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Legal skills: understanding and adapting legal education to the changing needs of clients

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Abstract

The movie *A Few Good Men* is known for the infamous line: 'You can't handle the truth.' Less attention is placed on the dialogue that follows when Jack Nicholson's character tells the attorney cross-examining him: 'You have the luxury of not knowing what I know… I have greater responsibility than you can fathom.' In imbuing lawyering skills, much of the academic focus has been on legal writing, research, analysis, and advocacy. Although, these skills remain the core requirements for lawyers in 'handling the truth', this article argues, however, that, particularly, in a world changed by the pandemic and artificial intelligence, lawyers will need to be able to offer more. There needs to be a move from a 'linear' approach to case progression which, typically, starts with the historical facts of the dispute presented at an initial lawyer-client interview and progresses to final hearing or settlement, to one in which lawyers need to consider the wider implications of the conflict that has arisen. Consideration must be given to the personal, financial, societal factors or responsibilities that may have contributed to the legal issue for the client and how these factors may potentially impact on the client's autonomy to resolve the dispute.

In attempting to ensure that future lawyers 'fathom' the client perspective, this article will examine importance of legal educators underpinning design thinking in law by being cognisant of, and engaging law students with theory, to include Bronfenbrenner's theory of the 'ecology of human development' and the extent to which being part of this wider ecology impacts on conflict and the way in which a dispute develops. It argues that a robust theoretical framework will aid understanding for a more 'client-centred', multi-disciplinary and therapeutic jurisprudential approach enhancing design thinking, such that

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future generations of lawyers develop the transversal skills required to take a wider, shared leadership perspective in addressing clients' concerns in a more complete way. While this applies more specifically to future lawyers in common law jurisdictions, it is argued that such understanding will be important for anyone who wishes to use their law degree or training, in-house or in industry, whether working with teams of professionals, clients or customers across both common and civil law jurisdictions.

Keywords: lawyering skills; legal education; role of lawyers; conflict resolution; design thinking; therapeutic jurisprudence.

Introduction

The legal profession is often slow to adapt and change, priding itself in its long-established traditions. In legal education, much focus is placed on what may be called 'typical lawyering skills': students are taught how to critically analyse information, research, and develop legal writing skills. The teaching of law has expanded to ensure that law students are now given opportunities to engage in experiential learning. This occurs, for example, through mooting before members of the judiciary thus gaining valuable experience and skills and, experiencing what has been termed 'law in action', through structured and managed work placements and law clinics.[1] These 'transferrable skills', not only enhance students' careers as lawyers but also prepare them for roles as in house counsel or in industry.[2] Much has thus been achieved since the early criticism from the likes of Schon that lawyers were too focused on 'technical

[1] Roscoe Pound, 'Law in Books and Law in Action' (1910) American University Law Review, 44. Law clinics first became popular in the US. More recently, they have become prevalent throughout both common law and civil law jurisdictions While the approach to the teaching of law in civil law jurisdictions was traditionally more doctrinal, lecture-based, changes arguably assisted by the adoption of the Bologna process seeking to promote a European model of higher education, necessitated legal educators to harmonise across jurisdictions and develop innovative teaching methods that linked theory and practice. See Laurel S. Terry, The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes, 41 Vanderbilt Journal of Transnational Law (2008) 107; Philip Genty Overcoming Cultural Blindness in International Clinical Collaboration: The Divide between Civil and Common Law Cultures and its Implications for Clinical Education Columbia Law School, (2008) 15 Clinical Law Review 131; Alberto Alemanno & Lamin Khadar (eds), *Reinventing Legal Education How Clinical Education Is Reforming the Teaching and Practice of Law in Europe*. (Cambridge University Press, 2018)

[2] Michele M. Leering, 'Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism' (2017) 95 Canadian Bar Review 47,82

rationality' rather than on how problems were actually solved.[3] While for lawyers, technical rationality remains important, this article highlights the need for both the technical rationality and practice focused elements to have a grounding in robust theoretical frameworks. While experiential elements of legal training are important in ensuring that law students are work-place ready,[4] nevertheless, it is also important to use their time at University, to reflect more broadly on the 'role' of lawyers and how they can best serve their clients, understand the client perspective and ensure access to justice.

Work has been undertaken in some jurisdictions to improve the courts system to make access to justice for potential litigants more 'human centred.'[5] These approaches concentrate on 'new interventions and knowledge— like social innovation, human–computer interaction, research through design, design for dignity, and participatory design.'[6] This article argues that to enhance and achieve a 'human-centred' approach to access to justice, however, change must begin with the way law students and thereby future lawyers, are taught during academic degrees at University level.[7] Work has begun in developing a design thinking approach to the teaching of law. Described by Hagan, the Director of Stanford University Legal Design Lab, as 'a new track for innovative legal education',[8] a design thinking approach argues that students need to move away from theory and structured education to improving skills like empathy and creativity which have, in the past, been somewhat frowned upon as

[3] Donald A. Schon, *The reflective practitioner: how professionals think in action* (New York, 1983)
[4] To include: law clinics; work placements; simulated learning and mooting
[5] Margaret Hagan, 'Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System' (2020) 36 (3) Massachusetts Institute of Technology Design Issues 3-15
[6] Margaret Hagan, 'Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System' (2020) 36 (3) Massachusetts Institute of Technology Design Issues 3, 6.
[7] Human-centered design has been described 'as a systematic approach to problem-solving and innovation, centering on human experiences to advance their overall well-being and alternate system-realities.' M. Senova, *This Human: How to Be the Person Designing for Other People*, (BIS Publishers, 2017).
[8] Margaret Hagan, 'Design Comes to the Law School' in C Denvir (ed) *Modernising Legal Education* (Cambridge University Press, 2020)

potentially clouding lawyers' objective, rational stance.[9] Such approach includes providing students with opportunities to engage with industry and exposing them to 'complex 'messy' problems'[10] that they are likely to encounter in practice. This article argues that while this sometimes termed 'reverse approach to legal problem solving'[11] is to be welcomed, that we need to go one further step back to truly go forward, not by moving *away* from theory but by ensuring that aspiring law students' education is underpinned with a robust theoretical foundation for such innovative approaches. Leering notes that legal educators are in a 'powerful position' to provide this underpinning to help students develop the skills necessary to become what she refers to as 'an integrated reflective practitioner' with potential benefits for the lawyers themselves in dealing with the challenges of practice and the clients they represent in 'fathoming' their perspective.[12] Hews *et al*, likewise, emphasise how such approach can 'humanise the teaching of law and support students to develop emotional intelligence, build resilience, diversify their thinking, gain creative confidence, and tackle their fear of failure.'[13] Wrigley and Mosley acknowledge that legal design thinking can operate alongside traditional legal education having 'transformative potential in legal education' and outlines the possibilities that provides for 'legal innovation and the future of work'.[14] Such innovation is also important as noted by the International Labour Organisation

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[9] See Rachel Hews, Gnanaharsha Beligatamulla, Judith McNamara, Queensland University of Technology, 'Creative Confidence and thinking skills for lawyers', Thinking Skills and Creativity (49) 2023 available at Creative confidence and thinking skills for lawyers: Making sense of design thinking pedagogy in legal education - ScienceDirect for research into the benefits of a design led approach to teaching law. Although a limited study and therefore not claiming generalisability, the study identified benefits for students to include developing empathic and creative skills, enabling a human-centred approach, developing confidence and broadening students' mindsets and way of thinking.

[10] Ibid at 11

[11] Rachel Hews, Gnanaharsha Beligatamulla, Judith McNamara, Queensland University of Technology, 'Creative Confidence and thinking skills for lawyers', 2023(49) Thinking Skills and Creativity available at Creative confidence and thinking skills for lawyers: Making sense of design thinking pedagogy in legal education - ScienceDirect 6

[12]Michele M. Leering, 'Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism' (2017) 95 Canadian Bar Review 47, 49-50; see also John Dewey, *How We Think: A Restatement of the Relations of Reflective Thinking to the Educative Process*, 2nd ed DC Heath & Company, 1933); Gillie Bolton*, Reflective Practice*: *Writing and Professional Development,* 2nd ed (Sage, 2005)

[13]Rachel Hews, Gnanaharsha Beligatamulla, Judith McNamara, Creative Confidence and thinking skills for lawyers: Making sense of design thinking pedagogy in legal education, (2023) 49 Thinking Skills and Creativity,10.

[14] Cara Wrigley and Genevieve Mosley *Design Thinking Pedagogy, Facilitating Innovation and Impact in Tertiary Education* (Routledge 2023) 10

in recognising the benefits of a human centred approach to education more generally, broader psychosocial skills being 'instrumental in promoting fundamental principles and rights at work.'[15]

Accepting the differences between legal education in common law and civil law jurisdictions, one being more heavily oriented towards facts, precedents and the nature of the arguments made and, the arguably more formulaic approach to legal interpretation under civil codes, this article argues that there are benefits under both systems of a more holistic approach, especially in an increasingly globalised legal environment with international trade, the widespread influence and impact of technology and the movement of clients and lawyers. Three main issues will be addressed in attempting to further improve legal education. These changes are not resource intensive, requiring instead and perhaps more challengingly, a change in culture and approach.

Centrally, part one of this article will highlight the importance of practice being informed by theory. Understanding Bronfenbrenner's theory on the ecology of human development,[16] Coser's writings on conflict and the function it plays in society,[17] factors that influence the trajectory of a dispute including Felstiner, Abel and Sarat's work on dispute transformation,[18] will provide law students with an insight into the 'person' that is their client and the wider context of the dispute. Frequently students are only exposed to these concepts in modules such as Alternative Dispute Resolution (ADR), which although widely available on modern curriculums, is most often taken as an elective rather than mandatory class, in some, but possibly not all universities. Part two of the article argues that students should be introduced to the comprehensive law movement and the concept, as part of that, of therapeutic jurisprudence. It is argued there is merit in understanding the field of therapeutic jurisprudence and how principles enshrined within this approach can be used across all areas

[15] International Labour Organisation, The Technical Meeting on the Future of Work in the Context of Lifelong Learning for All, Skills and the Decent Work Agenda (17–21 May 2021) Final Report, available at https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_dialogue/%40sector/documents/meetingdocument/wcms_822567.pdf 18,19

[16] Urie Bronfenbrenner, 'Ecological systems theory', in Ross Vasta (ed), *Six theories of child development: Revised formulations and current issues* (Jessica Kingsley Publishers Ltd, 1992).

[17] Lewis Coser, *The Functions of Social Conflict* (Free Press, 1956)

[18] William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…' (1980-1981) 15 (3-4) Law and Society Review 631

of law: examining the possibility of law as a therapeutic agent. This approach, which arguably underpins design thinking, will help students understand that good communication does not simply mean advocacy and legal writing but also encompasses active listening, teamwork and problem solving to really appreciate the impact of this particular conflict on the client. Finally, and building upon a therapeutic approach, part three of this article will argue for a multi-disciplinary approach to the teaching of law. Collaboration is one of the skills embraced as part of taking a design-led approach. It is important to encourage law students to fully identify when there may be a need for assistance from other professionals and develop confidence working as part of a team with students from other disciplines, understanding and appreciating the role that each professional on the team has in resolving both the legal issues and, what has been termed the 'extra-legal concerns', for litigants.[19] Adopting a design thinking approach within this robust theoretical underpinning,[20] it is argued will enhance a modern approach to lawyering in the care and management of clients because, as noted by Sachs:

> …lawyers constantly deal with people. They deal with people far more than they do with appellate courts. They deal with clients; they deal with witnesses; they deal with persons against whom demands are made; they carry on negotiations, they are constantly endeavouring to come to agreements of one sort or another with people, to persuade people, sometimes when they are reluctant to be persuaded. Lawyers are constantly dealing with people who are under stress or strain of one sort or another.[21]

[19] Susan Daicoff, 'Law as a healing profession: The comprehensive law movement' (2005, Fall) Pepperdine Dispute Resolution Law Journal NYLS Clinical Research Institute Paper No. 05/06-12, 3–4.

[20] While research has been undertaken into the benefits of a design thinking approach across other disciplines, research in the discipline of law has been limited. A small scale study undertaken was carried out by Rachel Hews, Gnanaharsha Beligatamulla, Judith McNamara at Queensland University of Technology, 'Creative Confidence and thinking skills for lawyers', Thinking Skills and Creativity (49) 2023 available at Creative confidence and thinking skills for lawyers: Making sense of design thinking pedagogy in legal education - ScienceDirect

[21] E.N., Griswold, (1956) 37 Chicago Bar Record 199 at 203, cited in Howard Sacks, 'Human Relations Training for Law Students and Lawyers', (1959) 11 Journal of Legal Education 316-345, 317.

Theory to inform practice

As noted earlier, particularly in common law jurisdictions, the move from a fully doctrinal approach to the study of law to one that it is more experiential has resulted in many law students being more 'practice ready' when entering the workplace. Much of the focus, however, has been on developing 'transferrable skills' specific to law, rather than taking a more holistic approach. Pierson-Brown has cautioned, however, that '[t]eaching law students to treat legal claims separately from critical reflection on the social and institutional systems tied to their creation ultimately leaves unanswered… question[s] about the purpose of a lawyer and the potential of advocacy to create meaningful change.'[22] To fully understand the impact of the particular legal issue that a client may present with, it is important for law students and lawyers to have an understanding of: the social context within which the client is embedded; 'conflict' as a concept and how disputes arise and are transformed; how the actions of the clients and the passing of time impacts on a dispute and also the impact of the approach taken by lawyers themselves as agents in the dispute resolution process.

Bronfenbrenner's ecology of human development

Recent scholarship on legal education has called for 'a systems thinking pedagogy': giving law students the tools to be able to 'see the water'; that is, to articulate the often translucent context that gives rise to legal problems.'[23] 'The task of the law professor' Pierson-Brown argues is therefore to 'bring conscious discussions about systemic outcomes to their instruction'.[24] This 'systems thinking' approach to legal education helps law students and future lawyers to recognise that the law is 'both a system in and of itself and an element of the other social and institutional systems.'[25]

Leering notes '[t]he depth of theoretical sophistication in the evolving professional education discourse in other disciplines' and argues that, by contrast, there is a 'paucity of attention paid to reflective practice in legal

[22] Tomar Pierson-Brown, '(Systems) Thinking like a Lawyer', (2020) 26 (2) Clinical Law Review 515 -562, 518
[23] Ibid at 533.
[24] Tomar Pierson-Brown, '(Systems) Thinking like a Lawyer' (2020) 26(2*)* Clinical Law Review 515-562, 533
[25] Tomar Pierson Brown, '(Systems) Thinking like a Lawyer' (2020) 26(2) Clinical Law Review 515-562, 532

education.'[26] It is argued, therefore, that a basic understanding of social systems, how they operate and what may influence a client perspective, reflecting more broadly on conflict as a concept, and awareness including self-awareness will enhance the law students' skills in practice.

Bronfenbrenner's theory on the 'ecology of human development' is thus important, in aiding law students and lawyers to reflect upon the 'social and institutional' systems, the 'multi-layered web into which disputants are born.'[27] Bronfenbrenner describes the ecology as the 'study of the progressive, mutual accommodation, between an active, growing human being and the changing properties of the immediate settings in which the developing person lives'[28] He notes that this process 'is affected by relations between these setting, and the larger context in which the settings are embedded.'[29] In describing this, Bronfenbrenner refers to a series of 'systems' which, in his view, allows humans to develop in a manner similar to a 'set of nested structures, each inside the next, like a set of Russian dolls.'[30] The immediate and wider relationships encountered throughout life can impact on the manner in which disputes are resolved, the extent to which individuals have autonomy, as will allegiances that may form and macro factors like changing government policy and the impact of time. Douzinas, too, as a postmodern legal scholar, notes that the

[26] Michele M. Leering, 'Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism' (2017) 95 Canadian Bar Review 47, 62
[27] Urie Bronfenbrenner, 'Ecological systems theory', in Ross Vasta (ed), *Six theories of child development: Revised formulations and current issues* (Jessica Kingsley Publishers Ltd, 1992).
[28] Urie Bronfenbrenner, *The ecology of human development: Experiments by nature and design* (Harvard University Press,1979) 21
[29]Urie Bronfenbrenner, *The ecology of human development: Experiments by nature and design* (Harvard University Press,1979) 21
[30]Ibid. at 201. The first system he identified was the 'micro-system.' This, he believed, represented the immediate relationships that people have in their lives. For example, the relationship between a parent and a child; between a child and a teacher. The next level, Bronfenbrenner described as the 'meso-system', namely, the relationships between differing 'micro-systems': the child's home and school environment combined and how they may influence each other. Beyond these immediate relationships, Bronfenbrenner noted how factors outside of an individual's direct environment, what he termed the 'exo-system,' may also impact on their lives: a parent's relationship with their work environment may impact on the family, in a situation where a parent, perhaps, becomes unemployed. Unexpected unemployment, for example, may not be relevant to the immediate issue at dispute but will affect how matters are resolved. Finally, wider social policy and developments, at national or international level, form part of what Bronfenbrenner referred to as the 'macro-system', or society's plan. Issues like changing Government policy, the pandemic or Brexit although initially at a macro-level filter down and impact on everyone

'[t]ime of justice differs from the time of interpretation.'[31] Issues that were important when the dispute began may not be as consuming for the parties at the time the matter comes before the court. Likewise, having to reengage with the issues that initially caused the dispute, perhaps up to two years later when a case comes before a court, may reignite tensions.

Much of Brofenbrenner's research was undertaken using a phenomenological approach; studying actual 'human lived experiences' rather than abstract theorising. He studied human behaviour over the life-course. Elder describes the 'life course approach' as one that:

> alerts us to the real world a world in which lives are lived and where people work out paths of development as best they can. It tells us how lives are socially organized in bioecological and historical time, and how the resulting social patterns affects the way we think, feel and act.[32]

Building on Bronfenbrenner's systems the place people are born and their life-history, influences their life-course and is their initial frame of reference. While humans have a certain agency in the decisions they make, Elder, in pioneering the life-course perspective, notes that particular events can become what he terms 'turning points' leading to periods of 'cumulative advantage' or 'cumulative disadvantage.' An unexpected success in life or conversely, ill-health can become the key identifier in the way persons recount their life experiences. The most recent example, perhaps, that the world can relate to at macro-level is life and practice pre and post the Covid 19 pandemic. Facilitating clients to express their narrative on how a dispute arose for them within the perspective of their life-course to date will ultimately help in enabling both the lawyer and the client find the best possible solution.

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[31] Costas Douzinas, *Law and Justice in Postmodernity* (Cambridge University Press, 2015) 218.

[32] Glen Elder, The Life Course as a Developmental Theory, 1998, 69 (1) Child development 1-12,9

Conflict and dispute transformation

In general, 'conflict' is perceived as a negative, signalling difference of opinion and having 'disruptive, disassociating and dysfunctional consequences.'[33] Coser, however, argues that '…groups require disharmony as well as harmony' and that 'a certain degree of conflict is an essential element in group formation and the persistence of group life'.[34] Thus, while conflict can be 'destructive,' he opines, it can also be 'constructive' or even creative …an opportunity for learning and growth.'[35] With conflict, positions and assumptions are challenged. Follet likewise, has argued that we should embrace conflict commenting:

> As conflict—difference—is here in the world, as we cannot avoid it, we should, I think use it. Instead of condemning it, we should set it to work for us… The music of the violin we get by friction… We talk of the friction of mind on mind as a good thing. …we have to know when to try to eliminate friction and when to try to capitalize it, when to see what work we can make it do. That is what I wish to consider here, whether we can set conflict to work and make it *do* something for us.[36]

Conflict is a complex concept. In seeking to address it, some disputants take a positional approach, whereas others may more easily accept that there can be a 'difference' of opinion between parties without assigning particular labels: some will take personal responsibility early on in a dispute whereas others tend to be more assertive using power, threats, or rights-based approaches. Thomas, in documenting the strategies that people use to either 'avoid' or 'engage with' conflict, lists approaches ranging from collaborative, accommodative and compromise, to avoidant and competitive.[37] Mayer similarly describes

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[33] T. Parsons, 'Racial and Religious Differences as Factors in Group Tension' in Bryson, Finkelstein and MacIver (eds) *Approaches to National Utility* (Harper Bros, 1945) 182–199.
[34] Lewis Coser, *The Functions of Social Conflict* (Free Press, 1956) 31.
[35] Carrie Menkel-Meadow, 'Mothers and Fathers of Invention: The Intellectual Founders of ADR' (2000) 16 Ohio Journal of Dispute Resolution 1-37, 6.
[36] Mary Parker Follet, *Prophet of Management: A Celebration of Writings From The 1920s* (Pauline Graham (ed.) (Harvard Business School Press, 1996) 67–68.
[37] Thomas, K.W., 'Conflict and Conflict Management' in M.D. Dunnette (ed) Handbook of Industrial and Organizational Psychology, Skokie, I11.: Rand Mc Nally 1983

responses to managing conflict through either one's tendency to avoid conflict at all costs or engage either directly or indirectly with it. [38]

Underpinned by an understanding of Bronfenbreener's ecology of human development, there is a need to also appreciate the importance of 'groups'[39] as noted above, which tend to form naturally within Bronfenbrenner's systems and understand the extent to which group dynamics influence the trajectory of a dispute. When a threat arises from something outside of the group, the group tends to mobilise to protect itself.[40] Another common reaction is for groups to pursue goals in a representative or collective way with one group appointed or self-appointed person, taking on the assumed role as protector of the 'group'. Coser argues that taking on these roles often allows disputants to distance themselves from personal issues and to argue or claim 'respectability'; portraying an image of fighting for the rights of other members of the group.[41] As a group, for example, the feminist movement argue that women lack autonomy, hampered by 'relational' issues, arguing that women, in particular, feel constrained in the decisions they are free to make during periods of conflict due to the potential impact of such decisions on the lives of children in their care.[42] If conflict arises from within a group and threatens its preservation, it is often more deep-seated and difficult to resolve. Coser argues that hostilities that have been building up will suddenly come to the fore; those that perceive themselves as 'underprivileged' will seek to assert their rights.

In her work, Menkel-Meadow notes additional factors to consider, including: the extent to which individuals are free to choose the dispute resolution method they wish to use or whether this may be court ordered; the visibility of the dispute itself — whether the negotiations take place in public or in private; the costs (legal and emotional) involved and, ultimately, what is at stake for the parties.[43] More broadly within the macro-system, anthropologists point to the

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[38] Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*, (John Wiley & Sons, 2000)
[39] Lewis Coser, *The Functions of Social Conflict* (Free Press, 1956) 35.
[40] Gorge Simmel, *Conflict* Wolff K. H., *et al*. trans., (Free Press, 1955) at 43-44; Lewis Coser, *The Functions of Social Conflict* (Free Press, 1956) at 67.
[41] Lewis Coser, *The Functions of Social Conflict* (Free Press, 1956) 113.
[42] C. Mackenzie, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 1999); Bryan, P., '"Collaborative Divorce", Meaningful Reform or Another Quick Fix?' (1999) 5 4 Psychology, Public Policy and Law 1001-1017.
[43] Carrie Menkel-Meadow, 'Mothers and Fathers of Invention: The Intellectual Founders of ADR' (2000) 16(1) Ohio Journal of Dispute Resolution 1-37.

importance of cultural issues in the type of disputing processes that a particular society may adopt. Nader, for example, cautions against merely transplanting different frameworks for resolution of disputes from one culture to another pointing to the difficulties that may arise for cultures that place a strong emphasis on public oversight in the administration of justice engaging in alternative processes, for example, mediation which may be perceived as being 'secretive' or occurring behind closed doors.[44]

The transformation of disputes

Disputes are further complicated by the fact that they are also subjective and reactive and impacted by persons' changing approaches or moving between approaches, the way conflict is managed by individuals or groups at cognitive, behavioural and emotional levels, the power these individuals have directly or indirectly and the roles they play in the conflict: most commonly identified as advocate, negotiator or mediator.[45] Each disputant will have his or her own narrative as to how the dispute arose and a view of the parts played by the respective parties. Each will have their declared motives for pursuing the action. Some may seek to distort the process by being deliberately deceptive in the assertions made. In other cases, however, motives can also 'exist unconsciously'[46] to the person in dispute. It is often only through probing further will one as noted by Parker-Follet, 'get underneath all the camouflage, to find the real demand.'[47]

In their work on '[t]he transformation of disputes', Felstiner, Abel and Sarat observed that some people may have a certain 'grievance apathy'[48] and will ignore 'experiences' that occur. For others an 'experience', something that causes conflict, can develop into a 'grievance' and this grievance, if not addressed, in turn, becomes a dispute. For a dispute to materialise Felsteiner, Abel and Sarat refer to the necessity of:

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[44] Laura Nader, 'Forums for Justice: A Cross-Cultural Perspective' (1975) 31 (3) Journal of Social Sciences 151-170.
[45] Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide (*John Wiley & Sons, Incorporated, 2000) 60
[46] Ibid.
[47] Parker Follett, M. *The New State Group Organization the Solution of Popular Government* (Pennsylvania University Press, 1918/1998).
[48] William Felstiner, Richard Abel, and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…' (1980–1981) 15 (3–4) Law and Society Review, 631-654, 636.

> *'naming'*: the wrong alleged to have been suffered; the aggrieved person acknowledges the issue by telling someone about it.
>
> *'blaming'*: attributing blame to the person or organisation believed to have caused or contributed to the wrong; and if this complaint is not dealt with
>
> *'claiming'***:** making a claim for the wrong suffered.[49]

Within business or personal relationships, this transformation may take place quickly or over several years. Moore and Mayer in designing what they described as the 'Wheel of Conflict' place 'needs' at the centre, surrounded by communication, emotions, values, structure and history. Resolving conflict can be seen as 'empowering' – overcoming oppression from others' opinions and developing your own democracy and sense of self. [50] The 'art of conflict resolution', Mayer opines, therefore lies in 'discovering the level at which the conflict is really operative.'[51]

Having this understanding of the societal conditions, personality traits and the approach to conflict by those in dispute when reflecting on the way disputes are formed and transformed should assist lawyers to refine their approach to their clients. Developing skills which enable lawyers to recognise the approach being taken by opposing counsel can also be advantageous in determining how best to attempt resolution. Providing space within legal education to enable lawyers to reflect on the how conflict develops and the many factors that influence its trajectory is, therefore, important. Likewise, space for lawyers to self-reflect on the role they may potentially play, advertently or inadvertently in adding to or deescalating a dispute enhances the delivery of human centred design.

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[49] William Felstiner, Richard Abel, and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…' (1980–1981) 15 (3–4) Law and Society Review, 631-654

[50] Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*, (John Wiley & Sons, 2000) 70

[51] Ibid xii

The comprehensive law movement and therapeutic jurisprudence

Lawyers as agents in the dispute resolution process

Mayer, in the Wheel of Conflict referenced earlier reminds us of the impact of the 'structural' elements of conflict.[52] What role does the structure of the legal system, and the approach of lawyers add to the 'camouflage' referred to by Parker-Follet behind the real demand for clients in dispute resolution?

While the facts and circumstances of a case may require immediate relief through the courts' system, there may be occasions where a lawyer could reasonably recommend less adversarial approaches. Letters, viewed as standard by law firms can, in certain circumstances, increase the conflict. The timing of correspondence can also have an impact. Examining the differences between the 'time of justice' and 'time of interpretation' noted above by Douzinas[53] issues that have caused hurt or conflict may be less relevant when a case comes to a court hearing or settlement. Lawyers who are aware of the changing landscape for clients and the role that their actions may play in calming or adding to the conflict can help to provide a more effective path to resolution. Acknowledging the role that lawyers and members of the judiciary play in supporting litigants, it is important, where possible, to ensure that legal training and education prepares members of the profession for reflection on how to proceed in situations where their own client or opposing party may have 'emotional reactions' and how best to ensure that self-represented litigants are supported through these processes. Giving law students the opportunity to consider these issues within University education will make them more reflective lawyers and help them to navigate what Mayer refers to as 'the narrow path between useful expression of emotion and destructive polarization.'[54]

So, acknowledging that there may be more to resolving a dispute than engaging with the purely legal issues in dispute, what approach could be taken by legal educators, lawyers and the judicial system to help ensure that lawyers have the requisite transversal skills? Daicoff describes litigant's 'extra-legal concerns',

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[52] Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (John Wiley & Sons Incorporated, 2000) 49

[53] Costas Douzinas, *Law and Justice in Postmodernity* (Cambridge University Press, 2015) 218.

[54] Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (Jossey-Bass, 2000) 11

as noted earlier, as 'factors beyond strict legal rights and duties" and which she opines includes a consideration of: "needs, resources, goals, morals, values, beliefs, psychological matters, personal wellbeing, human development and growth, interpersonal relations, and community wellbeing."[55] To address this gap in approach, the 'comprehensive law movement' has emerged, with research and academic commentary that focuses, specifically, on the role of law in society.[56]

In explaining what she describes as the 'vectors' of the comprehensive law movement, Daicoff broadly identifies three main elements:

> *lenses* through which to view the law: therapeutic jurisprudence; procedural justice; creative problem solving and holistic justice;
>
> *processes* in terms of how the law is administered: collaborative law, restorative justice; problem solving courts and preventative law and
>
> *skills:* active listening; an awareness and understanding of conflict dynamics; self-awareness and interpersonal skills.[57]

While the comprehensive law movement begin in the US, individual *processes* mentioned above are taught internationally under the guise of the comprehensive law movement, with students in both common and civil law jurisdictions being exposed to potential advantages of using less adversarial dispute resolution processes, such as restorative justice and problem-solving approaches to law. Acknowledging the difficulties posed by a judge taking on a therapeutic role in the civil law system, there has, however, been an acceptance that forward-looking, problem-solving courts, have benefits for society rather than looking back towards what has already happened and cannot

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[55] Susan Daicoff, 'Law as a healing profession: The comprehensive law movement' (2005, Fall), Pepperdine Dispute Resolution Law Journal. NYLS Clinical Research Institute Paper No. 05/06-12. (pp. 3–4)
[56] Susan Daicoff, 'Law as a healing profession: The comprehensive law movement' (2005, Fall), Pepperdine Dispute Resolution Law Journal. NYLS Clinical Research Institute Paper No. 05/06-12
[57] Susan Daicoff, The Comprehensive Law Movement 2002-2004, 19 Touro Law Review 825 835

be changed.[58] At international level, other less adversarial processes to include mediation, now supported by the Singapore Convention on Mediation[59] and Arbitration, given international recognition through the New York Convention, are also gaining popularity.[60]

Less focus is placed, however, on the *lenses* through which law can be viewed and the *skills,* which are specifically highlighted in the context of the comprehensive law movement. These are not, typically, considered across the broad base of legal education, nor addressed within individual modules. Alemanno and Khadar comment that '[l]egal education is a subject that is more often practiced than reflected upon.'[61] Within the field of legal education discussion of these lenses, processes and the particular 'skills' outlined above, are often left to, as noted earlier, whether students choose elective modules like Alternative Dispute Resolution. For the purpose of this article, further consideration will be given to taking an approach to legal education that encourages students to consider law as therapeutic agent.

What is therapeutic jurisprudence and how may it help inform legal education and practice?

So, what is involved in taking a therapeutic approach? Wexler, one of the founders of the therapeutic jurisprudence movement describes it as:

> …simply a way of looking at the law in a richer way, and then bringing to the table some of these areas and issues that previously have gone unnoticed…. simply suggests that we think about these issues and see if they can be factored into our law-making, lawyering, or judging.[62]

[58] Vanja Bajovic, 'Therapeutic Jurisprudence and Problem-Solving Courts' (2010) CRIMEN 257

[59] Singapore Convention on Mediation available at https://www.singaporeconvention.org/

[60] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") available at https://www.newyorkconvention.org/

[61] Alberto Alemanno & Lamin Khadar (eds), *Reinventing Legal Education How Clinical Education Is Reforming the Teaching and Practice of Law in Europe*. (Cambridge University Press, 2018)

[62] David Wexler, 'Therapeutic Jurisprudence: An Overview', (2000)17 Thomas M. Cooley Law Review, 125

The aim of therapeutic jurisprudence, therefore, is not to detract from the rule of law but to 'concentrate on the law's impact on people's emotional lives and psychological well-being'[63] using a therapeutic 'lens' through which to view laws and legal actors. Wexler clarified that:

> In actuality, therapeutic jurisprudence ('TJ') is not and has never pretended to be a full-blown 'theory'. More properly, and more modestly, it is simply a 'field of inquiry' — in essence a research agenda — focusing attention on the often-overlooked area of the impact of the law on psychological wellbeing and the like. From the very beginning, however, TJ has sought to work with frameworks or heuristics to organise and guide thought.[64]

Resolving conflict with an adversarial system typically means handing a dispute over to lawyers and taking an 'arm's length' approach. Client dissatisfaction with legal representation, however, can often stem from a perceived lack of procedural justice; settlements are negotiated by the lawyers, with no direct client involvement. Proponents of taking a therapeutic approach argue that it by permitting disputants to becoming more actively involved in reaching solutions, provides them with an element of 'intrinsic motivation' towards 'self-determination' and 'acknowledges that the individual must confront and solve her own problems.'[65] By facilitating this approach , lawyers therefore empower their clients and help them to find a solution that may not result in a binary win/lose scenario as they are actively involved in reaching solutions Allowing the client that involvement and giving them a sense of autonomy has been described as a 'rights plus' approach to law; emphasising the importance of rights and the rule of law as a starting point, but extending

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[63] Susan Daicoff, 'The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement', in *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Dennis P. Stolle et al. eds., 2000) 471

[64] David B Wexler, 'From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part', Arizona Legal Studies (2011) Discussion Paper No. 10-12, 1

[65] M, King, 'Should problem-solving courts be solution-focused courts'? (201 I) Monash University Research Paper. Victoria quoted in Babb and Wexler, Therapeutic Jurisprudence, University of Baltimore Legal Studies Research Paper –Paper No 2014-13 at 3

beyond this strictly legal interpretation to establish if other benefits can also be achieved perhaps in re-building relationships.[66]

The therapeutic 'field', is not, however without its critics. Arrigo, for example, argues that there are difficulties engaging a therapeutic jurisprudence approach because it starts from a premise that assumes all substantive law is fair, which may not always be the case. Arrigo also raises concerns that taking this approach 'promotes a moral, good, and docile individual in a one-size-fits-all law.[67] Ward is similarly critical of what he terms the promotion of the 'good lives' model and argues that it will lead to paternalism.[68] Freckelton sees it as signifying 'intellectual laziness, woolliness**,** a discomfort with conflict, or the realities of the adversarial system of justice'.[69] Much concern has been raised about the definitional issues surrounding what is meant by 'therapeutic', who is to decide what is 'therapeutic' and on what basis. Others argue that it is merely 'old wine in new bottles.'[70] This is what a good lawyer does anyway.

Daicoff, as a proponent of the process asserts that while good lawyering may well and should 'implicitly or unconsciously take those concerns into account, that those involved in the comprehensive law movement go a step further by explicitly valuing and promoting such factors'.[71] Many of these critiques raised are somewhat typical of scepticism levied against 'new processes', with proponents of deviation from established procedures being viewed as 'evangelical' or 'self–referential.'[72]

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[66] Jean Hellwege, *'Comprehensive Law' Makes the Case for a Kinder, Gentler Law Practice,* (2003) 12 39-APR JTLATRIAL

[67] Bruce A. Arrigo, 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' Psychiatry, Psychology and Law, (2004) 11(1), 23–43

[68] *See* Tony Ward, *Good Lives and the Rehabilitation of Offenders: Promises and Problems,* (2002) 7(5) Aggression and Violent Behaviour 513; Tony Ward & Claire A. Stewart, *Criminogenic Needs and Human Needs: A Theoretical Model,* (2003) 9(2) Psychology Crime and Law 125

[69] Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence', 2007-2008 30 T. Jefferson Law Review 575, 593

[70] Ibid

[71] Susan Daicoff,' Law as a Healing Profession: The "Comprehensive Law Movement" in the New York Law School Clinical Research Institute research Paper Series 05/06 # 12 at 7. Available at http://ssm.com/abstract=875449

[72] John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49 (2) Family Court Review 257-281, 262

Of concern, however, is the danger of lawyers embracing a therapeutic approach, 'talking the talk' without 'walking the walk'.[73] Diesfield and McKenna, similarly raise concerns about potential unintended consequences[74]. Daicoff, acknowledges this concern and points to the fact that lawyers '…need to know when they are in over their heads.'[75] So how can legal educators help law students become more intuitive and socially aware, while recognising the limits and parameters of their role?

A multidisciplinary approach

The skills gained by addressing these issues as part of legal education may merely involve developing an awareness and ability to recognise situations in which clients may need to be referred for additional, appropriate help.[76] It is argued that, therefore, that if being armed with a background understanding of conflict and the disputants particular legal and 'extra-legal' concerns, would benefit students that legal educators should consider moving from a silo-based approach to teaching law subjects to one that incorporates a more broad-based approach.

To address this, it is submitted that there needs to be a multidisciplinary approach to the teaching of law. Opportunities to identify links between subject areas and to work as part of a team with students of differing disciplines, will provide future lawyers with a broader understanding of the issues involved and teach them to respect each profession's role in reaching a solution. This insight will lead to future lawyers being more prepared for taking a human-centred approach to practice.

In legal education little emphasis tends to be placed on coaching students on how to recognise or deal with a client that may be overcome by emotion, the focus instead being solely on the legal issues. Macfarlane notes that under what she refers to as 'the traditional paradigm', concern can arise about emotions

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[73] Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' 2007-2008 30 T. Jefferson Law Review 575, 593

[74] Kate Diesfeld & Brian McKenna, *The Unintended Impact of the Therapeutic Intentions of the New Zealand Mental Health Review Tribunal? Therapeutic Jurisprudence Perspectives,* 14 J. L. & MED. 566, 569 (2007).

[75] Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement' in the New York Law School Clinical Research Institute research Paper Series 05/06 # 12 at 62 Available at http://ssm.com/abstract=875449

[76] The Law Society of Ireland is running courses in Trauma Informed Lawyering for trainee lawyers.

'lest they derail the lawyer's legal strategy.'[77] Miller, on the other hand, notes that 'affective lawyering' acknowledges 'that clients demand an emotional response, explicitly or implicitly, and that lawyers must have the skills to address the anger, frustration, despair or even indifference that legal interactions invoke.'[78]

It can be particularly challenging as a newly qualified lawyer to navigate the messiness of human nature, the impact of past traumatic experiences on the client's perceptions or actions before or during a case and how it may impact on otherwise rational individuals who have important decisions to make. Steering this middle ground of empathy and objectivity is challenging and not something that law students are always prepared for. More recently students may have received training in trauma informed lawyering, which 'can be seen as a natural extension of the teaching of therapeutic jurisprudence.'[79] Not all students, however, are provided with this insight.

As noted earlier, law has traditionally been taught in silos. Students generally take what may be described as core subjects, perhaps, contract law, criminal law, constitutional law and other core subjects with a choice of electives as they progress into the following years. Depending on the subjects chosen, educators may teach their modules in a very subject specific way. Some may encourage students to see the links between, for example, Family law or Company law where case scenarios are used perhaps in depicting legal issues that may straddle these areas of law: separating parties may have 'wealth management' structures that need to be addressed in resolving their separation or divorce, while the Courts need to ensure fairness.[80]

Using a family law context as one example, this lacune in knowledge has been highlighted in recent reports in the UK, where calls have been made for more client-centred and interdisciplinary approaches to legal education. In

[77] Julie McFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2018) 150
[78] Linda Miller 'Affective Lawyering: Emotional Dimensions of the Lawyer-Client Relationship' in Stole, Wexler and Winick (eds) *Practicing Therapeutic Jurisprudence* (Carolina Academic Press, 2000) 422
[79] Sarah Katz & Deeya Haldar, 'The Pedagogy of Trauma-Informed Lawyering' (2016) 22 Clinical Law Review 359,374.
[80] *White v White* [2001] 1 AC 596; *Miller v Miller* [2006] UKHL 24

November 2020, the Family Solutions Group in the UK, chaired the Right Honourable Lord Justice Cobb highlighted that in a family law context:

> This sensitive time for the separating family is as much about personal transitions as it is about dispute resolution. It is unhelpful for it to be viewed simply through a lens of legal disputes.[81]

The report comments that:

> …it is still a lottery as to whether the parent sees a solicitor with those necessary skills and therefore whether the family is supported to resolve the issue together or the approach adopted drives them further apart. [82]

Lawyers are not and should not be social workers, they are not trained to be so, but it is argued they should understand the role that social workers play and the challenges they face.[83] Likewise, social workers have their role to play but need to understand that lawyers have certain evidentiary standards that need to be met. Specific recommendations made by the Family Solutions Group included that, in addition to their legal training, family lawyers should have 'mandatory core training' on wider issues to include the psychological and mental health impact of relationship breakdown on the separating couple and their children and specific training to enable lawyers to screen for domestic and intimate partner violence and the ongoing effects of conflict and also to discuss and manage the way conflict can be resolved without the need to resort to the courts.'[84]

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[81] "What about me? Reframing Support for Families following Parental Separation, Report of the Family Solutions Group available at FamilySolutionsGroupReport_WhatAboutMe_12November2020.pdf-final.pdf (judiciary.uk) last accessed 18th November 2024 para.136, p.41

[82] "What about me? Reframing Support for Families following Parental Separation, Report of the Family Solutions Group available at FamilySolutionsGroupReport_WhatAboutMe_12November2020.pdf-final.pdf (judiciary.uk) last accessed 18th November 2024

[83] The report also highlighted a lack of 'inter-disciplinary practice. Many solicitors lack sufficient knowledge of the important role of other professionals (psychologists, psychotherapists, relationship counsellors, family therapists, child therapists) and lack understanding of local non-lawyer experts (particularly in London compared to smaller towns/areas where interdisciplinary practice may be better)' para 16

[84] Ibid para 304

Similar arguments have been made by professionals working in the commercial sector. Fraser and Roberge highlight the importance of being 'attentive' to the client's situation, 'insightful' through really gaining an understanding of the situation, having 'foresight' to plan for what may happen in the future and being 'adaptive' to the changing needs of the commercial world. They note that commercial clients are less likely to be interested in win/lose scenarios and the importance for lawyers of recognising the 'interdependence' of opposing parties in many disputes and their ultimate aim of preserving rather than ending the professional relationship.[85] They call for a move away from 'single loop' problem solving, merely changing strategies, to 'double loop problem solving strategies that include 're-evaluation of mental maps' and reflecting on 'why one does what one does.'[86]

The benefits of multidisciplinary seminars to enable students in all professions gain a broader understanding of issues that may encounter in practice and alert them as to when it is advisable to bring additional experts on board to assist with issues identified but outside of their expertise, will help to facilitate a more holistic solution for many clients and a more responsive and engaged legal profession. It will seek to address the dangers raised by Diacoff about lawyers getting 'in over their heads.'[87]

Conclusion

Mayer argues that it is not a question of persons learning how to *'do'* conflict resolution, it is more about deeper ways of *thinking* about conflict, what it involves and how to address it.[88]

Changes in legal pedagogy has meant that law students and the lawyers they become are more practice ready. Work placements and clinics have supplemented the doctrinal methods of teaching giving students a flavour of law in action. While acknowledging these advancements, this article calls for

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[85] Veronique Fraser & Jean-Francois Roberge, 'Legal Design Lawyering: Rebooting Legal Business Model with Design Thinking' (2016) 16 Pepperdine Dispute Resolution Law Journal 303

[86] Ibid 315

[87] Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement' in the New York Law School Clinical Research Institute research Paper Series 05/06 # 12 at 62 Available at http://ssm.com/abstract=875449

[88] Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (John Wiley & Sons Incorporated, 2000) Preface xi

a further development to ensure that law students across all modules in law and not just for students who may choose elective modules like Alternative Dispute Resolution, be given a more comprehensive legal education to develop their awareness of the social context within which their clients' disputes arise, the way in which conflict can be perceived and how it can be used to create positive change. Central to this is an understanding that in reaching possible settlements for clients or explaining court decisions, lawyers need to be aware of the extent to which the individual they are dealing with has autonomy within their ecological system and/or group to make or accept decisions. In aiming to provide legal services and access to justice, examining 'human lived experiences' provides lawyers and legal educators with a frame of reference that is beyond what can be learned from a doctrinal or case study approach.

Lawyers need to be aware and prepared for any emotional fallout and, where necessary know whom to consult if additional expertise is required. Legal education needs to demonstrate to law students that the legal system is part of the wider ecology of human-development. To offer the best, most holistic solution, future lawyers need to gain a more in-depth understanding of the issues in dispute and the importance of roles played by other professionals. Systems, be they it in-person or delivered online, need to be human-centred and design thinking is needed in the teaching of law but to truly understand the perspective before you attempt to design innovative ways to solve it, you need to understand the issues underpinning the dispute, the characters in the movie, the pressures they are under and what they are trying to protect. By introducing these changes and broadening students' minds using therapeutic jurisprudence law students will enhance their lawyering skills. To practise in a global legal environment, students need both doctrinal knowledge and exposure to legal skills and as argued here, a robust theoretical underpinning and understanding of why they do what they do. While, as acknowledged earlier, this duty to a client may be more to the fore in common law jurisdictions, an understanding of these principles is required across legal education. Doing so as part of university education provides a safe and protected environment to achieve this, rather than trying to 'fathom' the responsibilities of a client once in court or when faced with a difficult case in practice.