law Society recommended that steps be taken to encourage the ‘removal of value judgements about institution attended’.

Regardless of how many PDP modules have been undertaken, or how well their ‘commercial awareness’ has been assessed in a credit-bearing module, if their institution is not deemed as having the appropriate ‘resonance in the air’ or capable of delivering comparable quality of degree, then the students’ employability will only have been enhanced in an extremely limited manner. As Brown and Hesketh put it, ‘such activities will typically be seen as “compensatory”: an attempt to make up for the personal and social deficiencies that set them apart from the talent in top Universities.’ Thus, graduates’ social and cultural capital is further weakened by the institution’s reputational capital.

The weakened reputational capital of particular institutions may have an additional, negative effect on the self-worth of non-traditional students, and indeed their ability to draw successfully upon their ‘possible self’. Employability literature stresses the need for students to connect their current studies to their future employment. An effective conception of legal employability has, therefore, to include reference to students’ possible selves. Markus and Nurius define possible selves as ‘individuals’ ideas about what they might become, what they would like to become and what they are afraid of becoming.’ Stevenson and Clegg consider the ways in which students are able to connect current activities to ‘their future, possible selves ... as employable subjects’. Thus, positive emotions about the future self can increase an individual’s efficiency and creativity in the achievement of their goals.

Possible selves can only include those selves that it is possible for that individual to perceive. The inability to perceive possible selves and thus, use this to motivate and construct employability work appears to be a powerful limitation on the ability of law schools to put into place transformative employability agendas for the benefit of all their students. Partial interventions such as ‘work experience’ will struggle to challenge structural constraints.

Fundamentally, because many students from non-traditional backgrounds have not been able to prepare themselves (indeed may find it very difficult ever to do so), a future in the legal profession is not just the next stage and, thus, their possible self cannot be effectively enlisted to drive motivations for current employability work. Lehmann notes that many students re-appraise their career goals as fear grows about their capacity to realise previously held aspirations.

Recognising the uncertainty of the future possible self for students from non-traditional backgrounds is critical for a nuanced understanding of legal employability. For more privileged students, the future is knowable, but for many first-generation participants, attendance at university has not only already exceeded familial/social expectations but may generate tensions with those expectations. The future self beyond this is unknowable and unsettling and, as such, lacks purchase in motivating students to avail themselves of the support that is available within institutions.

Legal employability has to take account of the differential access that students from less advantaged socio-economic backgrounds have to the resources that will enable them to become not just *employable*, but *employed* as a member of the legal profession. I have argued that the variable student understanding of the subtle messages that they have to grasp in order to successfully negotiate the legal professional field means that ‘employability’ should not be read simply as an outcome to which students work towards.

The challenge is to maintain constructive debate with the profession, to develop critical readings of employability for our students and to acknowledge the structural constraints in which opportunities are seized and lost.

Changing gears to meet the ‘new normal’ in legal education

C G Lee

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**LEGAL EDUCATION
GENERALLY**

Growing up, I spent most of my summers at drag strips and racetracks. Before I even had my driver’s license, my brother introduced me to the concept of a manual transmission: the sensitive give and take between the clutch and the gas, and the importance of smoothly changing gears at the

right moment. I watched closely as drivers won and lost races based on that precise timing, and I carried that awareness with me as I myself began to race.

Legal education is much like car racing, at least in one sense. Like professional drivers, law professors and administrators need to be aware of variations in the track – a hairpin curve, a shift in elevation – and change gears and speed to suit the conditions before losing control and skidding into the barriers, or worse.

The course of legal education is changing. Many schools are downsizing, accepting classes with lower credentials, and otherwise adjusting to a decrease in applications and a weak legal economy. These factors combine to create a very different student body than most law schools have seen in recent decades, and it is time to change gears to meet the needs of this ‘new normal’.

There are many, many evolving aspects of what scholars have termed ‘the new normal’ in legal education – from budgets to class size, to tuition to tenure, to student debt to campus use and so on – and there is a wealth of research and articles examining those issues. This article focuses mainly on the new demographic of students entering law school classrooms, and the lasting effects this change will have on legal education.

One of the primary functions of law school is to train students to think like lawyers, which includes critical reading, analysis, and writing. Legal educators generally operate under the assumption that entering law students already have some foothold on these skills via their formative and undergraduate education. Some scholars refer to this notion as the ‘skills deployment assumption’, which may, for example, lead to the belief that students’ post-college literacy skills include the ability to read and comprehend complex legal opinions. Although the term is used to describe reading skills in particular, it could be applied just as easily to the other analytical and writing skills legal educators assume students possess upon matriculation to law school.

It follows logically that most legal educators view their roles as refining – rather than introducing – these skills, which is not unreasonable. Recently, however, many law professors have observed that their new students greet them with significant and often surprising deficiencies in basic critical reading, thinking, analysis, and writing skills, usually manifesting as an overall lack of preparedness.

In 2008, the national economy began a steep decline into the Great Recession, dragging most legal education programs along with it. Worsening economic conditions impacted law school applications steadily across the nation, resulting in fewer applicants and, consequently, a decrease in the levels of applicant entering credentials accepted at many law schools.

These economic shifts resulted in less demand for attorneys entering private practice in firms, which in prior decades formed the foundation of the legal industry and the primary feed from which most new law school graduates found jobs. To meet new budgetary demands, private law firms and even some public employers reduced hiring, downsized, merged and laid off employees, or in some circumstances simply closed their doors.

A law school graduate’s total debt could range from \$160,000 to \$250,000, depending on the school, while the median salary for a typical entry-level legal job is roughly \$60,000 per year. This is provided that the graduate can even secure such a job, which upwards of 45 per cent of recent law graduates, especially those in the bottom halves of their classes, cannot.

Moreover, it is becoming easier and more common for non-lawyers to complete basic legal tasks without hiring an attorney; for example, creating a simple will with a template found on the internet.

A combination of these factors has affected national applications to law school, leading to historic lows. The Law School Admission Council, the entity that administers the Law School Admissions Test (LSAT), reports that fall 2014 test applications have dropped 12.6 per cent, down 13.7 per cent from 2013.

Even when prospective law students complete the LSAT, many are not moving forward and applying to law school. This troubling decline in interest appears more prevalent with applicants who score the highest on the LSAT – the students who reportedly are most likely to succeed in the first year of law school. Overall, lower-performing applicants still seem to view a legal career as a viable option, and many law schools feel obligated to adjust their entrance criteria to admit these students in order to fill their classrooms and thus ensure that they can pay the bills.

With the exception of perhaps the highest-ranked schools, by this point most law schools have been forced to start accepting students with lower credentials than they would have accepted 10 or even five years ago. Fewer applications from fewer high-LSAT applicants means fewer opportunities for schools to maintain past standards. This change might negatively impact a law school’s ranking and the academic quality of its entering classes on paper, but does it mean that these students really are any less capable of mastering the skills that make good lawyers?

Even the administrators of the LSAT recognise that it, 'like any admission test, is not a perfect predictor of law school performance.'

Even more predictive than a law school applicant's LSAT score alone, however, is her LSAT score combined with her Under Graduate Grade Point Average (UGPA).

Despite the fact that LSAT and UGPA are not perfect predictors of law school success, various data support that they at least provide a generally accurate picture of where an applicant stands with respect to critical thinking skills at the beginning of law school.

Since these entering credential levels are in decline at most law schools, legal educators must make adjustments to compensate if they expect their students and programs to succeed. The case is far from hopeless, but it requires a re-tooling of traditional legal education to foster student engagement and focus on analytical skills beyond a predominantly substantive teaching agenda.

Further, the recent shifts in undergraduate, high school, and earlier education suggest that the students starting to apply and matriculate to law school now are very different as a whole, regardless of falling entering credential criteria at specific schools. Even if economic conditions were to revert to their prior states and allow law schools to restore previous admissions policies – an unlikely scenario – these changes in pre-graduate education suggest that entering law students still will have very different academic skills and needs than what law professors have seen from students in recent decades.

Fundamental changes in teaching from elementary schools to the university level – not all of which are considered positive – are affecting the critical thinking ability and preparedness of students, many of whom just now are beginning to apply to graduate school. Disturbingly, many of these students claim that they have not been challenged in their undergraduate education, and that they do not invest much effort in their academic endeavours.

Most professors will agree that good writing skills are closely linked to good critical thinking. Unfortunately, national college admissions tests report stagnant or declining scores in high school graduates' writing and reading skills, which is especially troubling when considering the link between these skills and the critical thinking required in law school and legal practice.

Essentially, students are not graduating from high school with the skills necessary to succeed in college-level reading and writing courses. This poses subsequent problems for undergraduate educators who must try to make up that lost ground.

In a study of over two thousand high school seniors, 46 per cent agreed with the statement, 'Even if I do not work hard in high school, I can still make my future plans come true.' Because many modern high school graduates proceed to college without sufficient critical thinking skills, it falls to college educators to fix the problem if those students are to advance to law school with the fundamental skills first-year law professors generally expect.

Another study, including over one thousand US college and university presidents, found that 58 per cent think public high schools are worse at preparing students for college than they were a decade ago. The outlook is even more negative at for-profit institutions, where 52 per cent of presidents claim public high school graduates' performance has declined in the last ten years. Only six per cent of all undergraduate institution presidents surveyed think public high schools are doing a better job now.

Despite the lack of preparedness of entering college and university students, or perhaps because of it, undergraduate students may not sufficiently develop such basic skills as critical thinking, complex reasoning, and writing.

Although most college and university professors are dedicated to their students and want to help them succeed, other demands and obligations, such as scholarship and service, compete for their time. Further, in response to the economic downturn many undergraduate institutions are laying off support staff, faculty, or both, meaning that remaining professors are stretched even more thinly. If a professor does not assign as much reading or writing, then she will not have to grade as much. If she does not grade as much, students probably will not come talk to her individually as often. She saves precious time, and the students are likely to leave her course with a decent grade without having to work too hard to get it.

Students who receive higher grades also tend to write more positive course evaluations. To the extent that a faculty member's teaching skills are relevant to tenure decisions – admittedly, that extent may be small compared to considerations like scholarship production – reviewing committees usually measure quality teaching by student satisfaction as conveyed on course evaluations. Practices like this further encourage professors to focus more on making their students happy, i.e. by reducing student workload and/or distributing higher grades, than on academic rigour and student learning.

Law school professors must meet the needs of this new demographic entering their classrooms; they cannot simply continue teaching as they have for years and expect their students and their schools to succeed. The cost of legal education is high and rising. Legal educators are morally bound not to take hundreds of thousands of dollars from students without believing those students are capable of succeeding, and at least trying to help them do so. Furthermore, lawyers already suffer from a high degree of depression and substance abuse, and this may increase if schools produce mediocre attorneys with no other options to repay their debts than to take jobs they hate – if they can find legal jobs at all.

Change is not easy, especially in an established law school with tenured professors who may have been teaching for decades. To rise to the challenge of adapting to ‘the new normal’ in legal education, however, law schools must foster a culture of innovation and openness to meaningful change.

Most importantly, law schools must address their financial structure, as many already have out of necessity since the economic downturn. But more than just cutting costs in order to keep the doors open, legal educators must seriously reconsider the value they provide to their students, particularly since potential applicants are more sceptical now than in the past, when many blindly entered their legal studies based upon the assurance of high-paying law jobs available for everyone at the end.

This reconsideration may result in major curricular reform, from restructuring graduation requirements to incorporating alternative revenue streams not based on tuition, to drastic measures such as transforming the structure of legal education itself. For example, several schools have instituted revenue producing legal training programs for people who do not need or want a JD, such as foreign attorneys, health professionals, and those working in other highly regulated fields. Some law schools also develop programs for undergraduate students to spur interest in attending law school, as well as continuing legal education programs to keep graduates engaged with their alma maters.

In addition to reconsidering finances, curricula, and other aspects of the big picture of legal education, law professors also must re-evaluate their own teaching and assessment practices. Regardless of the delivery format – online, accelerated, clinical, etc. – ultimately it will fall upon individual law professors to reach the new demographic of law students successfully. A thoughtful focus on student learning outcomes and assessment is essential to both student and teacher progress. Yet despite the multitude of research touting the importance of regular, quality, formative assessment, many professors still rely on end-of-course exams to assess their students. To prosper in the new normal, this must change.

Although not all assessment must be graded, periodic assessment exercises with prompt feedback administered throughout a course allow students to evaluate and work to resolve their weaknesses on an ongoing basis. Not only should professors assess their students regularly, but the feedback professors provide on those exercises must equip students to learn and improve. Comments should be specific, constructive, and informational, and they should assist students on the path to becoming self-regulated learners who ultimately can evaluate their own work. This teaching practice results in students who are better able to think critically and solve legal problems. Further, students who are taught in this way are less likely to suffer from psychological distress issues common among law students and lawyers, such as depression, since they are encouraged to view problems as temporary and solvable. Supporting students’ autonomy in this manner promotes true learning and psychological wellbeing, leading to more effective, happy lawyers in practice.

Of course this is easier said than done in an environment where staffs are shrinking and demands on professors’ time are increasing. Counter-intuitively, individual class sizes might also increase in the new normal if schools decide to shrink the sizes of their faculties, despite a decrease in overall entering class size. Accreditation standards that focus on expenditures and selectivity rather than student learning outcomes also may conflict with efforts to change. Although daunting, these difficulties provide all the more support for the proposition that all aspects of legal education, from individual courses to overall structure, should be subject to re-evaluation and adaptation.

First, now that the public no longer views law as a failsafe career choice, fewer people will choose to pursue a JD simply because they do not know what else to do with a liberal arts education. Media attention on truthful law school data reporting means potential law students will be able to make informed decisions regarding both law school and the field in general, and they should matriculate with a clearer picture of what a legal education will provide and what to expect in practice. Law students in ‘the new normal’ should have a deeper dedication to legal study and a stronger sense of purpose in pursuing the profession. Additionally, although law schools are in the negative media spotlight at the moment, they are not the only education providers dealing with

these issues. The Great Recession impacted other graduate programs, undergraduate providers, and earlier education providers as well; but law schools are subject to more stringent reporting requirements and thus are easier to criticise, even though some of the criticisms are warranted.

Indeed, the car may be speeding uphill toward a blind curve; but it will not crash as long as the driver remains focused and changes gears before it is too late. The landscape has changed, and although it may feel easier to continue driving at the current speed and in the same direction, doing so simply will not work anymore. Law schools can survive and even thrive in ‘the new normal’ if they re-evaluate their programs and teaching with a focus on the unique needs of their incoming students.

Teaching ‘thinking like a lawyer’: metacognition and law students

SKILLS

C B Preston, P W Stewart and L R Moulding

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Even in a discipline where ambiguity is cherished, law professors are stumped when it comes to understanding the content of legal education’s motto: ‘Teach them to think like a lawyer’. For decades, scholars have groaned under the weight of trying to describe what ‘thinking like a lawyer’ means. A recently popular educational psychology construct may hold the answer: metacognition, or the process of thinking about one’s thinking. Education theorists have been much more successful in defining, explaining, and testing for metacognition, than law professors have been in explaining ‘thinking like a lawyer’.

Studies in education have demonstrated that highly developed metacognitive skills help in converting a student into a life-long learner – one whose education and learning do not stop when he or she leaves school. Metacognitive skills improve oral communication, written communication, and comprehension of texts. In addition, metacognitive skills increase the speed and accuracy of factual analysis and, because of the increased confidence in performing these tasks, those with better metacognitive skills suffer from less anxiety about performing challenging intellectual tasks.

Often described informally as ‘thinking about thinking’, metacognition is the concept that individuals can monitor and regulate their own cognitive processes and thereby improve the quality and effectiveness of their thinking. Teaching metacognitive skills to thinkers is similar to what coaches and athletic psychologists try to teach athletes. They bring to the forefront the awareness of how to maximise, and consistently tap into, all the talent and genius possessed by the player, both inherently and by the process of practice. It is the awareness and then strategic adjustment that pushes someone with flashes of brilliance into a consistently brilliant thinker who can learn, absorb, and apply new material with increasing ease.

Metacognition requires having both awareness of the process and the ability to control learning and thinking. The two components are identified as knowledge and regulation. It appears that metacognitive knowledge and metacognitive regulation develop independently of each other. By the time students reach adulthood, most have fairly well-developed metacognitive knowledge. In contrast, metacognitive regulation, which involves ‘the monitoring of one’s cognition and includes planning activities, awareness of comprehension and task performance, and evaluation of the efficacy of monitoring processes and strategies’, is frequently underdeveloped.

Metacognition is different from mindfulness, though they are related concepts. Mindfulness ‘generally refers to a deliberate, present-moment, non-judgmental awareness of whatever passes through the five conventional senses and the mind: emotions, thoughts, and body sensations.’ Mindfulness is awareness of in-the-moment thought, while metacognition is awareness and regulation of the process of thinking, reasoning, and learning. Mindfulness is often associated with awareness of the substantive content of a person’s thinking and control of emotions while metacognition is thinking of the cognitive strategies and processes used while thinking.

For example, mindfulness may be demonstrated when a student is writing a journal entry or a reflection paper for a law class on what new information has been learned. Metacognitive work could also employ a journal, but the point would be for the student to reflect on and record *how* the student learned, rather than *what* the student learned. Metacognition is thinking about the cognitive process or strategies used while thinking about, or trying to learn, the content and then mentally monitoring if the strategy is working well and how it can be subsequently improved.

We began this project assuming that law students, with their high academic credentials, would be relatively advanced in their metacognitive abilities. The skills needed to succeed in law school and as a lawyer – problem-solving, oral and reading comprehension, writing, etc – are significantly

enhanced by metacognition. More importantly, high metacognitive awareness and regulation links to better academic performance. The students in our study demonstrated academic success, illustrated by the grades and test scores necessary to be admitted to the law school, and would seem likely to have excellent metacognitive skills.

The purpose of this study was to investigate the metacognition of first-year law students. Can law professors assume that most students who obtain admission in law programs are already equipped with sufficient metacognitive skills? If not, teaching metacognitive skills should then be a priority.

Participants were 150 law students, representing approximately one-half of the first-year class beginning their first semester in fall 2010 and one-half of the class beginning in fall 2013 at the J. Reuben Clark Law School at Brigham Young University ('BYU'). The two cohorts are appropriately combined given the statistical evidence of similarity and are thus analysed as a single group.

Because we understood that, independently, the data derived from the study would not hold much meaning for readers outside of education disciplines, we looked for other studies dealing with highly qualified postgraduate students for a basis of comparison.

We compared the law student data with results using the same instrument on 73 volunteer master's degree students in business administration and 53 volunteer master's degree students in education at Weber State University, a nearby regional university. We assumed both the comparison groups would score lower on metacognition than the law students because of the high academic scores of the law students. The Weber students have lower academic qualifications based on objective measures.

The student populations were similar in race and cultural traits, but two differences may be interesting. The mean age of students in the business administration and education programs was greater than the mean age of the law students, and the spread in age was wider. The law students were, on average, younger and closer in age.

The survey instrument used in this study was the Metacognitive Awareness Inventory (MAI). The MAI is a self-report questionnaire developed by Gregory Schraw and R.S. Dennison in 1994 that is commonly used in metacognition studies of adults. Earlier studies have shown that the MAI is reliable. The MAI consists of 52 statements to which participants respond by marking on a five-point Likert scale, with zero indicating 'never' and five indicating 'always.' The MAI statements represent the two components of metacognition: knowledge and regulation. Within the knowledge component are statements of declarative knowledge (knowledge about self and strategies), procedural knowledge (knowledge about strategy use), and conditional knowledge (knowledge about when and why to use strategies). The regulation component covers planning (goal setting), information management (organising), monitoring (assessment of learning and strategy), debugging (strategies to correct errors), and evaluation (analysis of performance and strategy effectiveness).

All three groups had similar metacognitive knowledge, but the BYU law students and Weber business students had significantly lower metacognitive regulation scores than the Weber education graduate students.

At first blush, it seems strange that law students with high entrance scores do not demonstrate metacognitive skills that are as well developed as graduate education students at a regional university. The first clue may lie in the fact that the education students have honed the ability to teach new and struggling thinkers to think. Teachers develop metacognitive skills in the process of figuring out how to transfer the processes in their own heads to others. Secondly, the natural intelligence and talent of law students may have been enough to perform well in school so far without the boost generated by metacognitive skills.

In addition, all of the education students and most of the business students had work experience in their field of current study. The work experience of these two groups may be a factor in distinguishing their performance from that of law students. In addition to age, prior related work experience may facilitate developing metacognitive skills. Some of the law students worked following their undergraduate degree and before applying to law school, but most did not.

Another factor could be that many of the law students in this study may be sufficiently intellectually talented that undergraduate academic success came without truly honing their learning processes. Like athletes who have relied on their natural abilities through high school and college, they eventually come to the point where the rubber hits the road and they must learn to manage their talent to meet new competitive demands. Although the law students' undergraduate grades were generally higher than the business and education students, it is easily possible that the more important factors were intelligence, time devoted to study, and motivation. Undergraduate students with well-developed metacognitive skills would perform better than their other abilities

would predict; students with higher levels of talent, time, and motivation would score even better than they now do with well-developed metacognitive skills.

Unfortunately, law school applicants who have received high undergraduate grades based on their diligence and raw intelligence may not have enough to rise to the top in law school, let alone in practice. Law students face competition unlike in their prior endeavours, and thinking like a lawyer requires something more. Highly qualified students have the natural talent, but their capabilities may not be realised without focused instructional intervention. A student with less talent but metacognitive skills could out-perform a student with more talent but no metacognitive skills; a student with natural talent and metacognition would be more capable of performing at the highest level.

Metacognition enhances the academic performance for whatever ability level the student exhibits. Many of the law students in this study may have enjoyed sufficient academic performance as undergraduates without having to engage in metacognition regulation. The thinking demands of law and the highly competitive legal market will require focusing on a skill they have not honed in their prior education.

Just as with students, some lawyers may be limping along on their I.Q. or hard work. What is clear from this discussion, however, is that lawyers are particularly engaged in the kind of work that is enhanced by high metacognitive skills.

To begin with, lawyers must continually improve in rhetoric, the manipulation of language, and the comprehension of long and dense texts. In this endeavour, comprehension, writing, attention, and memory are obviously invaluable. Metacognition enhances these abilities. The experts in educational science link metacognition especially with ‘oral communication of information, oral persuasion, oral comprehension, reading comprehension, writing ... attention, memory, [and] problem solving ...’

In addition to the ability to think, lawyers rely on other skills that are enhanced by a well-developed metacognitive awareness and regulation. Perhaps the most important is the ability to learn consistently how to think better when encountering each new legal problem. In addition, a lawyer needs excellent ability in oral communication and persuasion, reading and writing, fact gathering, and stress management. All of these are enhanced by high metacognition. Law is a profession centred on resolving complex disputes through competent advocacy.

Legal education requires some memorisation, but the law is ambiguous, changing, and mutated by facts. Law professors have struggled in trying to explain that they are not ‘hiding the ball’, but instead that there is no ball. Moreover, law schools have long recognised that they cannot teach students in three years the doctrine, let alone the theory, for all the areas of law in which they may be asked to practise. And the doctrine in a particular area may change even before the student graduates by a legislative enactment or a dramatic change in policy by the Supreme Court. Thus, law schools must aim to teach students to ‘think like a lawyer’, so they leave armed to continually learn new law, new applications of the law, and creative new ways to make and use law. The thinking skills required to be a lawyer are articulated in a list compiled by Nancy Shultz:

[L]awyers must be able to (1) analyse and synthesize legal principles; organize and present a coherent and persuasive line of reasoning in speech and writing; interview prospective clients, examine witnesses, and draft pleadings or interrogatories; listen, exercise judgment, and engage in moral reasoning; and develop knowledge of self and of the premises of the legal and the social order; (2) think independently, master complex bodies of data, organize the data into legal categories, and present the resulting intellectual product in a persuasive manner that is designed to achieve a particular goal; (3) critically analyse the utility, effectiveness, and social implications of legal doctrine and procedure; integrate nonlegal approaches into the legal problem-solving process; and synthesize and build original legal theories, frameworks, and systems; (4) figure out the different goals that a particular client might choose to pursue, sort out the relationships among different possible goals, devise possible strategies for realizing a particular goal, try to separate compatible from incompatible goals, and prioritise among different possible goals.

This list is daunting, but surprisingly true to what lawyers must do throughout their careers. Not included in this list is conquering every body of law raised by each client’s facts as applied in every jurisdiction in which the client does business or incurs liability. Each of these activities is a demanding intellectual endeavour. Law school cannot begin to give a student a formula that can solve all of these puzzles, let alone address the substantive law. Notwithstanding renewed enthusiasm in making skills courses available to students, law schools cannot hope even to teach students all the mental skills they need to excel. Law is a 30 or 40 year course of study. Professor Shultz concluded, ‘[p]erhaps the single most useful cognitive skill for a good lawyer is the ability to learn from experience.’

Learning how to learn each time faster, better, and with less stress is invaluable. Metacognition generates from every learning experience the awareness of how thinking happens and then, more importantly, the ability to strategise and control thinking in the next challenge. Thus, learning how to think better in the future is a metacognitive skill of infinite value to a lawyer.

Excellent oral comprehension and oral persuasion are perhaps more important in lawyering than in any other field. Litigators must explain the facts and legal arguments for a judge or a jury and respond quickly to the arguments and witnesses of the opposing parties. This requires the litigator to use metacognitive skills to quickly comprehend what he or she hears, process it, and find words to explain a response. Outside of a courtroom, a good lawyer must effectively explain the law and its application to a lay client while guiding the client toward finding solutions. In addition, much of any lawyer's business consists of negotiating with opposing parties and their counsel.

In addition to oral communication, a lawyer must work with complex texts. Metacognition enhances the ability to quickly comprehend, process, and apply language in texts. Lawyers write motions, court briefs, contracts, settlement agreements, demand letters, and a myriad of other documents. Even before entering legal practice, lawyers must complete reading assignments in law school that are extraordinarily long and demanding. While reading, a reader uses metacognition to monitor the complexity of the text, isolate difficult passages for rereading, and stop to make connections between different points within a text.

Metacognition may allow a lawyer to more efficiently gather accurate facts and better evaluate clients' options. With each new problem, lawyers with high metacognitive skills improve their ability to strategise – to quickly identify what they already know, fill gaps in that knowledge, and predict how much time it will take to solve a problem.

Metacognition reduces stress and arms lawyers with greater confidence in their ability to tackle each new problem that enters the door. In Angela Legg and Lawrence Locker, Jr.'s study of math performance, students with higher metacognitive skills demonstrated fewer negative, anxiety-related mental processes. Although further research needs to be done to examine the relationship between these variables, Legg and Locker postulate that students with higher metacognitive skills may focus more of their mental energy on using productive 'metacognitive processes to learn and think, rather than [focusing on] anxiety related thoughts.' This one benefit of metacognition training alone is sufficient to justify efforts to include it in legal education.

Given its importance, metacognition has garnered surprisingly limited specific attention in legal scholarship to date, and what does exist sometimes tends to confuse or blur the concept of metacognition.

Moreover, metacognition training is directly included in the practices of only a few law schools. Those who have addressed metacognition in the context of legal education and lawyering, despite the differences in approach and proposed solutions, support the broad idea that metacognitive skills are critical for law students, as well as for lawyers.

Metacognition received more targeted attention following 2010, although always in the realm of legal research courses. Paul Callister argued for the use of a long-held taxonomy of thinking skills, commonly referred to as 'Bloom's Taxonomy', as revised by David Krathwohl, to guide the structure of legal research courses. Krathwohl's revision added metacognition as a new category in the taxonomy, defining it as '[k]nowledge about cognition in general as well as awareness of and knowledge about one's own cognition'.

Metacognition, Callister contends, is essential to learning from mistakes and correcting them as a law student makes his or her way through the rigours of legal research. Callister identifies a specific competency within legal research that places metacognition as an essential skill for active construction of knowledge based on experience. This connection of metacognition to schema construction is unique, even for educational research and is one that should be further pursued.

Callister suggests several types of tasks to build metacognition. First, he recommends reiterative assignments that require self-assessment of what is working and not working. Second, he suggests group presentations that are critiqued by peers. Note that this activity spurs metacognition only if peers ask questions that require self-assessment of the tasks involved. Third, he recommends reflection logs and diaries, which promote metacognition only if the students document the cognitive processes of their research and evaluate them for patterns of thinking behaviour that were more or less successful. He concludes with asking a student to create a schema for understanding the research. These suggestions are similar to what education theorists have long considered metacognitive tasks. Unfortunately, Callister's examples do not explicitly identify the critical attributes of the tasks that make them metacognitive and therefore he does not provide enough guidance for using them as metacognitive exercises.

Adding to Callister's work, Kristina Niedringhaus called for metacognition to be part of explicit instruction within legal research courses. In addition, she provided several examples of specific exercises to build metacognition: modelling, predicting outcomes, reflection, graphic organisers, and directed student teaching. Unfortunately, while they all include active engagement of students in the learning process, some of these suggestions, such as graphic organisers and simple reflection, are not necessarily metacognitive and would not, by themselves, accomplish the goal of developing metacognition. Recording reflections in journals and blogs is metacognitive only if students use these resources to identify and reflect on their learning processes, and consequently re-direct such processes. Using journals and blogs simply to reflect on substantive content will not build metacognition.

After noting that guided and structured metacognitive reflection does not appear to be in wide use yet in law school training, Tonya Kowalski tied metacognition to the critical skill of 'transferring' knowledge. Specifically, she described the apparent loss of skill in writing from first-year writing courses to clinical practice in the second and third years. She suggested steps to aid students in using acquired skills in later contexts, including asking students to 'consciously connect their learning to experience in a process often referred to as metacognitive reflection.' In addition, she identified three exercises to foster metacognition: transfer exercises, private memos, and journals. These reflective exercises engage metacognition when the students go beyond recording what happened or the content of what they learned and describe the strengths and weaknesses of their thinking process, take actions to correct errors or weaknesses, and propose solutions for improving their thinking processes. Elsewhere Kowalski clarifies that 'deliberate effort' by students is critical to make reflection activities foster metacognition. If students underestimate the importance of metacognitive exercises, they 'may tend to see these deceptively simple devices as mere "fluff".'

Anthony Niedwiecki has provided the best legal scholarship on metacognition to date.

The principal focus of Niedwiecki's work is aimed at teaching techniques for improving students' metacognitive skills as part of the legal writing curriculum. Niedwiecki recommends student self-assessments as tools to develop metacognitive skills. The first self-assessment tool is implemented at the beginning of the course when the students articulate the thinking processes they bring to the class, 'including their past learning experiences, their own skill set, their cognitive abilities and preferences, and which skills the course requires.' His second method is to require the students to use a self-assessment tool immediately after submitting an assignment, in which the students identify the strengths and weaknesses of their work. Once the professor's critique of the assignment is returned, the students compare their self-assessment with the professor's. Should the two assessments differ, the student must determine why they differ and evaluate the problems with their self-assessment. As students go through this self-assessment routine, they not only learn legal writing in the course, they also learn the skills needed to be aware of the strengths and weaknesses of their thinking in all their courses.

We cannot assume that law students, no matter how successful in prior endeavours, have achieved, either inherently or through other training, the kind of metacognitive skills so essential to top performance in the profession they have chosen.

According to Professor Niedwiecki, traditional legal education, even at its finest, is insufficient to teach metacognitive skills. Although he acknowledges a link between metacognition and Socratic Method, he argues that Socratic Method 'teaches metacognition implicitly and is only likely to help students who already have strong metacognitive strategies. For example, many professors simply do not explain the basis for the particular questions or the types of reasoning that they are asking the students [to] develop.' Other commentators on legal education are virulent in the dislike of Socratic Method but seem confused about what is the fault of the method and what is the fault of the particular professor and the natural pressures of a highly competitive and highly demanding environment. On the other hand, many education theorists have suggested positive associations between Socratic Method and teaching metacognition. This relationship warrants further exploration and suggests that reformation of legal education will not be successful if all that is added are skills courses and practice clinics.

Although legal education has become more accepting of clinical and experiential learning, such pedagogy needs to be constructed with acute awareness of the need to inculcate metacognitive skills – the ability to continue learning faster and better from each future experience – and the role of substantive law courses. And, as in law, if the skill needed for practice is the ability to think, experiences in thinking (and review of how to think better next time) are essential. That may be the best and highest use of Socratic Method. Before we throw Socratic Method out with the bathwater, the relationship between it and learning metacognition must be more fully explored.

We challenge legal educators to recognise the apparent deficiency in student metacognitive skills illustrated by our study and incorporate curricula and other pedagogical techniques to help students develop this crucial skill.

STUDENTS Law student plagiarism: contemporary challenges and responses

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The Oxford English Dictionary defines plagiarism as ‘The action or practice of taking someone else’s work, idea, etc., and passing it off as one’s own.’ Though plagiarism is hardly a new topic, contemporary conditions in higher education pose fresh challenges to law schools seeking to apply anti-plagiarism rules. Rules against plagiarism nonetheless serve important law school goals, relating to student learning, university values and preparation for legal practice. Responsive strategies for addressing law student plagiarism are thus required.

Many Canadian university students admit to plagiarising. In a 2002–2003 survey of 14,913 Canadian undergraduates, 37 per cent of students admitted to ‘copying a few sentences of material from a written source without footnoting.’ In data reported for 2011–2012, only about 1 per cent of students at 42 participating Canadian universities were subject to academic misconduct proceedings, and about 50 per cent of these proceedings related to plagiarism offences.

The low rates of university apprehension of plagiarisers, as compared with the rates of students who admit to plagiarising, suggest that many students disregard rules against plagiarism and that professors and universities inadequately enforce such rules.

Students also plagiarise by submitting others’ work as their own, including papers purchased over the internet. Students’ use of these internet paper repository sites has spawned a related industry of plagiarism policing sites, including Turnitin (www.turnitin.com).

For a fee, instructors can require students to hand in their papers to Turnitin, which in turn matches the papers against Turnitin’s web database to verify whether papers are original. Turnitin’s database is ever growing because all submitted papers in turn become part of the database, raising privacy and ownership concerns. Turnitin has a sister site called WriteCheck (www.writecheck.com) that permits students to submit their papers to the Turnitin database before submitting papers to professors, in order to ‘avoid accidental plagiarism’. Papers submitted to WriteCheck do not become part of the Turnitin database.

Together, internet essay repositories, instructor verification sites and student verification sites represent an expansive web-based industry. Additionally, more specific assignments may be ordered written by professional ghost-writers. With the ease of a credit card transaction, students today can buy an internet paper, or commission a ghost-writer, and then check their paper against the top plagiarism verification services.

The above e-commerce phenomenon highlights the tension between an idealistic or traditional view of higher education (as a principled process of learning and reward according to merit) and a cynical, instrumentalist view of higher education (as a process of buying a branded degree in order to access the job market).

Law school is an illustrative environment for the tensions between idealism and cynicism in education to be played out. On the one hand, legal study attracts idealists interested in the concept of justice. On the other hand, particularly since the rise of tuition rates in the 2000s, law school often leads to serious debt.

One student view of law school, supported by high tuition fees, is that it is primarily a consumer experience. By this view, students are predominantly purchasers, not learners; they buy degrees. According to this conception of law school, rules against plagiarism are unjustified.

Conditions contributing to contemporary plagiarism thus include the decline of public funding for universities in Canada and significantly increased tuition fees for students. This presents the danger of changing the perceived basic character of the university from a place of effort, learning and merit to a place for the purchase of intellectually meaningless credentials. In order for a prohibition against plagiarism to be justified by either learning or fairness objectives, law schools and universities generally must remain more committed to seeing students as learners than to as revenue sources.

The relationship between law school practice and professional legal practice is a complex one, since law schools train lawyers but not exclusively so. In the academic environment of law school, there is no customary acceptance of non-attribution of sources in students’ written assignments. In

contrast, the Supreme Court of Canada recently acknowledged a customary acceptance of judges' non-attribution of sources.

Expediency is not just important for courts, but also for law firms, leading to shared documents within firms. Standard forms are an intrinsic part of legal practice in many areas. Commercial providers are the source for many legal templates, and are also in the business of selling legal analysis in the form of ready-made documents on a wealth of topics.

Attribution expectations are thus different in legal practice from those in academia. In legal practice, legal service outcomes are the commodities of value, whereas in academia original documents are valued in themselves. There are at least three reasons for nonetheless maintaining plagiarism rules in law school.

First, the prohibition against plagiarism in law school seeks to ensure that students actually do the work that learning requires. This is for the benefit of the students, and for that of the public which has an interest in ensuring that law school graduates are actually well-versed in the law before becoming eligible to join the legal profession. Students who believe that they are mere purchasers of a law degree, rather than learners, may not mind that they are not themselves completing the work expected of them. But this view is not consistent with the role presumably expected of students by law schools. Students are obliged by law schools to learn through effort, and are thus responsible in large part for their own mastery of the subject of law.

Some plagiarising students excuse their conduct by denying that they have the opportunity to act differently. Paper repository sites rely on this self-deception narrative, citing lack of time as a reason to plagiarise. To combat this reasoning, law schools must send a clear message that cheating is not an acceptable option, regardless of circumstances.

A second key purpose of prohibiting plagiarism in law school is to ensure adherence to principles of fairness, honesty, and merit, essential values in a university environment. Plagiarism is unfair to other students. If one student completes course requirements expending less time and effort than others, those who spend more time and effort are at a disadvantage because they experience more pressure from a higher workload. If assignment grades are curved, and a plagiarising student's assignment is awarded a high grade, this can push another student's genuine work out of the high-grade portion of the curve. Plagiarising is also unfair to the authors whose materials plagiarisers take credit for, since plagiarisers take away the author's moral right to attribution. Plagiarism is a slight against honesty, since it pollutes records concerning the origination of ideas.

Third, the prohibition against plagiarism serves the purpose of providing students with a conduct expectation that they are expected to fulfil in good faith, thereby developing their sense of responsibility, an attribute key to the practice of law. Both professors and students are bound by the specialised norms of academic honesty applicable in universities. Plagiarism shows a lack of good-faith conduct on the part of the plagiarising student, and calls into question a student's later ability to fulfil in good faith his or her professional obligations as a lawyer. Lawyers must act 'at all times *uberimae fidei*, with utmost good faith to the court, to the client, to other lawyers, and to members of the public'. As Worthen notes, plagiarism in law school can constitute a problematic form of self-interested deceit and thus requires discipline at the law school stage.

Law school is the first site of a lawyer's professional formulation, and law schools thus have a role in the integrity of the justice system.

Student plagiarism's frequency and causes have been extensively researched. There are both internal and external motivators for cheating.

It has been suggested that the single most influential factor in student cheating is knowledge that other students are cheating. When people think others are cheating, they feel entitled, and perhaps pressured, to do the same. Another factor in academic misconduct is student perception of what constitutes cheating.

The costs of plagiarism for law students are potentially higher than they may be in other fields, because law students must establish the good character requirement for admission to the bar. Nonetheless, as with other fields of study, a sense of entitlement or justification is likely a significant factor in law student plagiarism. In contrast, plagiarism may well also arise less out of entitlement than out of a sense of opportunity while under significant time constraints. Law student plagiarism may exist along a spectrum with desperate offences (out of opportunity) located on one extreme and calculated offences (out of a sense of entitlement) on the other.

Some students likely plagiarise largely out of desperation as a one-time event. Law schools tend to have a culture of strict deadlines, mimicking court filing dates and limitation period deadlines. Some students, while successful throughout their undergraduate studies, experience overwhelming pressure during law school and plagiarise to complete assignments on time. Addressing plagiarism committed by this type of student can be as simple as ensuring that paper late penalties are not

so severe as to undermine the value of a student handing a late, but genuine, paper. Policies on extensions should be spelled out in advance such that a student experiencing a personal crisis feels able to approach a professor.

The factor of opportunity to plagiarise can be reduced on at least two fronts. First, assignment design can affect students' ability to plagiarise. Narrowly construed assignments may be more difficult to plagiarise than broadly framed assignments.

The structural environment of law school instruction can also reduce the opportunity for plagiarism. If a student is taught such that the professor observes the student's writing abilities (eg, through in-class assignments), the professor will more easily be able to detect material that is inconsistent with the student's known writing abilities. A student will be less likely to cheat if he or she knows that the professor is familiar with the student's skill level and is thus likely to catch the student submitting unauthentic work.

Some students likely plagiarise out of a sense of entitlement. Such students may take such elaborate steps as retyping passages from obscure books, arranging bogus footnotes and stitching together lengthy passages on a single topic from multiple sources. If a student plagiarises in multiple classes, including such steps as having professors read fake paper outlines or drafts, this suggests a sense of entitled dishonesty.

How can plagiarism occur out of a sense of entitlement be prevented? A student's personal sense of entitlement to cheat may be undermined by broad-based messages to the contrary. A key step in creating a culture that actively discourages plagiarism is to have a clear definition of it. Terri Leclercq suggests, '[t]he definition should be uniform ... each school should create a policy that clearly defines its understanding of paraphrasing (including examples), collaboration, databases, academic versus professional attribution, and sanctions – including whether intent will be a factor.'

Perhaps most important, a cultural environment that does not accept plagiarism will also be fostered when students realise that professors check for plagiarism and when students do not get the impression that other students are cheating. Responding to plagiarism in a way that identifies offenders and institutes appropriate sanctions requires that professors have the support needed to investigate plagiarism, a time-consuming process. Services like 'Turnitin' will not necessarily catch unattributed paraphrasing, meaning that it is up to individual professors to use their intuition and initiative to catch plagiarisers who use this method.

Several universities have two types of plagiarism responses, formal and informal. The informal process is for minor incidents and may not lead to the student having a permanent record, while the formal process involves a hearing and possible impact on the permanent record. The problem with this dichotomy of responses is that there is no way to verify whether a student has already been subject to an informal proceeding. Within law schools it would be helpful to retain the 'no permanent record' element of the informal process, but to also have a method by which it could be verified whether or not a particular student has already gone through the informal process. If a professor catches a plagiarism incident appropriate for the informal process, the professor ought to be able to confidentially verify whether or not this is the first time this has occurred with respect to a particular student. Otherwise, there is a risk of students facing only the light sanction of the informal process if the plagiarism detected is 'minor' even when this happens multiple times. There are time and human-interest pressures that work against initiation of a formal hearing process, considering the stakes involved, and it may be that professors rarely use this process unless a glaring piece of plagiarism is discovered. A formal hearing can lead to expulsion. For a law student likely tens of thousands of dollars in debt, being expelled from law school without a degree is very serious, the possibility of which not all professors feel comfortable initiating.

Institutional responses should address plagiarism in a manner that identifies repeat offenders and ensures that the punishment fits the level of the offense. This means plagiarism that is truly a product of misunderstanding or oversight should not be punished severely, a process that is fair.

Contemporary conditions, including the low rate of apprehension of plagiarising university students, the rise of plagiarism-related e-commerce, and treatment of students as consumers rather than learners, all challenge the meaningfulness of law schools' prohibition of student plagiarism. There nonetheless remain strong reasons for addressing such challenges and encouraging law student adherence to plagiarism rules; these reasons relate to goals of pedagogy, university values and professional responsibility. While universities may use electronic verification services to police plagiarism, the more potent solution is to maintain a strong cultural stance against such conduct within the law school.

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Millennial students, those who were born between 1980 and 1995, are now swelling the ranks of post-secondary education. Millennial students are self-confident, self-assured, and assertive. However, due to the self-esteem boosting approach adopted by their parents and secondary school educators, this latest generation of post-secondary students is often not properly equipped to face the demands posed by post-secondary educational institutions. While Millennial students are supremely self-confident and brimming with high self-esteem, many suffer from low self-efficacy, which is a failure to exert a sufficient level of effort and persistence in any given task. This lack of self-efficacy prevents Millennial students from overcoming challenges in their educational growth.

A new generation of learners merits a new interdisciplinary approach to education. Many have recognised that higher self-efficacy leads to better learning outcomes and provides 'a powerful predictor of educational success.'

To the Millennial student, it is impossible to be told you have 'failed' at this task, and must try again. However, by denying Millennial students the opportunity to fail and thereby learn from their failures, Millennials have developed a false sense of confidence about their abilities and an inability to develop strong self-efficacy by overcoming obstacles and meeting new challenges.

Self-regulated learning is a process whereby the student 'actively controls her behaviour, motivation and thinking process as she is engaging in academic tasks.' Self-regulated learners design how they will learn, implement and monitor a plan for learning, and evaluate their learning while reflecting on how to improve learning when faced with a similar learning project in the future. Universal design ensures that environments are 'usable by all people ... without the need for adaptation or specialised design.' Universal design for learning is defined as 'a framework for designing curricula that enable all individuals to gain knowledge, skills, and enthusiasm for learning. Universal design in learning provides rich supports for learning and reduces barriers to the curriculum while maintaining high achievement standards for all.'

Rather than focusing on the mastery of subject material, a key component of self-regulated learning, most law students tend to focus on their ultimate goals – achieving the best grade and the best job. Millennial law students, therefore, often view constructive criticism and feedback designed to improve their ability as an impediment to their ultimate success, and even indicative of failure, rather than as a device for improvement and a tool for the attainment of goals. By ignoring these important structures that increase competency, the Millennial law student fails to obtain legal knowledge for intellectual growth and therefore misses the opportunity to develop the skills, values, and knowledge that will translate into future success.

While previous generations, most notably Generation X, would focus on a task and then rebound quickly from any failure, Millennials are in a constant pressure-cooker to measure up and succeed, relying on reputation and credentials, rather than commitment and determination, in order to achieve the expected pay-off. As a result of this need for instant gratification, Millennials' expectations of achievement and success are often unrealistic and, when unmet, can lead to a sense of lack of direction.

Millennials are often referred to as 'The Entitlement Generation', inasmuch as they 'want it all, they want it now, and believe that they deserve it.' Such an attitude should make students self-sufficient. However, 'students who have the most frequent contact with their parents are less autonomous than other students.' This lack of autonomy actually creates a sense of entitlement in the students and an inability to take ownership of their own beliefs and values, their own successes and failures.

Because many Millennials have been sheltered by their parents, they are likely to enter college without having had their confidence shaken or questioned. While they are highly driven to excel in their academic endeavours, the need to succeed develops from external forces, and not from internal needs and desires. Rather than striving to succeed due to self-motivation and the need to achieve greatness for themselves, Millennials pressure themselves to succeed to meet the expectations of authority figures and please these individuals. Due to these high expectations, Millennials need to see 'a direct correlation between their efforts and the goals they seek to achieve.' Absent such positive reinforcement, Millennials may abandon the effort.

Since most Millennials have been largely sheltered prior to attending college, and thus were often protected from consequences that can accompany difficult decision-making, most of them are underprepared to face the consequences of their decisions in college. As a result, Millennials have drawn out their adolescence often into their late twenties, which has created a developmental stage coined as 'emerging adulthood'. During emerging adulthood, Millennial students often assert that they are still trying to 'find themselves,' which further delays moral judgement in favour of self-indulgent behaviour and lack of individual responsibility.

However, to become competent and independent adults, children need to increase their autonomy over decision-making and self-regulation.

According to Darby Dickerson in her article 'Risk Management and the Millennial Generation', college students contact their parents prior to making any large or small decisions by calling, text-messaging, emailing, or through social networking three to five times a day.

Additionally, these students have little to no ability to self-assess since all their lives they have been told that they are exceptional, their grades have been inflated, and they have no conception of their actual strengths and weaknesses. Unfortunately for many Millennials, these skills are necessary tools for higher education learning.

However, if students can learn to accept and internalise constructive feedback regarding performance, stronger self-efficacy will result. Stronger self-efficacy leads to greater task initiation and persistence; whereas weaker self-efficacy produces task avoidance and less persistence. For instance, a Millennial law student may know what is expected in an effective piece of legal writing and understand the steps necessary to complete the task, but if the student lacks the belief that he can achieve the outcome, then effective behaviour will not result. So, how does one develop the belief that he can achieve the outcome? In a study of self-efficacy, McCarthy, Meier, and Rinderer defined high anxiety as an intense feeling of uneasiness. They opined that high anxiety is directly correlated to poor self-efficacy and leads to negative performance on writing problems. Thus, students who think negatively about their abilities (i.e. have low self-efficacy) suffer increased anxiety and cannot develop significantly improved writing skills because they limit their strategies when writing.

To combat this anxiety and improve writing, evaluations about students' abilities, which are self-efficacy expectations, develop as students attempt behaviours and receive feedback about the quality of their performance. Positive or negative feedback will impact self-confidence and self-efficacy and influence students' decision-making about their learning strategies. The belief that a strategy has been learned that aids the learning process instils a sense of control over the process, and, as a direct result, raises the level of self-efficacy with respect to that particular process. This increased sense of control leads the student to continuously apply the strategy diligently. High self-efficacy allows students to react less defensively when receiving negative feedback. When a student has low self-efficacy, negative outcomes reinforce the perception of incompetence that the student already perceives in himself. This mentality then becomes self-fulfilling – poor results are considered evidence of perceived inability, thereby lowering self-efficacy, effort, and future performance. Additionally, students with low self-efficacy will blame either the situation (i.e. the assignment was too difficult) or another person (i.e. the instructor is incompetent) when failure occurs, rather than take responsibility for the failure and grow from the experience. This lack of responsibility for the poor performance destroys any chance of learning how to perform more effectively on future assignments.

Because a student's sense of achievement and law school success is based on academic performance as determined by grades, most law school courses fit within the framework of performance-based learning. Despite the performance-based nature of law school, however, the most successful law students are those who are 'mastery-oriented.'

The relationship between engagement and student success is critical to the growth and development of self-efficacy in Millennial students. One aspect of engagement is personal interaction with faculty and fellow students. While advances in technology, such as IMs, SMS, and social media, have provided new means for students to communicate, these electronic communications have removed interpersonal dynamics from face-to-face interactions, with a resulting dehumanisation of the communication experience. By providing enhanced opportunities for Millennials to participate in engaging face-to-face educational interactions, law school faculty may promote Millennial student growth and development in ways that increase self-efficacy. Meaningful, face-to-face interactions promote reflective reasoning, an essential component toward becoming an expert learner with increased self-efficacy.

In conjunction with the lack of personal communication, another challenge for over-protected and ‘iConnected’ Millennials is to learn to manage their own behaviour. This self-regulation includes time-management, organisation, and study skills. As Millennial law students often read their material electronically, they fail to critically read a document from start to finish, but rather tend to click on hyperlinks and review cross-referenced material, which impacts their ability to learn and synthesise the material. As a result, students are ‘cherry-picking’ the information they believe they need without any deep, analytical reflection on the material as a whole.

‘Learning is best when students are self-regulating, engaged, and motivated learners, and when the learning process is active, experiential, collaborative, and reflective.’ As part of this self-regulation, Millennial students must be trained to become expert learners. Expert or self-regulated learners view academic learning as something they do for themselves rather than as something done for them. Self-regulated learning that will increase self-efficacy is proactive and self-initiated.

Students in the process of becoming self-regulated learners grow in their learning efficiency and in their self-efficacy by accomplishing learning tasks and by developing a keener understanding of subject matter content. ‘Self-regulated learning involves a recursive cycle [of] three phases: forethought, performance, and reflection, each of which has multiple components.’ The forethought or planning stage involves the thought process where the student decides what to learn and how it will be learned as the precursor to engaging in the learning activity. The self-regulated learner then sets goals and outcomes with respect to the task and devises a strategy for achieving the goal.

The performance phase involves the learning activity itself as well as an assessment of whether the student understands the activity. Students engage simultaneously in three processes during this phase – attention-focusing, implementation, and self-monitoring. In this phase, self-regulated learners employ cognitive strategies to focus their attention on their learning and perform the learning tasks. This performance includes reviewing already-learned material to aid comprehension, utilising auxiliary sources to supplement knowledge, reading cases several times to develop fuller command of the law, taking notes on the material read, and comparing and contrasting the newly-reviewed material to material already learned.

The final stage is the reflection or evaluation stage, which guides the student in future learning activities through careful review of the process to determine if it has produced efficient and optimal learning. During this analytical stage students reflect on the work completed and determine how effective it was, in addition to considering the implications for future learning activities through self-evaluation, attribution, self-reaction and adaptation. Students who are self-regulated learners will review their own performance in light of the professor’s objectives and ‘evaluate how they are doing promptly and accurately’ and then modify learning strategies based on their experiences.

While students can use these tools to become expert learners, educators should also use mastery-oriented learning experiences to promote students’ ability to grasp content and improve skills and become self-regulated learners. Law school professors can provide meaningful tasks, acknowledge student effort and improvement, use formative assessment, and insure opportunity for feedback and revision of work product.

For instance, in a legal writing class, students could develop the explanatory case description section of an office memo based on a fact pattern and two short cases provided in class. Once the students are given the opportunity to draft, the professor can then discuss the process for drafting the section, provide feedback on examples that are successful, and offer constructive evaluation of those examples that fail to meet the objectives of effective case synthesis. Students should then have the opportunity to repeat this exercise using different fact scenarios and case law, with a repetition of the feedback loop. Successful understanding and completion of small goals which are consistently assessed and demonstrate progression to a final project promotes a learning strategy for Millennial students that can be transferrable across the law school curriculum.

Importantly, students should not be allowed to procrastinate in setting goals and completing assignments. Students with weak self-efficacy seek to avoid tasks and will not persist when faced with new and challenging tasks. In order to avoid procrastination, and, at the same time, encourage self-efficacy in Millennial students, students should establish specific goals, set dates for realistic completion of tasks, provide ‘rewards’ for progress made, design an efficient plan of time management when undertaking a new task, and recall past accomplishments to help with the current project.

Self-efficacy in Millennial students also can be impacted through an adaptation of the universal design theory advocated by the disability community. Universal design is geared towards the development of processes that allow maximum participation for every person—those who have a disability and those who do not.

Universal design in learning ‘anticipates diversity of learners and provides a framework for college faculty to incorporate inclusive strategies in their teaching.’ Through this effort, universal design in learning promotes experts learners who are resourceful and knowledgeable, strategic and goal-directed, and purposeful and motivated. The goal of universal design in learning is to maximise all student learning and increase self-efficacy in Millennial students by applying universal design principles to information resources, personal interactions, and assessments.

Three distinct principles are at work in universal design in learning. The first is to ‘Provide Multiple Means of Representation,’ which give students a variety of methods for gathering information and knowledge. Under this principle, no one method is used to access the information and knowledge; rather, it means that the techniques for teaching, the means of highlighting critical information, and the connection of information to knowledge are fully accessible to all. Educators should provide information through various modalities and provide information in a format the student finds useful. Law professors must recognise that they are teaching to Millennial students who embrace a variety of learning styles: ‘verbal (learning through written text), visual (learning through pictures, diagrams, models), oral (learning through talking out ideas), aural (learning through listening to lectures, discussions, or recordings), tactile (learning through touching and manipulating material) and kinesthetic (learning through moving and doing).’ Significantly, as many as 50–70 per cent of the population are ‘multi-modal learners’, those who prefer to use two, three, or even four different learning styles.

The second principle is to ‘Provide Multiple Means of Action and Expression’, which allow students alternative ways to demonstrate competency in what they have learned and receive feedback that is critical to growth and learning. Under this principle, educators use multiple scaffoldings, including options for oral and written expression, as well as assessments and feedback that build upon themselves as students gain competency. To satisfy this principle it is critically important that educators provide ‘formative’ feedback that encourages ‘learners to monitor their own progress effectively and to use that information to guide their own effort and practice’.

The third is to ‘Provide Multiple Means of Engagement’ which challenges students appropriately, focuses on their interests, and motivates them to learn. Some students are motivated by extrinsic rewards or conditions while others develop intrinsic motivation. ‘Some learners are highly engaged by spontaneity and novelty while other are disengaged, even frightened, by those aspects, preferring strict routine. Some learners might like to work alone, while others prefer to work with their peers.’ Thus, educators must employ a variety of methods to engage student learners. Educators should encourage student self-awareness and growth, provide motivation, and aid in the development of self-critiquing.

All of these universal design in learning principles are aimed at ‘address[ing] learner variability by suggesting flexible goals, methods, materials, and assessments that empower educators to meet these varied needs.’ Utilising flexible goals, methods, materials, and assessments, will create ‘expert learners’ that are resourceful, knowledgeable, strategic, goal oriented, purposeful, and motivated.

Millennial students need to accept that failure is not defining and that success can be measured in more ways than by a grade at the end of the semester. Rather than be demoralised and disheartened in law school, law school professors need to reach out to law students and provide ongoing, consistent, and constructive formative feedback that will improve student morale and increase self-efficacy. Students should be taught to recognise that a paper with extensive comments is a learning tool, not a judgement. To remove the unwarranted pressure on law students and encourage students to become self-regulated learners, professors should develop small, ungraded assignments that can be used as in class exercises so that skills can be digested and synthesised. As students grasp and refine their ability to self-regulate, they can be expected to grow in their learning efficiency and in their perceived self-efficacy for accomplishing additional and more difficult learning tasks. The benefits of this effort are fewer ‘lost’ students, improved quality classroom discussion, improved student morale, and improved student test performance.

Law school educators have a unique opportunity to teach the incoming group of Millennial students to integrate the parts to understand big picture concepts and then break these concepts into their working components. By using recursive teaching, professors can assess and re-assess student understanding and help Millennial law students to develop greater self-efficacy so that these students can experience failure without self-destructing.

S Park and D Farag

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Envision your typical business law or legal environment of business classroom, filled with students. As class begins, most students are alert and attentive to the instructor. However, after class is under way, some students have diverted their attention elsewhere. Now consider a different classroom, one in which every student in the class is looking at the screen at the front of the room, reading the same question, and thinking intently about the answer. Imagine further that you, the instructor, can gather the students' answers to the question immediately and, with one click, present those results back to the class, in vivid graphics. When the results are displayed, the room is filled with a buzz as some students congratulate themselves on their correct answer, while others express dismay that they chose incorrectly.

The clicker is a small hand-held device that typically contains a ten-digit alpha-numeric keypad permitting students to transmit answer choices to the instructor's receiver. Each individual clicker has a unique signal, which corresponds to a particular user, so that answers can be received on the instructor's antenna, or receiver. The receiver itself is small, similar in size to a USB storage device, and is used by connecting to a classroom or laptop computer. The clicker software permits the instructor to record and display student responses to the polled questions, in real time, in a variety of ways, including bar charts, histograms, and pie charts.

Clickers offer an excellent approach to engaging students in active learning, which is especially important to a generation that has grown up with technology in all aspects of their lives.

Clickers have been shown to improve student engagement, sometimes dramatically. Clickers can be used to break up the tedium of lecture, gauge student understanding of material and difficult concepts, and indicate areas of student misunderstanding and confusion. Clickers give every student, even those who are uncomfortable participating in class, an opportunity to provide input.

Much of the literature also suggests that students prefer classrooms with clickers. Moreover, the use of clickers can create a sense of classroom community and 'change the atmosphere of lectures' to one in which students are 'invested' in the questions and thus more likely to attend class, retain the information, and succeed on exams.

Professor Catherine Easton, in *An Examination of Clicker Technology Use in Legal Education*, one of the few articles that address the use of clickers in law-related courses, suggests eight possible uses for clickers in law courses. These include assessing prior understanding, testing student completion and comprehension of the required reading, providing formative feedback, 'breaking up' lecture, assessment, promoting peer learning, and managing attendance.

Instructors who are considering adopting clickers in their classrooms are well advised to review the literature, as the uses of clickers are vast. Indeed, our own experience reflects this; although we both adopted clickers for largely the same reasons, our individual styles and methodology differ.

Professor Park has used clickers as an integral part of her classroom teaching since 2009, primarily as a method for conveying information and giving students an opportunity to practice application of the law. Her classroom approach consists of 'mini-lectures' centring on student responses to clicker questions. She removed less demanding material from classroom discussion altogether, requiring students to learn that material on their own outside of class and then covering it briefly, if at all, during an exam review session. This frees up considerable classroom time to cover more complex topics.

Professor Farag has used clickers as a supplement to traditional lecture and also as a tool for assessing student preparation prior to in-class lectures since 2011. Sustaining student interest for long class periods (one hour and 40 minutes), even with individual and small group exercises included, can prove challenging. Professor Farag's initial motivation for implementing clickers, by 'chunking' the material into mini-sessions by introducing clicker slides between discrete topics, was to enhance student interest and involvement during class. She quickly realised that clickers could be used as a classroom tool in myriad other ways to enhance student preparation and engagement.

We grade student work via clickers differently. Students in Professor Park's classes earn participation points for engaging in class via clickers and can also earn the occasional extra credit point for answering particular questions correctly (primarily to motivate students to do the reading), but clickers are not used for assessment purposes. Students in Professor Farag's classes can earn up to 20 points (5 per cent of their grade) from pre-lecture clicker quizzes but are not awarded participation points for clicker responses during lectures.

Despite the differences in our approach, the similarity of our course content has allowed us to develop a common structure for how other legal studies faculty might use clickers. We organise our clicker strategies under three broad headings: 1) Content focused (using clickers to help students learn basic content and master legal analysis); 2) Student focused (using clickers to create a sense of community and help build student self-confidence); and 3) Instructor focused (using clickers for purposes of classroom management and assessment).

Each of these three broad categories overlaps significantly.

Content-Focused Use of Clickers: Initially, we use clickers simply to determine whether students are prepared for class. Knowing whether most students have read the material can be helpful to an instructor, who may then decide to do a quick mini-lecture on the topic to help those unprepared students get up to speed.

Next, clickers can be used to ask questions about rules of law, identification of which is one of the first steps required in basic legal analysis. The questions can be either true/false or multiple choice. The topics that could be covered are limited only by one's syllabus.

Student-Focused Clicker Use: In addition to encouraging students to learn course content and engage in critical thinking, clickers can also help promote a sense of community in the classroom. Clickers foster a student's confidence in his or her learning and ability to improve. They can also help students develop their views of the world and themselves by asking them to consider their own opinions about particular topics. Asking questions regarding students' opinions in particular can also stimulate interesting classroom discussion and, to bring it full circle, add to the sense of community and sharing in the classroom.

Professor Farag makes a special effort to use clicker slides to solicit student opinions and stimulate student discussion when covering ethics. For this topic, Professor Farag informs students that their responses will remain anonymous, which the literature supports as increasing participation. Students are polled on a series of questions such as 'Is it unfair to move into better (open) seats at a sporting event or a concert?' After students register their responses with clickers, they are given the opportunity to discuss their answers. In Professor Farag's experience, even some of the more passive students may be willing to participate in discussions when they realise that other students share their conclusion.

Clickers are especially effective as an easy, efficient way of giving students immediate feedback on their thinking.

Our experience indicates that students highly value the feedback they gain from clickers.

Instructor-Focused Clicker Use: Our third category of clicker use is instructor-focused use. In addition to teaching course content with clickers and using clickers to create a sense of community and building student self-confidence, this final section in our framework explains how clickers can be used as a classroom management and assessment tool.

Each student who attends class with a properly registered clicker signifies his or her presence simply by using the clicker during that session. After class, instructors can download that information in a report (along with other information regarding the presented slides, such as correct answers, who left class early, etc.)

Clickers can also help instructors manage and resolve early classroom issues such as determining which students have attended class for administrative purposes, learning the number of students who have not purchased textbooks, helping with clicker registration issues, or reminding students to check their e-mail regularly. Professor Park has also used clicker slides to help with decisions regarding assessment.

Professor Park also saves a lot of time in grading by using clickers to provide feedback on homework and exams at one time to the entire class, rather than individually for each student.

To encourage her students to engage in the material prior to class, at the beginning of each class Professor Farag administers a 10-question multiple choice clicker quiz that covers the assigned reading. Students who answer nine or ten questions correctly receive one point. Students have access to the questions and answers prior to class, although the order of how the questions and answers appear on the clicker quiz are altered. While the pre-lecture clicker quizzes do not ensure that students will always complete the chapter reading prior to class, they do provide an incentive for students to at least partially engage with the material prior to lecture. In addition to the instant feedback given the students and the instructor at the time of the clicker quiz, another advantage to using clickers rather than paper and pen tests to administer the pre-lecture quizzes is that the results are automatically graded and ready to be downloaded in a course learning management system such as Blackboard Learn.

Generally, our students report increased engagement and interest in the material, which we have observed to be true. Our own engagement in and enjoyment of teaching has also improved dramatically. However, the process to get to this point was sometimes rocky. We both learned through trial and error, making many small mistakes along the way, some of which may have been avoidable had we had advice or specific tips from other legal studies faculty using clickers.

Although many faculty indicate that the use of clickers in their classrooms is beneficial, mastering the technology and learning to write appropriate questions can be a challenging process, especially in the beginning. The technology may also pose problems for students, as well as the added cost of purchasing a clicker or a license to use the software on a smart device. We believe that the benefits gained by using clickers are well worth the time spent in the beginning. However, our experience mirrors that of other faculty, who routinely report that the disadvantages of clicker use are the administrative burdens and extra time needed to learn to use them effectively.

Other practical start-up issues include clicker registration, receiver use, and wireless connections. In institutions where students purchase their own clickers, one common start-up issue new faculty should be aware of is learning how to instruct students on registering their clicker information within the applicable learning management system (such as Blackboard) so that individual student responses may be recorded. On occasion, individual clickers will not work in class, due to either user error or issues with the device. In class, faculty must ensure that they insert the clicker receiver into the computer USB drive in order for the software to record student responses. Also, faculty must remember to select the 'participant list' for that particular section, or else all answers will be recorded anonymously. For students using their smart devices rather than a clicker, a reliable wireless connection is necessary.

'The rich data that are recorded during class sessions create opportunities for analysis at many levels: individual responses to specific questions, response trends for students working in teams, scores on clicker quizzes and exams, and question item-response statistics.'

Learning the technology well also opens up a variety of teaching opportunities of which faculty may be unaware such as learning to use clickers to ask 'on-the-fly' questions in class as the opportunities arise.

'The art of designing effective questions is deceptively non-trivial and can be time-consuming for an instructor new to [clickers].' Indeed, drafting slides is an ongoing process that may begin with a steep learning curve. Several authors who have written on drafting clicker questions stress the importance of understanding their pedagogical goals first. For instance, Lincoln suggests that 'effective use of clicker technology requires faculty members to first develop their course goals, including learning outcomes such as what students should know and be able to do at the end of the course.' After that, instructors can then decide how to execute those course goals through the use of clickers and structure the learning environment accordingly.

Faculty who begin using clickers also report that they are left with less time in the classroom to cover all the material in the class, which poses the challenge Easton refers to as the 'pressure to cover content.' However, Easton and others stress that the benefits of using clickers, including 'increased participation and engagement' and better awareness of student understanding, outweigh the additional time needed to learn and master them.

Other than the initial cost, the '[c]hallenges for students in courses employing classroom clickers are minimal. Students learn to operate the clicker itself without difficulty as most contemporary college-age students were born in an era where use of computer and communications technologies have always been part of their lives.' Nonetheless, some students report that they simply do not like using clickers.

Any time points are awarded for clicker use in the classroom, the potential for cheating exists. For instance, in situations where students receive credit for registering their attendance via clicker or where participation points are awarded for responding to a certain number of slides, the temptation exists that an absent student might request that a friend click in on his or her behalf. This would be especially easy to do in courses with larger enrolments.

Students report that they appreciate responding to some questions anonymously. 'Students said that clicker questions asking about anonymous but highly personal information (e.g., past sexual experiences or drug use) were often the most interesting, memorable, and useful questions for learning in sociology.' However, questions that ask students their opinions about controversial or personal matters can cause students concern over whether the responses will remain private. For some students, instructors need to take care to always include a response option that offers participation credit for those who prefer not to respond.

Introduce clickers into the classroom gradually and wait to assign points for student clicker use until the technology is mastered. This approach will also allow the instructor to experiment with the many ways in which clickers can be used without fear of failing or losing important student data.

Start small when incorporating clicker slides in your lecture. Even two to three clicker slides in a lecture can be beneficial in the beginning. Over time an instructor can gradually expand his or her use of the variety and types of clicker slides that are used.

In those few instances where a clicker question is of a sensitive nature, the instructor can (1) either assure the students that the underlying data will not be looked at, (2) toggle the polling software from identifiable to anonymous, or (3) include a 'prefer not to answer' response option that still allows credit for students who wish not respond.

Provide students with a list of terms or a lecture outline of material that will not be covered in class.

Explaining how clicker use can benefit students and how it supports your class goals improves students' attitudes toward using clickers.

Limit the amount of points that can be earned by clickers to a minimal amount, say 5 per cent, so students have less incentive to cheat with their clickers. Add a section in your syllabus that clearly communicates to students that using a classmate's clicker, for any reason, is cheating.

Our decision to begin using clickers in the classroom was one of the best decisions we have made regarding our teaching. Our students are now more engaged in our classrooms and in the material. We find ourselves thinking much more about new approaches to try in our classroom and now have a much better understanding that deep thinking alone is not enough. Deep planning is also required. An unintended reward of working to introduce clickers into our classrooms is that our renewed interest in teaching has increased our desire to be more involved in campus life and in our professional organisations. We are also more engaged, not only in the classroom, but outside of it as well, in our departments, across our campuses, and in our professional lives.

TEACHERS **Creating wise classrooms to empower diverse law students: lessons in pedagogy from transformative law professors**

S Darling-Hammond and K Holmquist

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Imagine two students, recently admitted to a top law school. Their names are Legacy Lawrence and First Generation Felicia.

Lawrence has multiple legal practitioners in his family, and spent two summers during college as well as two years after graduation working as an unpaid law clerk. He secured these positions with effort, certainly, but the social capital imparted by his parents and by his time at an elite private high school and college provided an advantage. Similar to many of his soon-to-be-peers in law school, Lawrence is a wealthy, White male.

Felicia, unlike most students at her school, does not come from a wealthy background, and is both Black and female. She is the first person in her family to ever attend college, let alone law school. To enable this huge generational shift, she graduated top of her class from her local public high school and received a full academic scholarship from a little known public college, where she also excelled. With humble beginnings, a much smaller professional network to draw from, and financial demands at home, she had neither the connections nor the time to work for free in a law office. With no mentors in her community who had been down the law road before, she had not yet set her sights on law school or even a legal internship, and knew little about what lay ahead.

And so it is that they find themselves in the same 1L class, anticipating, with great trepidation, their first lecture. They seem at first glance to be equally engaged. Yet after three years, an experiential chasm divides them. Lawrence finds and joins his first study group within days while Felicia struggles to gain acceptance to even one during all six semesters. Building on his past legal experience, Lawrence is able to discern key lessons from even the most confusing lectures. Shocked at how much is new, Felicia buries herself in self-instruction in the library, but with no legal background to lean on, she becomes increasingly perplexed. Lawrence gradually gains the confidence needed to interact naturally with professors and develops great mentoring relationships while Felicia remains too embarrassed by her confusion, and too discouraged by professors who underestimate her, to visit a single office hour. Drawing on his experiences from 1L year, Lawrence successfully gains admission to the school's flagship legal journal. Felicia's failed attempt to write on to the same journal is just one more discouraging blow. After three years, in addition to other

honours and awards, Lawrence is inducted into the Order of the Coif, while Felicia wonders what orders she could have followed to get that first elusive A or honour grade.

Felicia's deflating experience with law school has left her underprepared for the bar exam, and she fails her first time. She faces crushing debt and lacks the critical pre-requisites for legal employment – good grades, good connections, and bar membership. She is forced to decide whether to abandon her legal career before it has begun. Not so for Lawrence, who continues his family's professional legacy – just as anticipated.

These depictions seem stark, but they are representative. They combine the experiences of actual students, and are rooted in the real experiences of the authors who as law students, teachers, affinity group presidents, and advisors at UC Berkeley and UCLA law schools, have seen students in both moulds follow predictable trajectories. Of course, some White and male students have backgrounds like Felicia's and feel the impact of lacking legal connections or a background in the law. And some students from underrepresented groups bear similarities to Lawrence and parlay their prior legal experience and social capital into legal academic success. But here, we are focusing on those students who face the mutually exacerbating triple-threat of the solo status that accompanies being a member of an underrepresented group, the stereotype threat that accompanies being a member of a stereotyped group, and the challenges that attend lacking a background in the law before beginning law school. We focus on these 'Felicias' because they are an increasing portion of the United States population and law school student universe. They face unique challenges and law schools too often ignore their legitimate pedagogical needs.

What are the pedagogical needs of 'Felicias'? Student surveys from UC Berkeley Law School (hereinafter Berkeley Law) provide insight. The Berkeley Student Commission for Access to Legal Education (SCALE) is a collection of law student leaders devoted to ensuring that Berkeley Law students of all backgrounds have access to a high-quality education. They work on understanding the challenges faced by underrepresented students, improving access to foundational information, introducing law professors to advances in pedagogy, and reducing implicit bias among students and professors alike. In 2013, co-author Sean Darling-Hammond led a SCALE survey asking 118 Juris Doctor (JD) students from the classes of 2013, 2014, and 2015, about their law school experiences. The SCALE team analysed the results of this survey by students' races (Black, White, East Asian, South Asian, Latino, and/or Native American), gender (male, female, and/or other), family income (ranging from less than \$25,000 per year to over \$500,000 per year), and other factors.

Our research demonstrated that many Black, Latino, female, and low-income family students indicated that they suffered academically from 'classroom and school environments that did not encourage or allow students from diverse backgrounds to excel.' We further reported that law students indicated being negatively impacted by a variety of challenges, including: 'stereotyping, implicit and explicit bias, and prejudice'; 'a default semester structure (with one issue spotter exam at the end of the year) that did not provide sufficient feedback to students to help them assess their progress and make appropriate adjustments in their approach'; 'doctrinal classes that immediately required knowledge about court systems and legal concepts [that] students had no [previous] exposure to'; and 'a feeling among students from diverse backgrounds that 'high prestige' opportunities (such as clerkships, law review membership, and other academic and non-academic distinctions) are not meant for them.'

Latino and Black students and students from low-income families were much more likely to feel that the law school had failed to ensure they 'knew how to study the law (explaining the definitions of legal terms and court systems, the way to read and brief a case, how to write an outline, etc.) before [they were] expected to learn legal content.' Black students were 36 per cent more likely than White students, and Latino students were 90 per cent more likely than White students, to feel professors did not teach foundational content. Students in the lowest income group (less than \$25,000) were more than two times more likely than students in the top three family income groups (\$175,000–\$250,000, \$250,000–\$500,000, and over \$500,000) to feel professors were skimping on the mechanics of law school. This discrepancy may be due to the extent to which White and wealthy students had prior exposure to the law and thus needed less instruction to get up to speed.

Women were twice as likely as men to indicate that racial and gender stereotypes made them uncomfortable admitting to peers and professors when they did not understand content (58 per cent versus 26 per cent). The difference of experience was even greater based on race, as more than twice as many Blacks and Latinos than White students indicated that stereotypes had muted them when they felt uncertain. Overall, 85 per cent of Black and Latino students felt stereotypes kept them from admitting when they did not understand content. Given the confusion that students from all backgrounds experience in law school, this stereotype-induced silence might have debilitating effects for Felicias in particular.

Finally, and perhaps partially explaining some of the group based differences in educational experiences, women were 80 per cent more likely than men (20 per cent versus 11 per cent) to feel their teachers had initially judged their academic capability based on their gender or race. Black students were *five times* more likely than White students, and Latino students were *three times* more likely than White students, to feel prejudged by professors based on race or gender, with 43 per cent of Black students and 26 per cent of Latinos indicating feeling prejudged. These fears of prejudgment might encourage fears of confirming stereotypes, which in turn might harm academic performance and silence students from pursuing clarification when necessary.

This data strongly suggests that low-income, minority, and female students are experiencing law school differently than wealthy, White, and male students. But data also suggests that what professors are doing matters. Many students from underrepresented groups tied their negative performance directly to teaching styles and biased treatment. Classroom management and demeanour can have real impacts on whether students are empowered to realise their potential, or spurred to silently buckle under fears of confirming stereotypes.

While this data provides a disheartening lens into the experiences of Black, Latino, low-income, and female law students, it also provides a silver lining. In our research focusing on Felicias, we observed that against all odds, many of these students have succeeded in law school – earning top grades, gaining admission to the flagship law journal (law review), and landing prestigious clerkships with judges. When we asked what they believed led to their success, many pointed to transformative teachers who helped make up for the preparation gap by teaching them foundational concepts, the legal approach, and allaying fears of not belonging.

With the notion that legal pedagogy can make a difference in mind, one of the co-authors began a process of understanding what professors can do to help students of all backgrounds thrive. During the spring semester of 2013, he asked members of student groups which professors they considered to be the most effective at conveying complicated concepts and creating classrooms where all students (regardless of gender, race, or other group status) can learn. Students provided many glowing recommendations. Using the list of professors that students recommended as a baseline, he then utilised quantitative student evaluation scores to develop a smaller list of teachers. Berkeley Law conducts student evaluations at the end of each semester. The evaluations provide students with guidance regarding which classes to take and help Berkeley Law make tenure and retention determinations. These surveys ask students how much they agree (on a scale of 1–5) with the following statements: (1) The instructor displayed knowledge and mastery of the subject; (2) The instructor was well-prepared; (3) The instructor's presentation was organised and clear; (4) The instructor stimulated student interest and thought; (5) The instructor was responsive to and respectful of student ideas and questions; (6) To the extent appropriate for the course, the instructor was available after class, during office hours, and for supervision of student writing; (7) The assigned course materials were effective; and (8) Considering both the limitations and the possibilities of the subject-matter and the course, how would you rate the overall teaching effectiveness of this instructor?

Professors were chosen for the study if they were both recommended by multiple students in the initial email requests, and garnered average scores between 4.5 and 5 on most of the student assessment criteria above for their instruction in courses with over 50 students. Of the 13 professors who fit both criteria, 11 professors participated in in-depth interviews regarding their teaching practices.

This project was initiated in response to previous SCALE research on bridging achievement gaps at Berkeley Law. After completing the interviews, analysing the data, and drafting an original report that was distributed to Berkeley Law professors as part of an effort to improve the school's pedagogy, Mr. Darling-Hammond recruited co-author and Berkeley Law lecturer Kristen Holmquist to help contextualise these findings within her experiences as an instructor who has been part of an ongoing, multi-year effort to improve legal pedagogy and close achievement gaps at a top law school.

Conversations with these transformative professors revealed core themes that defined their pedagogy. These transformative teachers made an effort to: (1) Approach teaching with a sense of Empathy and Enthusiasm, aim to understand the student experience, and inspire passion; (2) Communicate high expectations while creating safe classroom environments; (3) Provide context for comprehension, assume intelligence of every student, but never assume prior experience or legal skills; (4) Give the material structure to make it stick, structure the semester around a narrative arc or web of related themes or techniques and be transparent about how concepts fit together; (5) Use tools like clickers, breakouts, office hours, and mid-semester evaluations to understand and adapt

to students' progress and needs; (6) Provide assessment opportunities throughout the semester to help students learn and self-correct; (7) Provide opportunities for students to learn practical and academic skills by assigning and reviewing briefs and motions and by reviewing practice exams in class and outlines during office hours; (8) Use the Socratic method to teach, not intimidate; create an environment where compassionate cold calling is the norm; (9) Transcend classical cases and embrace discussions about the modern political and social phenomena that attracted many students to law school; and (10) Learn from fellow professors as much as possible.

The transformative professors discussed here provided a roadmap for professors willing to do their part toward ensuring that students of all backgrounds can succeed in law school. They encouraged their peers to share enthusiasm and empathy with *all* their students; create positive self-fulfilling prophecies by communicating universal high expectations; dedicate time at the outset of the semester to teach the foundational skills that Felicias lack due to constrained access to social capital and pre-law legal work; create safe spaces to invite all students to discuss critical, modern social issues that impact women and minorities; structure the semester with consideration of what students who are new to the topic would need to know to understand it; assess students frequently to help them grow; teach the practical skills that many women and minorities are eager to use to improve society; practice compassionate cold-calling; and leverage opportunities, whether online or in person, to constantly polish their pedagogical craft.

However, we are also mindful that 11 interviews cannot uncover a panacea for creating wise classrooms, reducing stereotype threat, and levelling the playing field. Thus, in addition to adopting these recommendations, we hope readers will consider continuing the journey to discover solutions. The debate about academic performance has been, we believe, unjustly overwhelmed by a philosophy that tells professors they are off the hook. This philosophy soothingly says that the real causes of continued achievement gaps, both during and after law school, are the intellectual and cultural shortcomings of Felicias. We reject this premise wholeheartedly. We have met and worked with hundreds of brilliant Felicias, and we have seen so many shine.

We hope that you will reject this premise, too. We hope you will study the approaches employed by expert professors and recommended by pedagogy experts around the world. We hope that you will help ensure your students have a fair chance to get the education they need and deserve. And we hope that legal pedagogy researchers will work to quantify, in more concrete terms, the impact that the quality of pedagogy can have. While we believe there are strong links between these phenomena, we are unaware of any research that assesses these links directly.

We implore professors, specifically, to improve legal pedagogy because you occupy a rare nexus. More than any other decision-makers in law school, you both understand how classroom experiences impact students and have the power to restructure the classroom. We hope you will encourage your institution to research and implement strategies that have not only been proven effective in other educational domains, but seem very effective in law school classrooms as well. We hope you will encourage your school to provide training to professors that will help them empathise with Felicias and ensure that they thrive.

Enhancing reciprocal synergies between teaching and scholarship

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The empirical scholarship exploring whether there is a relationship between teaching and scholarship in the legal academy is largely inconclusive. In Deborah Jones Merritt's excellent 1998 article, she concludes that claims 'that scholarship either systematically detracts from teaching, or that it is essential for good teaching, both remain unproven.' Merritt's article was part of a symposium that also included work by James Lindgren and Allison Nagelberg who found a 'small positive correlation between teaching and scholarship', and by Fred Shapiro who concluded there was a negative correlation between successful scholars and their teaching prowess. In an empirical study published in 2008, Benjamin Barton found there was 'no correlation or a slight positive correlation' between teaching effectiveness and scholarly success. In a forthcoming article, Tom Ginsburg and Thomas Miles determine that there is 'no strongly negative relationship between the volume of scholarship and the amount or quality of teaching,' and indeed there may even be a positive correlation.

In considering these studies, the usual caveats regarding empirical studies apply. The composition of the pool varied widely. For example, Merritt looked at 832 law professors across a wide number of schools, Lindgren and Nagelberg looked at selected professors across three law

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schools, most unusually Shapiro considered a select group of highly-cited legal scholars, Barton considered 19 law schools using four years of data, and Ginsburg and Miles used 10 years of data and focused on a single law school (that was one of the three also studied by Lindgren and Nagelberg). Additionally, there are issues with the very definitions of teaching (default to the classroom) and scholarship (default to the law review article). Even more problematical are the measurements for 'good' teaching and 'good' scholarship. Student evaluations are the most common method for measuring successful teaching, although teaching awards, and again most unusually in Shapiro's study, the mention of teaching in a law review tribute to the professor'.

Yet even if perfected, the empirical project does not necessarily lead to a plan of action. At the conclusion of his empirical study finding that teaching effectiveness and scholarship are not strongly related, Benjamin Barton noted it was 'worth thinking about why the AALS and ABA accreditation standards basically require every law school in the United States to have a sizable teaching faculty that also engages in scholarship.' Certainly there is much thinking about systemic change regarding the allocations of law faculty responsibilities. But whether or not such change occurs, the empirical studies do not provide a map for our individual practices. For Deborah Merritt, the task of empirical studies 'is to confront the deeply held assumption that teaching and scholarship must 'necessarily detract from one another' and that once that assumption 'is called into question, if not disproven,' an empirical study can only provide 'clues' for improving our actual practices. In Merritt's final paragraph she encouraged individuals to use her study to examine the relationships between research and teaching in their own careers as we each struggle to find 'balance'.

While a search for balance may be quixotic at best, this article makes concrete suggestions for actualising synergies between teaching and scholarship. How we each, as legal academics, engage in our pedagogical and scholarly work, is individualised and to some degree, idiosyncratic. Nevertheless, just as there are methods, tips, tricks, and best practices for improving our teaching and writing, there are approaches that can enhance the reciprocal synergies between our teaching and scholarship.

Even if it is true that as legal academics we are 'juggling the disparate demands' of the very different 'professional roles' of teacher and scholar with 'one foot planted in each of two different worlds', both feet belong to the same body and the same consciousness. Our consciousness conducts a conversation between all of our different roles allowing us to juggle many different demands as well as joys in our lives.

In developing synergies between our scholarship and our teaching, there are four topics of conversation: the doctrinal, the theoretical, the methodological, and the professional. These topics are not intended to be prescriptive, but instead provide a basic taxonomy of the concerns in legal academic work. By paying attention to these specific categories, the goal is to enhance the synergies between teaching and scholarship in specific ways.

The doctrinal category is the most obvious. The optimal situation is usually suggested as an identity between what we teach and what we write. It might be casually conjectured that writing in an area in which we teach will keep our teaching up to date; this assumes that we would not ordinarily be keeping abreast of developments in areas in which we teach just as it assumes that our scholarship is always devoted to the newest issues and never historical or revisionist. But doctrinal homogeneity does allow for a mutually reinforcing experience of both breadth and depth. Generally speaking, course coverage is more broad than the focused thesis of an article, or even a book. The experience of teaching a course, no matter how specialised or 'boutique', is usually one of examining a wide swath of material. Doctrinal synergies, however, are not limited to situations in which one's teaching and writing obviously overlap. It would be rare that an academic writing an article about the evidence necessary to prove a hostile work environment in a sexual harassment case could fulfil her teaching duties with an Employment Discrimination course; perhaps she is also teaching Contracts to first year law students. She can nevertheless cultivate synergies by consciously considering similarities and differences between her current writing and teaching endeavours in ways that can lead to fruitful understandings of both. Doctrine is not cabined by courses. Are there employment contract cases in the contracts text? Are there similar doctrines that recognise implied conditions? What are the evidentiary requirements?

Thus, to enhance the doctrinal synergies between teaching and scholarship, one must be willing to pay attention to their existence. If there is recognised overlap, one should look beyond the obvious parallels. And if there is no evident resemblance, it is a mistake, I suggest, to ever say 'my teaching and my scholarship have nothing to do with each other.' By construing doctrine broadly, both in its content and in its structures, we might discover affinities that improve both our teaching and scholarship. By attending to the details embedded in doctrinal discussions, we might notice

‘coincidences’ that can lead to a more sophisticated understanding displayed in our pedagogies and writings.

The theoretical perspectives that permeate both teaching and scholarship are a fertile ground for mutually reinforcing synergies. Both established and critical theories provide tools for understanding, applying, and reforming the law. As we diagram the taxonomies and test the vocabularies of legal theory in our classrooms and in our writings, we advance the understandings of ourselves and our students. Again, this is true whether our teaching and scholarship shares common doctrine or whether the content seems dissonant.

For example, critical legal feminisms can easily be brought to bear on the ‘gender cases’ in a Constitutional Law course, with differing views of ‘liberal feminism’ or ‘cultural feminism’ or ‘radical feminism’ evident in the arguments and resolutions of the major equal protection cases. Similarly, scholarship about gender issues deploys one or more of these theories, even when it does not specifically invoke them. Being conversant with these theories in the context of teaching can benefit scholarship, and vice-versa.

More provocative synergies can arise when one moves beyond the obvious parallels. For example, being conversant with critical feminist theories can allow a conversation to extend beyond the usual parameters. In teaching, one might ask whether there is an unexamined critical feminist theory in this case, even when it is about same-sex marriage rather than gender?

In teaching and scholarship the role of theory can be a vexed one, with the boundaries between exclusionary jargon and useful vocabulary shifting. At its best, theoretical labels can be useful shorthand for expressing value-laden complexities. In our teaching, we can use this vocabulary of theoretical perspectives to communicate without students, but also can provide them with the critical tools necessary to understand judicial reasoning, the ability to make and counter legal arguments, and another mechanism to further the ‘transferability’ of knowledge across courses and across semesters. In our scholarship, this vocabulary can also be useful, not only for our readers but for ourselves in our writing. It allows us to categorise our readings, to express our criticisms, and to advance our own ideas.

Theoretical synergies might naturally arise from one’s teaching and writing, but they might also be stimulated. As a simple exercise, one could read or reread a definitional theoretical piece, preferably with an unfamiliar or incompatible jurisprudential viewpoint. This reading could be a long law review article, one of the essays in the many compilations of legal philosophy, a short blog piece on a legal philosophy site, or dare I say, even a Wikipedia page. Then one could try to articulate the reaction by an adherent of that perspective to a case one is preparing to teach and then to one’s own current scholarly project. Again, this need not lead to a Socratic colloquy in class or a brilliant textual footnote. Instead, it would serve as an additional – and perhaps provocative – topic for conversation between one’s teaching and one’s scholarship.

In addition to the doctrinal and the theoretical, the methodological aspects of both teaching and writing can be used to enhance each other by using techniques from one endeavour in the other. These methods can be mundane or sophisticated; they can be ones we consider basic or ones that are quirky; they might be technical or personal. Yet however they are characterised, we can draw on the methods we use in teaching to assist our writing and the methods we use in writing to improve our teaching. Paying attention to these occasions can reinforce the habits of synergy.

For example, the practices that make us successful teachers can be prosaic, such as starting and stopping class on time, beginning class with a recap and roadmap, and ending class with a conclusion and preview. These have obvious translatability to authoring a piece of scholarship that can seem unwieldy, but often essentially mirrors a class session. Other less mundane skills such as mastering tangents in a classroom discussion – knowing when to hold ‘em and when to fold ‘em – is also transferable to writing a scholarly piece in which our page limit operates similarly to the classroom clock.

Techniques of promoting interactivity in the classroom also have some resonance to writing. Obviously, as scholars we cannot give our readers a task, tell them to get into groups of three or four, and then report back. However, remembering the goals of participatory involvement can enhance scholarship beyond pauses for rhetorical questions with obvious answers. Instead, imagining what a reader might be thinking/doing at this point in an article can enliven a piece.

By paying attention to the methodologies we have developed to improve our teaching or scholarship and then redeploying them to the other realm, we can strengthen both our pedagogical and scholarly practices. If we feel especially deficient or untalented in either teaching or scholarship – as a general rule or in the moment – developing the habits of capitalising on the methods we possess in our stronger skill set can clear a path out of a current difficulty. Additionally, recognising

the congruence of methodologies between our teaching and scholarly roles can be advantageous when encountering our roles as legal professionals.

Fourth and finally, the professional framework for both scholarship and teaching multiples the synergies. It is important to recall that as legal academics, both our legal writing and scholarship relate to the profession. This triangulation means that both our scholarship and teaching address matters that we generally believe have some relevance to the practice of law; matters we believe practicing attorneys, jurists, legislators, and policy makers do – or should – consider. Certainly, a dysfunctional psychological triangulation or a cynical political triangulation can occur: we might exploit or manipulate a pair of these aspects in order to elevate or diminish the third. But at its best, triangulation allows for a mutually reinforcing synergy between legal education, scholarship, and practice.

Whether we are addressing doctrinal, theoretical, methodological (skills) matters – or some combination – we ask why do attorneys care and why they should; how our concerns would surface in legal practice; how a jurist should handle this problem; how law or policy might be changed for the better. In class we ask our students to role-play as attorneys representing the clients in the case we are reading or in the hypothetical we have presented. In scholarship we tacitly ask attorneys, judges, and policy-makers to follow our arguments and adopt them.

We might enhance this triangulated synergy by being more explicit and specific in our references to the profession of law. Nonetheless, this is not to suggest that all of our pedagogy and scholarship be fixated on litigation and any resultant judicial decision. The legal profession is much more diverse than that. Highlighting the multiplicity of ways of ‘practising law’ can be a stimulating topic of conversation between our pedagogical and scholarly practices.

The professional, like the methodological, theoretical, and doctrinal, is a fertile ground for cultivating reciprocal synergies between our teaching and scholarship. Some of this happens ‘naturally’, we will be able to reap the rewards if we pay attention. But there are also a few habits we might establish in order to further promote the reciprocal synergies between teaching and scholarship.

The first suggestion is to develop the habit of taking just a few minutes to think about the ‘other’ activity before engaging in teaching or writing. For example, while walking to the classroom, laden with teaching materials (the notebook, the casebook, the handouts, the flash drive with the PowerPoint presentation), it is possible to take a moment to mentally focus on a specific problem in one’s present scholarly endeavour. Similarly, when starting to research or write, as one is ready to be ‘productive’ (ensconced in front of the computer, or in the library, or at a desk with a raft of papers), it’s possible to take a moment to think about teaching a particular class and topic.

Secondly, an essential habit is to record your insights about scholarship, teaching, and any relationships. This can be done in dedicated notebooks, in documents on laptops, in any number of ‘apps’ (Evernote, OneNote, Wikipad, Stickies), on the backs of envelopes and napkins, real or cyber. For some, this habit comes easily – or seems to. We see them with their trendy black notebooks and expensive pens, as if they are sipping an espresso on a languid afternoon in a perfect café, jotting down what must be a crucial insight.

Whether the pedagogical and scholarly pursuits by legal academics are inconsistent, mutually reinforcing, or not significantly correlated remains subject to debate. Likewise, in deliberations about the future of legal education the normative claims about the relationship between scholarship and teaching are unsettled. As individual faculty members in legal academia, we may have little influence on these developments. However, we can aspire as legal academics to be the best teachers and scholars possible. If that is one’s ambition, then enhancing the synergies between teaching and scholarship will be time well spent. By paying attention to the doctrinal, theoretical, methodological, and professional categories, as well as developing three simple habits, one might increase one’s chances of mutually reinforcing synergies between teaching and writing. It might make one better at both. Or perhaps even happier with both.

There is no doubt that this is an innovative text emphasising the importance of simulation as an integral part of a teaching and learning strategy. The Introduction explains the meaning of ‘simulation’ within the context of law teaching, describing how it involves tasks, exercises and assignments whereby students are either presented with real facts or realistic scenarios which they then have to follow through with prescribed actions in a predetermined way. The editors emphasise the merits of the simulation model as a highly desirable alternative to the disadvantages of the structured and inflexible model of the ‘traditional’ learning experience, stressing its value as an innovative mechanism for teaching and learning. In support of their view as to the importance of simulation in modern law teaching they emphasise how by breaking down barriers between the lecture room experience and the real world, simulation has an invaluable role both in preparing students for legal practice or assisting them to use their legal and transferable skills in other law related employment.

As might be expected the 12 chapters of the book cover a wide ranging number of topics which can involve the use of simulation models. However there are some chapters which will be of particular interest to the law academic. In Chapter 3, Nicola Ross, Ann Apps and Sher Campbell question the use of traditional approaches to legal education in satisfying the expectations of students or the legal profession. They argue that while simulation already has a significant role in clinical legal education, its use is challenged in mainstream undergraduate legal education by large class sizes and the difficulty of incorporating it into the mainstream curriculum. Nevertheless the text describes the means by which the authors of the chapter have been able to incorporate not only simulated client interviews into a foundation first-year law subject, but how the use of simulation can be structured into a role for students as to how they might approach their role as lawyers in the lawyer-client relationship.

In Chapter 6, Maebh Harding examines the use of interviewing and negotiation in furthering a critical understanding of Family and Child Law. She does this by illustrating her text with a case study of how she used simulation in her family and child law units at the University of Portsmouth from 2008 to 2012. In undertaking this exercise she uses it to examine the purpose of the academic law degree, including a modern review of legal education and the relevance of the tension between vocationalism and liberal education and its relevance to current legal education. She incorporates into this review the question as to whether there is a link between what a law teacher perceives to be the overall goal of the law degree and the typical teaching methodologies used to achieve this purpose. This is all placed into context when the author recounts the use of simulation on the family and child law units at the University of Portsmouth, particularly in the operation of the family law interview and child law negotiation. In describing these techniques she argues that simulation can be used to further the goals of liberal education and that it encourages more active learning and enthusiasm from the students than the use of problem questions and essays.

In Chapter 10 Edward Phillips revisits the law of evidence with a case study carried out at the University of Greenwich Law School on the practicalities of simulation-based learning and teaching. He does this by illustrating how simulation can stimulate both problem solving and role play with the latter offering the advantage of being both convenient, tried-and-tested and economical in terms of time and resources. The author offers the view that simulation-based teaching and learning offers both the advantage of being student-centred, focusing on the real knowledge and skills of students and integrates reality and context with academic learning. These chapters are illustrative of the challenging nature of this book which the editors in the Postscript claim to offer simulation techniques as providing a range of ideas and experiences based on practical application and relevant educational theory.

Emeritus Professor David Barker AM
Editor

In their preface to this book the authors claim that the best hope for ethical behaviour by legal practitioners is for law students to learn as early as possible about the most appropriate and essential connection between 'their humanity and their engagement in passionate and reasoned lawyering'. They also stress that ethics can be the bridge between these two aspirations.

The text is an interesting combination of 11 Chapters, 11 figures (such as a checklist of issues to consider before blowing the whistle), three Tables (four approaches to legal ethics), three Illustrations (cartoons etc.), Case Studies (alternative billing methods), a Table of Statutes and a Table of Cases. It also incorporates a complete set of online resources. From this it can be gathered that the whole book is, in effect, an entire ethics study manual.

This means that on first appearances it can be a daunting document and it requires the reader to carry out a structured approach to utilising the text, but when this is done it is possible to gain maximum benefit from all the resources which it makes available.

A good example of undertaking this approach is with regard to Chapter 3, The Responsibility Climate: Professionalism and the Regulation of Lawyers' Ethics. This is a suitable chapter to use as an example as it deals with the structure and processes of the regulatory systems which govern the legal profession, particularly with regard to ethical considerations. This incorporates the role of both the state and territory bar associations and law societies in the self-regulation of their professions. It also includes a study of the Wendy Bacon Case, one of the best known instances related to the refusal of admission into the legal profession and whether or not this ruling was justified. In addition there are discussion questions on the outcomes of this decision and a figure illustrating the key relationships of the *Legal Profession Act 2004* (Vic). The conclusion to the chapter explains why the ongoing reform of lawyers is so important, particularly with regard to ethical behaviour.

In contrast Chapter 9 is concerned with what might be considered a mundane topic –Lawyers' Fees and Costs: Billing and Over-charging. This is an extremely balanced chapter from both the point of view of the public and the lawyer. It explains how much easier it is for a householder to see what a plumber does and can relate to what might be the apparently expensive repairs to their roof and the fact that the roof no longer leaks in contrast to the difficulty for a legal client to comprehend the worth of their lawyer's work which is often invisible to the consumer. This is because the latter often consists of applying abstract knowledge and conceptual judgement to factual situations that can differ only subtly from previous cases. In this respect it examines the complex relationships arising from ethical problems with lawyers' fees and billing practices by providing a well-expressed explanation relating to the operation of item remuneration billing and time based billing. This explanation is assisted by the use of four well produced figures setting out the relationship between Solicitor-Client Costs, Party-Party Costs and Total Legal Costs, a Summary of Disclosure Requirements under Model Laws, and an Example of Rate of Increase of Fees in Litigation Under Traditional Item Remuneration Basis as compared to an Example of Rate of Increase of Fees in Litigation Under an Event Based Fee System. The chapter also has a table which illustrates the Amount of Legal Fees Charged at Different Stages of Litigation Under Traditional Item Remuneration Charging Structure and Event-Based Fee Structure. Again the chapter also includes a set of discussion questions and case studies.

The view is gained that the manner by which this complex topic is dealt with in Chapter 9 by the authors could serve as an object lesson both to the expected law student reader and would also assist any experienced legal practitioner or law academic in comprehending the ethical problems of both fee charging and costs.

Both Chapters 3 and 9 are examples of an outstanding text which covers all aspects of the ethical dilemmas which could possibly be faced by lawyers in the course of their professional career. It could obviously serve not only as the basic textbook for a law school ethics subject forming part of the undergraduate or postgraduate curriculum, but also as a recommended text supporting the legal ethics module provided as part of the compulsory continuing legal education programmes of most state and territory law society or bar associations.

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