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Editorial

I am delighted to introduce this fourth issue of the European Journal of Legal Education. The fourth issue follows the 2023 ELFA annual general meeting in Lausanne on the topic of "interdisciplinary approaches to Legal Education" and is in keeping with the ELFA mission "time for renewal, inspiration and dialogue". The issue finds itself in the global context of a year of political, economic and climate crisis, as well as a deepening humanitarian crisis. As a positive, we seem to have turned a corner following the first global pandemic of the century. However, Higher Education faces pressing challenges such as student wellbeing, barriers to research collaboration, challenges to equal opportunities, competition and financial squeeze.

Our fourth issue is set in this context and is inspired by the ELFA mission and themes. It includes interdisciplinary and multi-level research on legal education, offers innovative and renewed approaches to delivering legal education, inspires the consideration and calibration of mental wellbeing and emotions. It can broadly be distributed into three major themes: wellbeing, transformation – deepening/improving of legal education, achieving equality (gender).

In particular:

Michael Fay and Yvonne Skipper "The relationship between the sense of belonging, mental wellbeing and stress in students of law and psychology in an English University" explore how a sense of belonging impacts on mental wellbeing and stress in students of law and psychology in an English University. They propose targeting mental wellbeing interventions at the School group level, focussing on increasing sense of belonging and positive norms, as a potential tool to improve the mental wellbeing of all students.

Emma Jones "Incorporating an affective framework into liberal legal education to achieve the development of a 'better person' and 'good citizen'" presents a theoretical basis for the contemporary development and enrichment of liberal legal education. The suggested novel framework incorporates four

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core aspects: experiential thinking, emotional authenticity, affective empathy and emotional reflexivity.

Rasmus Grønved Nielsen "Law Teaching for Sale - Legal Shadow Education in Denmark from Historical and Current Perspectives" examines the use of supplementary private teaching ('shadow education') within the field of legal education in Denmark, specifically why law students chose to pay for private teaching services during their legal education. The results of this study are relevant for future debates on enhancing legal education, especially, as the author highlights, because these private providers tap into the student's negative emotions related to exams and preparation, adding to first-year students' sense of insecurity.

Edana Richardson, Brian McKenzie, Brian Flanagan, Neil Thompson and Maria Murphy "Democratising Case Law while Teaching Students: Writing Wikipedia Articles on Legal Cases" demonstrate to us how Wikipedia can be used as an educational tool by highlighting pedagogical benefits for students and providing a guide for educators, including preparatory steps and student support throughout. We are shown how article-based Wikipedia assignments can encourage students to deepen their understanding of a topic and consider how knowledge can be communicated effectively.

Dorothea Anthony and Colin Fong "Teaching Legal Research Subversively", present a novel approach to teaching the law degree subject Legal Research (compulsory in NSW, Australia) by reconceptualising the technique of teaching legal research. The authors highlight the opportunity for providing law students with a deeper social education in the law, if it is taught in a way that encourages law students to think critically about legal institutions and the broader social context that gives rise to them.

Louise C. Druedahl "Assessing change of traditions: teachers' insights on a legal education under transformation" analyses progress in legal education reform. This study investigates faculty's views, ambitions, and experiences with teaching practices while moving away from traditional learning methods towards approaches characterized as student-focused, active, collaborative, and reflective in a Danish Law Faculty.

Raúl Sánchez "The Application of procedural law at the Spanish law clinics" considers the role of law clinics in Spanish legal education. In this article, the

author argues that the American model is not transplantable to Spanish legal education, with a broader focus on social benefit and human rights in Spanish law clinics. This article makes a strong case for the value of procedural law in legal education.

Barbara Pozzo "Innovative teaching methods to achieve mainstreaming gender equality in legal education" analyses various initiatives to incorporate gender awareness into legal education, including innovative teaching methods. She takes a comparative approach, contrasting initiatives in the US and Europe.

The articles presented in this volume are interesting and diverse. The pieces demonstrate a variety of methods: through the use of quantitative and qualitative data as well as theoretical and historical approaches. This is also the most geographically diverse issue since the journal re-launched in 2020 – with contributions from Australia, Denmark, England, Ireland, Italy, Scotland, and Spain. I hope that you will enjoy reading this issue as much as the editors enjoyed producing it.

Greta Bosch
Editor-in-Chief

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The relationship between the sense of belonging, mental wellbeing and stress in students of law and psychology in an English University

Yvonne Skipper and Michael Fay*

Abstract

This paper explores how sense of belonging impacts mental wellbeing and stress in students of law and psychology in an English University. A questionnaire exploring undergraduate students' sense of belonging, stress and wellbeing was conducted between December and February of the academic year with Year 2 and 3 students. The questionnaire was made available to all undergraduate cohorts studying law or psychology. A total of 95 undergraduate students across both subject schools responded, with a split of 46 law students and 49 psychology students. The results of the questionnaire suggested that a sense of belonging predicted higher levels of mental wellbeing and lower levels of stress. Law students had a lower sense of belonging and wellbeing than psychology students, but both showed similar levels of stress. The results suggest that community-based approaches at school level may be a good way to promote positive mental wellbeing in students and that this approach may need to be tailored towards different academic schools.

Keywords: mental wellbeing, stress, students, community, belonging

Introduction

There is rising concern about the mental health of university students who are experiencing ever-greater levels of psychological distress.[1] One in four

* University of Glasgow and Keele University, respectively. This work was supported by the Society for Research in Higher Education.
[1] Strevens, C, & Wilson, C (2018). *Law student wellbeing in the UK: a call for curriculum intervention.* Association of Law Teachers Conference paper.

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students experiences poor mental health during their degree.[2] The typical age of entry to University is around 18-25 years and this age is the peak age for the onset of mental health problems.[3] Furthermore, the 2018 Higher Education Policy Institute study of more than 14,000 students indicated that undergraduates were more likely to have poorer mental health than other young people aged between 20-24.[4] Concerningly, only 17 per cent of undergraduates felt that their life was 'highly worthwhile', and considered themselves 'very happy'. It is therefore vital to increase our understanding of students' mental health and how we can support and improve it. This is recognised by the *University Mental Health Charter*, a United Kingdom (UK) wide scheme to 'make student and staff mental health a university-wide priority and deliver improved mental health and wellbeing outcomes'.[5] The current study explores the impact that sense of belonging can have on mental wellbeing and stress, and provides a foundation for the development of community-based mental wellbeing interventions.

A wealth of terminology is used in the field of mental health and wellbeing. In the current paper, we use the term 'mental wellbeing' to mean the extent to which an individual is able 'to develop their potential, work productively and creatively, build strong and positive relationships with others, and contribute to their community'.[6] Wellbeing has been found to predict successful life transitions and is linked to successful careers.[7] Wellbeing is considered to be distinct from some conceptualisations of mental health which are linked to diagnosable mental health conditions. This distinction is evidenced as correlations between mental illness and mental wellbeing are around 0.53, indicating that only one quarter of the variance between measures of mental

[2] YouGov, (2016). 'One in four students suffer from mental health problems'. https://yougov.co.uk/topics/lifestyle/articles-reports/2016/08/09/quarter-britains-students-are-afflicted-mental-hea (accessed 19th August 2022).
[3] Kessler, RC, Amminger, P et al 'Age of onset of mental disorders: A review of recent literature' (2007) 20 (4) *Current Opinions in Psychiatry*, 359–364.
[4] Neves, J, & Hillman, N (2018) *Student Academic Experience Survey,* Oxford: Higher Education Policy Institute.
[5] Student Minds (2019) UK University Mental Health Charter: https://www.studentminds.org.uk/charter.html (accessed 19th August 2022).
[6] Foresight Mental Capital and Wellbeing Project, *Mental Capital and Wellbeing: Making the most of ourselves in the 21st century: Final Project report*, (London: Government Office for Science, 2008) 8.
[7] Haase, CM, Heckhausen, J, Silbersen, R, 'The Interplay of Occupational Motivation and Well-Being During the Transition From University to Work' (2011) 48(6) *Developmental Psychology* 1739-1751.

illness and mental wellbeing is shared.[8] Thus, it is possible for an individual to suffer with mental health difficulties but to have good mental wellbeing. This paper explores mental wellbeing as it is something which all students experience and can be supported without medical or clinical intervention.

Stress is defined as a 'feeling of being overwhelmed or unable to cope with mental or emotional pressure'[9] and is a key predictor of poor mental wellbeing. Students at university may experience heightened stress as going to university is an important transition. University students often move away from family and friends who have provided support for many years and need to form new networks for support. They also have greater autonomy and need to develop healthy routines and self-directed learning skills independently.[10] These pressures may lead to heightened levels of stress. This can negatively impact all students, bur particularly those who already have poor mental health and wellbeing or those who may have had difficulties which were masked by family support.[11] For students, academic pressure is often seen as the main source of stress. Six in ten students experience levels of stress in their degree that interfere with their daily lives.[12] Students may also experience financial stress and career uncertainty in job markets which are becoming more competitive.[13] The effects of pressure and stress can be severe; it 'can reduce academic performance; interfere with a student's ability to participate in and contribute to campus life; and increase the likelihood of substance abuse and other potentially damaging behaviours'.[14] Academic pressure is also a common theme in suicide among under 20s.[15] Concerningly, a longitudinal

[8] Keyes, CLM, 'Mental illness and/or mental health? Investigating axioms of the complete state model of health' (2005) 73 *Journal of Consulting and Clinical Psychology,* 539–548.
[9] Mental Health Foundation (2021) https://www.mentalhealth.org.uk/explore-mental-health/a-z-topics/stress (accessed 19th August 2022).
[10] Auerbach, RP, et al 'WHO World Mental Health Surveys International College Student Project: Prevalence and distribution of mental disorder' (2018) 127(7) *Journal of Abnormal Psychology,* 623–638.
[11] Hill, M, Farrelly, N, Clarke, C, & Cannon, M (2020) 'Student mental health and well-being: Overview and Future Directions' *Irish Journal of Psychological Medicine*, 1-8.
[12] YouGov, n2 above.
[13] Bewick, B, Koutsopoulou, G, Miles, J, Slaa, E, Barkham, M 'Changes in undergraduate students' psychological well-being as they progress through university' (2010) 35 *Studies in Higher Education,* 633–645.
[14] Richlin-Klonsky, J, & Hoe, R 'Sources and Levels of Stress among UCLA Students' (2003) *Student Affairs Briefing*, 2.
[15] People with Mental Illness, National Confidential Inquiry into Suicide and Homicide: Annual Report 2017, University of Manchester.

study found that distress of students increased upon entering University and did not return to pre-university levels during their course.[16] Thus, it is important to learn more about how we can reduce stress in students and one way to do this is to explore student communities and sense of belonging.

Community, Mental Wellbeing and Stress

As Kelk, Luscombe, Medlow, and Hickie highlight, it is important to recognise that mental wellbeing is not simply a problem for individuals.[17] On the contrary, it is a problem for communities. According to Social Identity Theory (SIT) a sense of identity is derived from immediate group membership.[18] Groups give us a social, as well as an individual identity, and foster a sense of belonging. Literature demonstrates how having a strong social identity can improve mental wellbeing as it supports positive and adaptive responses to stress and makes people less likely to blame negative life events on internal causes such as personal shortcomings.[19] As well as providing a sense of identity, group membership is also likely to lead people to feel able to access support. Group membership can therefore lead to more adaptive responses to stressful events, such as exams. However, lack of group membership and feelings of belonging is a problem among young people. The 2018 Office for National Statistics survey highlights that young people who report symptoms of poor mental wellbeing are less likely to feel they have someone to rely on or a sense of belonging.[20] As feelings of group support are likely to lead to more positive mental wellbeing and more adaptive responses to stress, a lack

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[16] Berwick, n13 above.

[17] Kelk, N, Luscombe, G, Medlow, S & Hickie, I, *Courting the Blues: Attitudes towards depression in Australian law students and legal practitioners* (Brain and Mind Research Institute: University of Sydney: 2009)

[18] Tajfel, H, & Turner, JC, 'An integrative theory of intergroup conflict' in W G Austin, & S Worchel (eds) *The social psychology of intergroup relations* (Monterey, CA: Brooks/Cole, 1979) 33-37.

[19] Cruwys, T, Haslam, SA, Dingle, GA, Haslam, GA & Dingle, C, 'Depression and Social Identity: An Integrative Review' (2015) 18(3) *Personality and Social Psychology Review*, 215-238. See also: Jetten, J, Haslam, SA & Haslam, C, *The social cure: Identity, health, and well-being* (New York: Psychology Press, 2012), and Tajfel, H, & Turner, JC, 'The Social Identity Theory of Intergroup Behavior' in: S. Worchel and WG Austin (eds) *Psychology of Intergroup Relation* (Chicago: Hall Publishers1986), 7-24.

[20] Office for National Statistics, Measuring National Well-being: Quality of Life in the UK, 2018 (London: ONS, 2018) https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/articles/measuringnationalwellbeing/qualityoflifeintheuk2018 (accessed 19th August 2022).

of feelings of support during stressful circumstances – such as the transition from further education to higher education, or university exams – may lead to poorer mental wellbeing and poorer responses to stress.[21] Many undergraduate students will find their pre-existing group memberships, and the associated support, disrupted as they transition to higher education. New group memberships are therefore important in shaping a student's responses to stress, and one such group is the academic school of study.

According to Bronfenbrenner, the individual is nested within a series of systems all of which interact with each other to influence that person's experiences.[22] The microsystem is comprised of people they have regular contact with, for example, their peers and tutors. They are influenced by these people, but can also influence them, and this is the most influential level of the system.[23] Those within the microsystem interact with each other in the mesosystem, for example, peers may interact with each other, and tutors may interact with other tutors. The ecosystem includes other structures which do not contain the individual, but which may impact them. The macrosystem includes formal and informal structures including the ideologies, norms and values. Lastly, the chronosystem refers to changes and continuities over time which may impact an individual. This work was focused on how the microsystem of tutors and peers and their academic School create a culture which can either support or reduce wellbeing and how students are shaped by this culture.

Group membership can enhance both mental and physical wellbeing, providing a 'social cure'.[24] The sense of togetherness derived from being a member of a social group[25] is associated with a vast array of both physical and psychological

[21] Royal College of Psychiatrists, Mental Health of Students in Higher Education: College report CR166 (London: RCP, 2011).
[22] Bronfenbrenner, U, 'Toward an experimental ecology of human development' (1977) 32(7) *American Psychologist,* 513–531; Bronfenbrenner, U (ed) *Making human beings human: Bioecological perspectives on human development* (Sage Publications Ltd, 2005).
[23] Bronfenbrenner, U, 'Ecological models of human development' in *International Encyclopedia of Education*, Vol. 3, 2nd ed (Oxford: Elsevier, 1994); Bronfenbrenner, 2005, ibid.
[24] Jetten, J, Haslam, SA & Haslam, C, *The social cure: Identity, health, and well-being* (New York: Psychology Press, 2012).
[25] Hornsey, MJ, 'Social Identify Theory and Self-Categorization Theory: A Historical Review' (2008) 2 *Social and Personality Psychology Compass,* 204-222.

wellbeing outcomes.[26] For example, social groups can impact perceptions of stress. When an individual encounters a potentially stressful situation they engage in *primary appraisal* to decide if the stimulus is threatening and, if it is perceived to be, they then engage in *secondary appraisal* to decide whether they will be able to cope with the threat.[27] Group membership impacts individual's primary appraisals of stress. Haslam, Jetten, O'Brien and Jacobs found that when other members of a group (in-group members) perceived a task as either stressful or enjoyable, participants with a shared social identity tended to mirror these in-group ratings.[28] However, the views of people outside the group (out-group members) did not impact perceptions. Thus, the views of a group of peers with whom a person identifies can alter that individual's perceptions of a stressful situation. This means that the views of other students on a particular degree programme may alter students' perceptions of a how stressful a task or assessment is, whereas the views of lecturers, or students on a different degree programme, might not.

Group memberships also impact an individual's secondary appraisals of stress, in that people are more likely to provide social support to in-group than out-group members[29] and are more likely to accept help from in-group members.[30] Participants experiencing stressful life events who strongly identified with an important social group, rated their life/job satisfaction higher and their stress levels lower than those who did not identify strongly with a group.[31] This effect

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[26] Wakefield, J R, Hopkins, N, Cockburn, C et al, 'The impact of adopting ethnic or civic conceptions of national belonging for others' treatment'. (2011) 37(12) *Personality and Social Psychology Bulletin,* 1599–1610.

[27] Lazarus, RS, & Folkman, S, *Stress, Appraisal, and Coping*, (Springer Publishing Company, 1984).

[28] Haslam, SA, Jetten, J, O'Brien, A, & Jacobs, E, 'Social identity, social influence and reactions to potentially stressful tasks: Support for the self-categorization model of stress' (2004) 20(1) *Stress and Health: Journal of the International Society for the Investigation of Stress,* 3-9.

[29] Levine, M, Prosser, A, Evans, D, Reicher, S, 'Identity and emergency intervention: how social group membership and inclusiveness of group boundaries shape helping behaviour' (2005) 31(4) *Personality and Social Psychology Bulletin,* 443-53; see also Wakefield, n26 above.

[30] Haslam, SA, Jetten, J, Postmes, T & Haslam, C, 'Social Identity, Health and Well-Being: An Emerging Agenda for Applied Psychology' (2009) 58(1) *Applied Psychology-An International Review*, 1-23.

[31] Haslam, SA, O'Brien, A, Jetten, J, Vormedal, K, & Penna, S, 'Taking the strain: social identity, social support, and the experience of stress' (2005) 44(3) *British Journal of Social Psychology,* 355-70.

was mediated by perception of social support, again illustrating the importance of community. In addition, strong in-group ties are negatively associated with ruminative coping strategies, which is in turn negatively associated with stress.[32] This evidence suggests that group membership and sense of belonging can have a strong impact on perceptions of stress and ability to cope with stress and this, in turn, can impact wellbeing. Taken together, this literature leads us to predict that a higher sense of belonging will be associated with higher levels of mental wellbeing and lower levels of stress.

Differences between subject areas

Law

This is not to say that all students experience sense of community, stress and mental wellbeing in a similar way. This study focuses on how these may be experienced differently in students of different subject areas that have similarities in course delivery, such as a focus on lectures and seminar delivery as opposed to lab work. This allows for a closer scrutiny of the distinction between students' experiences by subject school and not predominant teaching methods. The study focussed on law and psychology due to the overlap in teaching delivery methods but differences in style, content, and career aspirations of students. Duffy, Field and Shirley found that 35.2 per cent of law students experienced high levels of psychological distress.[33] This is higher than medical students (17.8 per cent) and the general population (13.3 per cent). There are several possible reasons for this. O'Brien, Tang and Hall suggest that the way in which law is taught may play a role. They asked students to discuss the impact that studying law had on them.[34] Several themes emerged from these discussions, namely: law school made them more rational, objectifying, analytical and logical; more competitive, adversarial, arrogant and elitist; and made them feel isolated, disconnected and intolerant. Therefore, it appears that the way that law students are trained to think, in general and

[32] Ysseldyk, R, McQuaid, RJ, McInnis, OA, Anisman, H, & Matheson, K, 'The ties that bind: Ingroup ties are linked with diminished inflammatory immune responses and fewer mental health symptoms through less rumination' (2018) 13(4) *PLoS ONE*, e0195237.
[33] Duffy A, Saunders KEA, Malhi GS, Patten S, Cipriani A, McNevin SH, MacDonald E, Geddes J, 'Mental health care for university students: a way forward?' (2019) 6 *The Lancet Psychiatry*, 885–887.
[34] O'Brien, MT, Tang, S, & Hall, K, ,Changing our thinking: Empirical research on law student wellbeing, thinking styles and the law curriculum' (2011) 21 *Legal Education Review,* 149.

through specific courses such as Thinking Like a Lawyer,[35] may negatively impact their sense of belonging, and lead to ways of thinking which lead to poorer wellbeing.

The environment within the school can impact student wellbeing. For example, Bleasdale and Humphreys found that law students were more likely than students in other subjects to compare themselves to other students in their cohorts.[36] Typically, these comparisons led them to feel more negative about themselves as they saw other students as, for example, more competent than themselves. In addition, law students become immersed in an adversarial environment, where legal issues are presented as problems; whether it be Crime, Tort, Contract or Property, students are required to argue their viewpoint. O'Brien, Tang and Hall suggest that law students are more competitive and adversarial than students of other subjects. Social activities such as mooting and client interviews may enhance this feeling of competition.[37] This competitive environment may also reduce feelings of community and wellbeing, encouraging a lack of collaboration between students and leading to individuals developing negative perceptions of other students' relative performance.[38]

Moreover, many students who study law aspire to a narrow range of careers, e.g. barrister or solicitor. This also leads to high levels of competition.[39] Law students are likely to believe that future employers are concerned more with their grades than with other personal or social characteristics.[40] This may lead

[35] See Jones, E, 'Transforming legal education through emotions' (2018) 38 *Legal Studies,* 450-479

[36] Bleasdale, L, & Humphreys, S, *Undergraduate resilience research project: Project Report* (Leeds Institute for Teaching Excellence: University of Leeds, 2018).
[37] Skead, NK, & Rogers, SL, 'Do law students stand apart from other university students in their quest for mental health: A comparative study on wellbeing and associated behaviours in law and psychology students; (2014) 42 *International journal of law and psychiatry,* 81-90.
[38] O'Brien et al, n34 above. See also Fay, M, & Skipper, Y, '"I was able to ask for help when I became stressed rather than sitting alone and struggling": psychology and law students' views of the impact of identity and community on mental wellbeing' (2022) 56(1) *The Law Teacher*, 20-36.
[39] Bleasdale & Humphreys, n46 above.
[40] Tani, M, & Vines, P, 'Law Students' Attitudes to Legal Education: Pointers to Depression In the Legal Academy and the Profession?' (2009) 19(1) *Legal Education Review*, Article 2.

students to feel more of a sense of competition with their peers than those in other subjects. Furthermore, law students have been found to be more likely than medical students to view and assess friendships in terms of networking and career advancement.[41] They are therefore likely to experience low levels of social connectedness which may negatively impact mental wellbeing and increase stress. Taken together it appears that law students may experience poor mental wellbeing, which may in part be due to teaching styles in the subject, school environment and feelings of competition in the cohort, which are likely to increase stress and reduce feelings of belonging and wellbeing.

Psychology

In contrast, students who study psychology may have a different experience. Although there is a wealth of research exploring experiences of law students, there is much less literature devoted to students of other subjects like psychology. However, like law students, psychology students also often experience poor mental wellbeing. A 2009 study by the American Psychological Association found that 87 per cent of psychology graduate students reported experiencing anxiety, and 68 per cent reported symptoms of depression.[42]

The first factor may be the reason why students choose to study psychology. Psychology research is sometimes 'me-search', that is, researching topics relevant to oneself and one's own experiences.[43] Thus, those who experience poor mental health and wellbeing may be drawn to study psychology in an effort to understand these experiences. Furthermore, many students who choose to study psychology are motivated to support and help others. This can be seen in typical career paths, e.g. counselling and teaching.[44] A qualitative study by Bromnick and Horowitz found that psychology students had a

[41] Ibid.
[42] Bridgeman, D, & Galper, D, *APA Practice Survey* (American Psychological Association, 2010); see also, 'American Psychological Association Survey findings emphasize the importance of self-care for psychologists' (2010, American Psychological Association), retrieved October 5, 2022 from http://www.apapracticecentral.org/update/2010/08-31/survey.aspx.
[43] Giuliano, TA, Skorinko, JLM & Fallon, M, *Engaging Undergraduates in Publishable Research: Best Practices* (Frontiers Media, 2019).
[44] Coulthard, L, *BPS Careers Destinations (Phase 3) Survey 2016 Report* (British Psychological Society, 2017).

strongly other-orientated focus, with 'helping others' as their dominant value.[45] This may create a positive learning community. This makes psychology students an interesting group to compare to law students as their reasons for choosing the subject may mean they enter their course with the aim to understand themselves and others, this may lead them to have more of a positive community focus with a less competitive environment than law students.

Furthermore, psychology courses typically involve the development of knowledge which may promote positive interpersonal interactions. For example, the QAA suggests that psychologists will have the skills to, among other things, 'solve problems by clarifying questions, considering alternative solutions and evaluating outcomes and be sensitive to, and take account of, contextual and interpersonal factors in groups and teams'.[46] This may mean that psychology students learn knowledge and skills during their course which help them to form a supportive community. In addition, as psychology is the scientific study of the mind and how it dictates and influences our behaviour, students explicitly cover topics such as mental health, stress, social identity, empathy and helping behaviours. Most psychology courses also include elements of psychological literacy, which involves applying psychological principles to issues in work, relationships and the community.[47] Taken together these skills and this focus may lead students to be better placed to understand and support each other, and therefore lead to better wellbeing. Again, psychology students differ from law students as psychology courses teach skills which allow them to better support each other, while law courses teach skills which may lead to higher feelings of competition.[48]

Finally, unlike law, psychology students typically aspire to a wide range of careers at the point of entry. According to the QAA,[49] 80 per cent of

[45] Bromnick, R & Horowitz, A, 'Reframing employability: Exploring career-related values in psychology undergraduates' paper presented at the HEA STEM Annual Learning and Teaching Conference, University of Birmingham, April 2013.

[46] Quality Assurance Agency, Subject Benchmark Statement Psychology (2016): https://www.qaa.ac.uk/docs/qaa/subject-benchmark-statements/sbs-psychology-16.pdf?sfvrsn=af95f781_8 (accessed 19th August 2022).
[47] Cranney, J, Botwood, L & Morris, S , National standards for psychological literacy and global citizenship: Outcomes of undergraduate psychology education. (Sydney: Office for Learning and Teaching, 2012).
[48] Skead & Rogers, n37 above.
[49] QAA, n46 above.

psychology students do not become professional psychologists. In 2016, 35 per cent of psychology graduates were in careers linked to human health, 22 per cent in education, seven per cent in scientific research and four per cent in office work.[50] Even when a student aspires to be a 'psychologist', there is a breadth of specialism ranging from sport and exercise to education and forensic. This diversity might lead to lower levels of competition as few people are likely to be aiming for an identical career path. This may lead students to feel a greater sense of community. In contrast, at the beginning of their studies, law students may be aiming for a narrower set of careers – statistics of success entry into the legal profession often being shared in the first months of the degree – and this can also lead to greater feelings of competition within the cohort.

The current study

In this research we were interested in exploring how sense of belonging impacted mental wellbeing and stress in students of law and psychology. Although existing research explores how belonging impacts wellbeing and stress this has not yet been explored in students from different subject areas such as law and psychology. Based on the aforementioned literature, it is possible that students from these different subject areas will experience wellbeing and stress differently. To build on the current literature, we used a forced choice questionnaire to explore this and predicted that:

H1: a higher sense of belonging would be associated with higher levels of mental wellbeing

H2: a higher sense of belonging would be associated with lower levels of stress.

H3: law students would experience lower levels of belonging and mental wellbeing, but higher levels of stress than psychology students.

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[50] Coulthard, n44 above. In 2023, 41.9% of law graduates entered legal, social and welfare professions, while 7.9% of psychology graduates became health professionals: ACGAS, *What do Graduates do?* (2023, Prospects: London).

Method

Participants

Participants were 95 students aged 17-27. The sample consisted of 49 psychology students and 46 law students from a single university who were in Year 2 and 3 of their degree. Demographics are presented in Table 1.

Table 1: Demographic variables of participants organised by subject

	Law		Psychology	
Gender	16 male	30 female	11 male	38 female
Home or international	43 home	3 international	32 home	17 international
Disability	8 disability	38 no disability	5 disability	44 no disability
Ethnicity	29 White	8 Asian	28 White	17 Asian
	3 Black	1 Mixed or multiple ethnic groups	0 Black	3 Mixed or multiple ethnic groups

Materials

To test our research questions, we asked students of Law and Psychology to complete measures of belonging, wellbeing and stress which have previously been validated in the broader literature. Scales were presented in the following order as it was thought that asking about belonging first may have impacted participants' feelings of wellbeing.

Mental wellbeing was measured using the Warwick-Edinburgh Mental Wellbeing Scale (WEMWBS), which explores well-being and psychological functioning.[51] The scale consists of 14-items, answered on a 5-point scale

[51] Huppert, FA, & Johnson, DM 'A Controlled Trial of Mindfulness Training in Schools: The Importance of Practice for an Impact on Well-Being' (2010) 5 *The Journal of Positive Psychology,* 264-274.

ranging from 'none of the time' to 'all of the time'. An example item is 'I've been feeling optimistic about the future.'

Levels of stress were measured using the Perceived Stress Scale (PSS).[52] This scale measures participant's feelings and thoughts during the past month. It consists of 10 items answered on a 5-point scale from 'never' to 'very often'. An example item is 'In the past month, how often have you been upset because of something that happened unexpectedly?'

Academic belonging was measured using a scale developed by Ingram.[53] This scale consisted of 20-items measured on a 5-point agreement scale. An example item is 'I felt that I am a member of my school.'

Procedure

Ethical approval was sought and received from the Keele University Ethics Board. Participants were recruited via an email shared with the full cohort and data collection took place from December to February of the academic year. Each cohort comprised circa 300 students. The email gave brief information about the study and directed participants to the online survey but made it clear that participation was optional and that all data collected would be anonymous. No incentives for participation were offered. The online survey began by showing a detailed information sheet and consent form. Once participants had read and completed this, they progressed onto the survey which began by asking for demographic information, including subject. The survey then showed the WEMWBS, PSS and Belonging scales. Once participants had completed the survey, they were fully debriefed and were given information about support services they could contact if they felt that they needed extra support.

[52] Cohen, S, Kamarck, T, & Mermelstein, R 'A global measure of perceived stress' (1983) 24(4) *Journal of Health and Social Behavior,* 385-396.

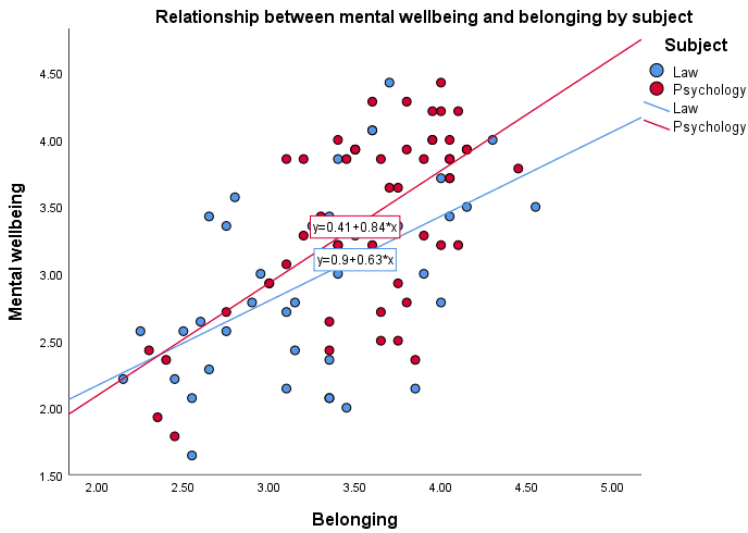
[53] Ingram, DC, *College students' sense of belonging: Dimensions and correlates* (2012). Accessed 12th September 2022 from: https://stacks.stanford.edu/file/druid:rd771tq2209/Dabney%20Ingram%20dissertation_submitted%20to%20Stanford_060512-augmented.pdf

Analysis

The online questionnaire was set up so that participants needed to answer all questions before moving on to the next section, so there was no missing data. To begin, each scale was tested for internal consistency using Cronbach's alpha. WEMWBS had a Cronbach's alpha of 0.94, PSS had a Cronbach's alpha of 0.81 and Belonging of 0.88, suggesting all had a very good level of internal consistency. The items were therefore combined to create a scale by taking the mean. Data were analysed using Regression and MANOVA in SPSS.

Results

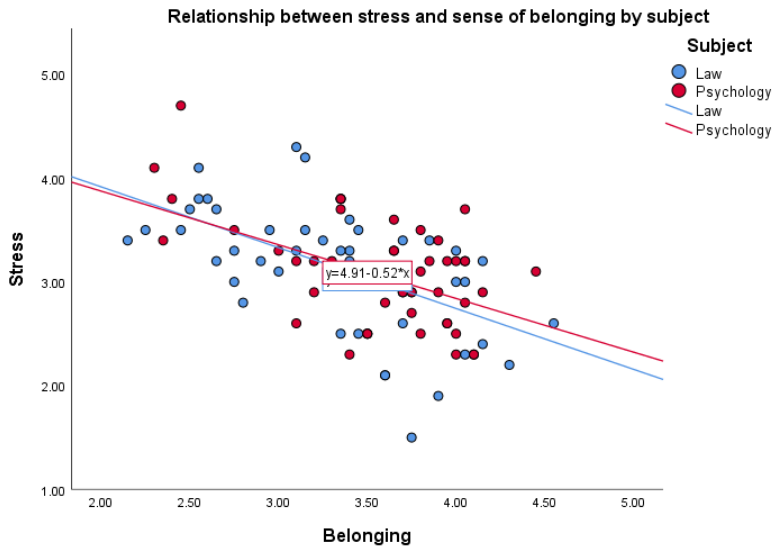
To test H1, a higher sense of belonging would be associated with higher levels of mental wellbeing, a regression was conducted with belonging as the predictor and mental wellbeing as the outcome. Sense of belonging significantly predicted higher mental wellbeing $F(1,93)=53.91$, $p<.001$ and accounted for 36 per cent of the variation in mental wellbeing with adjusted R2 =.360, a medium effect size according to Cohen.[54]



To test H2, a regression was also conducted with belonging as the predictor and stress as the outcome. Sense of belonging significantly predicted lower

[54] Cohen, J, *Statistical Power Analysis for the Behavioral Sciences*, 2nd ed (Lawrence Erlbaum Associates: Hillsdale, NJ, 1988).

levels of stress $F(1,93)=38.54$, $p<.001$ and accounted for 29 per cent of the variation in mental wellbeing with adjusted R2 =.285, a medium effect size according to Cohen.[55]



In order to test H3, that law students would experience lower levels of belonging and mental wellbeing, but higher levels of stress than psychology students, MANOVA was used with subject as the IV and belonging, wellbeing and stress as DVs. Results suggested that there was a significant difference in belonging and mental wellbeing, but that the difference in levels of stress was not significant. Descriptive and inferential statistics can be seen in Table 2.

Table 2: Descriptive and inferential statistics comparing law and psychology students.

	Psychology		Law		
	M	*SD*	*M*	*SD*	
Mental wellbeing	3.41	.68	3.00	.67	F (1,93)=-8.86, p=.004 $\eta^{2=}$.087
Belonging	3.57	.50	3.31	.58	F (1,93)=-5.40, p=.022, $\eta^{2=}$.055

[55] Ibid.

Stress	3.06	.50	3.15	.62	F (1,93)=-.54, p=.463, $\eta^{2=}$.006

The results from the study suggest that a stronger sense of belonging predicted lower levels of stress and higher levels of mental wellbeing. Additionally, law students experienced lower levels of belonging and mental wellbeing than psychology students but both experienced similar levels of stress.

Discussion

Summary of results

Our results supported our predictions as in line with H1 and H2, a stronger sense of belonging predicted lower levels of stress and higher levels of mental wellbeing. Furthermore, we found that, as predicted in H3, law students experienced lower levels of belonging and mental wellbeing than psychology students. However, we did not predict that law and psychology students would experience similar levels of stress. This suggests that Bronfenbrenner's theory,[56] which highlights the importance of exploring the social context around a person, can be used to better understand student wellbeing in different Schools. This provides support for the use of community-based interventions to promote positive mental wellbeing in students,[57] which could be used in the development of the UK *University Mental Health Charter.*

The finding that law students experienced lower levels of belonging and mental wellbeing than psychology students is not unexpected. It supports previous literature which has shown that law students experience high levels of psychological distress.[58] It has previously been suggested that this may be caused by the way in which law is taught, as law is often presented through opposing narratives such as claimant/defendant and winning and losing are inherent within such frameworks. The law degree leads students to become

[56] Bronfenbrenner, 2005, n23 above.
[57] For example, Haslam, C, Cruwys, T, Haslam, SA, Dingle, G, & Chang, MX, 'Groups 4 Health: Evidence that a social-identity intervention that builds and strengthens social group membership improves mental health' (2016) 194 *Journal of Affective Disorders,* 188-95.
[58] Duffy, J, Field, R & Shirley, M 'Engaging Law Students to Promote Psychological Health' (2011) 36(4) *Alternative Law Journal*, 250-4.

more rational, competitive, adversarial, arrogant and elitist and can make them feel isolated, disconnected and intolerant.[59] These feelings may lead to a lowered sense of community in the law school and lower wellbeing by fracturing cohorts into smaller groups and reducing the availability of wider peer support. Furthermore, law students have been found to be more likely to compare themselves to other students in a way that made them feel more negative about themselves and their performance (Bleasdale & Humphreys, 2018).[60] Even more concerningly, law students often see themselves as being in competition with their peers, which in turn is likely to lead to further challenges in developing a sense of community and in turn lower wellbeing.[61] Psychology students generally experienced a stronger sense of belonging and more positive mental wellbeing. This may in part be because psychology students aspire to a range of careers,[62] which may reduce feelings of competition between students.[63] Psychology students are also trained in skills and content during their course which help create a positive community, for example, listening skills and empathy, and they also cover topics such as mental health and wellbeing as part of their course.[64] Therefore, it is perhaps not surprising that psychology students showed higher wellbeing and a stronger sense of belonging than law students. In this paper, we suggest several possible explanations for differences between law and psychology including: reasons for choosing the subject, skills developed during the course and content knowledge in the degree, feelings of competition between peers within the cohort and competition for future jobs. However, these were not measured in this study, thus the reasons for the differences found are not known and future research should explore this explicitly.[65]

The finding that both law and psychology students experienced similar and relatively high levels of stress was unexpected. Previous research by Leahy et

[59] O'Brien, Tang & Hall, n34 above.
[60] Bleasdale & Humphreys, n47 above.
[61] O'Brien, Tang & Hall, n34 above.
[62] QAA, n46 above.
[63] Cruwys, T, Greenaway, KH and Haslam, SA, 'Stress and educational bottlenecks' (2015) 50 *Australian Psychologist,* 372-381.
[64] Landrum, RE & Harrold, R, 'What employers want from psychology graduates' (2003) 30(2) *Teaching of Psychology,* 131-133.
[65] Fay & Skipper, n38 above.

al[66] and Skead & Rogers[67] suggests that law students experience greater anxiety than other students. Our findings may have been due to the timing of the study. The study was conducted from December until February of the academic year with Year 2 and 3 students. During this period, students were preparing for the January exams, sitting them or waiting to receive results. As students were in second and third years, their marks would have counted towards their degree. This may have led to higher levels of stress than at other times of the year. Key times of stress during the degree have been identified by Bleasdale and Humphreys; these include assessment periods.[68] As both groups of students were experiencing exams at this time, this may explain why they were equally stressed. However, psychology students still exhibited more positive wellbeing than law students. This may have been because they were better able to seek support to help them to cope with this challenging period. Conley et al explored wellbeing at the beginning, middle and end of first year and found that wellbeing decreased from the start to the middle of the year and did not much improve by the end of the year.[69] Future research could explore levels of stress and wellbeing at different periods across the academic year and indeed, over the course of a degree. Students' reasons for experiencing peaks and troughs in stress and wellbeing could also be explored through questionnaires or in-depth interviews. This would allow us to better understand whether law students are entering university with poorer wellbeing than psychology students or whether wellbeing is impacted by different styles of teaching and courses. Better understanding of patterns of wellbeing would allow us to take a proactive approach to supporting mental wellbeing in our teaching topics and styles and help us to and reduce stress and support wellbeing during particularly challenging periods.

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[66] Leahy, CM, Peterson, RF, Wilson, IG, Newbury, JW, Tonkin, AL, & Turnbull, D, 'Distress levels and self-reported treatment rates for medicine, law, psychology and mechanical engineering students: Cross-sectional study' (2010) 44(7) *Australian and New Zealand Journal of Psychiatry*, 608-615.

[67] Skead, NK, & Rogers, SL, 'Stress, anxiety and depression in law students: How student behaviors affect student wellbeing' (2015) 4 *Monash UL Rev.,* 565.

[68] Bleasdale & Humphreys, n47 above.

[69] Conley, CS, Shapiro, JB, Huguenel, BM, & Kirsch, AC, 'Navigating the College Years: Developmental Trajectories and Gender Differences in Psychological Functioning, Cognitive-Affective Strategies, and Social Well-Being' (2020) 8(2) *Emerging Adulthood*, 103-117.

The current research provides support for Social Identity Theory (SIT)[70] and a community-based approach to mental wellbeing. Students who experienced a strong sense of belonging in their school were more likely to report positive mental wellbeing and lower stress. According to SIT, the first stage in developing a social identity is categorization, or creating groups. In the second stage, identification, we use information about the norms of our groups to guide our behaviour. Thus, SIT suggests that we can use group identification to change behaviour and literature supports this.[71] This means that groups can enhance our wellbeing if they are supportive and have norms around help seeking, but they can also reduce wellbeing if they do not. However, it is argued by Hoddinott, Allan, Avenell & Britten[72] that it is important to consider the framework of group-based interventions to discover which conditions are more likely to lead to positive change. For example, characteristics of participants, how members join groups, and intended outcomes may impact identification. Simply grouping students together in a School is unlikely to lead to a high level of identification. Similarly, feeling a strong sense of identity with a group which has norms which negatively impact mental wellbeing, for example, high levels of competition is likely to adversely affect wellbeing. Therefore, Schools need to consider how they can increase student identification with the group, for example by hosting events to bring staff and students together to create a shared identity. They also need to try to develop norms around behaviours which are linked to positive wellbeing, for example, by having students from higher year groups or staff sharing their experiences of seeking and receiving support.

Students typically express a strong desire for belonging and often want this sense of belonging to be tied to their discipline rather than the university.[73] In terms of implications, Schools may be able to achieve this by working to create a less competitive, adversarial environment between students and focusing on creating positive learning communities. For example, Kelk et al[74] argues that law schools should recognise the competitive elements of the course and make

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[70] Tajfel & Turner, n18 above.
[71] For example, Haslam et al, n57 above.
[72] Hoddinott, P, Allan, K, Avenell, A, & Britten, J, 'Group interventions to improve health outcomes: A framework for their design and delivery' (2010) 10(1) *BMC Public Health,* 800.
[73] MacKay, JRD, Hughes, K, Marzetti, H, Lent, N, & Rhind, S, 'Using National Student Survey (NSS) Qualitative Data and social identity theory to explore students' experiences of assessment and feedback' (2019) 4(1) *Higher Education Pedagogies*, 315-330.
[74] Kelk et al, n17 above.

support mechanisms available. It should be made clear to students that the competitive and rational nature of legal debate does not need to be taken into the personal aspects of their lives. Similarly, McInnis advocates harnessing the curriculum as the academic and social organising device to enhance a sense of community and feelings of belonging.[75] When students feel a sense of belonging, they are likely to act in line with group norms. It is therefore important to create norms within schools of discussing mental wellbeing and engaging in positive help seeking behaviours in order to create lasting change. Group level interventions such as this are likely to lead to a greater level of systemic change, as they can reach all students and create positive norms within the group which will likely lead to improvements in wellbeing across the community.

Future research

A next step in the research is to explore the link between belonging, wellbeing and stress with a larger and more representative sample and to collect more demographic data. For example, it may be that students from non-traditional groups such as those with lower socio-economic status may be less likely to feel like they belong at university,[76] this in turn could increase stress and reduce wellbeing. Furthermore, exploring a broader range of subjects would enhance our understanding of reasons for differences. For example, students of medicine aspire to a narrow range of careers but also express the desire to 'help' as a key motivator for their subject choice.[77] Those who study subjects like social work learn about mental health and communication skills, but will also be entering a narrow field of careers. Exploring experiences in different subjects will allow us to understand which elements have the greatest impact on belonging, stress and mental wellbeing and may help us better understand which elements to target with interventions.

The current research explores relationships between variables at a single point in time. Future research could be conducted longitudinally. Psychology research is often understood as 'me-search' and students may choose to study

[75] McInnis, C, 'Researching the First Year Experience: Where to from here?' (2001) 20(2) *Higher Education Research & Development,* 105-114.

[76] Jury, M, Aelenei, C, Chen, C, Damon, C, & Elliot, AJ 'Examining the role of perceived prestige in the link between students' subjective socioeconomic status and sense of belonging' (2019) 22 *Group Processes and Intergroup Relations*, 356-370.

[77] Bleasdale & Humphreys, n47 above.

psychology to better understand themselves. This may be why many psychology students enter university with existing mental health issues. In contrast, it has been suggested that the teaching methods in law, and high levels of competition may lead students to develop poorer mental wellbeing across their degree.[78] Therefore, it would be interesting to follow students through their degree from the beginning to the end, exploring how teaching, communities and pinch points such as assessment periods impact mental wellbeing, how schools are shaping this and what they could do better. Initial evidence of this from Cruwys, Greenaway and Haslam[79] suggests that psychology students experience lower wellbeing and high level of psychological distress at the time of dissertation submission, but that wellbeing improves substantially one month later except among students who received a disappointing grade. However, it is still unclear how these patterns may shift over a full degree programme, from entry to exit and the reasons behind this, therefore, further work is needed in this area. It would be interesting to conduct this research with a larger number of universities in a broader range of contexts. While the psychology curriculum in the UK is governed by the British Psychological Society, the law curriculum is no longer validated by the Solicitors Regulation Authority or Bar Standards Board, although the Bar Standards Board maintains certain academic requirements for entry into vocational training. Despite the requirements of professional bodies, there are likely to be differences between institutions in the methods of teaching and presentation of topics. These may help to enhance or reduce wellbeing. Therefore, a greater understanding of these different contexts may help us to design teaching which has the most positive impact on learners.

In the current study, we focused on sense of belonging within an academic setting, however, both academic and social engagement impact belonging.[80] Students may derive a sense of community in their school but may also experience this in other communities to which they belong. Literature on 'third

[78] O'Brien, Tang & Hall, n34 above.

[79] Cruwys, T, South, EI, Greenaway, KH, & Haslam, SA, 'Social identity reduces depression by fostering positive attributions' (2015) 6(1) *Social Psychological and Personality Science,* 65-74.

[80] Thomas, L, *Building student engagement and belonging in higher education at a time of change.* (2011) What Works? Student Retention and Success programme. See also, Vallerand, R 'Toward a hierarchical model of intrinsic and extrinsic motivation' in Zanna MP (ed) *Advances in experimental social psychology,* vol 27 (Academic Press: New York, 1997).

space' suggests that we have three spaces: work, home and, ideally, a third space for recreation and relaxation. This may be derived in community organisations, hobbies, church groups etc., where we can feel a sense of belonging.[81] Sani, Madhok, Norbury, Dugard, and Wakefield have shown that belonging to multiple groups can have a positive impact on stress and wellbeing, as different groups can serve different roles.[82] For example, peers in the same school can provide academic support while peers in social clubs may provide social support. Thus, future research could explore the impact of belonging to a variety of different communities and the positive and additive impact that each has. Belonging to a 'third space' community may be important for relaxing and relieving stress, but a strong academic identity may be important to promote engagement in learning and developing a professional identity (e.g. lawyer). Therefore, understanding the role of these different communities is an important area for future research.

Conclusion

In conclusion, while mental wellbeing is often seen as an individual issue, this research suggests that a strong sense of belonging can reduce stress levels and increase mental wellbeing. In addition, students in different schools can experience this differently, with law students feeling a lower sense of belonging and lower mental wellbeing than psychology students. Thus, we propose that targeting mental wellbeing interventions at the School group level, focussing on increasing sense of belonging and positive norms, has the potential to improve the mental wellbeing of all students.

[81] Skerrett, A, '"There's going to be community. There's going to be knowledge": Designs for learning in a standardised age' (2010) 26(3) *Teaching and Teacher Education*, 648-655.

[82] Sani, F, Madhok, V, Norbury, M, Dugard, P, & Wakefield, JRH, 'Greater number of group identifications is associated with lower odds of being depressed: Evidence from a Scottish community sample' (2015) 50(9) *Social Psychiatry and Psychiatric Epidemiology*, 1389–1397.

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Incorporating an affective framework into liberal legal education to achieve the development of a 'better person' and 'good citizen'

Emma Jones*

Abstract

This paper proposes an original framework for the incorporation of the affective domain into liberal legal education, in particular the undergraduate law degree. It argues that the aims of developing both the 'better person' and 'good citizen' can be facilitated by the incorporation of such a framework. The paper critiques liberal legal education's current focus upon narrow cognitive forms of reason and rationality. By excluding affect, legal educators' attempts to foster the insights and growth required to fully achieve the ends of liberal legal education are impeded, even obstructed. This paper advocates a novel affective framework incorporating four core aspects, experiential thinking, emotional authenticity, affective empathy and emotional reflexivity. Incorporating this framework has the potential to achieve the development of both the 'better person' and the 'good citizen' and foster synergies between both. This will significantly enrich liberal legal education and sustain and develop its importance within contemporary society.

Keywords: Legal Education; Liberal education; Affective domain; Better person; Good citizen

Introduction

This paper proposes an original affective framework to enable liberal legal education to successfully achieve its aims within the contemporary law school. The starting point of this paper is the notion that liberal legal education retains

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its international importance and value to society. Liberal education holds to 'the well-formed- and hard fought – judgement' that education should fundamentally assist students in developing their understanding of 'human things'.[1] In doing so, it challenges contemporary demands that education be in some way 'useful' or practical'. This approach retains its resonance today despite the incursions of neo-liberal policy within higher education via marketisation and narratives around students as consumers.[2] Internationally, members of the academy (and others) commonly seek to 'defend' or 'reclaim' liberal education.[3] The value of liberal education is often restated within academia in both traditional and new ways (such as in critiquing the traditional liberal notion of an 'examined' life).[4] It is also frequently utilised to challenge employability discourses which measure the value of higher education based upon its contribution to the economy and production of 'job ready' graduates.[5] Despite such neo-liberal ideals generating a more consumerist culture within universities, students also still consistently demonstrate at least some (perhaps unconscious) commitment to the basic principles of liberal education, acknowledging the intrinsic value and enjoyment of learning.[6] Significant concerns have been raised over the potential demise of liberal education in the light of wider trends, pressures and policy agendas influencing higher education, continuing to exacerbate neo-liberal consumerist tendencies.[7] However, within legal education, there is evidence that (at least at present) it holds an enduring place for both law students and legal academics globally.[8]

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[1] M. D. Guerra, 'The Place of Liberal Education in Contemporary Higher Education' (2013) 50(3) *Society* 251-256, 255.
[2] M. Thornton, Privatising the Public University: The Case of Law 2011.
[3] See, for example, Y. Hadzigeorgiou, 'Reclaiming Liberal Education' (2019) 9(4) *Education Sciences* 264; F. Zakaria, *In Defense a of Liberal Education* 2015.
[4] A. Miller, *A New Vision of Liberal Education. The good of the unexamined life* 2016; C. Haberberger, 'A return to understanding: Making liberal education valuable again' (2018) 50(11) *Educational Philosophy and Theory* 1052.
[5] D. B. MacKay, No Dilemma at all: The Importance of Liberal Education in Developing Skills for Employability' (2010) 3 *Collected Essays on Learning and Teaching Volume* https://celt.uwindsor.ca/index.php/CELT/issue/view/373 (accessed 9th August 2021).
[6] Marcela G. Cuellar, Alicia Bencomo Garcia & Kem Saichaie (2022) Reaffirming the Public Purposes of Higher Education: First-Generation and Continuing Generation Students' Perspectives, *The Journal of Higher Education*, 93:2, 273-296; R. Brooks, A. Gupta, S. Jayadeva and J. Abrahams, 'Students' views about the purpose of higher education: a comparative analysis of six European countries' *Higher Education Research and Development* (2021) 40 1375.
[7] Thornton, 'How the Higher Education "Industry" Shapes the Discipline of Law: The Case of Australia' (2017) 5(2) *Griffith Journal of Law and Human Dignity* 101, 112.
[8] A. Nicholson & P. Johnston, 'The value of a law degree – part 3: a student perspective' (2020) 55(4) *The Law Teacher* 431.

Indeed, it has been viewed as an important method of resistance against the greater incursion of neo-liberal agendas within law schools.[9] This paper begins by identifying key features of liberal education generally, and liberal legal education in particular, which demonstrate its oppositionality to such neo-liberal agendas.

The earlier reference to 'human things'[10] refers to proponents of liberal education's view of the aims of learning as the creation of either the 'better person' or 'good citizen'.[11] To date, much of the relevant literature focuses on one, rather than both, of these aims, conceptualising them as separate and potentially even incompatible, for example, the work of Bradney focuses largely upon individual growth, whereas the work of Brownsword emphasises the importance of citizenship and community.[12] However, this article will suggest that such aims have a crucial synergy and can both be viewed as part of a holistic developmental process, with students experiencing both individual transformation and contributing to wider society. The affective framework proposed is designed to facilitate achievement of both aims synergistically.

The article moves on to discuss the importance of the affective domain (encompassing moods, feelings and emotions) and its relationship with cognition, positioning it as key to the aforementioned developmental process. It challenges the arguments of proponents of the liberal legal tradition who commonly characterise the achievement of either or both aims as a wholly intellectual pursuit, based solely upon cognitive function.[13] Rather, it argues that, in doing so, such proponents disregard the crucial role which the affective domain plays within learning, personhood and citizenship.[14] The article then moves on to propose an original framework of four core affective concepts, namely, experiential thinking, emotional authenticity, affective empathy and emotional reflexivity, which are essential for meaningful development as both

[9] Doug Morrison & Jessica Guth, 'Rethinking the neoliberal university: embracing vulnerability in English law schools?' (2021) 55(1) *The Law Teacher* 42-56; D. Dixon, 'The Poverty of Pessimism' in *Imperatives for Legal Education Research* eds. B. Golder, N. Nehme, A. Steel & P. Vines 2019.
[10] Guerra n.1.
[11] R. Burridge & J. Webb, (2008) 'The values of common law legal education reprised' 42(3) *The Law Teacher*, 263, 264.
[12] A. Bradney, Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century 2003, 86
[13] E. Jones, Emotions in the Law School: Transforming Legal Education Through the Passions 2019, Chapter 1.
[14] Mary Helen Immordino-Yang, *Emotions, Learning and the Brain* 2016, 18.

a 'better person' and 'good citizen'. It explores how these can be integrated into the legal curriculum in a way which is compatible with liberal aims. Given the continued global interest in, and relevance of, liberal legal education, it is concluded that integrating this framework within the law school curriculum has the potential to enrich and revitalise legal liberal education in a way which perpetuates and supports its continued and increased international relevance and value.

The characteristics and aims of liberal legal education

The key characteristics of the liberal tradition and liberal legal education

The origins of the liberal tradition are commonly attributed to ancient Greece and Rome, although the influences of the Far East and Middle East are also increasingly acknowledged.[15] From its emergence, there have been tensions over what can, and should, be defined as a liberal education.[16] However, what is generally termed as liberal education within universities today can be traced back to the 12th century and the creation of the Universities of Bologna, Paris, Oxford and (slightly later) Cambridge.[17] Law was often included as a strand of a general liberal arts education within European universities from the Middle Ages.[18] However, within the UK and US it was not until the nineteenth and twentieth centuries that the academic law degree became increasingly well-established. In the UK the Inns of Court and Law Society's Law School traditionally undertook professional legal training.[19] Law as an academic discipline was developed in universities via the nineteenth century 'case book tradition' to carve out a niche for law schools as the site of a rational ordering of legal doctrine and principle.[20]

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[15] B. A. Kimball, The Liberal Arts Tradition: A Documentary History 2010, Introduction; P. Axelrod, Values in Conflict: The University, The Marketplace and the Trials of Liberal Education 2001, Chapter 1.
[16] F. Zakaria n.6, Chapter 2; Kimball n.14.
[17] R. Barrett, The Idea of a Higher Education 1990, 18.
[18] D. S. Clark, 'The Medieval Origins of Modern Legal Education: Between Church and State' (1987) 35(4) *The American Journal of Comparative Law* 653, 654; Freedman (1996) op. cit. (1996) n.32 at p.81.
[19] Clark n.18 654.
[20] David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in *Legal Theory and Common Law* ed. William Twining, 1986 at p.34.

There is a diffusion of definitions and descriptions of what constitutes a liberal education, with Rothblatt suggesting that '[I]t is possible for a liberal education to be all things to all men'.[21] As well as epistemological differences, there are also differences in the ways in which the liberal tradition has developed within different countries.[22] However, despite this breadth, it is possible to identify several key characteristics of liberal education.

First amongst these is the core notion that learning is, in itself, an intrinsic good.[23] As the key proponent of this approach within the legal academy, Bradney echoes this, stating that "Universities are like art galleries, being concerned with things that are good in themselves".[24] The question then arises as to what is it about the learning experience that constitutes such a 'good'? Liberal thinkers have emphasised that, for the individual, this is not about simply passively acquiring knowledge, or receiving a form of training in a particular technique or skill.[25] Instead, it is about understanding how to conceptualise and organise such knowledge and integrate it into a wider frame of reference.[26]

The idea of 'freedom' arguably underlies this focus upon broad intellectual development, as opposed to specialism or fragmentation.[27] Suggestions of what this development should look like differ between liberal commentators and sometimes disciplines.[28] However, the commonalities between such

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[21] S. Rothblatt, *Tradition and Change in English Legal Education. An Essay in History and Culture* 1976 at 195.
[22] K. A. Godwin, 'The Worldwide Emergence of Liberal Education' (2015) 79 *International Higher Education* 2-4; M. A. Boyle, 'Global liberal education: Theorising emergence and variability' (2019) 14(2) *Research in Comparative and International Education* 231.
[23] R. S. Peters, 'Aims of Education – A Conceptual Enquiry' in *The Philosophy of Education* ed. R. S. Peters (1973) 18; see also J. H. Newman, *The Idea of a University Defined & Illustrated I. In nine discourses delivered to the Catholics of Dublin II. In occasional lectures and essays addressed to the members of the Catholic University* 1994, 103; K. Jaspers, *The Idea of the University* 1960,31.
[24] A. Bradney, 'Raising the Drawbridge: Defending University Law Schools. (1995) 1 *Web Journal of Current Legal Issues*.
[25] P. H. Hirst, Knowledge and the curriculum 1974,47.
[26] Peters n.23 at 19; Zongyi Deng 'Bringing knowledge back in: perspectives from liberal education', (2018) 48(3) *Cambridge Journal of Education* 335-351; D. W. Hamlyn, 'Human Learning' *The Philosophy of Education* ed. R. S. Peters 1973, 179.
[27] James O. Freeman, *Idealism and Liberal Education* 1996 at 2; J. M. Halstead, 'Liberal Values and Liberal Education' in *Values in Education and Education in Values* eds. J. M. Halstead & M. J. Taylor 1996, 23.
[28] F. R. Leavis, *Education & The University* 1948, 43.

suggestions are captured well in the word 'liberal' itself. This encapsulates the notion of 'liberating the person who receives it' from 'the notion of the present and the particular'.[29] It also aligns with the broader notions of freedom and autonomy within general liberal thought.[30] It is this approach that will develop individuals who, in the words of Nussbaum, 'can call their minds their own'.[31]

It is another of liberal education's key characteristics, that of rationality, which is arguably of most importance when considering the relationship between liberal legal education and the affective domain.[32] The equation of education with the development and application of reason and rationality is a characteristic commonly emphasised by proponents of the liberal educational tradition.[33] Although the concept of rationality itself can be explained in different ways, the focus of liberal education is largely upon theoretical rationality, in other words, '…the rationality of cognitions, such as beliefs, in virtue of which we are theorizing beings seeking a true picture of our world'.[34] The way in which it conceptualises such theoretical rationality is largely through emphasis on the cognitive – effectively equating forms of cognitive reasoning with rationality. Given this, it is perhaps unsurprising that affect has been so frequently ignored and disregarded within the liberal legal education tradition.[35]

In relation to contemporary law schools, Krook (in the Australian context) suggests that legal education has formed a 'battleground' for an intellectual war between 'those who see law as a liberal art and those who see law as a science'.[36] A similar depiction has also been given within a UK setting.[37] This portrays liberal legal education as akin to socio-legal forms of study, in opposition to the would-be 'science' of the doctrinal tradition. It is

[29] C. H. Bailey, Beyond the Present and the Particular: A Theory of Liberal Education, 2010 at p.15.
[30] J. S. Mills, *On Liberty* 1854.
[31] M. Nussbaum, Cultivating Humanity. A Classical Defense of Reform in Liberal Education 1997 at 295.
[32] Halstead n.28 at 23; see also Bailey n.30 at 17.
[33] Bailey n.30 at 27; Hirstn.25 at 39.
[34] Robert Audi, 'Theoretical Rationality. Its Sources, Structure and Scope' in *Oxford Handbook of Rationality* 2004, 17.
[35] Jones n.13.
[36] Joshua Krook, 'A Brief History of Legal Education; A Battle Between Law as a Science and Law as a Liberal Art' (2017) 17(2) *Legal History.*
[37] John Hodgson, 'Response: From gavotte to techno – but the dance goes on' in *Perspectives on Legal Education. Contemporary Responses to the Lord Upjohn Lectures* ed. Chris Ashford, Nigel Duncan & Jessica Guth, 2016 at 196-206.

understandable that legal liberal education has commonly been equated with socio-legal studies, given the way it eschews the particular for the general.[38] This reflects the way that socio-legal study can enable students to go beyond insular doctrinal consideration of legal principles and instead develop broader insights into the intersections between law and society.[39] However, it should be noted that (regardless of the topic under consideration), liberal legal education still highly prizes rationality. Its common critique of the doctrinal tradition is not that it is wrong to take a 'scientific' approach, but rather that the approach it has currently chosen is flawed and, therefore, irrational, with approaches such as socio-legal scholarship being viewed as allowing 'deeper and more critical thought' and hence enhancing rationality.[40]

The tensions between liberal legal education and the doctrinal tradition have often been condensed to a dichotomy between the law degree as a liberal arts degree and as vocational preparation for the legal profession (or employment more generally).[41] Whilst there have been attempts to forge a form of peaceful compromise between these two sides, most notably by Twining,[42] the tensions appear to continue, often manifested through concerns about the impact of neo-liberal agendas which favour employability and the marketization of higher education.[43] It should be noted that this dichotomising represents a reductionist view given the variety of other potential approaches and traditions open to legal educators, such as the integration of contemplative practices based upon ancient Eastern traditions, and the use of feminist legal pedagogy (neither of which are incompatible with an overall liberal approach).[44] However, this

[38] Bailey n.30; Bradney n.12 at 86.
[39] R. Collier, 'Privatising the University and the New Political Economy of Socio-Legal Studies' (2013) 40(3) *Journal of Law and Society* 463.
[40] J. Guth & C. Ashford, 'The Legal Education and Training Review: regulating socio-legal and liberal legal education?' 48(1) (2014) *The Law Teacher* 5; A. Bradney, 'Law as a Parasitic Discipline' (1998) 25(1) *Journal of Law and Society* 71.
[41] Jones n.13.
[42] W. Twining, *Blackstone's Tower* 1994.
[43] R. Collier, 'Privatizing the University and the New Political Economy of Socio-Legal Studies: Remaking the (Legal) Academic Subject' (2013) 49 *Journal of Law and Society* 450; Thornton n.2.
[44] For contemplative practices, see S. L. Rogers, 'The mindful law school: An integrative approach to transforming legal education' (2012) 28 *Touro Law Review* 1189; R. Magee, 'Legal Education as Contemplative Inquiry: An Integrative Approach to Legal Education, Law Practice, and the Substance of the Law We Make' (2016) 3(1) *The Journal of Contemplative Inquiry*. For feminist legal pedagogy, see C. Menkel-Meadow, 'Feminist legal theory, critical legal studies, and legal education or the fem-crits go to law school' (1988) 38 *Journal of Legal Education* 61; D. L. Rhode, 'Missing questions: feminist perspectives on legal education' (1992) 45 *Stanford Law Review* 1547.

perceived dichotomy does illustrate that one of the key characteristics of legal liberal education is its rejection of the notion of the law degree acting for preparation for the legal profession.[45]

Overall, therefore, we can characterise liberal legal education as an approach to the law degree which emphasises the value of law as an intellectual discipline rather than for its potential vocational or neo-liberal consequences, which takes a wider, often inter-disciplinary approach to topics and that continues to prize, even deify, the concept of rationality. These characteristics shape not only the pedagogy of liberal legal education, but also the way in which proponents seek to achieve its aims.

The aims of liberal legal education: 'Better person' or 'good citizen'?

In the same way that the key characteristics of liberal education are diffuse, the aims of liberal legal education are sometimes unclear. However, it is possible to identify two broad notions – that of the 'better person' or the 'good citizen':

> The minimum credo for a liberal legal education includes a broad mission to prepare 'good citizens' or 'better people' in the sense of rational participants in the life of the community.[46]

The 'better person'

The concepts of the 'better person' and the 'good citizen', and their relationship, are an under-explored issue within liberal education generally. Given the retention of knowledge is not viewed as sufficient on its own, this implies that that there is some impact from a liberal education which goes beyond simply expanding a personal store of information. For some liberal commentators this requires the development of the 'good person'. A number, such as Hirst, use phrases focused upon intellectual expansion, such as 'the development of… the self-conscious, rational mind of man… in its most fundamental aspect'.[47] Other liberal commentators are more expansive, referring to education as having a transformative effect upon an individual

[45] Bradney n.12.
[46] Burridge & Webb n.11. The term 'wise citizen' is also sometimes used, see Haberberger n.4 1054.
[47] Hirst n.25 at 39; Peters n.23 19.

(something arguably impossible without the involvement of affect).[48] However, both capture a sense of personal and individualistic growth and development as a result of learning, whether purely cognitive or more transformational in nature.

Those commentators who focus solely upon cognitive development may query the term 'better person' as appropriate, viewing the ends of liberal legal education as wholly intellectual and with no focus on developing specific values or virtues[49] Conversely, others would view the inculcation of such values or virtues as key to the liberal enterprise, as encapsulated by Arnold's reference to 'the duty and possibility of extricating and elevating our best self, in the progress of humanity towards perfection'.[50] Nevertheless, underpinning both such perceptions is the notion of an individual's cognitive development leading them to make (better) informed choices in terms of values, allegiance and behaviour, whether that is through an objective oversight or via the inculcation of specific liberal values..

The individualised creation of the 'better person' is viewed by a significant number of proponents of liberal education as sufficient on its own.[51] The suggestion is that individual enrichment is the preferred aim of liberal education, regardless of whether or not this leads to a particular form of contribution or approach to wider society. Indeed, a person may well choose not to participate in civic society, or otherwise act as a 'good citizen', because they have made a rational, reasoned decision that this is not their best course of action.[52]

The 'good citizen'

Other proponents of liberal education view its end as the creation of a 'good citizen', often stemming from influential American writers such as Dewey.[53] However, even this notion can be interpreted in different ways, mirroring the

[48] See, for example, Peters n.23 21-22.
[49] S. Fish, *Save the World on your Own Time* 2012; Newman n.23 91.
[50] M. Arnold, *Culture & Anarchy* 1971, 202.
[51] M. Sanderson, 'Vocational and Liberal Education: A Historian's View' (1993) 28(2) *European Journal of Education* 189.
[52] Bradney n.12.
[53] J. Dewey, *Democracy and Education. An Introduction to the Philosophy of Education* 1916; Collini suggests that the idea of 'socialization in civic values' has resonance in both the US and France but 'has never played very well in Britan' (S. Collini, *What are Universities for?* 2012, 91).

discussion above over what constitutes the 'better person'. There are those who argue that the 'good citizen' in liberal ideology is the person who has absorbed tenets of liberal philosophy and seeks to uphold and apply those values within wider society.[54] This suggests that the creation of the 'good citizen' is predicated upon law students accepting and championing particular liberal tenets, focused upon individual autonomy and freedom to the extent that a person's actions do not harm the interests of others within society.[55] Pue captures this well in his comment 'Liberal states rest on the manufacture of liberal souls'.[56] Within contemporary society this manifests itself as a commitment to ideals such as democracy and equality, demonstrated in a range of ways, such as the upholding of the right to freedom of speech and the freedom to protest.[57]

Alternatively, others focus upon the idea of the 'good citizen' as the 'rational participant' within the community.[58] It could be surmised that there is something of an assumption that such a participant will, by virtue of their rational approach, be someone who upholds liberal values in any event. However, the stated focus of such proponents is largely upon developing qualities of critical thinking and fostering a form of intellectual curiosity, which shapes students' participation within society in a broader, less directive manner with an emphasis upon the acceptance of pluralism.[59]

The overall focus on 'the good citizen', in both its guises, appears closely entwined with the idea of the university (including the law school) as a public good. In other words, as enriching the intellectual, cultural and political life of the community.[60] In both the UK and US (and elsewhere), this was a central aspiration, even if it was not always fully realised in practice, in the evolution

[54] N. J. James, 'Liberal Legal Education: The Gap Between Rhetoric and Reality' (2004) 1(2) *University of New England Law Journal* 163; W. W. Pue, 'Legal education's mission' (2008) 42(3) *The Law Teacher* 270.
[55] Mills n.31 Chapter 4.
[56] Pue n.56 272.
[57] See, for example, the recent protests over the proposed Police, Crime, Sentencing and Courts Bill 2021 in relation of freedom to protest.
[58] Burridge & Webb n.11 264; R. Brownsword, 'Law Schools for Lawyers, Citizens and People' *The Law School – Global Issues, Local Questions* ed. F. Cownie 1999.
[59] M. Levinson, The Demands of Liberal Education 1999, 9.
[60] Collini n.55 x. This is also complemented by the wider focus on social justice of commentators such as bell hooks (see, for example, b. hooks, *Teaching to transgress: education as the practice of freedom* 1994) and Friere (see, for example, P. Friere, *Pedagogy of the Oppressed* 1970).

of the twentieth century university.[61] In recent years a pervasive neo-liberal ideology has focused upon the marketization of higher education and a shift towards ends which can be characterised either as a private good, or as a form of re-conceptualisation of the public good. This conflates the notion of a 'good' with economic success, whether as a workplace-ready graduate or as a contributor to the prosperity of society.[62]

Given this approach to higher education, it is perhaps unsurprising that the liberal notion of education as assisting a student to become a 'better person' or 'good citizen' has often been supplanted by a consumeristic, individualised view of students which focuses on their contribution to the knowledge economy rather than wider notions of flourishing and happiness.[63] However, there has been resistance to this within both the wider university and legal education, for example, by highlighting the need for the law degree to focus upon a mission of social justice.[64] The proposed affective framework set out in this paper is designed to encourage such resistance by providing liberal legal education with renewed vitality through the acknowledgment and utilisation of affect to develop students synergistically as both 'better people' and 'good citizens'.

A holistic developmental process

Although the 'better person' and 'good citizen' have largely developed as separate traditions within liberal education, there is a strong argument that the two notions are in fact compatible, and synergistic, with the potential for students to engage in a process of development which encompasses both. The starting point for this is that formalised learning is not, on the whole, an entirely solitary activity. Even if it is ultimately aimed at the development and enrichment of the individual, much of the learning itself will be socially

[61] R. L. Lieberwitz, 'Vulnerability theory and higher education' (2021) 55(1) *The Law Teacher* 5, 7-10; Jonathan Grant, *The New Power University. The social purpose of higher education in the 21st century* 2021, 19; L. C. Robbins, *The University in the Modern World and Other Papers on Higher Education* 1966.
[62] B. Hensley, M. Galilee-Belfer & J. J. Lee, 'What is the greater good? The discourse on public and private roles of higher education in the new economy' (2013) 35(5) *Journal of Higher Education Policy and Management* 553.
[63] A. Alwick & S. Cannizzaro, 'Happiness in higher education' (2017) 71(2) *Higher Education Quarterly* 204.
[64] Chris Ashford and Paul McKeown *Social Justice and Legal Education* 2018.

constructed via formal and informal communities of learning.[65] The fact that higher education, including university legal education, can include seminars and forms of group work and peer learning demonstrates the importance and value placed on the co-creation of knowledge within some formal settings.[66] The pedagogic worth of both formal and informal peer learning is also well-established in the more general educational literature.[67] The outcome of such peer learning may well be an individual student developing or changing their own personal viewpoint, but this will have taken place as a consequence of the communal learning experience, in other words, the students as active citizens within their learning experience.[68]

Given that students in these settings do not learn in isolation, whether intentional or not, students will also learn and absorb wider notions of citizenship (in the sense of belonging to a group or community) throughout their studies. If we are seeking to encourage students to be engaged and active learners instead of receptacles of knowledge we are, whether we like it or not, also shaping their notions of citizenship. It is naïve to think that the attitudes and values to citizenship modelled in teaching and learning environments will not influence the approach which students take to citizenship within wider society.[69] Even if an educator was to make a conscious decision to exclude any forms of discussion or dialogue around citizenship, this itself would amount to a deliberate statement around citizenship, characterising it as something which should be separate from law and justice.[70] As Maharg explains:

> Theories of learning that are focused on the singular mind bracket the world and set it aside. The world cannot be set

[65] Paul Adams, 'Exploring Social Constructivism: Theories and Practicalities' (2006) 34(3) *Education* 243.
[66] Alison Bone. 'The twenty-first century law student' (2009) 43(3) *The Law Teacher* 222; David Boud, Ruth Cohen and Jane Sampson eds. *Peer Learning in Higher Education: Learning from and with Each Other* 2001.
[67] D. Boud, 'Making the move to peer learning' *Peer Learning in Higher Education: Learning from and with each other eds.* D. Boud, R. Cohen & J. Sampson 2001, 1.
[68] N. Zepke, 'Learning with peers, active citizenship and student engagement in Enabling Education' (2018) 9(1) *Student Success* 61.
[69] Kathleen Lilley, Michelle Barker, and Neil Harris. 'Exploring the process of global citizen learning and the student mind-set' (2015) 19(3) *Journal of Studies in International Education* 225.
[70] For a counterpoint see Fish n.51.

> aside. We are ineluctably part of the world and it of us and our social relationships affect generations of knowledge.[71]

This is perhaps particularly the case within law, where so many of the topics considered touch upon key themes within society, from sexual offences to voting systems, from human rights to notions of the 'public interest'. As students become engaged with the theories, ideas, case law and debates in these areas it seems inevitable that their ideas about society, and their place within it, will begin to form and develop (although possibly not as fully as they could or should do, given the current lack of acknowledgment of the affective domain).[72] Despite neo-liberal incursions into legal education, there is also often a strong thread of commitment to social justice to be found within law schools, including through the provision of free law clinics and the other outreach activities commonly found within clinical legal education.[73] In addition, many law students are likely to have a level of prosocial motivation which supports notions of citizenship. They may be studying law to improve society or to in some way benefit certain groups within society. There is evidence from the US, Australia and the UK that many students at least begin law school with intrinsic goals which are orientated towards social justice and community service.[74]

Of course, simply learning more about society does not necessarily mean that students will then wish to participate within it as 'good citizens'. There is the possibility they may make a deliberate decision not to participate, or to limit their participation, or indeed to engage with a wholly different system of societal values than that of liberal democracy. However, Burrows argues that liberal education can develop core abilities that are pre-requisites for

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[71] Paul Maharg, Transforming Legal Education. Learning and Teaching the Law in the Early Twenty-first Century 2007, 6.
[72] F. Cownie, 'Alternative Values in Legal Education' (2003) 6(2) *Legal Ethics*, 159.
[73] Donald Nicolson, 'Legal Education, ethics and access to justice: forging warriors for justice in a neo-liberal world' (2015) 22(1) *International Journal of the Legal Profession* 51.
[74] Kennon M. Sheldon and Lawrence S. Krieger, 'Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261; Andy Boon, 'From public service to service industry: the impact of socialisation and work on the motivation and values of lawyers' (2005) 12(2) *International Journal of the Legal Profession* 229. For a nuanced discussion of law students' ethical development see Richard Moorhead, Catrina Denvir, Rachel Cahill-O'Callaghan, Maryam Kouchaki & Stephen Galoob 'The ethical identity of law students' (2016) 23(3) *International Journal of the Legal Profession* 235,

participation and action, namely, abstract thinking, self-direction, social interaction, and language.[75] It has already been noted that one of liberal education's key characteristics is the notion that learning has an intrinsic, even transformative, value, rather than being instrumentalist in quality. Peter argues that, for a person to be educated, their knowledge and understanding 'must permeate his way of looking at things rather than be "hived off"'.[76] If students develop such abilities it therefore seems likely that many will make a rational, informed decision to utilise them within society, particularly given the recognised associations between knowledge and understanding, critical thinking and global citizenship.[77] Indeed, it is arguable that, for liberal legal education's resonance to persist, it is necessary to develop such pre-requisites to function as a counterbalance to existing neoliberal discourses.[78]

In addition, for an individual to learn effectively and grow intellectually there needs to be a sense of autonomous or intrinsic motivation, rather than an extrinsic, un-internalized focus such as, for example, simply acquiring knowledge because it is a prescribed element of a module or programme.[79] If a student experiences an intrinsic interest or enjoyment in a topic it is more likely that they will also be motivated to act upon what they are learning, whether it be by voting in an election, protesting on a particular issue or debating with family and friends.[80]. Even if they do not find themselves engaged by the topic, within a liberal legal education they are likely to be encouraged to examine their own values and responses to it to identify why this

[75] David Burrows, 'Liberal Education and Effective Action' (2019) 68 (3-4) *The Journal of General Education* 289.
[76] Peters n.23 19.
[77] Lynn Davies, 'Global citizenship: abstraction or framework for action?' (2006) 58(1) *Educational Review* 5.
[78] J.McGee, M. Guihot & T. Connor 'Rediscovering Law Students as Citizens: Critical Thinking and the Public Value of Legal Education' (2013) 38(2) *Alternative Law Journal* 77.
[79] Carl A. Benware & Edward L. Deci (1984) 21 Quality of learning with active versus passive motivational set. *American Educational Research Journal* 755; Edward L. Deci & Richard M. Ryan, 'The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior' (2000) 11(4) *Psychological Inquiry* 227.
[80] Richard M. Ryan & Edward L. Deci, 'Intrinsic and extrinsic motivations: Classic definitions and new directions' (2000) 25 *Contemporary Educational Psychology* 54; Marylene Gagne & Edward L. Deci, 'Self-Determination Theory and Work Motivation' (2005) 26 *Journal of Organizational Behaviour* 331; Adam M. Grant, 'Does intrinsic motivation fuel the prosocial fire? Motivational synergy in predicting persistence, performance, and productivity' (2008) 93(1) *Journal of Applied Psychology* 48.

is the case. This form of reflection ensures they are more informed about society and their own sense of citizenship.[81]

In other words, in developing a 'better person', a liberal education is also likely to fuel behaviour and actions which can be equated with notions of 'good citizenship'. The two concepts can be viewed as synergistic, rather than oppositional. Working towards liberal education's notion of the 'better person' also fosters the abilities and forms of motivation which contribute to the development of the 'good citizen'. In trying to create a 'good citizen', liberal education facilitates personal growth and reflection, benefiting both the individual and society. Not all students may fully achieve both aims, depending on (amongst other things) their motivations, view of learning and disposition. However, it is likely that most will develop in a way which, at least in part, satisfies both aims.[82]

Having synthesised the characteristics and aims of liberal legal education to depict a holistic focus which can contribute to the development of both the 'better person' and 'good citizen', it is necessary to consider in detail the role which affect has to play within this form of endeavour. This will demonstrate the necessity of acknowledging the affective domain in striving to fully meet liberal legal education's aims.

The affective domain and its relationship with cognition

Definitions of affect

The term 'affect' is defined in a range of ways. A traditional distinction has been made between cognition (thought), affect (feeling) and conation (inclination).[83] More recently, definitions of affect have ranged from extremely broad characterisations, sometimes incorporating cognition and conation, such as Blackman and Venn's reference to 'the non-verbal, non-conscious dimensions of experience'[84] to more narrow suggestions, such as 'emotion and

[81] Haberberger n.4.
[82] M. S. Roth, Beyond the University. *Why Liberal Education Matters* 2014, 189; see also M. Oakeshott, *Rationalism in Politics and Other Essays* 1962, 198-9.
[83] Ernest R. Hilgard, 'The Trilogy of Mind: Cognition, Affection and Conation' (1980) 16 *Journal of the History of the Behavioral Sciences* 107.
[84] Lisa Blackman & Couse Venn, 'Affect' (2010) 16(1) *Body & Society* 7, 8.

mood'.[85] There has been considerable discussion over whether emotions form a part of the affective domain, with some accounts treating them as synonymous and others viewing emotions as one element of a broader range of feelings, moods and preferences.[86] Others draw a clear distinction between affect and emotions, with Feldman Barrett arguing that affect is a term for 'the general sense of feeling that you experience throughout each day' which are ever-present and, on occasion, are transformed into more complex and transitory experiences we know as emotions.[87]

As indicated in the Introduction, for the purposes of this paper, the terms 'affect' and 'affective' domain will be used as a form of shorthand to encompass moods, feelings and emotions. It is acknowledged this could be seen as adding to definitional confusion, however, there is a significant overlap in the ways in which these elements interact within learning and teaching environments, such as a law school. For example, a student will enter a lecture or workshop experiencing affect in terms of their mood that day (be it feeling bored and tired or alert and interested).[88] They may experience specific emotions throughout the session, based on their appraisal of events, such as happiness at seeing their best friend in the room, anger if the instructor is late without notice, or upset and agitation if dealing with sensitive content. This may impact on their feelings about the topic, the module and the instructor, as well as influencing their mood as they leave the session.[89] This illustration demonstrates the range of affective elements present at any one time in an individual's daily life and also the inter-connections between them all.[90] Each of the different elements of affect (including, within this paper's definition,

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[85] S. Schnall, 'Affect, Mood and Emotions' in *Social and Emotional Aspects of Learning* ed. Sanna Jarvela, 2011,59.
[86] For the former, see George Loewenstein, 'Defining Affect' (2007) 46(3) *Social Science Information* 405. For the latter, see Joseph P. Forgas, 'Affect in Legal and Forensic Settings: The Cognitive Benefits of not Being Too Happy' in *Emotion and the Law. Psychological Perspectives* ed. Brian H. Bornstein and Richard L. Wiener 2010,15.
[87] Lisa Feldman Barrett, How Emotions Are Made. The Secret Life of the Brain 2017, 72.
[88] Moods are generally of a longer duration than emotions and influenced by a wide range of biological and psychological factors (R. E. Thayer, *The Origin of Everyday Moods: Managing Energy, Tension, and Stress* 1997).
[89] Zane Asher Green & Sadia Batool, 'Emotionalized learning experiences: Tapping into the affective domain' (2017) 62 *Evaluation and Program Planning* 35; Colin Beard, Sue Clegg & Karen Smith, 'Acknowledging the Affective in Higher Education' (2007) 33(2) *British Educational Research Journal* 235.
[90] Reinhard Pekrun, Thomas Goetz, Wolfram Titz & Raymond P. Perry, 'Academic Emotions in Students' Self-Regulated Learning and Achievement: A Program of Qualitative and Quantitative Research' (2002) 37(2) *Educational Psychologist* 91.

emotions) will be experienced by the student throughout their daily life via a sense of affective valence and arousal.[91] In other words, whether something is experienced as a pleasant or unpleasant feeling, and how the strength of that experience varies in intensity over time. The effects and impacts of these affective experiences will depend upon an individual's capacity for affective regulation, and upon the type and nature of the emotions involved. However, their presence is inescapable.[92]

Affect and cognition as inter-related entities

As well as appreciating the pervasive and omnipresent nature of affect, it is also necessary to understand the ways in which it is an integral part of learning.[93] The relevance of the affective domain has been partially acknowledged within education for many years.[94] However, there has been a tendency to retain the characterisation of cognition and affect as separate functions.[95] Within higher education generally, and legal education in particular, this was manifested through a form of Cartesian dualism which divided and dichotomised cognition and affect and prized the former at the expense of the latter.[96] Affect was seen as a bodily function, to be suppressed or disregarded, whereas cognition was seen as a higher function of the mind, to be developed and prioritised. More recently, there has been what has been described as an 'affective' or 'therapeutic' turn within education.[97] Although the law school has remained relatively resistant to this turn,[98] the overall shift

[91] Feldman Barrett n.123 72.
[92] D. Trampe, J. Quoidbach & M. Taquet 'Emotions in Everyday Life' (2015) 10(12) *PLoS ONE*.
[93] Immordino-Yang n.14.
[94] David R. Krathwohl, Benjamin S. Bloom & Bertram B. Masia, Taxonomy of educational objectives: The classification of educational goals. Handbook II: Affective domain 1964.
[95] Hilgard n.119. This is also demonstrated in Krathwohl et al's separate taxonomies for the cognitive and affective domains (n.130).
[96] Terry Hyland, 'Mindfulness-based interventions and the affective domain of education' (2014) 40(3) *Educational Studies* 277. Jones n.13.
[97] Bessie Dernikos, Nancy Lesko, Stephanie D. McCall, Alyssa Niccolini eds. *Mapping the Affective Turn in Education: Theory, Research and Pedagogy* 2020. For a critique see Kathryn Ecclestone and Dennis Hayes, *The Dangerous Rise of Therapeutic Education* 2008.
[98] Gillian Calder, 'Whose body is this? on the role of emotion in teaching and learning law' in *Research Handbook on Law and Emotion* eds. Susan A. Bandes, Jodie L. Madeira, Kathryn D. Temple & Emily Kidd White 2021; Jones n.13; Paul Maharg and Caroline Maughan (eds) *Affect and Legal Education. Emotion in Learning and Teaching the Law* 2011.

in focus has led to a number of key insights which can be applied within legal education. Notable among these is that separating cognition from affect is erroneous because '[i]t is literally neurobiologically impossible to build memories, engage complex thoughts, or make meaningful decisions without emotion.[99]

Instead, affect and cognition have a bi-directional relationship – what we feel influences how we think and what we think influences how we feel.[100] Affect impacts both student and instructor motivation and interest, determining what we do (and do not) care about.[101] It influences students' interpretation, judgement, decision-making and reasoning as well as their interactions with instructors, peers and others.[102] It is not merely a case of trying to exclude or regulate affect to optimise learning, instead it is about a far more complex interaction with affect as an inescapable element of learning processes.[103] Danvers illustrates this well when discussing critical thinking within higher education (already referred to in terms of its link with citizenship).[104] She argues that this is 'an intensely affective process', embodied and relational.[105] Her empirical work with first year undergraduate students suggested they experienced not just transient emotions (such as nervousness around a specific activity) but also as a more complex, sometimes conflicting, set of on-going feelings.[106] As such, acknowledging these affects can open up new pedagogical landscapes and allow students to explore more fully 'the imperfection of all

[99] Immordino-Yang n.14.
[100] Helen Demetriou & Elaine Wilson, 'Synthesising affect and cognition in teaching and learning' (2009) 12 *Social Psychology of Education* 213.
[101] Mary Ainley, 'Connecting with Learning: Motivation, Affect and Cognition in Interest Processes' (2006) 18 *Educational Psychology Review* 391.
[102] Isabelle Blanchette & Anne Richards, 'The influence of affect on higher level cognition: A review of research on interpretation, judgement, decision making and reasoning' (2010) 24(4) *Cognition and Emotion* 561; Amanda D. Angie, Shane Connelly, Ethan P. Waples & Vykinta Kligyte 'The influence of discrete emotions on judgement and decision-making: A meta-analytic review' (2011) 25(8) *Cognition and Emotion*, 1393; Tyng M. Chai, Amin U. Hafeez, Saad N. M. Mohamad & Malik S. Aamir, 'The Influences of Emotion on Learning and Memory' (2017) 8 *Frontiers in Psychology* 1454.
[103] Isabelle Blanchette & Serge Caparos, 'When emotions improve reasoning: The possible roles of relevance and utility' (2013) 19(3-4) *Thinking & Reasoning* 399.
[104] Emily Clair Danvers, 'Criticality's affective entanglements: rethinking emotion and critical thinking in higher education' (2016) 28(2) *Gender and Education* 282. See also Sherri DioGuardi 'Critical Thinking in Criminal Justice Ethics: Using the Affective Domain to Discover Gray Matters' (2016) 27(4) *Journal of Criminal Justice Education* 535.
[105] Danvers n.140 at 295.
[106] Danvers n.140 at 285-286.

views of the world' and ask 'questions about how we are co-entangled and co-implicated'.[107] Similarly, in the context of legal education, Maharg identifies that liberalism itself involves strong affective urges 'about the nature of knowledge, society, the individual, privacy, freedom and the like'.[108] Taking the example from above of a student entering a lecture or workshop, if they are feeling bored their motivation is likely to diminish, affecting their concentration and leaving them less likely to absorb and engage with any new concepts introduced. Conversely, if they are alert and interested, they may well have the optimum level of affective arousal to engage fully and challenge themselves to develop their cognitive skills further by attempting to apply the new concept in a way which reflects their experience.

Understanding affect as an inescapable part of learning, and one which must be engaged with rather than simply excluded or regulated, has significant implications for both liberal education generally and legal liberal education in particular. This can be demonstrated by returning to the key characteristics of liberal legal education identified previously. If it is about the intellectual pursuit of law as an intrinsic good in a way which requires more than mere knowledge transmission, then it becomes necessary for the affective aspects of learning to be acknowledged and incorporated to enable students to learn in deep and potentially transformative ways.[109] Without these, thinking (and in consequence learning) becomes 'arid and shallow'.[110]

Liberal legal education's conception of rationality is also challenged. If affect can no longer be seen as irrational, but is instead integral to commonly accepted components of rationality within law (such as reasoning), it cannot be separated or excluded from rationality.[111] Indeed, it can be argued that some aspects of affect, such as intentional emotions involved in the appraisal of a situation, in

[107] Danvers n.140 at 295.
[108] P. Maharg, Transforming Legal Education. Learning and Teaching Law in the Early Twenty-First Century 2007, 7.
[109] Immordino-Yang n.14; Jones) n.13.
[110] Angela P. Harris & Marjorie M. Schultz, '"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education' (1993) 45(6) *Stanford Law Review* 1773; Pekrun n.126.
[111] Michel Tuan Fam, 'Emotion and Rationality: A Critical Review and Interpretation of Empirical Evidence' (2007) 11(2) *Review of General Psychology* 155; Mark Lance & Alessandra Tanesini, 'Emotion and Rationality' (2004) 30 *Canadian Journal of Philosophy Supplementary Volume* 275.

fact, enhance rationality or are themselves rational.[112] This means that, to study and engage effectively, students will need to develop an understanding of the influences of the affective domain on the different facets of learning and how to both regulate and utilise these influences.[113]

Regardless of the specificities of emotion's influence, it is clear that the affective domain is relevant and influential. Even if a separation between affect and rationality were possible, with cognitive rationality alone being acknowledged within educational settings, it would leave a significant gap within learning, again reducing it to something akin to knowledge transmission. The reasoning and judgement required even to appreciate the connections and inter-relationship between facts are weakened through the absence of affect. The polarization of reason and affect 'prevents either from enriching the other', resulting in emotions and feelings that are 'undisciplined, unexamined, and unowned', as well as thinking that is 'arid and shallow.[114] Insights from branches of psychology and neurology can both be used to justify its inclusion and also to facilitate students' engagement with, and understanding of, this relationship.[115]

In summary, applying key fundamental concepts from psychology and neuroscience demonstrates that the exclusion of affect from liberal legal education is not possible. Even if it were, it would be ill-advised and unreflective of the characteristics of such an education. Therefore, the remainder of this paper will seek to construct a framework of core affective concepts which can inform the characteristics of liberal legal education and assist it in meeting its overall aims by holistically developing both the 'better person' and the 'good citizen'. The concepts identified were each selected because they can each be applied to both aims, reinforcing the synergistic relationship between them. Each concept is broad enough to encompass both,

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[112] Ronald De Sousa, *The Rationality of Emotion* 1987; Klaus L. Scherer, 'On the rationality of emotions: Or, When are emotions rational?' (2011) 50(3-4) *Social Science Information* 330.

[113] J. Tan, J. Mao, Y. Jiang, M. Gao, 'The Influence of Academic Emotions on Learning Effects: A Systematic Review' (2021) 18 *International Journal of Environmental Research and Public Health*; Pekrun et al n.126.

[114] Harris & Schultz n.110 1779; see also Carole Leathwood & Valerie Hey, 'Gender/ed discourses and emotional sub-texts: theorising emotion in UK higher education' (2009) 14(4) *Teaching in Higher Education* 429.

[115] Bronwyn E. Wood, Rowena Taylor, Rose Atkins & Michael Johnson, 'Pedagogies for active citizenship: Learning through affective and cognitive domains for deeper democratic engagement' (2018) 75 *Teaching and Teacher Education* 259.

depending on its use and application within a programme or course. A number of suggestions for practical applications are provided for each concept. It should be noted that often these are not specific to legal education but instead drawn from other disciplines. This reflects the type of intellectual breadth which is key to liberal thought, whilst also acknowledging the limitations of existing legal pedagogy in this area. Legal educators will then have the flexibility to draw on such suggestions and adapt them to the diverse needs of individual programmes and courses.

Core affective concepts for personhood and citizenship

This section identifies the four affective concepts which assist in developing the 'better person' and the 'good citizen' within liberal legal education. It is not being suggested that these are in themselves sufficient for this progress. However, it is argued that these are necessary components to be developed alongside the other traditional 'cognitive' elements currently most closely associated with liberal education. It is not anticipated that a liberal legal education will enable every student to attain and fully develop all of these concepts, but each has a value in its own right as well as being part of a wider developmental process.

It is also worth noting that a number of these concepts are not solely or exclusively affective in nature, in that they often involve complex inter-plays between cognition and affect.[116] However, each has a strong affective element which is required, but currently often ignored or undervalued. In addition, each acknowledges and validates the importance of affect in a way often missing in discussions of liberal legal education. This also aligns with this paper's overall position, challenging the false dichotomy or form of Cartesian dualism which is often constructed between affect and cognition.[117]

Experiential thinking: Relevance and value

The notion of experiential thinking is based on the work of Epstein, whose 'cognitive-experiential self-theory' draws together a number of earlier psychological theories which posit that there are two different ways of thinking.[118] Drawing on these, Epstein identified two different ways of

[116] Ainley n.101.
[117] Joanna Conoghan, *Law and Gender* 2013 at p.208; Jones n.13.
[118] Simon John Handley, Stephen J. Newstead & Helen Wright, 'Rational and Experiential Thinking: A Study of the REI' in Richard J. Riding & Stephen Raynor (eds.) *International*

processing information, termed as 'rational' and 'experiential'.[119] The experiential mode is driven by affect, largely in the form of emotions, which are in turn generated by the way in which an individual interprets a particular event.[120] For example, if a person is coming towards you with a knife in a darkened alley you are likely to interpret them as a threat and feel scared and anxious. If a person is coming towards you with a knife during a birthday party, you are likely to feel excited and happy because it's time to cut the birthday cake.[121] There is a social constructivist basis to this as your interpretations will have been shaped by your previous experiences and interactions with others.[122] Epstein explains the role of experiential thinking as follows:

> At its lower levels of operation, it is a crude system that automatically, rapidly, effortlessly, and efficiently processes information. At its higher reaches, and particularly in interaction with the rational system, it is a source of intuitive wisdom and creativity. Although it represents events primarily concretely and imagistically, it is capable of generalization and abstraction through the use of prototypes, metaphors, scripts, and narratives.[123]

It is the rational thinking style that is most associated with academic achievement, mirroring liberal education's focus on rationality. However, the experiential thinking style has been found to have a significant correlation with positive interpersonal relationships, empathy, creativity, aesthetic judgment, humour, and intuition.[124] Although perhaps not commonly associated with academic success (particularly within law), these elements do have an important role to play within learning. For example, Immordino-Yang & Faeth discuss the role of 'skilled intuition' in shaping approaches and responses to

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Perspectives on Individual Differences Vol 1 Cognitive Styles Ablex Publishing Corporation 2000.

[119] Seymour Epstein, 'Integration of the Cognitive and the Psychodynamic Unconscious' (1994) 49(8) *American Psychologist* 709-724, 711; Seymour Epstein 'The Self-Concept Revisited. Or a Theory of a Theory' (1973) 28 *American Psychologist* 404.

[120] Epstein ibid. 715.

[121] M. Corbetta & G. Shulman 'Control of goal-directed and stimulus-driven attention in the brain' (2002) 3 *Nature Reviews Neuroscience* 201.

[122] Lisa Feldman Barrett, 'Constructing emotion' (2011) 20(3) *Psihologijske teme* 359, 372.

[123] Epstein n.119.

[124] Paul Norris & Seymour Epstein, 'An Experiential Thinking Style: Its Facets and Relations with Objective and Subjective Criterion Measures' (2011) 79(5) *Journal of Personality* 1043.

learning tasks based upon previous emotional reactions.[125] Creativity is also required to enable individual learners to synthesise and apply information within interdisciplinary study[126] and to form a 'vision of where they want to go'.[127] The growing interest in experiential learning also evidences the value of experiential thinking.[128] Drawing on the work of Dewey and others,[129] Kolb & Kolb refer to learning as '[n]ot just the result of cognition, learning involves the integrated functioning of the total person - thinking, feeling, perceiving, and behaving'.[130]

In terms of liberal legal education, there is some evidence that studying law decreases students' reliance on an experiential thinking style. Towness O'Brien *et al* applied the Rational-Experiential Inventory to assess the thinking styles of ANU College of Law students in Australia.[131] This included one cohort nearing the end of their first year of study and one cohort who were surveyed at both the beginning and end of their first year of study.[132] They found there was a 'significant difference' between the thinking styles of the cohort surveyed twice when comparing the beginning and end of the year, with rational thinking increasing and experiential thinking decreasing.[133] The study also provided some evidence that those students who did retain their propensity for experiential thinking had higher levels of wellbeing.[134] This mirrors a broader theme in the literature on lawyer wellbeing which suggests that legal education's interpretation of 'thinking like a lawyer' can be harmful.[135] It is

[125] Mary Helen Immordino-Yang & Matthias Faeth, 'The Role of Emotion and Skilled Intuition in Learning' *Mind, brain and education: Neuroscience implications for the classroom* ed. David A. Sousa 2010.
[126] Merel Van Goch, 'Creativity in liberal education before and after study commencement' (2018) *4th International Conference on Higher Education Advances* 1475.
[127] Robert J. Sternberg, 'Wisdom, Intelligence and Creativity Synthesized: A New Model for Liberal Education' (Fall 2009) *Liberal Education* 10.
[128] See, for example, Janet Eyler, 'The Power of Experiential Education' (Fall 2009) *Liberal Education* 24.
[129] Dewey n.55.
[130] Alice Y. Kolb & David A. Kolb, 'Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education' (2005) 4(2) *Academy of Management Learning & Education* 193.
[131] M. Towness O'Brien, S.Tang & K. Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21(1/2) *Legal Education Review* 149.
[132] Towness O'Brien et al, ibid. 154.
[133] Towness O'Brien et al ibid. 162.
[134] Towness O'Brien et al ibid. 163.
[135] C. James 'Lawyers' wellbeing and professional legal education' (2008) 42(1) *The Law Teacher* 85.

essentially an even narrower sub-section of the rational thinking style, involving 'a form of linear analysis in a constricted paradigm, best used for a specific purpose'.[136] However, there is a tendency for law schools to portray it as a 'superior way of thinking' rather than a useful approach in specific circumstances (such as when analysing problem scenarios).[137]

Overall, there are a number of compelling reasons for law schools to purposefully seek to foster experiential thinking within their curricula. One of these is to ensure that attributes such as creativity and aesthetic judgement are not overlooked within legal education.[138] To do so would be to prioritise narrow forms of rational thinking in a way which seems to undermine liberal education's emphasis on breadth and different perspectives.[139] To produce rigid minds, which analyse all arguments and situations through a narrow legalistic prism, forgoes the significant advantages of experiential thinking and learning. Over-reliance on 'rational' thinking and 'thinking like a lawyer' has the potential to be detrimental to wellbeing in a way which will, in turn, be likely to harm the students' motivation and engagement with their learning.[140] Therefore, experiential learning has a relevance and value for liberal legal education.

The fact that experiential thinking can, at its lower levels of operation, result in potential bias and intolerance is important to acknowledge.[141] It is therefore not intended to downplay the importance of cognition and rationality within the law degree (not least in fostering students' understanding of the potential and limitations of experiential thinking). However, a reliance solely on rational thinking and 'thinking like a lawyer' suggests a deification of the most narrow of legalistic mindsets, rather than a focus on developing the 'better person' who can draw creatively upon their personal experience, contextualise their learning and apply it across aspects of their life, or the 'good citizen' who can positively interact with society and respond intuitively to others. If this is the case, then it

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[136] James (2008) ibid. 91.
[137] James (2008) ibid. 91.
[138] J. Weinstein & L. Morton, 'Stuck in a rut: The role of creative thinking in problem solving and legal education' 9 (2002) *Clinical Law Review* 835.
[139] B. Hepple, 'The Renewal of the Liberal Law Degree' (1996) 55(3) *Cambridge Law Journal* 470.
[140] Y. Lu, D. T. L. Shek & Z. Xiaoqin, 'The Influence of Personal Well-Being on Learning Achievement in University Students Over Time: Mediating or Moderating Effects of Internal and External University Engagement' (2018) 8 *Frontiers in Psychology*.
[141] J. J. Gunnell & S. J. Ceci, 'When Emotionality Trumps Reason: A Study of Individual Processing Style and Juror Bias (2010) 28 *Behavioral Sciences and the Law* 850.

is hard to see how a liberal legal education can avoid embracing experiential thinking in ways which foster the intellect more broadly in order to achieve its aims.

Experiential thinking: Applications within legal education

Experiential thinking has the potential to be developed and honed through a process of learning and development.[142] Within law, aspects of experiential thinking such as creativity have been most commonly associated with problem-solving activities and developing lawyering skills.[143] In particular, creative problem-solving is generally positioned as an important skill for future lawyers, enabling them to consider the wider, non-legal factors which may well be involved within the generation of a seemingly legal issue and its eventual resolution.[144] As Menkel-Meadow suggests 'Good problem solving requires many modes of thinking, in which legal, analytic and analogical thinking are a part, but not the whole, of what we need'.[145] Suggested ways to foster such creative problem-solving include word play, reframing situations, use of narratives, mind mapping, the use of analogy and metaphor or even using toys, costumes and props.[146] For example, performing 'skits' and 'role plays' to re-enact problem question scenarios, and even using 'nerf weaponry' in negotiation exercises![147]

Wider educational literature on experiential thinking (and related concepts) indicates the potential for a much broader application of experiential thinking. Yorks and Kasl suggest it involves both fostering an appropriate learning environment and working with students in different ways.[148] The former can involve introducing specific 'rituals' at the start of a teaching session to assist

[142] C. Harteis & S. Billett, Intuitive expertise: Theories and empirical evidence' (2013) 9 *Educational research review* 145.
[143] See, for example, J. Weinstein & Li Morton, 'Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education' (2003) 9 *Clinical Law Review* 835.
[144] A. M. Seielstad, 'Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education' (2002) 8 *Clinical Law Review* 445.
[145] C. Menkel-Meadow, 'Aha--Is Creativity Possible in Problem Solving and Teachable in Legal Education' (2001) 6 *Harvard Negotiation Law Review* 97, 99; J. Gerarda Brown, 'Creativity and Problem-Solving' (2003-2004) 87 *Marquette Law Review* 697, 706.
[146] Menkel Meadow n.145 123-124.
[147] Gerarda Brown n.145 706-707.
[148] L. Yorks & E. Kasl, 'I know more than I can say: A taxonomy for using expressive ways of knowing to foster transformative learning' (2006) 4(1) *Journal of Transformative Education* 43.

students in transitioning into a space where they can be both cognitively and affectively engaged, for example, using guided visualisations or mindfulness-related activities. It can also involve including storytelling, allowing students to share their own prior experiences (or those of others) to foster empathy and build connections within the classroom.[149] In terms of working with students, they refer to the need to evoke experiences and to encourage a consciousness of emotions and feelings. For example, stimuli such as a guest speaker, an object or a piece of music could be used to build students' connection with an experience or idea. Students could then be encourage to respond intuitively via free writing or drawing.[150] Yorks and Kasl also refer to the need to facilitate creative ways of capturing insights and concepts: 'If a learner creates an expressive representation of a new insight, he or she can later relive the entire learning experience by reexperiencing the expressive representation'.[151] This could be done through a physical (bodily) enactment or artistic representations.

Within legal education, there is the potential to adopt many of these suggestions and techniques. There has already been work done to challenge the highly text-based focus of law by expanding the use of movement and visual arts.[152] Some legal educators have already begun to incorporate mindfulness activities within their teaching.[153] Watkins & Guihen have recently experimented with using both narrative and metaphors within formative assessment feedback to students.[154] However, to date there is no evidence of these approaches having been absorbed into the mainstream of legal education. In the US context, Kennedy famously described the first-year law school experience of being introduced to a 'hot' case, one with a sympathetic claimant and seemingly unscrupulous defendant who successfully defeats the claim. He explains:

> The point of the class discussion will be that your initial reaction of outrage is naïve, nonlegal, irrelevant to what you're supposed to be learning, and maybe substantively

[149] Yorks & Kasl ibid. 51-52.
[150] Yorks & Kasl ibid. 53-55.
[151] Yorks & Kasl ibid. 55.
[152] Z. Bankowski, M. Del Mar & P. Maharg, *The Arts and the Legal Academy: Beyond Text in Legal Education* 2016.
[153] R. V. Magee, Contemplative practices and the renewal of legal education (2013) 135 *New Directions for Teaching and Learning* 31; A. Cullen, Cultivating a Reflective Approach to the Practice of Law: The Use of Meditation in Legal Education (2019) 48 *Southwestern Law Review* 343.
[154] D. Watkins & L. Guihen, Using Narrative and Metaphor in Formative Feedback (2018) 68(1) *Journal of Legal Education* 154.

> wrong into the bargain. There are "good reasons" for the awful result when you take a legal and logical "large view", as opposed to a knee-jerk passionate view…[155]

Despite this quotation now being over forty years old, it still has resonance, reflecting the continuing emphasis on rigid and narrow forms of 'thinking like a lawyer' discussed previously.[156] A simple way to begin redressing the balance between this interpretation of rational thinking and introducing experiential thinking could be to allow law students to explore this initial and intuitive 'hot' response to a case, rather than encouraging them to suppress or disregard it. At its most basic, this could involve a question to draw student's explicit attention to their initial reaction, for example, 'how do you feel about this case?'. Developing this further, heightening the impact of this initial reaction via stimuli such as photographs, a video clip or a replica of an item of evidence, could lead to a vivid connection with both the case and the emotional reactions it generates. This would enrich the wholly cognitive approach currently taken within liberal legal education in a way which allows students to understand both themselves as a person, and their position within society, in a more holistic manner (which in itself facilitates better learning).[157]

Affective authenticity: Relevance and value

If students are to be permitted to develop both their rational and experiential thinking within the law degree, it is also necessary for them to be equipped with the affective authenticity to be able to fully explore and interpret their affective responses and reactions. Trilling draws an important distinction between sincerity and authenticity, defining sincerity as 'a congruence between avowal and actual feeling'.[158] Salmela echoes this by arguing that emotional sincerity is simply the truthful expression of a particular affective state, however fleeting or incongruent with the person's usual values. There is a discernible value to be found in affective sincerity itself, in the way it enables individuals to correctly identify and interpret the affective states they

[155] D. Kennedy, 'Legal education and the reproduction of hierarchy' (1982) 32 *Journal of Legal Education* 591, 594.
[156] James n.135.
[157] P. Maharg, *Transforming Legal Education. Learning and Teaching the Law in the Early Twenty-first Century* 2007; C. R. Rogers & H. J. Freiberg, *Freedom to Learn* 1994.
[158] Lionel Trilling, *Sincerity and Authenticity* 1974, 2.

experience.[159] This is a vital part of self-knowledge, which in turn frames, guides and directs behaviour (despite such knowledge not always being accurate).[160] However, simply being able to correctly recognise an affective state does not imply in itself any form of consistency or connection with one's values. An example of this is emotional contagion, where an individual's emotions or moods are transferred to or 'caught' by others around them.[161] This could lead to someone sincerely feeling 'happy' or 'sad' as a result of someone they are in close proximity to experiencing that particular emotion, without it reflecting their true self. Therefore, the focus in this affective framework is upon affective authenticity.

There are many different interpretations of the word 'authenticity'.[162] The word itself has origins in Latin and ancient Greek and is most commonly viewed as meaning being genuine or 'true to one's self'.[163] Therefore, affective authenticity is where these affective states 'are congruent with, or integral to one's self, not just passing episodes that occur in one's body and mind'.[164] As a result, there is a normative element to it, as to understand one's values and identity it is necessary to have a conception of what is being strived for, in other words, what is 'good'.[165] The link between emotional authenticity and an individual's values and inner being demonstrates a richness which has particular resonance to liberal education's notion of the 'better person'. Our emotions indicate to us what we value and care for. If someone is unable to ascertain whether their affective state is authentic, then they cannot use these cues and signals to assist them in identifying and understanding their values and true self.

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[159] David Pugmire, 'Real Emotion' (1994) 54(1) *Philosophy and Phenomenological Research* 105; Christoph Jager, 'Affective Ignorance' (2009) 71 *Erkenntnis* 123.
[160] Hazel Markus, 'Self Knowledge: An Expanded View' (1983) 51(3) *Journal of Personality* 543; Jonathon D. Brown, *The Self* 1998.
[161] Vijayalakshmi and Sanghamitra Bhattacharyya, 'Emotional Contagion and its Relevance to Individual Behavior and Organizational Processes: A Position Paper' (2013) 27(3) *Journal of Business and Psychology* 363.
[162] Jacob Golumb, In Search of Authenticity. From Kierkegaard to Camus 1995.
[163] Merlin B. Thompson, 'Authenticity in Education: From Narcissism and Freedom to the Messy Interplay of Self-Exploration and Acceptable Tension' (2015) 34 *Studies in the Philosophy of Education* 603.
[164] Mikko Salmela, 'What is Emotional Authenticity?' (2005) 35(3) *Journal for the Theory of Social Behaviour* 209, 217.
[165] Nimrod Aloni, 'A Redefinition of Liberal and Humanistic Education' (1997) 43 *International Review of Education* 87, 102.

The exact relationship between emotions and moral values is heavily debated, with Kristjánsson suggesting emotions can be characterised as either 'value-recorders' or 'value' donors'.[166] In other words, as either assisting in identifying and interpreting a person's existing objective values or as generating a person's values through their subjective lens. Regardless of which characterisation is chosen, the key point for the purposes of this paper is that there is some form of relationship in place, one which requires us to access and understand of our affective states to develop and understand our values. As such, an examined life has to be one which encompasses and acknowledges affect:

> […]if one admits the possible existence of hidden, subterranean, unacknowledged forces that may to some extent govern one's life, that may determine one's actions, without suitable self-examination it may never be clear whether it is such alien forces that are living their life through us while we passively surrender to their impetus.[167]

This is particularly the case when, as noted earlier, liberal education strives for students to integrate their learning into their lives more widely.[168] This cannot occur if students are unable to identify, and act in tune with, their authentic values as a 'better person'.

The emphasis on the need for affective sincerity and authenticity in self-examination is particularly challenging for those involved with legal education where the traditional focus has been upon suppressing or disregarding affect.[169] This arguably requires a form of affective inauthenticity, with students (and instructors) either hiding or ignoring their genuine affective responses. One way to characterise this is as a form of 'emotional labour'.[170] In particular, a form of 'surface acting' which involves an inauthentic portrayal of particular emotions or, in the case of legal education, no emotions.[171] It is a form of role-play or performance designed to meet social expectations in a given situation.

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[166] Kristján Kristjnsson, *Virtuous Emotions* 2018 31.
[167] Jerome Neu, 'Authenticity and the Examined Life' in John Deigh (ed.) *On Emotions: Philosophical Essays* 2013.
[168] Peters, n.23.
[169] Maharg and Maughan n.98; Jones n.13.
[170] Arlie Russell Hochschild, The Managed Heart. Commercialization of Human Feeling 1983.
[171] Hochschild ibid.

This can lead to a sense of exhaustion and cynicism.[172] In turn, the stress and emotional dissonance involved could impede students' engagement with their learning, acting as a barrier to intrinsic values.[173]

Our acquisition of knowledge and the way in which we process and frame it are not neutral processes, instead they are shaped by our perceptions, experiences and values.[174] Therefore, the form of learning involved in liberal legal education involves (indeed requires) self-examination and an understanding of values and the true self. It is inevitable, as educational theories of social constructivism demonstrate so clearly, that these individual attitudes and responses will also be influenced by the wider societal and cultural contexts the student in question inhabits.[175] Conversely, as students identify and understand their values more clearly, this is likely to lead to them enacting such values within society, interacting with others in authentic and meaningful ways. This once again demonstrates the synergies between the 'better person' and 'good citizen', with individual self-examination also required for a wider appreciation of notions of society and citizenship to develop. Affective authenticity is a crucial affective foundation for this type of insight and understanding, making it a valuable concept to incorporate within liberal legal education.

Affective authenticity: Applications within legal education

To foster affective authenticity within legal education, it is necessary for students to have the self-awareness to acknowledge and identify the emotions and other affect they are experiencing during their learning.[176] Many of the techniques to foster emotional literacy currently used within compulsory schooling can potentially be adapted to the law school to assist in this, such as enhancing learners' emotional vocabulary and teachers modelling appropriate

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[172] Samantha Rae Powers and Karen K. Myers (2020) 34(2) 'Work-Related Emotional Communication Model of Burnout: An Analysis of Emotions for Hire' *Management Communication Quarterly* 155-187.
[173] Nikki Bromberger, 'Enhancing Law Student Learning - The Nurturing Teacher' (2010) 20(1 and 2) *Legal Education Review* 45-61.
[174] V. R. Delclos & R. P. Donaldson 'Contemporary liberal education: slowing down to discern' (2014) 22(1) *On the Horizon* 7; A. Miller, 'Rhetoric, Paideia and the Old Idea of a Liberal Education (2007) 41(2) *Journal of the Philosophy of Education* 183-206.
[175] L. S. Vygotsky, *Mind in society: The development of higher psychological processes* 1978.
[176] S. Douglas, 'Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective' (2015) 9(2) *e-Journal of Business Education and Scholarship of Teaching* 56.

behaviour.[177] Enhancing emotional vocabulary involves giving students the linguistic tools to correctly identify and explain their emotional experiences, allowing them to 'elucidate more nuanced and intricate emotions from a more inexplicit general state of emotional arousal'.[178] This could be done by incorporating greater usage of emotional vocabulary into the teaching of general legal topics, potentially drawing upon storytelling and narrative as tools.[179] There have also been examples of targeted programmes within law schools focused upon developing such skills. For example, in the US context, Cain introduced a session of one hour per week for ten weeks on 'emotional intelligence' for law students which included speakers from other disciplines (such as psychology), the use of audio-visual materials and small group discussions.[180] Although in this case the focus was on upskilling students for work on a clinical legal education programme and as future legal professionals, the author acknowledges it as a 'first step' and as a 'successful and rewarding' experience.[181]

More generally, legal educators have an important role to play in modelling the use of expressive vocabulary relating to emotions and sharing their emotional reactions.[182] While this may entail a degree of emotional labour, it can be integrated into existing teaching practices. For example, Stewart discusses the value of using little half stories, about 'the ordinary change in encounters and events and what people do with this change' as starting points for teaching, describing them as 'building a muscle to respond to what happens around us in singular moments'.[183] Using such stories and anecdotes can not only foster experiential thinking and a sense of connection, but also enable legal academics to incorporate a richer emotional vocabulary and model an openness around emotions which is valuable as a step towards affective authenticity. For

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[177] S. Srikanth & R. Sonawat, 'Emotional literacy: The ABC of understanding emotions' (2012) 3(3) *Indian Journal of Positive Psychology* 309.
[178] A. S. Dylman, E. Blomqvist & M. F. Champoux-Larsson, 'Reading habits and emotional vocabulary in adolescents' (2020) 40(6) *Educational Psychology* 681, 682.
[179] C. Grose, 'Storytelling across the Curriculum: From Margin to Center, from Clinic to Classroom' (2010) 7 *Journal of the Association of Legal Writing* Directors 37; Watkins & Guihen n.190.
[180] P. J. Cain, 'A First Step toward Introducing Emotional Intelligence into the Law School Curriculum: The Emotional Intelligence and the Clinic Student Class' (2003) 14 *Legal Education Review* 1.
[181] Cain ibid. 16-17.
[182] A. Juergens, 'Practising what we teach: The importance of emotion and community connection in law work and law teaching' (2005) 11(2) *Clinical Law Review* 413.
[183] K. Stewart, 'Teaching Affectively' *Mapping the Affective Turn in Education: Theory, Research and Pedagogies* eds. B. Dernikos, N. Lesko, S. McCall & A. Niccolini 2020.

example, in a law of obligations class, sharing a personal experience of a contract for a much-anticipated concert or event being cancelled would allow the teacher to express frustration and disappointment openly and give students an opportunity to relate that experience, and those emotions and feelings, to their own life events. It may be that students are also encouraged to share stories from their personal contexts, whilst bearing in mind the need to ensure that the burden of educating others is not placed upon individuals whose demographics, background or circumstances have led them to experience disadvantage.[184]

Equipping students with the self-awareness to acknowledge and identify the emotions they are experiencing will provide them with the requisites required to be affectively sincere. However, as discussed previously, affective authenticity also requires a congruence between affect and values.[185] Within legal education, there has been a traditional tendency to disregard values, alongside affect, focusing instead upon the 'rational coherence' of a particular policy or law.[186] However, in recent years there has been a number of calls for the importance of values to be acknowledged.[187] These largely seem to emphasise plurality in values, rather than an inculcation of liberal values specifically, an approach which is in tune with the notion of affective authenticity: If students understand their own values, they will then be able to align them with their affective responses. This does not only apply in the legal context, but also within their individual life and interactions with society.

To foster this understanding, it is possible for law schools to adapt and use existing programmes designed to foster an understanding of individual values, such as Gentile's *Giving Voice to Values* programme.[188] More broadly, pedagogic approaches including a focus on open debate and critical inquiry are valuable, involving students as 'active participants and co-constructors of knowledge'.[189] The way adversarial systems of law offer (at least) two contrasting perspectives on a legal issue can be viewed as fertile ground for

[184] J. Haritaworn, 'Perverse Reproductions: Notes From the Wrong Side of the Classroom' (2011) 8(1) *Journal of Curriculum and Pedagogy* 25, 27.
[185] Salmela n.164.
[186] F. Cownie 'Alternative Values in Legal Education' (2003) 6(2) *Legal Ethics* 159, 160.
[187] See, for example, W. Pue, 'Educating the Total Jurist' (2005) 8(2) *Legal Ethics* 208; G. Ferris, *Uses of Values in Legal Education* 2015.
[188] M. C. Gentile, *Giving Voice to Values. How to Speak Your Mind When You Know What's Right* 2010. For discussion in a legal context see Ferris n.187, Chapter 9.
[189] M. Walker, 'Universities and a Human Development Ethics: a capabilities approach to curriculum' (2012) 47(3) *European Journal of Education* 448, 455.

this type of engagement. However, if constrained by highly technical language, strict boundaries about what issues and arguments can be admitted as 'relevant' or 'valid', the requirement for there to be a 'winner' and 'loser' and other adversarial constructs, this approach can be overly restrictive.[190] Therefore, one way to foster freer critical dialogue can be to focus less on the traditional law school fare of appellate case law and instead promote wider engagement with so-called 'alternative' dispute resolution and alternative legal paradigms, including therapeutic jurisprudence and integrative law.[191] For example, when teaching law of obligations students could be introduced to the integrative law notion of 'conscious contracts' and the emphasis it puts upon the values of the contracting parties, as a way of developing broader discussions around the values inherent within contract law and the implications of those within different arenas where contracts are formed.[192]

Affective empathy: Relevance and value

Empathy is perhaps the aspect of the affective domain which is most commonly alluded to within liberal education, potentially because it is commonly recognised as an ability which can be taught and learnt.[193] For example, Martha Nussbaum refers to the 'narrative imagination', which requires students to foster 'a capacity for sympathetic imagination that will enable us to comprehend the motives and choices of people different from ourselves'.[194] Whilst Nussbaum proposes using literature to develop this capacity, there is a clear overlap with the notion of empathy. In fact, there is no single accepted definition of empathy.[195] However, it is commonly agreed that genuine

[190] C. Menkel-Meadow, 'The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Nonpartisanship in Lawyering' 72 (1999) *Temple Law Review* 785; M. Towness O'Brien, 'Facing down the gladiators: Addressing law school's hidden adversarial curriculum' (2011) 37(1) *Monash University Law Review* 43.
[191] See, for example, S. L. Brooks, 'Practicing (and teaching) therapeutic jurisprudence: Importing social work principles and techniques into clinical legal education' (2004) 17 *Thomas Law Review* 513; J. K. Wright, *Lawyers as Changemakers. The Global Integrative Law Movement* 2017.
[192] J. Marson, H. Alissa & K. Ferris, 'Driving Towards a More Therapeutic Future? The Untraced Drivers Agreement and Conscious Contracting' (2021) 25(1) *European Journal of Current Legal Issues*.
[193] R. Samra and E. Jones, 'Fostering empathy in clinical teaching and learning environments: A unified approach' (2019) 6(1) *Australian Journal of Clinical Education*; Frederic W. Platt & Vaughn F. Keller, 'Empathic communication' (1994) 9(4) *Journal of General Internal Medicine* 222.
[194] Nussbaum n.31, 85.
[195] B. M. P. Cuff, S. J. Brown, L. Taylor & D. J. Howat, 'Empathy: A Review of the Concept' (2016) 8(2) *Emotion Review*144-153. D. Batson, 'These Things Called Empathy:

empathy has both cognitive and affective elements, although arguments remain around which (if either) of these elements predominates.[196] The type of empathy most commonly associated with law schools and lawyers is a cognitive form of empathy or 'perspective-taking', in other words, 'the ability to understand another's view, even if it is different from your own, by cognitively "putting yourself in the place of 'another person'.[197] Such a cognitive ability has significant instrumental value in building rapport with clients.[198]

The affective element of empathy is often ignored within legal education.[199] In fact, it is generally characterised as more problematic than cognitive perspective-taking. It has been criticised as potentially leading to biases and prejudice by favouring a single and relatable instance over innumerable, potentially worthier, instances, which did not elicit such an immediate affective response.[200] However, the value of affective empathy has also been highlighted:

> Untutored empathy can blind us to the non-actual and the wider context. But it can spur us to reflect on what the alternatives to the actual situation are, and to consider their impact in the light of principles that may get their grip on us in virtue of resonating with impartially empathic responses.[201]

Therefore, although in and of itself affective empathy may be flawed, when combined with cognitive elements it provides the potential for a creative, rich and deep understanding of the situations of others, an understanding that can

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Eight Related but Distinct Phenomena' in *The Social Neuroscience of Empathy* eds.J. Decety & W. Ickes 2011.

[196] J. Bošnjaković & T. Radionov, 'Empathy: Concepts, Theories and Neuroscientific Basis' (2018) 54 *Alcoholism and Psychiatry Research* 123.

[197] G. Barnett & R. E. Mann, 'Empathy deficits and sexual offending: A model of obstacles to empathy' (2013) 18(2) *Aggression and Violent Behavior* 228.

[198] C. Westaby and E. Jones, 'Empathy: an essential element of legal practice or 'never the twain shall meet'?' (2018) 25(1) *International Journal of the Legal Profession* 107.

[199] Westaby & Jones ibid.

[200] P. Bloom, Against Empathy. The Case for Rational Compassion 2016.

[201] A. Kaupinnen, 'Empathy and Moral Judgement' in *Routledge Handbook of the Philosophy of Empathy* (eds) 2016.

then be developed into a wider social and political consciousness and has even been suggested as the basis of moral agency.[202]

Affective empathy is at the heart of students' development as a 'better person' and 'good citizen' within liberal legal education. The affective response allows the individual a potentially stronger and more accurate understanding of the feelings and needs of others, developing them as a 'better person'. The understanding and insights affective empathy provides also become a bridge to understanding society and developing an appreciation of the role of, and need for, citizenship within it. This role also, once again, illustrates that the 'better person' and 'good citizen' should not be dichotomised as separate ends of liberal legal education. It cannot be guaranteed that an individual empathetic response will be converted into positive action for, as Nussbaum points out, the best torturers must be highly empathetic to understand how to best torment their victim.[203] However, by incorporating affective empathy as a valid and potentially valuable response within legal education, liberal educators are given the opportunity to explore with students what such a response means and how it can be aligned with both individual and societal values such as social justice and freedom (or whichever values the individual student holds dear).

Affective empathy: Applications within legal education

Perhaps the area currently most closely associated with empathy within law schools is that of clinical legal education.[204] It is suggested that giving students the opportunity to hear clients' own experiences and positioning these as central to the giving of legal advice can foster increased levels of empathy.[205] While this is valuable, there are two potential limitations with this approach. Firstly, the type of empathy likely to be emphasised and valued by clinical

[202] P. Margulies, 'Re-Framing Empathy in Clinical Legal Education' (1999) 5 *Clinical law Review* 605; E. Aaltola, 'Affective empathy as core moral agency: psychopathy, autism and reason revisited' (2014) 17(1) *Philosophical Explorations* 76.
[203] M. Nussbaum 'Reply to Amnon Reichmann' (2006) 56(2) *Journal of Legal Education* 320, 321.
[204] S. Whittam, K. Saban & A. Lawton, 'Do we want a human first, and a lawyer second?: Developing law student empathy through clinical legal education' (2021) *International Journal of Clinical Legal Education*; A. Gascón-Cuenca, C. Ghitti & F. Malzani 'Acknowledging the relevance of empathy in clinical legal education. Some proposals from the experience of the University of Brescia (IT) and Valencia (ESP)' (2018) 25 *International Journal of Clinical Legal Education*.218; Margulies n.238.
[205]

supervisors is a form of cognitive perspective-taking.[206] At a point where students are often being taught lessons about the need for professional boundaries and encouraged to demonstrate detachment and neutrality, it can be difficult for clinical supervisors to have the understanding, time and resources to explicitly discuss the more complex role and importance of affective empathy in an appropriate manner.[207] Secondly, in some clinical settings at least, the focus is very much on the development of lawyering skills as preparation for legal practice in a manner which appears contrary to the aims of liberal legal education.[208] These potential limitations should not detract from the ways in which clinical legal education can foster empathy. For some students this may be a naturally occurring process, as a result of their exposure to real-world legal scenarios. For others, it may be their clinical programme does give them explicit opportunities to explore and acknowledge aspects of affective empathy.[209] Even where the focus is largely upon practical preparation, it is likely that there will be some form of reflective element which will allow for a more personal, education-focused exploration of such a skill.[210] Therefore, clinical legal education is certainly valuable, but is not, on its own, sufficient to fully integrate affective empathy into liberal legal education.

Considering the legal curriculum more broadly, a number of the pedagogic techniques discussed in relation to experiential thinking and affective authenticity are also relevant in fostering students' affective empathy. For example, incorporating narrative and storytelling can assist students in understanding someone else's position not only cognitively but also affectively because 'a concrete story comes closest to actual experience and so may evoke our empathic distress response more readily than abstract theory'.[211] This does not have to involve the legal educator telling the story – it may be possible to invite guest speakers with relevant experience or ask students to contribute

[206] J. Gerada Brown, 'Deeply contacting the inner world of another: practicing empathy in values-based negotiation role plays' (2012) 39 *Washington University Journal of Law & Policy* 189.
[207] Samra, R. & Jones, E. 'Fostering empathy in clinical teaching and learning environments: A unified approach' (2019) 6(1) *Australian Journal of Clinical Education*.
[208] R. Grimes, 'Experiential learning and legal education – the role of clinic in UK law schools' in E. Jones and F. Cownie. Eds. *Key Directions in Legal Education. National and International Perspectives* 2020.
[209] See above n. 144.
[210] V. Roper, 'Reflecting on Reflective Practices in Clinical Legal Education' (2019) 26 *International Journal of Clinical Legal Education*.216.
[211] T. M. Massaro, 'Empathy, legal storytelling, and the rule of law: New words, old wounds' (1988) 87 *Michegan Law Review* 2099, 2105.

(again with appropriate acknowledgement of the vulnerability and unpaid labour this can entail).[212] Such experiences can also be evoked via audio-visual resources, from news interviews to documentaries to films. As indicated by Nussbaum, the use of literature, selected to highlight relevant legal topics, is also valuable.[213] Encouraging students to design and participate in role plays has the potential to bring narratives and stories to life in an imaginative way which once again engages participants affectively. [214]

Overall, the ways in which affective empathy are fostered can range significantly. They can entail small shifts in focus within more traditional teaching and learning activities, such as drawing students' awareness to their affective response when they hear something likely to invoke empathy or including a brief reflection on your own emotional reaction to a relevant news story. However, they can also include activities with an explicit focus upon empathy. For example, Cornell argues that students should be encouraged to read legal cases in an empathetic manner.[215] Students could be asked to construct an emotional narrative for a defendant or claimant, entering into their world and enhancing their understanding of the affective stories underlying the (often somewhat technical and dry) judgments. This extends the exercise of examining their own initial intuitive response suggested earlier.

More creative methods, less commonly used within legal education, can also be used to foster empathy. For example, Niccolini *et al* discuss the creation of an arts-based workshop in a postgraduate course on gender and education where they developed the practice of 'kinshipping'. This involved asking students to bring in objects they felt an affective connection to. The objects were then discussed (again, using storytelling) and threaded to one another with multi-coloured yarn, creating 'string figures' together.[216] The authors argue that this enabled students to 'identify connections and dissonances by the patterns made, engaging with difference and tensions'.[217] This use of tension as a pedagogic tool is particularly helpful. If students engage with affective

[212] J. Haritaworn, n.184, 27.
[213] Nussbaum, n.31.
[214] K. Douglas & C. Coburn, 'Students designing role-plays: Building empathy in law students' (2009) 61 *Legal Education Review* 55.
[215] J. L. Cornell, 'Reading Cases for Empathy' (2022) 17 *University of St. Thomas Law Journal* 772.
[216] A. D. Niccolini, S. Zarabadi and J. Ringrose, 'Spinning Yarns: Affective kinshipping as posthuman pedagogy' (2018) 24(3) *Parallax* 324, 325.
[217] Niccolini ibid. at 325.

empathy, they are likely to experience discomfort as their privileged (or non-privileged) status becomes apparent through their greater understanding of the affective experiences of others. This discomfort is likely to be felt most keenly by those in a privileged position who may not have previously had to engage with such dissonance. In itself, it therefore has the potential to be a powerful teaching tool, challenging complacency and engendering a sense of both individual and collective responsibility.[218]

Emotional reflexivity: Relevance and value

Reflexivity itself is a complex and widely debated term. At its simplest it can be defined as the inner dialogue or conversation which individuals experience.[219] However, as used in this paper, the notion of emotional reflexivity involves moving beyond the forms of self-reflection involved in affective authenticity and, to some extent, within experiential thinking. Instead, it implies such emotional self-reflection being used to in some way alter or shape subsequent actions, responses or choices as part of an individual's life and within their interactions with society.[220] It is not only about individual reflection, but is also a relational process, encompassing interpretation and judgements on the wider social context.[221] Therefore, when engaged in alongside affective empathy, it ensures that individuals are not indulging in forms of 'passive empathy' but are instead required to take responsibility as a result, navigating, questioning and acting upon 'the complex relations of power and emotion' which our empathetic response can assist us in accessing.[222] Overall, emotional reflexivity contributes to an individual's personal development, aligning their affective responses, values, actions and choices so they are congruent.[223] It also facilitates the process of becoming a 'good

[218] M. Zembylas, 'Affect, race, and white discomfort in schooling: decolonial strategies for 'pedagogies of discomfort'' (2018) 13(1) *Ethics and Education* 86; M. Zembylas, 'Encouraging shared responsibility without invoking collective guilt: exploring pedagogical responses to portrayals of suffering and injustice in the classroom' (2019) 27(3) *Pedagogy, Culture & Society*403.
[219] M. A. Archer, *Making our Way through the World: Human Reflexivity and Social Mobility* 2007, 3.
[220] M. Holmes, 'The Emotionalization of Reflexivity' (2010) 44(1) *Sociology* 139; A. Giddens, *Modernity and Self-identity: Self and Society in the Late Modern Age* 1991.
[221] I. Burkitt, 'Emotional Reflexivity: Feeling, Emotion and Imagination in Reflexive Dialogues' (2012) 46(3) *Sociology* 458.
[222] M. Bowler, Feeling Power. Emotions and Education 1999.
[223] W. S. Ryan & R. M. Ryan, 'Toward a social psychology of authenticity: Exploring within-person variation in autonomy, congruence, and genuineness using self-determination theory' (2019) 23(1) *Review of General Psychology* 99.

citizen' by fostering an individual's ability to understand, interpret and act appropriately upon both their cognitive and affective reactions and responses, enabling them to enact meaningful change in institutions and society.[224]

Writers such as Holmes and Burkitt emphasises that 'emotional reflexivity' should not be viewed as a cognitive process designed to achieve a more effective way of monitoring and managing emotions.[225] Instead, Burkitt argues that 'emotion is the source of all our thinking as it is integral to the relations we have with our world and the people within it'.[226] This means that emotional reflexivity is 'embodied and relational, in ways beyond the habitual; infusing people's interactions with others in the world'.[227] As with affective empathy, it also demonstrates that attempts to dichotomise the 'better person' and 'good citizen' are based on a false distinction being drawn between the individual and personal and the social, emphasising the intricate ways in which these interact.[228]

Within liberal legal education, fostering emotional reflexivity is important not only for students' self-awareness as they strive to become a 'better person', but also to instil in them an awareness of 'the possibilities for change' on a wider scale, which they can utilise as a 'good citizen'.[229] Reflection and reflexivity more generally are increasingly becoming an accepted part of both higher education generally and legal education particularly.[230] The inclusion of emotional reflexivity in this paper's affective framework therefore provides liberal legal educators with a valuable opportunity to influence and guide the ways in which such reflection and reflexivity are conceptualised and explored with students going forward. In particular, its inclusion aligns such concepts and exploration with liberal notions of self-examination and the accompanying development of values and broader notions of citizenship. Emphasising the need for emotional reflexivity can also enhance affective authenticity and

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[224] T. Ruebottom & E. R. Auster, 'Reflexive dis/embedding: Personal narratives, empowerment and the emotional dynamics of instertitial events' (2018) 39(4) *Organization Studies* 467.
[225] Holmes n. 220 at 61; Burkitt n.221 at 459.
[226] Burkitt n.221 at 461.
[227] M. Holmes, 'Researching Emotional Reflexivity' (2015) 7(1) *Emotion Review* 61.
[228] Burkitt n.2521; Holmes n.220
[229] Ruebottom & Auster n.224.
[230] R. Spencer, '*'First they tell us to ignore our emotions, then they tell us to reflect':* The development of a reflective writing pedagogy in clinical legal education through an analysis of student perceptions of reflective writing' (2014) 21 *International Journal of Clinical Legal Education*.

affective empathy, providing an overall holistic affective approach and demonstrating how the four affective concepts identified each link and mutually support each other when seeking to attain the ends of liberal legal education.

Emotional reflexivity: Applications within legal education

While reflection and reflexivity have become an increasingly acknowledged part of higher and legal education, to date this has been largely focused upon the cognitive. In other words, upon what a student thought rather than what they felt.[231] Therefore, there is a need to explicitly focus upon the emotional aspects of reflexivity to counter-balance this over-emphasis on rationalising the process. Ruebottom and Auster suggest that bringing a diverse range of people together (for example, for a concert or other event) to create 'interstitial spaces' can enhance emotional reflexivity by enabling individuals to become dis-embedded from the familiar and usual.[232] In particular, they identify two complementary mechanisms which can be used, namely, the 'sharing of personal narratives of injustice and action' and 'individual collective empowering'.[233]

Within legal education, the former could include various forms of storytelling around law and the legal system, designed to demonstrate their societal impacts. It could include inviting guest speakers to discuss their experiences, either as a defendant or claimant themselves, or as a legal professional or on behalf of a charity. It could even involve students sharing their experiences from extra-curricular work, such as in clinical legal education settings.[234] The emotional responses and reactions to these could enable students to challenge assumptions and expectations they may have, giving them the opportunity to re-examine the role, workings and impact of law and the legal system. There is also the potential for students to construct a meta-narrative around the function and role of legal education itself by examining the hidden norms and

[231] Spencer n.230; M. Harvey, C. Baumann & V. Fredericks, 'A taxonomy of emotion and cognition for student reflection: introducing emo-cog' (2019) *Higher Education Research & Development*, 38(6), 1138.
[232] Ruebottom & Auster n.224 at 471.
[233] Ruebottom & Auster n.224 at 469.
[234] Tyler, J. A., & Mullen, 'Telling tales in school: Storytelling for self-reflection and pedagogical improvement in clinical legal education', (2011) *Clinical Law Review*, 18, 283.

expectations within law schools, including the notion of 'thinking like a lawyer' discussed above.

In relation to the notion of 'individual collective empowering', Ruebottom & Auster describe this as 'activities that make salient the power of individual actors within a group'.[235] This empowerment can take place via metaphors, tropes and other forms of symbolism and through the creation of embodied, physical collective experiences.[236] The former can be achieved within legal education via the language used by educators (and invited speakers) and the deliberate inclusion of relevant quotations and readings from others within teaching materials. Students are likely to be accustomed to the use of such techniques from their reading of academic articles and case law, for example, Lord Denning's famous metaphor of the company as a human body.[237] However, to incorporate such techniques in a way which fosters emotional reflexivity will require a deeper interaction which both involves imagination and fosters a sense of collective engagement. The latter is arguably the greater challenge, given a tendency within legal education (including liberal variants) to individualism.[238] Nevertheless, this can be tackled (at least in part) via the intentional use of collective projects and an emphasis on legal ethics. The value of both these components is well-demonstrated in relation to clinical legal education, but their wider incorporation within the law school curriculum could further promote emotional reflexivity.[239]

The creation of embodied, physical collective experiences can be achieved in a range of ways including using theatrical techniques and games,[240] walking and mapping geographical terrains to understand their interactions with the law[241] and incorporating contemplative practices such as mindfulness exercises which take a holistic approach to the affective, cognitive and physical

[235] Ruebottom & Auster n.224 at 478.
[236] Ruebottom & Auster n.224 at 478.
[237] Bolton Engineering Co Ltd v Graham & Sons Ltd [1957] 1 QB 159, 172.
[238] H. Brown, 'The cult of individualism in law school' (2000) 25(6) *Alternative Law Journal* 279.
[239] See, for example, D. Nicolson, 'Calling, character and clinical legal education: a cradle to grave approach to inculcating a love for justice' (2013) 16(1) *Legal Ethics* 36.
[240] G. Calder, 'Performance, Pedagogy and Law: Theatre of the Oppressed in the Law School Classroom' *The Moral Imagination and the Legal Life. Beyond Text in Legal Education* eds. Z. Bankowski & M. Del Mar (Eds.) 2013, 215-254.
[241] A. Philippopoulos-Mihalopoulos, 'Mapping the lawscape: Spatial law and the body' *The Arts and the Legal Academy* eds. Z. Bankowski, M. Del Mar & P. Maharg, 133-148.

domains.[242] Although contemplative practices have sometimes been characterised as individualistic, there is an increasing emphasis on their potential as agents for social change, for example, through fostering awareness of inter-connections between individuals and communities.[243]

In addition to these specific focuses, emotional reflexivity can be fostered more generally across liberal legal education through an intentional approach to the law degree which highlights such reflexivity's relevance and value within induction and orientation, includes the creation of an individual learning and/or personal development plan by each student and frequently revisits the notion within the curriculum, for example, within portfolios for assessment.[244] These techniques can be used to not only enhance individual reflection, but also to create a form of community of practice which fosters collective dialogue and sharing and, in turn, creates the circumstances for action and change based on these. This once again contributes to both the 'good person' and 'better citizen'.

Conclusion: Enrichment through affective redefinition

> Affective aspirations represent an alternative view of the value of higher education that needs to remain in our discourse, even more so because such views are at risk in the current milieu.[245]

This paper critiques existing literature's emphasis on liberal legal education as aiming to create either the 'better person' or 'good citizen' as wholly separate ends. It instead conceptualises the two as equally valid and important aims which are synergistic and can both be incorporated within a student's developmental journey through the law degree. The paper challenges liberal legal education's current focus on the cognitive domain by demonstrating that it is necessary to include the affective domain as a core and fundamental part

[242] S. L. Rogers, 'The mindful law school: An integrative approach to transforming legal education' (2012) 28 *Touro Law Review* 1189.
[243] P. Kaufman, 'Critical contemplative pedagogy' (2017) 14(1) *Radical Pedagogy* 1; C. Singh, 'Contemplative pedagogy and practices in higher education: a tool for transformative learning, youth development and social change' (2017) 3 *International Education and Research Journal* 321.
[244] Suggestions made to develop reflective practice in M. M. Leering, 'Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism' (2017) 95(1) *Canadian Bar Review* 47.
[245] Kathleen M. Quinlan, 'How Emotion Matters in Four Key Relationships in Teaching and Learning in Higher Education' (2016) 64(3) *College Teaching* 101, 110.

of the student journey to enable such development and progression. The original framework constructed within this paper identifies four core affective elements which are essential to this development, deepening students' understanding of, and engagement with, both personhood and citizenship. Although none of the core affective elements proposed here are sufficient on their own to achieve this purpose, they have a bi-directional relationship with cognition, which renders them essential for the growth and development which is at the heart of all liberal education. By providing an original perspective on the aims of liberal legal education and a framework for the utilisation of affect, this paper presents a theoretical basis for the contemporary development of liberal legal education. For liberal education to retain its resonance within law schools, it is necessary for it to embrace this basis. Doing so will evolve liberal legal education in a way that equips it for the increasing incursion of neo-liberal policies and agendas and the rigours of the twenty-first century legal academy.

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Law teaching for sale: legal shadow education in Denmark: from historical and current perspectives

Rasmus Grønved Nielsen*

Abstract

This study examines the use of supplementary private teaching ('shadow education') within the field of legal education in Denmark from historical and current perspectives. The aim is to estimate the extent of this phenomenon in a Danish context and understand why law students chose to pay for private teaching services. The study documents that practices presently labelled as shadow education are as old as the University of Copenhagen (1479) and the formal legal education (1736). During a period of around 150 years (1780-1930), the exam-oriented private teaching (manuduction) was, in fact, the backbone of legal education. Sources show that the poor state of the university education, including archaic teaching methods, was the primary reason for this: private teaching was the market's solution to a broken public education. Educational reforms during the first half of the 20th century challenged the raison d'être of the private manuduction industry, and the Danish welfare state provided the fatal blow in 1960: free university manuduction. However, the private teaching industry was resurrected in the 21st century in a more corporate, professional, and aggressive form. The study indicates that currently around 60 percent of law students have paid for private teaching services during their legal education. Moreover, the study shows that it is no longer the quality of university teaching that is the main catalyst, but rather the appeal of very exam-oriented courses and the students' insecurities, especially the first-years. The study links this development to the emergence of the competition state. Finally, the study recommends that the findings are taken into account in future reform endeavours and suggests directions for further research into shadow education in law, including through comparative analysis.

* University of Copenhagen.

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Keywords: Shadow education, private teaching, legal education, history of education, Denmark

Introduction: aim and methodology

Why do Danish law students readily pay for private teaching services? This question has always been enigmatic to me. It seems illogical. By all measures, the universities of the Danish welfare state provide high quality legal education – and it is even entirely publicly financed. Why, then, do far more than half of the students spend time and money elsewhere? In this study, I examine the Danish private legal teaching industry from historical and current perspectives to approach an answer.

In Denmark, legal education is adapted to the common framework of the European Credit Transfer System (ECTS) and consists of a bachelor's degree (180 ECTS points) followed by a master's degree (120 ECTS points). By standard measures, this is the equivalent of 5 years, but many students postpone parts of their education. Unlike many other countries, the bachelor's degree in law (BA.jur.) is practically useless in Denmark, as it does not qualify for entry into the legal profession. Consequently, the vast majority pursue the master's degree and become candidatus/-a juris (cand.jur.). In 2021, a total of 1,209 lawyers graduated in Denmark.[1]

Private providers play an increasingly important role in the general educational systems throughout the world with Asia and North America as epicentres.[2] Consequently, one can detect a growing interest in the phenomenon of private supplementary teaching, often labelled as *'shadow education'* and mostly associated with the works of Professor Mark Bray.[3] Previously, comparative

[1] 613 from the University of Copenhagen, 367 from the University of Aarhus, 118 from the University of Southern Denmark, and 110 from the University of Aalborg.
[2] M. Bray, *Shadow Education: Comparative Perspectives on the Expansion and Implications of Private Supplementary Tutoring*, Procedia, 2013, 412-20, and M. Bray, *Shadow Education in Europe: Growing Prevalence, Underlying Forces, and Policy Implications*, ECNU Review of Education, 2021, 442-475.
[3] M. Bray, *The shadow education system: private tutoring and its implications for planners*, 1999, International Institute for Educational Planning, M. Bray, *Researching shadow education: methodological challenges and directions,* Asia Pacific Educ. Rev., 2010, 11:3-13, M. Bray et al. (eds.), *Researching Private Supplementary Tutoring: Methodological Lessons from Diverse Cultures*, 2016, M. Bray, *Shadow Education in Europe: Growing Prevalence, Underlying Forces, and Policy Implications*, ECNU Review of Education, 2020, 442-475, and W. Zhang & M. Bray, *Comparative research on shadow*

mapping studies have detected a scarce presence of this phenomenon in Scandinavia.[4] A recent Danish study even establishes that "shadow education is fairly new and upcoming in Denmark".[5] While this may be a fair conclusion to draw from a general perspective, it is plainly wrong in the context of Danish legal education where private teaching and tutoring has been a prominent feature since the Middle Ages and, at times, even the backbone of the education.

As mentioned, the aim of this study is to explain *why* Danish law students opt for supplementary private teaching services – and, as a precondition, to estimate the *extent* of this phenomenon. I aim at keeping the examination neutral and descriptive rather than normative, although I disclose my – critical – opinion in the end of the piece. My approach differs from traditional shadow education research both in terms of scope and methodology: the scope is narrow (Danish legal education) and the methods applied are quite diverse.

As far as I can tell, no one has systematically examined shadow education within the field of law before. To demarcate the study, I have chosen to focus on private providers of law teaching services specifically aimed at law students, not continued education courses or courses focusing on more general skills such as rhetoric or grammar. This demarcation is somewhat narrower than the traditional characterisation of shadow education.[6] I concentrate on the service of teaching, lecturing, or tutoring although these have historically been accompanied by alternative textbooks, course notes or the like. The teaching may be in person or online (synchronous or asynchronous), collective or

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education: Achievements, challenges, and the agenda ahead, European Journal of Education, 2020, 322-341.

[4] D.E. Southgate, *Determinants of shadow education: A cross-national analysis*, 2009 (doctoral dissertation, Ohio State University), 161, et passim, S. Christensen & W. Zhang, *Shadow Education in the Nordic Countries: An Emerging Phenomenon in Comparative Perspective,* ECNU Review of Education, 2021, 431-441, S.R. Entrich, Worldwide shadow education and social inequality: Explaining differences in the socioeconomic gap in access to shadow education across 63 societies, International Journal of Comparative Sociology, 2021, 441-475, D. Baker et al., Worldwide shadow education: Outside-school learning, institutional quality of schooling, and cross-national mathematics achievement, Educational Evaluation and Policy Analysis, 2001, 1-17, and W. Zhang, *Modes and Trajectories of Shadow Education in Denmark and China: Fieldwork Reflections by a Comparativist*, ECNU Review of Education, 2021, 615-629.

[5] S.H. Mikkelsen & D.T. Gravesen, *Shadow Education in Denmark: In the Light of the Danish History of Pedagogy and the Skepticism Toward Competition*, ECNU Review of Education, 2021, 546-565 (547).

[6] Bray (1999), op.cit. and Zhang & Bray (2020), op.cit.

individual. Only the commercial undertakings are of interest, ie the teaching services provided with the aim of gaining profit, not open source materials or non-profit services. The study takes its point of departure in the oldest and largest legal education institution in Denmark: the Faculty of Law at the University of Copenhagen. Consequently, the study does not take into account potential regional variances or similarities within Denmark. Today, however, legal shadow education is a nationwide phenomenon. Moreover, I know as a matter of fact that similar services are provided in other countries such as Norway, Germany, and the Netherlands, but it falls outside the scope of this study to venture into a comparative analysis. In any event, the Danish case appears unique in the sense that the education is publicly funded in its entirety, and the students even receive a monthly grant from the state.

Traditional shadow education research tends to ignore the cultural heritage of its research object.[7] It is a self-contained point of this study to show that important knowledge is hidden in university archives and the history of education in general. I investigate the emergence and persistence of the 'private' features of legal education in Denmark from the establishment of the University of Copenhagen in 1479 and onwards. It is an obvious anachronism to label these historical facts a 'shadow education' in the present sense. However, I submit that it is justifiable to draw certain parallels from the historical practices to the modern phenomenon. Moreover, it is important to account for the development of Danish legal education more generally in order to understand the context of private legal teaching. The analysis is based on a parallel reading of existing literature (mostly in Danish) and primary sources, including official university sources and private testimonials from students and teachers alike. By combining these 'subjective' and 'objective' sources, I hope to mitigate the uncertainties pertaining to each. I have translated the source quotes into English.

Building on the historical backdrop, I analyse the current state of affairs both from the perspective of the *seller* (the private providers) and the *buyer* (the law students). I outline the private provider perspective through basic market and business analysis instruments, focusing specifically on business models and marketing strategies. I concentrate on the two dominant market players, Aspiri A/S and My Law Story ApS. The analysis is based on publicly available sources, including in particular websites, social media, and marketing materials

[7] There are, of course, exceptions, eg A.K. Sorensen, *A History of Shadow Education in Japan and South Korea*, English and English-American literature, 2019, 1-42.

as well as annual accounts. I have chosen this strategy rather than the traditional interview or survey approach to avoid certain well-known bias issues pertaining to that type of data collection.[8]

I examine the law student perspective primarily through a survey. I collected the data on an anonymous basis via the programme *Sendsteps* during my four identical lectures (with different sets of students) in week 18 of 2022 at the University of Copenhagen. I chose this approach to obtain more and better data by being present and having the opportunity to clarify the questions etc. (in a strictly neutral manner, of course). The lectures were a part of the mandatory course on general administrative law which is placed on the fourth semester of the bachelor programme. I informed the students that participation in the survey was entirely optional and that I would use the anonymized data to conduct this study.[9] It is a predominantly quantitative survey based on seven closed-ended questions related to two main topics: the respondents' use of private teaching services and their motivation. The respondents had the opportunity to supplement their responses by answering an open-ended question, thus, adding a bit of complementing qualitative data. In total 214 respondents participated in the survey with a response ratio to each question of 206-210. There are 689 students formally enrolled in the course, but this figure does not reflect the number of students attending the non-mandatory lectures. Although, the data might be categorised as a convenience sample, I estimate that the respondents are fairly representative of their year. If anything, I would suggest that the tendency of using private teaching services is greater amongst the students not prioritising the lectures. Regardless, it is hard to tell if the respondents are representative of the law students as such since this particular class year (2020) has been studying law during the COVID-19 pandemic. By comparing my data to the sparse already existing data, it seems that the pandemic and the accompanying restrictions have intensified the use of private teaching services. It is difficult to assess whether this reflects a COVID-19 related peak or rather a new normal. The survey study has been carried out in Danish and, for the purpose of this study, I have translated the results into English.

[8] Bray (2010), op.cit., 6.
[9] I have also informed the students about the main results in their student magazine *Stud.Jur*, 2022, no 3, 20-23.

The rise and fall of legal shadow education

Origins: dictation lectures and collegia privata (1479-1736)

Although The Faculty of Law was one of the original faculties when the University of Copenhagen was founded in 1479, it does not make sense to talk about a legal education as such this early. The curriculum was designed for the theology students, not practicing lawyers, and the administration of justice was at the hands of laymen. The faculty of law hosted just one full professorship with an obligation to lecture on canon law and later, after the Reformation (1536), elements of Roman law.[10]

From the university's charter of 1539 and other sources, we can gather a few fragments of the teaching methods at the law faculty. Lectures (*lectiones* or *prælectiones*) were held four times a week and normally by reading aloud from the professor's manuscript for the students to transcribe, since they did not have the luxury of textbooks.[11] The bad reputation of these so-called 'dictation lectures' is as old as the method itself, and a contemporary theologian, Jesper Brochmand (1585-1652), advocated an outright ban.[12] As we will see, this didactical malpractice came to haunt the legal education for centuries. One day a week – Wednesday – was reserved for more engaging learning activities: *disputationes* (academic disputes) and *repetitions* (repetitions and exercises).[13]

While the lectures were held publicly and free of charge, the professors were permitted to host private lectures in exchange for money (*collegia privata*).[14] Other graduates were only allowed to facilitate private lectures upon the approval of the rector.[15] The prevalence and importance of these embryonic practices of shadow education in law is uncertain. However, the popularity of private teaching grew in the beginning of the 17th century under the influence

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[10] P.J. Jørgensen, *Retsundervisningen og Retsvidenskaben ved Københavns Universitet 1537-1736: Forordningen af 10. Februar 1736*, in E. Reitzel-Nielsen & C. Popp-Madsen (ed.), *Festskrift i Anledning af Tohundrede Aars Dagen for Indførelsen af Juridisk Eksamen ved Københavns Universitet*, 1936, 11-114 (12-23), D. Tamm, *The Faculty of Law: Law teaching at the University of Copenhagen since 1479*, 2010, 11-30 and D. Tamm et. al, *Juraen på Københavns Universitet 1479-2005*, 2005, 1-70.
[11] Jørgensen (1936), op.cit., 30 & 70-72.
[12] H.F. Rørdam: *Aktstykker til Universitetets Historie i Tidsrummet 1621-60*, Danske Magazin, 5. rk., vol. 1, 1887-89, 36-72 (37).
[13] Jørgensen (1936), op.cit., 30.
[14] H. Matzen, *Kjøbenhavns Universitets Retshistorie 1479-1879*, vol. 1, 1879, 55.
[15] Ibid., 70-73.

of a methodological shift: in Continental Europe, legal scholars replaced the fragmentary medieval approach derived from the Bologna school (*mos Italicus)* with a more systematic approach to the law. Whereas the professors were required to apply the traditional approach in their public lectures, they were free to apply the new method in private.[16] The systematic approach was not only a paradigm shift in jurisprudence; it was a pedagogical breakthrough that eventually penetrated the walls of the public lecture halls. The new approach was most clearly reflected in the legal education at the Knightly Academy of Sorø as evidenced by the introductory textbooks *Catholica juris* (1634) and *Methodus discendi juris civilis* (1647) by Professor Henrik Ernst (1603-65).[17]

A bad reputation seemed to stick to the public lectures. For instance, the famous Danish-Norwegian dramatist and polyhistor, Ludvig Holberg (1684-1754) noted: "when a law professor … wants to give a public lecture, he is nothing but content with an audience of three to four".[18] Later, the historian Hans Gram (1684-1748) was appointed to examine the causes of the poor attendance. In his report from 1741, he suggested that the popularity of *collegia privata* had damaged the public law education. He found that both the students and the professors generally preferred the private lectures over their public counterpart: the professors did not have to spend the same amount of preparation time, and the students were under the impression that the learning outcome was greater.[19]

Examinibus juridicis and the privatisation of legal education (1736-1800)

The absence of professional lawyers in the executive and judicial branches of government caused increasing concern.[20] As a consequence, a formal examination in law (*examinibus juridicis*) and thereby an actual legal education was introduced by royal decree of 10 February 1736. However, the university had no intention of 'degrading' itself to educating the bourgeoisie in Danish law. The result was a 'caste system': the Latin students who attended the

[16] Jørgensen (1936), op.cit., 36.
[17] K. Waaben, *Jura på Frue Plads*, 2005, 40-42 and H. Vogt, *Den juridiske undervisning på det andet ridderlige akademi i Sorø*, Tidsskrift for Rettsvitenskap, 2007, 579-613.
[18] L. Holberg, *Danmarks og Norges Beskrivelse*, 1729, reprinted in *Ludvig Holbergs Samlede Værker*, vol. 5, 155-723 (298-99).
[19] Jørgensen (1936), op.cit., 67-68.
[20] Ibid., 90-93 &113-14, K.F. Hammerich, *Juristerne og Embedslivet*, in E. Reitzel-Nielsen & C. Popp-Madsen (ed.), *Festskrift i Anledning af Tohundrede Aars Dagen for Indførelsen af Juridisk Eksamen ved Københavns Universitet*, 1936, 259-307 (285-95) and D. Tamm, *Juridisk eksamen i 250 år*, Ugeskrift for Retsvæsen, 1986, 41-42.

professors' lectures and eventually obtained an academic degree in law (*candidatus juris*) as opposed to the so-called 'uneducated' lawyers who passed a more practice-focused Danish language exam and earned the degree *examinatus juris* (exam.jur.). In turn, different categories of public functions were reserved to these two kinds of professional lawyers. In the years to come, far more 'Danish' than 'Latin' lawyers graduated.[21]

Since it was not the university's task to educate the examinati, the legal education remained highly theoretical and primarily focused on natural law, Roman law, and moral philosophy. Danish law played a subordinate role as reflected, inter alia, in the university charter of 1732.[22] The exam questions were abstract in form.[23] Some students took it upon themselves to remedy this and established *The Legal-Practical Society* ('Det juridisk-praktiske selskab') in 1750.[24] The ambition was to train practical skills as a supplement to the formal legal education. As we will see, this gap between *law-in-theory* and *law-in-practice* still is a fundamental problem in legal education.

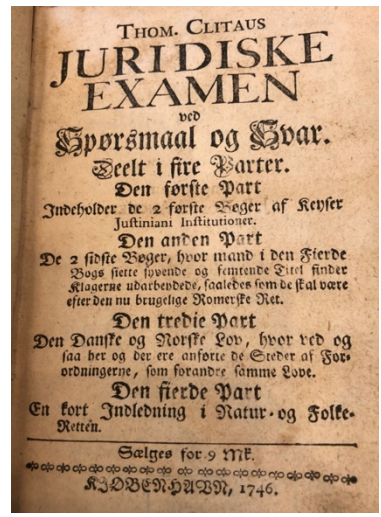
THOM. CLITAUS
JURIDISKE EXAMEN
ved
Spørsmaal og Svar.
Deelt i fire Parter.
Den første Part
Indeholder de 2 første Bøger af Keyser Justiniani Institutioner.
Den anden Part
De 2 sidste Bøger, hvor mand i den Fierde Bogs siette syvende og femtende Titel finder Klagerne udarbeydede, saaledes som de skal være efter den nu brugelige Romerske Ret.
Den tredie Part
Den Danske og Norske Lov, hvor ved og saa her og der ere anførte de Steder af Forordningerne, som forandre samme Love.
Den fierde Part
En kort Indledning i Natur- og Folke-Retten.
Sælges for 9 Mk.
KIØBENHAVN, 1746.

Figure 1: Exam-oriented private textbooks emerged as early as 1746, where Thomas Clitau (1694-1745) published the rather comprehensive "Juridisk Examen ved Spørsmaal og Svar" (Royal Library).

The most prominent contemporary law scholars began incorporating more elements of Danish law into their academic works and lectures. Andreas Hojer (1690-1739) opined as early as 1736 that "a lawyer first and foremost ought to familiarise himself with Danish-Norwegian law and thereby form a general view of our domestic legal science".[25] This

[21] Tamm (2010), op.cit., 47.
[22] Also, see F. Dahl, *Hovedpunkter af den danske Retsvidenskabs Historie*, in E. Reitzel-Nielsen & C. Popp-Madsen (ed.), *Festskrift i Anledning af Tohundrede Aars Dagen for Indførelsen af Juridisk Eksamen ved Københavns Universitet*, 1936, 115-225 (117-19).
[23] Handwritten compilation *Juridisk Examen ved Spørsmaal og Svar over den danske og norske Lov* (Royal Library).
[24] H. Hjort-Nielsen, *Det Juridisk-Praktiske Selskab 1749-1863,* Tidsskrift for Rettsvitenskap, 1926, 84-130.
[25] A. Hojer, *Forestilling paa en Dansk Jurist, den 1. Part forfatted i en offentlig Disputatz,*1737 (translation by Peder Sommer of Hojer's doctoral dissertation *Ideæ jurisconsulti danici*, 1736), 43. Note: The notion of "legal science" does not entirely

'radical' idea is also reflected in the writings of Peder Kofod Ancher (1710-88).[26] In his autobiography from 1766, Henrik Stampe (1713-89) notes that "he was the first at the University of Copenhagen who rather systematically lectured on Danish and Norwegian law in their entireties".[27] Lauritz Nørregaard (1745-1804) put flesh on the bones of these efforts by publishing his lectures on Danish-Norwegian private law in seven volumes (1781-99). The value of this creation is known to be of pedagogical rather than scientific nature.[28]

The introduction of professional law degrees did not ease the demand for private lectures – quite the opposite: historical studies of this period support the impression that the private teaching played an increasingly important role in legal education.[29] The public lectures were often handled by *professores extraordinarii* or *designati* or philosophy professors rather than the law professors, who were often otherwise engaged.[30] The law professors were still allowed to host *collegia privata/privatissima* pursuant to the university charters of 1732 (§ 17) and 1788 (§§ 7 & 12). Accordingly, all the prominent professors of the era – namely Hojer, Stampe, and Ancher (all mentioned above) – took advantage of this option. The substitute professor B.G. von Obelitz (1728-1806) notes in an official report in the 1750'ies: "Sometimes many, sometimes few students attended my public lectures; however, most of the time just three to four … Fourteen attended my private lectures".[31] The later law professor J.F.W. Schlegel (1765-1836) recollects from his law studies in the 1780'ies that the private lectures were "so common that only exceptionally few students dared subjecting themselves to the exam without such guidance".[32] Other sources are in line with this assertion.[33]

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resemble the Danish word "Lovkyndighed", which literally translates into "knowledge of the law". See, also, T.G. Jørgensen, *Andreas Hojer: Jurist og Historiker*, 1961, 240-278.

[26] P.K. Ancher, *En kort Anviisning i sær for en Dansk Jurist, angaaende Lovkyndighed og Staats-Konstens adskillige Deele, Nytte og Hielpe-Midler*, 1755, 50-55.

[27] H.S. Stampenborg, *Statsminister Henrik Stampes Autobiografi*, Personalhistorisk Tidsskrift, 8. rk., vol. 3, 1924 (reprint of the original manuscript from 1766), 42-52 (45). The autobiography is written in third person.

[28] Dahl (1936), op.cit., 143.

[29] Waaben (2005), op.cit., 97 and Dahl (1936), op.cit., in toto.

[30] E. Slottved, *Lærestole og lærere ved Københavns Universitet 1537-1977*, 1978, 14-19, 44-46 & 88-104, and Waaben (2005), op.cit., 92-93.

[31] Konsistorium kopibog 1749-59, no. 232, cf. Waaben (2005), op.cit. 97-98.

[32] Universitetsdirektionens Forestilling 1839, nr. 2013, cf. Waaben (2005), op.cit. 98.

[33] Eg, H. Steffens, *Was ich erlebte: aus der Erinnerung niedergeschrieben*, 1840, vol. 2, 12.

The professors' double role as public and private lecturers was met with disapproval around the turn of the 19th century. For instance, the later philologist Jacob Baden (1735-1804) posed the rhetorical question: "Which reasons could possibly justify the academic teachers' privilege of demanding money for their lectures? They are hired to share their knowledge with the students, and their salary is paid by the state."[34]

It then became increasingly customary for other prominent lawyers than the professors to host exam-oriented lectures (so-called *manuduction*). For example, the later civil servant Jacob Gude (1754-1810), who enrolled in 1772, logged that he followed the private lectures of the Supreme Court attorney J.E. Colbjørnsen (1744-1802).[35] The official exam instruction of 1789 (§ 14) prohibited the law professors from hosting manuduction and mock exams for money. This ban left an unsatisfied market demand. Eventually, it became the norm that newly graduated lawyers and experienced law students advertised for private manduduction which could be a rather profitable enterprise. In turn, these private services outperformed the professors, some of whom had to cancel their private lectures due to lack of interest.[36] These fragments foreshadowed a fundamental shift in legal education, as private teaching services became genuinely private and detached from the formal legal education.

Legal education vs. private manuduction – confrontation and debate (1800-1850)

In a historical account of Danish legal education, it would be a crime to omit the most influential Danish lawyer of all time, Anders Sandøe Ørsted (1778-1860). His literary production as well as his influence as judge and high ranking civil servant triggered a tectonic shift in Danish jurisprudence: he insisted on a mutually fertilising relation between law-in-practice and law-in-theory and was a determining factor in the development of a pragmatic approach to law that is still the hallmark of Danish legal culture.[37] In my opinion, his approach sowed

[34] Kjøbenhavns Universitets-Journal, 1793 (vol. 1), 23-25.
[35] J. Clausen and P.F. Rist (eds.). *En kjøbenhavnsk Embedsmand: Jacob Gudes Optegnelser 1754-1810*, 1918, 65. Colbjørnsen later became a professor and celebrated educator, cf. J.F.W Schlegel: *Om Jacob Ewald Colbiörnsen som Videnskabsmand og Embedsmand*, 1802.
[36] Steffens (1840), op.cit., 12 and Waaben (2005), op.cit., 98.
[37] From English sources, see for instance D. Tamm, *Anders Sandøe Ørsted and the Influence from Civil Law upon Danish Private Law at the Beginning of the 19th Century*, Scandinavian Studies in Law, 1978, 245-65.

the seeds of the harsh criticism of the legal education that arose throughout the 19th century as well as the growing popularity of the private manuduction. Although Ørsted was a sought-after private lecturer (*manuducteur*) already as a student, he passed the law exam himself – with distinction, which was extremely rare – without ever attending private lectures and mostly by self-study.[38]

The high demand for private lectures does not necessarily mean that the private manuducteurs were better pedagogues than the professors. Rather, at least some manuducteurs took advantage of the vulnerabilities of the university: its openness and its study programmes' incentives to foster rote learning. As the later philosophy professor, Henrik Steffens (1773-1845), who studied law in the 1790'ies, notes in his memoirs: "The exams were public; a professor, who must examine a certain quantum of students twice a year every day for several consecutive weeks, often tends to fall back on the same set of questions, and these old gentlemen were pleased with the same particular answers to the same questions. The private manuducteurs never missed the chance to be a spectator to the examination; they carefully noted a few dozen questions that were repeatedly posed and the answers that the professors expected. This way, candidate NN was fully equipped for the exam, but learnt nought".[39] Other sources support this impression. For instance, the educationist Johan Henrik Tauber (1743-1816) used a striking imagery to denounce the private lecturers as "the Zimmer frames of science".[40]

For obvious reasons, this arrangement was intolerable to the university. To make matters worse, the legal education was increasingly out of tune with the demands of the labour market. The law maker sought to deal with these issues through a decree of 26 January 1821 on legal education. The overall objective is stipulated in the first paragraph: the students "should be able receive adequate and thorough knowledge of the law by attending the academic lectures in combination with appropriate self-study *without private manuduction*… The public lectures, the academic exercises, the law exam, and everything else are organised in accordance with this aim" (italics added). However, the university did not match the words with deeds, and the private

[38] A.S. Ørsted, *Af mit Livs og min Tids Historie*, vol. 1, 1851, 31 & 41, T.G. Jørgensen, *Anders Sandøe Ørsted: Juristen og Politikeren*, 1957, 16-22, Waaben (2005), op.cit., 167-69.
[39] Steffens (1840), op.cit., 12-13.
[40] J. Clausen & P.F. Rist (eds.), *Blade af Rector Joh. Henr. Tauber's Dagbøger*, 1922, 79.

manuduction remained an inescapable feature of legal education. For instance, a popular private manuducteur, P.V. Jacobsen (1799-1848), hosted as many as five parallel classes in 1834 and had to get up at 3 AM to prepare his teaching.[41]

According to the 1821 decree (§ 5), the professors were supposed to host both public and private lectures and produce textbooks covering the entire curriculum. Underprivileged students could apply for an exemption to the obligation to pay the professors. As a consequence, the professors experienced a substantial decrease in income. For instance, Schlegel asserted that he once earned 800-1,000 rix-dollars, but the revenue was diminished to 250 in the beginning of the 1830'ies. To make matters worse, the students normally paid their professors immediately before the final exam, which could easily give the wrong impression.[42] In 1857, some of these issues were debated in the Danish parliament (*Folketinget*).[43] The decree had also introduced the element of 'legal-practical exercises', which in turn was outsourced to The Legal-Practical Society from 1751 (mentioned above).

An entry in the memories of the later statesman Orla Lehmann (1810-70), who studied law in 1830-33, indicates a change in the study pattern of the law students in a more professional, rather than academic, direction: "Most law students just wanted to get the exam over with and enter the 'forecourt' of civil service, and most private manuducteurs took pride in helping them achieving this goal as swiftly and easy-going as possible… This custom took form during a period in which the Faculty of Law failed its duties".[44]

The year of Lehmann's graduation, a member of the university management Andreas Bjørn Rothe (1762-1840) launched an attack on the students' use of private manuduction which he found utterly superfluous and contrary to the spirit of academia.[45] A counterstrike was soon circulated by a young lawyer, Frederik Emil Elberling (1804-1880), with the message that private manuduction was necessary because of the poor state of public legal education. Elberling criticised the lack of textbooks and the archaic teaching methods,

[41] J. Clausen (ed.), *Breve fra P. V. Jacobsen: Udgivne i Anledning af Hundredeaarsdagen for hans Fødsel*, 1899, 209.
[42] Waaben (2005), op.cit., 163
[43] Rigsdagstidende 1857, Anhang A, 465-556, and Folketingets forhandlinger, 529-74 & 2913-81.
[44] H. Hage (ed.), *Orla Lehmanns efterladte Skrifter*, vol 1, 1872, 37.
[45] A.B. Rothe, *Bemærkninger angaaende Privat-Manuduction til den fuldstændige juridiske Examen ved Kjøbenhavns Universitet*, 1933.

namely the dictation lectures: "One might as well send a recorder to transcribe everything as doing it themselves".[46] He also claimed that the education was far too theoretical and did not equip the students to meet the professional expectations; the Legal-Practical Society was nothing but a "forced labour camp".[47] His criticism provoked two polemic reviews, one of which was written under the shelter of pseudonymity, but most likely by a law professor.[48]

Tage Algreen-Ussing (1797-1872), who had lectured privately himself, took part in the dispute and opined that neither the private manuduction nor the performance of the professors were the real issue, but rather students themselves, namely their lack of culture and diligence. To Algreen-Ussing the solution was simple: "You get up at 5 AM and immediately sit down at your study desk. You stay there, without breaks, until 11 AM. Then you attend lectures and eat lunch. At 3 PM, you get back to your books and stay there until 9 PM. Then you may go for a walk before heading to bed at 10 PM. The next morning you get up at 5 AM again and repeat. While you read, you are fully focused on your books and do not think about excursions to *Dyrehaven*, dance balls, horses, dogs, or girls".[49]

Later that same year (1833), Rothe was appointed as chairman of a committee that was to deliberate on legal education. The committee produced a report in 1834 that, inter alia, recommended the introduction of university employed manuducteurs ('repetitors') and the establishment of a formal approval procedure for private manuducteurs. The university rejected the former as incompatible with the ideals of academia while the King's chancellery deemed the latter at odds with the freedom of trade.[50] The outcome was an insignificant reform (decree of 30 December 1839).

Two protest petitions and a shrug (1850-1900)

During the following decades, the law students' dissatisfaction with the legal education grew, in particular, due to the ever-growing curriculum and

[46] F.E. Elberling, *Om det juridiske Studium ved Københavns Universitet: Sendebrev til Geheime-Conferentsraad A.B. Rothe*, 1933, 9.
[47] Ibid., 25-30.
[48] Maanedsskrift for Litteratur, vol. 9, 1933, 526-54, cf. the reply F.E. Elberling, *Fornøden Oplysning til Recensionen i Maanedsskrift for Litteratur*, 1933, followed by Maanedsskrift for Litteratur, vol. 10, 1933, 483-529.
[49] T. Algreen-Ussing, *Ogsaa nogle Bemærkninger om det juridiske Studium ved Kjøbenhavns Universitet,* Bibliothek for dansk Lovkyndighed, vol 1, 1933, 602-406 (617).
[50] Waaben (2005), op.cit., 171-72.

demands.[51] The public debate reignited in 1860 when an experienced external censor anonymously accused the professors of not being compliant with their duties under the 1839 decree.[52] This was seconded by a young civil servant and manuducteur, P. Schjørring (1831-1913), who went as far as calling the law professors criminals. Moreover, the professors failed as pedagogues: "The professors used to be aware of the fact that they talked to beginners… they offered their audience a short and concise presentation … which sufficed in combination with the students' ability to think independently. Now, on the other hand, the professors want to share all of their thoughts and dictate their entire knowledge… The students get headaches from the mere glance at the heavy reading materials… Therefore, they seek the private manuducteurs; and the manuduction industry is flourishing while independent self-study has become a rarity".[53]

In other words, the private manuduction was a necessary evil; the free market's solution to a broken education. In the years to come, an abundance of newspaper articles and manuscripts followed in support of these critical opinions.[54] The message was clear: the status quo was harmful not only to the students but also the public good as such. Several politicians agreed, and Member of Parliament A.F. Tscherning (1795-1874) was a particularly strong proponent of a reform.[55]

[51] O. Müller, *Om det juridiske Studium og den juridiske Examen ved Kjøbenhavns Universitet*, 1867, 8.
[52] Dagbladet, 19 June 1860 (No. 141).
[53] Fædrelandet, 27 October 1860 (No. 252), 1029.
[54] Dagbladet, 19 & 20 September 1861 (No. 218 & 219), Dagbladet, 7 & 8 November 1861 (No. 260 & 261), Dagbladet, 19 September 1862 (No. 218), Dagbladet, 9 January 1863 (No. 7), P.C, *Hvorledes er det fat med det juridiske Studium og hvad kan der gøres derved?*, 1861, L.N. Friis, *Den juridiske Examen og det juridiske Studium*, 1862, P. Schjørring, *Om det juridiske Studium*, Tidsskrift for Retsvæsen, 1863, 64-104, and L.N. Friis, *Universitetsspørgsmaalet og Examenscommissioner*, Tidsskrift for Retsvæsen, 1863, 405-40.
[55] Rigsdagstidende 1860, Anhang A, 1469, and Folketingets forhandlinger, 1512-1612.

In 1862, a protest petition signed by 151 students was circulated in which they asked for more guidance to young students and proper textbooks instead of dictation lectures.[56] The faculty rejected both of these reasonable wishes although they acknowledged the burden of the dictation approach which was "no less exhausting for the lecturer than the students".[57] This rather arrogant answer was met with swift indignation.[58] In 1873, a new petition, this time signed by 128 students and graduates, was sent to the faculty demanding new teaching methods and, in particular, a ban on the dictation lectures. The faculty, once again, refused to interfere with the professors' didactical methods.[59]

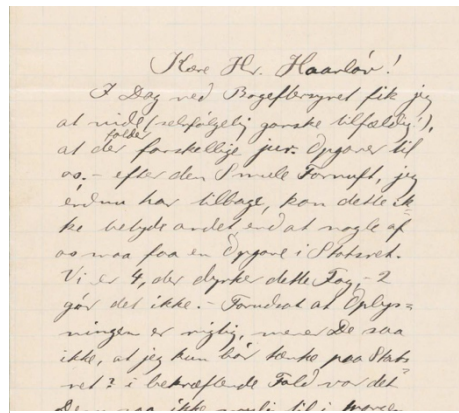

Figure 2: The later civil servant Viggo Rothe Haarløv (1872-1931) graduated in 1895. Letters from his manuduction students are kept in the National Danish Archive for the period of 1894-1900. Above is a copy of the beginning of a letter from a student who "by coincidence" had eavesdropped some information about the exam topic. "Do you have time tomorrow (Tuesday) at 6 to help us identify the questions that you think are most relevant?" Rothe's reply is not available.

In spite of the rejections, the sources reveal continuous deliberations behind the scenes.[60] Two reforms were implemented in 1871 and 1890, but they did not break the old habits. Moreover, it is hard to follow the rationale behind the decision to remove the practical elements from the exam.[61] An act was passed in 1871 that prohibited the professors from requiring payment for any of their teachings. In the beginning of the 1880'ies, the influential legal scholar and politician Carl Goos (1835-1917) strongly opposed the idea of

[56] Dagbladet, 7 November 1862 (No. 260).
[57] Dagbladet, 24 January 1863 (No. 20).
[58] Dagbladet, 31 January & 1 March 1863 (No. 26 & 27).
[59] Aarbog for Kjøbenhavns Universitet 1871-1873, 44-46.
[60] Eg, Aarbog for Kjøbenhavns Universitet 1864-1871, 63-72 & 241-47 and E. Koppel et al. (ed.), *Andreas Frederik Krigers Dagbøger 1848-1880,* vol. 5, 171.
[61] Waaben (2005), op.cit., 207-08, and V. Bentzon, *Juridisk Studium og Eksamen fra 1879 til Dato*, in E. Reitzel-Nielsen & C. Popp-Madsen (ed.), *Festskrift i Anledning af Tohundrede Aars Dagen for Indførelsen af Juridisk Eksamen ved Københavns Universitet*, 1936, 413-88 (417-30). Examples of the abstract nature of the exam questions can be found in *Examensopgaver givne ved "fuldstændig juridisk Examen" fra 1848-1888*, 1888 (Royal Library).

employing university manuducteurs.[62]

Important insights into the private manuduction industry during the last decades of the 19th century can be gathered from an account from the later dean, Viggo Bentzon (1861-1937): "The daily manuduction was the bedrock to the vast majority of law students. Many did not even show up at the university, and the faculty … did no attempt to offer the kinds of teaching that (perhaps) would make this daily hour of private manuduction redundant. Students applied for classes hosted by a few especially 'famous' manuducteurs… No one ventured into more independent or deeper studies, not even in the best of classes." [63] Archival fragments support some of these observations. Although Bentzon hosted private classes himself, in hindsight he condemned it as a "far-reaching and extremely harmful phenomenon".

In sum, the main structures of legal education stemming from the 1821 decree remained in place throughout the 19th century despite harsh and returning criticism from students, practicing lawyers, and politicians. As a result, the private manuduction remained a pivotal, although informal, part of legal education.

The 1902 reform and university manuduction (1900-1950)

Critical voices were raised once again around the turn of the century. A recent graduate, and later Supreme Court assessor, Erling Tybjerg (1863-1925), was particularly blunt: "Legal education consists of a more or less superficial rote learning of an overwhelming curriculum, while it ought to focus on training those exact proficiencies and developing the capabilities that the practicing lawyer needs".[64] These words resonated broadly amongst the stakeholders. The dean, Bentzon, took the lead on the much-needed reform and received public funding to visit German universities and research their approach to legal education. He concluded that the Danish legal education was in poor shape: "not only does it dry out the spirit of the students, it makes many of them physically ill".[65] This time, the professors, the students, and the practicing

[62] Rigsdagstidende 1880-81, Folketingets forhandlinger, 601-02.
[63] Bentzon (1936), op.cit., 435-36 & 440-41.
[64] E. Tybjerg, *Det juridiske Studium ved Københavns Universitet*, Tilskueren, 1890, 609-618 (609).
[65] V. Bentzon, *De juridiske Eksaminer i Tyskland og Danmark*, Ugeskrift for Retsvæsen, 1900, 657-95. Cf. also M.S.L. Henriksen, *Om Reformer ved det juridiske Studium og vor*

lawyers worked closely together in a committee that agreed on both the diagnosis and the cure. In accordance with much of the earlier criticism, the report from 1901 observed that the existing programme promoted an unhealthy study culture of mechanical rote learning with a narrow-minded focus on exam.[66]

After almost a century of denial, stalling, and half measures, the solution was swift and thorough: the reform of 1902 (ordinance of 1 December 1902). Some of the major changes included significant curricular reductions, more pedagogical textbooks, and increased focus on concrete practical exercises (cases), both as a part of the learning activities and in relation to the exam.[67] The university established the so-called Law Laboratory (*Juridisk Laboratorium*) as an independent institution under the faculty. The purpose was to facilitate a deeper understanding of the law and the legal method through practical and theoretical exercises and by making library resources available. The Law Lab's first headmaster, professor Hans Munch-Petersen (1869-1934), had been a pioneer in this aspect as a university employed teaching assistant on a trial basis already in the mid 1890'ies.[68] The lab was run by a so-called 'practical docent', and Oskar Johansen (1860-1942) was the first to fill this new position.[69] His successor, Ernst Møller (1860-1916), formulated the theoretical and pedagogical foundation to this new teaching method in *Konkret retsundervisning,* 1912 ('Concrete legal teaching'), which is still worth reading today. Møller wanted the students to grasp the interaction between theoretical knowledge and practical circumstances and, thus, to be able to critically apply and combine deductive and inductive approaches. O.K. Magnussen (1881-1973) took over in 1916 and became a respected and influential educator during the course of the 36 years he held this position.[70]

In short, the new study programme aimed at bridging the gap between law-in-theory and law-in-practice. No doubt, the 1902 reform was a major step

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Eksamensordning, 1900, and N. Lassen, *Om Uddannelsen af Juridiske Embedsmænd i Preussen*, Ugeskrift for Retsvæsen, 1871, 1025-35.

[66] Det juridiske Studium: Beretning fra det paa Juristmødet den 10. Oktbr. 1900 nedsatte Udvalg and Aarbog for Kjøbenhavns Universitet, 1902-1903, 463-500 (464-65).

[67] Early examples of concrete exercises can be found in H. Munch-Petersen, *Retstilfælde for yngre juridiske Studerende*, 1st ed., 1901, 2nd ed., 1911 – and the exam cases in O.K. Magnussen, *Konkrete Opgaver stille ved juridisk Eksamen i Aarene 1907-1943,* 1943.

[68] Waaben (2005), op.cit., 247-49.

[69] Aarbog (1902-03), op.cit., 432-33 & 577.

[70] A. Vinding Kruse in *Festskrift udgivet af Københavns Universitet i anledning af universitetets årsfest (Den unge Henrich Steffens 1773-1811)*, 1973, 131-34.

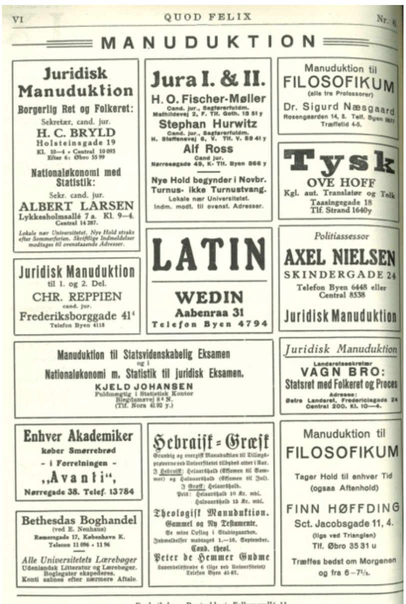
forward from a pedagogical standpoint and, accordingly, several elements of the current Danish approach to legal education build on these breakthroughs. Several aspects of the new approach are in line with principles of modern university pedagogy such as problem based learning (PBL), focus on method over rote learning, constructive alignment, and Bloom's taxonomy. The use of dictation lectures decreased steadily, and Bentzon "shamefully" admitted to being the last to systematically apply this method.[71]

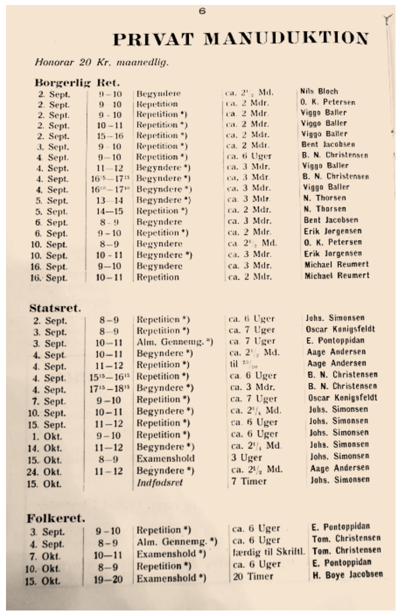
The university expected the new measures to "reduce the superfluous use of private manuducteurs to the benefit of the study programme in general and the less privileged students in particular".[72] However, it turned out to be wishful thinking. Apparently, the private manuduction was too deeply embedded into the educational structure to get rid of by mere pedagogical reform. A concrete example is found in a small student guide from 1912 published by a private manuducteur by the name J.L Buch: *Det juridiske Studium: En skematisk Vejledning* (Royal Library). In reality, it was an advertisement. The introduction reads as follows: "The exam is the primary goal of the study in law. It is important to recall this truth on a daily basis. Every measure that serves to reach this end ought to be used." Buch claimed that private manuduction was an "inescapable necessity" for parts of legal education. He then introduced the specifics of his services, including comprehensive study plans, professional study notes, and discount agreements with book sellers. Buch hosted classes consisting of six to seven participants in his office at *Gammeltoftsgade* 10 in Copenhagen. A class cost 600 crowns a year (≈ 38,000 DKK or 5,000 EUR by 2020 standards), and each participant had to pay between 10 and 15 crowns monthly (≈ 630-950 DKK or 84-125 EUR).

In 1918, the student association, *Studenterådet,* urged the university to introduce university manuduction as a part of the formal legal education. Almost a century after Rothe's suggestion of hiring 'repetitors', the faculty gave in, and in 1921 the first four university manuducteurs were employed.[73] This was an important milestone that broke the monopoly of private manuduction. The faculty explicitly informed the students that the use of private manuducteurs was no longer necessary.[74] However, private teaching

[71] Bentzon (1936), op.cit., 420-26.
[72] Aarbog (1902-03), op.cit., 457.
[73] Aarbog for Københavns Universitet 1920-23, vol. 3, 107-19.
[74] *Vejledning ved det juridiske Studium, udgivet af Det Rets- og Statsvidenskabelige Fakultet*, 1926, 14 (Royal Library).

services did not disappear overnight. The university manuducteurs had a relatively weak market position: the students had to pay for this service, and the university struggled to offer price competitive salaries.[75] During this period, it was common to attend one or two hours of manuduction daily.[76] In the mid 1920'ies the normal monthly tariff was 25 crowns (≈ 850 DKK or 115 EUR by 2020 standards), which some students complained about.[77] The tariff stabilised to 20 crowns (≈ 700 DKK or 95 EUR) in the mid 30'ies. During the German occupation of Denmark 1940-45, it was decided that the university manuducteurs were to host the examinations of the students, since most of the professors had fled to Sweden.[78] The private manuducteurs called it unfair competition.





6

PRIVAT MANUDUKTION

Honorar 20 Kr. maanedlig.

Borgerlig Ret.

2. Sept.	9—10	Begyndere	ca. 2½ Md.	Nils Bloch
2. Sept.	9—10	Repetition	ca. 2 Mdr.	O. K. Petersen
2. Sept.	9—10	Repetition *)	ca. 2 Mdr.	Viggo Baller
2. Sept.	10—11	Repetition *)	ca. 2 Mdr.	Viggo Baller
2. Sept.	15—16	Repetition *)	ca. 2 Mdr.	Viggo Baller
3. Sept.	9—10	Repetition *)	ca. 2 Mdr.	Bent Jacobsen
4. Sept.	9—10	Repetition *)	ca. 6 Uger	B. N. Christensen
4. Sept.	11—12	Begyndere *)	ca. 3 Mdr.	Viggo Baller
4. Sept.	16¹⁵—17¹⁵	Begyndere *)	ca. 3 Mdr.	B. N. Christensen
4. Sept.	16¹⁰—17¹⁰	Begyndere *)	ca. 3 Mdr.	Viggo Baller
5. Sept.	13—14	Begyndere *)	ca. 3 Mdr.	N. Thorsen
5. Sept.	14—15	Repetition *)	ca. 2 Mdr.	N. Thorsen
6. Sept.	8—9	Begyndere	ca. 3 Mdr.	Bent Jacobsen
6. Sept.	9—10	Repetition *)	ca. 2 Mdr.	Erik Jørgensen
10. Sept.	8—9	Begyndere	ca. 2½ Md.	O. K. Petersen
10. Sept.	10—11	Begyndere *)	ca. 3 Mdr.	Erik Jørgensen
16. Sept.	9—10	Begyndere	ca. 3 Mdr.	Michael Reumert
16. Sept.	10—11	Repetition	ca. 2 Mdr.	Michael Reumert

Statsret.

2. Sept.	8—9	Repetition *)	ca. 6 Uger	Johs. Simonsen
3. Sept.	8—9	Repetition *)	ca. 7 Uger	Oscar Konigsfeldt
3. Sept.	10—11	Alm. Gennemg. *)	ca. 7 Uger	E. Pontoppidan
4. Sept.	10—11	Begyndere *)	ca. 2½ Md.	Aage Andersen
4. Sept.	11—12	Repetition *)	til ²³/₁₀	Aage Andersen
4. Sept.	15¹⁵—16¹⁵	Repetition *)	ca. 6 Uger	B. N. Christensen
4. Sept.	17¹⁵—18¹⁵	Begyndere *)	ca. 3 Mdr.	B. N. Christensen
7. Sept.	9—10	Repetition *)	ca. 7 Uger	Oscar Konigsfeldt
10. Sept.	10—11	Begyndere *)	ca. 2¼ Md.	Johs. Simonsen
15. Sept.	11—12	Repetition *)	ca. 6 Uger	Johs. Simonsen
1. Okt.	9—10	Repetition *)	ca. 6 Uger	Johs. Simonsen
14. Okt.	11—12	Begyndere *)	ca. 2¼ Md.	Johs. Simonsen
15. Okt.	8—9	Examenshold	3 Uger	Johs. Simonsen
24. Okt.	11—12	Begyndere *)	ca. 2½ Md.	Aage Andersen
15. Okt.		*Indfødsret*	7 Timer	Johs. Simonsen

Folkeret.

3. Sept.	9—10	Repetition *)	ca. 6 Uger	E. Pontoppidan
4. Sept.	8—9	Alm. Gennemg. *)	ca. 6 Uger	Tom. Christensen
7. Okt.	10—11	Examenshold *)	færdig til Skriftl.	Tom. Christensen
10. Okt.	8—9	Repetition *)	ca. 6 Uger	E. Pontoppidan
15. Okt.	19—20	Examenshold *)	20 Timer	H. Boye Jacobsen

Figure 3: Examples of manuduction ads in student magazines, here from 'Quod Felix' (1926) to the left and 'Stud. jur.' (1935) to the right. Note that the ad to the left (top, center) is from Alf Ross and Stephan Hurwitz, two of the greatest Danish legal scholars of the 20th century.

The fact that the private manuduction industry was still flourishing is reflected in the abundance of advertisements in the student magazines that came into existence in the first half of the 20th century, such as *Akademisk Ugeblad,*

[75] Waaben (2005), op.cit., 252-53 and Bentzon (1936), op.cit., 461-62.
[76] Bentzon (1936), op.cit., 456.
[77] Quod Felix, 23 October 1926 (No. 4), 35-36, and 8 November 1926 (No. 5), 49.
[78] Tamm (200), op.cit., 329-30.

Quod Felix, and *Stud.jur.* From 1935 onwards, the latter was the primary marketplace and even provided thorough timetables (see illustration)

Not all manuductuers were worth their pay and some used rather aggressive (and peculiar) marketing strategies. For instance, a university manuducteur gave this account: "The private manuducteurs are entirely self-appointed… which naturally means that not all of them are worth the fee. Some manducteurs have established the most ingenious beer [sic!] and discount schemes, by which they lure innocent – or reckless – students, often with the result that they have to pay for a retake by a proper manuducteur".[79] Naturally, these circumstances were grounds for conflict. A remarkable example made headlines in the national media outlet *Politiken* in 1929.[80] Three students publicly accused three private manuducteurs, V. Baller, Boye H. Jacobsen, and Paul G. Rohbeck, of whom the two latter were students themselves, of abusing their position toward first year students by exaggerating the effect of manuduction and paying the student magazine *Den akademiske Borger* to recommend their manuduction business and write disparagingly of competitors. The two student manuducteurs and the editors of the magazine were temporarily expelled from the university as a consequence.

In 1931, the 'uneducated' law degree was abolished, and the last exam.jur. graduated in 1936 – at the 200 years anniversary of Danish legal education. The study programme was modernised again in 1937, 1944, 1948, and 1956, inter alia, by putting further emphasis on the university manuduction, hiring more manuducteurs and external teachers, and introducing elective courses.[81] Some professors pushed back on the reform agenda to avoid "the extinction of the university teaching and the revitalisation of private manuduction".[82] It was the dawn of a new era.

The Welfare State and the fading of private manuduction (1950-2000)

The university manuduction was not an instant success. Around 1950, merely 10 percent of the students apparently made use of this new offer.[83] During the

[79] Abel (1945), op.cit., 11.
[80] Tamm (2005), op.cit., 320.
[81] Waaben (2005), op.cit., 265-71 & 310-11, and Tamm (2005), op.cit., 330.
[82] A. Ross, *Reform af den juridiske Uddannelse*, Ugeskrift for Retsvæsen, 1948, 145-90 (150 & 186-87).
[83] Ibid., 150 and M.C.A. Bjerre, *Reform af den juridiske Uddannelse*, Ugeskrift for Retsvæsen, 1948, 241-49.

first half of the 1940'ies, as many as 80 manuducteurs paid for ads in the student magazine *Stud.jur*, but already in 1949, the number had fallen to 30.[84] Rough data on this matter can be extrapolated from the biographical data compilations on the legal profession (*Juridisk Stat*) from the period 1928-1965:[85]

	Private manuducteurs	**University manuducteurs**
1928	23	6
1935	24	11
1940	37	19
1946	42	33
1952	48	49
1965	51	73

The numbers indicate how many of the *living* lawyers in the specific years that offered manuduction at some point in their careers and, therefore, the numbers are significantly delayed compared to the listed years. Some lawyers are represented in both categories. Moreover, the data is inconsistent. Although, this only paints a very rough picture, it is fair to draw some conclusions: private manuduction was still relatively prevalent after the introduction of university manuducteurs (1921), but steadily the university manuduction took over a significant portion of the market share.

[84] V. Abel, *Det juridiske studium: En lille introduktion*, 1st ed., 1943, 11; 2nd ed., 1945, 11; and 3rd ed., 1949, 10-11. A review of the *Stud.jur.* magazines from this period roughly confirms these estimates.

[85] A. Falk-Jensen, *Juridisk og statsvidenskabelig Stat*, vol. 18-22, 1928, 1935, 1946 & 1952 and T. Holmboe, *Juridisk-Økonomisk Stat*, vol. 23, 1965. Vol. 24, 1981, does not distinguish clearly between the two categories.

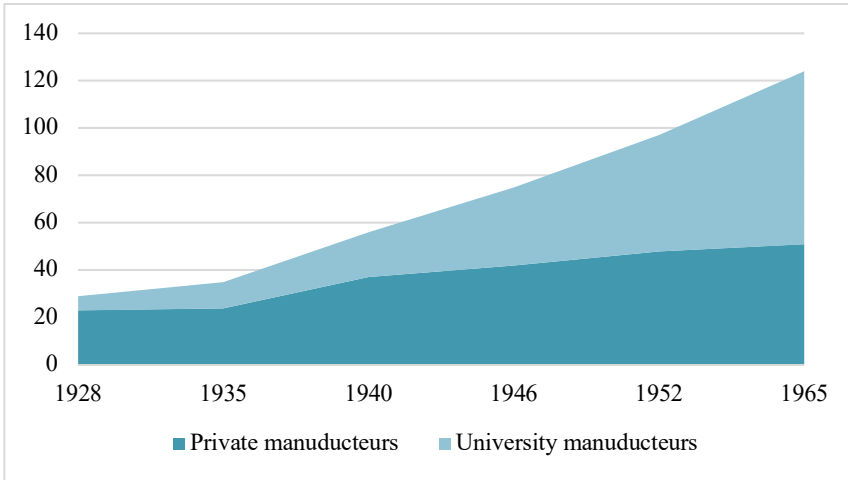


Figure 4: Estimate of the relative relation between private manuduction and university manuduction over time

In accordance with tradition, the business of private manuduction was normally strictly personal – almost like apprenticeships. However, the advertisements in the student magazines (mentioned above) reveal that the manuducteurs were still professional and specialised and that they sometimes joined forces and formed partnerships. Although, the brand value was normally connected to the specific names of certain popular manuducteurs, a more commercial approach was lurking. For instance, there are trails of an enterprise called *Juridisk-økonomisk Kursus* ('Legal-economic Course') from 1940 to 1965.[86]

The private manuduction faded away during of the following decades (1960-80), which happens to coincide with the golden age of the Danish welfare state. Education became one of the many services that was offered by the universal welfare system – usually free of charge. Accordingly, in 1960, the minister of education decided to exempt the law students from paying for the university manuduction.[87] Apparently, this was a fatal blow to the private manuduction. No doubt, private teaching services still existed in some form, but its importance and popularity was decimated. This is reflected in the ongoing debate about legal education as it did not address the use of private teaching

[86] Ibid. (under the name "Holst, Hans Poul") and Kraks Vejviser, 1948, II:388 and 1960, II:618.
[87] Juristen, 1960, Foreningsmeddelelser, 34 & 100.

services.[88] Informal talks with older colleagues confirm the impression that private manuduction had lost its relevance.

However, as we will see, this was not the end.

The revival of legal shadow education in the 21st century

Revitalisation – background and numbers

History tends to repeat, or rather mimic, itself. The shadow education industry began thriving again in the 1990'ies with Copenhagen Business School (CBS) as its nest.[89] However, this time, the undertakings were organised as actual corporations (limited liability companies), and the major players were Complet A/S and Manu Kurser A/S (later Aspiri A/S). During the mid-00's these companies entered the market of legal education. In 2006, a group of law students complained to the faculty of law about the companies' predatory marketing strategies which included placing brochures on the students' chairs right before class, recruiting some of the university teachers and making them advertise for the private courses, and paying students to recommend the private courses to their peers.[90] This new wave of private legal education focused more exclusively on exams, and the main product was exam preparation courses. Some of the entrepreneurs behind the companies mentioned the use of private supplementary teaching in Asia as a source of inspiration.[91]

The Faculty of Law expressed strong discontent with the development and introduced a clause in employment contracts prohibiting the internal and external university teachers from offering private teaching services on the side. The then head of studies Mette Hartlev added: "We think that the students are cheating themselves, and that the private course providers are taking advantage of the insecurity of the young students. Grades are perceived as very important

[88] Eg, B. Gomard, *De samfundsvidenskabelige studier*, Juristen, 1968, Foreningsmeddelelser, 139-49, B. Christensen, *Den juridiske uddannelse: Et indlæg i en debat,* Juristen, 1968, Foreningsmeddelelser, 246-57, and Betænkning 1062/1985, *En reform af den juridiske kandidatuddannelse*. A study survey from 1992 (N. Krarup, *Studiestart på jura 1992*, 1992/93) does not mention private manuduction at all.
[89] *Privat undervisning giver millioner,* Berlingske Tidende, 3 June 1997.
[90] *Privatundervisning I: Betalingsundervisning boomer*, Information, 12 February 2007, *Bred kritik af eksamensindustrien*, Jyllands-Posten, 1 March 2008, and *Studerende betaler for en god eksamen*, Djøfbladet, 26 October 2012.
[91] *Privatundervisning II: Der er penge i eksamenspres*, Information, 12 February 2007.

by the students, and we understand their worry, but the private courses are superfluous from a learning perspective".[92]

It ignited a new public debate in 2011-12, when the trade union in social sciences, business, and law, *Djøf,* published an analysis according to which around 1/4 of the responding students – and around 40 percent of law students – had paid for private courses during their current education.[93] The Faculty of Law at the University of Copenhagen sought to remedy this unfortunate trend with the study reform of 2012 which to a great extent replaced the large-scale lectures with smaller 'seminars' and put more emphasis on group work, PBL, active student participation, and concrete exercises (cases). However, the figures did not change significantly: in 2018, 39 percent of law students had paid for private teaching services.[94] These are the most recent numbers from Djøf.

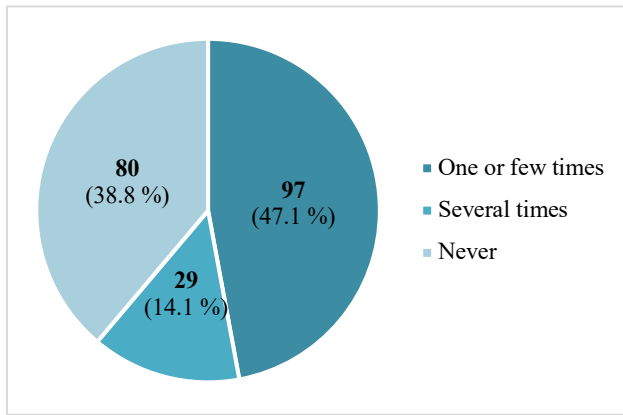


Figure 5: The use of private teaching services in relation to legal education (4th semester)

My survey study from 2022 suggests a drastic increase: 61.2 percent of the law students on the fourth semester of the bachelor programme at the University of Copenhagen have used private teaching services during their legal studies – including 14.1 percent who have used it "several times". 90.5 percent answered that they knew people who had purchased private teaching services as a part of

[92] *Interview*, Politiken, 18 February 2007.
[93] Djøf's studielivsundersøgelse, 2012, cf. *Undervisning forn egen regning* and *Jura vil bremse karakteræset,* Universitetsavisen, 1. March 2012, *Studerende køber privat undervisning*, MetroXpress, 21 October 2011, and *En ud af fire køber stadig privatundervisning*, Universitetsavisen, 16 October 2012.
[94] Djøf's studielivsundersøgelse, 2013-18.

their legal education (56.7 percent selected the option "numerous", 33.8 percent chose "some"). When asked if they had *ever* made use of private teaching services, ie also before starting university, the positive answers accounted for 72.2 percent. I also asked if they would consider using private teaching services in the future, irrespective of their previous answers. A total of 70.4 percent replied positively (48.6 percent "to some extent" and 22.4 percent "to a great extent"). Only 13.8 percent replied "not at all".

It is obvious to hypothesise that the substantial increase from 2018, at least to some extent, is linked to the COVID-19 pandemic and, more generally, the growing availability of online content. However, this does not necessarily mean that a decrease can be expected in the years to come.

Outlining the business model of shadow educators: Aspiri A/S and My Law Story ApS

As mentioned, the private teaching industry has been resurrected in a new and more corporate form. I have limited my further study to the two current dominant market players, *Aspiri A/S* and *My Law Story ApS*, although there are other providers, eg *Studie Akademiet ApS*. No doubt, more informal arrangements, such as one-on-one assistance from older students, still exist, but they are harder to research and are not advertised to any extent comparable to what has previously been seen.

Aspiri A/S was founded in 1993 and focused on CBS until the 00's. Its primary products are exam preparation courses and alternative textbooks aimed at the mandatory law courses. Until recently, Aspiri's courses were held physically, but now it offers them in an online synchronous format through their own platform *AspiriPlay* (www.play.aspiri.dk). The COVID-19 pandemic has accelerated this transformation.[95] According to its own website counter (as per 15 January 2023), Aspiri has assisted 447,664 students since 1993. According to the public annual accounts, Aspiri's gross profit in 2021 amounted to almost 6.2 million DKK (≈ 830,000 EUR) and the net profit before taxes to almost 2.6 million DKK (≈ 350,000 EUR).

The fourth semester respondents to my survey can buy a 15-hour exam preparation course in general administrative law for 749 DKK (≈ 100 EUR).

[95] *Kursusvirksomheden Aspiri har succes med online-undervisning*, Omnibus, 18 February 2021.

They get discounts if they buy all the courses of the semester or the academic year, and they may postpone their payment via an instalment plan. Aspiri's strong exam focus is its main selling point. As the CEO puts it: "People will happily pay a penny to do well at the exam. In our courses, we review a lot of earlier exams… It's all handed to the students on a silver platter".[96] He admits that legal education is particularly well fitted for their products since, apparently, the exam can be reduced "to a formula with a single correct answer".[97]

Aspiri has a history of aggressive advertising. Aspiri advertises that it effectively raises the grades of its customers by 1-2 levels.[98] In another context, they argue that the customers receive grades that are 1-2 point higher than their peers.[99] Both of these assertions are hard, if not impossible, to verify. Analyses carried out by CBS suggest that the students attending the private courses systematically get lower grades.[100] In any case, these findings cannot be transferred to the law faculty without further proof.

Since the university has effectively barred Aspiri and other private providers from the university area, Aspiri primarily reaches its target group through

[96] Jyllands-Posten (2008), op.cit.
[97] Djøfbladet (2012), op.cit. See also *Undervisning for egen regning*, Universitetsavisen, 1 March 2012.
[98] See the video advertisement uploaded on 20 November 2020: https://youtu.be/Jx4kV3tQ-_U (accessed 01-15-2023).
[99] *Privatkurser har tvivlsom effekt*, Universitetsavisen, 1 March 2012.
[100] *Analyse af karaktereffekten af deltagelse i manuduktion på HA 2. år*, Evalueringsenheden, Copenhagen Business School, 23 January 2009, and M.M. Nielsen, *Analyse af manuduktionsdeltagelse i faget Finansiering på HA 2. år – 2011, 2012 og 2013*, CBS Evaluering og Akkreditering, 2 December 2015.

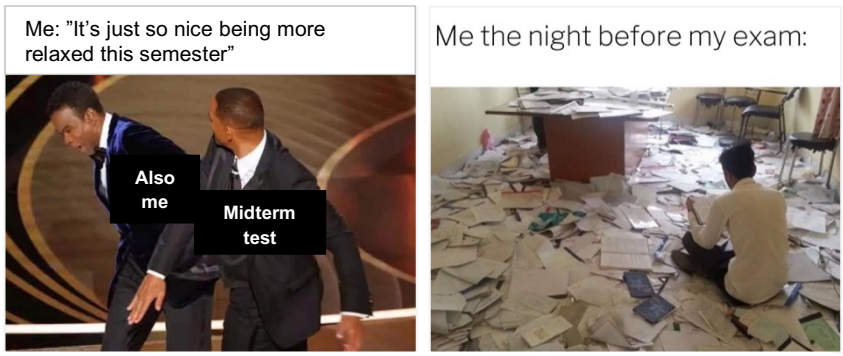


Figure 6: Examples of memes form Aspiri's Facebook page. The one on the right (1 June 2021) went viral with more than 2,000 likes and 7,800 comments. I have translated the left one (28 March 2022) from Danish to English.

social media, especially Youtube and Facebook. Lately, Aspiri has launched a meme campaign that is focused on typical student issues related to exams and performance anxiety.

My Law Story, on the other hand, is a new start-up with a novel approach. While Aspiri and other traditional private course companies are mostly frank about the fact that they are running a business for profit, My Law Story seemingly has made an effort concealing it. It has marketed itself as almost an NGO involved in the well-being of law students. The following is an example of the storytelling from the website: "It all started when our CEO… noticed the misery amongst the students. She met with students who suffered from performance anxiety, were stressed out, or simply lonely. [She] started meeting with a group of students every once in a while to talk about their struggles as law students… At My Law Story, we wanted to tell more stories, create bigger projects, and gather more people in diverse communities. That's why [the CEO] chose to go all-in on My Law Story, which today offers a broad range of networks bringing people together".[101]

My Law Story has created an online platform (www.mylawstory.org) for students and professional lawyers. It has introduced a membership model (My Law Story Club) that gives the paying members access to exclusive content, including online course reviews and exam preparation courses. The monthly student price is 49 DKK (≈ 6.5 EUR). However, the members must pay additional amounts to become a part of a professional network. Moreover, they

[101] www.mylawstory.org/vores-historie (accessed 01-15-2023). See, also, *Mødet med de store personligheders sårbarhed skal øge juristernes trivsel*, K-News, 16 October 2019.

offer certain specialized services, such as a three-hour master thesis supervision for 2,000 DKK (≈ 335 EUR). My Law Story markets its product on all the major social media platforms, such as Facebook, Instagram, Youtube, and LinkedIn.

It seems that My Law Story gets professional lawyers, law students, and even some professors to produce content for free, which My Law Story then uploads to the students. Some of the content is publicly available, but some of it is behind paywalls. My Law Story's public accounts reveal that the entire revenue is spent on salaries to the employees, which until recently consisted of one person (ie not the content creators). It can only be speculated where this money ends up. In any case, the accounts show a rapid growth from a gross profit in 2019 of 60,000 DKK (≈ 8000 EUR) to 937,000 DKK (≈ 126,000 EUR) in 2021. In 2021, staff expenses accounted for 991,000 DKK (≈ 133,000 EUR)

The 'mass university' and student motivations

What comes after the welfare state? – The competition state, many political scientists would argue: "The basic institutions of the welfare state remain in place but are gradually trimmed, rearranged, and "refunctionalize[d]"… to serve a new purpose: to make society fit for competition".[102] In this context, the main task of universities is to cater to the labour market by providing as many productive individuals as fast as possible.[103] Legal education and the legal profession have always been highly competitive. But the new approach to university education (the so-called 'mass university') has probably intensified the side-effects of this inherent competitive culture.

While the competition state hypothesis seems like an attractive explanation, I am interested in more specific answers from students themselves. According to the annual analyses carried out by *Djøf*, there are three main reasons why the students (ie students in law, social sciences, and business) buy private courses: Grade competition, inadequate teaching, and insufficient teaching.[104] In 2014, two students published a critical feature in which they claimed that the private providers were taking advantage of the students' exam anxiety: "… when the

[102] P. Genschel & L. Seelkopf, *The Competition State: The Modern State in a Global Economy*, in S. Leibfried et. al (eds.), *The Oxford Handbook of Transformations of the State*, 2015, 234-49 (234) with further references.
[103] See, eg, A.M. Mai et. al, *Imod en ny videnskabelig dannelse: Sider af universitetets undervisning og kultur*, 1997.
[104] Djøf (2012-18), op.cit.

well-known exam panic hits us… we can't help the temptation to sign up for Aspiri courses. Our nervousness and despair take control… In the moment, it feels like this particular course will secure us the grade we desire. The course becomes a key that unlocks a world of excellent grades although we know that only diligence and thoroughness can get us there".[105]

In my survey study, I asked the students who had used or wanted to use private teaching services what their primary motivation(s) was/were. Each respondent could pick up to three options. The three most important motivations were the opinions that 1) the private courses are more exam-oriented, 2) they are a great supplement to the university teaching, and 3) they give the students a sense of security. Many (106) explicitly opted for options about exam anxiety or performance anxiety. As one respondent put it: "In general, the exam demands are too high, and I need help to pass". A fair share (30) of students admitted that they attended the courses because they had not paid enough attention during the semester. This figure is probably underreported considering precisely the students who did not attend the lecture. 17 deemed the private courses better than university teaching. However, the open-ended answers indicate that inadequate teachers may be an issue. For instance: "If you get a bad teacher, some of us feel the need to pursue other options to get a sense of security".

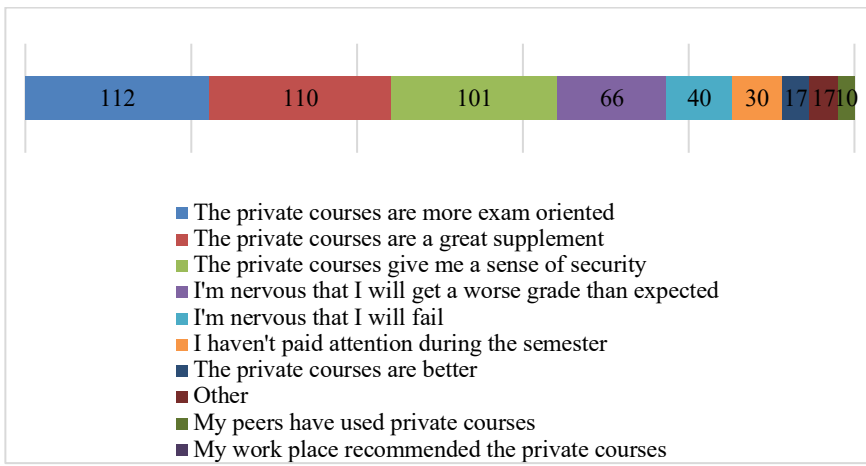


Figure 7: Student motivations for using private teaching services

[105] *Aspiri spinder guld på studerendes nervøsitet*, Universitetsavisen, 27 November 2014.

I also examined the primary reason(s) for the students who had *not* and did *not* want to use private teaching services. The vast majority (52) responded that they simply felt capable of attending exams without. However, around 1/6 of the students (31) gave the reason that they cannot afford the private services. Roughly 1/8 of the students (25) are fundamentally against the use of private teaching services. As one respondent framed it: "The private courses contribute to the growing inequality." However, moral convictions like these do not always keep the students from giving in to the pressure: "I'm fundamentally against it, but for the first time I have bought an Aspiri course this semester [the 4th semester] due to the course on property and creditor law."

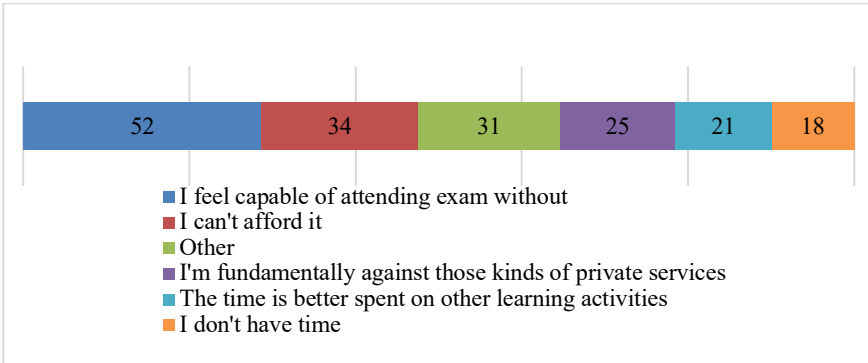


Figure 8: Student motivations for not using private teaching services

Finally, I asked the students who have used private teaching services to rate their experience. 48.7 percent were satisfied (including 7.4 percent who were "very satisfied"). However, 39.7 percent were neutral and 11.6 were dissatisfied. Against this background, it is paradoxical that 70.4 percent of the respondents are considering using the services in the future and that according to Aspiri's own numbers, 80-98 percent of their customers return.[106] It seems that some students are paying for the private teaching services as a mere precaution. Several open-end responses show that the courses are particularly popular in the very beginning of the education, for instance: "I used it [private teaching services] to begin with. I was pretty disappointed. You are able to obtain the same knowledge by yourself. They take advantage of our exam anxiety and our fear of getting a bad grade." Another respondent put it this way: "To a great extent, I think that first year law students are insecure about

[106] *Jura på KU har høj kvalitet – men vores kurser er stadig relevante*, Universitetsavisen, 1 December 2014.

their ability to perform without private courses due to the many ads and the fact that their peers are talking about them all the time." This is in line with a third response: "I attended them [the private courses] on the first semester because I didn't want to miss out on anything that might be an advantage at the exam. It wasn't the case – won't use it again."

In sum, it seems that the students' motivations to a high degree are aligned with the business models of the private providers: the private providers have a narrow focus on exams and tap into the students' negative emotions related to their performance combined with a prospect of raising their grades. Correspondingly, the students opt for the private services because of their strong exam focus and as a tool to manage their insecurities. Overall, the growth in the use of private teaching services does not seem to be caused by inadequate or insufficient university teaching. Moreover, from a welfare state perspective, it is discouraging that several students have chosen not to use private services because they cannot afford it. Finally, the demand seems unaffected by the fact that more than half of the students who have used the private teaching services were not particularly satisfied with them.

Conclusion and perspectives

This study has examined private teaching services within the field of Danish legal education from historical and current perspectives. The aim was to estimate the extent of legal shadow education and understand the students' motivation. Although there are some inherent uncertainties related to the findings, it is possible to outline certain trends and to pinpoint some significant push and pull factors.

In Denmark, legal shadow education is as old as the university (1479) and legal education (1736) alike and, as such, deeply embedded in the educational culture. The main providers of private teaching services have shifted from professors (1479-1800) to private individuals such as professional lawyers and experienced law students (1800-1960) to commercial corporations and online platforms (1900 onwards). During a period of around 150 years (1780-1930), the private teaching services were more than supplementary in nature; they were the backbone of legal education. The relationship between the university and private teachers has been antagonistic most of the time. Only in a relatively short era (1960-2000), private teaching services were irrelevant. A rough timeline may be illustrated thus:

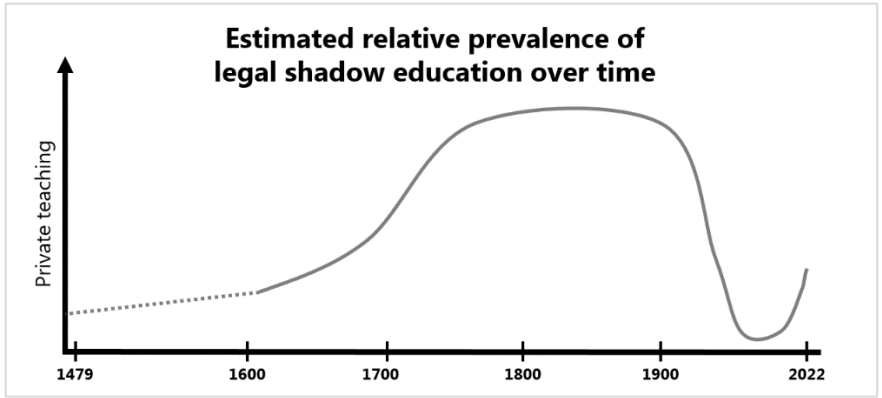


Figure 9: Estimated relative prevalence of legal shadow education over time

Originally, it was a part of the professors' privileges to offer private lectures for money. Information about these *collegia privata* is scarce, but we know that their popularity grew in the 17th century as professors were free to apply new and better teaching methods. When a formal legal education was introduced in 1736, a demand for more exam-oriented teaching (*manuduction*) emerged. However, by the end of the 18th century, professors were banned from using this kind of teaching method. Accordingly, a genuinely private shadow education industry grew as professional lawyers and, to some extent, experienced law students began hosting private manuduction. Although it was the university's proclaimed ambition in the beginning of the 19th century that the students were to complete their legal education without resorting to private manuducteurs, the private manuduction sector remained a pivotal feature of legal education throughout the century. The university deflected the countless complaints about university education voiced by both students, professional lawyers, and politicians. The reform of 1902 was a turning point as it to a higher degree focused on practical problems and cases and established the Law Laboratory. The reforms continued, and from 1921 the university employed university manuducteurs. However, the private manuduction remained popular until the Danish welfare state provided the fatal blow in 1960: free university manuduction.

Numerous contemporary student accounts and other sources point to the assertion that the poor state of university education, mainly the lack of (proper) textbooks and the use of archaic teaching methods, such as dictation lectures, is the historical raison d'être of the private teaching services. Moreover, the exam questions were normally abstract and highly repetitive which promoted

rote learning and exam-oriented private manuduction. The private manuduction was simply a necessity; the market's solution to a broken education.

The private teaching industry was brought back to life in the 1990'ies in the form of corporations that penetrated the market of legal education from the mid-00's. Throughout the 2010's, around 40 percent of the Danish law students attended private courses. My survey study from 2022 shows that more than 60 percent of the more than 200 participating 4th semester law students at the University of Copenhagen have paid for private teaching services, and that more than 70 percent are considering using such services in the future.

The new wave of legal shadow education in the 21st century is fundamentally different from its origins. Today, students receive free legal education and, by all measures, university teaching is generally of a high quality and mainly organised in smaller classes, not in large lecture halls. There is always room for improvement, of course, but the data indicates that the quality of university teaching is not a key issue anymore. From a historical perspective, the private teaching industry is thriving against the odds. The emergence of the competition state and its impact on the university might serve as a structural explanation. The private providers are now organised as highly professional commercial entities. Their main products are exam preparation courses and online content. They have a track record of rather aggressive campaigning that, inter alia, taps into the student's negative emotions related to exams, and they offer the prospects of raising their grades. And it works: the main reasons behind the students' purchase of such products are their strong exam focus and the first-years students' sense of insecurity. The companies also managed to benefit greatly from the COVID-19 pandemic by developing their online businesses.

History bears witness to the assertion that legal shadow education is not inherently bad. It falls outside the scope of this study to pass sentence on the appropriateness of the private teaching services in current society. Personally, however, I find it questionable, and I think that the university ought to work proactively on minimizing the use of private teaching services.[107] In any case, the results of this study are relevant for future debates and reform considerations. It all boils down to fundamental market mechanisms – the laws

[107] R.G. Nielsen, *Mellem profession og videnskab*, in M.B. Andersen et al. (eds), *Festskrift til Peter Pagh*, 2023, 487-512.

of supply and demand. The principal take-away from this historical account is the dynamic relationship between the three actors: the university, the students, and the private providers. The action of one may affect the others in relation to the prevalence of shadow education. This may be illustrated thus:

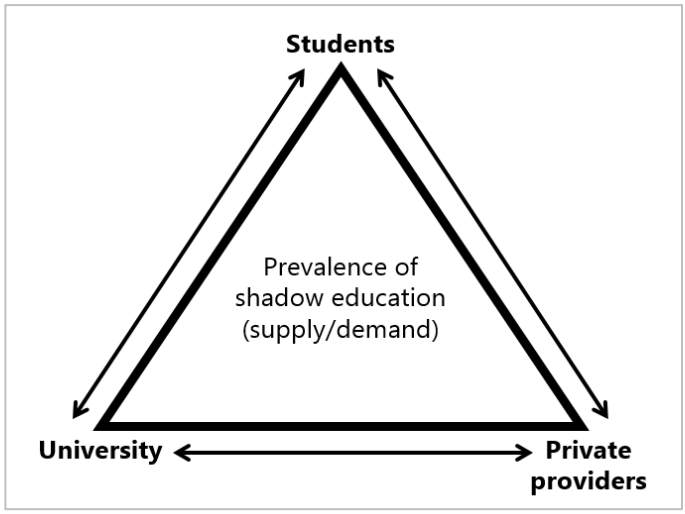


Figure 10: Prevalence of shadow education (supply/demand)

For instance, I suspect that the exam format is crucial to shadow education. The private providers are benefitting greatly from the use of the same exam 'script' year after year. If we develop more dynamic exam formats, it will be harder for the private providers to create and sell their products. However, this may have unwelcome side-effects, such as hindered foreseeability and less constructive alignment, which might foster a new market for other types of private services. Moreover, in my opinion, the Danish law faculties ought to adopt a strategy for producing e-learning content of a quality that can compete with the most recent developments within the shadow education industry.

For now, it suffices to remind the law students of a Roman legal principle: *Caveat emptor!*

My study is coming to a close. However, it is my humble hope that I can inspire more researchers to venture into the niche of shadow education in law. We need to collect more and better data and monitor the developments in Denmark and elsewhere. Moreover, there ought to be conducted comparative analyses, both by comparing the law education to other types of university educations, and by

comparing the Danish example to experiences in other jurisdictions. Such studies would help achieve a deeper understanding of the dynamics of shadow education in law and, indirectly, help improve legal education.

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Democratising case law while teaching Students: writing Wikipedia articles on legal cases

Edana Richardson,[*] Brian McKenzie,[*] Brian Flanagan, [*] Neil C. Thompson[**] and Maria Murphy[*]

Abstract

This article draws on qualitative student feedback and lecturer experience to provide a guide for educators who are interested in creating Wikipedia article-based assignments. Using legal cases as an example, this article details how these assignments can encourage students to deepen their understanding of a topic and consider how knowledge can be communicated effectively. In particular, this article focuses on how educators outside of the United States and Canada can navigate Wikipedia's bureaucracy and how they and their students can contribute information of relevance to smaller jurisdictions on a publicly-accessible repository. This article begins by addressing concerns that educators may have with student use of Wikipedia, while highlighting pedagogical benefits for students who write Wikipedia articles. It goes on to provide a guide for educators who want to create a Wikipedia article writing assignment – in particular, the preparatory steps required to make the assignment effective, how to support students in their writing journey, and how to better ensure that student-authored articles remain available on Wikipedia once uploaded. This article concludes by encouraging educators to consider using Wikipedia as an educational tool, and to teach their students how they can use Wikipedia article writing to contribute to public knowledge.

Keywords: Best practice guide, law school, public knowledge, Wikipedia, student skills.

[*] Maynooth University.
[**] MIT Computer Science and Artificial Intelligence Laboratory (CSAIL).

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Introduction

Wikipedia and academia

Wikipedia has been described by the Irish courts as 'a form of continually evolving encyclopaedia maintained on an internet site'.[1] It has today become a profoundly influential source of information.[2] Founded in 2001,[3] Wikipedia reached twenty-four billion monthly page views in January 2023.[4] This makes the online encyclopaedia the seventh most-visited website in the world.[5] Although originally conceived as a peer-reviewed free and evolving encyclopaedia that would be authored and edited by academics and experts,[6] it is now a platform whose content can be edited and added to by virtually anyone. This has transformed Wikipedia into one of the world's largest user-generated content platforms.[7] Use of Wikipedia is driven by current events, media, a desire for in-depth knowledge about a topic, random exploration, or a work, business, or school-related information need.[8]

Yet despite Wikipedia's scope and reach, it has occupied an uneasy relationship with academia. Those of us teaching within universities and other higher education institutions may seek to dissuade students from relying on

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[1] *IR v Minister for Justice Equality & Law Reform & anor* [2009] IEHC 353 [18] (Cooke J).

[2] In a more recent case in Ireland in 2018, the High Court simply referred to Wikipedia, without any need to explain what it meant – see, *RAK (Eswatini) v The International Protection Appeals Tribunal & anor* [2018] IEHC 681.

[3] Wikipedia, <https://en.wikipedia.org/wiki/Wikipedia> accessed 26 February 2023, see also John C Kleefeld and Katelyn Rattray, 'Write a Wikipedia Article for Law School Credit – Really?' (2016) 65(3) *Journal of Legal Education* 597, 599.

[4] 'Wikimedia Statistics' (*Wikimedia Foundation*) <https://stats.wikimedia.org/#/all-projects> accessed 26 February 2023.

[5] 'List of most visited websites' (*Wikipedia*) <https://en.wikipedia.org/wiki/List_of_most_visited_websites> accessed 26 February 2023.

[6] Nate Lanxon, 'The greatest defunct Web sites and dotcom disasters' (*CNET*, 18 November 2009), <https://www.cnet.com/tech/computing/the-greatest-defunct-web-sites-and-dotcom-disasters/#:~:text=Nupedia%20(2000-2003%3B%20precursor%20to%20Wikipedia)> accessed 26 February 2023.

[7] Wikipedia, 'User-generated content', <https://en.wikipedia.org/wiki/User-generated_content#:~:text=Wikipedia%2C%20a%20free%20encyclopedia%2C%20is,used%20as%20an%20instructional%20aide> accessed 26 February 2023.

[8] Florian Lemmerich, Bob West, and Leila Zia, 'Why the world reads Wikipedia: What we learned about reader motivation from a recent research study' (*Wikimedia Foundation*, 15 March 2018) <https://wikimediafoundation.org/news/2018/03/15/why-the-world-reads-wikipedia/> accessed 26 February 2023.

Wikipedia as a source of information. We may not train our students how to use Wikipedia critically or how to improve it. Instead, we simply tell them that it 'isn't recognised as a reliable source'.[9]

In recent years, however, there has been an emergence of examples of lecturers and instructors setting Wikipedia-based assignments as an alternative to students 'handing in papers, having them graded, and getting them back (generally with no opportunity to revise them)'.[10] For instance: Kleefeld's law students in Saskatchewan College, Canada edited Wikipedia articles about legal topics;[11] Edwards allowed her Manhattan College, New York history students to either critique an existing Wikipedia article or to create a new one (although in neither case were the edits or new articles required to be published on Wikipedia);[12] and Chandler and Gregory's students in Lycoming College, Pennsylvania were asked to create Wikipedia articles on Islamic history, or to edit existing articles.[13] To help academics and students contribute to Wikipedia, the Wiki Education Foundation ('WikiEdu', a non-profit organisation) supports projects in the United States (the 'U.S.') and Canada.[14] Although WikiEdu works with academics from these two countries to write about a wide range of topics, this nevertheless results in a specific jurisdictional, and arguably North American, framing of content production that may not adequately address issues of relevance in smaller jurisdictions.

Reflecting this narrow jurisdictional focus, prior to our exercise there was scant information on Wikipedia concerning the judgments of the highest court in Ireland – the Irish Supreme Court. In an exercise that we conducted in collaboration with students, we established a category of Wikipedia articles

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[9] Anonymous feedback provided by a student as part of a feedback questionnaire distributed to participants in May 2019 and December 2019 ('Student Feedback') – No3 (anonymous responses were given a number). The questionnaire was approved by the Maynooth University Ethics Committee - reference SRESC-2018-098. See also, Charles Knight and Sam Pryke, 'Wikipedia and the University, a case study' (2012) 17(6) *Teaching in Higher Education* 649, 652.

[10] Matt Barton, 'Is There a Wiki in This Class? Wikibooks and the Future of Higher Education' in Robert E Cummings and Matt Barton (eds), *Wiki Writing: Collaborative Learning in the College Classroom* (University of Michigan Press 2008) 177, 189.

[11] Kleefeld and Rattray, (n 3).

[12] Jenifer C Edwards, 'Wiki Women: Bringing Women Into Wikipedia through Activism and Pedagogy' (2015) 48(3) *The History Teacher* 409.

[13] Cullen J Chandler and Alison S Gregory, 'Sleeping with the Enemy: Wikipedia in the College Classroom' (2010) 43(2) *The History Teacher* 247.

[14] 'Teach with Wikipedia' (*Wiki Education Foundation*) <https://wikiedu.org/teach-with-wikipedia/> accessed 26 February 2023.

that had previously been virtually non-existent: summaries of Irish Supreme Court cases. Given the accessible nature of Wikipedia as a source of publicly available knowledge, we considered the addition of dozens of Wikipedia articles about Supreme Court cases from a smaller jurisdiction, such as Ireland, to be in the public interest.

For our exercise, we tasked students with writing Wikipedia articles on cases that they had chosen, within an area of law with which they felt comfortable. Our Wikipedia article exercise ran over 2019 and 2020 as part of a larger, ongoing research project. The articles were published on Wikipedia, and all remain available at the time of writing.[15] Open to both undergraduate and postgraduate law students at Maynooth University, Ireland, this exercise sought to build research and writing skills, and information literacy. We also found using Wikipedia article writing in class to be an archetypical example of a civic engagement pedagogy by providing our students with an academically rigorous opportunity to contribute to wider public knowledge and develop a sense of civic responsibility.[16] In this way, our students' Wikipedia additions directly expanded Wikipedia's content to cover topics that are central to the development of legal rights and obligations within a small jurisdiction (Ireland).

However, educators must be cautious when framing and rolling out Wikipedia-based assignments. Using Wikipedia in the classroom requires significant time and preparatory work. Educators need to work closely and carefully with students to ensure both a positive experience for the students, and that class engagement and content production are not disruptive to the encyclopaedia.

This article charts our experience of creating and implementing a Wikipedia-based assignment. It is one of the only detailed guides to Wikipedia-based assignments created for educators outside of the U.S. and Canada and is designed to make the process rewarding for educators and students. While our students wrote articles about Irish court cases, our experience can be applied to any in-class Wikipedia article writing exercise, legal or otherwise.

First, this article explores the background and objectives of the exercise. It considers Wikipedia's reputational issues and the importance of allowing

[15] February 2023.
[16] Debra L. DeLaet, 'A Pedagogy of Civic Engagement for the Undergraduate Political Science Classroom' (2016) 12(1) *Journal of Political Science Education* 72, 73.

students to use Wikipedia to both build their own skills and contribute to public knowledge. It then discusses the process of developing and implementing a Wikipedia-based assignment, outlining the challenges that we faced and providing a narrative guide on how to facilitate an effective Wikipedia-based assignment. Next, it evaluates the success of the exercise by reflecting on the experience from both our students' and our perspectives. Finally, it concludes by encouraging educators, particularly those outside of the U.S. and Canada, to consider using Wikipedia in class assignments.

Background and Objectives

Reputational issues faced by Wikipedia

The use of Wikipedia in higher education has been the subject of debate for many years. There have been several examples of attempts by academics to integrate Wikipedia authorship and editing into the classroom, to 'give students the opportunity to learn through their contributions.'[17] Yet the ability for anyone to anonymously contribute to Wikipedia underpins the reputational difficulties faced by the free encyclopaedia in an academic context. You do not need qualifications or expertise to create or change a Wikipedia page. This is in contrast to academics' usual preference for encouraging their students to learn by reading sources that have a level of overt academic credibility – be that peer reviewed articles or benchmark works from leading academics published by respected publishers. As academics, we seek a clear line of authorship, peer review and with that, credibility, in our sources.[18]

Scepticism surrounding the academic legitimacy of Wikipedia and the reliability of its content has led to entire university departments banning citation of Wikipedia in academic writing[19] and lecturers telling students that any Wikipedia citation in their assignments will result in an automatic zero.[20]As one of our students reflected, 'several people (teachers/lecturers) have told me not to use [Wikipedia] calling it "unreliable"'.[21] While this scepticism is rooted in the academic goals of rigour, transparency and

[17] Kleefeld and Rattray, (n 3), 604.
[18] Chandler and Gregory, (n 13).
[19] An example of which is Middlebury College's history department – Meghan Sweeney, 'The Wikipedia Project: Changing Students from Consumers to Producers' (2012) 39(3) *Teaching English in the Two-Year College* 256, 257.
[20] Chandler and Gregory, (n 13), 249.
[21] Student Feedback No3.

accountability, it is not limited to university corridors. Partners in law firms have criticised the use of Wikipedia by trainee lawyers asked to produce a piece of research,[22] judges have expressed doubts about Wikipedia as a valid source of information for the courts,[23] and news organisations have banned their journalists from using Wikipedia as a source.[24]

In addition to concerns arising from the credibility of Wikipedia's content, academics may fear that Wikipedia is used as a 'one-stop shop' by students to avoid having to critically evaluate multiple sources. Consulting Wikipedia is quick and easy. Internet search engines' reliance on Wikipedia to generate search results further aids this accessibility.[25] While Wikipedia may be used as a springboard into underlying (and more authoritative) literature on a topic,[26] there is research that suggests that those reading Wikipedia may go no further in verifying the information that they read on the encyclopaedia, satisfied that the content provides them with their answer. Rieh and Hilligoss have shown that students are sometimes willing to compromise information reliability of their online sources for speed and convenience,[27] while Fallis has found that people tend to choose easily available sources of information.[28] Our own students reflected that they 'do look up to see whether the[re] may be case[]

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[22] Natasha Choolhun, 'Google: to use, or not to use. What is the question?' (2009) 9 *Legal Information Management* 168.

[23] As the Irish High Court noted in *Rowan v Kerry County Council and others* 2012 [IEHC] 65, [31] (Birmingham J):

> I have been referred to a number of dictionary definitions […] This exercise reached its nadir in the first affidavit sworn by Dr. Martin Rogers which referred to Wikipedia and Wiktionary entries. *Sensibly, counsel for the applicant indicated that he was not relying on these passages from the affidavit*. [emphasis added].

[24] Laura Oliver, 'AFP reporters barred from using Wikipedia and Facebook as sources' (Journalism.co.uk, 17 January 2008) <https://www.journalism.co.uk/news/afp-reporters-barred-from-using-wikipedia-and-facebook-as-sources/s2/a530941/> accessed 26 February 2023.

[25] Conor McMahon, Isaac Johnson and Brent Hecht, 'The Substantial Interdependence of Wikipedia and Google: A Case Study on the Relationship Between Peer Production Communities and Information Technologies' *Proceedings of the Eleventh International AAAI Conference on Web and Social Media* (ICWSM 2017) 142, 148-149.

[26] Neil Thompson and Douglas Hanley, 'Science Is Shaped by Wikipedia: Evidence From a Randomized Control Trial' (13 February 2018) *MIT Sloan Research Paper* No. 5238-17, <https://ssrn.com/abstract=3039505>, accessed 26 February 2023.

[27] Soo Young Rieh and Brian Hilligoss, 'College students' credibility judgments in the information-seeking process' in Miriam J. Metzger and Andrew J. Flanagin (eds) *Digital Media, Youth, and Credibility* (The MIT Press, 2007) 49.

[28] Don Fallis 'Toward an epistemology of Wikipedia' (2008) 59(10) *Journal of the American Society for Information Science and Technology* 1662.

summaries up on wikipedia when it is last minute to see what the case was about.'[29]

Scepticism has not, however, prevented academics,[30] students,[31] professionals,[32] and even the courts,[33] from relying on Wikipedia for information (albeit not always overtly). Over the last decade, empirical research has demonstrated the impact of Wikipedia, from the use of its content in articles published in peer-reviewed science journals to the economic benefit from tourism for towns in Spain that have articles on the English language version of Wikipedia.[34] Yet one of Wikipedia's main downfalls as a reliable source of information is that each article is only as good as its anonymous author and its subsequent editors – from the reader's perspective, 'the author [is] unknown'.[35] As one commentator noted, '[b]ut what if the information provided on Wikipedia is misleading, or even wrong? The answer is supposed to be: Then change it. That's what collaboration means. But what if nobody changes it? What if nobody cares?'.[36] Reflecting this concern, articles on Wikipedia where the content is more 'peripheral' have been found to be of lower quality[37] and a 2018 study found Wikipedia content to exhibit greater

[29] Student Feedback No6.
[30] A survey of Spanish academics found that 38.1% of faculty consult Wikipedia articles from their own discipline 'frequently' or 'very frequently' and that many use Wikipedia articles as a stepping stone to the sources they reference, Tiziano Piccardi and others, 'On the Value of Wikipedia as a Gateway to the Web', *WWW '21: Proceedings of the Web Conference 2021* (2021) 249, 255-256.
[31] Tomoko Traphagan and others, 'Changes in college students' perceptions of use of web-based resources for academic tasks with Wikipedia projects: a preliminary exploration' (2014) 22(3) Interactive Learning Environments 253; Michael Piccorossi, 'Teachers Say that for Students Today 'Research = Googling'' (*Pew Research Center*, 6 December 2012) <https://www.pewresearch.org/fact-tank/2012/12/06/teachers-say-that-for-students-today-research-googling/> accessed 26 February 2023.
[32] Elisa Alonso, 'Analysing the use and perception of Wikipedia in the professional context of translation' (2015) 23 *The Journal of Specialised Translation* 89.
[33] Neil Thompson and others 'Trial by Internet: A Randomized Field Experiment on Wikipedia's Influence on Judges' Legal Reasoning' in Kevin Tobia (ed) *The Cambridge Handbook of Experimental Jurisprudence* (Cambridge University Press, forthcoming 2023); Joseph L Gerken, 'How Courts Use Wikipedia Developments' (2010) 11(1) *The Journal of Appellate Practice and Process* 191, 198.
[34] Marit Hinnosaar and others, 'Wikipedia matters' (2019) *Journal of Economics and Management Strategy* 1, 10-11; Neil Thompson and Douglas Hanley, (n 26).
[35] *R v Amjad* [2016] EWCA Crim 1618, (Lady Justice Rafferty), [11].
[36] Denis Hlynka, 'Educational Technology and "Wikipedia"' (2009) 49(5) *Educational Technology* 50, 50.
[37] Gerald Kane and Sam Ransbotham, 'Content as Community Regulator: The Recursive Relationship Between Consumption and Contribution in Open Collaboration Communities' (2016) 27(5) *Organization Science* 1258. Technically, 'peripheral (low

bias than comparable entries in *Encyclopaedia Britannica*.[38] These are legitimate issues that are of particular concern for educators in smaller jurisdictions, where students (and the public) may be relying on weaker quality Wikipedia articles.

Are these reputational issues a roadblock to reliable content on Wikipedia?

While Wikipedia articles can be created by anyone, they can also be improved, added to, and corrected by those in the vast community of Wikipedia editors. As Noveck has noted, '[t]hese tools are designed around the assumption that in certain circumstances the judgment of many is better than the judgment of few and that the quality of information will improve with more contributions.'[39] As a source of information, therefore, Wikipedia is not necessarily the muddle of inaccuracies and misunderstandings that its detractors sometimes make it out to be.

Research into the accuracy of Wikipedia's content is almost as old as the encyclopaedia itself. In 2005, *Nature*, the multidisciplinary science journal, compared scientific articles on Wikipedia and those in *Encyclopaedia Britannica*. While acknowledging errors in both encyclopaedias, the study found that the level of accuracy between the two was comparable, with Wikipedia having only slightly more inaccuracies than the printed book.[40] Similarly, Chesney's 2006 study asked researchers to review a Wikipedia article in their field of expertise and another article in a field in which they were

centrality)' means a lack of graph centrality where Wikipedia pages are nodes on the graph and edges are the links between them. Quality was measured on a seven-point scale from lowest to highest quality evaluated by the Medicine WikiProject. They also use additional measurements of quality, including agreement with experts, such as medical students. See further, Linton C Freeman, 'Centrality in social networks conceptual clarification' (1978-1979) 1(3) *Social Networks* 215.

[38] Shane Greenstein and others, 'Do Experts or Crowd-Based Models Produce More Bias? Evidence from Encyclopædia Britannica and Wikipedia' (2018) 42(3) *MIS Quarterly* 945.

[39] Beth Simone Noveck, 'Wikipedia and the Future of Legal Education' (2007) 57(1) *Journal of Legal Education* 3, 6.

[40] Jim Giles, 'Internet Encyclopaedias Go Head to Head' (2005) 428(7070) *Nature* 900. See also, Jona Kräenbring and others, 'Accuracy and Completeness of Drug Information in Wikipedia: A Comparison with Standard Textbooks of Pharmacology' (2014 9(9) *PLoS ONE* e106930. Encyclopaedia Britannica objected to this study, following which Nature published a follow up in 2006: 'Britannica attacks', (2006) *Nature* 440, 582.

not an expert.[41] The accuracy of Wikipedia was found to be high, with the researchers who were experts rating the Wikipedia articles to be more credible than the non-experts.[42] Since *Nature* and Chesney's studies, others have examined specific content areas of Wikipedia more closely. Health and medicine are topics of particular importance to researchers given the potential impact of inaccurate content for readers. Wikipedia has performed well here, aided by editing initiatives and partnerships with public health professionals and academics.[43] Since 2014, Wikipedia has partnered with the Cochrane Library (which compiles databases containing healthcare related information)[44] to grant Wikipedia's editors access to high quality medical research.[45] In late 2020, the World Health Organization made all of its information, graphics, and videos available to Wikipedia editors to help combat disinformation about COVID-19.[46]

The basis for our study of Irish Supreme Court cases on Wikipedia

These discussions as to Wikipedia's article quality and accuracy, or any ideas about using the platform to bring together collective knowledge on a subject, are, however, only possible when the relevant Wikipedia entry on a particular subject actually exists. Prior to our research, this was not the case for Wikipedia entries on Irish Supreme Court decisions on which there were only nine articles.[47] A similar absence of Wikipedia entries could also be highlighted with respect to topics of relevance in other comparable jurisdictions.

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[41] Thomas Chesney, 'An Empirical Examination of Wikipedia's Credibility' (2006) *First Monday* <https://firstmonday.org/ojs/index.php/fm/article/view/1413> accessed 26 February 2023.
[42] ibid.
[43] Norman J Temple and Joy Fraser, 'How Accurate Are Wikipedia Articles in Health, Nutrition, and Medicine?' (2014) 38 *Canadian Journal of Information and Library Sciences* 37.
[44] Cochrane Library, 'About the Cochrane Library' <https://www.cochranelibrary.com/about/about-cochrane-library> accessed 26 February 2023.
[45] Wikipedia, 'WikiProject Medicine/Cochrane' <https://en.wikipedia.org/w/index.php?title=Wikipedia:WikiProject_Medicine/Cochrane&oldid=949298411> accessed 26 February 2023.
[46] Donald G McNeil Jr, 'Wikipedia and W.H.O. Join to Combat Covid-19 Misinformation' (New York Times, 22 October 2020) <https://www.nytimes.com/2020/10/22/health/wikipedia-who-coronavirus-health.html> accessed 26 February 2023.
[47] Contrast this with other disciplines – a study of the field of chemistry showed that nearly 90% of university undergraduate topics and 50% of graduate topics are covered by

Case law is a key source of law in Ireland. In a common law system, like Ireland, the United Kingdom and the U.S., legal rules are articulated, shaped, and developed by judges in the context of individual court cases. As with other common law jurisdictions, the doctrine of 'precedent' – which dictates that a court is bound by earlier court decisions of superior courts on analogous legal issues – is central to the Irish legal tradition.[48] This doctrine is both a source of consistency and predictability in the application of the law, and a means of alleviating the need for fresh reconsideration of a legal issue in each case that it arises.[49]

Once a decision is handed down in an Irish High Court, Court of Appeal or Supreme Court case, open access to written judgments is available through the Courts Service of Ireland website.[50] The judgments of Ireland's superior courts are, therefore, freely available to the public. However, the practical utility of this website to the public as a source of information about legal rules in Ireland is questionable. The published judgements are not categorised by area of law, they (generally) do not contain a readily accessible summary of the decision, and they are typically drafted for an experienced legal audience. It is only once these written judgments are uploaded onto subscription-based legal databases, accessible through a paywall, that they are collated, organised, indexed, and summarised. This can be contrasted to larger jurisdictions such as the U.S., where summaries of over 3,000 U.S. Supreme Court cases already exist on Wikipedia – making them freely accessible and readily comprehendible. The man from the country in Franz Kafka's *The Trial* reminds us that '[t]he law should be accessible to anyone at any time',[51] yet Irish case law, and the legal rules these cases establish or develop, are not truly accessible. It was to begin the process of filling this gap with respect to Irish case law that we engaged students as direct contributors to Wikipedia's knowledge database.

Wikipedia articles, and that Wikipedia is either the largest or second largest source of review-like articles in the world (with only academic literature itself having more), Neil Thompson and Douglas Hanley, (n 26).

[48] Sumner Lobingier, 'Precedent in Past and Present Legal Systems' (1946) 44 *Michigan Law Review* 955, 962.

[49] Benjamin N Cardozo, The Nature of the Judicial Process (Yale University Press 1921) 149, quoted in Michael BW Sinclair, 'Precedent, Super-Precedent' (2007) 14(2) *George Mason Law Review* 363, 372.

[50] The Courts Service of Ireland, <https://courts.ie> accessed 26 February 2023.

[51] Franz Kafka, *The Trial* (Breon Mitchell, trans) (Schocken Books 1999) 215-216.

Getting Students Involved - From Knowledge Consumers to Producers

As part of a larger research project studying the use of Wikipedia by Irish courts,[52] our students wrote full Wikipedia articles on Irish Supreme Court cases. 77 of these were published as new articles on Wikipedia in 2019 and 2020.[53] This was an exercise in which the students had to engage with cases that they may only have referred to in passing throughout their legal studies. The articles produced from the assignment resulted in Wikipedia's database of articles on Irish Supreme Court cases increasing almost tenfold.

Engaging undergraduate and postgraduate law students in the task of reading, understanding, and then explaining Irish Supreme Court cases in the form of individual Wikipedia articles was a shift in the style of assignment to which the students were accustomed. The assignment moved students away from the standard essay, assessed only by their lecturer, to a text subject to ongoing scrutiny by a group of anonymous editors.[54] It was also the first time that most of the students produced work that was made publicly available. These characteristics in themselves made a Wikipedia-based assignment unique for both the students and lecturers involved. The students, so used to being passive consumers of published knowledge, would now be producers, adding to the knowledge bank of Wikipedia.[55] The lecturers no longer had the final word on the articles – this was left to the online community into which they were released. This assignment was designed to give students a clear rationale for reading the cases, and sought to enhance students' legal research and writing skills.

Reading cases is an important aspect of a law degree. Particularly in a common law context, this is how students understand 'how formal legal rules are

[52] The findings for which can be found here, Thompson and others, (n 33). WikiEdu itself discussed the benefits of this research in Ian Ramjohn, 'Judging Wikipedia's content' (*WikiEdu*, 10 August 2022), <https://wikiedu.org/blog/2022/08/10/judging-wikipedias-content/> accessed 26 February 2023. This research has also been covered extensively in popular media, including Wired: Will Knight, 'Wikipedia Articles Sway Some Legal Judgments' (*Wired*, 2 August 2022), <https://www.wired.com/story/wikipedia-articles-sway-some-legal-judgments/> accessed 26 February 2023 and CNET: Stephen Shankland, 'Wikipedia Articles on Court Cases Influence Judges, MIT Study Finds' (*CNET*, 27 July 2022) <https://www.cnet.com/culture/internet/wikipedia-influences-how-judges-work-mit-study-finds/> accessed 26 February 2023.

[53] Which included 7 faculty-authored articles.

[54] Piotr Konieczny, 'Rethinking Wikipedia for the Classroom' (2014) 13(1) *Contexts* 70, 82.

[55] Kleefeld and Rattray, (n 3), 604.

generated, shaped, and justified'.[56] Understanding cases, and the legal rules that they establish, is also a skill that must be practised and developed over time.[57] Yet law students frequently do not know or understand why they are assigned lists of cases to read as part of their degree. Instead, they may read 'cases in a vacuum',[58] skimming the judgment, failing to see the wider legal context of the judges' words, missing the significance of the legally relevant sections.[59] As part of our assignment, students had to consider what legal principle each case was authority for and how the judges reached that conclusion – without having any Wikipedia article about the relevant case to help them. They then had to take their case analysis and present it in a way that was understandable to an audience without legal training. We wanted to give the students' actions a practicality and tangibility – they were active readers digesting and explaining legal principles and judicial reasoning.[60]

The Wikipedia-article writing assignment was not, of course, a university assessment that yielded only inward-looking results. By publishing articles on Wikipedia, we wanted students to focus on their civic engagement by contributing to public knowledge. As Edwards notes, giving students the opportunity to add to Wikipedia 'is important for shaping history, for shaping knowledge. Doing this within the university is an important way to bring academic knowledge to the public, particularly since so much scholarly work is now available only behind a paywall in expensive article databases.'[61] The cases for which our students wrote articles were often long, complex, and difficult to understand. Indeed, initial attempts to read case law have been described as 'like stirring concrete with [one's] eyelashes'.[62] But our students benefit from several years of academic legal study, guidance from members of the law faculty, and access to subscription-based peer-reviewed research that

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[56] Vincent Kazmierski, 'How Much "Law" in Legal Studies? Approaches to Teaching Legal Research and Doctrinal Analysis in a Legal Studies Program' (2014) 29(3) *Canadian Journal of Law and Society* 297, 301.
[57] Martin Davies, 'Reading Cases' (1987) 50(4) *The Modern Law Review* 409, 431.
[58] Patricia Grande Montana, 'Explaining the "Big Picture": Why Students Should Know Why They Read Cases in Law School' (December 2008) Legal Studies Research Paper Series Paper #08-0162, St John's University.
[59] James F Stratman, 'When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection' (2002) 34(1) *Discourse Processes* 57, 61.
[60] Eryk Salvaggio, 'Five reasons a Wikipedia assignment is better than a term paper' (28 March 2016) < https://wikiedu.org/blog/2016/03/28/five-reasons-a-wikipedia-assignment-is-better-than-a-term-paper/> accessed 26 February 2023.
[61] Edwards, (n 12).
[62] Scott Turow, *One L* (Penguin 1978) 30-31.

is inaccessible to the public. This gives those student authors valuable legal context in which to digest and present cases to that public. In this way, their articles on Wikipedia sought to improve public access to legal knowledge in an otherwise neglected topic. For jurisdictions outside of the U.S. and Canada, where article coverage is often sparser, this contribution to accurate and jurisdictionally-relevant public knowledge is particularly valuable.

In the following sections, we provide a guide for those who want to implement a Wikipedia article-writing assignment.

Method and Process – Pre-semester preparation

Wikipedia describes itself as 'the free encyclopedia that anyone can edit'.[63] However, veteran editors and researchers have suggested that a more accurate description is, '[t]he encyclopaedia that anyone who understands the norms, socializes himself or herself, dodges the impersonal wall of semi-automated rejection, and still wants to voluntarily contribute his or her time and energy can edit.'[64] Any attempt to add complex, specialised content to Wikipedia, especially the number of new articles created as part of our exercise, requires an in-depth familiarity with the platform's curation process. Prior to beginning a classroom-based Wikipedia assignment, therefore, we recommend that educators gain experience with the Wikipedia community and platform, undertake a trial run of uploading Wikipedia articles to gain familiarity with the process, and develop resources for students.

Understanding the community and the platform

Creating a new article on Wikipedia is more difficult than editing an existing article.[65] Following the creation of a hoax biography of the journalist John Seigenthaler in 2005, Wikipedia created a complex curation process.

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[63] 'Wikipedia:The Free Encyclopedia' <https://en.wikipedia.org/wiki/Wikipedia:The_Free_Encyclopedia#:~:text=The%20subtitle%20of%20Wikipedia%20is%20the%20free%20encyclopedia%20that%20anyone%20can%20edit> accessed 26 February 2023.

[64] Aaron Halfaker and others, 'The Rise and Decline of an Open Collaboration System: How Wikipedia's Reaction to Popularity Is Causing Its Decline' (2013) 57(5) *American Behavioral Scientist* 664, 683.

[65] Some university Wikipedia projects required students to edit an already written article, or an article that is a 'stub', rather than requiring the creation of completely new Wikipedia pages (and, indeed, the near creation of a new Wikipedia category 'Supreme Court of Ireland cases').

Unregistered users cannot create new articles directly on Wikipedia - any such articles must first be vetted through a process called 'Articles for Creation' ('AfC'). Through the AfC process, experienced editors assess articles with one primary consideration: whether the article will survive if nominated for deletion by another editor.[66] *Registered* users who have made at least ten edits on Wikipedia pages and have an account that is at least four days old can create new articles directly on Wikipedia. However, there is a curation process here too. New articles created directly on Wikipedia are not visible (indexed) to search engines until a volunteer from Wikipedia's 'New Pages Patrol' ('NPP') accepts the article, or ninety days pass (whichever is sooner). NPP also approves articles accepted through AfC. Two concerns dominate the NPP process: copyright violation and 'notability'. Other key policies include 'Neutral Point of View',[67] 'No Original Research'[68] and 'Verifiability'.[69] Critiquing these policies is a worthwhile pastime (and some observations follow), but any educator wishing to help students add content to Wikipedia must understand how these policies operate in practice.

The biography article of physicist Donna Strickland, which AfC rejected a few months before she won the Nobel Prize in Physics in 2018, acts as an example of the obstacles that new Wikipedia contributors, including educators, face. This serves to highlight why an educator must understand the Wikipedia community and its policies before setting a Wikipedia-based assignment. These policies are nuanced, and – if not understood at the start of the project – can result in the rejection of an article.

The rejection of the Strickland article highlights a number of issues in Wikipedia's curation process. Starting with the concept of notability on

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[66] 'Wikipedia: WikiProject Articles for creation/Reviewing instructions' <https://en.wikipedia.org/wiki/Wikipedia:WikiProject_Articles_for_creation/Reviewing_instructions> accessed 26 February 2023.

[67] 'Wikipedia: Neutral Point of View' <https://en.wikipedia.org/wiki/Wikipedia:Neutral_point_of_view> accessed 26 February 2023.

[68] 'Wikipedia: No Original Research' <https://en.wikipedia.org/wiki/Wikipedia:No_original_research> accessed 26 February 2023.

[69] 'Wikipedia: Verifiability' <https://en.wikipedia.org/wiki/Wikipedia:Verifiability> accessed 26 February 2023, see more generally, 'Wikipedia: Core Content Policies' <https://en.wikipedia.org/wiki/Wikipedia:Core_content_policies> accessed 26 February 2023.

Wikipedia,[70] which Wikipedia defines as being when a topic 'has received *significant coverage* in *reliable sources* that are *independent of the subject*'.[71] In essence, AfC and NPP volunteers look for citations to established sources – primarily newspapers – when assessing notability. As topics become more complex, so too does the process of assessing their notability. For example, there were few references in the news to Strickland prior to her winning the Nobel Prize. The original article on Strickland sent to AfC referenced her role as the former President of The Optical Society (OSA) (now known as Optica) and cited a press release from this organisation and its biography of her. However, Wikipedia editors concluded that this source was insufficient to establish notability because, in their eyes, it lacked independence. Of course, any expert in the field of physics would immediately recognise that only a notable individual would be elected as President of The Optical Society (OSA). While Strickland may not have been a household name, she met the benchmark of notability within the field of physics. Yet the Wikipedia article about her was rejected. Similar issues have arisen for other contextually-notable entries – television personalities from the Global South,[72] female chemists,[73] and superior court decisions from smaller jurisdictions.

There are some specific policies that grant automatic notability to articles. For example, a song that won a Grammy or a populated, legally recognised place are presumed notable.[74] The policy for academic notability identifies several characteristics, any one of which confers notability. One of these is: 'the person has been an elected member of a highly selective and prestigious scholarly

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[70] Ed Erhart, 'Why didn't Wikipedia have an article on Donna Strickland, winner of a Nobel Prize?' (*Wikimedia Foundation*, 4 October 2018) <https://wikimediafoundation.org/news/2018/10/04/donna-strickland-wikipedia/> accessed 26 February 2023.

[71] 'Wikipedia: Notability' <https://en.wikipedia.org/wiki/Wikipedia:Notability> accessed 26 February 2023, emphasis added.

[72] Michael Barera, 'Mind the Gap: Addressing Structural Equity and Inclusion on Wikipedia' (University of Texas at Arlington Open Access Week, 20 October 2020) <https://rc.library.uta.edu/uta-ir/handle/10106/29572> accessed 26 February 2023.

[73] Katrina Kramer, Female scientists' pages keep disappearing from Wikipedia – what's going on? (*ChemistryWorld*, 2019) <https://www.chemistryworld.com/news/female-scientists-pages-keep-disappearing-from-wikipedia-whats-going-on/3010664.article> accessed 26 February 2023.

[74] 'Wikipedia: Notability(music)' <https://en.wikipedia.org/wiki/Wikipedia:Notability_(music)> accessed 26 February 2023, 'Wikipedia:Notability (geographic features)' <https://en.wikipedia.org/wiki/Wikipedia:Notability_(geographic_features)#Geographic_regions,_areas_and_places> accessed 26 February 2023.

society or association…'.[75] The rejection of the original Strickland article can thus be attributed to two causes. First, the editor at AfC failed to grasp the notability of a person elected as President of The Optical Society (OSA). Second, the original author presumed that Wikipedia editors would recognise Strickland's notability without the need to pad the article with citations to newspapers and other secondary sources.

Other elements of context are also important. The author of the Strickland article possessed no prior editing history on Wikipedia. Editorial authority on Wikipedia derives primarily from an editor's contributions to the encyclopaedia. Wikipedia displays an editor's 'edit count' on both the AfC and NPP curation tool. New authors with no or little edit count lack this key visible status marker. In addition to this, a Stakhanovite ethic prevails among the volunteers. Content creation is valued amongst editors, but administrative work is arguably more important for building credibility with the community of editors.[76] New authors must be willing to work on improving existing content before creating something new on the encyclopaedia. Each of these elements builds the picture of what an educator must be prepared for ahead of setting a Wikipedia-based assignment, and how that educator can take initial steps to minimise risks of article deletion.

In order to address the AfC and NPP processes at the outset, therefore, we suggest that educators take a number of preliminary steps.

First, familiarise yourself with Wikipedia by creating an account and completing a tutorial. The tutorial 'The Wikipedia Adventure'[77] is straightforward and has the advantage of generating badges on your user page; this presents you as a conscientious novice. In addition, you should update your user page with a description of your area(s) of expertise.

You can then start making modest edits (and in doing so, building your credibility) by using the tool 'Citation Hunt' to find articles where editors are

[75] 'Wikipedia: Notability (academics)' <https://en.wikipedia.org/wiki/Wikipedia:Notability_(academics)> accessed 26 February 2023.
[76] Jemielniak, Dariusz, *Common Knowledge?: An Ethnography of Wikipedia*. Redwood City (Stanford University Press, 2014).
[77] 'Wikipedia: The Wikipedia Adventure' <https://en.wikipedia.org/wiki/Wikipedia:The_Wikipedia_Adventure> accessed 26 February 2023.

asking for citations to be added.[78] The combination of subject-matter expertise and access to peer-reviewed sources makes academics strong contributors here. In addition, the edits will be modest—you are adding citations rather than content. Participating in a WikiProject is another good way to gain experience contributing while also becoming familiar with the culture of Wikipedia. These WikiProjects are groups of editors who edit about a topic of shared interest. There are WikiProjects for just about everything, from Dungeons & Dragons, to women's history, to cities.[79] The page of the relevant WikiProject will generally contain a form of 'to-do' list setting out the upcoming goals of that WikiProject.

Once you are familiar with the structure of Wikipedia articles, the editing process, and the community norms, you can then add a new article to Wikipedia. Here too, WikiProjects are helpful. Before starting our project, one of our co-authors wrote Wikipedia articles requested by the WikiProjects 'Birds,' 'Ireland,' 'Women's History,' and 'Dungeons & Dragons' to gain familiarity with the process. In doing so, they had the support of editors from these WikiProjects and gained practice focusing on secondary sources as citations. We recommend that any interested educator contribute to Wikipedia through independent edits or via a WikiProject for at least two months – with just a handful of edits weekly and one new article – before engaging with it as a classroom assignment. This will help immeasurably with the subsequent upload of student-authored articles.

Use a trial run

Before beginning any student inductions, we sought to manage Wikipedia's curation process using a trial run of new Wikipedia articles. To do so, law faculty members of the project wrote Wikipedia articles on seven Irish Supreme Court cases in early 2019. Bots (computer programs that perform automated tasks on Wikipedia) incorrectly identified direct quotes from case decisions in the faculty articles as copyright violations and editors nominated several of them for deletion (in general, Wikipedia discourages direct quotations, even if those quotations are cited).[80] We were successful in saving

[78] 'Citation Hunt' <https://citationhunt.toolforge.org/en?id=1226ea58> accessed 26 February 2023.
[79] 'Wikipedia:WikiProject Council/Directory' <https://en.wikipedia.org/wiki/Wikipedia:WikiProject_Council/Directory> accessed 26 February 2023.
[80] Salvaggio, (n 60).

these articles by reducing the quoted material and adding additional citations to secondary sources. Our familiarity with the deletion process (as a result of our preparatory steps) allowed us to move quickly and we even managed to save one article that had been nominated for 'speedy deletion', a measure that removes the need for a consensus based on a deletion discussion.[81] We subsequently contacted the volunteers who oversee copyright on Wikipedia. They agreed to whitelist Irish Supreme Court decisions on the British and Irish Legal Information Institute (BAILII)[82] website so that the bots would not flag articles with direct quotations that matched text from that site.

After publishing these seven articles on Wikipedia, we also reached out to WikiProject Law[83] for feedback and to inform them of our future plans. An editor there commended the idea of adding articles about court decisions from a smaller jurisdiction. The editor suggested that we increase the number of secondary sources and use less technical language in our upcoming student-authored articles. Finally, we reached out to NPP directly to let them know that we would be publishing dozens of articles in batches, and emphasising that we had received feedback from WikiProject Law. This also gave NPP a point of contact if they had questions about the articles.

Creating student resources

Previous experience working with students on Wikipedia article-based projects imparted valuable experience both on the support necessary for students and the proper formatting and style of Wikipedia articles.[84] Prior to engaging our students in this exercise, therefore, we developed a suite of electronic resources to help students with Wikipedia article creation and editing. These consisted of a series of screencasts that explained how to set up an account, how to add detail to a user page (including a link to the Wikipedia account of one of the

[81] 'Wikipedia: Criteria for speed deletion' <https://en.wikipedia.org/wiki/Wikipedia:Criteria_for_speedy_deletion> accessed 26 February 2023.
[82] British and Irish Legal Information Institute (BAILII) <https://www.bailii.org> accessed 26 February 2023.
[83] 'Wikipedia: WikiProject Law' <https://en.wikipedia.org/wiki/Wikipedia:WikiProject_Law#:~:text=This%20Wikiproject%20is%20aimed%20at,and%20proper%20categorization%20of%20articles> accessed 26 February 2023.
[84] Brian McKenzie and others, 'From Poetry to Palmerstown: Using Wikipedia to Teach Critical Skills and Information Literacy in a First-Year Seminar' (2018) 66(3) *College Teaching* 140, 140.

supervising lecturers), a Wikipedia style guide, an overview of the structure of a Wikipedia article, and a step-by-step guide on the editing process and adding citations to an article.

We hosted these on a dedicated Moodle (our Virtual Learning Environment) site. Students participated in the project as part of two cohorts. In the spring of 2019, undergraduate law students voluntarily participated as part of the civic engagement stream of the Maynooth University Student Experience Award – an extracurricular programme that emphasises experiential learning. Given the paucity of Irish legal information on Wikipedia, civic engagement was a compelling framing of our student authors' work. Their articles were democratising knowledge and actively increasing the publicly accessible information base. In the autumn of 2019, the second cohort, a class of graduate law students, contributed as part of a professional development module designed to build students' employability skills. The exercise fitted well with this skills-based module as the development of explanatory writing and discipline-specific research skills will benefit students in their future legal careers.[85]

Method and Process – Activities during the Semester

Student training and support with the writing process

Our approach to the authorship of articles was as important as our ability to navigate Wikipedia's community norms and curation process. We used the seven faculty-created articles, written during the trial run described above, to determine the optimal method for this authoring process. We discovered that it was better to use an individual author's 'sandbox' (in essence, a personal test space on Wikipedia) rather than compose articles in the 'draft' space of Wikipedia where they might be flagged by bots for copyright violation of BAILII. Draft space articles are also occasionally published by random editors who deem them acceptable – this would not have worked from our perspective due to the need for all articles to be released in a managed way in light of our wider ongoing project. As a result, the use of sandboxes allowed for closer quality control of student work, and greater curation of the publication process. Working to create new articles in a user sandbox also minimises interaction with other Wikipedia editors. Although this limits students' experience of Wikipedia as an exercise in collaborative content creation, it prioritises student

[85] Kleefeld and Rattray, (n 3), 609-620.

well-being. For example, previous efforts by a student to add information on gender to the article 'Chef' directly on Wikipedia were deleted. Efforts by other students to edit popular articles relating to Premier League football teams were also deleted. If the primary goal of the class is content creation - as it was for us - then project design should focus on making this as smooth and as successful an experience as possible.

A common problem with student editing is that contributing to existing articles can be difficult and result in a negative experience for students, but creating new articles on topics selected by students can result in the creation of obscure, short articles (called 'stubs' on Wikipedia) with questionable notability by Wikipedia standards. Such articles are also frequently orphan articles (meaning that no other article on Wikipedia links to it). In contrast, there are several advantages to writing articles about Supreme Court cases from any jurisdiction. Sources to satisfy notability are likely available and articles about cases are standalone. Wikipedia editors often recommend that smaller, more obscure topics be merged into a larger article. For example, an article about the feeding behaviour of a bird would probably be merged into the main article for that bird. In contrast, it is unlikely that a Supreme Court decision article will be merged with another article. Finally, it is easy to connect other articles on Wikipedia to Supreme Court cases. The Wikipedia article about a law, or even the constitution of a country, could link to the article of a relevant case decision written by a student; articles about notable people or corporations could link to a case decision naming them. The combination of authoring in a sandbox and writing articles that are discrete and that easily satisfy Wikipedia's notability requirements minimises the chance that a student will encounter other editors, that their work will be immediately edited by other editors, or that the article will be nominated for deletion when published.

With respect to our own student writing process, student cohorts had a mandatory induction session before selecting their cases and beginning their editing. For the undergraduate cohort, students could then edit on their own with the help of the electronic resources that we created for them or attend fortnightly editing sessions in a computer lab. For the postgraduate cohort, further support was embedded within their professional development class in which we ran the induction session, supplemented by a question-and-answer session and an editing session.

Students were able to select cases from a list grouped into seven categories of law: administrative and constitutional law; asylum, immigration and nationality; crime and sentencing; family law; tort; practice and procedure; and banking and finance. This approach gave students the independence to choose what cases they researched and wrote about, and to pick an area of law that particularly appealed to them. The faculty-authored articles served as exemplars and our electronic resources and computer lab sessions provided technical and research support. Conscious of the importance of articles being deemed noteworthy, we also emphasised the importance of secondary sources, the use of internal cross-referencing to other Wikipedia articles, and the creation of strong article leads providing a concise summary that demonstrates why the topic is notable by Wikipedia standards in a way that a typical editor would recognise.

We also required students to include a Wikipedia infobox for each case. An infobox is a table that summarises important information about a topic (so, in our case, the relevant Irish Supreme Court case). Infoboxes improve the appearance of the article, but crucially they also embed metadata that allows search engines to draw on their content. Significantly, the addition of an infobox does not require any special coding skill. They exist on Wikipedia as editable tables that an author can insert into an article.

Publication of the articles

After the students completed their articles, these were reviewed by faculty. The articles were then published from the sandbox to Wikipedia itself (referred to as 'mainspace' or 'namespace' by editors). This is a straightforward process, consisting of moving the sandbox to mainspace, but our familiarity with the procedure following our trial run proved helpful. Once published, we made two small additions to each article. First, we added a short description to each article: 'Irish Supreme Court case'. This short description is important for the visibility of Wikipedia articles on mobile platforms.[86] Second, we added several categories to each article: 'Supreme Court of Ireland cases,' '[*year of case*] in case law', '[*year of case*] in Irish law', and the area of law, for example, immigration, criminal or constitutional. Categories at the bottom of a

[86] 'Wikipedia: Short Description' <https://en.wikipedia.org/wiki/Wikipedia:Short_description> accessed 26 February 2023.

Wikipedia article are important metadata for search engines and for internal Wikipedia linking.

As part of this project, we also created one article – 'List of Irish Supreme Court cases' – that, unlike the other articles, was not about an individual Supreme Court decision. Instead, this article collates links to every Irish Supreme Court case article on Wikipedia (almost all of which our students created). This 'list article' allowed us to provide a consolidated resource for readers interested in Irish law and searching Wikipedia for Irish Supreme Court case articles. List articles of this type are important for search engines, and supplement the use of categories in the case articles themselves. For example, when 'Irish supreme court cases' is entered into Google, the result is a carousel based on the articles in our Wikipedia list article and the articles that have the category 'Irish Supreme Court case'.

The combination of infoboxes, categories, short descriptions, and a list article resulted in high-level visibility for our articles on various search engines and greater accessibility of our articles to the public. Once published, our Wikipedia articles were the first result for almost every case when searched by case name or citation. Most impressively, internet search engines (Google, Bing, Duckduckgo) now pull text and information from our article leads and infoboxes to create so-called 'knowledge panels', which are summary boxes to the right of the search results.

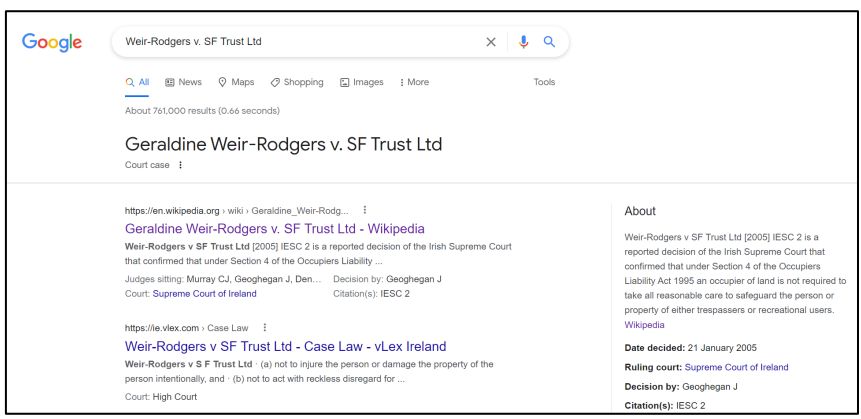

Figure 1: Screenshot of Google search results (21 June 2022) for Weir-Rodgers v. SF Trust Ltd.

Discussion – Evaluating Success

Student Feedback on the Exercise

In anonymous qualitative feedback provided by our students following the Wikipedia article writing exercise, students reflected on their impressions of Wikipedia as a useful research tool before and after undertaking the article writing process. The majority of respondents acknowledged the usefulness of Wikipedia as a platform through which information can be obtained quickly – 'I think it is a useful research tool in gaining quick access to secondary sources'[87] one commented, while another felt that it was 'a good starting point'.[88] Yet despite this, when asked about their impression of Wikipedia's accuracy *before* they participated in the exercise, students noted their scepticism (or at least acknowledged that they had been told to be sceptical) of Wikipedia's accuracy. One student noted that they 'have never trusted the accuracy of information provided via Wikipedia',[89] while another commented that 'I was (and still am) cautious when approaching smaller topics on Wikipedia, as they are very easy to change without anyone noticing. Therefore when I see something obscure that looks dubious on Wikipedia, I often assume it is false or vandalized, just to be safe, and look into it myself elsewhere'.[90] Reflecting the sometimes-tense relationship between Wikipedia and academia, another student noted that 'I was always told that you can use Wikipedia as a guide but to never cite it as it[']s not a peer reviewed website. I was under the assumption that while the knowledge pool in Wikipedia is vast the authenticity of the information is questionable and subject to scrutiny.'[91] Overall, the students displayed a notable level of astuteness with respect to the potential shortcomings of Wikipedia, highlighting the limitations of it as a platform for deep academic research, with one student commenting that they 'think Wikipedia, despite its flaws, has a worse reputation than it deserves as a research tool. While I don't believe it should be cited directly as a source at all, I do appreciate its ability to provide a foothold in an unfamiliar topic or help someone get their bearings in a large one.'[92] 'I think' one noted, that Wikipedia 'is a useful tool for learning about specific things and gaining knowledge of the facts surrounding something. However, because it isn't recognised as a reliable

[87] Student Feedback No1.
[88] Student Feedback No7.
[89] Student Feedback No1.
[90] Student Feedback No4.
[91] Student Feedback No5.
[92] Student Feedback No4.

source when writing essays for example I don't think it can be considered a useful research tool'.[93]

This feedback reflects what other researchers have found – people express uncertainty about the accuracy of Wikipedia's contents, particularly for academic research, but they still refer to it as an easily accessible source of information.

The process of researching and writing Irish Supreme Court case articles on Wikipedia does, however, appear to have resulted in students having a greater appreciation for the quality of content that can be possible on Wikipedia and the effort that goes into creating much of that content. When asked whether, *after* preparing the articles, the students' view on the relevance of Wikipedia as a tool for learning had changed, one student noted that '[a]s I am now more aware of the integrity and effort which goes into the development of articles on Wikipedia I will not be as quick to disbelieve things I read on it'[94] while another reflected that '[t]he experience has taught me that a lot of research and preparation goes into writing Wikipedia articles and reinforces my initial thoughts that the majority of [articles] are accurate'[95] and a third noted that 'I see now that writing a Wikipedia article involves quite a lot of research and meticulous writing, as well as careful formatting to prevent things like broken links. It reminds me of writing a college essay.'[96] This was an interesting transition – the exercise highlighted for the students that while Wikipedia is an open access encyclopaedia that can be edited by the public, there are a number of safeguards in place to control the content that is added. For these students, therefore, Wikipedia 'is not so much a collection of random facts from around the world. It is a well organised and well reviewed collection of important topics from people who have a want to publish this information'.[97]

Pedagogically, this exercise also had the effect of demonstrating to students that in order to truly understand a case, and to be able to explain the decision reached in that case, it is not enough to skim read it, or to rely on a summary in a book. A number of students specifically commented on how this exercise will make them more likely to read cases as part of their future studies – as one

[93] Student Feedback No3.
[94] Student Feedback No1.
[95] Student Feedback No3.
[96] Student Feedback No4.
[97] Student Feedback No5.

noted 'I believe I'm more likely to read the cases following this project as it is the only guaranteed way to ensure nothing is missed',[98] while another commented that 'I will be more likely to read the more important cases, as they often contain information that one might gloss over'.[99] Another student went so far as to suggest that going forwards they would be '[m]ore likely to read cases and read the subsequent cases also that… cite the original case'.[100] Students also commented on the benefits to their studies more broadly of summarising cases, and taking 'the points made in a case and summariz[ing] them to the most important points which will help my study'.[101]

Our Review and Feedback

This exercise gave our students a level of agency and a responsibility to get things right that went beyond the expectations of their usual class assignments. They were responsible for selecting the most appropriate information to include in their articles; they were responsible for accurately distilling the most important elements of each case; and they were responsible for ensuring that the information that was set out in each case summary was useful and accessible to a non-specialist audience. While they had ongoing support from faculty members, and case summaries were reviewed by faculty before publication, students were always aware that they were ultimately contributing to a public knowledge base. This sought to place the students in the role of expert and public knowledge contributor and in doing so, 'removes students' work from the ivory tower and puts it squarely in the real (virtual) world'.[102]

Pedagogically, this project had positive benefits, as reflected in student feedback (and the final case report articles). Students' research became deeper, with a focus on supporting statements with accurate and varied sources. Students also became more aware of the importance of reading cases closely in order to understand their outcome and impact and to consider how best to convey that understanding to a wider audience. Based on the feedback that they provided, students who participated in this project appear to have realised that fully engaging with case reports is the most effective way of gaining the necessary level of understanding of key cases in their legal studies. Our

[98] Student Feedback No3.
[99] Student Feedback No4.
[100] Student Feedback No5.
[101] Student Feedback No5.
[102] Alana Cattapan, '(Re)Writing "Feminism in Canada": Wikipedia in the Feminist Classroom' (2012) 22 *Feminist Teacher* 125, 129.

experience aligns with that of Kleefeld and Rattray, who also asked law students to contribute to Wikipedia as a class project. They argue that editing Wikipedia benefits law students by improving their expository writing and their ability to synthesise information. [103] To this we would add that editing Wikipedia imparts digital skills that otherwise would not be achievable as a learning goal using traditional assessment formats.

By going beyond the standard in-class assignment, students who prepared Wikipedia articles were also empowered to see their work in a public setting and with that, to take greater ownership of it. This was an effective way of bringing students in as knowledge disseminators. Students showed that they are in a strong position to add to the public knowledge base on topics that they study in class – they are familiar with the paywalled academic databases that are not available to the public, they have been encouraged to be discerning in the sources of information that they use, and they have the faculty support to give them the confidence to disseminate their knowledge in a meaningful and public-facing way. By adding to Wikipedia, students can see that these topics have real-world relevance and a tangibility that is often lost in more traditional assignments. Reflecting this, students have already included their participation in the project in their CVs, cover letters and in posts on LinkedIn. Wikipedia administrators, familiar with the nuances of Wikipedia authorship, have also commented on the wider knowledge benefits of this particular assignment noting that 'it seems like it was a net positive to the encyclopedia by getting some articles written about subjects we should be covering'.[104] Indeed one administrator of the encyclopaedia suggested that '[a]mbitious undergrad college professors trying to organize miniature classroom edit-a-thons should take notes from this.'[105]

However, while the exercise of preparing and uploading articles to Wikipedia as part of this project had positive benefits both for students and the wider community, it posed challenges for the faculty involved.

Students need to be incentivised to participate in a project of this nature beyond the longer-term skills development and civic engagement benefits. Without

[103] John C Kleefeld and Katelyn Rattray, 'Write a Wikipedia Article for Law School Credit—Really?' (2016) 65 Journal of Legal Education 597.
[104] Wikipedia:Administrators' noticeboard/Archive345, <https://en.wikipedia.org/wiki/Wikipedia:Administrators%27_noticeboard/Archive345#Wikipedia_used_to_test_behaviour_of_Irish_judges> accessed 26 February 2023.
[105] *Ibid*.

some incentive that students saw as directly relevant to their ultimate degree qualification, other priorities took students' time and attention. Even with the Maynooth University Student Experience Award offered to participating undergraduate students, the number of students who submitted final case report articles was relatively small (despite the initial interest being significant). Much more effective in terms of both student engagement and production of finished articles was the integration of the assignment into a credit-bearing class (in our case, the postgraduate professional development class). Going forward, when implementing a similar initiative, we would recommend that educators embed Wikipedia article writing within a class, to allow students to gain research and writing skills and to develop a deeper understanding of topics relevant to that class. This way, students are incentivised to finish their articles, increasing scope for students to gain all the benefits of this type of exercise and for society to gain accurate knowledge.

Students are also likely to need greater supervision, guidance, and reassurance as they write their Wikipedia articles. These articles must fit within the format and stylistic parameters expected by Wikipedia's editors, and the nature of a Wikipedia-based assignment is likely to be unique for students. Students may be daunted by the novelty of the platform and the initial learning curve with respect to navigating Wikipedia's editing process. Clear guidance resources, exemplar articles, and periodic editing sessions can go a long way to addressing student concerns and highlighting the long-term benefits to be gained from this type of exercise.

Finally, it is essential that any educator using Wikipedia article writing in class gains familiarity with the rules, practices, and nuances of uploading and editing on Wikipedia prior to undertaking any such in-class exercise. Pre-semester preparation must be undertaken to minimise the risk of articles being deleted almost immediately upon publication. Once this pre-semester preparation has been undertaken, the educator is then well placed (both in terms of their own skills and from the perspective of the Wikipedia community) to adapt Wikipedia-based assignments in future classes without needing to front-end preparatory work each time.

Conclusion

The accessibility of Wikipedia as a knowledge resource highlights the importance of, and opportunity for, contributions by academics and their

students to a broader public knowledge pool beyond our classes or peer-reviewed journals. The North American bias of WikiEdu's assistance and Wikipedia's content shows the importance of using Wikipedia in the university classroom outside of the U.S. and Canada.[106] As educators, we should embrace the opportunity to expand Wikipedia outwards beyond its existing scope, to add information that is relevant to smaller jurisdictions, to ensure that any relevant information in our field that is available is accurate and accessible. We and our students can improve both the quality and scope of Wikipedia's content in our field. In doing so, we can provide the public with access to accurate information that may not otherwise be available while also giving students valuable research and writing experience.

Prior to the work of our students as part of our Wikipedia writing exercise, there was only the scantest of information about Irish Supreme Court cases on Wikipedia. Our Wikipedia articles have been viewed over a hundred thousand times since publication[107] and our wider research confirms the impact of these articles on judicial decisions in Ireland.[108] By adding articles to Wikipedia we gave a presence to Irish caselaw both on Wikipedia and, as a result of the integration between Wikipedia and search engines, in the global internet knowledge base.

Yet, without prior understanding of Wikipedia, our work most likely would have ended when the first faculty article was nominated for deletion. With that, an entire category of Irish legal knowledge would have had limited public accessibility. Our experience editing Wikipedia offers a guide for educators on how to overcome the obstacles that exist for adding information that is relevant to smaller jurisdictions, or more niche topics. It is clear that familiarity with Wikipedia's complex bureaucracy and policies is the *sine qua non* for educational engagement with the encyclopaedia. The challenges that authors face range from the epistemological – what sources Wikipedia editors recognise as conferring notability – to the procedural. In order for a Wikipedia-based assignment to be successful, educators must understand how authority is

[106] Caroline Ball, 'Using Wikipedia to explore issues of systemic bias and symbolic annihilation in information sources' in Elizabeth Brookbank and Jess Haigh (eds) *Critical Library Pedagogy in Practice* (Innovative Libraries, 2021) 194.
[107] Massviews, 'Analysis of category Supreme Court of Ireland cases' <https://pageviews.wmcloud.org/massviews/> accessed 26 February 2023.
[108] Thompson and others, (n 33).

constructed on Wikipedia, not only in content, but also as authors and members of the community.

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Teaching legal research subversively

Dorothea Anthony and Colin Fong*

Abstract

This article presents a novel approach to teaching the compulsory law degree subject Legal Research. It considers that while legal research is traditionally a non-substantive subject that does not explain — let alone question or critique — the law, it can be taught in a way that encourages law students to think critically about legal institutions and the broader social context that gives rise to them. The article explores ways to pursue such legal instruction, with reference to methods used in a legal research subject taught in the Law and Justice Faculty of the University of New South Wales, Australia. It concludes that the discipline of legal research presents valuable opportunities for providing law students with a deeper social education in the law.

Keywords: teaching, legal research, critique, legal institutions

Introduction

Of all the law subjects capable of subverting the minds of unsuspecting law students, or at least opening these minds a little wider, who would ever think of legal research? Surely, few law academics would imagine that a legal research subject, with its lack of substantive legal content and its limited class time to invite critical thinking, could lead students to question their faith in mainstream legal institutions, doctrines, and traditions.

Indeed, legal research is commonly perceived simply as a subject that instructs students on where to find the law, as opposed to how to think about the law, and as a subject that is not generally informed by higher-level theory or

* University of Wollongong and University of New South Wales (UNSW), respectively.
This research commenced while the authors were Teaching Fellows at UNSW.

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politics.[1] Purportedly, in being short on interdisciplinary perspectives,[2] legal research is only as engaging as the teaching methods used to convey it, which, we are told, should be creative in order to hold students' attention.[3] The subject is often regarded as bland even for teaching staff, who have been said to try their best to avoid it.[4] Some commentators even recommend outsourcing the tuition of legal research to law librarians, whose knowledge is technical rather than oriented to methods of analysis and critique,[5] and consider the use of permanent staff to teach the cognate Legal Writing as 'a great waste of their time and talent'.[6]

Those who do teach legal research sometimes feel they must 'make the most of a dry subject' by offering 'chocolate incentives' and advising students that taking the subject is like taking medicine that may not be as palatable as international law but has practical benefit.[7] Some teachers design class exercises in the form of games such as *Who Wants to Be a Millionaire* and *Mission Made Possible*,[8] and create animated library tours with acting and sound effects in the style of tours of Alcatraz.[9] They reimagine the form of the subject to make it more stimulating but do not consider how they could alter the content to achieve the same end. This is because they see their role as providing a solid grounding, rather than delicately destabilising that which is

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[1] Robert C Berring and Kathleen Vanden Heuvel, 'Teaching Advanced Legal Research: Philosophy and Context' (2009) 28(1–2) *Legal Reference Services Quarterly* 53, 54.
[2] See, e.g., Vincent Kazmierski, 'How Much "Law" in Legal Studies? Approaches to Teaching Legal Research and Doctrinal Analysis in a Legal Studies Program' (2014) 29(3) *Canadian Journal of Law and Society* 297, 299.
[3] See, eg, Kelly Browne, 'Teaching Legal Research Can Be Fun!' (2003) 8(2) *AALL Spectrum Magazine* 28; Perry M Goldberg and Marci Rothman Goldberg, 'Putting Legal Research into Context: A Nontraditional Approach to Teaching Legal Research' (1994) 86(4) *Law Library Journal* 823; James B Levy, 'Escape to Alcatraz: What Self-Guided Museum Tours Can Show Us about Teaching Legal Research' (2001) 44(2) *New York Law School Law Review* 387; Jean Davis, Victoria Szymczak, Katherine Topulos and Stefanie Weigmann, 'Perspectives on Teaching Foreign and International Legal Research' (2001) 19(3–4) *Legal Reference Services Quarterly* 55, 66–67.
[4] Herbert E Cihak, 'Teaching Legal Research: A Proactive Approach' (2001) 19(3–4) *Legal Reference Services Quarterly* 27, 28.
[5] Joyce Manna Janto and Lucinda D Harrison-Cox, 'Teaching Legal Research: Past and Present' (1992) 84(2) *Law Library Journal* 281, 281.
[6] Willard H Pedrick, 'Should Permanent Faculty Teach First-Year Legal Writing? A Debate' (1982) 32(3) *Journal of Legal Education* 413, 415. Cf Jan M Levine, 'Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching' (1998–2000) 7 *Scribes Journal of Legal Writing* 51, 51, 59.
[7] Thu Nguyen, 'Legal Research is Not So Dry' (2000) 1 *Uniken* 14, 14.
[8] Davis et al (n 3) 66–67.
[9] Levy (n 3) 403–405.

solid and thereby enhancing students' ability to identify flaws in socio–legal institutions.

Accordingly, legal research is not known for being on the same subversive plane as, say, the brand of human rights law interrogating Western concepts of freedom or the brand of international law confronting feeble policies of the United Nations. It is not regarded as raising issues as compelling as societal responsibility in criminal law, Indigenous dispossession in real property law, industrial disharmony in labour and corporate law, and unequal relations in contract law and equity. Supposedly, legal research is, at most, useful to the subversive cause in a passive rather than active way, by assisting scholars and practitioners from areas of law such as these to search for supporting sources.

This paper challenges the foregoing assumptions by showing a different side of legal research education that is being practised in the Law and Justice Faculty of the University of New South Wales (UNSW), Australia, in the undergraduate subject Introducing Law and Justice (Research), referred to herein as Legal Research. Offered at the beginning of the law degree in the form of one-hour weekly tutorials, the subject teaches a standard legal research syllabus on locating, understanding, and documenting sources of law. But, through a critical frame, it also poses questions at various intervals in class and in the subject workbook that do not always have straightforward answers. This paper demonstrates how, when revealed, these answers, together with the ensuing discussion, give students a new perspective on the legal institutions that give the law its character; they pull the rug out from under legal certainty, setting a tone of critique for students' entire law degree.

The purpose of the subject, it should be noted, is not simply to encourage critique for critique's sake. On the contrary, it is to help students direct their inquisitive minds towards problematising legal institutions that do not deliver justice for people in a consistent or complete manner, and the elements of society on which such institutions are founded. These elements include distinctions in social class that continue to create differences in people's enjoyment of legal rights. They also include liberal paradigms which, for all their benefits, possess a formalistic nature that can serve to conceal and perpetuate such distinctions. In this way, the subject helps develop in students an instinct to recognise and inquire into some of the basic barriers of our legal system.

Subverting the Institution of Law School

A common entry point for discussion in legal research subjects is the idea that, as in many professions, research is integral to the legal profession, as it is, to some degree, a contingent fact of everyday life. In Legal Research at UNSW, this observation is used as a springboard to suggest to students that they would probably have already begun their legal research journey by researching the path to attending university and becoming a lawyer. Hence, some of the opening questions posed are: 'What requirements are there to practise law in Australia?' and 'How does one become a solicitor or barrister?'

Students often answer that one first needs a qualification from a law school. We then challenge them by noting that neither Susan Kiefel, the current Chief Justice of the High Court of Australia and thus Australia's most preeminent judge, nor Michael McHugh, a former Justice of this apex court, obtained a Bachelor of Laws or Juris Doctor from a law school. We inform students that still today the *Legal Profession Uniform Admission Rules 2015* of New South Wales (NSW) state that successful completion of an accredited tertiary education course is a prerequisite to practise law, 'whether or not leading to a degree in law'.[10] This exception is a hangover from when one's main education in the law in Britain was not at an academic institution, but rather in the workplace of the practising legal profession, which contrasts with continental Europe's longstanding location of legal education in universities.[11]

Upon learning these facts, some students look bewildered as they wonder why they studied so diligently to obtain a high Australian Tertiary Admission Rank score to qualify for law school. When informed that the substitute for a law degree — the Diploma in Law, awarded by the NSW Legal Profession Admission Board — is significantly cheaper and requires less time to complete, they further ponder the point of the pricey piece of paper they will gain at the end of their university studies.

We refer them to US celebrity Kim Kardashian. The tabloid press states that she has 'dropped a surprise bombshell in her interview: She's studying to

[10] Legal Profession *Uniform Admission Rules 2015* (NSW) s 5(1).
[11] Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15(3) *American Journal of Comparative Law* 419, 429.

become a lawyer, and she has been doing so in secret for the last year.'[12] It continues, 'No, Kim is not in law school. But she is doing a four-year apprenticeship at a law firm in San Francisco, which in California, is a legal way for someone to become a lawyer and take the bar without attending law school.'[13]

Intrigued by the alternative pathways that also exist in the United States of America and the irony of a privileged person traversing one such route, the students are now at a peak point of puzzlement over the institution of law school and university in general. They query whether they are at university to get a well-rounded legal education with critical perspectives, academic rigour, and access to bountiful scholarly resources — supplemented by other degrees, extra-curricular activities, a stint of student activism, and a vibrant campus culture, which provide an edifying experience — or whether they are there merely to become a lawyer on good pay. In weighing the value of education against that of material gain, they question their morality and class perspective. They experience their intrinsic motivation to learn for the sake of learning, and extrinsic motivation to gain a prestigious degree that their family and friends will admire, compete with the weight of financial pressures in their lives. Ideally, they also reassure themselves that they are, at the end of the day, in the right place, if not the wrong point in history where the cost of a comprehensive education can create indebtedness and render it exclusive.

Subverting the Institution of Legal Terminology

Another institution the Legal Research subject seeks to subvert is that of legal terminology. We inform students that the law library they will be expected to frequent, like most Australian university libraries and the National Library of Australia, uses Library of Congress subject headings in its catalogue. This means that the subject headings are American, which can be counter-intuitive to people researching Australian law.

We point out that competition law, for example, is listed in the library catalogue as 'antitrust law', which is a throwback to an age when monopolies commonly took the business form of a trust in the United States. The goods and services

[12] Alyssa Bailey, 'Kim Kardashian is Studying to Become a Lawyer and Plans to Take the Bar in 2022', *Elle* (10 April 2019) <https://www.elle.com/culture/celebrities/a27101447/kim-kardashian-studying-to-become-lawyer/>.
[13] Ibid.

tax appears as ‘value-added tax’, which is the term adopted in US debates on whether to introduce such a levy at the federal level. Individually owned flats or units and strata title come up as ‘condominiums’, which Americans often abbreviate to ‘condos’. And compulsory acquisition or resumption of land is shown as ‘eminent domain’.

When mentioning eminent domain, it is apt, we figure, to ask students whether they have seen the iconic Australian film *The Castle*, made in 1997 before many of them were born. Usually a few hands are raised, and the more cultivated students proceed to tell us that it is a comedy about a family’s legal struggle against a government acquisition of its modest home located in the path of a proposed airport expansion. We then explain to students that the authority under which this acquisition is performed is what Americans call eminent domain and show them that the Australian titles on land resumption in the library catalogue contain the American expression as the subject heading.

Thus, students learn that the legal terminology they were expecting to master must be studied alongside that of a different English dialect used in another legal system. Not only should students memorise a raft of British cases inherited from our colonial past, but they must also learn to recognise the law in American terms, if they have not already done so from the US legal programs that pervade their television sets and devices. In this way, students are gaining a sense of the humble place of Australian law in the wider global context. They are seeing through their legal research that with the spread of influence of great powers across the world comes not only imperialist interventions and fast-food chains, under the banner of liberal democracy, but also the most basic legal ramifications — the Americanisation of our legal language — with evidence reposed in a simple library catalogue.

Subverting the System of Government

In addition to subverting the institutions of law school and legal terminology, the Legal Research subject attempts to dismantle assumptions about the institution of government. Students often begin their law degree with a particularly optimistic view of the form of governance and level of democracy in Australia and other Western nations. They see a pluralistic governing structure that entertains diverse perspectives, and a separation of powers that ensures restraints on the power of lawmakers. Sometimes this vision reflects an uncritical acceptance of the messages of liberal democracy found in the

media, popular culture, and certainly their law textbooks. While not wishing to dampen students' spirit of justice, the teachers in the subject make a point of finding opportunities to balance evidence of the representativeness of government and the independence of its component parts with a dose of realism.

One means of approaching this discussion is through the topic of sources of law. Students are provided with a list of legal sources they are asked to categorise in terms of primary, secondary, and hybrid sources. One source that students tend to be uncertain about classifying is a Bill of Parliament, with some claiming that it is a primary source of law because it comes from lawmakers themselves, and others suggesting that it lacks the authoritativeness of such a source, in not yet having officially become law and perhaps never becoming law. So, we delve into the topic of Bills and encourage students to start thinking about why some Bills are so short-lived and what this might say about the operation of government.

We show students various Bills currently before federal and state Parliaments and ask which ones will be passed. For instance, will the Ending Native Forest Logging Bill 2023 (Cth) or the Liability for Climate Change Damage (Make the Polluters Pay) Bill 2020 (Cth), sponsored by Australian Greens members, be made into an Act of Parliament? Will the Abortion Law Reform (Sex Selection Prohibition) Amendment Bill 2021 (NSW) or the Anti-Discrimination Amendment (Sex Workers) Bill 2020 (NSW) succeed? What about the COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022 (Cth) or the Australian Education Legislation Amendment (Prohibiting the Indoctrination of Children) Bill 2020 (Cth), proposed by the populist One Nation party?

We explain that although many Bills are introduced into Parliament, only rarely do those not sponsored by the executive government get passed. Between 1901 and 2017 in Australia, a mere 30 private members' Bills were voted in, including Bills put forward by backbenchers of the incumbent political parties.[14] While Parliament regularly considers Bills that come from various positions on the political spectrum, this consideration does not tend to lead to change that would represent a material expression of pluralism and the separation of the executive and legislature. It consequently has the appearance

[14] DR Elder and PE Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 584.

of a well-oiled operation that Parliaments invest in largely to communicate the importance of open debate in the political sphere.

Granted, the experience in Australia with private members' Bills is not necessarily replicated across Western countries. Yet, if not at the point of Bills, celebrated liberal principles can come undone at other junctures. There are limits to the representativeness of government, despite democratic processes in place. For example, it may be said that representativeness is undermined where the same interests of the major corporations — such as the banks and mining companies that underpin the economy — are represented regardless of which political party in the two-party system is in power. Representativeness is also obscured to the extent that the class composition of Parliament does not tend to reflect that of society, with ordinary workers under-represented.

One may be ready in class to draw on examples in which the ostensible openness of the branches of government to the will of the people may lead to, in quoting Gerald Rosenberg, a 'hollow hope'.[15] It is tempting to point out the peculiar logic in which democratic mechanisms can consolidate people's faith in the system even while that system fails them. For instance, when former US President George Bush encountered backlash in addressing the Australian Parliament shortly after sanctioning the invasion of Iraq, he tendentiously responded, 'I love free speech'.[16] In this way, he leveraged the dissent to bolster support for a system that extols the virtues of free speech, while deflecting attention from his ideological position that led him to declare war, which might otherwise have called that system into question. Although one may endorse the enlightened role that democratic doctrines have played since ancient times, the practice of emphasising formal arrangements of power over substantive policies can serve to reinforce unsavoury policies by default.

While a legal research subject is not the place to expose all the traps of liberalism, it can be a useful venue to sow seeds of critique that prompt further explication by students in their study of government in constitutional and

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[15] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2008).
[16] Margo Kingston, 'Parliament Greets Bush: A Day in the Life of Our Faltering Democracy', *The Sydney Morning Herald* (online at 24 October 2003) <https://www.smh.com.au/opinion/parliament-greets-bush-a-day-in-the-life-of-our-faltering-democracy-20031024-gdhnd2.html>.

administrative law subjects, even if it was not originally intended to be a stepping-stone to these subjects in this way.

Subverting the Rule of Law and Human Rights

Other liberal doctrines raised in the Legal Research subject are the rule of law and human rights. The rule of law includes the notion that people are entitled to know what the law is at the time that the law applies.[17] This entitlement is also a human right in relation to penal offences, having been enshrined in the *Universal Declaration of Human Rights* as well as in the *International Covenant on Civil and Political Rights* to which Australia is a party.[18] It is compromised when governments enact laws retrospectively, which has been done in Australia for some time, principally in the areas of criminal law, taxation law, migration law, social security law, and Native Title law,[19] with laws in some cases predated by numerous years.[20]

The subject introduces the concept of retroactivity to unwary law students in their education on locating statutes and determining from the notes field when the legislation came into force. We direct students to the *Civil Liability Act 2002* (NSW) — which they will need to have an intimate knowledge of when they study the law of torts — and ask, first, when the Act was assented to and, second, when it became operational. Students tell us that the answer to the first question is 18 June 2002, but that the answer to the second question is in fact 20 March 2002. That is, they discover that the Act became effective before approval of the instrument's entry into law. Similarly, students find that while former Prime Minister Paul Keating (as Treasurer) announced on 19 September 1985 a capital gains tax on profit from the sale of assets, effective immediately, the implementing legislation, the *Income Tax Assessment Amendment (Capital Gains) Act 1986* (Cth), was not passed and assented to until 24 June 1986.

We explain to perplexed students that such *ex post facto* legislative practice has become relatively accepted in our legal system over the decades, just as

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[17] See, eg, Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 235, 237.
[18] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 11(2); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 15(1).
[19] See Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (ALRC Report 129, 2015) ch 13.
[20] Denise Mulder, 'Legislation by Leaflet' (2001) 72(3) *Charter* 30, 30.

retrospectivity is a cornerstone of the common law that has existed for centuries. Indeed, the principle of the non-retroactivity of the law is undermined each time a judge makes rather than interprets the law, which inevitably involves subjecting the defendant to a law enunciated following the commission of the act in question.[21] Nor are civil law systems immune where judges are authorised to fill occasional gaps in the law and where the government answers to the European Union, whose laws sometimes have retrospective effect in member States.[22] Thus, notwithstanding that apologists for non-retrospectivity may argue, for instance, that the application of retroactivity at the post-World War II Nuremberg trials was a rare deviation from a relatively stable norm of liberal democracy, legal researchers can unearth many exceptions to this norm.

We suggest to students that although the rule of law and human rights have profoundly influenced the socio–legal landscape, in facilitating the development of a liberalised society, they remain to some extent at the level of ideals and aspirational targets. In a high-stakes market economy there are significant economic incentives for the legal certainty and predictability that liberal doctrines impart, such as attracting and retaining investors who favour regulatory stability. Yet every now and then, economic factors trigger a departure from the doctrines.

Systemic problems around people and entities not paying taxes, for instance, have led to the retrospective commencement of tax avoidance and tax evasion legislation in Australia,[23] and even the passage of amending legislation before the legislation being amended has been passed,[24] as well as administrative action in anticipation of the statute.[25] This is not to say that retrospective legislation has escaped objection from certain parliamentarians who, while supportive of wealthy people contributing their fair share of tax, see that any instance of legislative retrospectivity 'leads one down a track which is fraught

[21] James Popple, 'The Right to Protection from Retroactive Criminal Law' (1989) 13(4) *Criminal Law Journal* 251, 252, 260–261; G Nash, 'Legislation by Ministerial Fiat and the Dangers of Retrospectivity' (1978) 6 *Australian Business Law Review* 226, 229.
[22] Dainow (n 11) 433; Leigh Hancher, Kim Talus and Moritz Wüstenberg, 'Retrospective Application of Legal Rules in the European Union: Recent Practice in the Energy Sector' (2021) 39(1) *Journal of Energy and Natural Resources Law* 65.
[23] Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013 (Cth); Taxation (Unpaid Company Tax) Assessment Act 1982 (Cth).
[24] Mulder (n 20) 30.
[25] Nash (n 21) 236.

with disaster … the track that Adolf Hitler went down' and who implore, therefore, that the end should not justify the means.[26]

Students are asked for their opinion on whether legal retroactivity is in the interests not only of human rights, but the rights of everyday people. These rights can diverge where there is competition between individual rights (such as the right of propertied persons to enjoy their property without the intervention of retrospective tax laws) and collective rights (such as the right of the greater population to public services and welfare and infrastructure financed by tax laws which, even if retrospective, can help property owners fulfil their civic responsibilities). Woozley argues that 'back-dating tax relief' is 'wholly to the advantage of those affected by it' and therefore an acceptable form of retrospectivity.[27] But this observation pertains only to how individuals are directly affected, rather than how society is indirectly affected, and only to how individuals benefit materially through accumulating wealth rather than spiritually through sharing it. One should also bear in mind that not all tax is progressive and that government spending from tax revenue is not always benevolent.

As a prelude to their studies in legal ethics and professional responsibility, students might be asked to consider whether lawyers ought to have a duty to detect changes to the law in advance. That is, should lawyers assiduously follow pronouncements by ministers (and even by government agencies such as the Australian Taxation Office)[28] on the impending introduction of retrospective legislation, and monitor cases that are before the courts in the event that these cases set precedent, which can affect their clients' legal position if and when the potential law crystallises into actual law?

Conceivably, if lawyers neither conduct legal research in this way nor act upon it, they could be subjected to legal action in negligence. Alternatively, practitioners could be sued for acting in accordance with the announcement or the imminent judicial decision. The latter scenario may arise where the announced legislation is not passed or where a Bill on the matter was never

[26] Senator Don Chipp (inaugural leader of the Australian Democrats party), cited in Popple (n 21) 260.
[27] AD Woozley, 'What is Wrong with Retrospective Law?' (1968) 18(70) *The Philosophical Quarterly* 40, 53. See also Andrew Palmer and Charles Sampford, 'Retrospective Legislation in Australia: Looking Back at the 1980s' (1994) 22(2) *Federal Law Review* 217, 275–276.
[28] See Mulder (n 20) 30.

even put before Parliament, as in circumstances where the announcement was intended by the executive only as an 'amorphous' or 'inchoate threat',[29] or where the contemporaneous case was not decided as expected.

Hence, in another subversive twist, the subject exposes an inherent vulnerability of the legal profession around expectations of what one might call 'crystal ball legal research'. We mention the case of *NRMA Ltd v Morgan*, in which it was held at first instance that the legal advice of, *inter alios*, Mr Dyson Heydon QC, who would go on to become a Judge of the High Court of Australia, should have taken into account the landmark High Court case of *Gambotto v WCP Limited* that had not yet been concluded.[30] The point, which led to an award of over $32 million to the plaintiff, was overruled by the NSW Court of Appeal in *Heydon v NRMA Ltd*, which effectively rescued lawyers from a situation outside their control. The appellate court did not expect lawyers to be aware of present appeals concerning legal principles that relate to their active cases, or obtain court transcripts and foresee how such appeals might be decided (particularly where the decision was not reasonably foreseeable), or delay the provision of advice until the conclusion of the appeals.[31] The High Court subsequently declined to entertain a final appeal on the matter,[32] contrary to the prediction of one commentator who flippantly expressed fear of being found negligent if proven incorrect.[33]

Therefore, at least for the time being, students can be assured that lawyers do not necessarily need to follow the multitude of developments around the formation of the law or have an awareness of the law before it is binding. Nonetheless, we advise students that a commitment not only to research that looks back on what has been decided but also looks forward by anticipating future and retrospective legal events — in noting prospects of relevant cases and heeding 'government by press release'[34] on the prospective implementation of retrospective legislation — is judicious in a legal system

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[29] See, eg, H Reicher, 'Legislation by Press Release' (1978) 7 *Australian Tax Review* 31, 32–34, 38; Nash (n 21) 237.
[30] *NRMA Ltd v Morgan* (1999) 17 ACLC 1029; *NRMA Ltd v Morgan* (No 3) [1999] NSWSC 768; *Gambotto v WCP Ltd* (1995) 182 CLR 432.
[31] *Heydon v NRMA Ltd* (2000) 51 NSWLR 1.
[32] NRMA Ltd v Heydon S 26/2001 [2001] HCATrans 439.
[33] Bob Baxt, 'The Foresight Saga' (2001) 72(4) *Charter* 54, 57.
[34] This is also referred to as 'legislation by press release', 'legislation by leaflet', 'legislation by ministerial fiat', and 'law by force of proclamation'. See Popple (n 21) 262; Reicher (n 29) title; Mulder (n 20) 30; Nash (n 21) title; Dicey, cited in Nash (n 21) 236.

where retrospectivity appears to be more common than our founding legal principles may suggest.

Subverting the Authority of Legislators and Courts

As well as showing students the notes field of legislation, we look at the legislative provisions and, specifically, the topic of statutory interpretation. In dovetailing with our teaching on this topic, we suggest to students that while learning to interpret legislation is an important initial step, they will be expected during their degree to develop a distinct position on the law in question, including a position on whether it serves a socially constructive purpose. The Legal Research subject encourages them to use legal sources effectively towards this end so that they adopt an informed view and build a solid case for either the maintenance or reform of the law.

There are many roles that lawyers play in helping to improve the law, not least of which is working for a law reform commission. Even those who choose to enter the practising legal profession may find themselves in a situation in which they must negotiate a balance between, on the one hand, respecting the law and, on the other hand, calling it into question, whether they are presenting a legal interpretation in court or advancing a reform agenda of a professional law association. Students' interest in law reform will help define where they fit institutionally, and whether indeed they are able to find a comfortable fit that complements their 'sense of general morality'.[35]

In this connection, one may recall the fictional barrister Horace Rumpole, who, with his sharp sense of justice and aversion to the pomposity of the English legal profession, famously said, in the words of his creator John Mortimer, 'If I don't like the way the times are moving I shall refuse to accompany them',[36] or the main character in Andrea Camilleri's *Inspector Montalbano*, who flouted as many rules of a Mafia-corrupted system as he followed in order to solve murder mysteries in southern Italy. These dramas aim to paint a realistic picture of the state of the law and, in doing so, ignite an interest in legal resistance that might otherwise be delayed by classics such as *Twelve Angry Men* and *To Kill a Mockingbird*. While inspiring generations of law students, the latter stories lead us towards the other end of the spectrum in fostering confidence that our laws and legal institutions can successfully guard against miscarriages of

[35] Adrian Evans, *The Good Lawyer* (Cambridge University Press, 2014) 86–87.
[36] John Mortimer, The Anti-Social Behaviour of Horace Rumpole (Penguin, 2007) 85.

justice if only there is a will to overcome parochialism and prejudice among the laity, including those who populate juries.

By this stage, students should realise that legislators and courts are not infallible; that there is a distinction between law and justice; and that although mechanisms are in place to minimise injustice, not everyone who engages with the legal system will have a satisfying experience. Some fascinating examples that may be relayed in class come from defamation law, which is sometimes presented with a measure of scepticism as an area of law that 'protect[s] powerful people from scrutiny'.[37]

A defamation matter widely publicised in Australia concerned former Deputy Prime Minister of Australia Jim Cairns and his private secretary Junie Morosi, who, in the 1970s, sued numerous media outlets that portrayed the pair in an extramarital relationship. Cairns denied under oath that he had committed adultery, and former Prime Minister Gough Whitlam provided corroborating evidence, which led to wins against newspapers and radio stations and the awarding of a great deal of money in damages. However, in 2002, a year before Cairns' death, it transpired through his own admission that he had in fact been in a sexual relationship with Morosi at the time of the alleged defamation.[38]

This case study reveals to students that people of high standing in our society can engage in contempt of court and squander its precious resources simply because they have the means to do so. In addition, the legislature can choose to have little say on the matter and the judicial system can follow suit. The judiciary may even preference defamation cases of the rich and famous amid the congestion of the courts, as with the lengthy libel trial involving actors Johnny Depp and Amber Heard held in person in London at the height of a government-imposed lockdown during the COVID-19 pandemic. The Criminal Bar Association of England and Wales and family and children's law barristers complained that this case contributed to the delay and consignment to video-link of numerous more pressing matters involving vulnerable

[37] Brian Martin, *Information Liberation* (Freedom Press, 1998) 107.
[38] Richard Ackland, 'Cairns Admits Sex, and Breathtaking Hypocrisy', *The Sydney Morning Herald* (online at 20 September 2002) <https://www.smh.com.au/opinion/cairns-admits-sex-and-breathtaking-hypocrisy-20020920-gdfndq.html>; Annabel Crabb, 'Cairns Admits Morosi Affair', *The Age* (online at 16 September 2002) <https://www.theage.com.au/national/cairns-admits-morosi-affair-20020916-gdulfu.html>.

people.[39] They implied that a legal system that bows to privilege fails to serve properly those most in need of its expertise. A knowledge of colourful areas of legal history can be used to convey this message, in encouraging students to evaluate their identity as advocates or reformers of the law.

Subverting the Authority of Legal Publishers

Students should also appreciate that legal research is not a pure method of gathering evidence for understanding and scrutinising the law. As with the law itself, it can reflect obstacles created by the political and economic conditions of the society in which it is conducted, as well as the state of technology and means of access to this technology.

We barely need tell students that the internet has significantly improved access to legal information. Yet the internet cannot be credited alone. In Australia, legislation and cases can be readily sourced because the government and the Australasian Legal Information Institute, commonly known as AustLII, have provided universal free access to them on their websites, without the encumbrance of subscriptions or advertising. While older cases, statutes, and parliamentary debates have not all been uploaded, and decisions of lower courts and court transcripts are often not made public, students can expect a relatively short time frame between the creation of the major laws of Australia and their appearance on public internet sites.

Nevertheless, as we explain to students, the courts and the academy still prefer the citation of authorised versions of cases found in privately published law reports over so-called medium neutral citations. The *Australian Guide to Legal Citation* states: 'The authorised version of the report should always be used where available.'[40] Similarly, while legal commentaries are highly regarded in civil law systems as a method of legal interpretation,[41] they are often held by commercial publishers. Even where the library possesses a subscription, accessing privately published cases and commentaries from private databases such as Lexis Advance and FirstPoint can be a time-consuming and involved

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[39] Mark Townsend, 'Star Treatment for Depp Trial Branded "Galling" by Lawyers amid Huge Backlog', *The Guardian* (online at 25 July 2020) <https://www.theguardian.com/film/2020/jul/25/johnny-depp-libel-trial-branded-galling-by-lawyers-amid-covid-backlog-of-half-a-million-cases>.
[40] *Australian Guide to Legal Citation* (Melbourne University Law Review Association Inc and Melbourne Journal of International Law Inc, 4th ed, 2018) 50.
[41] Dainow (n 11) 428.

process. It is necessary to enter one's login credentials at various points of the library and database sites, calling to mind the series of security barriers in the opening sequence of *Get Smart*.[42] Sometimes one must go on to navigate a range of databases before succeeding at finding the relevant information. Although private investment in legal research has contributed to innovations of many kinds, the private entities that drive progress, in being competitors, naturally lack coordination with one another, complicating the process of legal research for end users.

In addition, private databases exclude people who do not have a subscription or who do not belong to an institution with one, which can include students and academics at universities with limited funds for library resources, lawyers employed by non-profit organisations such as trade unions, and, notably, self-represented litigants and the general public who are seeking to know their legal rights. For example, the cost of subscribing to Halsbury's Laws of Australia, published by LexisNexis, or the Max Planck Encyclopedias of International Law, published by Oxford University Press, is prohibitive for a number of small and regional universities in Australia, which widens the divide between those who study and work at top-tier tertiary institutions and those who do not. Private publishers are simply not inclined to allow people to share equitably in the fruits of legal information lest this be detrimental to their bottom line.

Another complication is that private publishers make organisational and editorial decisions that are consistent with their interests, which sometimes differ from the interests of the legal community. They commonly choose the path of efficiency, which may mean cutting corners and making mistakes. One exercise we would give students was to look up the entry for Susan Kiefel in the Encyclopaedic Australian Legal Dictionary on Lexis Advance and tell us her current occupation. For several years following her appointment to the position of Chief Justice of Australia's highest court, students would say that she is a mere Justice, precisely because the computerised resource, which should have been able to respond quickly to her promotion on the bench, erroneously listed her as such.

Teachers can ask students whether they agree that, just as new technologies have shaped methods of legal research and the types of information that we are able to find, the private sector and its publishers who are profit-driven have

[42] *Get Smart*, television series created by Mel Brooks and Buck Henry and broadcast on NBC and CBS, United States of America (1965–1970).

influenced the art of legal research. Comment may thus be solicited on the following statement by Robert Berring and Kathleen Vanden Heuvel: 'Contrary to what most law students thought (that is if they thought about it at all), the forms in which legal information appeared were not divinely ordained or historical inevitabilities. They resulted from editorial choices, market forces, and social pressures, translated through the life cycle of profit-making enterprises.'[43] A legal research subject can thereby extend beyond instructing students on how to find sources; it may promote, as Christopher Knott states, 'a deeper understanding of how legal information is produced, arranged, and consumed'.[44]

There are, of course, limits to how subversive legal research teachers can be. When students ask about overcoming paywalls or saving time in the research process by using unauthorised sources, we cannot provide advice that would be in breach of intellectual property laws. We can, however, encourage them to avoid personally paying for sources by optimising their use of the library and turning to law librarians who are skilled at producing sources through various channels. In some instances, librarians will put a case to their university for purchasing a particular resource, subscription, or licence, although the addition of one resource may mean the subtraction of another. In this way, students can see librarians (at universities, but also court houses, parliaments, and libraries of international organisations) as their advocates in a largely user-pays system of legal information, a drop of salve for their efforts in accessing the law.

Students may be assured that they can take advantage of public resources on the world wide web. But it is prudent to set standards around internet usage, given that this dynamic platform is not primarily an academic tool and is cluttered with a morass of advertisements, including those for law firms, that can distract students on their research expedition. Hence, students may be warned against what Kurt Meyer refers to as 'directionless Google searches

[43] Berring and Heuvel (n 1) 55.
[44] Christopher A Knott, 'On Teaching Advanced Legal Research' (2009) 28(1–2) *Legal Reference Services Quarterly* 101, 117.

and overuse of less-sophisticated "free" resources'[45] or what Tony Thew describes as an excessive 'reliance on serendipity'.[46]

Many privately published journal articles and books are now available via open access, often because a fee has been paid to the publisher to release the publication to the public, or because the publisher has permitted a repository to reproduce it, usually following an embargo period. Journals that have bypassed private publishing houses — through support from tertiary institutions or law associations and foundations — can likewise be universally accessible online, bringing scholarship a step closer to the scholars of the world. Similarly, the literary content of classic legal works that are no longer subject to copyright is free to read on the internet, provided it has been digitally transcribed and uploaded (often a labour of love by volunteers).

However, a discernible bias remains in academia towards conventional, privately published versions. Many citation styles require pinpoint references and a standard publisher name,[47] which can discount unofficial sources. While countless books scanned in their originally published forms are available on Google Books, many on this site have limited or no text for public view, or else can be missing page numbers, which is intended to compel scholars to purchase the book for reference purposes.[48]

In any case, there are increasingly legitimate 'grey literature' alternatives to traditional sources of legal information. Some examples are working papers, reports, and concise papers on current legal developments published in informal journals such as ANZSIL *Perspective* and ESIL *Reflections* of the Australian–New Zealand and European international law societies, respectively. While not as authoritative as materials that undergo blind peer review, these types of sources can assist students along the research trail, particularly in meeting an interim need for academic analysis where formal expositions on a topic have not yet been published.

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[45] Kurt Meyer, 'Teaching Legal Research to Today's Digital Natives' (2017) 21(4) *AALL Spectrum* 12, 14.
[46] Tony Thew, 'Working on Serendipity: An Approach to Teaching Legal Research for Practice' (1994) 2(3) *Australian Law Librarian* 127, 129.
[47] See, eg, Australian Guide to Legal Citation (n 40) 4, 102.
[48] Tim Parks, 'References, Please', *The New York Review of Books* (online at 13 September 2014) <https://www.nybooks.com/daily/2014/09/13/references-please/>.

Moreover, it is conceivable that a new world of sources and ideas awaits students beyond Google, given the availability of other search engines with different algorithms, and of artificial intelligence assistants. Yet the myriad possibilities conspire to make the research enterprise highly complex. While pre-internet legal research was once considered a 'monster',[49] internet legal research might now be regarded as one with many heads, like the Hydra of Ancient Greek legend standing in the way of the golden fleece.

It is helpful for students to appreciate that the struggle of legal research is amplified by broad social circumstances. These circumstances include the chaos of the market economy and its sheer number of rivals competing for legal research business in the publishing industry and online, including predators. There is also the array of charitable alternatives responding to gaps that the business model of service provision inevitably leaves, while they themselves compete for survival. Moreover, the pervasiveness of private property in this market economy naturally encourages legal disputes, which generate an immense volume of law through which legal researchers must wade. On this point, an Australian lawyer who visited a differently constructed society in Europe some decades ago wrote of his experience:

> I began to consider the remarkable fact that there is no private property in the USSR. The citizen has his or her personal property but the large private ownership which dominates ownership of land and the means of production in capitalist countries is non-existent. As a result, all that litigation which comes before our courts arising from disputes over private property […] — the list is endless — do not exist in the USSR. There are no insurance cases, no banking cases, no company cases. In addition there is no dispute over workers' compensation. … This absence of disputes arising from the ownership of private property and of disputes arising from personal injuries means that if a similar system applied in Australia at least 80% of all time now spent in court disputes would be eliminated.[50]

Added to the convolutions of contemporary legal research is the prevalence of developing economies that are under-resourced and developed ones that have

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[49] Wesley Jr Gilmer, 'Teaching Legal Research and Legal Writing in American Law Schools' (1972) 25(5) *Journal of Legal Education* 571, 571.
[50] Roy Turner, *An Australian Lawyer Examines — Law in the USSR* (Alternative Publishing Co-Operative, 1979) 37–38.

digitalised legal resources but require people to pay for them — both of which, students soon realise in their attempt to engage in foreign and comparative law studies, present enormous challenges.

The imagination of students may consequently transport them to a society with a more palpable emphasis on education, where knowledge is not owned by the privileged few, all legal sources are free and accessible in the public domain, and legal research is a considerably more centralised, straight-forward, and rewarding activity. Indeed, it follows from a subject that seeks to teach legal research in context that some forward-looking students will emerge.

Conclusion

In response to the question of what teachers of a legal research subject teach, Michael Lynch has suggested that '[t]he subject matter is not a coherent body of thought; it is a mass of details', with the 'end result' being the development of merely a technical 'skill, or a knack'.[51] His is a standard representation of the subject. It conjures the idea of law schools as 'trade schools' or 'lawyer factories', as opposed to institutions in which critical thought is nurtured.[52] It is redolent of the classical common law method of research starting at the level of the particular (that is, individual cases that interstitially form a common law), rather than the level of general precepts.[53] It is also reflective of the broad emphasis in law schools on black-letter law.

The present article has reconceptualised the technique of teaching legal research. It suggests that there is no compelling reason why a legal research subject should not find ways, as other law subjects have, of tying technical aspects of the law to social issues, especially from a perspective that questions institutions that are designed to enhance our lives but can instead perpetuate division and disadvantage. The discipline of legal research covers a wide array of legal sources and concepts that lend themselves to social reflection. In the

[51] Michael J Lynch, 'An Impossible Task but Everybody Has to Do It — Teaching Legal Research in Law Schools' (1997) 89(3) *Law Library Journal* 415, 429.
[52] See John Littrich and Karina Murray, *Lawyers in Australia* (Federation Press, 4th ed, 2019) 28; Nickolas J James, 'More than "Lawyer Factories": The Social Obligation of Law Schools' (Conference Paper, Professional Legal Education Conference, 2 October 2020).
[53] Dainow (n 11) 422, 426, 430–431.

process of teaching research skills, its educators are in a good position to teach thinking skills.

This article has accordingly shown how the subject of legal research can be a vehicle for exploring the relationship between law and the prevailing socio–legal structures and for contemplating problems pertaining to its access and outcomes. The examples in the article constitute a mere sample that is illustrative of the potential of this unique pedagogy. Thought-provoking questions and ideas that seek to provide a social education in the law can be tailored to the specific legal sources and materials of each legal research subject and jurisdiction — whether common law or civil law — and the knowledge base of each teaching team.

In a similar vein, Charles Brink has sought to inject his Advanced Legal Research subject with legal theory in an effort to make students 'critical judges' of the legal sources they are learning to research.[54] Brink structures his legal research classes around themes from the discipline of jurisprudence, with a particular emphasis on the formalist and legal realist schools of thought of the late nineteenth and early twentieth centuries, respectively.[55] He also introduces theories of Wittgenstein and Critical Legal Studies (CLS) that question the very basis of legal rules, albeit '[j]ust for fun' and with an allusion to Humpty Dumpty.[56]

While Brink takes the important step of integrating analysis into legal research, the subversion he sets up, in furnishing radical ideas of CLS and so forth, is undermined by his offering of HLA Hart as a 'tonic'.[57] He suggests that to question mainstream legal theories is to be 'angry' at the system.[58] But in reducing critical theories to negative emotions and children's tales — even though jurists and academics have commonly drawn on Lewis Carroll's

[54] Charles J Ten Brink, 'A Jurisprudential Approach to Teaching Legal Research' (2004) 39(2) *New England Law Review* 307, 307–308.
[55] Ibid 309.
[56] Ibid 313.
[57] Ibid 315.
[58] Ibid.

anthropomorphic egg[59] —Brink adopts an air of subjectivity. He liberates legal research from its legal practice orientation, only to replace it with a circumscribed theoretical perspective with a (reportedly) more palatable tone and with which he acknowledges students are already familiar.[60]

Our Legal Research subject instead aims to present students with a new world of ideas. We do not try to convince or persuade, in straddling the different sides of the issues; the focus is simply on exposing students to less orthodox ways of looking at the law that they may wish to keep in mind as they progress through their law degree — perspectives that are generally not directly assessed but rather form the context of our teaching on legal research techniques. Typically, students lack the experience and confidence to mount an argument that fundamentally questions prevailing legal institutions. We therefore believe that a formative first-year legal research subject is an apposite point at which to encourage students in their journey of critical analysis and intellectual inquiry at the tertiary education level.

Certainly, most people would not expect classes in legal research to involve dynamic discussions, let alone be subversive. The subject tends to be viewed as a compartment of the 'unstoppable train of vocationalism' passing through law schools.[61] However, if the academic profession is committed to diverting this train, it ought to consider how subjects as seemingly pedestrian as this one, which does not *prima facie* have a social justice character, may be reformed.

Indeed, if Legal Research can be shown to be subversive, or at least to entertain social critique, then any subject can, including the core law subjects that have built a reputation for disproportionately emphasising legal doctrine. It does not take a great deal of imagination to formulate basic social questions around the process of legal research and the legal institutions on which it is constructed.

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[59] See, eg, Ken Barlow, 'Alice, Humpty Dumpty and the Law' (2011) 85 *Australian Law Journal* 365; Martin H Redish and Matthew B Arnould, 'Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative' (2012) 64(6) *Florida Law Review* 1485, 1513 fn 116; Alok Prasanna Kumar, 'Humpty Dumpty Jurisprudence' (21 March 2020) 55(12) *Economic and Political Weekly* 10.

[60] Brink (n 54) 311.

[61] Nickolas J James, 'More than Merely Work-Ready: Vocationalism versus Professionalism in Legal Education' (2017) 40(1) *University of New South Wales Law Journal* 186, 209.

No new technology or ‘app’ need be introduced. It is simply a matter of thinking more deeply about the origins and ideological role of the law.

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Assessing change of traditions: teachers' insights on a legal education under transformation

Louise C. Druedahl*

Abstract

Legal education is moving away from traditional learning methods towards approaches characterized as student-focused, active, collaborative, and reflective. A variety of factors co-create such a teaching environment, including teachers' understanding of learning and teaching in practice. One example of a legal education undergoing such change is at the Faculty of Law at the University of Copenhagen in Denmark. However, knowledge of this transformation is scarce, therefore, the aim of this study was to investigate the faculty's views, ambitions, and experiences with teaching practices. A questionnaire was developed and distributed per e-mail to all (768) teachers. The data collection lasted from 3 May 2022 to 23 May 2022. The main findings were that the surveyed teachers mostly understood learning that favoured student-focused teaching. In addition, case-based teaching is widely applied, but 62.7 per cent of the teachers' in practice talked more than students in the teaching setting despite their ambitions for another distribution of talking between students and teachers. Although the faculty's teaching has changed from solely monologic lectures, there is still a way to go to reach their goal of reforming the legal education.

Keywords: Legal education, understanding of learning, student-focused teaching, case-based teaching, pedagogical training.

Introduction

The approach to teaching law differs across countries; US law schools have primarily relied on the 'Langdell' or 'Socratic' method by using case method, whereas Northern European law schools have typically relied on traditional

* University of Copenhagen. I would like to thank all of the teachers who responded to the questionnaire, without them it would not have been possible to conduct this study.

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lectures.[1] However on both continents, there is a general trend to rethink legal teaching to introduce a learning process characterized as student-focused, active, collaborative, and reflective.[2] Such a learning process is essential for training future lawyers because modern legal practice demands more than analysis and the dissection of case law but also requires advanced skills in order to analyse problem-based contexts in interdisciplinary collaborations.[3] One part of the change in legal education is the application of additional and new methods for teaching law such as the Jig-Saw teaching activity or the case study analysis that is applied, for example, at Harvard Law School.[4] However, such methods alone cannot achieve the goals of obtaining engaged and reflective teaching, there are other factors that also influence the teaching setting. These factors include habits, routines, expectations, prior experiences, power relations,[5] and also teachers' understanding of learning, which all play a key role.[6] Teachers' understanding of learning is important because it directly affects how they teach and can be characterised based on Saljö's five

[1] Brittannica Dictionary, 'Legal Education' <https://www.britannica.com/topic/legal-education/Study-and-practice> accessed 21 July 2022; Elizabeth Moroney, ' Legal Education's 9 Big Ideas, Part 3. It All Started with a Case Study' (*Harvard Law School The Case Studies Blog*, 23 July 2013) <https://blogs.harvard.edu/hlscasestudies/2013/07/23/summer-reading-legal-educations-9-big-ideas-part-3/> accessed 21 July 2022; Todd D Rakoff and Martha Minow, 'A Case for Another Case Method' (2007) 60 Vanderbilt Law Review 597; Steven I Friedland, 'How We Teach: A Survey of Teaching Techniques In American Law Schools' (1996) 20 Seattle University Law Review 1.

[2] Timothy W Floyd, Oren R Griffin and Karen J Sneddon, 'Beyond Chalk and Talk: The Law Classroom of the Future' (2011) 38 Ohio Northern University Law Review 257; Claas Friedrich Germelmann, 'Challenges and Approaches to Modern Legal Education in a European Perspective' in Claas Friedrich Germelmann (ed), *Innovative teaching in European legal education* (Nomos Verlagsgesellschaft 2021).

[3] Center on the Legal Profession. Harvard Law School, 'Jazzing up the Classroom. The Case Study Method' (2017) 4 Executive Education for Lawyers <https://thepractice.law.harvard.edu/article/jazzing-up-the-classroom/> accessed 21 July 2022; Germelmann (n 3).

[4] Harvard Law School, 'The Case Study Teaching Method' <https://casestudies.law.harvard.edu/the-case-study-teaching-method/> accessed 21 July 2022; Kire Jovanov, '"Jigsaw Classroom" and Law Teaching – Theoretical and Practical Implications from Modeled Lecture with "Jigsaw Classroom"' in Claas Friedrich Germelmann (ed), *Innovative teaching in European legal education* (Nomos Verlagsgesellschaft 2021).

[5] Anna Bager-Elsborg, 'Hvordan Begrunder Undervisere Deres Praksis? Et Interviewstudie Med Undervisere Fra to Fagmiljøer' (2017) 12 Dansk Universitetspædagogisk Tidsskrift 4; Lars Ulriksen, 'The Implied Student' (2009) 34 Studies in Higher Education 517; Paul Ramsden, *Learning to Teach in Higher Education* (RoutledgeFalmer 2003).

[6] Keith Trigwell and Michael Prosser, 'Changing Approaches to Teaching: A Relational Perspective' (1996) 21 Studies in Higher Education 275.

understandings of what learning is.[7] Trigwell and Prosser, 1996[8] found that teachers who understand learning as transfer of information conduct teacher-focused teaching, whereas teachers who aim to develop and change students' understanding carry out student-focused teaching. A student-focused approach to teaching can result in students' obtaining a greater retention of knowledge, an increase in academic performance, and a deeper understanding of a topic because *'the one who does the work does the learning*'.[9] Generally, an essential feature of student activity is that students participate and interact in the classroom, such as asking questions or providing examples that drive them in their learning process.[10]

One example of a European law school that decided to rethink its legal education is the Faculty of Law at the University of Copenhagen in Denmark. At this institution, the traditional way of teaching law was dominated by monologic lectures and expectations that the students learn the law by heart.[11] However in 2011, the faculty decided to reform the teaching of both their bachelor and master programs of law[12] with a vision to deliver research-based, problem-based, and case-based legal training based on forward-thinking, innovative, and challenging pedagogical and didactical principles.[13] Similar to the general trend, this reform envisioned a pedagogical shift from teacher-focused teaching to a teaching approach based on dialogue and that focused on

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[7] Ramsden (n 6).
[8] Trigwell and Prosser (n 7).
[9] Hoidn Sabine and Reusser Kurt, 'Foundations of Student-Centered Learning and Teaching' in Sabine Hoidn and Manja Klemenčič (eds), *The Routledge International Handbook of Student-Centered Learning and teaching in Higher Education* (Routledge 2021).
[10] ibid.
[11] Louise Victoria Johansen, '"Hvad Angår Det Mig Som Jurist?" - Refleksion over Jurastuderendes Møde Med Nye Fagligheder' (2016) 11 Dansk Universitetspædagogisk Tidsskrift 110; Pernille Rattleff, 'Jurastuderendes Læring via Deres Aktive Arbejde Med Stoffet' (2013) 8 Dansk Universitetspædagogisk Tidsskrift 51.
[12] Københavns Universitet Det Juridiske Fakultet, 'Konkretisering Af Læringsstrategien' (2010) <https://jura.ku.dk/pdf/uddannelsesservice/studiereform2011/laeringsprincipper.pdf> accessed 22 July 2022; Københavns Universitet Det Juridiske Fakultet, 'Strategi for Læring Ved de Juridiske Heltidsuddannelser Ved KU' <https://jura.ku.dk/pdf/uddannelsesservice/studiereform2011/laeringsstrategi_vedtaget_210409.pdf> accessed 21 July 2022.
[13] Det Juridiske Fakultet Københavns Universitet, 'Vision for Læring Og Pædagogisk Arbejde Ved Det Juridisk Fakultet, Københavns Universitet' (17 March 2016) <https://jura.ku.dk/pdf/kvalitetssikring/Vision_for_l_ring_og_p_dagogisk_arbejde_17.03.2016.pdf> accessed 21 July 2022.

the students' active learning both before, during, and after the classroom teaching.[14] In this vision, students become active by working in groups with cases.[15]

The current knowledge of the transformation of the legal education at the University of Copenhagen is sparse, but it is known that surveyed law students were sceptical about being active in the teaching.[16] Therefore, the research question was "What are the faculty's teachers' current views, ambitions, and experiences with teaching practices at the Faculty of Law at University of Copenhagen?". The outcome is to evaluate the transition towards the faculty's goal of rethinking its legal education.

The structure of this paper is as follows: section 2 outlines the applied method using a questionnaire to explore the research question, section 3 describes the results of the questionnaire on the faculty's teachers' current views, ambitions, and experiences with teaching practices, section 4 discusses these results in a wider perspective, and section 5 contains the conclusions of the research.

Materials and methods

Sampling and settings for pedagogic training

The participants were teachers teaching the bachelor and/or master programs of law at the Faculty of Law at the University of Copenhagen. At the start of the study the administration reported a total number of 768 teachers, which included: 157 academic personnel; 64 PhD students and 547 part-time teachers (teaching assistants and external lecturers).

Depending on their affiliation the teachers have different possibilities for pedagogical training. Externally lecturers must have a mandatory 1-day pedagogical training course offered by the faculty, PhD students must attend three mandatory workshops (in total 2 ECTS) as pedagogical training[17], and the internally affiliated academic personnel can have the 200-hours course 'teaching and learning in higher education programme' offered by the

[14] Rattleff (n 12); Det Juridiske Fakultet, 'Strategi for Læring Ved de Juridiske Heltidsuddannelser Ved KU' (n 13).
[15] Det Juridiske Fakultet, 'Konkretisering Af Læringsstrategien' (n 13).
[16] Johansen (n 12).
[17] Faculty of Law at University of Copenhagen, 'Pedagocial Courses' (2022) <https://jura.ku.dk/phd/english/courses/pedagogical-courses/> accessed 5 September 2022.

University of Copenhagen. The 200-hour course consists of a series of seminars, individual supervision of teaching practice by both a pedagogic supervisor and an academic supervisor, peer feedback, the preparation of a teaching portfolio, and an individual development project.

Survey instrument

A questionnaire was developed (see appendix 1) to assess various aspects related to the current teaching practices. The content of the questionnaire was inspired by:

- The Faculty of Law's vision for case-based teaching using the following five case types: decision/verdict case; process case; response case; research case/reflection case; and conception case.[18]
- That law students' preference for teachers with legal training.[19]
- That teachers' pedagogical training is associated with student-focused teaching,[20] and by
- Saljö's five understandings of learning;[21]
    1. Learning as a quantitative increase in knowledge. Learning is acquiring information or 'knowing a lot'.
    2. Learning as memorising. Learning is storing information that can be reproduced.
    3. Learning as acquiring facts, skills and methods that can be retained and used as necessary.
    4. Learning as making sense or abstracting meaning. Learning involves relating parts of the subject matter to each other and to the real world.
    5. Learning as interpreting and understanding reality in a different way. Learning involves comprehending the world by reinterpreting knowledge.[22]

The understanding of learning 1–3 and 4–5 is associated with teacher-focused teaching and student-focused teaching, respectively.[23]

[18] Det Juridiske Fakultet, 'Konkretisering Af Læringsstrategien' (n 13).
[19] Johansen (n 12).
[20] Liisa Postareff, Sari Lindblom-Ylänne and Anne Nevgi, 'The Effect of Pedagogical Training on Teaching in Higher Education' (2007) 23 Teaching and Teacher Education 557.
[21] Ramsden (n 6).
[22] ibid.
[23] ibid; Trigwell and Prosser (n 7).

The questionnaire consisted of 17 questions: seven basic questions about the teachers internal/external affiliation, their teaching experience, pedagogical training, and feelings of influence on teaching form and curricula; three questions about the teachers' understanding of learning; and six questions related to the use of case-based teaching and the distribution of talking between teacher and students in the classroom. The questions regarding the teachers' understanding of learning included: to indicate which of the five types of learning they evaluated as important; what they believed the students found to be important; and they were asked to rank their view on the importance of each of the five learning types (from 1–5, with 1 being most important).

The questionnaire was developed in both Danish and English. The questionnaire was pilot tested three times. The first two tests were made with law teachers at an early and late career stage, respectively. These tests lead to changes in the questions' wording and to the addition of a few new questions. The third pilot test was made with a law teacher involved in the planning of the legal program, and did not lead to further changes in the questionnaire.

Recruitment, data collection, and data analysis

All 768 teachers (both externally and internally affiliated) were invited to participate in the questionnaire survey. The invitation was distributed per e-mail and included information about the study, but also contained endorsement by the Dean of the Faculty of Law who supported the survey. Subsequently, two e-mail reminders were sent. Participation was further encouraged by information of and links to the questionnaire in the faculty's e-mail newsletter. Data were collected using SurveyXact in the period 3 May 2022 – 23 May 2022. The data were exported from SurveyXact to Microsoft Excel, where the entire analysis was conducted using descriptive statistics.

Ethics

The questionnaire survey was carried out anonymously. No personal information was collected, therefore Danish law does not require approval. However, ethics, for example anonymity, was taken into consideration in the survey design. The respondents were given a choice to enter their email address at the end of the survey if they wished to receive the survey results, but the email addresses were not linked to the responses and only used for this purpose. All materials are stored and processed confidentially.

Results

The sample consisted of 153 complete responses. In total, 183 responded but 30 were excluded due to incomplete responses (n=28) and when the respondent responded that they do not teach at the surveyed faculty (n=2). Ninety respondents were external teachers, and 63 were internally affiliated teachers or PhD students. This corresponds to a response rate of 16.5 per cent for externally affiliated teachers and 28.5 per cent for internally affiliated teachers or PhD students (the total response rate was 19.9 per cent). The majority of teachers held a degree in law (n=140). Their pedagogical training also differed, where 92 (60.1 per cent) of the respondents had the faculty's 'mandatory course for external teachers', 37 (24.2 per cent) had the teaching courses mandatory for PhD students, 37 (24.2 per cent) had the course 'teaching and learning in higher education programme', 38 (24.8 per cent) had 'another' pedagogy course. Nine (5.9 per cent) teachers had not taken any pedagogy course.

Table 1: Teachers' indication of importance, ranking of importance, and what teachers thought students find important regarding five understandings of learning. The surveyed understandings of learning is based on Saljö's five understandings of learnings. [24]

Surveyed understandings of learning	**Teachers' indication of importance (per cent)**	**Teachers' ranking of importance (1 is most important, 5 is least important) (average)**	**Teachers' indication of what they thought students find important (per cent)**
#1: The students should have an increase in knowledge	81.0	2.7	77.8
#2: The students should be able to remember and recall information by heart	21.6	4.5	62.1
#3: The students should be able to use facts and methods	86.3	2.5	71.9
#4: The students should be able to connect legal issues to the real world both concretely and abstractly	95.4	2.3	62.1
#5: The students should be able to interpret and create understanding of the real world	83.0	2.6	40.5

[24] Ramsden (n 6).

through the knowledge they have acquired			

Whereas 95.4 per cent of the teachers found it important that 'the students should be able to connect legal issues to the real world both concretely and abstractly', only 21.6 percent found it important that 'the students should be able to remember and recall information by heart', see Table 1. This coincides with the teachers' ranking of how important they found each understanding of learning to be, where least important was the ability to remember and recall information by heart (average: 4.5) compared to the four other understandings (range of averages: 2.3-2.7). The teachers' views on the importance of understandings of learning were in large contrast to what teachers thought students find important, where the most prominent difference was the understandings of learning 'to remember and recall information by heart' and 'to interpret and create understanding of the real world through the knowledge they have acquired'. For these two, the number of teachers who found them important were 21.6 per cent and 83.0 per cent, respectively, and the corresponding views of teachers on what students find important were 62.1 per cent and 40.5 per cent, respectively.

Comparison of how teachers scored importance of different understandings of learning with which type of pedagogy course they had taken showed no apparent differences except for one. The difference was that teachers who had not taken a pedagogy course viewed learning as the students should 'interpret and create understanding of the real world through the knowledge they have acquired' (3.3) and 'connect legal issues to the real world both concretely and abstractly' (3.0) as less important than teachers who had taken at least one pedagogy course (corresponding averages: 2.5 and 2.3). Moreover, teachers who had not taken a pedagogy course also evaluated learning as the ability to remember and recall information by heart as more important (3.9) than teachers who had taken at least one pedagogy course (average: 4.5). Comparison of the scoring of different understandings of learning on whether the teacher is internally or externally affiliated showed that the two largest differences were that internal teachers value that students learn 'to interpret and create understanding of the real world through the knowledge they have acquired' (2.3) more so than external teachers (2.8), whereas external teachers valued that students learn 'to use facts and methods' (2.4) more than internal teachers (2.7). There were not major differences ($\leq$0.3 difference) between teachers' scoring of understanding of learning and whether teachers mainly taught on bachelor or master level.

In the teaching settings, there was a difference between the teachers' ambitions for and their actual teaching practices regarding the distribution of talking between teacher and students. The teachers' ambition was that the students and themselves should talk about the same amount of time (66.7 per cent), whereas 20.9 per cent had the ambition that the teacher themselves should talk most of the time, and 12.4 per cent that the students should talk most of the time. However, in practice (Figure 1), 62.7 per cent of teachers talked most of the time. Also, 78.1 per cent of those who intended to talk most of the time themselves also ended up doing so. There were no dominating patterns for distribution of talking related to whether they were mostly teaching at the bachelor or master level.

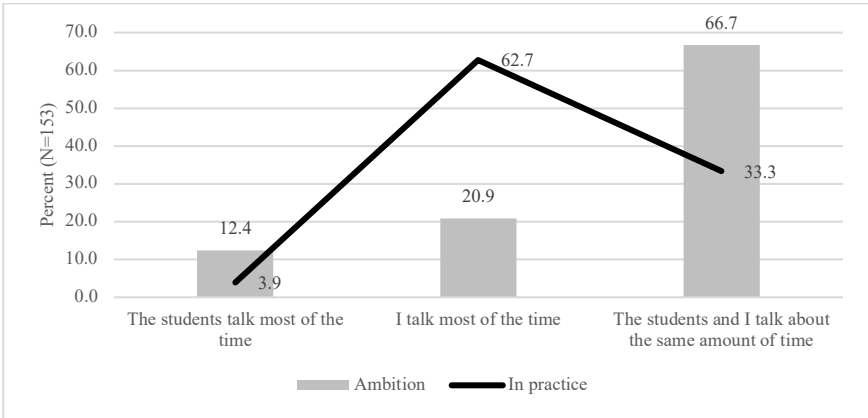

Figure 1: Teachers' ambition and practice regarding the distribution of talking in teaching settings.

Comparison of how teachers scored the importance of different understandings of learning with their ambition for the distribution of talking between students and teachers showed that teachers who thought students should talk most of the time, also evaluated the understandings #3, #4, and #5 as more important than the understandings #1 and #2 (for terminology, see Table 1). Moreover, these teachers evaluated the understandings #3, #4, and #5 as more important than teachers with another ambition for the distribution of talking. Moreover, exploring the teachers' ambition for the distribution of talking in relation to the teachers' pedagogical training showed that teachers whose ambition is for the students to do most of the talking more often had taken the course 'teaching and learning in higher education programme' (29.7%), Figure 2. Also, teachers

with all other types of pedagogical training or no training had a somewhat similar ambition for students to do most of the talking (varied 7.9%–11.1%).

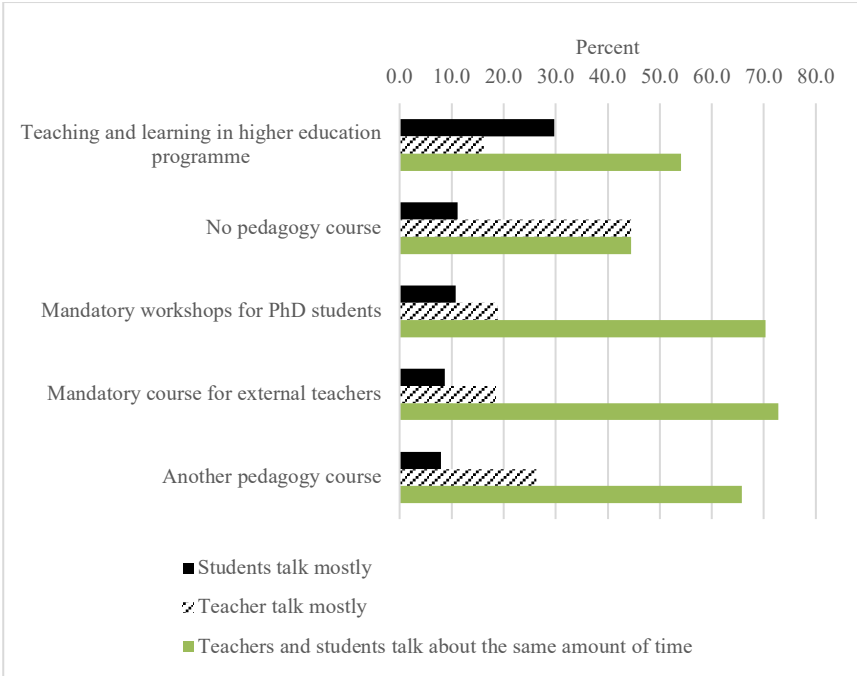

Figure 2: Teachers' ambition for distribution of talking related to their pedagogical training. Categories ranked according to the ambition for students to talk of the time.

Case-based teaching was used by almost all teachers (n=150, 97.4 per cent) and carried out primarily in groups (n=130), but some teachers conducted teaching where students mostly interacted with cases in pairs (n=3), individually (n=8), or in plenum only (n=9). Teachers reported that they employ a variety of case types as specified in the faculty's learning principles, but 85 respondents (55.6 per cent) also indicated that they used cases which either were not captured by the case types in the learning principles, or that they were unsure about how to categorize, (see Table 2). However, of those teachers that applied the case types, as described in the learning principles, it varied if the same teachers indicated having a good understanding of the case-type that they used. This ranged from 75.0 per cent of teachers who used conception cases who also indicated that they had a good understanding of that case type to 96.5 per cent for decision/verdict cases, Table 2.

Table 2: Teachers' use of cases in their teaching and their understanding of the case types in the faculty's learning principles.

Use of cases and case types in teaching	**Teachers (n, n_{total}=153)**	**Teachers teaching mostly at the bachelor program (n, n_{total}=100)**	**Teachers teaching mostly at the master program (n, n_{total}=53)**	**Teachers with good understanding of case types (n/ per cent of all respondents)**	**Teachers who applied a case type of which they also indicated a good understanding (n/ per cent of those who apply the case type)**
Decision/Verdict case	86	59	27	111 / 72.5 per cent	83 / 96.5 per cent
Process case	58	41	17	74 / 48.4 per cent	55 / 94.8 per cent
Response case	33	27	6	50 / 32.7 per cent	29 / 87.9 per cent
Research case/Reflection case	48	32	16	67 / 43.8 per cent	43 / 89.6 per cent
Conception case	20	14	6	43 / 28.1 per cent	15 / 75.0 per cent
None of the above	N/A	N/A	N/A	25 / 16.3 per cent	N/A
Teachers that used cases, but were not sure how to categorize them	52	34	18	N/A	N/A
Teachers who used another case type than those above	33	22	11	N/A	N/A
Teacher who did not use cases in their teaching	3	0	3	N/A	N/A

Teachers generally responded a lower influence on the choice and prioritization of curricula as well as choice and type of teaching form if they taught on bachelor level compared to master level, see Figure 3. However, the overall picture was that all teachers generally reported a larger feeling of influence regarding the teaching form compared to the curricula. There was no apparent

link between the teachers' feelings of influence on the choice and type of teaching form and 1) the teachers' pedagogical training, 2) teachers' ambition for distribution of talking, or 3) the distribution of talking in practice according to teachers.

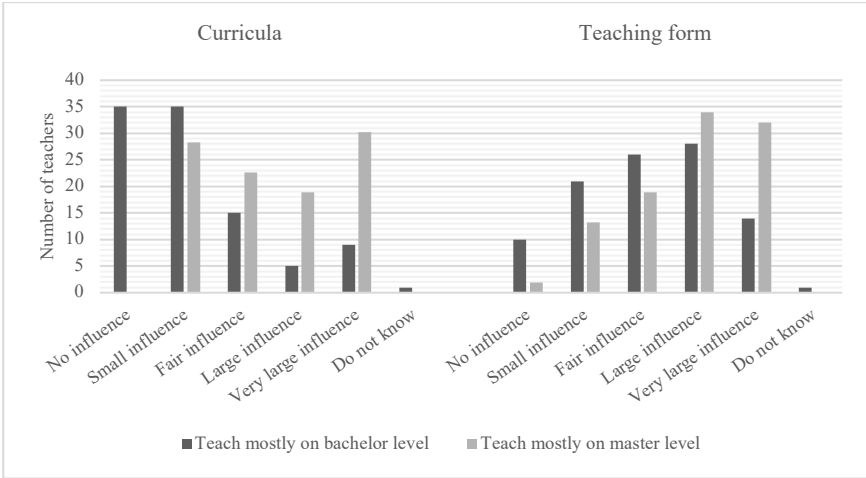

Figure 3: Teachers' feeling of influence on curricular and teaching form. Left: Influence on choice and prioritization of curricula. Right: Influence on choice and type of teaching form.[25]

Discussion

The Faculty of Law at the University of Copenhagen showed their ambition for learning by introducing a teaching reform for its legal education. The results however showed that the reform has not yet fully been carried out in practice due to discrepancies between the vision of the reform and the teaching practice. On the one hand, teachers' ranking of importance of five understandings of learning indicated an overall student-focused approach to teaching,[26] and teachers also reported that students mostly work in groups in their case-based teaching. On the other hand, 62.7 per cent of the teachers talked most of the time in practice despite their ambitions for the distribution of talking. Moreover, there was a mismatch between the understandings of learning that

[25] To allow equal comparison, the depicted data were correlated to equal sample sizes for teachers who teach mostly at bachelor (n=100) vs master level (n=53).
[26] Trigwell and Prosser (n 7); Ramsden (n 6).

teachers indicated as important and those they thought the students find important.

On basis of the results, some teachers have an ambition to let students be active by letting them talk most of the time in the teaching, but partly this more often does not happen in practice and partly it is far from all teachers who have that ambition to start with. The students learning process should be driven by their active participation in the teaching process, so as not to have a situation where '[s]tudents are there, but too often education is being done unto them' such as described by Sabine and Kurt.[27] Student-focused teaching is more likely encouraged and carried out by teachers who have a pedagogical training because.[28] Thus, all teachers should have pedagogical training, which was not the case in the current study. Furthermore, the results showed that teachers without a pedagogy course ascribed lower importance to the understandings of learning associated with student-focused teaching which aligns previous research.[29] However, this may limit the possible learning approaches that students experience from their teachers in the teaching settings because '[s]trong relations are found between conceptions of teaching and approaches to teaching'.[30]

At the same time, it should be considered that the effects of pedagogical training do not occur until after a year and teachers that only have short pedagogical courses tend to have less self-efficacy beliefs about their teaching than if they had no pedagogical training.[31] A person's self-efficacy beliefs refers to the person's evaluation of her/his ability to perform a specific action or obtain a certain goal via their own actions in a particular situation.[32] Moreover, teachers' pedagogical training is linked to higher self-efficacy regarding teaching,[33] which can lead to a choice of teaching activities that result in higher learning outcomes.[34] Thus, teachers' pedagogical training should be of an appropriate extent and duration. At the moment, the pedagogical training

[27] Sabine and Kurt (n 10).
[28] Postareff, Lindblom-Ylänne and Nevgi (n 21).
[29] Ramsden (n 6); Trigwell and Prosser (n 7).
[30] Trigwell and Prosser (n 7).
[31] Postareff, Lindblom-Ylänne and Nevgi (n 21).
[32] Albert Bandura, 'Self-Efficacy: Toward a Unifying Theory of Behavioral Change' (1977) 84 Psychological review 191; Albert Bandura, 'Self-Efficacy Mechanism in Human Agency' (1982) 37 American Psychologist 122.
[33] Postareff, Lindblom-Ylänne and Nevgi (n 21).
[34] Sari Lindblom-Ylänne and others, 'How Approaches to Teaching Are Affected by Discipline and Teaching Context' (2007) 31 Studies in Higher Education 285.

that the faculty offers is the extensive course 'teaching and learning in higher education programme' (200 hours over 1 year) and the mandatory course for external teachers (1 day course before the external teacher starts teaching). The extensive pedagogical course is primarily offered to internally affiliated teachers and is a prerequisite for employment as associate professor and professor. However, the results also show that teachers who have taken this course were most likely to have an ambition to let the students talk most of the time. It is not a feasible goal that all teachers should have extensive pedagogical training, but there is a substantial difference in the extent and duration of pedagogical training offered to the faculty's teachers. This is particularly apparent when considering that external teachers comprise 71.2 per cent (n=547/768) of all the teachers at the faculty.

The results showed that teachers with the mandatory course for external teachers and teachers with the course 'teaching and learning in higher education programme' had not largely different understandings of learning, however, there was a profound difference in their ambition to let students speak most of the time in the teaching setting. The pedagogical skills of external teachers comprise a large part of the faculty's teaching, therefore it is their skills and the environment they create that dominate the students teaching experience. Thus, the pedagogical competences of external teachers have a large potential to let the students be more active in the classroom. Such an increase in student activity will also make the teaching more student-focused, student engagement in their learning processes supports higher learning outcomes and recall of information than if the students are passive.[35] However, changing such epistemological beliefs about knowledge is difficult, so it may be easier to train teachers to create better dialogues and discussions in their teaching[36] . There is still a question of how realistic it is to change approaches to teaching and learning in the course of one day.

Another aspect of the results is the use of case-based teaching at the faculty and how this is carried out. The current picture is that most teachers do most of the talking and do not have a good understanding of the case types included in the faculty's vision for learning. In fact, 16.3 per cent of the teachers reported that

[35] Michael Prince, 'Does Active Learning Work? A Review of the Research' (2004) 93 Journal of Engineering Education 223.
[36] Ian AG Wilkinson and others, 'Toward a More Dialogic Pedagogy: Changing Teachers' Beliefs and Practices through Professional Development in Language Arts Classrooms' (2016) 31 Language and Education 65.

they did not have a good understanding of any of the case types. One way forward could be to initiate discussions among teachers on the use of cases, which case types students should work with, when, and why, as well as how to carry these out in practice in the teaching environment so that students do the work and hence the learning.[37] Teachers should communicate clearly the' intended learning outcomes of the cases to the students so they know what they are expected to learn. In turn, this can aid students to dissect how teachers view, what Ulriksen terms, 'the implied student',[38] to fulfil teachers' expectations, and to characterize their legal experiences and hence competencies regarding case types.

This study is relevant with its applied method using a questionnaire informed particularly by Saljö's five understandings of learning[39] to other universities who might wish to undertake a teaching reform for a legal education. The study can serve as inspiration as to what to be aware of when implementing such reforms. Moreover, for the individual teacher, a study such as this provides knowledge on what the students are used to and with what types of teaching, they have experienced. At a faculty level, it provides insights to the learning environment that can be used to assess the current level of implementation of reformed learning principles from the teachers' perspectives.

Strengths and limitations

It is a strength that the questionnaire was distributed to all the faculty's teachers and that the sample size allowed analysis. Further, that the study was conducted by a person not trained at the Faculty of Law at the University of Copenhagen, which enabled 'new eyes' on the teaching environment as well as that it was a person with existing experience with quantitative methods. Having a non-lawyer background could also be a limitation, but this was minimized by extensive discussions of the study prior to survey start with lawyer-trained colleagues as well as during the pilot testing of the questionnaire with lawyer-trained colleagues at different stages of their career. Limitations of the study include the low response rate[40] and that two teachers were invited to participate, but responded that they did not teach at the surveyed faculty. The latter were

[37] Sabine and Kurt (n 10).
[38] Ulriksen (n 6).
[39] Ramsden (n 6).
[40] Felicity Smith, 'Survey Research: (1) Design, Samples and Response' (1997) 5 International Journal of Pharmacy Practice 152.

likely previous teachers who did not currently teach at the faculty. A third limitation is that it is not possible to know how or if non-responders were different from the responders. Thus, one must be careful about interpretations because it is impossible to generalize or draw statistical conclusions to all teachers at the Faculty of Law at the University of Copenhagen. However, it is plausible that the teachers that chose to and took the time to respond to the questionnaire also are those who are most interested in teaching. So even though it is not possible to generalize from the results, it is possible that the results present the best-case scenario regarding teachers' interest for teaching and thus the ensuring teaching environment.

Conclusion

This study of teachers' views, ambitions, and experiences with teaching practices at the Faculty of Law at the University of Copenhagen showed that the faculty's teaching has changed from solely monologic lectures, but that there is still a way to go for the faculty to reach its goal of reforming its legal education. Teachers' ranking of importance of the five understandings of learning indicated, on the one hand, an overall student-focused approach to teaching and teachers also reported that students primarily work in groups in their case-based teaching. However, on the other hand, 62.7 per cent of teachers ended up, in practice, doing most of the talking despite their ambitions to distribute the talking between students and teacher.

To move the faculty closer to reaching its goal for learning and teaching, there needs to be reflections on what pedagogical training its' teachers should have, what extent and over which duration of time. There is a large discrepancy between pedagogical training of internally and externally affiliated teachers, and the pedagogical competencies of both groups are important, particularly since the external teachers comprise 71.2 per cent of the faculty's teachers. Thus, the pedagogical skills of external teachers comprise a large part of the faculty's teaching environment and approaches to teaching that the students meet. However, another aspect is the use of case-based teaching, where one way forward could be to initiate discussions among teachers on the use of cases, which case types that students should work with, when, and why, as well as how to carry these out in practice in the teaching environment so that students do the work and hence the learning. For this faculty and other law schools, a continuous focus on enhancing a more student-focused, engaged teaching should aid learning outcomes of the future lawyers as well as to move law

schools closer to reaching their goals when reforming their teaching and learning principles also in practice.

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The application of procedural law at Spanish legal clinics

Raúl Sánchez*

Abstract

The American clinical education model is not entirely exportable, to the Spanish model of legal education as a consequence of the functional and methodological differences that arises between both legal systems. The conceptualization of the Spanish legal clinic is reasonably tied to its functionality. As a starting point, the configuration of the Spanish clinical legal education is growing exponentially. With a developed social function of legal clinics, the pedagogical function must be accomplished for the perspective of the legal sciences. Although, the interconnection between both functions is not yet strongly established. The clinical treatment of the legal conflict should also be based on the perspective provided by Procedural Law.

Keywords: Legal Clinic, Procedural, Law, Methodology, ADR, Conflicts.

Introduction

The teaching system of North American law schools promote methodological spaces such as Legal Clinics, considering it is based, essentially, on Advocacy and directly related to private legal business.

The traditional conception of the casuistic method of North American law is deeply rooted both in teaching methodologies and in legal practice. This conception is very useful in procedural practice because it considers that law may be created and is always applied before the Courts of Justice.[1]

* Universidad Pablo de Olavide, de Sevilla.

[1] See Blázquez Martín, Diego, «Apuntes acerca de la educación jurídica clínica», Universitas. Revista de Filosofía, Derecho y Política, 2006/2007, num. 3, pp. 48 y 49.

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Likewise, a holistic vision of the North American advocacy model conceives the lawyer as a kind of wolf (...) who does not act in defence of his client but moved by economic greed[2].

That affirmation links the economic expectation of the claim exclusively to the legal profession. However, the parties to a procedure demand a successful procedural strategy regarding their legal claims under the belief that the final judicial decision may satisfy the economic expectation linked to it, generally[3].

In addition, the excessive cost that access to justice entails in the North American system should be considered. The financial sustainability of the procedural claim is almost as important as its legal basis. There is a direct relation between economic resources, the continuance of the procedural action and the expectation to judicially succeed.

Thus, the North American clinical legal education model is not exportable to the Spanish legal system, neither in substance nor in form. Among many other reasons, because the Spanish legal educational model is not based just on the practice of the law. The legal professions or persons with legal significance in the Spanish territory are varied. Also, the Spanish legal system, more sensitive to the *lex certa, praevia and scripta*, advises a didactic methodology quite different from the Anglo-Saxon model.

Therefore, a legal clinic model can be configured according to the idiosyncrasy and needs of the Spanish legal system, importing those benefits of the Anglo-Saxon system that are useful to strengthen the clinical results.

However, the widespread claim to link Spanish clinical legal education to the professional advocacy environment, admits the paradox that the clinical tutor may not be a lawyer or has never acted as such. The risk of distorting the learning teaching process exists.

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[2] It is not possible to share this vision that conceives a "soulless" corporate professional, driven solely by the amount of the attorney's cost and expenses.

[3] Most of the violations of the American legal system can be mitigated through the monetization of the legal conflict. A quick consideration at the kinds of disputes that are composed in civil proceedings (judicial public records), at the state level, allows to strengthen the previous arguments.

Furthermore, Spanish clinical education is connected to the third sector development as well as the private sector.[4]

Towards the conceptualization of legal clinics in Spain

It is not an easy task to agree on a conceptualization of what should be understood as legal clinics under the Spanish system, although, the concept of legal clinic is generally tied to its own functionality.

As a consequence, and under the influence of didactics as a discipline, there is no unanimity defining the concept of legal clinic in Spain. Several ideas are managed, such as teaching method,[5] based on service learning;[6] innovation in competences,[7] strengthening of competences,[8] clinical methodology,[9] learning

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[4] See Blázquez Martín, Diego, Cuenca Gómez, Patricia & Iglesias Garzón, Alberto, *Guía sobre cómo crear, organizar, gestionar y conducir una clínica jurídica en una Facultad de Derecho*, Ilustre Colegio de Abogados de Madrid, 2014, p. 9

[5] *Atienza, Soledad, «Las Clínicas jurídicas como método de formación de abogados. Una visión desde EEUU», Revista Aranzadi Doctrinal, 2017, num. 1, pp. 1; Gascón Cuenca, Patricia, «La evolución de la enseñanza jurídica clínica en las universidades españolas: oportunidades y desafíos de la litigación estratégica en las clínicas de derechos humanos», Revista de Educación y Derecho, 2016, p. 5 and Blázquez martín, Diego, Cuenca Gómez, Patricia y Iglesias Garzón, Guía sobre cómo crear, organizar, gestionar y conducir una clínica jurídica en una Facultad de Derecho, Ilustre Colegio de Abogados de Madrid, op. cit., p. 9.*

[6] Álvarez, Alicia, «La educación clínica. Hacia la transformación de la enseñanza del derecho», *Enseñanza clínica del derecho. Una alternativa a los métodos tradicionales de formación de abogados*, (Villarreal y Courtis, eds.), Instituto Tecnológico Autónomo de México D.F., 2007, pp. 225 to 245; FONT I MAS, María & Marín Consarnau, Diana, «Experiencias de aprendizaje – Servicio a través de la metodología de la Clínica jurídica», *Educación y Diversidad*, 2016, Vol. 10, num. 2, pp. 191 to 203, Marqués I Banqué, María, «La dimensión docente de la Responsabilidad Social Universitaria: la institucionalización del aprendizaje servicio en la Universitat Rovira i Virgili», *I Jornadas Internacionales sobre Responsabilidad Social Universitaria*, Cádiz, 2014 and Mugarra Elorriaga, Aitziber & Martínez De Bringas, Asier, «La Clínica Jurídica Loiola: un proyecto de lucha por la justicia social», *Oñati Socio-legal Series*, 2018, Vol. 8, num. 4, p. 491.

[7] Gascón Cuenca, Patricia, «La evolución de la enseñanza jurídica clínica en las universidades españolas: oportunidades y desafíos de la litigación estratégica en las clínicas de derechos humanos», *Revista de Educación y Derecho*, op. cit., p. 1.

[8] Pabón Mantilla, Ana Patricia, Aguirre Román, Javier Orlando y Cáceres Rojas, Paul Breinner, «La Clínica jurídica como estrategia para fortalecer las competencias ciudadanas: una apuesta por la convivencia pacífica», *Revista Ratio Juris*, 2016, Vol. 11, num. 23, pp. 27 to 46.

[9] De Prada Rodríguez, Mercedes, Callejo Carrión, Soraya & López De Osa Escribano, Pilar, «La Clínica jurídica Villanueva: función social y pedagógica del aprendizaje del Derecho», *Reduca*, op. cit., p. 3.

space,[10] professional volunteering,[11] research project,[12] all understood from a perspective related to learning and its results. Those concepts are linked to the clinical work developed at the Spanish legal clinics,[13] and particularly used by them to design the clinical services provided to the Community.

Therefore, even admitting a common functional nexus, the concepts proposed differ substantially.

Despite this, the complex task of conceptualizing a unitary model of legal clinic in the Spanish legal system should be progressively accomplished, considering the close underlying relationship between the concept of legal clinic and the clinical methodology available.[14]

However, the initial lack of standards agreed by Spanish legal clinics regarding their configuration[15] provoked this wide conception about what a legal clinic should be, how to approach the clinical method or the resolution of the cases submitted to clinical treatment.

Fortunately, the lack of conceptual uniformity initially considered is being surpassed by the interaction of most of the Spanish legal clinics, that put in common the results of their clinical projects and the creation of the "Red de Clínicas Jurídicas", where are voluntary represented all Clinics that want to be part of the common project.

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[10] Bregaglio Lazarte, Renata, Constantino, Renato & Ocampo, Diego, *Guía para usuarios de la Clínica Jurídica sobre los derechos de las personas con discapacidad*, Open Society, 2013, p. 6.

[11] Mugarra Elorriaga, Aitziber & Martínez De Bringas, Asier, «La Clínica Jurídica Loiola: un proyecto de lucha por la justicia social», *Oñati Socio-legal Series*, op. cit., p. 491.

[12] PABÓN MANTILLA, Ana & PINZÓN MEJÍA, Diego, «La experiencia de la Clínica Jurídica de derechos humanos e interés público. El caso de la garantía de los derechos de niños y niñas con discapacidad en el municipio de Bucaramanga», *ADVOCATUS*, 2016, VOL. 14, num. 27, pp. 17 to 34.

[13] Authors cited in footnotes 5 to 12 are related or has participated in a specific legal clinic in Spain using one of the concepts described *ut supra* to define the clinical services.

[14] See Blázquez Martín, Diego, «Apuntes acerca de la educación jurídica clínica», *Universitas. Revista de Filosofía, Derecho y Política*, op. cit., pp. 44.

[15] However, this situation also generated a major specialization of several different legal clinics such as the CEDAT de la Universidad Rovira i Virgili de Tarragona, Clínica Jurídica de Dret al Dret de la Universidad Autónoma de Barcelona, *Clínica Jurídica per la Justícia Social* (Facultad de Derecho de la Universidad de Valencia,) Clínica Legal de la Facultad de Derecho de la Universidad de Alcalá or Clínica Jurídica Justicia y Derechos Humanos Professor Juan Antonio Carrillo Salcedo de la Universidad Pablo de Olavide de Sevilla.

As previously said, clinical legal education is commonly understood from the projection of its actions or services. Above all, a practical and real vision of law is provided to the students.

Therefore, it is possible to affirm that clinical legal education becomes especially suitable from the perspective provided by procedural law. Together with forensic practice, legal clinics may achieve other objectives such as social transformation, ethical and professional development of future legal professionals[16] and their awareness towards social justice.[17] In other words, clinical legal education is linked to its rationality and the social commitment of the future jurist doctor.

However, it is possible to sustain a double limitation of the clinical method, both in its pedagogical and social function[18] and define how the clinical pedagogical function will be implemented to achieve the social one.

The standards that inform clinical methodology logically assume the parameters previously designed by other disciplines such as pedagogy or didactics.[19] This leads to search a specific methodology that fitted the legal

[16] About the practice of Law and the acquisition of ethical standards at the University stage see García Añón, José, «La integración de la educación jurídica clínica en el proceso formativo de los juristas, en *REDU: Revista de Docencia Universitaria*, 2014, Vol. 12 (3), p. 158.

[17] Regarding the connection between Social Justice and legal clinical education, see WILSON, Richard, «La educación clínica como un medio para mejorar el acceso a la justicia en países en desarrollo con democracias incipientes», en *Enseñanza clínica del derecho. Una alternativa a los métodos tradicionales de formación de abogados*, (Villarreal y Courtis, eds.), Instituto Tecnológico Autónomo de México D.F., 2007, pp. 225 to 245.

[18] De Prada Rodríguez, Mercedes, Callejo Carrión, Soraya & López De Osa Escribano, Pilar, «La Clínica jurídica Villanueva: función social y pedagógica del aprendizaje del Derecho», en *Reduca*, op. cit., p. 1 to 15.

[19] To this end, Spanish Royal Decree 1393/2007, of October 29, which establishes the organization of official university education, far from providing conceptual clarity, encourages an inappropriate terminological confusion and do not provide legal and conceptual security to the matters it regulates. In this way, the concept of competences has a generously (See Anexo I of the abovementioned normative) legal implementation, constituting the essential legal framework that allows obtaining the bachelor's degree (even when the final configuration of competences transcends the field of knowledge of Procedural Law, it is possible to affirm the Legislator vision, avoiding settling the standards of concepts related to the teaching-learning process). Therefore, the learning results are relegated to their interpretive consideration to obtain, as a mere unit of measurement, the European credits (ECTS) related to each bachelor's degree (Annex 1, section 8.2 of the aforementioned normative). Learning results are assessed according to the acquisition of skills and competences under Spanish Law.

field regarding clinical education because the characteristics that inform the method under study, teaching and learning programs, differ substantially[20] when it is considered from the legal perspective.[21]

This leads to consideration of the necessary instruments that will make it possible to approach a methodology adjusted to the idiosyncrasies of the legal field.

The characteristics that inform the method under study, in one and other disciplines, differ substantially. Jurists are used to the firm ground provided by the principle of legal certainty, especially in the determination of the essential legal concepts. When the clinical method in the legal field approaches those disciplines, the conceptualization of the basic elements that inform the method is characterized, precisely, by its great diversity.

As soon as the elementary concepts of competence, learning objects and learning outcomes or methodology are confronted from the legal perspective, the diversity, rich in nuances, of the conceptualization provided by those disciplines may clash head-on with the necessary primary concreteness that should inform the study of legal sciences.[22]

By way of conclusion, it is necessary to develop and agree a common concept of clinical legal education, and its standards, defining the different applicable methodologies together with the objectives and results that are intended to be achieved.

If the clinical legal education model is linked to the teaching and learning methodology, the didactic objectives and its results should be tied to it, reserving the development of the meta didactic objectives or purposes, to a

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[20] Adam, Stephen, «Using Learning Outcomes», Report *for the Bologna conference on learning outcomes*, Edinburgh, 2004, p. 6.

[21] As an example, see the conceptualization of competences and learning basis according to the Spanish legal system as developed by DEL REAL ALCALÁ, J. Alberto, «Sobre las competencias y resultados de aprendizaje en Derecho», *Nuevas formulaciones de los contenidos docentes* (Fombona Cadavieco, Javier y Caldevilla Domínguez, David, Coords.), Mc Graw Hill Education, España, 2014, pp. 215 to 220; Jérez Yañez, Óscar, *Los resultados de aprendizaje en la educación superior por competencias*, Universidad de Granada, 2011, p. 55; Juandó Bosch, Josep & Pérez Cabaní, María Luisa, «La evaluación de los resultados de aprendizaje», *Evaluación y calidad en la universidad, Simposio internacional: 27 y 28 de septiembre de 2010*, Huelva, 2010, pp. 265 to 270.

[22] An example of this is the implicit difficulty in conceptually distinguishing between competencies and learning outcomes in accordance with the Spanish legal system.

certain conception of law[23] and the firm commitment of juris doctor to their social responsibility.

In this regard it may be necessary to assume the configuration of didactics and legal methodologies and differentiate them from their correlatives in educational sciences using those educational parameters that may be applicable, in all or in part, to the legal sciences.[24]

Conflicts and clinical treatment

As it was previously stated, the categorization of the conflicts that legal clinic may deal with depend on its degree of functionality, being always preferable a reasonable specialization and coordination between the different existing legal clinics.

To this extent, Spanish legal clinics are generally designed to promote human rights,[25] especially regarding social conflicts, marginalization of people or groups of people, from the higher consideration of the right to access to justice.[26]

Conflicts that may receive clinical legal treatment are particularly complex, as they are not generally configured in a linear manner: composition is not generated by the mere application of previously defined jurisprudential standards.

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[23] Blázquez Martín, Diego, «Apuntes acerca de la educación jurídica clínica», *Universitas. Revista de Filosofía, Derecho y Política*, op. cit., p. 50.

[24] As an example, the necessary differentiation between the concepts of legal clinic and service learning can be assessed, from the perspective of the existing tangential lines between both concepts. To this regard, see Gascón Cuenca, Andrés, «La evolución de la enseñanza jurídica clínica en las universidades españolas: oportunidades y desafíos de la litigación estratégica en las clínicas de derechos humanos», *Revista de Educación y Derecho*, op. cit., p. 4.

[25] Regarding the implementation of Legal Clinics in Spain, GARCÍA AÑÓN, José, «La evolución de la Educación Jurídica Clínica en España», *Revista de Educación y Derecho*, 2014 - 2015, num. 11 pp. 1.

[26] Blázquez Martín, Diego, Cuenca Gómez, Patricia y Iglesias Garzón, Alberto, *Guía sobre cómo crear, organizar, gestionar y conducir una clínica jurídica en una Facultad de Derecho*, Ilustre Colegio de Abogados de Madrid, op. cit., p. 10.

Indeed, the controversies submitted to clinical knowledge tend to transcend the mere underlying legal conflict in a subjective or plurisubjective legal relationship.

Both the conflict, as well as its eventual judicial resolution present numerous edges that encourage the intervention of other professions or different disciplines[27] may contribute to a comprehensive treatment of the proposed clinical composition.

Likewise, a specific vision of procedural law has been provided, strategic litigation, perhaps adjusted to the reality of the typology of conflicts discussed. Certainly, as Blázquez Martín, Cuenca Gómez, and Iglesias Garzón,[28] point out "in other legal systems, activities of public interest are usually reduced to the procedural sphere in those cases in which we find possibilities of legitimation or participation open to more or less numerous groups".

The traditional scheme of judicial resolution of disputes allows us to affirm how the legal system pre-establishes the solution designed by the legislator in the event of a controversy with legal significance. Therefore, it is possible that said situation be evaluated according to legal criteria due to the effects that emanated from it.[29]

In effect, the defence of people's rights, generally, must be enforced through a court action[30] under the public authority of the judiciary, impartial and independent, following due process of law, considered as the procedural

[27] Also see Mugarra Elorriaga, Aitziber y Martínez De Bringas, Asier, «La Clínica Jurídica Loiola: un proyecto de lucha por la justicia social», *Oñati Socio-legal Series*, op. cit., p. 496.
[28] Blázquez Martín, Diego, Cuenca Gómez, Patricia y Iglesias Garzón, Alberto, *Guía sobre cómo crear, organizar, gestionar y conducir una clínica jurídica en una Facultad de Derecho*, Ilustre Colegio de Abogados de Madrid, op. cit., p. 46. A good example may be article 125 of the Spanish Constitution, arts. 6 to 11 Spanish Civil Procedure Rules, articles 19.1 and 20.3 of the Spanish Organic Law of the Judiciary Power, in concurrence with arts. 101, 102, 110, 270 and 281, 782.1 of the Spanish Criminal Procedure Rules. However, a broad conception of the defence of the public interest does not have to be limited to these procedural aspects.
[29] Almagro Nosete, José, *Consideraciones de Derecho procesal,* Bosch, D.L., Barcelona, 1987, p. 121.
[30] Moreno Catena, Víctor, *Sobre el contenido del derecho fundamental a la tutela efectiva*, Poder judicial, 1984, num. 10, pp. 41 to 46.

mechanism that brings Justice to the citizenship. The application of law also means the preservation of the legal system[31].

Consider some examples about how legal clinics may contribute to this extent.

Article 125 of the Spanish Constitution constitutionalizes the engagement of citizens in popular action and the participation in the administration of justice through the institution of the jury. The popular action is a nineteenth century legal mechanism that allows any Spanish citizen to bring a case to courts as long as the case is in the larger public interest. Under the Spanish Code of Criminal Procedure, the exercise of criminal action, commonly understood as the right to accuse a person alleged to have committed an offence punishable by law, corresponds either to the ones directly offended or harmed by the crime, or to any citizen through the exercise of popular action, as provide by article 270 LEcrim. Thus, the popular action (*quivis ex populo*) is connected to the prosecution of crimes that present a wider social impact.[32]

Also, similar institutions exist in fields outside the criminal proceedings, for example, issues related to Urban Planning Law (arts. 4 and 48 of Legislative Royal Decree 2/2008 of 20 June, by which is approved the Consolidated Text of the Land Act) in connection to environmental law.

The connection of popular action in both criminal and environmental law with the right to access to justice confirms the suitability of the clinical treatment of conflicts to anticipate potential legal action where clinicians may participate in the design of the procedural strategy prior to take court action.

A similar approach may be considered regarding other legal fields such as consumer law, health law, or the expanded legal legitimacy established for associations specialized on equality rights (articles 11 and 12 of Spanish Code of Civil Procedure).[33] In other words, the clinical treatment of those conflicts

[31] Cortés Domínguez, Valentín, «El proceso», en *Introducción al Derecho* Procesal (con Moreno Catena), Tirant lo Blanch, 2014, p. 224.
[32] Moreno Catena, Victor, «La acción popular» en *El Proceso Penal*, Tirant Online, Valencia, 2000.
[33] These premises are presented considering the scope of some legal clinics, such as Clínica Jurídica Justicia y Derechos Humanos Professor Juan Antonio Carrillo Salcedo de la Universidad Pablo de Olavide de Sevilla but probably is not extensible to all legal projects developed.

may be developed from the perspective of the three essential concepts that inform procedural law: jurisdiction, legal remedies, and procedure.

Undoubtedly, there are other dispute composition mechanisms – alternative dispute resolution methods (ADR) – that may inform the legal clinical services in Spain. This proposal brings some positive aspects. The promotion of ADR should be promote at the base of the legal educational system,[34] abandoning a strictly adversarial point of view at the conflict's resolution. Agreements between parties at the legal clinical stage optimize clinical resources and increase or may increase a prompt satisfaction of claims.[35]

However, the legal requirements to act as a mediator at the Spanish systems requires that a fully authorized professional participates during the mediation sessions at the clinical stage. Recently adopted by some public institutions, mediation in public services may help with this task by subscribing agreements with the legal clinics interested on the promotion of ADR as a suitable mechanism to resolve controversies.

Therefore, the clinical treatment of a legal conflict will favour the promotion of the public interest, but it should not be conceived as a service that only reaches the doors of the courts of justice. Alliances with the so-called clearing houses[36] and other entities become crucial to grant effectiveness to the comprehensive legal treatment of the conflict.

On the other hand, the planning of clinical work linked to the issuance of reports and legal opinions has an immediate reflection on the training of students, bringing its conclusions available to the Society. Furthermore,

[34] However, the impulse pretended by different legal bodies regarding the promotion of ADR in the Spanish legal system, it is still residual in the practice of Law.

[35] The introduction of ADR methods through the intervention of a public mediation service, such as the one developed by Diputación de Sevilla, would be an interesting instrument in providing greater efficiency in the composition of conflicts, especially those who present a community and convivial perspective.

[36] *For a more extended point of view about Clearing Houses in Spain, see Sánchez Gómez, Raúl, «La implementación del pro-bono en la cultura jurídica española como sistema de acceso a la justicia», en Práctica de tribunales: Revista de derecho procesal civil y mercantil, 2019, num. 136, pp. 8.*

guidelines designed for a specific type or legal action strengthens its administrative and judicial composition.[37]

Likewise, the consideration of clinical work is especially useful to promote social transformation through the more effective protection of fundamental rights and guarantees. There is no better approach in the design of a procedural strategy than the concatenation of similar cases resolved judicially in a certain direction.

However, the scope of litigation at Spanish legal clinics has been considered, general and exclusively, from a strategic point of view. This conception of clinical work can lead to a deviation in the clinical methodology used, assuming that the ordinary and usual cases resolved by the courts follow the procedural standards that inform the more complex strategic cases.

The contribution of legal clinics to future professionals on values related to public services and ethical standards cannot be separated from a wider conception of procedural law. It is not recommended to train future legal practitioners outside of the discipline. The procedural strategy must be at the clinical worktable, as long as the resolution conflicts and enforcement still have a jurisdictional nature. Disregarding these arguments may produce serious dysfunctions if, finally, the conflict turns into a legal action at the jurisdictional stage.

Conclusion

Clinical legal education must not be exclusively linked to professional advocacy, considering the wide range of legal professions available in the Spanish legal market.

The conceptualization of Spanish legal clinics is reasonably linked to their functionality, although there is still a long way to go in defining its pedagogical functions as clinical education model based on its own legal system. A specific methodology that informs the clinical method should be developed, assuming

[37] As an example, see Sánchez Gómez, Raúl, «La reclamación por asistencia sanitaria pública en casos de enfermedades infecto-contagiosas. Estrategia procesal y sistema de recursos», en *Revista Aranzadi Doctrinal*, 2015, num. 10, pp. 153 to 190.

the premises disposed by other disciplines such as didactics or pedagogy, but considering the concrete circumstances of the legal field.

As previously stated, the procedural strategy must be at the clinical worktable, as long as conflict resolution and enforcement still have a jurisdictional nature. Disregarding these arguments may produce serious dysfunctions if, finally, the conflict turns into a legal action at the jurisdictional stage. To this end, the clinical treatment of the legal conflict must also use the perspective provided by procedural law, especially in terms of the effective and efficient resolution of conflicts.

There are great spaces in Spanish law where legal clinics may collaborate in order to perform a procedural treatment of the conflict submitted to clinical knowledge.

To this extent, clinical experts and students may consider the three basics concepts that inform procedural law: jurisdiction, legal remedies, and procedure, preparing the case before going to trial. A good preparation of cases with a common nexus may avoid action before the court, promoting access to justice by implementing either procedural strategies or ADR. However, considering how ADR is regulated in the Spanish system, the intervention of ADR accredited professionals is required.

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Innovative Teaching Methods to Mainstream Gender Equality in Legal Education

Barbara Pozzo*

Abstract

In many countries, data show that women are slowly overtaking men in law schools. Nevertheless, accounts from American law schools often report that women find law school a hostile atmosphere. Moreover, women remain significantly underrepresented in positions of leadership and power in all areas of the profession.

Legal education has followed different paths in different countries to cope with this reality. Thus, while law schools in the United States have developed specific programmes to transform legal education by opening up spaces for feminist legal research and have created research centres specifically dedicated to women's and gender studies, this seems far from possible in Europe, where law schools maintain a very traditional curriculum.

This article aims to investigate the differences between legal education in the United States and Europe, shedding light on the various initiatives undertaken to incorporate gender awareness into legal education.

The ultimate goal will be to examine innovative methods of teaching law to achieve the integration of gender equality into legal education.

Keywords: Legal education, gender, comparative law.

* Professor of Comparative Law, Università dell'Insubria (Como – Italy); President of the Italian Society for Research in Comparative Law (SIRD, Società Italiana per la Ricerca nel Diritto Comparato); Member of ELFA's Board.

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Introduction

The presence of women in the legal profession is increasing in the United States as well as in Europe.

According to the Profile of the Legal Profession 2021[1] published by the American Bar Association

> the gender numbers have changed drastically over the past half-century. From 1950 to 1970, only 3% of all lawyers were women. The percentage has edged up gradually since then – 8% in 1980, 20% in 1991, 27% in 2000, 37% in 2021.[2]

Numbers will further grow in the coming years "as more women, and fewer men, are enrolling in law school every year". [3]

Similarly, a recent study commissioned by the European Parliament states that

> the increase in female law graduates and lawyers does not only change the composition of the professions numerically, but also the image and self-perception in the professions. [4]

A closer look also reveals some clear and noticeable differences in the gender presence in the legal professions. In many European countries such as Italy, France, Germany, Austria, Switzerland, there is a sharp increase in the presence of women especially in the judiciary, while among practicing lawyers the top positions in law firms are still largely held by men.[5] In the United States, the

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[1] American Bar Association, *Profile of the Legal Profession 2021,* https://www.americanbar.org/news/reporter_resources/profile-of-profession/

[2] *Profile of the Legal Profession 2021,* cit., p. 12.

[3] Ibidem.

[4] Yvonne Galligan, Renate Haupfleisch, Lisa Irvine, Katja Korolkova, Monika Natter, Ulrike Schultz, Sally Wheeler, *Mapping the Representation of Women and Men in Legal Professions Across the EU,* Directorate General for Internal Policies, Department for citizens' rights and constitutional affairs legal and parliamentary affairs, European Union, Brussels, 2017, http://www.europarl.europa.eu/studies, p. 22.

[5] For France compare: C. Bessière C., S. Gollac, M. Mille, *Féminisation de la magistrature: quel est le problème?,* in *Travail, genre et sociétés*, 2016/2 n° 36, pp.175 - 180; For Italy compare: Consiglio Superiore della Magistratura, Ufficio Statistico, Distribuzione per genere del personale di magistratura, February 2020, https://www.csm.it/documents/21768/137951/Donne+in+magistratura+%28aggiorn.+marzo+2020%29/26803fce-0c00-a949-d70d-0bdcfc5f30e3; for Germany compare: J. Wagner, *Ende der Wahrheitssuche, Justiz zwischen Macht und Ohnmacht,* Munich, C.H.Beck.

federal judiciary is overwhelmingly dominated by judges who are white and male[6], although even here things are changing as in 1980, only 5% of all federal judges were women, while in 2021, that percentage was 27.8%.[7]

In Europe, women's preference for a career in the judiciary can be explained by the guarantees that they obtain by becoming magistrates: from maternity leave to more flexible working hours that are – at least, in general terms - more suited to the rhythms that best reconcile with the desire to have a family. This is particularly true in Civil Law Countries because the judiciary provides the advantages of the civil service, while in England and Wales this step was taken only in 1997.[8] An additional appeal of the judiciary is that it offers a relatively elevated position even if no career steps are taken, and little competitive pressure.[9]

Despite the differences still existing in the legal professions between men and women, in Europe there is no widespread feeling that the lack of success of women derives from a discrimination that originates in the faculty of law. On the contrary, a review of the last forty years American literature seems to point out that law schools are at the origin of sex discrimination in the legal professions, blaming a certain type of higher education for the failure of women as lawyers.[10] In the eyes of a European observer, this stance seems particularly

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2017; Rolf Lamprecht, *Nicht nur Justitia ist weiblich,* in Süddeutsche Zeitung, 23. April 2017, https://www.sueddeutsche.de/politik/gender-debatte-nicht-nur-justitia-ist-weiblich-1.3472410; for Switzerland compare: Ludewig, Revital, and Kathleen Weislehner. *Einstieg, Aufstieg, Entfaltung: Drei Generationen von Richterinnen in der Schweiz*. Bern, Stämpfli, 2007; for Austria: Petra Tempfer, *Verweiblichung der Justiz: Das Recht ist weiblich,* in Wiener Zeitung, 3 November 2013, https://www.wienerzeitung.at/nachrichten/chronik/oesterreich/581571_Das-Recht-wird-weiblich.html?em_no_split=1

[6] *Profile of the Legal Profession 2021,* cit., p. 68.

[7] *Profile of the Legal Profession 2021,* cit., ibidem.

[8] *Mapping the Representation of Women and Men in Legal Professions Across the EU,* op.cit., p. 25.

[9] *Mapping the Representation of Women and Men in Legal Professions Across the EU,* ibidem.

[10] R. Bader Ginsburg, *Women's Work: The Place of Women in Law Schools,* 32 J. Legal Educ. 272 (1982); D. Fossum, *Law and the Sexual Integration of Institutions: The Case of American Law Schools,* 7 ALSA F. 222 (1983); C. McGlynn, *Women, Representation and the Legal Academy,* Legal Studies, Volume 19, Issue 1, March 1999, pp. 68 – 92; C. Wells, *Working out women in law schools*, Legal Studies, Volume 21, Issue 1, March 2001, pp. 116 – 136; S. Bashi, M. Iskander, *Why legal education is failing women*, in *Yale JL & Feminism* 18 (2006), 389-449; C. Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric that Encourages Practical Change*, The Modern American, Fall 2008, 36-41; Purvis D., *Female Law Students, Gendered Self-*

striking given the fact that it is precisely in the United States where a movement of thought has developed aimed at emphasizing the contribution of feminism to legal studies.[11]

The article aims at investigating the origins of women's access to law schools in Europe and in the United States, to understand whether there have been substantial differences between the United States and Europe in the admission of women to the study of law (Part 2). It then analyzes the current differences in the legal education system on both sides of the ocean to determine if these differences are at the origin of the perceived gender gap in legal education (Part 3). Finally, it considers the current debate on possible reforms that could be introduced to make the attendance of law courses more attractive, but also more effective, not only for women, but more generally for all students (Part 4).

The admission of women to legal education: a look into the past

The admission of women to legal education is part of the more general debate concerning the opening of higher education to women that developed at the end of the 19th century in Europe as well as in the United States.[12] The reasons to exclude women from access to legal education and to legal professions were formulated in various ways from one jurisdiction to the other, but at the same time represented common *traits* that overcome existing differences between Common Law and Civil Law Countries.

In Europe, the admission of women to higher education depended heavily on the national legal regime in force, but also on the autonomy recognized to universities.

Evaluation, and the Promise of Positive Psychology, 2012 *Mich. St. L. Rev.* 1693 (2012); R.A. French-Hodson, *The continuing gender gap in legal education,* The Federal Lawyer, July 2014, p. 81.

[11] C. Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School",* in *Journal of Legal Education,* March/June 1988, Vol. 38, No. 1/2, pp. 61-85.

[12] D. Kelly Weisberg, Barred from the Bar: Women and Legal Education in the United States 1870-1890, 28 J. Legal Educ. 485 (1977); Donna Fossum, *Law and the Sexual Integration of Institutions: The Case of American Law Schools,* 7 ALSA F. 222 (1983); Guido Alpa, *L'ingresso della donna nelle professioni legali,* in *Rassegna Forense,* 2010/2 pp. 223-244; Albisetti, James C. *Portia Ante Portas: Women and the Legal Profession in Europe, ca. 1870-1925*. Journal of Social History, vol. 33 no. 4, 2000, p. 825-857; Corcos C. A., *Portia Goes to Parliament: Women and Their Admission to Membership in the English Legal Profession,* Denver University Law Review, 1998, vol 75, 2, pp. 307-417.

From a comparative law perspective, it is interesting to underline that women's access to universities in Europe was not necessarily linked with the conquest of a role in the public space through the gaining of voting right.[13]

Just to give a few examples, French universities gradually opened their courses to women in the second half of the 19th century, but it is only in 1880,[14] when the admission of girls to high schools and the possibility to get a *baccalauréat* was established by law,[15] that women began to gradually flow to universities.[16] Notwithstanding this first success that opened a new space towards autonomy and independence for French women, they had to wait until 1944 to gain voting rights.[17]

In Italy, the official recognition of the right for girls to enroll at universities was introduced few years after the Unification of the Italian Kingdom, as early as 1875 by the Bonghi Decree,[18] whose article 8 provided that "[w]omen can be enrolled in the register of students and auditors, if they present the required documents". However, in addition to a "certificate of good conduct", the documents required for enrollment at the university also included the "original high school diploma", a requirement that was difficult for girls to obtain, since

[13] See *The Struggle for Female Suffrage in Europe: Voting to Become Citizens,* Blanca Rodríguez-Ruiz and Ruth Rubio-Marín (Eds.), Leiden/Boston, Brill. 2012.
[14] N. Tikhonov Sigrist, *Les femmes et l'université en France, 1860-1914*. Histoire de l'éducation, 2009, pp. 53; Carole Lécuyer, *Une nouvelle figure de la jeune fille sous la IIIe République: l'étudiante*. Clio. Histoire, femmes et sociétés, 4, 1996, p. 166-176; Jean-François Condette, *Les "cervelines" ou les femmes indésirables: l'étudiante dans la France des années 1880-1914*. Carrefours de l'éducation, 15, 2003, p. 39-61.
[15] *Loi sur l'enseignement secondaire des jeunes filles* 21 décembre 1880, called *"Loi Camille Sée"* after the name of Minister who proposed it.
[16] Carole Christen-Lécuyer, *Les premières étudiantes de l'Université de Paris*. Travail, genre et sociétés, 2000/2 N° 4, pp. 35-50, who points out that the *Loi Camille Sée* was aimed more to train cultured wives and mothers than future college students.
[17] Art. 17 of the *Ordonnance du 21 avril 1944 – portant organisation des pouvoirs publics en France après la liberation,* signed by Charles De Gaulle, Journal Officiel n° 34 du 22 avril 1944, p. 325-327.
[18] Regio Decreto n° 2728 del 3 ottobre 1875, in Gazzetta Ufficiale del Regno, 22 October 1875 n. 247.

their access at high schools was regulated only in 1883.[19] Women's suffrage in Italy was introduced only on the 1st of February 1945.[20]

We find a different situation in Germany, where voting right to women was established already in 1918,[21] at the end of World War I, much earlier than in the two other legal systems already taken into consideration, but where women struggled to be admitted to universities for a long while.[22] This is most probably due also to the circumstance that during the 19th century, German higher education was strongly characterized by the idea that university years were the test of whether inside the young person there was a "man".[23] German universities were organized in fraternity-type student associations, the so-called *Studentenverbindungen* that carried out a model of masculinity, which had to test itself with the sense of honor, with fencing and duels, but often also with extraordinary drinks, which put a strain on the admission of women. [24]

In this context, immoral excess and dissipation were to be considered part of the educational process and the price of academic freedom according to the theologian Friedrich Schleiermacher, an aspect that distanced the girls even more from the university environment.[25]

In Germany, as in Italy and France, a further difficulty derived by the fact that to be admitted to university, a high school diploma was needed: in Italy, this was called *maturità*, in France *baccalauréat*, in Germany: *Abitur*. As girls'

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[19] G. Gaballo, *Donne a scuola. L'istituzione femminile nell'Italia post-unitaria*, in *Quaderno di storia contemporanea*, vol. 60 (2016), p. 115; S. Uliveri, *La donna egli studi universitari nell'Italia post-unitaria,* in *Cento anni di Università. L'Istruzione superiore in Italia dall'Unità ai nostri giorni,* Napoli, 1986, Ed. Scientifiche, p. 224; A. Lirosi, *Libere di sapere. Il diritto delle donne all'istruzione dal Cinquecento al mondo contemporaneo*, Roma, Edizioni di Storia e Letteratura, p. 58 ss.

[20] Decreto Legislativo Luogotenenziale 1 febbraio 1945, n. 23, *Estensione alle donne del diritto di voto*, in Gazzetta Ufficiale, Serie Generale n.22 del 20 febbraio 1945

[21] *Verordnung über die Wahlen zur verfassungsgebenden deutschen Nationalversammlung* vom 30. November 1918.

[22] Patricia M. Mazón, *Gender and the Modern Research University, The admission of women to German Higher Education,* 1865-1914. Stanford University Press, Stanford. 2003.

[23] Mazón, op. cit., p. 19, quoting the historian Friedrich Paulson.

[24] Elm, Ludwig, Dietrich Heither, and Gerhard Schäfer. *Füxe, Burschen, Alte Herren*. *Studentische Korporationen vom Wartburgfest bis heute*, Köln., PapyRossa, 1992; Alexandra Kurth. *Männer-Bünde-Rituale: Studentenverbindungen seit 1800*. Vol. 878. Frankfurt/New York, Campus Verlag, 2004.

[25] Mazón, op. cit., p. 35.

schools were generally not offering the *Abitur*, this was an additional obstacle to women's admission to universities.[26]

Education was not and is not of federal competence in Germany, so that important differences were possible among the different *Länder*: Baden opened its universities to women in 1900, Bavaria in 1903, Württemberg in 1904, Saxony in 1906, Thuringia in 1907, Hesse and Prussia in 1908, Mecklenburg in 1909.[27]

United Kingdom offers us again a significant different picture, partly deriving by the status of universities and colleges that render the British system of higher education unique in the European context. Just to quote the most famous two, Oxford granted women full membership to the University in 1920, but Cambridge University did not grant degrees to women until the late 1940s, the last British university to do so, more than twenty years after women had achieved the right to vote.[28]

Even more puzzling appears to European eyes the situation of American women. The legal right of women to vote was established in the United States nationally in 1920, although even before, women were enfranchised in different states: in Wyoming Territory in 1869, in Utah in 1870, in Colorado in 1893 and Idaho in 1896.[29]

Nonetheless, it was only in the late 1960s and early 1970s that two laws were enacted to prohibit sexually discriminatory admissions by the nation's law schools.[30] It was only in 1972 that the American Congress passed the Higher Education Act, which prohibited sex discrimination in the employment as well

[26] Barbara De Nicolò, Johanna Luggin J.,*"Revolution"in der Bildung: Frauen an die Universitäten (2. Hälfte 19. Jh. bis zum 1. Weltkrieg),* Historia.scribere, 2009-03-01 (1), p. 344.
[27] De Nicolò, Luggin, *op. cit.,* p. 348.
[28] Krista Cowman, *Female Suffrage in Great Britain,* in *The Struggle for Female Suffrage in Europe*, cit., p. 273.
[29] Sebastian Till Braun and Michael Kvasnicka. *Men, Women, and the Ballot - Woman Suffrage in the United States* (March 1, 2009). Ruhr Economic Paper No. 93, Available at SSRN: https://ssrn.com/abstract=1358466 or http://dx.doi.org/10.2139/ssrn.1358466
[30] Fossum, *Law and the Sexual Integration of Institutions: The Case of American Law Schools,* cit., p. 224.

as in the admissions policies and practices of all higher educational institutions receiving any federal aid.[31]

In this already complex situation, the study of law seemed to be the most unfeminine career, even more than other professions full of responsibilities, like the study of medicine.[32] As it has been suggested by a French commentator, in continental Europe, the faculty of law remained for a long time "a territory reserved for men".[33] In most European countries, women gained access to medical schools before they could study law, in some case several decades earlier.[34] In Austria, for example, women could not matriculate in the legal faculties of the universities until 1919, while the medical profession was opened to women already in 1895.[35] Most likely it was believed that women were – by their very nature – capable of caring for other human beings, especially if they were other women or children. The society of the time, on the other hand, was much less inclined to consider that women had that rationality and that capacity for abstract logic, required for the legal profession.

Once the university qualification was obtained, in fact, women encountered enormous difficulties to be admitted to practice law,[36] as even when women managed to have access to the faculties of law, the problem of access to the profession of lawyer and judge persisted.[37]

In the United States, the analysis of the situation needs to bear in account that during the 19th century a law school degree was not necessary to enter the legal

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[31] Fossum, *Law and the Sexual Integration of Institutions,* cit., loc. cit.
[32] Corcos, *Portia Goes to Parliament: Women and Their Admission to Membership in the English Legal Profession,* cit., p. 319 ss.
[33] Christen-Lécuyer, *Les premières étudiantes de l'Université de Paris*, op.cit., p. 35: *"Certaines facultés s'ouvrent plus facilement aux femmes que d'autres: le droit demeure longtemps un territoire réservé aux hommes".*
[34] Albisetti, *Portia Ante Portas: Women and the Legal Profession in Europe, ca. 1870-1925*, cit., p. 825.
[35] Albisetti, op.cit., loc.cit.
[36] Albisetti, op. cit., p. 829 ff., with references to the Italian, Belgian, French, Swiss, British, Russian, German, Austrian and other European legal systems.
[37] L. Schwartz, S. Homer, *Admitted But Not Accepted, Outsiders Take an Inside Look at Law School,* 5 Berkeley Women's Law Journal 1 (1989).

profession.[38] Before the birth of modern law schools,[39] the admission to the legal profession was through a period of apprenticeship under the supervision of an experienced attorney and depended on the given context existing at State level. The first woman admitted to the bar was Belle Mansfield in 1869 in Iowa, but in other States like Illinois,[40] women were refused admittance to the bar in the same years solely on the ground of sex.[41]

As far as universities are concerned, it was not until 1972 that all ABA accredited schools removed bans on admitting women students.[42] Before that day, each university followed its own admission policy. Washington University in St. Louis admitted women already in 1869, Boston University Law school admitted women from the day it opened in 1872, Stanford in 1893, Boalt Hall – Berkeley in 1894,[43] Yale Law School in 1919,[44] Columbia in 1927,[45] but Harvard Law School admitted women only in 1950, when Dean Erwin Griswold[46] reassured anxious alumni that this development was not very important or very significant:

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[38] Paul D. Carrington, *One law: the Role of Legal Education in the opening of the legal profession since 1776,* in *Florida Law Review,* vol. 44, September 1992, n. 4, p. 501, p. 507 ff; Albert J. Harno, *Legal Education in the United States, A Report prepared for the Survey of the Legal Profession,* Clark, New Jersey, The Lawbook Exchange Ltd., 2004, p. 16 ff.

[39] Grant Gilmore, *The Ages of American Law*, Yale, Yale University Press, 1977, 2nd edition, 2014, p. 38 ff.

[40] Weisberg, Barred from the Bar, cit., p. 485.

[41] Fossum, *Law and the Sexual Integration of Institutions,* cit., p. 224.

[42] See Cynthia Fuchs Epstein. *Women in Law.* New York, Basic Books, 1981.

[43] Daniel R. Coquillette & Bruce A. Kimball, *On the Battlefield of Merit. Harvard Law School, the First Century,* Cambridge, Massachusetts, Harvard University Press, 2015, p. 608.

[44] In 1885, Yale Law School accidentally admitted its first female student, Alice Rufie Blake Jordan, who had applied using only her initials and was assumed to be a man. With the support of the Law School, but against the wishes of the Corporation, Jordan successfully completes her coursework and is awarded a degree a year later. After her graduation, the Corporation officially stipulated that courses were only open to men unless both sexes were specifically included. Women were then officially admitted into Yale Law School in 1919 (https://celebratewomen.yale.edu/history/timeline-women-yale).

[45] Barbara Aronstein Black. *Something to Remember, Something to Celebrate: Women at Columbia Law School*. Columbia Law Review, vol. 102, no. 6, 2002, p. 1451.

[46] In the famous movie *On the Basis of Sex*, directed by Mimi Leder in 2018 and based on the life of Supreme Court Justice Ruth Bader Ginsburg, there is an interesting, if not folkloristic, representation of Dean Griswold, who denied to RBG the permission to complete her Harvard law degree with classes at Columbia Law School in New York. RBG is then obliged to transfer to Columbia, where she graduates at the top of her class.

> Most of us have seen women from time to time in our lives and have managed to survive the shock. I think we can take it, and I doubt that it will change the character of the School or even its atmosphere to any detectable extent.[47]

Regardless of the moment in which women were admitted to the legal profession in the individual legal system, it is interesting to underline how the justifications adduced to explain their exclusion appear very similar in every context.

The first argument put forward to exclude women concerned the interpretation of the legal regime in force, which did not clearly specify that women could be admitted,[48] or that by indicating only the male gender as the referent for the norm, had to be interpreted to include female gender as well.[49]

Another argument developed to bar women from the profession was their "natural inability" to "think like a lawyer",[50] as they were thought to be more emotional than rational and logical.[51] Therefore, "judgement would no longer be impartial if women were present in the courtroom."[52] Women were also "naturally less combative than men"[53] and didn't have the strength required by the profession.[54]

Social consequences of admitting women to the legal profession were also taken in consideration to inhibit their path. The proper sphere for women was in the home: families and especially children would have suffered from being away from the mother. [55] Italian judges also referred to common sense, to the inconvenience that "gentle sex" took part in the "clamor of public judgments" in which arguments that could embarrass honest women are discussed. [56] A

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[47] Erwin Griswold, *Developments at the Law School,* 1950 Harv. L. Sch. Y.B., 10, quoted in Deborah L. Rhode. *Missing Questions: Feminist Perspectives on Legal Education.* Stanford Law Review, Jul., 1993, Vol. 45, No. 6, p. 1547.
[48] I. Bagno, *Donne e professioni legali tra antico e nuovo regime,* in *Teoria e storia del diritto privato,* 2011/4, p. 1, in particular p. 30.
[49] Alpa, *L'ingresso della donna nelle professioni legali,* cit., p. 233; Weisberg, *Barred from the Bar,* cit., p. 487; Corcos, *Portia goes to Parliament,* cit., p. 312-313.
[50] Corcos, Portia goes to Parliament, cit., p. 329.
[51] Weisberg, Barred from the Bar, cit., p. 489.
[52] Weisberg, Barred from the Bar, cit., p. 492.
[53] Corcos, Portia goes to Parliament, cit., p. 346.
[54] Weisberg, Barred from the Bar, cit., p. 490.
[55] Weisberg, Barred from the Bar, cit., p. 492.
[56] Alpa, *L'ingresso della donna nelle professioni legali,* cit., p.235.

decree of the Court of Cassation of Turin, dated 1884 in order to exclude the application to the bar by Mrs. Linda Poët who had profitably concluded the law school and the period of apprenticeship, sentenced that "it would be unbecoming and villainous (brutto) to see women descending into the arena of the forum, taking part in the midst of the bustle of public procedure, exciting themselves in discussions which easily carry one beyond bounds, and in which one could not show toward them, all the respect which it is proper to observe toward the more delicate sex".[57]

Finally, it is necessary to remember that in all civil law countries that had introduced a civil code following the model of the French Code *Napoléon* of 1804,[58] like Italy and Belgium, married women needed to ask the husband's permission (autorité maritale,[59] autorità maritale[60]) to practice any kind of professional activity,[61] which amounted to a legal incapacity for women who wanted to practice law.

These general rules on the legal capacity of women had long-term repercussions on the ability of women to access any profession, including the legal one.

In France, although a Law of 18th of February 1938 granted married women civil capacity, finally deleting art. 213 of the Code Civil, it was only a law of 1965 that gave women the right to manage their own property and engage in professional activity without the consent of their husbands.[62]

In Germany, where the German Civil Code was promulgated only in 1900, §1354 dealt with the relationship between husband and wife in legal matters as follows: "The man is entitled to the decision in all matters relating to community life." The so-called "obedience paragraph" (Gehorsamsparagraph) remained in force until 1957, when the Law on the Equality of Men and Women in the Field of Civil Law (Gesetz über die Gleichberechtigung von

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[57] Court of Cassation of Turin, dated May 8, 1884, quoted in Louis Frank, *The Woman Lawyer,* 3 CHI. L. Times 120 (1889), p. 133.
[58] A. Desgagné. *Les règles du Code civil relatives aux "pouvoirs" dans le cadre de la famille,* Les Cahiers de droit (1961). 4(3), 50–68.
[59] Art. 213 introduced the "puissance marital" in the French civil code.
[60] Articles 134 to 137 of the Italian Civil Code of 1865 established the *autorità maritale.*
[61] Corcos, *Portia goes to Parliament*, cit., p. 328; Alpa, *L'ingresso della donna nelle professioni legali,* cit., p. 229.
[62] Loi n° 65-570 du 13 juillet 1965.

Mann und Frau auf dem Gebiet des bürgerlichen Rechts) came into force, but it was not until 1977 with the Reform of marriage and family law (Reform des Ehe- und Familienrechts) that the so-called housewives' marriage was replaced with the partnership principle. Until 1977, under the law in force in West Germany, a married woman's right to work was recognized only insofar it was compatible with her marriage and family duties.

In Italy, Parliament passed Law 1176 in 1919,[63] concerning the legal capacity of women which abrogated articles 134 to 137 of the Civil Code of 1865 related to the *autorità maritale*. The same law had a very important provision for the professional future of Italian women because it enabled them to exercise all the professions and to hold jobs in the public administration, except in the Judiciary. It was only in 1963, in fact, that women were admitted to the Judiciary in Italy.[64]

A different perspective must be taken as far as the English Common Law is concerned, where the legal status of married women was governed by the "doctrine of coverture". According to the doctrine of spousal unity or of coverture as set out in Blackstone's "Commentaries on the Laws of England" (1765): "if husband and wife were «one body» before God, they were «one person» in the law, and that person was represented by the husband". This theory was usually given as a reason to deny women the vote and public office under the assumption that a married woman would be represented by her husband. Blackstone's doctrine also had an enormous impact on the evolution of common law rules in the private sphere. Since English law held that a married woman had no legal identity distinct from the one of her husband, this doctrine denied her independent legal existence. At the beginning of the 19th century, under the common law, married women could not access any professional activity without husband's consent. It was only with The Sex Disqualification (Removal) Act of 1919[65] that women were enabled to join the professions and professional bodies, to sit on juries and be awarded degrees and gained access to the legal profession as well.

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[63] Legge n.1176 del 17 luglio 1919, *Norme circa la capacità giuridica della donna,* Gazzetta Ufficiale, 19 luglio 1919, n.172.
[64] Legge 9 febbraio 1963, n. 66, *Ammissione della donna ai pubblici uffici ed alle professioni*, Gazzetta Ufficiale, 19 febbraio 1963, n. 48.
[65] 9 & 10 Geo. 5 c. 71

In conclusion, it can be said that both in Europe and in the United States since the end of the First World War there has been a gradual removal of the impediments that prevented women from pursuing a legal career, even if in some branches, like the Judiciary, the admission of women was postponed until much more recent times. But it was only after the tumultuous '60s, with the birth of a Feminist movement, that universities began to change and became more welcoming to women, who entered law school in increasing numbers.[66]

Women in legal education today

Although the admission of women to law schools and to legal professions was a path full of obstacles, today we have a very different situation, even if stereotypes in legal education die hard. Markedly sexist treatment of female law students seems to have survived for a long while. At some American law schools, professors refused to call on female students except for specific days designated as "Ladies Days" or only to discuss issues perceived as female such as "sexual assault".[67] And "even the formal curriculum was misogynist: a property casebook issued in 1968 stated that "land, like woman, was meant to be possessed".[68]

This link between the female figure and the right to property appears to be recurrent as I still remember to have heard, as a young researcher back in the '90s, an enlightened Italian jurist stating: "property is like a beautiful woman: much cannot be asked of her".

Women seem anyhow to have overcome an infinite series of difficulties, as nowadays statistics show that practically overall women have outnumbered

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66 Elizabeth F. Defeis, *Women in Legal Education Section*, 80 UMKC L. REV. 679 (2012); Loretta De Franceschi, *Documenti del Movimento studentesco per rivoluzionare l'università italiana,* in Andrés Payà Rico, José Luis Hernández Huerta, Antonella Cagnolati, Sara González Gómez, Sergio Valero Gómezset, *Globalizing the student rebellion in the long '68,* 2018, FahrenHouse, p. 153; Jenson Jane, *Le féminisme en France depuis mai 68*, in *Vingtième Siècle, revue d'histoire,* n°24, octobre-décembre 1989, pp. 55-68.

67 Dara E. Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology*, 2012 *Mich. St. L. Rev.* 1693 (2012), in particular pp. 1694-5.

68 Purvis, *Female Law Students,* cit., *ibidem.*

men in law schools. This is true in the United States,[69] as well as in Italy,[70] in France,[71] and practically in all EU Member States.[72]

However, as already mentioned, it is only in the United States that a vast literature has developed, analyzing the reasons why the law school experience seems to be particularly stressful for female students:

> it is clear that for the last few decades, female law students have a markedly different and more negative experience in law school than do their male counterparts".[73]

On the other side, it has been underlined that it is the very ways law schools educate men and women that "actively perpetuate and exacerbate the challenges women face prior and subsequent to their induction into the legal profession as law students".[74]

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[69] In the United States, according to the recent statistics published by ENJURIS (https://www.enjuris.com/students/law-school-women-enrollment-2020.html) in 2016, the number of women enrolled in Juris Doctorate programs moved past 50% for the first time. Female enrollees then proceeded to outnumber male enrollees in 2017, 2018, and 2019. In 2020, women once again outnumbered men in law school classrooms. Specifically, women made up 54.09% of all students in ABA-approved law schools, while men made up 45.70% of law school students. In 2016, the number of women enrolled in Juris Doctorate programs moved past 50% for the first time. Female enrollees then proceeded to outnumber male enrollees in 2017, 2018, and 2019. In 2020, women once again outnumbered men in law school classrooms. Specifically, women made up 54.09% of all students in ABA-approved law schools, while men made up 45.70% of law school students. For a review of the statistics before 2016, compare Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. Legal Educ. 313 (2000)

[70] The Report published by AlmaLaurea in 2021 that refers to data collected in 2020 (https://www.almalaurea.it/universita/profilo/profilo2020) put forward that of the 32360 students who enrolled to a law school, only 39,7% are male, while 60, 3% are female.

[71] Compare Christine Fontanini, Josette Costes, Virginie Houadec, *Filles et garçons dans l'enseignement supérieur : permanences et/ou changements ?* Éducation & formations, n. 77, novembre 2008, p. 64, who pointed out that already in 2007 women were the 65% of the enrolled students of the law schools in France.

[72] *Mapping the Representation of Women and Men in Legal Professions Across the EU,* p. 69 ff.

[73] Dara E. Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology, cit.,, p. 1696;* see also Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow and Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School,* University of Pennsylvania Law Review , Nov., 1994, Vol. 143, No. 1 (Nov., 1994), at 44, where the Authors point out that women were more likely than men to report disorders as a result of law school.

[74] Bashi, Iskander, *Why legal education is failing women*, cit., p. 391.

Finally, this situation seems to reverberate also within the faculty[75], which seems to be the natural consequence of that discrimination existing at law school level.

At a time when Europe often looks to the United States in search of inspiration to modernize the teaching models of law,[76] one wonders, however, what are the variables that have created this discrimination against women, if only to avoid reproducing them.

One of the peculiarities of legal education in American law schools, that amounts to a strong differentiation with respect to European legal education is the so-called Socratic method. The Socratic method was introduced at Harvard Law school by Christopher Columbus Langdell in 1870, as a radical innovation able to subvert the legal pedagogy in use until that time. [77]

Grant Gilmore's ferocious description of Langdell has gone down in history, introducing him as "an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius".[78]

The novelty introduced by Langdell consisted in the fact that, contrary to what happened before - when law professors used class to lecture as in Europe – the Socratic method was based on assignments to students, who had to read and discuss the original sources, that is to say the cases that the professor was choosing to illustrate a particular legal subject.[79] Here is the way Langdell described the method, few years after starting using it:

> The instructor begins by calling upon some member of the class to state the first case in the lesson, i.e., to state the facts, the questions which arose upon them, how they were decided

[75] Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. Rev. 99 (2009).
[76] See for example: *Reinventing Legal Education, How Clinical Education Is Reforming the Teaching and Practice of Law in Europe,* Alberto Alemanno, Lamin Khadar (Eds.), Cambridge University Press, 2018; Clelia Bartoli, *Legal clinics in Europe: for a commitment of higher education in social justice, Diritto & Questioni Pubbliche,* Special issue – May 2016.
[77] On the development of legal education in the U.S and on the importance of law schools, see Robert Stevens, *Law School, Legal Education in America from 1850s to the 1980s.* Union, New Jersey, 2001.
[78] Grant Gilmore, *The Ages of American Law*, cit., p. 42.
[79] Bruce A. Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826-1906,* Chapel Hill, University of North Carolina Press, 2009, p. 141.

> by the court, and the reasons for the decision. Then the instructor proceeds to question him upon the case. If his answer to a question is not satisfactory (and sometimes when it is), the question is put round the class; and if the question is important or doubtful, or if a difference of opinion is manifested, as many views and opinions as possible are elicited. [80]

The teaching revolution introduced by Langdell was aimed at rendering students active thinkers, not passively accepting the authoritative statements made by professors: the *lectio ex cathedra,* that we still find in many European law schools, was leaving space to maieutic, based on the dialectic between professor and students. Although the initial skepticism showed by his colleagues, by the early 1900s, the Socratic method would become the common teaching method in all law schools all over the country.[81]

In this context, it is necessary to point out the profound difference with the education that law students receive in Europe, at least in Civil Law Countries.

In continental Europe, where there is a long-established university experience dating back the Middle Ages,[82] students enroll in law school directly after high school, where they receive a mostly theoretical preparation, the minimum contents of which are defined at ministerial level, considering the requests of the Bar associations. Of course, there are infinite differences between national legal systems, as evidenced by the still existing difficulty of obtaining double degrees between universities based in different countries. But the scheme remains the same: immediately after high school students enroll in law school, which generally provides a five-year curriculum, after which a (more or less long) period of legal practice is foreseen before having the right to be admitted at the Bar.

In the United States, students enter law school, which is generally a three-year course, only after having attended college. On average, therefore, people who enter law school in the US are more mature than the nineteen-year-old student

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[80] Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma,* Harvard Law Review, Vol. 130, No. 9, Bicentennial Issue (2017), p. 2322.
[81] Gersen, *The Socratic Method in the Age of Trauma,* cit. p. 2324.
[82] Charles M. Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna 850-1150.* New Haven, Yale University Press, 1988.

who enrolls in university in Europe, which makes the request to read and discuss case law more realistic.

Another difference that makes the Socratic method impracticable in European law schools is the number of students the professor must deal with, especially in the first years of university. Just to give a very superficial idea of the numbers we are dealing with and making reference to the data that are available on-line for this last year: Yale law school accepts 200 law students a year (with an acceptance rate of 6,9%); Columbia has enrolled 394 new law students (with an acceptance rate of 16,8%); Harvard has accepted 560 students, divided in seven sections of approximately 80 students **(**with an acceptance rate of 12.9%); NYU has accepted 425 new law students (with an acceptance rate of 23.6%).

In Europe, access to higher education is essentially free or, in any case, heavily financed by the state. In some countries, like Germany, the open access to all universities for anybody with secondary degree has been constitutionally guaranteed. [83] The result is that law schools like the one at the State University of Milan has every year some 1600 new students, while *Paris I Sorbonne* has 14.000 students in the field of law. Students at the *Facultad de Derecho* of the *Universidad Complutense de Madrid* are altogether 6768, at the *Fachbereich Rechtswissenschaft* in Frankfurt there are 4.702 students, while the *Juristische Fakultät* of the Humboldt-Universität in Berlin has "only" 3080 students.

In the European context, besides a very long tradition that foresee another kind of teaching method, one wonders if the Socratic method would be practicable at all with the number of students that professors have in class.

Anyway, more than a hundred years after its introduction, the Socratic method has been the subject of strong criticism[84] even in the United States, blaming its potential of reproducing the "hierarchical structure of life in the law".[85] In

[83] I. Michael Heyman, *German and American Higher Education In Comparison: Is The American System Relevant For Germany?,* Research & Occasional Paper Series: CSHE.6.99 Center for Studies in Higher Education, University of California, Berkeley, March 5, 1999 (https://cshe.berkeley.edu/sites/default/files/publications/pp.heyman.6.99.pdf).
[84] Gersen, *The Socratic Method in the Age of Trauma,* cit. p. 2326 ff.; Duncan Kennedy, *How the Law School Fails: A Polemic,* 1 Yale Rev. L. & Soc. Action 71 (1971); Alan A. Stone, *Legal Education on the Couch*, 85 Harv. L. Rev. 392, 407- 08 (1971).
[85] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy,* 32 J. Legal Educ. 591 (1982)

particular, Duncan Kennedy shed light on the fact that the class of a law school had a particular gender, race, and class inclination:

> [T]he line between adaptation to the intellectual and skills content of legal education and adaptation to the white, male, middle- class cultural style is a fine one, easily lost sight of

pointing out that the legal professional style to which students learn to assimilate is "overwhelmingly white, male, and middle class." [86]

It should therefore not come as a surprise that American feminists have referred to the educational method to explain why female students general report higher levels of depression than male students at law schools. [87] This seems to derive from the "comparative reticence of female law students to speak in class",[88] which renders the Socratic method a unique "traumatic challenge only for girls".[89] Girls' classroom participation is relatively low[90] and the empirical observations divulgated in literature emphasize that "male students dominate classroom discussions, particularly in large classes, in loud classes, and in classes taught by men". [91] Female students participate in class less than men, while women's participation increases in classes taught by female professors, which, however, are few compared to the ones taught by male professors. Here it is clear that another problem also emerges, which derives from the lack of identification of female students with respect to a male model of professor.

So, while some Authors have pointed out that "many women are alienated by the way the Socratic method is used in large classroom instruction, which is the dominant pedagogy for almost all first-year instruction",[92] others have stressed how the Socratic method has "devastating aggregate effects upon women law students" and "hinders the academic development of women by

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[86] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy,* p. 605.
[87] Dara E. Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology,* cit., *p. 1701.*
[88] Dara E. Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology,* cit., *p. 1696.*
[89] Gersen, *The Socratic Method in the Age of Trauma,* cit. p. 2327.
[90] French-Hodson, *The continuing gender gap in legal education,* cit., p. 83.
[91] S. Bashi, M. Iskander, *Why legal education is failing women*, cit., p. 405.
[92] Guinier, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School,* cit., p. 3.

maintaining a denigrating psychological atmosphere of silence, and adversarial competition". [93]

Interestingly, the argument that legal education could be detrimental to women is not new, as it had already been formulated in the past, but with the aim of excluding women from the legal profession.[94] In the same years that Harvard was implementing Langdell's method, the Supreme Court of Illinois was considering one of the first cases dealing with admission to the bar of a woman. In *Bradwell v. Illinois*,[95] the judges held that it was not unconstitutional for a state to deny women admission to its bar.[96] Justice Bradley in his concurrence opinion underlined that "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits occupations of civil life",[97] namely law practice, for which was needed the "energies and responsibilities, and that decision are presumed to predominate in the sterner sex".[98] Langdell himself, of which we must never forget the presentation made by Gilmore,[99] spoke out against the access of women to Harvard,[100] expressing the idea that the "study of the law would be not an improvement but an injury" to women.[101]

In addition, other studies try to understand why women speak less in class.[102]

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[93] Tanisha Makeba Bailey, *The Master's Tools: Deconstructing the Socratic Method and Its Disparate Impact on Women Through the Prism of the Equal Protection Doctrine*, 3 MARGINS 125 (2003), p. 127.
[94] Gersen, *The Socratic Method in the Age of Trauma,* cit. p. 2328.
[95] *Bradwell v. The State*, 83 U.S. 130 (1872).
[96] Id. at 139.
[97] Id. at 141 (Bradley, J., concurring).
[98] Id. at 142.
[99] See supra, footnote 78.
[100] See Daniel R. Coquillette & Bruce A. Kimball, *On the Battlefield of Merit Harvard Law School, the First Century,* cit., pp. 483-95.
[101] Id., p. 495.
[102] Katharine T. Bartlett, *Feminist Perspectives on the Ideological Impact of Legal Education upon the Profession,*72 N.C.L.Rev. 1259 (1994), p. 1268; Weiss Catherine and Louise Melling, *The Legal Education of Twenty Women,* Stanford Law Review, 1988, Vol. 40, No. 5, *Gender and the Law,* p. 1299; Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric that Encourages Practical Change*, cit., p. 36.

Women may be discouraged from participating because most of the first-year professors are males,[103] or because of the aggressiveness showed by classmates.[104]

Another reason may derive from the fact that professors treat female students differently, because of "hesitation on the part of some faculty members to challenge women or to engage their ideas".[105]

Finally, women's behavior may be the consequence that "faculty members run their classes in ways that give more attention to students who speak more quickly and unequivocally - behaviors that are more often displayed by men than by women".[106]

Women's hesitation to participate actively to the class and to promote themselves in front of the faculty may also have other repercussions on the life of female students,[107] as classroom performance is considered as a springboard to relationships with faculty, which are very helpful when it comes to research and teaching assistance or in writing projects.[108] The studies conducted show that for male students is easier to develop mentoring relationships with faculty than for female students;[109] this discrepancy may induce further disadvantages for women in getting professional guidance, or simply encouragement, and friendship.[110]

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[103] Schwartz and Homer (*Admitted But Not Accepted, Outsiders Take an Inside Look at Law School,* cit., p. 35) point out during their analysis developed at Boalt Hall that: *"A majority (57%) of women in both ethnic categories said they were more comfortable with a woman professor's approach to legal thinking; slightly less than a majority (46%) said they were more likely to speak in a class taught by a woman professor than in one taught by a man".*

[104] Weiss and Melling, *The Legal Education of Twenty Women,* cit., p. 1340.

[105] S. Bashi, M. Iskander, *Why legal education is failing women*, cit., p. 409.

[106] Id. at p. 409.

[107] Dara E. Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology, cit.,* p. 1713.

[108] S. Bashi, M. Iskander, *Why legal education is failing women*, cit., p. 416.

[109] French-Hodson, *The continuing gender gap in legal education,* cit., p. 86, who points out that *"Mentorship often provides for an informal transmission of information and advice about careers and law school, as well as how to integrate professional lives with social and family commitments".*

[110] S. Bashi, M. Iskander, *Why legal education is failing women*, cit., p. 419 present these results: "*Empirical data gathered from both faculty interviews and student responses demonstrate that women find it more difficult than men to approach faculty members outside of class. Student perceptions on this issue vary by gender:*

Another salient aspect that differentiates the lives of American law students from their European counterparts is the editing of law journals.[111] Since the birth of the law schools in the United States,[112] students have developed their legal research and writing skills by doing editing, citation formatting, and proposition-checking of articles that were going to be published, but also adding notes and comments. Law reviews give the opportunity to students to publish papers written under the supervision of faculty members,[113] as they not only publish articles written by law professors, judges, and other legal professionals, but also shorter pieces written by law students called "notes" or "comments". [114]

Again, the representation of women seems disproportionately low, a fact that needs to be evaluated in itself, but also for the consequences it may have, as the publication rate may influence the under-representation of women even as legal scholars.[115]

Finally, women graduated with lower GPAs,[116] although men and women had equal academic indicators entering school.[117]

63% of women, but only 28% of men, observed differences in the way men and women interact with faculty outside the classroom. Several female students suggested that male students feel "entitled" to professors' time outside the classroom. A female 2L said that not only do men appear more comfortable talking to professors, but that, "more discouragingly, professors seem much more comfortable talking to male students." Differences in out-of-class interactions are expressed in
(1) men's greater levels of comfort in approaching faculty members outside class and
(2) men's and women's different ways of responding to pressures to "perform" in their interactions with faculty members.

[111] Nathan H. Saunders, *Student-Edited Law Reviews: Reflections and Responses of an Inmate,* Duke Law Journal, Vol. 49, No. 6 (Apr., 2000), p. 1663. John G. Rester, *Faculty Participation in the Student-Edited Law Review*, Journal of Legal Education, Vol. 36, No. 1 (March 1986), p. 14; Critical on the issue Richard A. Posner, *The Future of the Student-Edited Law Review,* Stanford Law Review, Summer, 1995, Vol. 47, Law Review Conference (Summer, 1995), p. 1131.

[112] Erwin N. Griswold, *The Harvard Law Review–Glimpses of Its History as Seen by an Aficionado*. *Harvard Law Review: Centennial Album* (1987): 23.

[113] S. Bashi, M. Iskander, *Why legal education is failing women*, cit., p. 425.

[114] See also Michelle Fabio, *What Is a Law Review and How Is It Important?* February 21, 2019, https://www.thoughtco.com/what-is-law-review-2154872.

[115] S. Bashi, M. Iskander, *Why legal education is failing women*, cit., p. 426.

[116] GPA: grade point average, which is calculated by using the number of grade points a student earns in a given period of time.

[117] Ann C. McGinley, *Reproducing Gender on Law School Faculties*, cit.

Concluding this part of the article, it is worth mentioning that awareness of gender inequality within law schools has been slowly increasing, not least because this inequality also seemed to cast its long shadow on the legal professions:

> "Gender disparity in law school continues both inside and out of the classroom. These effects spill over as women enter the legal workforce and are exacerbated by similar institutional problems across the profession. Additionally, the legal profession has played a role in perpetuating some of the education structures that alienate and disadvantage women through prioritizing certain markers of law school success".[118]

This awareness led to a debate that developed several hypotheses to correct the current situation in order to close the gender gap that still exists within law schools.[119]

The current debate and the possible reforms in the law schools' curriculum

Unlike in Europe, the United States has witnessed the development of a "Feminist Legal Theory",[120] a body of scholarship in search of a theoretical understanding of the relation of law to women's subordination, focusing on issues pertaining to gender equality, that reflected also on women faculty and students' struggles in law schools.[121]

Feminist legal theory movement has proliferated in the U.S. in a way that is incomparable to the situation in the European Union, introducing specific courses,[122] organizing annual colloquia,[123] devoting specific research centers

[118] See French-Hodson, *The continuing gender gap in legal education,* cit.
[119] R.A. French-Hodson, *The continuing gender gap in legal education,*
[120] Robin West, *Women in the legal academy: A brief history of feminist legal theory,* Fordham law review, 2018, Vol.87 (3), p.977-1003
[121] West, *Women in the legal academy: A brief history of feminist legal theory,* cit., p. 980.
[122] Harvard law school has a course on Feminist Legal Theory held by Professor Janet Halley; Yale has introduced a Feminist Legal Theory Seminar held by Professor Vicky Schultz.
[123] University of Baltimore organizes the Feminist Legal Theory Conference and Colloquia sponsored by the Center on Applied Feminism (http://law.ubalt.edu/centers/caf/conference/index.cfm).

to the issue[124] and publishing handbooks, articles, and casebooks on the matter.[125]

While in Europe the entry of women as students and teachers has been a silent revolution, unaccompanied by a critical approach to the issue, in the United States feminist scholars have launched an awareness-raising campaign in an attempt to identify the reasons why women experience law school negatively and promote new solutions.[126]

A first proposal consists in inserting gender and feminist perspectives into the basic law school courses[127], that otherwise would continue

> "to convey only an incomplete knowledge unless they are expanded to examine how law has affected women's opportunities, and how the law's attention to or failure to acknowledge women's experiences has shaped our views of women and women's views of themselves". [128]

According to this approach, the curriculum of law schools should be integrated by "law and feminism classes" to help female students feel more part of the

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[124] At Columbia Law School there is a Center for Gender and Sexuality Law.
[125] Bowman, Cynthia, Laura Rosenbury, Deborah Tuerkheimer, Kimberly Yuracko, *Feminist Jurisprudence: Cases and Materials,* 5th Edition, American Casebook Series, West Academic Publishing, 2018; Bartlett, Katherine. *Feminist legal theory: Readings in law and gender*. Abingdon-on-Thames, Routledge, 2018; Nancy Levit, Robert R.M. Verchick, Feminist Legal Theory. A Primer, 2nd ed., New York, New York University Press, 2016; Martha Chamallas, *Introduction to feminist legal theory*, Third edition, New York, Wolters Kluwer Law & Business, 2013; *Feminist Legal History. Essays on Women and Law*. Tacy A. Thomas and Tracey Jean Boisseau (Eds.). New York, New York University Press, 2011; *Feminist Legal Theory: An Anti-Essentialist Reader.* Nancy E. Dowd and Michelle S. Jacobs (Eds.). New York, New York Univ Press. 2003; Bowman, Cynthia Grant, and Elizabeth M. Schneider. *Feminist legal theory, feminist lawmaking, and the legal profession*. Fordham L. Rev. 67 (1998), p. 249; Cain, Patricia A. "The future of feminist legal theory." *Wis. Women's LJ* 11 (1996), p. 367; *Applications of Feminist Legal Theory: Sex, Violence, Work and Reproduction* (Women in the Political Economy), D. Kelly Weisberg (Ed.). Philadelphia, Temple University Press. 1996; *Feminist Jurisprudence.* Patricia Smith (Ed.), New York – Oxford, Oxford University Press, 1993; Carrie Menkel-Meadow. *Mainstreaming Feminist Legal Theory*, 23 Pac. L. J. 1493 (1992).
[126] Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric that Encourages Practical Change*, cit. p. 36.
[127] Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM (1989), 41.
[128] Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, p. 42

teaching experience[129] and faculty staff should increase the number of female law professors.[130] The presence of female role models would increase the comfort level of women at the law school.[131]

The presence of female professors in class, in fact, would determine an identification process for women in the classroom and their self-esteem would increase looking how women were able to achieve success in the legal profession.[132]

A second proposal aims at introducing more feminized teaching methods.[133] Some scholars have asserted that the law school curriculum should be more accessible to women,[134] while others have underlined that a "student-supportive" approach to legal education would decrease gender inequity.[135] It is therefore not surprising that precisely these scholars also propose the abolition of the Socratic method or its dilution.[136]

A third proposal aims at humanizing law schools,[137] developing an ethic of care, claiming a different approach to the Socratic method, where law professors should explain that the aim of this method is more to create a dialogue rather than their opportunity to demonstrate that they can "think like

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[129] Nancy E. 65Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender and Ethnicity in Legal Education,* 15 U. Fla. J.L. & Pub. Pol'y 12 (2003); Melissa Harrison, *A Time of "Passionate Learning:" Using Feminism, Law, and Literature to Create A Learning Community*, 60 Tenn. L. Rev. 393,425 (1993).
[130] Dowd et alii, *Diversity Matters: Race, Gender and Ethnicity in Legal Education,* p. 44.
[131] Heather A. Carlson, *Faculty Mentoring as A Way to End the Alienation of Women in Legal Academia,* 18 B.C. Third World L.J. 317, 333 (1998); see also Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment On Women and Minority Students,* 7 UCLA Women's L.J. 81, 111-12 (1996).
[132] Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric that Encourages Practical Change*, cit. p. 36.
[133] Ibidem.
[134] Sarah E. Theimann, *Beyond Guinier: A Critique of Legal Pedagogy*, 24 N.Y.U. Rev. L. & Soc. Change 17, 22 (1998)
[135] Fischer, *Portia Unbound: The Effects of A Supportive Law School Environment On Women and Minority Students,* cit., p. 82.
[136] Morrison Torrey, Jennifer Ries & Elaine Spiliopoulos, *What Every First-Year Law Student Should Know*, 7 Colum. J. Gender & L. 267 (1998), p. 308 who pursue the elimination or a drastic reform of the Socratic method to make women "more comfortable in the classroom".
[137] Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric that Encourages Practical Change*, cit. p. 37.

a lawyer",[138] giving women the possibility to participate in the discussion without developing anxiety about it.

The idea of including a Feminist perspective into the law curriculum in Europe is far from being reality and the analysis on Feminist legal theory developed in Europe do not focus on gender issues at the law school.[139] Even here the reasons may be multiple. One possible explanation could be that American law schools, although strongly supervised by the American Bar Association, do not have to correspond to the strict standards set by centralized agencies or by the Ministry of Education like in most European countries and have therefore a certain freedom to introduce new courses in the curriculum. Another explication may be that the study of law in the United States has always been more open to interdisciplinary dialogue after the evolution of the Realists' movement,[140] that professed that lawyers should use the tools of the social sciences to study and understand the real world in which law functioned,[141] creating fertile ground for all "law and …" movements, such as law and economics,[142] law and sociology, law and literature and law and feminism.

These reasons may explain why the debate developed in the States seems quite different. Scholars have pointed out not only the contribution,[143] but also the

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[138] Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize,* 7 S. Cal. Rev. L. & Women's Stud. 37 (1997).
[139] Régine Dhoquois, *La recherche féministe à l'université dans le domaine du droit. Une absence en forme de desertion.* Les Cahiers du CEDREF (Centre d'Enseignement, de Documentation et de Recherches pour les Études Féministes), 10, 2001. https://journals.openedition.org/cedref/278; Anna Simone, Ilaria Boiano, Angela Condello, *Femminismo giuridico, Teorie e problemi,* Milano, Mondadori, 2019; Ute Sacksofsky. *Was Ist Feministische Rechtswissenschaft?*. Zeitschrift Für Rechtspolitik, vol. 34, no. 9, 2001, pp. 412–417.
[140] Lon L. Fuller. *American Legal Realism,* University of Pennsylvania Law Review and American Law Register, March 1934, Vol. 82, No. 5, pp. 429-462.
[141] Stephen Wizner. *The law school clinic: Legal education in the interests of justice*. *Fordham L. Rev.* 70 (2001), 1929, 1932.
[142] Ejan Mackaay. *History of Law & Economics. Encyclopedia of law and economics* (2000): 65-117.
[143] Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School",* cit.; Katharine T. Bartlett, *Feminist Perspectives on the Ideological Impact of Legal*
Education upon the Profession, cit.; Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, cit.; Deborah L. Rhode. *Missing Questions: Feminist Perspectives on Legal Education,* cit.; see also: Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort,* 38 J. Legal Educ. 3 (1988).

gaps and problems in feminist scholarship to cope with women and legal education.[144] If the inclusion of an approach to law that considers the point of view of women now seems an unequivocal fact even outside the university classrooms,[145] the idea of softening up the law school curriculum appears less convincing and - even - counterproductive precisely for women.[146] Nobody would like in fact to suggest that women will never succeed in law schools unless these require lower expectations.[147]

Bashi and Iskander,[148] analyzing the results of a comprehensive study related to the way Yale Law School educates female and male students, argued that

> "Law schools and the legal profession were built by men and for men; it would be remarkable, indeed, if they did not reflect preferences and tendencies associated with men".[149]

Such a rhetoric seems today fruitless as Higher Education, more than looking into the past, should wonder which are the tools needed today to prepare students to cope with the existing real world, opening the minds to the needs of the world of tomorrow.

For this reason, the arguments put forward by those scholars who identify the deficiencies of law schools with respect to the current needs of the legal profession seem much more convincing. [150] And these are very useful also for the European university, which on the one hand has shown to follow a different philosophy than the American one, but which on the other - like the American one - is always and naturally on the hunt for tools that enable students to face their career choices in the most appropriate way.

A Symposium devoted to Civic and Legal Education published on the Stanford Law Review in 1993,[151] nearly 30 years ago, was already highlighting the

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[144] Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric that Encourages Practical Change*, cit. p. 37 ff.
[145] McGinley, *Reproducing Gender on Law School Faculties*, cit., p. 106.
[146] Howell, ibidem.
[147] Howell, ibidem.
[148] S. Bashi, M. Iskander, *Why legal education is failing women*, cit., p. 389.
[149] Ibidem, p. 392.
[150] Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric that Encourages Practical Change*, cit. p. 38.
[151] Stanford Law Review, Vol. 45, No. 6, July, 1993.

deficiencies of the legal education paradigm in the United States,[152] pointing out that the abilities that legal education overlooks are those most important to the actual practice of law,[153] and that the Socratic method should not be any more considered the most effective tool to educate lawyers of the future.[154]

The legal profession, at the end of the twentieth century, required different skills, which did not fit well with the old and traditional way of conceiving legal education.[155] The development of transactional lawyering,[156] that is to say of practicing lawyers who do not litigate for the most of their professional life, put in evidence the importance of other important skills, like collaboration, counseling, mediation, lawyer-client relationships,[157] problem solving and facilitating transactions.[158]

Law schools should then choose to give all their students the cultural and technical background to face the legal profession, as it develops to cope with the different needs of a constantly evolving and constantly changing society. The Socratic method should be reframed not because it clashes with the natural

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[152] Besides the already quoted article by Deborah L. Rhode (*Missing Questions: Feminist Perspectives on Legal Education*), see also Judith Resnik, *Ambivalence: The Resiliency of Legal Culture in The United States,* Stanford Law Review, July, 1993, Vol. 45, No. 6., p. 1525; Ann Shalleck, *Constructions of the Client Within Legal Education*, Stanford Law Review, July, 1993, Vol. 45, No. 6., p. 1731.

[153] Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education,* cit. 1559.

[154] Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education,* cit., at 1554 points out *"While the abusive interrogations traditionally associated with this format unquestionably have declined, this increase in civility may have deflected attention from more fundamental questions. Is this method an effective way of teaching skills that are most essential to effective legal practice?"*

[155] *See* Guinier et alii, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School,* at 13, pointing out that lawyering requires more diverse perspectives and skills than those currently being taught in law schools.

[156] Steven L. Schwarcz, *Explaining the value of transactional lawyering.* Stanford journal of law, business & finance, 2007-03-22, Vol.12 (2), p.486; Elisabeth de Fontenay, *Law Firm Selection and the Value of Transactional Lawyering,* The Journal of corporation law, 2015-12-01, Vol.41 (2), p.393; *Defining Key Competencies for Business Lawyers,* Report of the Task Force on Defining Key Competencies for Business Lawyers, Business Law Education Committee, ABA Business Law Section Source. The Business Lawyer , Vol. 72, No. 1 (Winter 2016-2017), pp. 101-156.

[157] Ann Shalleck, *Constructions of the Client Within Legal Education*, cit., who argues that clients are "mostly absent from classroom discussions.

[158] Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric that Encourages Practical Change*, cit. p. 38, quoting the Law School Admission Council/Law School Admission Services, *Law As A Career: A Practical Guide* 17 (1993), stating that many lawyers do not litigate at all.

reluctance of female students to participate in a competitive discussion, but because it no longer prepares for the current needs of the profession. It is therefore not by working on gender, but rather by looking at the actual skills required by the legal profession that mainstreaming gender equality in legal education can be achieved.

Conclusions

Universities in Europe and the United States have followed different paths, facing different problems. Any evaluation in relation to American law schools must then be inserted in their particular context, where university education still appears to be largely the monopoly of private universities, with selective access methods, that require a high-level quality standard but also an enormous economic effort to pay tuition fees. A recent post, published on Aug. 12, 2021, states that

> [a]ccording to a U.S. News report, the average tuition and fees for a private law school during the 2018-2019 school year were $48,869 per year, compared to $40,725 for non-resident law students or $27,591 for residents per year at a public law school.[159]

Elite law schools, such as Columbia, Harvard, Yale, New York University, and others[160] charge more than $60,000 per year. These figures don't even consider the cost of living and other expenses indirectly linked to attendance.

If we compare this situation with that existing in Europe, where access to higher education is essentially free, the differences are immediately evident. In terms of democracy and inclusion, the European choice guaranteed social mobility. On the other side, the idea of having a tuition free or almost free university education across the continent lead also to negative side effects, like the overcrowding and consequently underfunding of higher learning institutions.

Finally, although at European law schools, female students never pointed out the existence of an unfriendly environment, the teaching of American legal feminists should arrive also in our classes: not to cope with teaching methods

[159] See https://crushthelsatexam.com/in-depth-breakdown-of-law-school-costs-in-the-united-states/).
[160] See ranking by tuition fees: https://www.ilrg.com/rankings/law/tuition.

that would be improbable to transplant in mass universities, but to open the mind to new perspectives, in a society that evolves and becomes the more and more diverse.