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Editorial

The EJLE had an exciting and busy year since its last publication. For 2025 we organised our regular, annual issue, and alongside this, we published our first Special Issue in collaboration with The European Law Faculties Association (ELFA) and The Law School Global League (LSGL). Even though we expanded our editorial board by 50% early in 2025, we are still a small team of (passionate) volunteers. Given our ambitious publication for 2025, our regular issue, Volume 6 (No.2), is thus slightly later than usual.

Nonetheless, we are excited to present to our readers an issue that could be summarised under the overall heading of 'breaking out of the conventional mould of legal education', specifically by revolving around these three broad themes:

Focusing on Problem-Solving Skills: Legal education is shifting towards teaching problem-solving skills and collaboration, within an environment of inclusivity and wellbeing.

1) Karen Geertsema, Marieke de Wijse-van Heeswijk, Tobias Alf, Tesseltje de Lange, in "The EU Migration Law Simulation Enriching higher education by a gaming tool for knowledge exchange" evaluate a law simulation and its successful integration into the Masters' curriculum of two courses at Radboud University.

2) Xiaoren Wang, in "Breaking the silence: empirical insights on encouraging quiet students to speak out in law classes" analyses, quantitatively, inclusion of all students, specifically the engagement of quieter students in class.

3) Emma Jones, Rachael Field and Caroline Strevens, in "Legal Wellbeing Pedagogy: A New Model for Promoting Wellbeing in Law Schools" propose a holistic wellbeing framework, as a vehicle for thriving, for students and staff.

Linking learning to the skills needs in the legal profession and catering meaningful legal education to the needs of the evolving legal profession.

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4) Connie Healey, in “Legal Skills: Understanding and adapting Legal Education to the changing needs of Clients” argues for the need of a more therapeutic approach and multidisciplinary teaching to support contextual understanding and skills development of future, modern, lawyers capable of client-centred conflict resolution.

5) Jane Ching, in “Liberty and the Legal Services Act - The new qualifying regime for solicitors in England” examines two different approaches to qualification for solicitors in England and Wales through the lens of social justice theories by Fraser and Young, as to how these routes promote diversity in the profession.

6) Agustín Parise and Arthur Willemse, in “Law in Historical Fiction: A Research-Based Approach to Legal History and Legal Philosophy” propose historical fiction as a tool for legal education, sharing experiences and insights from a case study, Law and Historical Fiction, a course delivered at their institution.

Integrating Technology: Legal education and the profession are increasingly incorporating technology to enhance learning experiences, including legal research tools and Generative Artificial Intelligence. Two articles evaluate this critically:

7) Daniel Bansal, Maribel Canto-Lopez, Clark Hobson, in “The role and impact of relying on digital technologies in contemporary legal education: an empirical study” investigate the risk of digital exclusion in legal education, through quantitative and qualitative methods, and make recommendations to promote a more inclusive and supportive learning environment for students.

8) Anne de Hingh and Tina van der Linden, in “Why allowing law students to use GenAI for writing assignments is a bad idea. Some reflections on the labour market orientation on HLE curriculum decisions” critique institutional policies and the regulatory gap within Higher Education, and suggest the need for stricter rules, in essence to hone students’ critical thinking and writing as key legal skills for the future.

We hope you enjoy reading this volume as much as we did putting it together.

Greta Bosch
Editor-in-Chief

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The EU migration law simulation: enriching higher education through a gaming tool for knowledge exchange

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Abstract

The development, testing and application of an educational simulation tool to prepare students for a complex legal practice in which co-operation across European member states is essential has resulted in the EU Migration Law Simulation. The objective of the simulation was to facilitate engagement with strategies for the protection of human rights, the guarding of national borders, and the facilitation of safe migration channels for the purpose of achieving a sustainable future in accordance with EU migration law. This contribution presents the development, testing and functionality of the EU Migration Law Simulation, along with the results of student evaluations from law schools across Europe. The study aims to provide a comprehensive evaluation of existing theories of educational simulation and to test the SCRIPTed Framework on facilitation design. The objective of this educational project was to implement an educational simulation, with the aim of providing European law and migration studies students with opportunities for new forms of knowledge exchange. The simulation requires a modest but well-informed facilitator, which confirms existing knowledge on the facilitation of educational simulations. Furthermore, legal cultures had a significant influence on how students perceived their roles, which in turn shaped the development of these roles during the game design and testing phase. Moreover, we found that legal professionals were just as keen on engaging in the simulation as university students as it took them outside their professional 'tunnel vision' on problem solving and generated novel systems insight.

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Keywords: simulation, educational simulation game tool, experiential learning, migration, law, higher education.

Introduction

Migration is one of the major global challenges of the century. Teaching migration law asks for new forms of knowledge transfer to accomplish critical and creative thinking, paramount for good lawyering and to support the development of both substantive legal knowledge (understanding what the law entails) and procedural and process insight (understanding how legal processes unfold).[1] The benefits of simulations for higher education in disciplines outside of law school have been proven, showing them to be a positive learning method.[2] The EU migration law simulation was developed to innovate the teaching of law students and fulfil the need for experiential learning. The EU Migration Law Simulation was developed to provide students with a distinctive experiential learning opportunity in the realm of EU migration law. The simulation fosters the development of competencies in legal communication and international collaboration. This contribution presents the development, testing and functionality of the EU Migration Law Simulation, along with the results of student evaluations from law schools across Europe. The overall research question addressed in this paper is: What learning outcomes were achieved in the EU Migration Law Simulation?

The educational simulation game tool is designed to prepare students for a specific complex legal practice: EU migration law. This legal field is complex as it is multilayered and dynamic. Sources of international, regional and national law influence the applicable rules and regulations. In addition to the variety of legal sources, policies are subject to rapid change due to the political sensitivity of the field. Students of European migration law experience difficulties in establishing connections between various legal regimes and in navigating between treaties, regulations, directives, and national laws transposing these where required. Our findings demonstrate how experiential

[1] E. Scott Fruehwald, *How to Teach Lawyers, Judges and Law Students Critical Thinking: Millions Saw the Apple Fall, but Newton asked Why*, Independently published, 2020, retrieved from https://catalog.libraries.psu.edu/catalog/29267531.
[2] A.J. Faria and others, 'Developments in Business Gaming: A Review of the Past 40 Years' (2008) 40(4), *Simulation & Gaming*, *p.* 464-487. https://doi.org/10.1177/1046878108327585.

learning activities such as simulation gaming can facilitate mastery of the requisite skills.

Simulation gaming is a proven aid for teachers to help students reach the stage of self-authorising knowledge.[3] Moreover, integrating the simulation into an EU migration law course provides students with an interactive learning experience. Law in the books is enriched by law in practice. This contribution describes our journey of developing a simulation that fits the needs of students and that enables us to reach teaching goals within the traditional setting of the classroom. The development is embedded in findings on the effects of simulations for learning processes of students. Thus, by evaluating the EU migration law simulation we add to the body of literature on the effect of simulations in higher education, the role of the facilitator and the potential of simulation gaming for other law courses and law schools.

This paper evolves as follows. After introducing EU Migration Law and Experiential Learning (part 2), we describe our theoretical framework (part 3) and methodology and materials (part 4). Next, we present our results (part 5). We conclude with a discussion of the use of simulations in higher education on European Migration Law (part 6). In part 7 we conclude.

EU Migration Law & Experiential Learning

EU Migration Law is taught at law schools throughout Europe. It requires lecturers to engage in a policy field in which public debate is tense and rules and regulations have become instrumental, at both European and national levels, for political achievements. The subject of EU migration law is included in the curricula of most European law schools as part of (international) master's programs. However, it is a subject difficult to place in a complex legal field of legislative (e.g. Treaties, Regulations and Directives) and non-legislative tools at the EU level, their transposition and implementation at the national level,

[3] T. de Lange, K. Geertsema, S. Mantu, 'Theoretical foundations of gaming in teaching the functioning and future of European Migration. Let's play!' in P. Grimes et al (eds) *Teaching Migration and Asylum Law. Theory and Practice* (Routledge 2021) pp. 171 – 176; J. Klabbers, *The Magic Circle. Principles of Gaming and Simulation* (Sense Publishers 2009); L. de Caluwé, G.J. Hofstede and V. Peters, *Why Do Games Work? In Search of the Active Substance* (Kluwer 2008).

and the international human rights frameworks that serve as a base for both.[4] Simulation gaming has students think about migration as a global phenomenon. Moreover, it offers the opportunity to experiment with developing convincing and possibly original legal arguments to advance the case of their clients, or that might lead to legislative improvements. This requires a comprehensive range of teaching and learning tools. In a literature review on legal education,[5] we found that law schools are not (yet) equipped to prepare students for practising law and critically thinking on how law connects with broader societal challenges such as global migration.[6] The so called stage of self-authorizing knowledge is rarely reached.[7] Teaching methods mainly focus on doctrine through offering lectures in a classroom setting. Although attention for experiential methods is expanding,[8] this mainly translates into moot courts and legal clinics. These educational tools are effective for practical legal skills. Moot courts specifically focus on the roles of legal professionals in a courtroom and legal clinics are often available for small groups of students only, demanding intensive supervision of lecturers. In the course of developing the simulation presented here, we drew from other disciplines, such as management science. This process culminated in collaboration with the educational developer of the GRIP game format: Gamified Roleplay for Interesting Problems. This format was applied in the development of the EU Migration Law Simulation.

The benefits of simulations in higher education have been proven. It is shown that the learning process of students is impacted in the long run by a simulation experience.[9] Simulations help students contextualize challenging, real-world

[4] T. de Lange, K. Geertsema, S. Mantu, 'Theoretical foundations of gaming in teaching the functioning and future of European Migration. Let's play!' in P. Grimes et al (eds) *Teaching Migration and Asylum Law. Theory and Practice* (Routledge 2021) pp. 171 – 176

[5] T. de Lange, K. Geertsema, S. Mantu, 'Theoretical foundations of gaming in teaching the functioning and future of European Migration. Let's play!' in P. Grimes et al (eds) *Teaching Migration and Asylum Law. Theory and Practice* (Routledge 2021) pp. 171 – 176.

[6] E. Scott Fruehwald, *How to Teach Lawyers, Judges and Law Students Critical Thinking: Millions Saw the Apple Fall, but Newton asked Why*, Independently published, 2020, retrieved from https://catalog.libraries.psu.edu/catalog/29267531; B. Adamson and others, 'Can the Professor Come Out and Play?' (2008) 58, *Journal of Legal Education*, pp. 481-519.

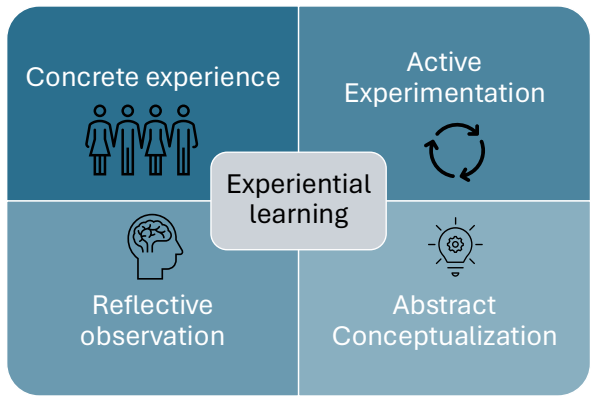
[7] B. Bloom, 'Learning for Mastery'(1968)1, UCLA - CSEIP - Evaluation Comment.

[8] T. Casey, 'Reforming the Legal Curriculum: Integration into the Practice' (2014)12(3) *R.E.D.U. (REVISTA DE DOCENCIA UNIVERSITARIA),* p. 65-91.

[9] S. Subhash and E. Cudney, 'Gamified learning in higher education: a systematic review of the literature' (2018) 87 *Computers in Human Behavior*, pp. 192-206.

environments and encourage collaboration. Effective legal reasoning requires the ability to see issues from multiple perspectives. A dynamic and enjoyable learning experience allows students and teachers to explore different legal scenarios freely, without the pressure of providing one single 'right' answer.[10] The experiential learning cycle as developed by Kolb (fig.1), is therefore easily achieved.[11]

Figure 1: Experiential learning ingredients. Source: Authors' adjustment of Kolb, non-linear model.



This study uses a unique and recently developed theoretical framework for facilitating design in simulation and gaming contexts (from now on referred to as SCRIPTed facilitation design), developed through an extensive theoretical

[10] B. Adamson and others, 'Can the Professor Come Out and Play?' (2008) 58, *Journal of Legal Education*, pp. 481-519.
[11] D.A. Kolb and R. Fry, 'Toward an applied theory of experiential learning' in C. Cooper (ed.), *Theories of Group Process* (John Wiley 1975).

foundation and refined across multiple academic studies.[12] The framework integrates insights from systems thinking, educational psychology, and intervention methodology. It has been tested and iteratively improved through a series of studies employing both comparing analysis and mixed-method research, offering a novel, evidence-based approach to effective facilitation in complex learning environments.

This effect study presents a successful case and provides academic explanations for the learning outcomes associated with the EU Migration Law Simulation, along with implications for its future development. The subsequent discussion will entail a detailed elaboration on the framework, followed by a presentation of the methodology employed in this mixed methods effect study.

Theoretical Framework: SCRIPTed Facilitation design

The script was developed for facilitators of simulation games in educational and change settings to enhance the learning effects.[13] The script has been

[12] M. de Wijse-van Heeswijk, 'Facilitation Interventions to Increase Learning Effectiveness in Game Simulations. A Generic Approach of Facilitation Applicable to a Broad Variety of Simulation Games', in M. Angelini, R. Muniz (eds.) *Simulation for Participatory Education: Virtual Exchange and Worldwide Collaboration* (Springer 2023), pp. 53-85; M. de Wijse-van Heeswijk and W.C. Kriz, 'A design science perspective on formative evaluation in simulation games' in M. Angelini and R. Muniz (Ed.), *A generic approach of facilitation applicable to a broad variety of simulation games. Simulation for Participatory Education. Virtual Exchange and Worldwide Collaboration* (Springer, 2023)*;* M. Wijse-van Heeswijk, E. Rouwette & J. van Laere, 'Case Study Report on Facilitation Interventions to Increase Learning Effectiveness in Game Simulations' in M. Angelini, R. Muniz (eds.) *Simulation for Participatory Education: Virtual Exchange and Worldwide Collaboration* (Springer 2023), pp. 87-114; M Wijse-van Heeswijk and others, 'The mechanisms behind learning in simulation games, a proces tracing study into the gameplay' (forthcoming 2025).

[13] M. de Wijse-van Heeswijk, 'Facilitation Interventions to Increase Learning Effectiveness in Game Simulations. A Generic Approach of Facilitation Applicable to a Broad Variety of Simulation Games', in M. Angelini, R. Muniz (eds.) *Simulation for Participatory Education: Virtual Exchange and Worldwide Collaboration* (Springer 2023), pp. 53-85.

researched by using case studies[14] and quantitative analysis.[15] Essentially the framework consists of a guided sequence for learning-driven facilitation in six different phases, briefly described below:

1. Set the Stage
2. Clarify the Journey
3. Repeat & Reflect
4. Intervene with Intent
5. Process the Experience
6. Transfer the Learning

1. Set the stage

This first phase refers to the participants' motivation and commitment to engage in the game, which is essential for effective learning. To foster engagement, participants need to feel psychologically safe and supported, both by the facilitator and their peers. When they experience a sense of acceptance and confidence, they are more likely to fully engage and derive meaningful learning from the simulation.

2. Clarify the Journey

Managing expectations helps participants engage in the game, to understand its relevance and meaning and prepares them for what behavior is needed to learn from the game. Learning in simulation games is often an intensive, sometimes frustrating experience. For instance, if participants realize feeling a bit

[14] M. de Wijse-van Heeswijk, E. Rouwette, S. Meijerink, 'The learning effects of first, second and third order interventions in a rule based and open simulation game'(forthcoming 2025) *Instructional Science*; Case studies on the transfer of knowledge: M. Wijse-van Heeswijk, E. Rouwette & J. van Laere, 'Case Study Report on Facilitation Interventions to Increase Learning Effectiveness in Game Simulations' in M. Angelini, R. Muniz (eds.) *Simulation for Participatory Education: Virtual Exchange and Worldwide Collaboration* (Springer 2023), pp. 87-114; T. Kikkawa and others, *Transferring Gaming and Simulation Experience to the Real World* (Springer 2025).
[15] T. Alf et al., 'The Role of Reflection in Learning with Simulation Games – A Multi-Method Quasi Experimental Research' (2023)54(6) *Simulation & Gaming,* DOI 10468781231194896.

frustrated at times helps the learning processes they engage in it more effectively.

3. Repeat & Reflect

Weaving multiple reflective moments from start to finish throughout the simulation game helps participants deal with feedback and brings focus to their learning goals as they evolve while playing and reflecting on the game.

4. Intervene with Intent

Rather than instructing participants on how to play, facilitators can support their learning processes by optimising the learning environment in the game. This agency-based way of learning enables participants to enjoy a rich learning environment in which they take on their own learning journeys and own their learning processes. Such agency supports knowledge transfer.

5.Process the Experience

Structured questions that connect to participant's experience and that still allow room for their own interpretation enhance the learning process by bringing focus and more even participation in the debriefing process.

6. Transfer the Learning → (Impact beyond the game)

Transfer of learning should be enhanced from the start,[16] meaning all the steps in the script so far contribute to the end result and the translation of the goals of participants into the game and then backwards again to their reality. Possibly further supported by evaluation methods such as surveys, questionnaires and methods to enhance transfer, such as writing a letter to a future participant on how the simulation game should be played, which brings to the surface the assumptions behind the learning and makes more explicit what the effective behavior actually consists of. It generates a final learning loop of reflection.

[16] M. de Wijse-van Heeswijk and others, 'Debriefing as a leverage point for the transfer of simulation game learning outcomes to reality; Building blocks before and during debriefing that enhance learning transfer' in T. Kikkawa and others, *Transferring Gaming and Simulation Experience to the Real World* (Springer 2025).

Thus, the research question addressed in this paper is, more specifically: what learning outcomes were achieved by applying the SCRIPTed facilitation design in the Migration Game? In order to address this question, a mixed methods approach was employed, encompassing both survey analysis and content analysis of transcription records. This comprehensive methodology is elaborated upon in the next section.

Methods and materials

This study is a case study based on the EU Migration Law simulation as developed by the Centre of Migration Law, Radboud University in collaboration with Gripgame. To measure the learning outcomes mixed methods were used. We conducted a survey to research how students experienced the learning conditions. In addition, we applied content analysis using Atlas ti software to find out how the SCRIPTed facilitation design was applied and what learning outcomes occurred. Before we explain the methodology further and how data gathering took place, we provide a case description.

Case description

How does it work?

The EU Migration Law Simulation exists of three scenarios that can be played together, or as a stand-alone scenario. These custom scenarios connect to the curriculum and make the achievement of learning goals possible, which is the goal **of** the game. The simulation works on the base of a pressure cooker in which students must play a given role and come up with a cooperative solution for the given problem in a fixed period, which is the goal **within** the game. The students are handed a written role description; additional information comes through a video screen, which also keeps track of time.

In all three scenarios a Pakistani national is followed in her journey into the European Union. The narrative is composed in such a manner that it may be possible to apply a variety of legal solutions in order to facilitate her residence in a member state of the European Union. It is important to note that legal categories such as asylum, labour, study and family can all apply to the same individual. All three scenarios cover the learning goal of understanding EU migration law (Treaty and Directives and case law of the Court of Justice of the European Union), with emphasis on different directives in each scenario,

see table 1. Although the legal instruments in scenarios 1 and 2 overlap, the emphasis in scenario 1 is more on family reunification where scenario 2 sees more to labour migration possibilities. The additional learning goal of developing soft skills is achieved as students must communicate and negotiate in order to come to a legal solution to the case.

Table 1: Relevant legislation to engage with per scenario in the EU Migration Law Simulation

Scenario 1 (6 roles): *Noora and Ray*	Scenario 2 (5 roles): *Noora wishes to stay*	Scenario 3 (5 roles): *Ray has a child*
Article 79 TFEU	Article 20, Article 45 and Article 78-79 TFEU	Article 20, Article 45 and Article 78-79 TFEU
Family Reunification Directive	Family Reunification Directive	Family Reunification Directive
Student and Researchers Directive	Student and Researchers Directive	Return Directive
Single Permit Directive	Single Permit Directive	EU citizen directive
Blue Card Directive	Blue Card Directive	
	Asylum Qualification Directive	
	EU citizen directive	

Each scenario is played in the order as shown in table 2.

Table 2: Order of actions in the EU Migration Law Simulation.

	Action	Time in minutes
1.	Introduction	5
2.	Reading time	10
3.	Simulation	30
4.	Wrap-up	30-50

The integration of the simulation within the extant teaching format is facilitated by this periodisation, for instance within working groups or 90-minute classes. The number of students can vary from 5 to 100 students, as long as the students can be divided in groups sitting at a table with enough space for the paperwork and with a view of the central video screen, which is connected to Wi-Fi (see figure 2). The lecturer logs on to a website for the instruction video and to start the scenario. During the scenario a clock is ticking on the screen and

instructions and multimedia events influence the scenario. The lecturer has an observing role as facilitator of the game.

Each scenario consists of five or six roles: Noora (the migrant), Ray (the partner of Noora, only in scenario 1 and 3), a hospital, an employer of Noora and Ray, her immigration lawyer, the immigration officer and a mediator. Each role has a secret goal to fulfil, which adds to the game element of the simulation. The role of the mediator is of importance to get the discussion within the group going and to come to a compromise at the end of the playing time. The occurrence of multimedia events during the simulation, displayed on the central screen, has the potential to stimulate discussion within a group and enhance the learning experience. On paper, four or five information request 'cards' are offered to each team, with descriptions of a specific topic. However, only two requests of information can be used, which also adds to the gaming element of the simulation.

When cycles of the simulation have finished, the wrap-up in the form of a plenary debriefing starts following an enquiry-based format. During the wrap-up students can share how they experienced playing their role and if they were able to reach their secret goal. The practical aspects of the case are discussed in relation to both legal practice and theoretical knowledge. At this juncture, the lecturer, in a collaborative effort with the participants, aligns the course's learning objectives with the curriculum, leveraging the participants' experiential knowledge.

Development of EU migration law simulation

The development of the simulation is embedded in a cursory literature review of the effect of educational simulations for higher education and literature review on legal education. From this review[17] we concluded that 'serious gaming' was a teaching method that caters to the diverse backgrounds and needs of our law students, the intricacy of teaching objectives, and our aspiration to equip future generations of experts in European migration law with the tools to cultivate a shared understanding of EU migration law. Moreover, experience from other disciplines, mainly management science,

[17] T. de Lange, K. Geertsema, S. Mantu, 'Theoretical foundations of gaming in teaching the functioning and future of European Migration. Let's play!' in P. Grimes et al (eds) *Teaching Migration and Asylum Law. Theory and Practice* (Routledge 2021), pp. 171 – 176.

were considered when developing the simulation, resulting in a co-operation with the educational developer of the format 'grip game' (GRIP: Gamified Roleplay for Interesting Problems). This format is rooted in experience-based learning and serious simulation games. It had been used at management schools, but never for law schools. The three scenarios were developed according to this format, using the reiteration cycle to improve the text and gaming elements in order to meet the learning goals.

In the testing phase, a number of challenges had to be overcome. Firstly, the challenge of intercultural communication was evident. It was evident during the test phase that the cultural background of the participants had a significant impact on their performance in the role of judge. This finding indicated that cultural influences could have a substantial influence on the way in which roles are performed in a simulation, and consequently on the experience of participants in the simulation. The decision was taken to relocate the simulation to an area external to the courtroom, with the objective of avoiding the situation of conflict that is characteristic of courtroom cases.

Secondly the available time for the playing of the simulation posed a challenge. Earlier edu-formats based on Gripgame are pressured in twenty minutes, which was too short for the developed scenarios. Law students must apply legal instruments that are normally accessible online. Information sheets on the relevant legal norms were added later to the simulation as a replacement of the (online) legal textbooks, allowing students a quick overview of the EU directives that they could apply to the case. This did however, result in extra reading time. The scenario was therefore extended to 30 minutes playing time, instead of the proposed 20 minutes. After testing the scenarios on co-workers of the lecturers developing the simulation, it was decided to add a pause button to the simulation. The lecturer/facilitator has been given the option to stop the simulation in order to answer pressing questions.

Thirdly, it was a challenge to foster European co-operation and harmonization. Although the existing edu-format is known for the limited role of the facilitator, our law students asked for more guidance than was foreseen. A good introduction appeared to be crucial for quality playing time. Besides that, the EU harmonized migration rules and regulations are minimum norms and may differ significantly at a national level. Differences among EU member states in practice thus do not allow for a 'one-size-fits-all' wrap-up. The wrap-up by the facilitator/lecturer is therefore pivotal in establishing a link between the

simulation experience and the acquisition of knowledge, while also highlighting the variances in the application of the same standards throughout the EU. It is imperative to acknowledge the pivotal role of the facilitator in optimising the learning experience.

Finally, although we envisaged an online simulation in order to be able to play the simulation with European universities at the same time and to facilitate discussion among European students, in practice the off-line simulation showed the best results. We found that off-line simulation was most successful for knowledge exchange and systems insight.

Setting of the simulation game in the curriculum

Each year between 15 and 25 students are participating in the courses Dutch Migration Law and 35 students participate in the course European Migration Law, both at Radboud University (Nijmegen). In both these courses the simulation became integral part of the curriculum. Since its inception, the simulation has been incorporated into the curricula of two other Dutch universities.

Methodology and Data collection

A survey was conducted with the objective of providing an empirical basis for the analysis of the impact of the simulation game on students' perceptions of learning. It was designed by the Centre for Management Simulation (ZMS) at the Cooperative State University in Stuttgart.[18] The survey consists of a questionnaire for the evaluation of teaching on learning including the specific demands of simulation games. It consists of seven latent constructs that are formed of 25 items evaluated using six-point scales:

Satisfaction and Learning: Evaluates the overall satisfaction with the simulation game-based teaching and contains a student-self-assessment on learning. It consists of three items related to learning and three items related to overall satisfaction.

[18] F. Trautwein & T. Alf, 'Theory-Based Development of an Inventory for the Evaluation of Simulation Game Lectures' in C. Harteveld and others *Simulation and Gaming for Social Impact* (Springer 2023), https://doi.org/10.1007/978-3-031-37171-4_1.

Facilitation: Addresses teaching specific aspects of facilitation such as structure of the seminar or communication between instructors and students.

Simulation Game Reality/Relevance: Students evaluate to what respect the game represents corresponding real-world issues.

Simulation Game Comprehension: Students evaluate how well they understand how the game proceeds and the results provided.

Student Engagement: Students assess how engaged they were during gameplay and debriefing.

Team Atmosphere: Students evaluate the atmosphere within their group.

Team Task: Students assess how tasks were distributed within their groups and whether they knew what their function or job was.

To gather data on the student experience and learning achievements, all students are asked to fill out the survey after playing the simulation. The data can be compared to other simulation games that were evaluated using the same questionnaire.[19]

Since the development of the three scenarios, we requested all participants to participate in the evaluation by filling out a survey. In total, from December 2022 till November 2024, 163 students participated in the simulation evaluation survey we quantitatively analyzed, of which 111 completed the questionnaire. These students are divided over four universities:

Table 3: Played sessions and completed surveys

Date	University	Scenario played	Participants	Completed survey
8 December 2022	Radboud University (NL)	2	8	8
21 March 2023	Charles University Prague (CZ)	1	12	11
20 October 2023	Radboud University	1	18	10

[19] F. Trautwein & T. Alf, 'Simulation Games on Sustainability – A Comparative Study' in C. Harteveld and others *Simulation and Gaming for Social Impact* (Springer 2023), p. 121-133, https://doi.org/10.1007/978-3-031-37171-4_8.

23 November 2023	Radboud University	2	15	14
1 December 2023	Radboud University	2	5	5
8 March 2024	VU University (NL)	2	25	18
15 May 2024	Gent University (BE)	1	54	34
28 November 2024	Radboud University	1	26	11
TOTAL			**163**	**111**

To analyze the statistical data we used Jamovi, a graphical interface based on R.[20]

As an additional source for assessing the influence of the simulation game on learning motivation and learning success were the observations of the lecturers during the simulation, a transcript content analysis (In Atlas.ti) of one session of the simulation and the wrap up at the end of the simulation.

Ethical Considerations: Informed Consent

Participants were adequately informed about the research objectives, the nature of data collection, and the data storage protocols during both the invitation phase and the session itself. This ensured compliance with ethical standards for research involving human participants.[21]

A limitation of our research as presented in this paper, is that we have no data evaluating the courses *before* the simulation was introduced to measure the learning impact and the isolated effect of the simulation.

[20] The Jamovi project. (2023). Jamovi [Software]. https://www.jamovi.org

[21] Ethical approval for this study was obtained through participant consent procedures in accordance with European regulations. Prior to data collection, participants were informed about the aims of the research, the intended use of recordings for analyzing learning outcomes and facilitation approaches, and the procedures for secure data storage. Consent was primarily documented on film, a method recognized under European law. Participants were assured that all data would be stored securely, treated confidentially, and published only in anonymized form. All standard ethical considerations regarding voluntary participation, confidentiality, and data protection were addressed. As extra we told participants if they wanted to respond not in the group on their consent or not they could approach us during or after the session and would always be taken seriously.

Results

Integration in curriculum

After several testing rounds which resulted in adjustments to scenario and settings, the simulation was integrated in the curriculum of two courses at Radboud University in the Master Human Rights and Migration Law. On this integration, students cheered the introduction to practice and 'reality', which apparently text books had not offered. On the open space in the earlier mentioned surveys they wrote:

> 'Great way to teach students the practical aspects of migration law, that there are other considerations than legal ones. Thinking on our feet is necessary. Awareness of the dynamic relation between law and policy. Practice in work life. Realities on solving issues quickly and in teams.'[22]

> 'It was really thought provoking and interesting to be part of such a simulation. It gave me a perspective on reality and how things can be complicated in real.'

One student recognized that the different roles and interests at play has students see different interpretations of the law:

> 'Overall, it was fun and informative, I liked how there were different interests represented and so it helped me to think about how different outcomes are preferable for different parties.'

Student surveys results

The overall survey results are presented in figure 3. In addition, we present already published data on business games to contrast the results.[23] This data was collected with the same survey as for the EU Migration Simulation.

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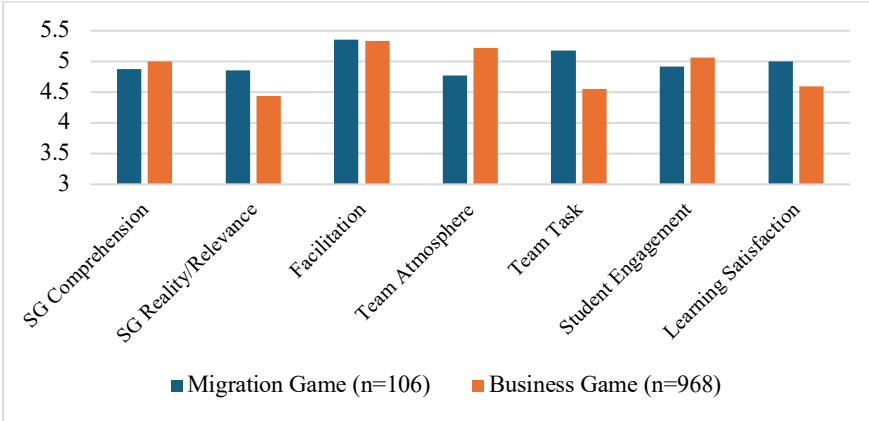
[22] The term 'thinking on your feet' refers to the skill to respond quickly and effectively to unexpected situations, real-time problem solving and quick decision taking.

[23] F. Trautwein & T. Alf, 'Simulation Games on Sustainability – A Comparative Study.' in C. Harteveld and others *Simulation and Gaming for Social Impact* (Springer 2023), p. 121-133, https://doi.org/10.1007/978-3-031-37171-4_8.

Figure 2: Comparison of evaluation, migration game and business games



Observation and video analysis

We first tested the prototype of the game on a mixed group of students and lecturers providing this course. The game at that time consisted of the following components.

Narrative of the first prototype test:

There was a running scenario film that also included the introduction sheets on the game roles. There was preparation time and next, players would step into their roles. Subsequently at prefixed times an interruption with an event film would take place, adding new information after which participants were supposed to process this feedback and incorporate it into their strategies and negotiations. However, the film event interruptions were not functional to the participants as the introduction failed to meet their expectations and prepare them well enough for their roles, no additional interventions of the facilitator supported their learning because it just all happened too fast. Participants lost their feelings of meaning, agency and control and felt overwhelmed by the sudden interruptions they felt they could not catch up on. Some participants claimed it was a waste of their time in the debriefing.

Evaluation

The basic setup of the game in terms of scenario, integrated learning content, roles and events were estimated as sound and designed according to the principles of effective game design such as short cycled concrete relevant

feedback, not too many roles, hidden profiling to generate game flow and an evolving scenario. Yet, the way the simulation game was presented without a separate introduction, with limited expectancy management and the interrupted game flow, it was generating such a cognitive load that even the lecturers present at the test could not follow up on what was needed to perform well in the game and achieve its goals.

Redesign by adding the **SCRIPTed Facilitation** design:

To resolve all the issues from the first test the script was applied; An introduction with a facilitator connecting to the audience and explaining the relevance and meaning of the game was designed. This resulted in the following findings following the SCRIPT steps:

1. Set the Stage
In the introduction sheets the expectations regarding roles, rules and resources were explained as well as goals of the game and goals in the game by a physically present facilitator

2. Clarify the Journey
The game now had a pause button to stop the game whenever needed for an intervention by the facilitator and the interventions of the facilitator were directly aligned with the learning needs of the participants.

3. Repeat & Reflect

and

4. Intervene with intent taken together and Process the Experience

At regular intervals, the facilitator intervened to summarize the process, have participants respond, and deepen their understanding so they could make more meaningful decisions and better absorb the feedback obtained through the events.

5. Process the Learning

The participants were asked how they experienced the process and if they felt it was adding to their learning. All participants responded positive, they replied it helped apply and process their knowledge on application of migration law

and that it contributed to studying for their exams and understanding the relevance and workings of the processes.

Negative prototype and subsequent positive prototype with facilitation design

Table 4 presents the summative overview of the comparison of the learning effects and facilitation design factors for the negative prototype session and the positive second session of the prototype with added facilitation design script.

Table 4: Overview of learning effects engaging SCRIPTed facilitation design

SCRIPTed Facilitation design	**Positive Session**	**Negative Session**	**Key Differences & Notes**
Set the Stage	Medium – Adequate setup, players understood the context.	Medium – Basic setup; lacked preparation such as clear goal-setting.	Both sessions did not fully maximize the setup phase; role framing could be improved.
Clarify the Journey	Medium – General awareness of flow and structure.	Medium – Steps remained unclear due to a rushed introduction.	Clearer explanation of roles and flow needed from the start.
Repeat & Reflect	Mixed – Some reflection but lacked structure and third-order learning.	Negative – No real learning occurred due to poor structure and lack of facilitation design.	Structured reflections in-between were missing; negative session missed learning opportunities.
Intervene with Intent	Positive – 25 content + 14 process interventions, though lacked deeper role-level insights.	Negative – 11 content + 2 process interventions, minimal process focus.	Positive had more and varied interventions; both lacked third-order (role-reflective) focus.

Process the Experience	Positive – Active facilitation and integration of experiences.	Negative – Passive facilitation, limited feedback loops.	The positive session engaged players; the negative missed learning opportunities.
Transfer the Learning	Positive – Connections were made to real legal contexts (migration law).	Negative – No real learning occurred to enable transfer.	Positive session enabled applied legal learning; negative lacked foundation for transfer.

The second test session of the EU Migration Law Simulation Game demonstrated notable advancements in its design and implementation. The simulation game aimed to familiarize students with the functioning of migration law by immersing them in realistic, teacher-generated scenarios, which were brought to life by a professional game design company. The addition of a facilitation design for this session proved to be a critical enhancement.

Discussion

The overall outcome of the research shows that students rate the simulation game as a positive learning experience. As key success factor we identify the SCRIPTed Facilitation design. A more in-depth analysis brings forward the following five success factors.

Firstly, students rate the EU migration law simulation very comprehensible. It is a little less comprehensible than a variety of established business games were rated (see figure 3). Given the fact that the EU Migration Law Simulation game is a rather new development it is still a high level of comprehension. The questions whether a simulation game is realistic or not is an important predictor for learning.[24] The simulation game is rated to be more realistic than a variation of business games. In this respect the game fulfils an important characteristic

[24] S. Zeiner-Fink, A. Bullinger & S. Geithner, 'Learning Effects and Acceptance in Business Games: A Systematic Literature Review' in C. Harteveld and others *Simulation and Gaming for Social Impact* (Springer 2023), p. 36–51, https://doi.org/10.1007/978-3-031-37171-4_3.

to contribute to learning. From the SCRIPTed Facilitation design follows that the game design and facilitation interventions during gameplay and reflection are already rendering considerable learning results, as the debriefing setup without a structured framework for post-game reflection rendered a satisfying learning outcome: 11 on first- (content/procedural) and 11 second order (process) level, suggesting that participants were able to derive meaningful insights. In the future we aim to achieve more third order learning outcomes in terms of critical role reflections with third order reflective questions during the gameplay and added debriefing techniques that urge participants to critically reflect on their roles from a third order perspective.

Secondly and importantly, from the survey and the observation we draw that the instructions given by the facilitator and the role description are sufficient to play the simulation. According to the students, the simulation game was very well facilitated. Students rated it with the highest mean that is reported in this evaluation. This finding on the importance of the facilitator echoes existing literature on facilitation.[25] From the SCRIPTed Facilitation design we take that the facilitation approach was modest, as intended, because the game design should trigger the learning process. We find that a facilitator should only have a supportive role. In our observation the facilitator intervened nine times, primarily addressing content (25 interventions) and process (14 times),[26] and did so without relying on pre-scripted or structured questions, adaptive to participants needs.

Thirdly, we highlight the team variables, as here we see a differentiated picture. The team atmosphere in teams playing the migration game is obviously lower than the team atmosphere of teams playing business games. This is an effect we have seen in prior studies comparing business games to games on sustainability.[27] A possible explanation might be that conflict-laden topics (as

[25] M. de Wijse-van Heeswijk, E. Rouwette, S. Meijerink, 'The learning effects of first, second and third order interventions in a rule based and open simulation game' (2025) *Instructional Science;* J. van Laere, J. Lindblom, ., & M. de Wijse-van Heeswijk, 'Complexifying Facilitation by Immersing in Lived Experiences of on-the-fly Facilitation' (2021) *Simulation & Gaming*, https://doi.org/10.1177/10468781211006751; M. de Wijse-van Heeswijk, 'Ethics and the Simulation Facilitator: Taking your Professional Role Seriously'(2021) 52(3) *Simulation & Gaming*, p. 312-332. https://doi.org/10.1177/10468781211015707.

[26] Interventions can be a combined process and content intervention.

[27] F. Trautwein & T. Alf, 'Simulation Games on Sustainability – A Comparative Study' in C. Harteveld and others *Simulation and Gaming for Social Impact* (Springer 2023), https://doi.org/10.1007/978-3-031-37171-4_8, p. 130.

migration and sustainability are) are reflected in the teams' experience dealing with the conflicting topics. Law students in higher education are used to conflict settings to practise their legal communication skills, with the moot courts as best example.[28] Most law schools prepare their students for the conflict setting in which a court must give the final verdict. The set-up of the EU migration law simulation though is different, on purpose it is not in a conflict setting, to help students to realize a team effort is needed to come to an outcome when interests are conflicting, and different legal solutions are possible. For law students this might be a setting that is out of their comfort zone in learning about law.

Fourthly, students are very satisfied with the learning experience and expect it to have a positive influence on their education. We do note that, after the first observation and adjustments made, the students playing the migration game are very confident about the roles which are given through a role description. Although students rate their own engagement marginally lower than students rate their engagement in business games, their individual feedback is very positive. Indeed, looking at the overall assessment on learning and satisfaction we see that the EU migration Law simulation game is rated very positively. Thus, as the observation showed, participants showed eagerness to start and asked relevant questions after the introduction. Expectancy guidance on the goal of the game, the learning process in the game and the goals in the game supported the engagement of participants from the start. The learning process of the simulation allows the students to follow their own learning paths and only when learning support was needed did the facilitator intervene. The gameplay process of 1,5 hrs is relatively short and might be interrupted too much by having plenary central reflections on the gameplay with structured questions. During interventions of the facilitator participants actively engaged in discussions, which also contributed to the learning process.

Fifthly and finally, in comparison to business games, a simulation on law is characterized by the difference in learning goals: in the EU migration law simulation, students must apply legal instruments in an individual case. Most likely, in a law simulation game more emphasis is put on knowledge of legal sources, where the learning goal is at the same time to develop communication

[28] See on developments in this field of law education: E. van Dongen, 'Pleading in the Virtual Courtroom. Exploring Experiential Learning in Law through Virtual-Reality-Based Exercises and Student Feedback' (2024)5, no. 1 *European Journal of Legal Education*, p. 157–190.

and teamwork skills to discuss, argue and plea the application of different legal sources. Moreover, to prepare law students for their professional lives, both (cultural) soft skills that focus on mediation and hard skills that require creative thinking on a global issue like migration, are of great importance.[29] The finding in the survey that students find the EU migration law simulation realistic, is confirming that this learning goal is reached.

Conclusion

The development, testing and application of an educational simulation tool to prepare students for a complex legal practice in which co-operation across European member states is essential has resulted in the EU Migration Law Simulation. The objective of the simulation was to facilitate engagement with strategies for the protection of human rights, the guarding of national borders, and the facilitation of safe migration channels for the purpose of achieving a sustainable future in accordance with EU migration law. This contribution presented the development, testing and functionality of the EU Migration Law Simulation, along with the results of student evaluations from law schools across Europe.

Via the immersion of students in the scenario and practising law from their roles in the game, the transfer of both content and procedural knowledge was enhanced. The EU migration simulation enriches existing courses on EU migration law: the analysis of student experiences shows an increased interest in the topic and learning motivation. The structure of the instruction and coordination of the simulation means that the tutor, or facilitator, is able to perform the simulation with minimal guidance. Thus, the scalability of the EU Migration Law Simulation offers potential for higher education on migration throughout Europe. Advancing the implementation of this educational tool within European law schools will validate the value in legal education on EU Migration Law. Thus, our evaluation of the effects of the added SCRIPTed Facilitation design was positive and turned a seemingly not effective simulation game in an effective one. Moreover, further quantitative as well as qualitative analysis of the simulation will enrich the academic findings on experiential learning.

[29] J. Faulconbridge and D. Muzio, 'Legal education, globalisation, and cultures of professional practice' (2009) 22(4) *Georgetown Journal of Legal Ethics*, 1335-1359.

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Breaking the silence: empirical insights on encouraging quiet students to speak out in law classes

Xiaoren Wang*

Abstract

For law students, particularly law undergraduates, actively engaging in class discussions is crucial not only for their learning but also for their future careers. However, research in legal education and my own teaching experiences reveal that a substantial number of law students remain quiet during class discussions. Existing research on why students are quiet primarily focuses on the context of US law schools, which differ from the settings of other regions such as the EU or UK. Using two surveys and one intervention, this research explores the obstacles preventing quiet students from participating in discussions in the context of a Scottish law school and tries to improve their participation in class discussions. The findings reveal that the obstacles preventing quiet students from speaking out differ from those affecting active students. Quiet students are more likely to be hindered by subjective factors such as social anxiety or shyness, whereas active students tend to be influenced by objective factors such as whether they have prepared for class discussions. Additionally, as the semester progresses, the inhibiting effects of these obstacles on quiet students decrease significantly, compared with active students. These findings imply that strategies for encouraging quiet students should differ from those for active students. To encourage quiet students to speak up in law classes, lecturers should focus on alleviating subjective anxiety or shyness and helping them quickly become familiar with the module setting. Finally, the article further discusses the pedagogical value of class discussion for quiet students, despite the fact that this is not their comfort zone.

Keywords: empirical, quiet students, inclusivity.

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Introduction

Over the past few decades, higher education has shifted from teacher-centred to student-centred settings. Class discussions are essential in a student-centred classroom. O'Neill and McMahon noted that one of the key strategies of student-centred learning is a focus on interaction, such as class discussions.[1] First, student participation in class discussions enhances their learning outcomes. In-class discussions significantly improve the student learning experience by developing critical thinking skills.[2] Second, in-class discussions provide self-motivation in the learning process. Marvell et al. pointed out that student-led teaching empowers students to explore knowledge actively.[3] McKee emphasized that classroom discussions transform students into active collaborators, which can substantially motivate their self-learning after class.[4]

For law students, particularly law undergraduates, actively engaging in class discussions is particularly important. Oral skills are crucial for lawyers.[5] A good speaking style indicates confidence and professionalism, which earns the trust of law firm partners and clients. In addition, students who actively participate in law school discussions gain more advantages during their studies.[6] Reference letters from law lecturers are crucial for securing jobs at reputable law firms. It is often easier for outspoken students to receive strong reference letters as they make a memorable impression on their lecturers. Therefore, actively participating in class discussions is particularly important in law school.

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[1] Geraldine O'Neill and Tim McMahon, 'Student-Centred Learning: What Does It Mean for Students and Lecturers' in G O'Neill, S Moore, and B McMullin (eds), *Emerging Issues in the Practice of University Learning and Teaching I* (AISHE 2005).
[2] Robert Joseph McKee, 'Encouraging Classroom Discussion' (2014) 14 Journal of Social Science Education 66.
[3] Andrew Marvell, David Simm, Rob Schaaf, and Richard Harper, 'Students as Scholars: Evaluating Student-Led Learning and Teaching During Fieldwork' (2013) 37 Journal of Geography in Higher Education 547.
[4] McKee (n 2).
[5] Sarah E Ricks, 'Some Strategies to Teach Reluctant Talkers to Talk about Law' (2004) 54 Journal of Legal Education 570.
[6] Ibid.

However, existing research[7] and my past teaching experience reveal that the same students always engage actively in class, while others remain quiet. This phenomenon has also been observed by my colleagues during their law classes. This is an important issue not only for student-centred learning but also in the sense of developing an inclusive class. An effective in-class discussion should include not just talkative students but also quiet students. All of these points lead to the question to be explored in this article: how to encourage the engagement of quiet students in undergraduate law modules.

Literature review

A significant body of research explores why students are quiet in class. Morris, Quenk, and Medaille and Usinger have mentioned that fixed traits are related to students' willingness to speak out in the classroom, noting that introverts tend to be quieter than extroverts.[8] Briggs, McCroskey and Richmond stated that social anxiety and the fear of being evaluated or judged might be reasons why students remain silent.[9] Neer explained that students tend to avoid participation when they perceive it as an evaluation by lecturers or professors.[10] Hamouda found that the fear of making mistakes significantly influences students' willingness to participate.[11] Rocca; Wade; Smith; and Dallimore et al. emphasized the critical role of lecturers and professors in altering students' confidence, mindset, and perceptions, thereby encouraging greater

[7] Stephanie M. Wildman, 'Question of Silence: Techniques to Ensure Full Class Participation' (1988) 38 Journal of Legal Education 147; Mark Wojcik, 'The quiet classroom' (1998) 6 Law Teacher 1; Rachel Spencer, 'Hell is Other People: Rethinking the Socratic Method for Quiet Law Students' (2022) 56 The Law Teacher 90.
[8] Larry Wayne Morris, *Extraversion and Introversion: an Interactional Perspective* (Hemisphere Pub. Corp, 1979); Naomi L. Quenk, *Essentials of Myers-Briggs Type Indicator Assessment* (John Wiley & Sons, 2009); Ann Medaille and Janet Usinger, 'Engaging quiet students in the college classroom' (2019) 67 College Teaching 130.
[9] Stephen R. Briggs, 'Shyness: Introversion or neuroticism?' (1988) 22 Journal of Research in Personality 290; James C. McCroskey and Virginia P. Richmond, 'Understanding the Audience' in Timothy P. Mottet, Virginia P. Richmond, and James. C. McCrosky (eds). *Handbook of Instructional Communication: Rhetorical and Relational Perspectives* (Routledge 2016).
[10] Michael R. Neer, 'The Development of an Instrument to Measure Classroom Apprehension' (1987) 36 Communication Education 154.
[11] Arafat Hamouda, 'An Exploration of Causes of Saudi Students' Reluctance to Participate in the English Language Classroom' (2013) 1 International Journal of English Language Education 17.

participation.[12] Reda indicated that some students do not know how to speak in an academic voice.[13] Strayhorn pointed out that a feeling of not belonging in department or college may prevent students from speaking.[14]

Further, some researchers have specifically focused on why law students keep quiet. Wojcik pointed out that one reason students remain silent in a law class is fear of looking foolish.[15] This may be particularly common in the legal field because law students or lawyers are often perceived by society as intelligent individuals, and looking foolish could undermine their perceived qualifications as professionals. Wildman noted that female law students in the US tend to be quieter than their male counterparts for cultural and gender-related reasons.[16]

By contrast with previous researchers, Spencer proposed that quiet students are not necessarily disengaged from the class.[17] They tend to learn by listening and thinking quietly. As law lecturers, we should adjust our perceptions of quiet law students and adapt our teaching methods to meet their needs.[18] Sovinee-Dyroff pointed out some class interactions such as the Socratic method in US law schools might harm introvert students.[19]

Nevertheless, to my knowledge, there is no empirical research on the reasons why law students are quiet in the classroom and how to address this issue.

In addition, most of the research discussed above is in the context of US law schools, where the culture and education system differ significantly from those in Europe. These differences may substantially influence student engagement

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[12] Kelly A. Rocca, 'Participation in the College Classroom: The Impact of Instructor Immediacy and Verbal Aggression' (2008-2009) 43 Journal of Classroom Interaction 22; Rahima C. Wade, 'Teacher education students' views on class discussion: Implications for fostering critical reflection' (1994) 10 Teaching and Teacher Education 231; Elise J., Dallimore, Julie H. Hertenstein, and Marjorie B. Platt, 'Classroom participation and discussion effectiveness: Student-generated strategies' (2004) 53 Communication Education; Daryl G. Smith, 'College classroom interactions and critical thinking' (1977) 69 Journal of Educational Psychology 180.
[13] Mary M. Reda, *Between Speaking and Silence: A Study of Quiet Students* (State University of New York Press 2009).
[14] Terrell L. Strayhorn, College Students' sense of Belonging: A Key to Educational Success for all Students (Routledge 2018).
[15] Wojcik (n 7).
[16] Wildman (n 7).
[17] Spencer (n7).
[18] Ibid.
[19] Chloe Sovinee-Dyroff, 'Introverted Lawyers: Agents of Change in the Legal Profession' (2023) 36 Geo. J. Legal Ethics 111.

in a law class. One difference is that the US law students, Juris Doctor (JD) candidates, are postgraduates whereas a majority of EU or UK law students start learning law as undergraduates. Before entering a US law school, the US JD students have already obtained an undergraduate degree in another major, making them relatively mature in academic experience and often more active and skilled in learning. This leads to the second difference: teaching methodologies differ between the EU/UK and the US law schools. The Socratic method, widely used in US law schools,[20] is not as prevalent in the EU or the UK. The Socratic method involves in-class interaction where the lecturer asks a student to state their opinion on a legal issue and then follows up with a series of further questions to expose the weakness of the student's arguments.[21] Compared with undergraduates, postgraduates with more academic experience and higher resilience to pressure are typically more prepared for the Socratic method. This might explain why the Socratic method is more popular in US law schools. The third difference is cultural. My own experience indicates two distinct engagement styles associated with the two cultures. I received my law school education in the US where the culture encourages students, particularly law students, to assert their opinion, even if the opinion is not perfect. I found this challenging to myself, as an introvert who tries to think deeply before talking. Now teaching in Scotland in the UK, I have observed that class engagement levels are relatively lower. More than one local colleague has told me that Scottish people are of few words and consider speaking out in a group as somewhat 'pushy'. A psychological study conducted by Cambridge University indicates that 'large proportions of residents of these areas (east Scotland) were quiet, reserved, and introverted'.[22] Furthermore, several Scottish blog authors describe Scots as 'polite but reserved',[23] noting that 'Scots are clearly prone to severe emotional restraint and an inclination towards the quiet guy at the back of the class'.[24]

All these differences imply that the US research findings might not apply to Scottish law schools in explaining or addressing the engagement of quiet

[20] Spencer (n 17).
[21] Spencer (n 17).
[22] Peter J. Rentfrow, Markus Jokela, and Michael E. Lamb, 'Regional personality differences in Great Britain' (2015) 10 PloS One.
[23] Scottish at Heart, 'About Scottish People' (*Scottish at Heart*) < https://www.scottish-at-heart.com/scottish-people.html?> accessed 24 December 2024.
[24] Neil, 'A Study of the Scots' (*Travels with a Kilt*, 2018) <https://www.travelswithakilt.com/scottish-traits/> accessed 24 December 2024.

students. Empirical research in Scottish law schools is needed to explore this issue.

Therefore, this project is conducted in a Scottish law school -- Dundee Law School. The project has two objectives. First, it uses a survey to explore the obstacles that prevent students from speaking out in an undergraduate law module. It particularly focuses on quiet students in comparison to their active peers. Second, it implements a reflective practice method (action) to improve students' participation and further measures the effectiveness of this intervention through a second survey. The participants are law undergraduates at the third and fourth year enrolled in the Intellectual Property (IP) Law module.

Methodology

Dundee Law School and the Intellectual Property Law module

Before describing the methodology, it is important to provide some background on Dundee Law School and the IP module. Dundee Law School is part of the School of Humanities, Social Sciences and Law at the University of Dundee. It offers three undergraduate programmes: Scots Law (4 years), English Law (3 years) and a Dual programme (4 years). The Scots Law programme prepares students for a career as a solicitor or advocate in Scotland, while the English Law programme focuses on the legal systems of England, Wales and Northern Ireland. The Dual programme covers both jurisdictions. Modules taught in the English Law programme are primarily in the common law system, whereas the Scots Law and Dual programmes incorporate elements of both common law and civil law.

The IP module is an optional module available to third-and fourth-year undergraduates across the three programmes. In the Spring of 2024, 54 undergraduates were enrolled in this module (25 from the Scots Law programme, 15 from the English Law programme, 12 from the Dual programme, and two exchange students from France). Of these, 44 students are in their fourth year, while 10 are in their third year.

The IP module consists of 10 seminars, each lasting two hours and including both lecturing and in-class discussions. The discussions involve group discussions, Socratic recitations, and debates. Group discussions typically involve three or four students in each group, focusing on discussing the judicial

opinions expressed in a case. Recitations consist of a dialogue between a lecturer and a student, where the lecturer asks a question, the student responds, and the lecturer evaluates the response.[25] In this module, recitation is combined with the Socratic method (called 'Socratic recitation' in this article), wherein I ask a student to state their opinion on a legal issue or argument, and then I ask a series of questions designed to challenge their opinions and deepen their understanding of the law. In addition, I also organise spontaneous short debates in class where the students present contrasting opinions on a legal rule or principle.

Method

Surveys are a widely used method for investigating people's opinions, attitudes, preferences, and behaviours.[26] They are also employed to explore reasons and relationships in exploratory research.[27] In particular, surveys have been frequently used in educational research to investigate the reasons behind students' performance[28] and to measure their behavioural changes.[29] This research aims to capture why quiet students avoid class discussions and to assess the improvement in participation (behaviour change) following an intervention. Therefore, surveys are appropriate methods to achieve the two aims.

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[25] David Backer, 'The Distortion of Discussion' (2018) 27 Teacher Education 3.
[26] Anol Bhattacherjee, 'Chapter 9: Survey research' in Samara Rowling (ed), *Social Science Research: Principles, Methods and Practices* (Revised edition) (University of Southern Queensland, 2019).
[27] Liam Murphy, 'The Questionnaire Surveying Research Method: Pros, Cons and Best Practices ' [2023] ScienceOpen Preprints <https://www.scienceopen.com/hosted-document?doi=10.14293/S2199-1006.1.SOR-.PP3WYS8.v1> accessed 7 August 2025.
[28] Valentin Kassarnig, Enys Mones, Andreas Bjerre-Nielsen, Piotr Sapiezynski, David Dreyer Lassen & Sune Lehmann, 'Academic Performance and Behavioral Patterns' [2018] 7 EPJ Data article 10;
Theresa M Akey, 'Student Context, Student Attitudes and Behavior, and Academic Achievement' (MDRC 2006) <https://www.mdrc.org/work/publications/student-context-student-attitudes-and-behavior-and-academic-achievement> accessed 7 August 2025;
Malena Nygaard and Heather Ormiston, 'An Exploratory Study Examining Student Social, Academic, and Emotional Behavior across School Transitions' (2024) 53 School Psychology Review 310.
[29] Rene Martinez and Mervyn Wighting, 'Teacher-Student Relationships: Impact of Positive Behavioral Interventions and Supports' (2023) 10 Athens Journal of Education 397; Catherine Bradshaw, Mary Mitchell and Philip Leaf, 'Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes' (2010) 12 Journal of Positive Behavior Interventions 133.

The method involves three steps, as illustrated in Appendix. Step one, Survey 1 was conducted at the beginning of the module to capture the potential obstacles preventing quiet students from engaging in class discussions, compared with active students. Step two, an intervention was implemented in my teaching to alleviate one of these obstacles captured in Survey 1. Step three, Survey 2 was conducted at the end of the semester. Survey 2 contained the same questions as Survey 1, with certain adjustments. Moreover, by comparing the results of Survey 1 and Survey 2, was able to measure the effectiveness of the reflective intervention: whether it improved quiet students' engagement in class discussion. Ethical approval was obtained from Ethical Approvals Committee, University of Dundee before collecting data. The details of the three steps are illustrated in Appendix and explained below.

Survey 1

Survey 1 includes seven questions (see Questions 2-8 of Survey 1 in Appendix), aiming to address the following issues:

The student's initial level of engaging class discussions (Question 6 of Survey 1 in Appendix). Question 6 asked participants to report how often they participated in class discussions in the past two years, using a 5-point Likert scale: always, often, sometimes, rarely, and never. The main purpose of this question was to capture the students' initial level of engaging class discussions. The same question with a little adjustment was used in Survey 2 (see Question 6, Survey 2, Appendix). By comparing the responses to Question 6 between the two surveys, I was able to capture the effectiveness of the intervention which was a repeated oral statement in class to encourage students engagement. Additionally, Question 6 served to separate quiet students from active students. Participants who chose 'always' or 'often' were considered as active students, while those who selected 'sometimes', 'rarely', or 'never' were regarded as quiet students. In the data analysis, 'quiet students' and 'active students' were compared.

I placed Question 6 near the end of Survey 1 to avoid priming participants' responses to subsequent questions.[30] This question could influence participants' perceptions of themselves as either quiet or talkative, potentially altering their

[30] Daniel J. Hopkins and Gary King, 'Improving Anchoring Vignettes: Designing Surveys to Correct Interpersonal Incomparability' (2010) 74 Public Opinion Quarterly 201.

answers to the other questions. Therefore, it was best to place this question at the end.

Obstacles which might prevent students from joining class discussions (Questions 4-5 of Survey 1 in Appendix). Based on the literature review and my own teaching observations, Question 4 addressed five potential obstacles that might prevent students from joining class discussions. Q4 included five sub-questions, each covering one obstacle. These obstacles were:

Question 4.1 Fear of judgement or criticism: As introduced in the literature review, fear of judgement or criticism may prevent students from participating discussion. [31]

Question 4.2 Lack of confidence in speaking abilities: This question was designed to test Reda's opinion that some students do not participate as they do not know how to speak in an academic voice.[32]

Question 4.3 Not feeling well-prepared for the discussion: Ahmad proposed that students who have not completed homework or reading materials may be reluctant to participate in class discussion. [33]

Question 4.4 Social anxiety or shyness: As explained in the literature review, social anxiety and the fear of being evaluated might prevent students from speaking out in class. [34]

Question 4.5 Feeling overshadowed by more vocal classmates: Armstrong and Boud, Weaver and Qi noted that students who fear of appearing inadequate in front of classmates might choose not to participate in discussion.[35] This is also consistent with my own observations in daily teaching that some students were hesitating to speak when the discussion was dominated by one or two talkative students.

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[31] Wojcik (n 7); Neer (n 10); Hamouda (n 11).
[32] Reda (n 13).
[33] Crizjale V. Ahmad, 'Causes of Students' Reluctance to Participate in Classroom Discussions' (2021) 1 ASEAN Journal of Science and Engineering Education 47.
[34] Briggs (n 9); McCroskey and Richmond (n 9).
[35] Merilyn Armstrong and David Boud, 'Assessing participation in discussion: An exploration of the issues', (1983) 8 Studies in Higher Education 33; Robert Weaver and Jiang Qi, 'Classroom Organization and Participation: College Students' Perceptions' (2005) 76 The Journal of Higher Education 570.

Participants scored the impact of each obstacle on a 5-point scale: extremely likely, likely, neutral, unlikely, and not at all.

The same questions with a small adjustment were used in Survey 2 (see Question 4 of Survey 2 in Appendix). By comparing the responses on this question between the two surveys, I was able to capture the effectiveness of the action.

Question 5 asked students to write down any additional obstacles not listed in Question 4.

Other factors which might indirectly influence student engagement in class discussions (Questions 2-3, Questions 6-7 of Survey 1 in Appendix). The following questions addressed factors that might indirectly influence students' willingness to join class discussions:

Question 2 asked which year of law school the student is in. This question was designed to test Strayhorn's ideas about belonging, which might be more intense in the later years of law school.[36] Therefore, the longer students have been in law school, the stronger their sense of belonging may become, potentially increasing their willingness to participate in class discussions.

Question 3 asked students to identify which types of class discussions are most challenging: group discussions, recitations, debates, or presentations. As introduced above, my IP module includes group discussions, recitations and debates. Despite not used in this IP module, presentations are not unknown to Dundee undergraduate law students: some of my colleagues have frequently included oral presentations in their modules. So, I also included this format of discussion in this question.

Question 6 asked if the participant is a native English speaker, as language skills impact participation in class discussions. Some research indicates that

[36] Strayhorn (n 14).

non-English speaking students tend to be passive in discussion in English speaking classes.[37]

Question 7 asked students to evaluate whether they are intrinsic, extrinsic or a mix of both. As discussed in the literature review, traits might also influence classroom activity.[38]

I placed Question 6 and Question 7 at the end of Survey 1 to avoid the priming effect for the reasons mentioned above.

Intervention

Based on the results of Survey 1 (see further 'Results and Analysis'), I implemented an intervention – repeatedly stating in the class, 'There is nothing mistaken or wrong in class discussions. All input in the classroom is helpful for improving teaching and learning.' The intervention focused on reducing the fear of judgement or criticism as this was identified as a significant obstacle in Survey 1 and existing research. Such research indicated that students tend to avoid participation if they perceive class discussions as evaluations,[39] fear making mistakes,[40] or worry about looking silly.[41]

However, research also indicated that lecturers or professors play an important role in changing students' perceptions or mindsets, and thus the negative classroom climate.[42] Additionally, if students feel that their opinions are valued this helps overcome the fear of being judged.[43] Based on this research, I chose the statement above to develop a positive classroom climate, which might overcome the fear of judgment or criticism (see further. 'Results and Analysis').

[37] Thi Mai Le, 'An Investigation into Factors that Hinder the Participation of University Students in English Speaking Lessons' (M.A Thesis, Baria Vungtau University 2011); Zhengdong Gan, 'Understanding L2 Speaking Problems: Implications for ESL Curriculum Development in a Teacher Training Institution in Hong Kong' (2012) 37 Australian Journal of Teacher Education 43.
[38] Morris (n 8); Quenk (n 8); Medaille and Usinger (n 8).
[39] Neer (n 10).
[40] Hamounda (n 11).
[41] Wojcik (n 7).
[42] Rocca (n 12).
[43] Wade (n 12).

Survey 2

After the action, Survey 2 was conducted. It included the same questions as Survey 1 with two changes.

One change was that the context of Questions 3-6 switched from past experiences to the 'Intellectual Property module' . For example, Question 4 in Survey 1 (Appendix) asked the participants to evaluate the five obstacles' impact on class participation without emphasising the context. However, Survey 1 was conducted at the beginning of the IP module. So, to avoid students answering this question based on their general past experience, Question 4 in Survey 2 (Appendix) added the context of 'in the module of Intellectual Property law'. Therefore, comparing the responses to Question 4 in Survey 1 and Survey 2 can capture whether the action conducted between the two surveys reduces the effect of the obstacles s on student participation in class discussions. Questions 3-6 in Survey 2 had the same adjustment for the same purpose.

The second change was that Survey 2 added one more question than Survey 1. This extra question (see Question 7 of Survey 2 in Appendix) asked participants whether they engaged more in the IP law module compared to their past experiences ('Which statement best describes your engagement in class discussions within the Intellectual Property Law module?'). The participants chose among 'I'm more involved in class discussions now compared to the past', 'My participation hasn't significantly changed from the past', 'I'm participating less in class discussions than before' and 'I'm not sure/I don't know'. The purpose of this question was to directly measure, through self-report, whether the intervention improved students' engagement in class discussions.

Limitations of the method

The surveys conducted in this research have certain limitations. First, it was not possible to compare the responses of the same participants in Survey 1 and Survey 2. Both surveys were anonymous. Participation of both surveys was voluntary, meaning that there was no guarantee that the participants who completed Survey 1 would also do Survey 2. Consequently, a within-group analysis, which precisely tracks and compares the same group's change

between two time points, was not possible.[44] Instead, the project conducted a causal comparison between the two surveys, in which participation might partially overlap. Therefore, the comparison is merely a causal descriptor of the effects of the intervention (the action).

Second, the research relies solely on surveys to explore the obstacles preventing quiet students from speaking out in class. Ideally, follow-up interviews could have been conducted, providing additional insights to the surveys.[45] However, due to the time constraints and difficulties in recruiting volunteers from the IP module, follow-up interviews were not conducted. Therefore, this research presents only preliminary findings on the topic, and future studies should include follow-up semi-structured interviews to deepen the investigation.

Third, the obstacles listed in Question 4 did not include cultural obstacles (speaking out in a group is considered as 'pushy' in Scotland). The omission is due to that it might partially overlap with other two obstacles 'fear of judgement or criticism' (Question 4.1) and 'social anxiety or shyness' (Question 4.4). In addition, Question 5 was an open question which invited participants to add any obstacles not listed in Question 4. Question 5 was designed to capture the cultural obstacle if it was identified as a factor. However, only one participant in Survey 2 responded to Question 5, adding new reasons which prevented them from speaking out. So, this survey obtained no substantive data on this cultural factor. To address this drawback, future empirical research should explicitly include cultural factors relevant to the Scottish context. In particular, researchers could list 'not wanting to be pushy' as an obstacle in the questionnaires.

Last, the sample size is limited. Therefore, its findings are not representative of Scottish law undergraduates as a whole. They do, however, provide a

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[44] Erich C. Fein, John Gilmour, Tanya Machin and Liam Hendry, *Statistics for Research Students: An Open Access Resource with Self-Tests and Illustrative Examples* (University of Southern Queensland 2022), <https://usq.pressbooks.pub/statisticsforresearchstudents/> accessed 29th July 2024.

[45] This research is an exploratory study, in which the factors' impacts in a situation are unknown. In this kind of research, merely using surveys with pre-designed questions offers no chances to ask immediate probing questions which might reveal hidden factors in an unexpected situation. Therefore, a following-up interview with probing questions would supplement this drawback of surveys. See Neha Jain, 'Survey Versus Interviews: Comparing Data Collection Tools for Exploratory Research' (2021) 26 The Qualitative Report 541.

preliminary empirical exploration rather than a complete picture of the topic of quiet student engagement in class discussions in legal education contexts.

Results and analysis:

Of the 54 students enrolled in the IP module, 26 completed Survey 1, and 13 completed Survey 2. As the semester drew to a close, students had heavier studying loads and higher pressures. This might have reduced the participant numbers of Survey 2.

Survey 1

The proportion of quiet/active students in Survey 1 (Question 6)

As discussed in 'Methodology', Question 6 ('In the past two years, on average, how often did you participate in class discussion') aimed to capture the initial level of student engagement in class discussions. The results show that 50% of the participants chose 'sometimes,' 'rarely,' or 'never' in Question 6 (defined as 'quiet students'), and the remaining 50% chose 'always' or 'often' (defined as 'active students'). In the following analysis, quiet students were compared with active students.

The impacts of obstacles in Survey 1 (Questions 4-5)

This section reports the obstacles preventing class participation, based on the responses to Question 4 which included five obstacles. I calculated the proportion of students who chose 'likely' and 'extremely likely' to each obstacle and ranked the obstacles according to this proportion.

The Impacts of Five Obstacles on Quiet Students in Survey 1. Tracking quiet students' choices in Question 4 reveals the impacts of five obstacles on their participation in class discussions.

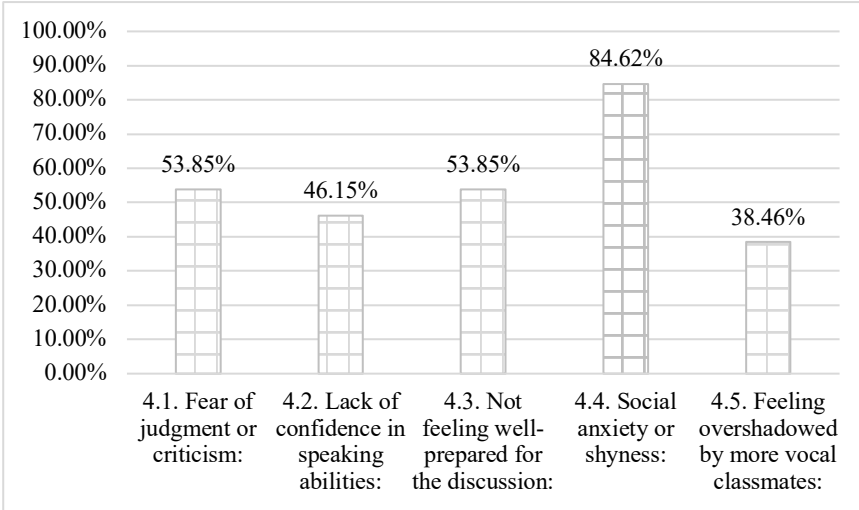


Figure 1: Survey 1: Quiet Students-5 Obstacles

Figure 1 illustrates the impact of each of the five obstacles on quiet students. For quiet students, the most influential obstacle was 'social anxiety or shyness' (84%), followed by 'fear of judgement or criticism' (53.85%) and 'not feeling well-prepared for the discussion' (53.85%). 'Lack of confidence in speaking abilities' ranked fourth (46.15%), followed by 'feeling overshadowed by more vocal classmates' (38.46%).

Though 'not feeling well-prepared for the discussion' and 'fear of judgement or criticism' appeared equally significant, a closer look revealed a difference. For 'not feeling well-prepared for the discussion,' all 53.85% chose 'likely.' For 'fear of judgment or criticism,' the 53.85% included 7.69% who selected 'extremely likely' and 46.15% who selected 'likely.' Thus, the effect of 'fear of judgment or criticism' was slightly greater than that of 'not feeling well-prepared for the discussion'.

The Impacts of Five Obstacles: Quiet Students vs. Active Students. With the same method, I also identified the impacts of the five obstacles on active students. To be efficient, the results of the quiet and active students are combined (Figure 2) to make a comparison. The obstacles which substantially inhibit quiet students and active students are different.

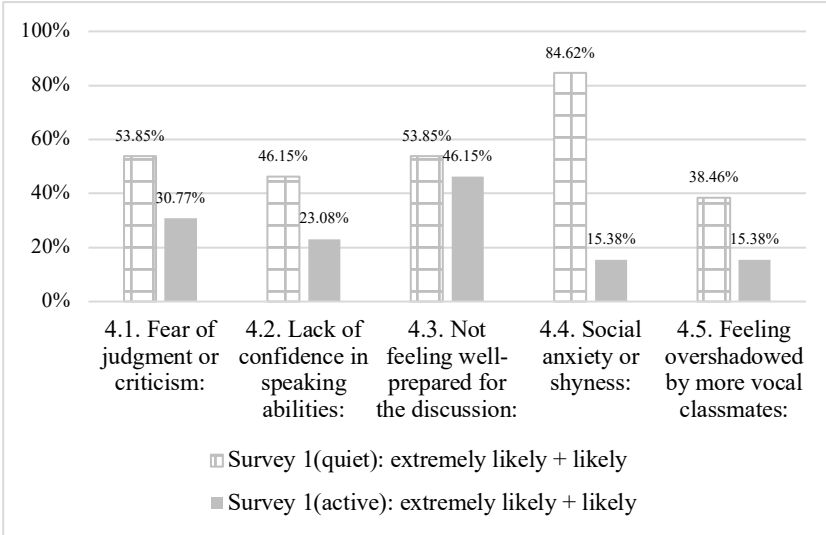


Figure 2: Survey 1: Impacts of 5 Obstacles: Quiet Students vs. Active Students

Figure 2 reveals that 'social anxiety or shyness' was the most influential obstacle for quiet students but the least influential for active students. This suggests that quiet students are more likely to be influenced by factors related to subjective aspects such as social anxiety or shyness, while active students are more influenced by factors which are relatively objective such as whether they have prepared for the discussion.

Figure 2 also shows that 'fear of judgement or criticism', 'feeling overshadowed by more vocal classmates' and 'lack of confidence in speaking abilities' had a greater impact on quiet students compared to active students: to each of the three obstacles, the percentage was around 20% higher in the quiet group than that in the active group. This further implies that, for those subjective aspect factors impacting both groups, the impacts are substantially greater on quiet students than on active students.

In Figure 2 the obstacle of 'not feeling well-prepared for the discussion' affected both groups without significant differences. In addition, 'Not feeling well-prepared for the discussion' was the most influential obstacle for active students but only the second for quiet students. This implies that the preparation for discussion impacts both quiet and active students, but for quiet students, the inhibition of this obstacle is surpassed by social anxiety and shyness.

Therefore, strategies to increase quiet students' participation in class discussions should focus on students' subjective aspects, such as anxiety or shyness rather than objective aspects (see further 'Discussions and Conclusions). This finding is consistent with the existing research of Briggs, McCrosky and Richmond, which reveals that students might be reluctant to speak out due to anxiety.[46]

In Question 5, no participants provided additional reasons or obstacles not listed in Question 4.

Intervention

Based on these results in Survey 1, I chose an action aimed at reducing the 'fear of judgement or criticism'. I did not address the most influential obstacle, 'social anxiety or shyness,' as it is related to internal traits that are difficult to change within a short period—a semester. Therefore, the action targeted the second most influential obstacle for quiet students.

The action is a repeated statement in class: 'There is nothing mistaken or wrong in class discussion. All input in the classroom is helpful to improve teaching and learning.' I emphasised this statement several times in classes to create a mistake-friendly environment, expecting to reduce the fear of being judged or criticised and therefore encourage students, particularly the quite students, to engage more in class discussion. This statement was designed based on studies highlighting the significant role of lecturers in changing students' mindsets and, consequently, their participation.[47] Participation is likely to increase when students realise that the purpose of in-class discussions is to facilitate learning rather than serve as an evaluation. In addition, lecturers' affirmation of students' contributions and ideas can enhance engagement.[48] Therefore, this statement was crafted to clarify the purpose of discussions ('to improve teaching and learning'), affirm the value of students' participation ('all input is helpful'), and guarantee a non-judgmental climate ('nothing mistaken or wrong'). To reinforce its impact, I repeated this statement multiple times, expecting this action to have a good chance of overcoming the fear of criticism and judgement.

[46] Briggs (n 9); McCroskey & Richmond (n 9).
[47] Rocca (n 12); Wade (n 12); Dallimore, Hertenstein, and Platt (n 12); Smith (n 12).
[48] Dallimore, Hertenstein, and Platt (n 12); Smith (n 12).

Unfortunately, the action did not achieve this purpose. This conclusion is primarily drawn from the comparison between Survey 1 and Survey 2. Further details and analysis will be provided in 'Survey 2 Results and Comparison between Survey 1 and Survey 2.

However, I observed one student in this module significantly increased her engagement in class discussions following the action. This student is an exchange student from France, with a civil law education background. She was keeping quiet for the first half of the IP module, but engaged once or twice in the last three classes after the action was implemented. However, this change is too minor to prove the quantitative effect of the action.

Survey 2 Results and Comparison between Survey 1 and Survey 2

The purpose of Survey 2 was, through comparing Survey 1 and Survey 2, to capture whether the action improved quiet students' participation in class discussions compared to active students. To streamline this discussion, I present the findings of Survey 2 alongside those of Survey 1 in the following paragraphs, allowing for a direct comparison between the two surveys.

Comparison of the proportion of quiet/active students between Survey 1 and Survey 2

As mentioned, the action did not improve student engagement in class discussions. Figure 3 below combines the proportion of quiet and active students in both surveys. It indicates that the proportion of participants selecting 'sometimes', 'rarely' or 'never' in Question 6 (quiet students) increased from 50% in Survey 1 to 61.54% in Survey 2, while the proportion of participants choosing 'often' or 'always' in Question 6 (active students) decreased from 50% in Survey 1 to 38.46% in Survey 2.

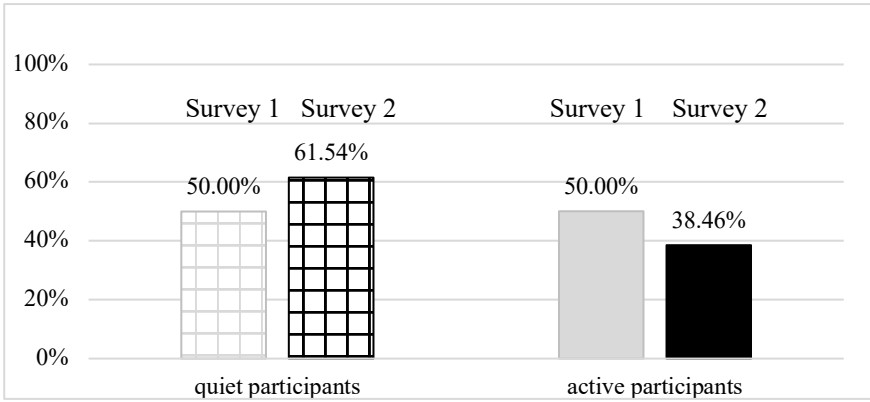


Figure 3: Survey 1 and Survey 2: proportion of quiet/active students

This result indicates that participation in class discussions did not increase but rather decreased following the intervention. However, this reduction is not statistically significant (p-value = 0.495628), suggesting that the intervention was not significantly associated with participation on overall class discussion.

Question 7 in Survey 2, which directly measured changes in class participation through participants' self-report, was consistent with the finding above: Out of 13 participants, 11 (85%) indicated that their participation had not significantly changed, or they were unsure if it had changed. This means the action did not affect the participants' engagement for either active or quiet students.

Looking at the quiet students, of the eight quiet students in Survey 2, seven reported that their participation had not significantly changed, had decreased, or they were unsure. It suggests that the action did not significantly influence the engagement of quiet students.

Some hidden factors might explain the failure of the action. One potential factor might be the tighter schedule in the latter half of the semester, when students needed to prepare for exams, final assignments, or dissertations. The increased pressure may significantly prevent students from actively engaging in class discussions and counteract any positive effects the action might have had.

The Change of the Impacts of Five Obstacles to quiet students from Survey 1 to Survey 2

This part focuses on quiet students. Figure 4 combines the results of Survey 1 and Survey 2, illustrating the change of the impacts of the five obstacles on quiet students before and after the action. The grey grid bars represent the results from Survey 1, and the black grid bars represent the results from Survey 2. It shows that the intervention-targeted obstacle 'fear of judgement or criticism' and other three obstacles ('social anxiety or shyness', 'feeling overshadowed by more vocal classmates' and 'not feeling well-prepared for the discussion') had large reductions in their inhibiting effect. But the obstacle 'lack of confidence in speaking abilities' shows no significant change between Survey 1 and Survey 2.

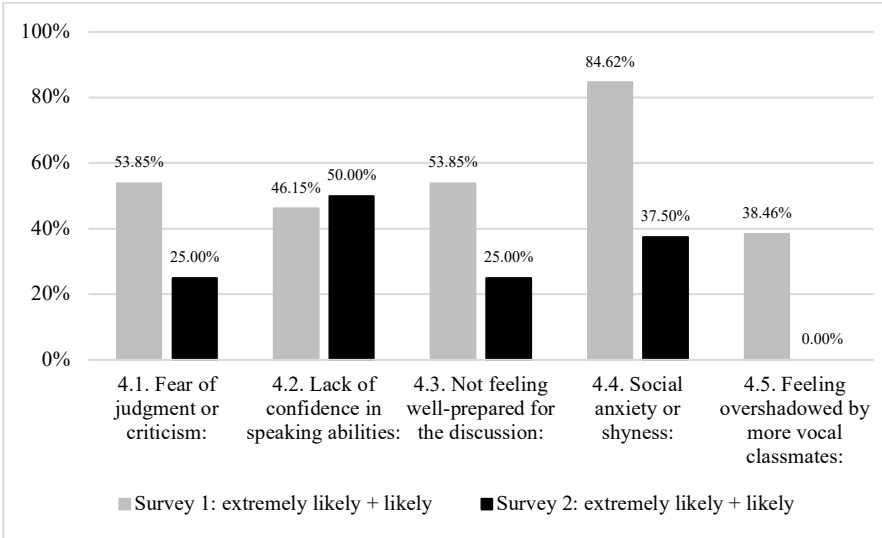


Figure 4: Survey 1 and Survey 2: Quiet Students-5 Obstacles

I explain the five obstacles' impact change one by one as below:

'Social anxiety or shyness' reduced from 84.62% to 37.50% for quiet students, which is surprising because this obstacle, as an internal trait, is unlikely to be reduced in a short time. One potential explanation is that participants might misidentify their temporary nervousness as a stable trait described in this obstacle. This temporary feeling of nervousness could decrease when circumstance changes. At the beginning of the module, students might feel

nervous because they were not familiar with the module. As the semester progressed and students got used to the lecturer and the module setting, their nervousness decreased. Hence, the significant reduction was actually a reduction in temporary nervousness. In addition, the action targeting the obstacle of 'fear of judgement or criticism' might have unintentionally reduced the temporary nervousness, which explains the large reduction in 'social anxiety or shyness'.

'Feeling overshadowed by more vocal classmates' also decreased significantly for quiet students from 38.46% in Survey 1 to 0% in Survey 2. The explanation is similar: as the semester progressed, students became more familiar with their classmates. Therefore, fewer quiet students felt overshadowed by vocal classmates compared to the beginning of the semester, leading to a significant decrease in this obstacle's effect.

The effect of 'fear of judgement or criticism' on quiet students decreased from 53.85% in Survey 1 (before the intervention) to 25% in Survey 2 (after the intervention). This obstacle is the one which the action targeted, and it seems that the action might contribute to the reduction of this obstacle. However, it is difficult to attribute this reduction solely to the action, as Figure 4 shows some other obstacles also largely reduced in effect. This implies that other hidden factors, such as increased familiarity with the module, might change the inhibiting nature of this and other obstacles together.

The effect of 'not feeling well-prepared for the discussion' on quiet students decreased from 53.85% in Survey 1 to 25% in Survey 2, indicating the same reduction as 'fear of judgement or criticism.' A potential explanation is that the pre-class reading materials in the second half of the semester were fewer than those in the first half. In addition, later in the semester, students might be better versed in the topic overall and could draw on knowledge gained throughout the semester, which means they might feel more prepared for class discussions. These changes might reduce the impact of 'not feeling well-prepared for the discussion' on participation, even though the action did not target this obstacle.

The 'lack of confidence in speaking abilities' showed no significant change between Survey 1 and Survey 2. This is reasonable as speaking abilities are not likely to change in a short term, nor is confidence in these abilities.

Overall, the impacts of the five obstacles on quiet students were reduced from Survey 1 to Survey 2, except for 'lack of confidence in speaking abilities,' which showed no significant change.

Contrasting with the reduction of these obstacles, the quiet students' participation in class discussions was not increased as revealed previously. The decline in these obstacles' inhibiting nature does not necessarily mean that quiet students engaged more in class discussions. As mentioned, other hidden factors might have prevented students from joining class discussions, offsetting the decline in these obstacles as inhibiting factors. For instance, one hidden factor could be the tighter schedule in the second half of the semester.

The comparison of five obstacles' impacts on quiet/active students in Survey 1 and Survey 2

This part includes both quiet and active students. It involves comparing the quiet and active students' difference in the change of the obstacles' significance as inhibitions from Survey 1 to Survey 2. Figure 5 illustrates this comparison. The two dashed lines represent quiet students: the grey dashed line represents quiet students in Survey 1 while the black dashed line denotes quiet students in Survey 2. The two solid lines represent active students: the grey solid line represents the active students in Survey 1 while the black solid line denotes active students in Survey 2.

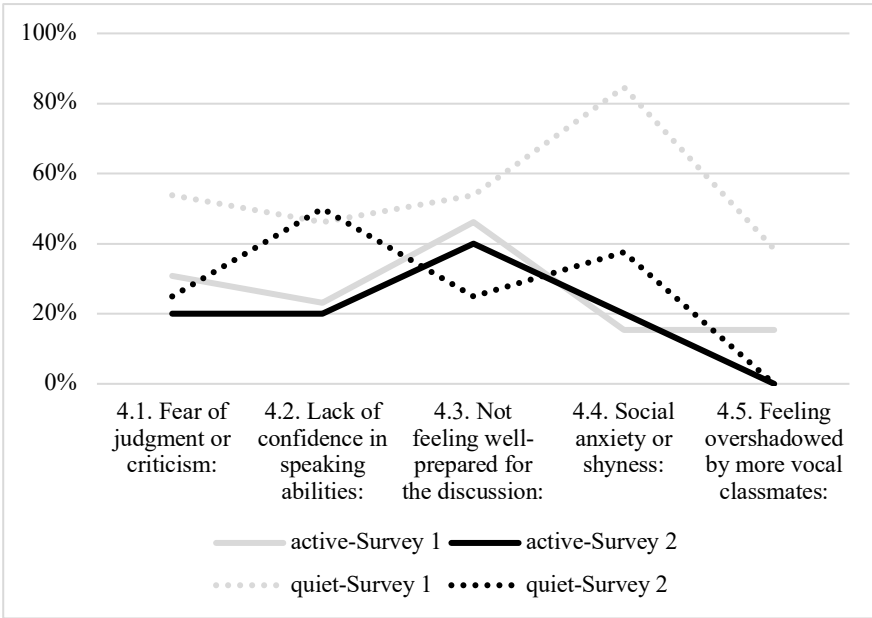


Figure 5: Change between Survey 1 and Survey 2 on 5 Obstacles: Quiet Students vs. Active Students.

Figure 5 shows that for quiet students (dashed lines), the inhibiting nature of the five obstacles decreased largely from Survey 1 to Survey 2, except for 'lack of confidence in speaking abilities'. In contrast, for active students (solid lines), the impact of the five obstacles remained largely unchanged between the two surveys. It suggests that active students remain more consistent in their responses to the five obstacles throughout the semester, while quiet students are initially more affected by these obstacles. However, the impact on quiet students decreases significantly as the semester progresses.

This result implies that with the increased familiarity with the module, there is much space for improving quiet students' engagement. This finding also suggests that the strategies to encourage quiet students to participate in class discussions should be different from those for active students. This is discussed further in 'Discussions and Conclusions'.

A statement from an active student:

Another extra finding in Survey 2 is that one student described a new obstacle in Question 5: 'Not wanting to be the only person participating', in addition to

the five obstacles in Question 4. This student, classified as active based on their response to Question 6, raises two potential insights. First, active students might participate less when other students' engagement decreases. Second, it points to the possible influence of Scottish cultural norms. As mentioned, Scots may regard speaking out in a group as somewhat 'pushy,' and this norm could affect student engagement. Since only one student mentioned this obstacle, its implication should be considered cautiously. Nevertheless, this finding indicates a potential area for further research into the influence of Scottish culture on class participation.

Other indirect factors

This section discusses other factors that might have influenced quiet participants' engagement in class discussions.

Discussion format

Quiet students demonstrate a greater aversion to 'debates' compared to active students. Table 1 includes the numbers of participants who chose a specific discussion format as the most challenging activity in Survey 1 and Survey 2. It shows that in both surveys, a significantly higher number (9. 56% and 4. 50%) of quiet students identified 'debates' as most challenging to them. Conversely, the numbers of active students who chose any discussion format are approximately even.

	Debates		Presentations		Group discussions		Recitations	
Survey 1(active)	3	18.0%	4	24.0%	5	29.0%	5	29.0%
Survey 2(active)	1	20.0%	1	20.0%	1	20.0%	2	40.0%
Survey 1(quiet)	9	56.0%	4	25.0%	3	19.0%	0	0.0%
Survey 2(quiet)	4	50.0%	1	12.5%	2	25.0%	1	12.5%

Table 1: Discussion Formats

Personality traits

Table 2 shows that the 'mixed' trait type was the most common among both active and quiet students in both surveys. In Survey 1, more extroverts (38%) than introverts (8%) are active, while that more introverts (30.8%) than

extroverts (7.7%) were quiet. In Survey 2, however, equal numbers of introverts and extroverts are active, and similar numbers of extroverts and introverts are quiet. One possible explanation is that, as the module progressed, some extroverts became less active in class due to heavier study loads toward the end of the semester, while some introverts became more active as they grew more familiar with the module and their classmates. Alternatively, the change may simply reflect random variation, given the small sample size.

	Introvert		Extrovert		Mixed	
Survey 1(active)	1	8.0%	5	38.0%	7	54.0%
Survey 2(active)	2	40.0%	2	40.0%	1	20.0%
Survey 1(quiet)	4	30.8%	1	7.7%	8	61.5%
Survey 2(quiet)	1	12.5%	2	25.0%	5	62.5%

Table 2: Personality Traits

Academic level

The distribution of academic levels (third and fourth year) is even between active and quiet students in both surveys. The length of time spent in law school does not significantly influence students' participation in class discussions.

	The third year		The fourth year	
Survey 1(active)	6	46.0%	7	54.0%
Survey 2(active)	3	60.0%	2	40.0%
Survey 1(quiet)	6	46.0%	7	54.0%
Survey 2(quiet)	4	50.0%	4	50.0%

Table 3: Academic Levels

Native language

All participants in Survey 1 were native English speakers, and only two participants in Survey 2 were non-native English speakers. The small number of non-native English speakers in Survey 2 makes it difficult to draw any conclusive insights about the impact of language on class participation.

Discussions and conclusions

The main obstacles preventing quiet students from joining in class discussions

The research indicates that the obstacles preventing quiet students from speaking out in class differ from those preventing active students. Quiet students are more impacted by obstacles related to subjective aspects. For quiet students, the most influential obstacle is 'social anxiety or shyness'. In contract, this obstacle is least influential for active students. Active students are most affected by objective aspects such as 'not feeling well-prepared for this discussion', which is only secondary for quiet students.

This comparison emphasise that lecturers should distinguish their engagement strategies for quiet students from those for active students. For active students, improving preparation for discussions may enhance their participation. While for quiet students, the most efficient strategy might be helping them overcome the feeling of social anxiety or shyness. For example, lecturers might create a relaxed classroom environment to reduce quiet students' feeling of social anxiety or shyness. In addition, lecturers might also use tools like Menti or Padlet where students can post (anonymously) answers to questions. This might reduce the anxiety in speaking out loud in classroom.[49]

The change of the obstacles' significance as inhibitions to quiet students during a semester

The research also reveals that the significance of the main obstacles as inhibiting factors decreases significantly for quiet students as the semester progresses, compared with active students. Particularly, the obstacles 'fear of judgement or criticism', 'not feeling well-prepared for the discussion', 'social anxiety or shyness' and 'feeling overshadowed by more vocal classmates' become substantially less inhibiting for quiet students over time. This may be due to the increased familiarity with the module and classmates. When accumulating more knowledge in the module, students also feel more confidence to join in class discussions. All of these reduce the inhibiting nature of these obstacles existing at the beginning of the semester.

[49] Natasha Pushkarna, Angela Daly and Angel Fan, 'Teaching Digital and Global Law For Digital And Global Students: Creating Students As Producers In A Hong Kong Internet Law Class' (2022) 56 The Law Teacher 404.

Conversely, active students experience little change in the impact of these obstacles throughout the semester. This lack of significant change indicates these obstacles do not heavily impact active students regardless of the semester's progression.

This observation suggests that strategies to encourage quiet students should account for the natural reduction in obstacles due to increased familiarity. For example, lecturers might help quiet students quickly adapt to the module and classmates. The familiarity will naturally counterbalance the resistance of joining in class discussions.

The failure of the action and lessons to learn

Unfortunately, the action did not increase the participation of quiet students in class discussions. One possible reason for this failure is the increased workload and tighter schedule in the latter half of the semester, which may have counteracted the intended effects of the action. Nevertheless, valuable insights and lessons can be drawn:

Strengthening the effectiveness of the action in research

Considering the counteracting factors, future research should aim to enhance the effectiveness of interventions against the fear of judgement and criticism. The mistake-friendly oral statement could be combined with immediate positive responses to each student's input. Additionally, lecturers should use positive language when correcting students in oral discussions and assessments. Together, these approaches reaffirm a non-judgemental climate and will strengthen the action's effectiveness in reducing the fear of being criticized or judged.

Complexity of influencing factors and multi-strategies in teaching practice

Due to the complexity of influencing factors, no single strategy can address the challenges lecturers face when striving to engage quiet students. Lecturers should target several substantial obstacles and adopt multiple strategies to increase participation. To overcome the fear of judgement or criticism, lecturers can clarify the non-evaluative purpose of class participation, provide immediate positive feedback to each input, and use positive language when correcting students. To address the fear of shyness or anxiety, lecturers might develop introvert-friendly teaching strategies such as posting questions before

class discussions, allowing longer thinking time before answering questions, and changing the classroom seating arrangement from a traditional lecture setup to a roundtable setting. To address the feeling of being unprepared, lecturers can tailor pre-class reading materials and mix questions that do not rely solely on pre-class readings with those that do.

Hidden factors, such as heavier workloads and tighter schedules, can negate the positive effects of interventions. Lecturers should be mindful of these counteracting factors and provide additional support to maintain student engagement during peak periods. They might strategically frontload the study materials to alleviate pressure during peak times. Lecturers can also utilize casual engagement outside the classroom to help quiet students become more familiar with the module.

In addition, a single intervention in one module is insufficient to change the non-participation habit among quite students in law school. Similar interventions should be repeated across modules at the programme or school level to establish a default participation culture in law school, counteracting the habit of non-participation.

Impact of discussion formats:

The format of class discussions might also discourage quiet students' participation. Debates were particularly challenging for quiet students and could have discouraged their engagement. Future approaches should incorporate a diverse range of discussion formats to maintain engagement. As mentioned, the anonymous non-oral discussions should be considered.

A broader discussion

This article aims to find out the obstacles which prevent quiet law students from participating in class discussions and tries to encourage their oral engagement in class. However, it does not assert that ‘speaking out’ is the only or the most effective means for quiet students to learn. As Spencer has observed, many quiet students, despite their reluctance to speak, are deeply engaged through non-oral ways--such as through reading, listening, and reflective writing.[50] Their written work often demonstrates strong comprehension and insight, highlighting that quiet students can learn

[50] Spencer (n 17).

effectively in non-oral, non-demonstrative ways.[51] Moreover, Sovinee-Dyroff noted some oral interactions, such as the Socratic method, may not be conductive to, and can even be detrimental for, introverted students.[52]

Given this understanding, should we still care whether quiet students engage in oral discussions in law classes? Should we encourage quiet students to speak out, even if this may not be their preferred learning style? My position is affirmative, but with certain conditions.

First, oral communication remains a crucial aspect of a lawyer's work. In addition to advocacy in court, oral communication is very important in consultations and negotiations. While participating in oral discussion in law classes might initially be uncomfortable for quiet students, it offers valuable preparation for their future legal careers. Even for those who do not plan to enter the legal profession, oral communication remains an important skill for success in other careers.

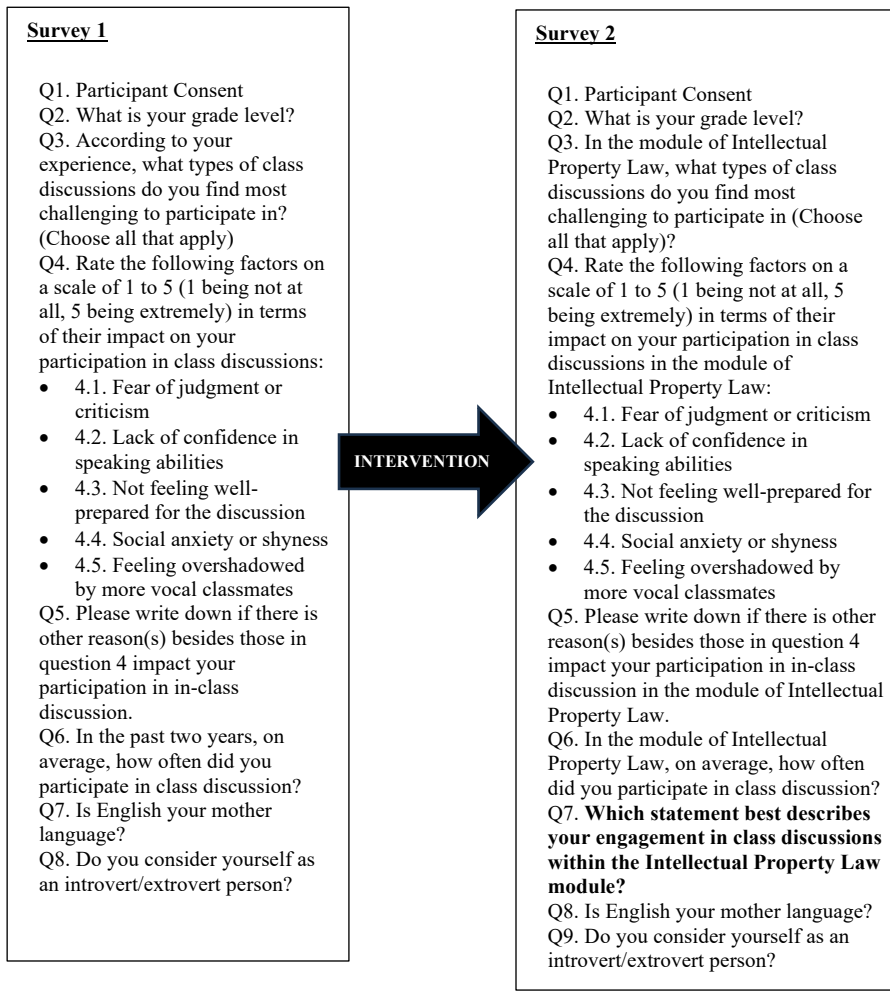
Second, about the question is not whether we should encourage quiet students to talk but rather about finding out the obstacles they face and fostering a classroom environment where they feel safe and comfortable to express them. It is important to move away from the assumption that students are silent simply because they do not want to speak, or they have nothing to share. Seligman said that connection with others is the meaning of life.[53] Cain pointed out quietness has different reasons.[54] Some quiet students prefer to speak after deep thinking and dislike spontaneous and shallow talk.[55] - Others might have an inherent fear of negative judgement so that they avoid talking.[56] Law lecturers should focus on identifying and alleviating these obstacles, rather than abandoning oral discussions for quiet students altogether. We can develop an inclusive class environment where students with different personalities feel comfortable sharing their opinions. For example, allowing a few minutes for

[51] Ibid.
[52] Sovinee-Dyroff (n 19).
[53] Martin EP. Seligman, Flourish: A Visionary New Understanding of Happiness and Well-Being (Simon and Schuster, 2011)
[54] Susan Cain, Quiet Power: Growing Up as An Introvert In A World That Can't Stop Talking (Penguin UK, 2016).
[55] Ibid.
[56] Ibid.

students to reflect and write before discussions can help quiet students prepare to speak.

Third but not the last, recognising that quiet students might engage with the class differently from talkative peers, law lecturers should strive to balance between oral engagement and non-oral engagement. Group discussions or recitations can encourage quiet students to go out of their comfort zone, while incorporating 10-15 minutes of reflective writing in class can allow them to return to their comfort zone. This approach not only prevents quiet students from feeling overwhelmed but also provides active students an opportunity of deep reflection in addition to spontaneous oral interactions. An inclusive approach should be a good combination of different methods fitting with different kinds of students.

Appendix


Survey 1
Q1. Participant Consent
Q2. What is your grade level?
Q3. According to your experience, what types of class discussions do you find most challenging to participate in? (Choose all that apply)
Q4. Rate the following factors on a scale of 1 to 5 (1 being not at all, 5 being extremely) in terms of their impact on your participation in class discussions:
• 4.1. Fear of judgment or criticism
• 4.2. Lack of confidence in speaking abilities
• 4.3. Not feeling well-prepared for the discussion
• 4.4. Social anxiety or shyness
• 4.5. Feeling overshadowed by more vocal classmates
Q5. Please write down if there is other reason(s) besides those in question 4 impact your participation in in-class discussion.
Q6. In the past two years, on average, how often did you participate in class discussion?
Q7. Is English your mother language?
Q8. Do you consider yourself as an introvert/extrovert person?
INTERVENTION
Survey 2
Q1. Participant Consent
Q2. What is your grade level?
Q3. In the module of Intellectual Property Law, what types of class discussions do you find most challenging to participate in (Choose all that apply)?
Q4. Rate the following factors on a scale of 1 to 5 (1 being not at all, 5 being extremely) in terms of their impact on your participation in class discussions in the module of Intellectual Property Law:
• 4.1. Fear of judgment or criticism
• 4.2. Lack of confidence in speaking abilities
• 4.3. Not feeling well-prepared for the discussion
• 4.4. Social anxiety or shyness
• 4.5. Feeling overshadowed by more vocal classmates
Q5. Please write down if there is other reason(s) besides those in question 4 impact your participation in in-class discussion in the module of Intellectual Property Law.
Q6. In the module of Intellectual Property Law, on average, how often did you participate in class discussion?
Q7. Which statement best describes your engagement in class discussions within the Intellectual Property Law module?
Q8. Is English your mother language?
Q9. Do you consider yourself as an introvert/extrovert person?

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Legal wellbeing pedagogy: a new model for promoting wellbeing in law schools

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Abstract

This paper introduces a new pedagogical model for law schools, the Legal Wellbeing Pedagogy. It draws upon Positive Psychology, namely Self-Determination Theory and its Basic Psychological Needs sub-theory, as its theoretical basis. Synthesising these theories with existing international research into legal education enables them to be adapted to meet the specific requirements of the discipline of law. Based on this theoretical grounding, the focus of Legal Wellness Pedagogy spans cognitive, experiential and affective engagement with learning and teaching in legal education. It provides a clear framework for the integration of challenge and growth, independence and meaning, and collaboration and connection into the law degree. It also highlights the role of empathy, reflection and values and ethics as key inter-connecting concepts to promote a holistic approach to wellbeing. Overall, this paper sets out a theoretically grounded model which is focused upon promoting positive wellbeing for both staff and students, reimaging the legal curriculum as a vehicle to facilitate thriving and flourishing in an evidence-based and sustainable manner.

Keywords: legal education, wellbeing, pedagogy, learning and teaching, self-determination theory.

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Introduction

This article introduces a new pedagogical model for law schools, the Legal Wellbeing Pedagogy ('LWP'), which is focused upon promoting positive wellbeing for both staff and students. The model is grounded within Self-Determination Theory ('SDT'), a meta-theory of Positive Psychology with a strong empirical research evidence-base.[1] The model draws, in particular, upon the unifying sub-theory of Basic Psychological Needs and the promotion of autonomous self-regulation.[2] The existing studies on law student wellbeing, and the wider psychological and pedagogical literature, both within and external to legal education, are synthesised to provide a theoretically-grounded model which moves away from identifying and rectifying specific problems, and instead reimagines the legal curriculum as a vehicle to facilitate thriving and flourishing in an evidence-based, sustainable, and holistic manner.

The majority of the literature synthesised in the article is drawn from the law degree as delivered in the common law context, in particular, the United Kingdom ('UK'). However, it also acknowledges the valuable work on legal education being done across Europe and beyond.[3] Some of the specific norms of common law legal education are examined, for example, its traditional

[1] For detailed overviews of SDT see Richard M. Ryan & Edward L. Deci, 'Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being'(2000) 55(1) Am Psychol 68; Edward L. Deci & Richard M. Ryan, 'The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior' (2000) 11 Psychol Inq 227; Richard M. Ryan & Edward L. Deci, 'Overview of Self-Determination Theory: An Organismic Dialectical Perspective' in Edward L. Deci & Richard M. Ryan (eds) *Handbook of Self-Determination Research* 3-33 (, 2002); Martin E. P. Seligman & Mihaly Csikszentmihalyi, 'Positive Psychology: An Introduction' (2000) 55(1) Am Psychol 5; Claude-Hélène Mayer & Elisabeth Vanderheiden, 'Contemporary Positive Psychology Perspectives and Future Directions' (2020) 32(7-8) Int'l Rev Psychiatry 537.

[2] Maarten Vansteenkiste et al., The Development of the Five Mini-Theories of Self-Determination Theory: An Historical Overview, Emerging Trends, and Future Directions, in THE DECADE AHEAD: THEORETICAL PERSPECTIVES ON MOTIVATION AND ACHIEVEMENT 105 (T. C. Urdan & S. A. Karabenick eds., 2010); Richard M. Ryan & Edward L. Deci, *Self-Determination Theory: Basic Psychological Needs* in MOTIVATION, DEVELOPMENT, AND WELLBEING (2017).

[3] See, for example, Sanja Manchevska & Jasmina Pluncevic-Gligoroska, The Prevalence of High Anxiety and Substance Use in University Students in the Republic of Macedonia, 35(2) PRILOZI 67 (2014); Nadja Rabkow et al., Facing the Truth: A Report on the Mental Health Situation of German Law Students, 71 INT'L. J. LAW & PSYCHIATRY 101599 (2020); Melanie Walker & Christopher Rawson, Forming Lawyers Who Can Contribute to Equitable Access to Justice in South Africa, 30 INT'L J. CLINICAL LEGAL EDUC. 97 (2023).

emphasis on adversarialism.[4] However, it is anticipated that the LWP also translates into other legal education settings (including civil law systems), across a range of jurisdictions, due to its rigorous theoretical grounding.

Within common law jurisdictions, there is an ever-increasing body of literature which highlights the wellbeing issues that law students most commonly experience. In the USA, as early as 1976, Taylor referred to a range of anecdotal evidence, theoretical exposition and popular debate creating longstanding 'uneasy feelings about the psychological, emotional, and moral effects of legal training'.[5] Since then, a range of USA-based empirical research has highlighted the detrimental impacts that studying law can have upon individuals. For example, Sheldon and Krieger's seminal studies, applying SDT, have identified a decline in law students' subjective wellbeing, self-determination (capacity to act autonomously) and intrinsic values across their studies.[6] In Australia, interest in law student (and lawyer) wellbeing was galvanised by the tragic suicide of young lawyer, Tristan Jepson. The work of the then Tristan Jepson Memorial Foundation (now the Minds Count Foundation) includes funding the first large-scale empirical study in Australia on this topic conducted by the Brain and Mind Research Institute (BMRI) at the University of Sydney and published in 2009.[7] That study found that the participating law students experienced higher levels of psychological distress and depression than those of the general population. This result has been

[4] Molly Townes O'Brien, Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum, 37(1) MONASH U. L. REV. 43 (2011).

[5] James B. Taylor, *Law School Stress and the Deformation Professionnelle*, 27 J. LEGAL EDUC. 251, 251 (1976).

[6] Kenneth M. Sheldon & Larry S. Krieger, Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being, 22 BEHAV. SCI. & L. 261 (2004); Kenneth M. Sheldon & Larry S. Krieger, Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Study of Self-Determination Theory, 33 PERS. & SOC. PSYCHOL. BULL. 883 (2007). See also, Kenneth M. Sheldon & Larry S. Krieger, Walking the Talk: Value Importance, Value Enactment, and Well-Being, 38(5) MOTIV. EMOT. 609 (2014).

[7] Norm Kelk et al., COURTING THE BLUES: ATTITUDES TOWARDS DEPRESSION IN AUSTRALIAN LAW STUDENTS AND LAWYERS (Brain & Mind Research Institute, 2009).

reflected in subsequent Australian studies.[8] While the literature is more limited within Canada, New Zealand and the UK, the available scholarship generally reflects the themes identified in other jurisdictions.[9]

It should also be noted that there have been a number of calls for legal educators to take a proactive role to promote better wellbeing within the legal profession by adopting aspects of psychosocial education. For example, the Canadian *National Study on the Psychological Health Determinants of Legal Professionals in Canada* recommends that law schools support wellbeing in the profession by ensuring 'a better theory-practice balance' in the curriculum, developing 'key skills', including 'wellbeing skills' and by engaging in psycho-social education around healthy lifestyles, mental health and help-seeking.[10] While the literature on legal educators (herein also referred to as 'staff') and wellbeing is less well-developed globally, the limited evidence

[8] Kelk et al., id. (note 7). For other examples, see Massimilliano Tani & Prue Vines, *Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?*, 19(1) LEGAL EDUC. REV. (2009); Wendy Larcombe et al., *Does an Improved Experience of Law School Protect Students Against Depression, Anxiety and Stress: An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students*, 35 SYDNEY L. REV. 407 (2013); Natalie K. Skead & Shane L. Rogers, *Do Law Students Stand Apart from Other University Students in Their Quest for Mental Health? A Comparative Study on Wellbeing and Associated Behaviours in Law and Psychology Students*, 42 INT'L. J. L. & PSYCHIATRY 81 (2015); Natalie K. Skead et al., *The Role of Place, People, and Perception in Law Student Well-Being*, 73 INT'L. J. L. & PSYCHIATRY 101631 (2020).

[9] For Canada, see Mary E. Pritchard & Daniel N. McIntosh, What Predicts Adjustment Among Law Students? A Longitudinal Panel Study, 143(6) J. SOC. PSYCHOL. 727 (2003); Maureen F. Fitzgerald, Rite of Passage: The Impact of Teaching Methods on First Year Law Students, 42(1) L. TEACH. 60 (2008); Valerie Sotardi et al., Influences on Students' Interest in a Legal Career, Satisfaction with Law School, & Psychological Distress: Trends in New Zealand, 56(1) L. TEACH. 67 (2022); Lynne Taylor et al., The Making of Aotearoa/New Zealand Lawyers: A Longitudinal Study of Law Students and Law Graduates, 57(3) L. TEACH. 309 (2023); Emma Jones, Rajvinder Samra & Mathijs Lucassen, The World at Their Fingertips? The Mental Wellbeing of Online Distance-Based Law Students, 53(1) L. TEACH. 49 (2019); Elisa G. Lewis & Jacqueline M. Cardwell, A Comparative Study of Mental Health and Wellbeing Among UK Students on Professional Degree Programmes, 43(9) J. FUR. & HIGH. EDUC. 1226 (2019).

[10] Nathalie Cadieux et al., RESEARCH REPORT (FINAL VERSION): TOWARDS A HEALTHY AND SUSTAINABLE PRACTICE OF LAW IN CANADA: NATIONAL STUDY ON THE HEALTH AND WELLBEING DETERMINANTS OF LEGAL PROFESSIONALS IN CANADA, PHASE I (2020-2022), Université de Sherbrooke, Busi. Sch. 359-62 (2022).

available also points to issues with poor wellbeing and levels of self-determination.[11]

The scholarly literature to-date clearly indicates that the causes of such sustained wellbeing concerns within law schools are multi-factorial. However, a majority of work indicates that a number of the issues are discipline specific to law as a result of the academically demanding, competitive and isolating environment of legal education, the erosion of intrinsic values, and the rigid focus upon 'thinking like a lawyer'.[12] Rather than relying upon pastoral institution initiatives, such as counselling services for students and employee assistance programs for staff, there is a clear need for law schools to address these issues.

Actively promoting student and staff wellbeing in law schools also accords with two key trends within the work on wellbeing in tertiary education more broadly. First, there is an increasing emphasis upon the need for a holistic, whole-of-institution approach to wellbeing in higher education contexts. For example, the UK University Mental Health Charter states that 'we want all universities to adopt a whole-university approach to mental health' defining this approach as including 'adequately resourced, effective and accessible mental health services and proactive interventions … an environment and culture that reduces poor mental health, as well as supporting good mental health, and facilitating staff and students to develop insight, understanding and skills to manage and maintain their own wellbeing'.[13] In the USA, drawing on nearly ten years of student data from the Healthy Minds Study, Lipson et al

[11] See, Mary Heath et al, Learning to Feel Like a Lawyer: Law Teachers, Sessional Teaching and Emotional Labour in Legal Education, 26(3) GRIFFITH L. REV. 430 (2017); Clare J. Wilson & Caroline Strevens, Perceptions of Psychological Well-Being in UK Law Academics, 52(3) L. TEACH. 335 (2018); Colin James et al, Student Wellbeing Through Teacher Wellbeing: A Study with Law Teachers in the UK and Australia, 10(3) STUDENT SUCCESS 76 (2019); WELLBEING IN THE LEGAL ACADEMY (Caroline Strevens & Emma Jones eds., 2023).

[12] Sheldon & Krieger, *supra* note 6; Tani & Vine, *supra* note 8; Skead & Rogers, *supra* note 8; Colin James, *Lawyers' Wellbeing and Professional Legal Education,* 42(1) L. TEACH. 85 (2008); c.f. Wendy Larcombe et al, *Who's Distressed?: Not Only Law Students: Psychological Distress Levels in University Students Across Diverse Fields of Study,* 37(2) THE SYD. L. REV. 243 (2015). See also, Molly Townes O'Brien, Stephen Tang & Kath Hall, *Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum*, 21(1/2) LEGAL ED. REV. 149 (2011).

[13] Gareth Hughes & Leigh Spanner, THE UNIVERSITY MENTAL HEALTH CHARTER, Leeds, Student Minds (2019).

have argued that 'there remains an urgent need for research on how campus systems and structures shape student mental health'.[14] The findings of the body of work on law student wellbeing to date, create an imperative for law schools to examine their practices, procedures and policies in depth.

Second (and related to the first key trend) there is an increasing focus upon embedding wellbeing within the law school curriculum.[15] This focus challenges traditional dichotomies within tertiary education separating the pastoral from the intellectual, acknowledging the complex inter-play between the two.[16] A focus upon embedding wellbeing within the law school curriculum requires law schools to address the design, delivery and development of their curriculum to address the range of discipline-specific issues which have been identified as negatively impacting upon student (and staff) wellbeing. However, this article argues for a more radical new approach. It proposes that there can and should be a pedagogical model for legal education which not only ameliorates negative impacts, but in fact promotes positive change and flourishing. In sketching out the framework of the LWP, the article provides a model which acknowledges, but also challenges, the existing norms of many forms of legal education. In doing so, the article provides legal education providers with a sound theoretical and practical basis from which to review and develop their existing curriculum.

Part 1 of the article explores the notion of 'wellbeing' and introduces the key tenets and principles of SDT as the theoretical underpinning for the LWP. Part 2 describes and explains the framework of the LWP itself in detail. Part 3 then uses two common elements of the contemporary law school curriculum, namely the law of obligations (contracts and torts) and clinical legal education ('CLE'), to explore how the LWP could be integrated into, and positively influence, the student learning experience (and the staff teaching experience) of these subjects. These examples are designed to demonstrate the breadth and

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[14] Sarah Ketchen et al., Trends in College Student Mental Health and Help-Seeking by Race/Ethnicity: Findings from the National Healthy Minds Study, 2013–2021, 306 J. AFFECT. DISORD. 138, 145 (2022).
[15] Rachael Field, PROMOTING LAW STUDENT WELL-BEING THROUGH THE CURRICULUM. Office for Learning and Teaching (2014); Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools,* 77 MD. L. REV. 649 (2017).
[16] Mary Helen Immordino-Yang, *EMOTIONS, LEARNING, AND THE BRAIN: EXPLORING THE EDUCATIONAL IMPLICATIONS OF AFFECTIVE NEUROSCIENCE (*2016).

flexibility of the LWP, showing that it has relevance to all subjects in the law degree (and it potentially also has relevance beyond legal education in other disciplines). The article's conclusion looks to the future to emphasize the opportunities the LWP provides as we enter the second quarter of the twenty-first century.

Wellbeing and SDT

This Part begins by briefly explaining the term 'wellbeing' as it is used in the LWP. We then argue that SDT provides a robust conceptual and theoretical framework for justifying the LWP as a critical element of contemporary legal education internationally. In considering SDT and its centrality to the efficacy of the LWP, key factors and conditions are identified for personal and professional wellbeing, satisfaction and growth, thus reaffirming the relevance of SDT itself to contemporary legal education.

Understanding wellbeing

The term 'wellbeing' is ubiquitous in today's society, with a myriad of definitions and interpretations available.[17] However, there are two commonly acknowledged traditions which form the basis of contemporary Western approaches to wellbeing, namely, the *hedonic* and *eudaimonic* traditions. The *hedonic* tradition focuses upon 'happiness' in the form of 'pleasure attainment and pain avoidance'.[18] The *eudaimonic* tradition draws upon the work of Aristotle and refers to '…the blossoming of capacities and individual potential as a route to achieving full psychological functioning'.[19] A number of commentators have identified overlaps and synergies between these two

[17] See, for example, Alex C. Michalos & Daniel Weijers, *Western Historical Traditions of Well-Being* in THE PURSUIT OF HUMAN WELL-BEING: THE UNTOLD GLOBAL HISTORY 31-57 (Richard J. Estes & M. Joseph Sirgy eds., 2017); Carol D. Ryff et al, *Eudaimonic and Hedonic Well-Being* in MEASURING WELL-BEING 92-135 (Tyler VanderWeele et al eds., 2021). See also, Jonathan Crowe, *What is Wellness? The Role of Human Values*, 45(4) ALT. L. J. (2020) 261; Oscar H Kawamata, *Legal Education, Wellness and Buddhism: A Student's Response to Crowe*, 48(1) ALT. L. J. (2023) 67; Jonathan Crowe, *Defining Wellness in Legal Education: A Reply to Kawamata*, 48(2) ALT. L. J. (2023) 140.

[18] Richard M. Ryan & Edward L. Deci, On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being, 52(1) ANNU. REV. PSYCHOL. 141, 141 (2001).

[19] Carlos Friere et al, Eudaimonic Well-Being and Coping with Stress in University Students: The Mediating/Moderating Role of Self-Efficacy, 16(1) INT. J. ENVIRON. RES. PUB. HEALTH 48 (2019).

traditions, whilst others have proposed new formulations.[20] As a discipline, Positive Psychology largely focuses upon the *eudaimonic* tradition, for example, Seligman's PERMA theory draws on this tradition emphasising the importance of Positive emotion, Engagement, Relationships, Meaning, and Accomplishment.[21] SDT has also been clearly linked to the *eudaimonic* tradition of wellbeing in a series of papers by Ryan and others.[22] Ryan and Martela, for example, identify three key ways in which SDT mirrors Aristotelian notions of *eudaimonia*, including encouraging the pursuit of intrinsic goals, promotion of autonomy and fostering of self-reflection and awareness.[23] These core concepts are linked in SDT's key unifying sub-theory of Basic Psychological Needs which identifies the satisfaction of three basic psychological needs - autonomy, competence, and relatedness - as key to individual *eudaimonic* wellbeing.[24] The Basic Psychological Needs sub-theory therefore forms the core theoretical underpinning of the LWP's central premises.

Core concepts in SDT

Overall, SDT, as a meta-theory, includes six sub-theories relating to human motivation and behaviour. These six sub-theories are: Cognitive Evaluation Theory, Organismic Integration Theory, Causality Orientations Theory, Basic Psychological Needs Theory, Goal Content Theory and Relationships

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[20] Luke Wayne Henderson & Tess Knight, *Integrating the Hedonic and Eudaimonic Perspectives to More Comprehensively Understand Wellbeing and Pathways to Wellbeing,* 2(3) INT. J. WELLBEING 196 (2012); Mart G. Pancheva et al, An Integrated Look at Well-Being: Topological Clustering of Combinations and Correlates of Hedonia and Eudaimonia, 22 J. HAPPINESS STUD. 2275 (2021); Ryff et al supra note 17.

[21] Eranda Jayawickreme et al, *The Engine of Well-Being,* 16(4) REV. GEN. PSYCHOL. 327, 334 (2012).

[22] Richard M. Ryan et al, What Humans Need: Flourishing in Aristotelian Philosophy and Self-Determination Theory in *THE BEST WITHIN US: POSITIVE PSYCHOLOGY PERSPECTIVES ON EUDAIMONIA* American Psychological Association 57–75 (A. S. Waterman ed., 2013).

[23] Richard M. Ryan & Frank Martela, EUDAIMONIA AS A WAY OF LIVING: CONNECTING ARISTOTLE WITH SELF-DETERMINATION THEORY in HANDBOOK OF EUDAIMONIC WELL-BEING 109-122 (Joar Vittersø ed., 2016).

[24] Frank Martela & Kennon M. Sheldon, Clarifying the Concept of Well-Being: Psychological Need Satisfaction as the Common Core Connecting Eudaimonic and Subjective Well-Being, 23(4) REV. GEN. PSYCHOL. 458 (2019); Frank Martela et al, Needs and Well-Being Across Europe: Basic Psychological Needs are Closely Connected with Well-Being, Meaning, and Symptoms of Depression in 27 European Countries, 14(5) SOC. PSYCHOL. PERS. SCI. 501 (2023).

Motivation Theory.[25] A brief overview of these sub-theories, all of which are interrelated, follows to contextualise the later focus on Basic Psychological Needs theory.

First, the sub-theory of Cognitive Evaluation Theory is concerned with the factors that enable or hinder an individual's intrinsic motivations.[26] Intrinsic motivation relates to engagement in activities for which there is a genuine interest and from which legitimate enjoyment is derived.[27] According to Cognitive Evaluation Theory, 'interest' is understood as an individual's attraction towards a particular activity, and 'enjoyment' is understood to be 'a by-product of full immersion in an activity.'[28] Activities involving interest and enjoyment can be contrasted with hedonic activities pursued for self-interested reasons that are characterised, for example, by instantaneous gratification.[29]

Cognitive Evaluation Theory asserts that autonomy supportive, controlling or amotivating environments all impact a person's intrinsic motivation differently.[30] When enjoyment and interest are integrated into lived environments through, for example, 'rewards, interpersonal controls, and ego-involvements'[31]and when the basic psychological needs of autonomy, competence and relatedness (discussed further below) are satisfied, intrinsic motivation is likely to be supported because these things 'form the energetic

[25] Richard M. Ryan & Maarten Vansteenkiste, *Self-Determination Theory: Metatheory, Methods and Meaning* in THE OXFORD HANDBOOK OF SELF-DETERMINATION THEORY (Richard M. Ryan ed., 2023) 12-20.
[26] Vansteenkiste et al, *supra* note 2, 107.
[27] Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Role of Basic Psychological Needs in Personality and the Organization of Behavior* in HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 654, 660-1 (Oliver P. John, et al eds., 3rd ed, 2008). Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225 (2012-2013).
[28] Vansteenkiste et al, *supra* note 2, 107.
[29] Vansteenkiste et al, *supra* note 2, 107.
[30] The terms 'amotivating' and 'amotivated' refer to a lack or absence of motivation, experienced by individuals as viewing their behaviour as outside their own control and failing to link their conduct to possible outcomes. See for example, Lisa Legault et al, *Why Do High School Students Lack Motivation in the Classroom? Toward an Understanding of Academic Amotivation and the Role of Social Support,* 98(3) J. EDUC. PSYCHOL. 567, 568 (2006).
[31] Centre for Self-Determination Theory, SELF-DETERMINATION THEORY: AN APPROACH TO HUMAN MOTIVATION AND PERSONALITY (2013) <http://www.selfdeterminationtheory.org/theory> accessed 27 Sep 2024.

basis for the development and maintenance' of intrinsic motivation.[32] A logical deduction that informs the conceptualisation of the LWP, is that the promotion of law students' subjective experiences of enjoyment and interest, as well as the creation of learning environments that satisfy autonomy, competence, and relatedness, are likely to positively support intrinsic motivation for the study of law. The whole LWP framework is designed to support student learning success in this way.

The second sub-theory of SDT is Organismic Integration Theory. This theory examines the 'properties, determinants and consequences' of extrinsic motivation.[33] Extrinsic motivations are reasons for acting that are primarily predicated on external recognition. They are typically a means to an end.[34] According to this theory, when interest and enjoyment (as conceptualised in Cognitive Evaluation Theory) are not present, then extrinsic motivations may hold an important role in terms of achieving a range of socially important tasks.[35]

A core tenet of Organismic Integration Theory is that extrinsic motivations can be internalised to varying degrees, but predominantly work most positively when they are experienced autonomously.[36] That is, the extent to which individuals are able to connect duties and obligations that arise in their life to personally meaningful criteria impacts their capacity to cultivate internal reasons for acting.[37] Importantly, autonomous extrinsic motivation has been found to produce the same high levels of engagement and performance that intrinsic motivation can produce.[38] This sub-theory informs strategies in the LWP aimed at supporting the autonomy, volition and self-regulation of law students who lack intrinsic motivation for studying law.[39]

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[32] Edward L. Deci et al, *Need Satisfaction and the Self-Regulation of Learning,* 8(3) LEARN. INDIVID. DIFFER. 165 (1996); Vansteenkiste et al, *supra* note 2, 108-9.
[33] Deci et al, *supra* note 32.
[34] Deci et al, *supra* note 32.
[35] Vansteenkiste et al, *supra* note 2, 112-3.
[36] Ryan & Deci, *supra* note 27, 661-5.
[37] Aaron Black & Edward L. Deci, The Effects of Student Self-Regulation and Instructor Autonomy Support on Learning in a College-Level Natural Science Course: A Self-Determination Theory Perspective, 84(6) SCI. EDUC. 740 (2000); Johnmarshall Reeve et al, Self-determination Theory: A Dialectical Framework For Understanding Socio-Cultural Influences on Student Motivation in BIG THEORIES REVISITED 31-60 (Dennis M. McInerney & Shawn Van Etten eds., 2004).
[38] Manning, *supra* note 27, 236.
[39] Ryan & Deci, *supra* note 1.

Causality Orientations Theory is the third sub-theory of SDT. This theory seeks to explain individual personality preferences for, and tendencies to orient towards, autonomy supportive, controlling or amotivating environments.[40] The theory identifies three types of causality orientation: 'autonomy orientation in which persons act out of interest in and valuing of what is occurring; the control orientation in which the focus is on rewards, gains, and approval; and the impersonal or amotivated orientation caused by anxiety concerning competence'.[41] The relevance of this sub-theory to the LWP is that it informs approaches in curriculum design that encourage students to develop an autonomy orientation and manage control and amotivated orientations.

Fourth, Goal Content Theory asserts that psychological wellbeing is impacted differently by intrinsic and extrinsic goals.[42] Intrinsic goals, which include personal growth, meaningful relationships, community contribution and physical health, are associated with higher levels of psychological wellness and adjustment because they promote an '*inward* orientation' which is supportive of the fulfilment of the needs of autonomy, competence, and relatedness.[43] Extrinsic goals, such as attractive appearances, financial affluence, and fame, are associated with lower levels of psychological wellness and adjustment, because they promote an '*outward* orientation' that distracts time and energy away from the fulfilment of basic needs.[44] The link between intrinsic goals and autonomous motivation means that the SDT-informed LWP model will work as a needs-supportive framework by guiding the design of the curriculum in ways that support law students to prioritise intrinsic over extrinsic goals.[45]

Fifth, Basic Psychological Needs Theory is arguably the most important of SDT's sub-theories because it operates as a 'unifying principle' for the meta-theory.[46] Basic Psychological Needs Theory relates to understanding how satisfying the fundamental human needs of autonomy, competence, and

[40] Richard M. Ryan & Edward L. Deci, Overview of Self-Determination Theory: An Organismic Dialectical Perspective in HANDBOOK OF SELF DETERMINATION RESEARCH 665 (Edward L. Deci & Richard M. Ryan eds., 2002).
[41] Deci et al, *supra* note 32.
[42] Deci et al, *supra* note 32.
[43] Vansteenkiste et al, *supra* note 2, 145-7
[44] Vansteenkiste et al, *supra* note 2, 145-7
[45] Sheldon & Krieger (2004), *supra* note 6.
[46] Vansteenkiste et al, *supra* note 2, 131; Deci et al, *supra* note 32.

relatedness supports psychological wellbeing and success.[47] It defines 'needs' as the 'innate psychological nutriments that are essential for ongoing psychological growth, integrity, and well-being'.[48] The notion of 'thriving' denotes a 'positive life experience' which is characterised by, amongst other things, positive affect and mood, satisfaction with life and a sense of meaning and purpose, once again mirroring notions of *eudaimonic* wellbeing.[49]

The term 'autonomy' refers to an individual's subjective experience that their behaviour is self-governed, volitional and congruent with their true beliefs, values, and interests.[50] It has been described as the 'master need' of the three needs.[51] As Krieger notes:

> Autonomy can be considered 'the most important of the three basic psychological needs, since people must have a well-defined sense of self, feel intimately connected to themselves, and express their core values in daily life in order to function in a consistent way and with a sense of security and grounding.[52]

Autonomy has been described variously as the opposite of heteronomy (which is 'the experience of feeling controlled or pressured to think, feel, or behave in certain ways');[53] as being analogous to authenticity,[54] integrity[55] and genuineness;[56] and as 'endorsing one's actions at the highest level of

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[47] Ryan & Deci, *supra* note 27, 656–659, 666–669.
[48] Deci & Ryan (2000), *supra* note 1, 229.
[49] Lawrence S. Krieger, The Most Ethical of People, the Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation, 8(2) U. ST. THOMAS 168 (2011).
[50] Christopher Niemiec, Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Relation of Autonomy to Self-Regulatory Processes and Personality Development* in HANDBOOK OF PERSONALITY AND SELF-REGULATION 169, 176 (Rick Hoyle ed., 2010).
[51] Kennon M. Sheldon et al, SELF-DETERMINATION THEORY IN THE CLINIC: MOTIVATING PHYSICAL AND MENTAL HEALTH (2003) 19.
[52] Krieger, *supra* note 49, 174.
[53] Niemiec et al, *supra* note 50, 176.
[54] Lawrence S. Krieger, Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence, 52(1/2) J. LEGAL EDUC. 112, 119 (2002).
[55] Kennon M. Sheldon et al, What is Satisfying About Satisfying Events? Testing 10 Candidate Psychological Needs, 80(2) J. PERS. SOC. PSYCHOL. 325, 328 (2001).
[56] Krieger, *supra* note 54, 119.

reflection'.[57] Autonomy is different to independence because independence indicates freedom from the influence of external forces, whereas autonomy accommodates external influences that are self-endorsed.[58] A sense of autonomy is integral to effective self-regulatory processes.[59]

Competence is the second basic need identified in Basic Psychological Needs Theory. 'Competence' refers to an individual's sense of ability, capability, and mastery in relation to tasks and challenges[60] as well as encompassing the 'experience of effective interactions with the environment'.[61] Competence is fundamental to important law student characteristics, such as the ability to 'learn and work independently' and to engage in 'personal and professional development'.[62]

Relatedness is the third basic need within Basic Psychological Needs Theory and involves an individual's experience of meaningful and reciprocal connections with others who are important to them.[63] This includes an ability to rely on and trust others, and/or provide care for others.[64] The basic need of relatedness highlights that *how* the law is taught at law school is as important as, if not more important than, *what* is taught at law school.[65] The LWP acknowledges this, for example, with approaches and techniques that support rapport building and student engagement.

Whilst the three premises of Basic Psychological Needs Theory are all important, the LWP gives particularly detailed attention to how intentional curriculum design in legal education can enact a wellbeing-focussed approach

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[57] Kennon M. Sheldon et al, The Independent Effects of Goal Contents and Motives on Well-Being: It's Both What You Pursue and Why You Pursue It, 30(4) PERS. SOC. PSYCHOL. BULL. 475, 475 (2004).
[58] Manning, *supra* note 27, 229.
[59] Niemiec et al, *supra* note 50.
[60] Krieger, *supra* note 49, 172.
[61] Krieger, *supra* note 49, 176.
[62] Sally Kift, Mark Israel & Rachael Field, LEARNING AND TEACHING ACADEMIC STANDARDS PROJECT BACHELOR OF LAWS LEARNING AND TEACHING ACADEMIC STANDARDS STATEMENT DECEMBER 2010*,* ALTC < https://cald.asn.au/wp-content/uploads/2024/04/LLB-TLOsKiftetalLTASStandardsStatement2010-TLOs-LLB2.pdf> accessed 27 Sep 2024, TLO 6: Self-Management.
[63] Niemiec et al, *supra* note 50, 176; Krieger, *supra* note 49, 172.
[64] Niemiec et al, *supra* note 50 , 177; Ryan & Deci, *supra* note 27, 658-659.
[65] James B. Levy, As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher, 58(1) ME. L. REV. 50 (2006).

by supporting students' autonomous self-regulation. SDT research has consistently evidenced that autonomous self-regulation supports 'engagement and optimal learning in educational contexts.'[66] This approach involves supporting students' needs for autonomy, competence and relatedness and harnessing students' intrinsic motivations and goals, as well as assisting students to achieve self-determined extrinsic motivation. Such autonomy support is a positive way in which SDT can inform the enactment of the LWP, assisting students to develop 'foundations in personal maturity' which in turn provide deep and sustained foundations for student learning success and personal and professional wellbeing.[67] The LWP also reflects the notion that autonomy needs are satisfied in 'autonomy-supportive' (as opposed to 'controlling' environments), the need for competence is supported in 'well-structured' (as opposed to 'chaotic and demeaning') environments, and the need for relatedness is supported in 'warm and responsive' (as opposed to 'cold and neglectful') environments.[68]

The SDT literature tells us that when students perceive that their basic psychological needs for autonomy, competence, and relatedness are being satisfied, they are more likely to experience wellbeing, autonomous self-regulation, learning success and thriving.[69] As Niemiec and Ryan have said, 'when students' basic psychological needs for autonomy, competence, and relatedness are supported in the classroom, they are more likely to internalize their motivation to learn and to be more autonomously engaged in their studies'.[70]

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[66] Christopher P. Niemiec & Richard M. Ryan, *Autonomy, Competence, and Relatedness in the Classroom: Applying Self-Determination Theory to Educational Practice,* 7(2) THEORY RES. EDUC. 133, 133 (2009); Anna Huggins, IMPLEMENTING THE SELF-MANAGEMENT THRESHOLD LEARNING OUTCOME IN AUSTRALIAN LEGAL CURRICULA: INSIGHTS FROM SELF-DETERMINATION THEORY, Master of Laws Thesis (Queensland University of Technology, 2013); Anna Huggins, *Autonomy Supportive Curriculum Design: A Salient Factor in Promoting Law Students' Wellbeing* 35(3) UNSW. L. J. 683 (2012); Rachael Field, James Duffy & Anna Huggins, *Teaching Independent Learning Skills in the First Year: A Positive Psychology Strategy for Promoting Law Student Well-Being,* 8(2) J. LEARN. DES. 1 (2015).
[67] Krieger, *supra* note 49, 170.
[68] Vansteenkiste et al, *supra* note 2, 131-132.
[69] Niemiec & Ryan, *supra* note 66, 133; Ryan & Deci, *supra* note 26, 656–659, 666–669.
[70] Niemiec & Ryan, *supra* note 66, 139.

The most recent, sixth, addition to SDT's sub-theories is Relationships Motivation Theory.[71] This theory emphasizes the inter-connected nature of relatedness and autonomy, arguing that autonomously entering into and developing close relationships, and being given autonomy-support through such relationships, is vital to wellbeing.[72] This emphasizes, once again, the importance of the basic psychological needs being met to achieve psychological wellbeing.

SDT as the basis of the LWP

SDT's suitability as a theoretical framework for the LWP is confirmed, first, by examples of relevant recent applications of SDT in legal education research and, second, by SDT's connections with ethics and professionalism.

In relation to the recent applications of SDT in legal education research , a number of important studies of law students in Australia and the USA establish SDT as a fitting theoretical framework for understanding law student psychological ill-health and for designing law curricula that support and promote law student wellbeing.[73] The results of Sheldon and Krieger's aforementioned studies on the wellbeing of law students in the USA in 2004 and 2007 indicate that empirical correlations exist between the factors measured in SDT – goals, motivations, values, universal needs, and autonomy supportive environments – and law student wellbeing. Sheldon and Krieger have subsequently applied SDT in a study of thousands of lawyers in various US states which examined the factors influencing legal professionals' values, purposes, satisfaction and emotional health.[74] Manning also used SDT in analysing possible curricular innovation with autonomy supportive feedback practices for law school assessment tasks.[75]

71 Richard M. Ryan & Edward L. Deci, SELF-DETERMINATION THEORY: BASIC PSYCHOLOGICAL NEEDS IN MOTIVATION, DEVELOPMENT, AND WELLNESS (2017).
72 Ryan & Deci, *supra* note 71, Chapter 12.
73 Sheldon & Krieger, *supra* note 6 (2004); Sheldon & Krieger, *supra* note 6 (2007); Krieger *supra* note 49; Manning, *supra* note 27; Tani & Vines, *supra* note 8; Wendy Larcombe et al, *Law Students' Motivations, Expectations and Levels of Psychological Distress: Evidence of Connections*, 22(1) LEG. EDUC. REV. 21 (2012).
74 Lawrence S. Krieger & Kennon M. Sheldon, What Makes Lawyers Happy: A Data-Driven Prescription to Redefine Professional Success, 83(2) GEO. WASH. L. REV. 554 (2015).
75 Manning, *supra* note 27.

In 2009, Tani and Vines surveyed 2,528 students across ten disciplines at the University of New South Wales in Australia about their 'attitudes to their experience and expectations of their university education'.[76] The authors found that, relative to students from all other disciplines, law students were more influenced to choose law by external factors, such as pleasing their parents and future career and income prospects,[77] suggesting relatively low personal autonomy, and strong competitiveness. On this basis Tani and Vines argued that law schools should focus on autonomy and connectedness-support in the design and implementation of legal education.[78]

Larcombe et al's 2012 study at the University of Melbourne Law School in Australia (MLS) affirms that there is a direct relationship between students' perceptions that their needs for experiences of autonomy, competence, and relatedness are not being fulfilled and high levels of self-reported psychological distress.[79] Larcombe et al undertook two surveys of LLB and JD students at MLS in 2007–2008 and 2011.[80] Their data confirmed the connection between high levels of psychological distress, particularly depression, and students' privileging of extrinsic reasons for studying law, such as parental advice and law being the best option available.[81] The authors found that students who did not nominate intrinsic motivations for studying law, such as interest and aptitude, were three times more likely to be severely or extremely depressed.[82] Although the majority of such studies have been conducted in the USA and Australia, SDT has also been used in a UK research project on law student wellbeing, with largely similar findings.[83]

In relation to the second justification of SDT's suitability (its connections with ethics and professionalism), Krieger has established that wellbeing, thriving and autonomous self-regulation are connected with professionalism and ethical behaviour. As Krieger asserts, intrinsically and authentically motivated people

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[76] Tani & Vines, supra note 8, 3.
[77] Tani & Vines, *supra* note 8, 12, 25.
[78] Tani & Vines, *supra* note 8, 30.
[79] Larcombe et al, *supra* note 73, 27.
[80] Larcombe et al, *supra* note 73, 76-7.
[81] Larcombe et al, *supra* note 73, 86.
[82] Larcombe et al, *supra* note 73, 86.
[83] Emma Jones et al, The World at their Fingertips? The Mental Wellbeing of Online Distance-Based Law Students, 53(1) L. TEACH. 49 (2019); Emma Jones et al, Key Challenges and Opportunities Around Wellbeing for Distance Learning Students: The Online Law School Experience, 38(2) OPEN LEARNING: THE JOURNAL OF OPEN, DISTANCE AND E-LEARNING 117 (2023).

not only enjoy improved psychological health and life satisfaction, they also demonstrate greater consistency, congruence and integrity, which are integrally linked with professionalism.[84] In other words, intrinsic motivations are more likely to be associated with professionalism, while extrinsic motivations are more likely to be associated with unethical behaviour and a lack of professionalism.[85]

The above studies are typical in focusing largely upon the negative impacts experienced by students when aspects of SDT are not satisfied within law schools. The focus has been on questions such as 'are law students more susceptible to poor mental health and wellbeing issues than other student populations?' and 'what factors make law students susceptible to such issues?'. The findings in relation to such questions tend then to generate a set of recommendations around how to ameliorate the negative impacts upon law students. Such studies are important and have greatly raised awareness and understanding of the law school experience and its impacts upon students (and, also in some instances, staff).[86] The studies clearly tell us that there is a problem and indicate some ways in which that problem can be addressed.

At the same time, within the wider literature on wellbeing in law schools, there have also been calls for legal education to ensure that law students not only survive, but also thrive.[87] While this goal can (and has been) phrased in different ways, it encompasses a clear aim to support law students to flourish and experience positive impacts from their studies. In other words, the goal is to achieve wellbeing within the *eudaimonic* sense of the word in a way which corresponds with both Positive Psychology generally, and SDT in particular.[88] Focussing on students thriving encompasses the provision of a meaningful

[84] Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness,* 11(2) CLINICAL L. REV. 425, 425 (2005); Krieger, *supra* n.52.
[85] Krieger, *supra* note 84, 428-430.
[86] Caroline Strevens et al, An Analysis of Studies on the Wellbeing of Law Teachers in the UK and Australia in 2020 Using the Lens of Seven Psychosocial Hazards of Academic Work in WELLBEING AND THE LEGAL ACADEMY 21-38 (Caroline Strevens & Emma Jones eds., 2023).
[87] Paula Baron, *Thriving in the Legal Academy,* 17(1/2) LEG. EDUC. REV. 27 (2007).
[88] Noël Williams et al, *The Impact of Positive Psychology on Higher Education,* 5(1) WM. & MARY ED. REV. (2018) 12; Frank Martela & Kennon M. Sheldon, *Clarifying the Concept of Well-Being: Psychological Need Satisfaction as the Common Core Connecting Eudaimonic and Subjective Well-Being,* 23(4) REV. GEN. PSYCH. 458 (2019).

learning experience at law school that will allow students to grow and develop in healthy ways.

We pause here to mention that this focus is outside the perpetual debate about the ends of legal education as liberal or vocational (or some form of hybrid).[89] A student undertaking a law degree which concentrates largely upon lawyering skills and preparation for practice will require active attention to their wellbeing just as much as a law student whose degree functions more as a liberal arts subject. The means of achieving wellbeing may, in part, be different depending on the context. For example, in the context of focussing on preparation for practice, the emphasis may be more on fostering a healthy understanding of professional identity,[90] whilst in contexts where the law degree is seen as more of a liberal arts education, the emphasis may be more about ensuring that students' active scholarly engagement with the construction of discipline-specific knowledge does not inculcate unhealthy concepts of reason and rationality.[91] However, this article focuses upon a pedagogic approach which can encompass a range of different visions for the role and purpose of legal education. This is to reflect that law schools, their staff and their students are likely to have a variety of aims and approaches. The constant within the LWP model is to achieve such visions in a way that intentionally promotes and supports positive wellbeing.

The Elements of LWP

This part discusses each element of the LWP model in turn, providing a rationale for their inclusion in the LWP model, together with an explanation of their possible applications. The core elements are shown visually in Figure 1.

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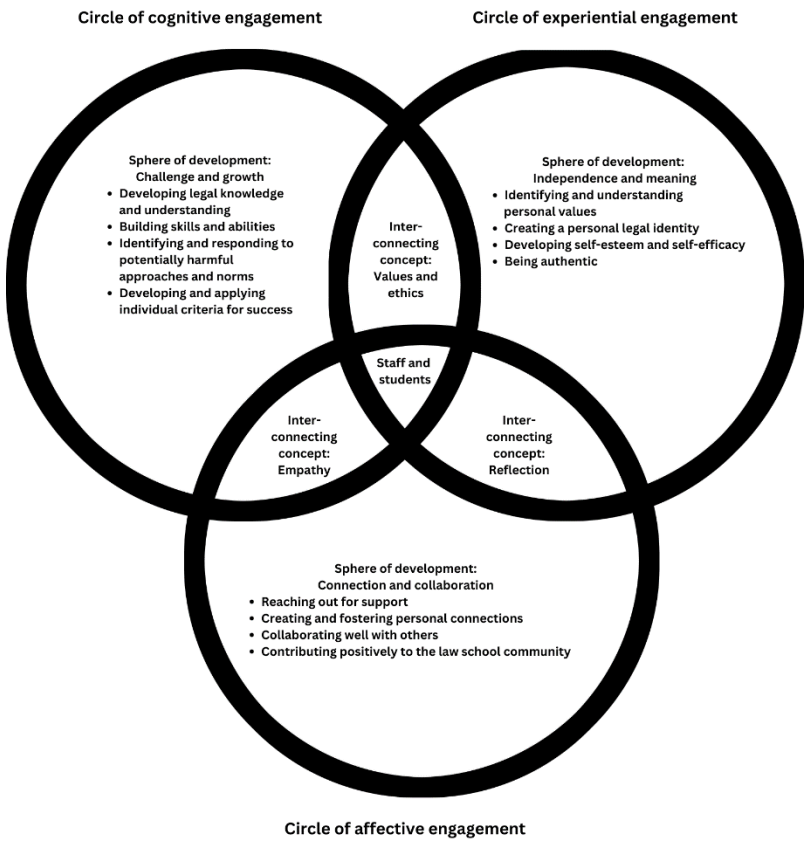
[89] For example, see John Hodgson, *Response: From Gavotte to Techno–But the Dance Goes On* in PERSPECTIVES ON LEGAL EDUCATION 196-206 (Chris Ashford, Nigel Duncan & Jessica Guth eds., 2015); William Twining, *Rethinking Legal Education,* 52(3) L. TEACH. 241 (2018).

[90] Rachael M. Field et al, LAWYERING AND POSITIVE PROFESSIONAL IDENTITIES (2nd ed. 2020).

[91] Emma Jones, EMOTIONS IN THE LAW SCHOOL: TRANSFORMING LEGAL EDUCATION THROUGH THE PASSIONS (2019).

Figure 1 – An outline of the LWP model



The centre of the LWP model

Law students and legal educators are at the conceptual centre of the LWP model, as indicated in Figure 1. A distinction has sometimes been drawn between 'teacher-centred' and 'student-centred' forms of education and

learning in a way that implies oppositionality and mutual incompatibility.[92] This binary perspective, when applied to wellbeing in higher education, ignores the integrated ways in which student wellbeing impacts upon educators and educator wellbeing impacts upon students. The two are inseparable and therefore it is vital that the LWP acknowledges both.[93] For example, dealing with a student who is facing challenging and/or traumatic circumstances can detrimentally impact an educator's wellbeing or, conversely, lead to a sense of reward or fulfilment where it results in a feeling of competence or relatedness.[94] For a student, having an educator who seems unenthusiastic or unhappy may lead to them feeling uncomfortable and detached from the subject they are learning. Conversely, an educator engaging positively with the principles and models of wellbeing can benefit from such knowledge in terms of their own wellbeing, as well as being able to enhance the learning experience of their students.[95]

This means that the references in Part I to promoting and supporting thriving and flourishing are intended to encompass the wellbeing of both students and staff. The challenge is to identify the specific point at which the needs and interests of both in terms of wellbeing are appropriately balanced and calibrated to avoid harmful impacts on either and to maximise benefits. This is certainly not easy. For example, spending time to understand and implement the LWP has an implication for staff in terms of both time and mental labour. These extra demands could potentially be detrimental to wellbeing. At the same time, the potential long-term benefits for students and staff are valuable, even necessary.

There is no single or simple solution to achieving the necessary balance. Rather, it is likely that individual law schools will have to engage with a continuous form of balancing act in terms of workload and wellbeing. The

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[92] Glynis Cousin, Neither Teacher-Centred nor Student-Centred: Threshold Concepts and Research Partnerships, 2 J. LEARNING DEV. HIGHER ED. 1759 (2010).
[93] Liz Brewster et al, *Look After the Staff and They Would Look After the Students' Cultures of Wellbeing and Mental Health in the University Setting,* 46(4) J. FURTHER & HIGHER ED. 548 (2022).
[94] Gareth Hughes et al, STUDENT MENTAL HEALTH: THE ROLE AND EXPERIENCES OF ACADEMICS. Student Minds < https://wwwstudentminds.org.uk/theroleofanacademic.html> accessed 24 Sep 2024 (2018).
[95] Nikki Bromberger, *Enhancing Law Student Learning – The Nurturing Teacher,* 20(1/2) LEGAL ED. REV. 45 (2010); Karen Aldrup et al, *Does Basic Need Satisfaction Mediate the Link Between Stress Exposure and Well-Being? A Diary Study Among Beginning Teachers,* 50 LEARN INSTR 21 (2017).

extent to which a balance is achieved will depend upon a number of diverse factors, including the level of resources which a law school is able and willing to channel into the work required to implement the LWP's pedagogic model. This, of course, will be a decision much influenced by the wider institutional setting in which the law school is situated. The literature on mental health services and support within universities notes that there is a need for 'effective, scalable interventions that are attractive to students'[96] and suggests that students are seeking:

> … a proactive and preventative mental health culture at university that would facilitate early identification and supportive pastoral staff–student relationships, alongside structural changes to existing academic, social, and financial risks to the mental health and well-being of the whole student community.[97]

However, there is also evidence that the marketized neoliberal environment of contemporary Western universities is one which can militate against the development of such a culture. The marketized, metric-driven environment in which students pay high tuition fees and face a highly competitive job marketplace imposes additional pressures upon the wellbeing of both students and staff.[98] There is also a continued tendency to individualise wellbeing issues, wrongly characterising poor wellbeing as a form of weakness or a demonstration of poor personal resilience or lack of effort.[99]

Despite such institutional constraints, individual legal educators, may be able to integrate parts of the model within the specific context of a law school and institution. This is not a case of 'all or nothing', the LWP or aspects of it, can be enacted and implemented in a gradual, incremental way if that is what the situation requires. Whilst the ideal is to have a sense of engagement and

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[96] June S. L. Brown, *Student Mental Health: Some Answers and More Questions,* 27(3) J. Ment. Health 193, 196 (2018).
[97] Michael Priestley et al, *Perspectives on Improving Mental Health Support Services at University*, 22 COUNS PSYCHOTHER RES. 1 (2022). This study was conducted in the UK context. For a global discussion, see Jason Bantjes et al, *Public Health Approaches to Promoting University Students' Mental Health: A Global Perspective,* 24(12) CURR. PSYCHIATRY REP. 809 (2022).
[98] Margaret Thornton, *Law Student Wellbeing: A Neoliberal Conundrum,* 58(2) AUST. UNIV. REV. 42 (2016).
[99] Louise J. Lawrence, REFIGURING UNIVERSITIES IN AN AGE OF NEOLIBERALISM: CREATING COMPASSIONATE CAMPUSES (2021).

ownership at all levels of a law school and beyond, there can be merit in taking smaller steps which validate the worth of the model to others as it develops incrementally. As Mahoney and Thelen state, '[g]radual changes can be of great significance in their own right; and gradually unfolding changes may be hugely consequential as causes of other outcomes'.[100]

Part of an incremental process for the development and acceptance of the LWP is likely to be challenging a focus on the short-term reform of legal education and encouraging a focus on sustainable long-term change. For example, time and resources spent on embedding wellbeing into the curriculum now could potentially lead to less retroactive responses to individual student problems being required at a later stage. An approach to wellbeing which proactively raises awareness and understanding and encourages engagement throughout the program could lead to fewer issues being left unidentified until a crisis arises.

Circles of intellectual engagement

The outlines of the three interlocking circles on the LWP model in Figure 1 represent the three forms of engagement which, we argue, are key to learning and teaching in law: cognitive engagement, experiential engagement and affective engagement. It should be noted at this point that all three 'types' of engagement are viewed as a form of intellectual endeavour. It is not the case that we are equating 'cognitive engagement' with academic pursuits and the others with less-intellectual aspects of legal education. What we are doing is challenging some of the traditional notions of what, within the legal academy, is sometimes characterised as 'intellectual', arguing that it has become both narrow and rigid in scope.

Perhaps the easiest target in terms of traditional notions of legal education is that of the doctrinal approach to law, with its focus on abstracting, analysing and applying key legal rules and principles. This has been heavily critiqued for its lack of acknowledgment of potential biases and subjectivities, its binary nature and lack of nuance, and its de-prioritisation of wider societal and

[100] James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change* in EXPLAINING INSTITUTIONAL CHANGE. AMBIGUITY, AGENCY AND POWER 3 (J. Mahoney & K. Thelen eds., 2010).

contextual factors.[101] Indeed, there is evidence that much law teaching, even if avowedly doctrinal in nature, now avoids a purely doctrinal focus to waylay some of this criticism.[102] However, other approaches to legal education often demonstrate a similar rigidity when substituting their own definition of what constitutes the 'intellectual' study of law. For example, many proponents of liberal legal education reject or disregard the role of the affective domain within learning.[103]

It is worth noting here that we have not sought to distinguish between knowledge and skills within the LWP model. This is a deliberate choice, reflecting the reality of the need for law students to synthesise both knowledge and skills in their learning of law and legal practice. Without knowledge, there is nothing to apply the skills to. Without skills, learning is reduced to a behaviouristic form of memorising and regurgitating knowledge. In contrast, we subscribe to the opinion that more successful learning can be achieved when students 'learn by doing' and are 'actively involved in the discovery process'.[104] This could be seen as implying a sole focus on experiential forms of learning. However, at its broadest this form of doing can involve actions such as writing a summary of a judgment or completing a multiple-choice quiz on a legal topic.

Cognitive engagement

The left-hand circle of the LWP model diagram, that of 'cognitive engagement, fits most clearly into traditional notions of legal education. It encompasses the type of abilities and activities commonly associated with the cognitive domain section of Bloom et al's 'Taxonomy of Educational Objectives'.[105] This taxonomy captures a hierarchical approach to levels of thinking, from

[101] For example, see Foluke Adebisi, *Should We Rethink the Purposes of the Law School? A Case for Decolonial Thought in Legal Pedagogy,* 2(3) AMIC. CURIAE 428 (2021).
[102] Vincent Kazmierski, *How Much "Law" in Legal Studies? Approaches to Teaching Legal Research and Doctrinal Analysis in a Legal Studies Program,* 29(3) CAN. J. LAW SOC. 297 (2014).
[103] Emma Jones, Incorporating an Affective Framework into Liberal Legal Education to Achieve the Development of a 'Better Person' and 'Good Citizen', 4(1) EUR. J. LEG. EDUC. 27 (2023).
[104] George M. Slavich & Philip G. Zimbardo, *Transformational Teaching: Theoretical Underpinnings, Basic Principles, and Core Methods,* 24 EDUC. PSYCHOL. REV. 569, 575 (2012).
[105] Benjamin S. Bloom et al, TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS. VOL. HANDBOOK I: COGNITIVE DOMAIN (1957).

knowledge and understanding through to synthesis and evaluation.[106] In the context of legal education, it is likely to cover aspects such as reading textbooks, journal articles and case judgments, taking notes, analysing legal rules and principles, applying them to scenarios and writing answers to essays and problem-style questions which critically analyse, discuss and evaluate specific propositions and problems. The taxonomy encompasses largely transmissional forms of delivery, such as lectures, as well as other modes of learning and teaching.[107] For example, in a law of obligations module, students may be introduced, via a lecture and textbook reading, to the doctrine of consideration within contract law. They may then be asked to apply the fundamental principles to legal scenarios. In a further lecture, or via journal articles, they may then move on to consider more challenging notions such as the principles surrounding past consideration and part payment of debts. They may then be required to answer an essay question asking them to discuss, critically analyse or critically evaluate a statement about the importance or role of consideration in the law of obligations.

Experiential engagement

The right-hand circle of the LWP model diagram, that of 'experiential engagement', is based on the idea of experiential learning. Experiential learning is commonly associated with the work of theorists such as Dewey[108] and Kolb.[109] It emphasizes and celebrates the role of practical experiences and applications of knowledge within learning, both curricular and extra-curricular.[110] That is not to say that an individual can wholly rely on their own experiences, there is a need for those experiences to be informed by knowledge and reflected upon to ensure that a subjective experience does not lead to biases and errors in judgement.[111] However, for the purposes of this model, the key is the way in which experiential learning acknowledges the validity and relevance of an individual's experiences and integrates them into learning. Although cognitive engagement will inevitably be shaped by such experiences,

[106] Bloom et al, *supra* note 105.
[107] Alison Bone, *The Twenty-First Century Law Student,* 43(3) L. TEACH. 222 (2009).
[108] John Dewey, EXPERIENCE AND EDUCATION (1938).
[109] David A. Kolb, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT (2014).
[110] Jay Roberts, From the Editor: The Possibilities and Limitations of Experiential Learning Research in Higher Education, 41(2) J. EXP. EDUC. 3 (2018).
[111] Thomas Howard Morris, Experiential Learning - A Systematic Review and Revision of Kolb's Model, 28(2) INTERACT. LEARN. ENVIRON. 1064 (2020).

experiential engagement tends to leave such influences implicit or even ignore them. By including experiential engagement as a circle, our intention is to recognise that rejecting or disregarding such influences is inadequate, mirroring the aforementioned critiques of the doctrinal approach. Portraying knowledge as objective and not acknowledging the role of individual experience, can lead to both valuable experience-based insights and biases and subjectivities being ignored, disregarding the reality of the positionality of both staff and students.[112]

Within the context of existing approaches to legal education, it is clinical legal education (CLE) which appears to be the most common form of experiential engagement. Often CLE involves students interacting with real-world legal issues and real-life clients (or at least simulations of realistic scenarios) and then spending time reflecting on their experience. This has become increasingly recognised as a valuable part of legal education, with growing arguments for CLE to be 'mainstreamed' within law degrees.[113] The circle representing experiential engagement encompasses CLE, as well as experiential engagements within more traditional 'classroom' settings. However, it also represents the importance of experience more broadly. Namely, the notion of individuals being able to draw upon and voice their own experiences within all learning and teaching settings (with due acknowledgment of the unpaid labour this could potentially generate), and the need to explore the collective experiences of cohorts, groups and teams within legal education.

Affective engagement

The final circle, at the bottom of the LWP model diagram, represents affective engagement. This is perhaps the least-explored element of learning and teaching within legal education. The term 'affect' has been interpreted in numerous ways and can be viewed as separate from emotions.[114] However, for the purpose of the LWP model, the word 'affective' is used to encompass feelings, preferences, motivations, values and emotions. This broad definition

[112] Donald Nicolson, *Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World,* 22(1) INT'L J. LEGAL PROF. 51 (2015).
[113] Amy M. Brett, Melissa L. Smith & William G. Huitt, *Overview of the Affective Domain* in BECOMING A BRILLIANT STAR: TWELVE CORE IDEAS SUPPORTING HOLISTIC EDUCATION (83-104) (William G. Huitt ed., 2003).
[114] Lisa Feldman Barrett, HOW EMOTIONS ARE MADE: THE SECRET LIFE OF THE BRAIN (2018).

aligns with previous attempts to capture the contours of the word 'affective' within education. For example, Bloom's lesser-used taxonomy of the affective domain refers to the ways in which students begin to attach a value to knowledge, to enable them to synthesise such information into their worldview.[115]

It is arguably the role of emotions, which are key within this circle, to shape the ways in which information is retained and processed thus influencing reasoning, judgement and decision-making.[116] There is a bi-directional relationship between emotions and learning. That is, students' emotions will impact upon their learning, at the same time their learning impacts upon their emotions.[117] For example, one student may have been offered a vacation placement on a particular day, leading to them feeling happy, enthusiastic and engaged in their seminars. Conversely, another student may find the subject-matter of a particular case they are required to read upsetting and distressing, leading to them struggling to concentrate and finding the rest of the day challenging in terms of engaging with their learning.

Spheres of development

Each of the 'circles of engagement' in the LWP model contains a 'sphere of development'. For example, the circle of 'cognitive engagement' includes the sphere of 'challenge and growth'. It is important to emphasize that this is not meant to imply each sphere belongs solely within one circle of engagement. However, each sphere is situated within the circle where there is the greatest affinity. There will inevitably be some overlap and blurring and this should be seen as a positive aspect of the model, as we are avoiding trying to impose any form of 'one size fits all' representation of the LWP.

Challenge and growth

The notion of 'challenge and growth' is captured within the circle titled 'cognitive engagement' and relates to the idea of competence within SDT. As

[115] David R. Krathwohl, Benjamin S. Bloom & Bertram B. Masia, TAXONOMY OF EDUCATIONAL OBJECTIVES. HANDBOOK II: AFFECTIVE DOMAIN (1956).
[116] Mary Helen Immordino Yang, EMOTIONS, LEARNING, AND THE BRAIN: EXPLORING THE EDUCATIONAL IMPLICATIONS OF AFFECTIVE NEUROSCIENCE (2015).
[117] Bromberger*, supra* note 95.

described previously, competence involves being able to act effectively.[118] In terms of legal studies, this is likely to involve students being able to complete their learning and assessments in an effective manner. What is meant by 'effective' in this context? We suggest that it refers to students being able to reach their full academic potential in a healthy manner – that is, in a way which does not impact detrimentally upon their mental health and wellbeing. This sphere of development seeks to identify and explore key elements involved in achieving this goal.

Developing legal knowledge and understanding

For law students, attaining legal knowledge and understanding will include being able to grasp potentially challenging legal topics and concepts, and being able to synthesise information and progress to analysing and evaluating it. In other words, the types of cognitive task discussed earlier when we explained the notion of 'cognitive engagement'.

It is important for the model to explicitly emphasize the role of 'challenge and growth' in cognitive engagement. One of the criticisms commonly levelled to critique the perceived 'therapeutic' or 'affective' turn of higher education is that it involves in some way infantilising students and 'diminishing the curriculum'.[119] The argument is that such an approach to higher education often focuses on building students' self-esteem by removing their sense of personal responsibility – 'encouraging the belief that many people are vulnerable, not very resilient and preoccupied with their self-esteem'.[120] This approach is viewed as reducing students' levels of autonomy because they become reliant on the support available and fail to develop their capacity for independent learning. It is argued that the richness of the curriculum is diminished or impoverished as a result of universities prioritising conformity and safety over challenge and uncertainty.[121]

By their very nature, the concepts of challenge and growth involve some level of development. They require a student to move outside their 'comfort zone'.

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[118] Krieger, *supra* note 49.
[119] Kathryn Ecclestone & Dennis Hayes, THE DANGEROUS RISE OF THERAPEUTIC EDUCATION (2009).
[120] Kathryn Ecclestone, *Learning or Therapy? The Demoralisation of Education,* 52(2) BR. J. EDUC. STUD. 112 (2004) 119.
[121] Frank Furedi, WHAT'S HAPPENED TO THE UNIVERSITY?: A SOCIOLOGICAL EXPLORATION OF ITS INFANTILISATION (2017).

This can feel stressful and provoke a sense of anxiety. However, evidence from neuroscience suggests that, within limits, such a response can assist with the learning process. This is not to suggest at all that chronic stress and anxiety is good for students. Indeed, we know that a sustained experience of stress can be highly detrimental - both personally and academically.[122] However, moderate levels of stress are acknowledged as necessary for motivation. Without any sense of stress we would have no incentive to get out of bed in the morning. Therefore, there is a level of stress (sometimes termed as 'challenge' or 'eustress') which is actually beneficial for individuals.[123]

The key for legal educators is to stretch and challenge students sufficiently for them to experience this optimal level of arousal and subsequent motivation, whilst at the same time avoiding generating negative experiences of chronic stress and anxiety. This balancing act can never be a perfect science – tolerance to stress will vary between individuals and will also be affected by a wide range of environmental factors. For example, a student who is struggling financially and is sharing cramped, noisy accommodation is understandably likely to have lower levels of resilience than a financially secure student living in a calm flat with dedicated study space and excellent facilities. The realities of higher education mean that individual students will have to navigate differing experiences. However, there are techniques that can help students with judging the right or optimal level of stress for them to experience motivation. For example, staff can support students in differentiating between 'essential' and 'additional' reading, encourage them to ask clarifying questions about the relevant marking rubric criteria, and signpost available wellbeing resources on lecture slides.

Building skills and abilities

A second aspect of 'challenge and growth' concerns individual students being able to recognise and develop their skills and abilities. Even within the academic sphere, this will encompass not only specific legal skills (such as reading and interpreting a case judgment) but also generic academic skills (such as note-taking and essay writing). Skill building by students also requires

[122] Immordino Yang, *supra* note 116; Adele Bergin & Kenneth Pakenham, *Law Student Stress: Relationships Between Academic Demands, Social Isolation, Career Pressure, Study/Life Imbalance and Adjustment Outcomes in Law Students,* 22(3) PSYCH. PSYCHOL. LAW 388 (2015).
[123] Chris Gibbons, *Stress, Eustress and the National Student Survey,* 21(2) PSYCHOL. TEACH. REV. 86 (2015).

them (with the help of their educators) to appreciate the transferable nature of many of these skills within the law degree, between courses, and into diverse post-legal education professional contexts. For example, when reading a case judgment, students are developing skills of reading large quantities of complex text and extracting key information in a way that translates to tackling journal articles and books and dealing with detailed problem scenarios in examinations. When breaking down and examining a legal principle given in such a case, students are developing the type of analytical skills which can be applied across diverse areas of the law, in other disciplines, in empirical research and within professional workplaces.

Such an emphasis on skills and abilities within the LWP framework recognises that genuine cognitive engagement requires more than simply retaining and regurgitating legal information. It necessitates a form of active learning which in turn demands the developments of relevant skills and abilities. These 'metacognitive' skills enable students not only to understand their learning and thinking processes, but also then to utilise this understanding to regulate these processes in ways which optimise learning.[124] Given their importance, it is crucial that students are encouraged to also draw upon such skills to ensure they approach their studies in psychologically and emotionally healthy ways, factoring these considerations into the regulation of their learning and thinking processes. For example, a student reflecting upon their approach to formative feedback could also consider the psychological and emotional impact of the critique and how to regulate their responses to positive and negative feedback in future.

Traditionally, there are skillsets that have been under-valued or even ignored in legal education, in particular those involving so-called 'soft skills'.[125] These are skills which are less easy to categorise and master, often involving an affective element, such as empathy and emotional literacy.[126] The term 'soft skills' can be critiqued as diminishing the value of these vital skills which are

[124] Cheryl B. Preston, Penée Wood Stewart & Louise R. Moulding, *Teaching Thinking Like a Lawyer: Metacognition and Law Students,* BYU. L. REV. 1053 (2014); Jennifer A. Gundlach & Jessica R. Santangelo, *Understanding the Metacognitive 'Space' and its Implications for Law Students' Learning,* 50(4) HOFSTRA L. REV. 3 (2022).
[125] Jessica Guth, *The Past and Future of Legal Skills Teaching* in KEY DIRECTIONS IN LEGAL EDUCATION: NATIONAL AND INTERNATIONAL PERSPECTIVES (Emma Jones & Fiona Cownie eds., 2020).
[126] Aspasia I. Tsaoussi, *Using Soft Skills Courses to Inspire Law Teachers: A New Methodology for a More Humanistic Legal Education,* 54(1) L. TEACH. 1 (2020).

essential across study and the workplace – indeed in life generally. The social and communication skills involved in collaboration and group work provide an example of such skills. These skills are necessary, for example, in preparing for a group presentation or moot. A lack of such skills can negatively impact the wellbeing of students who undertake these activities.[127] There is also the important ability to self-care.[128] For law students, this involves having healthy habits in place around nutrition and sleep, managing and organising their time, building in time for rest and relaxation and generally studying in a mentally, emotionally and physically healthy manner.

Identifying and responding to potentially harmful approaches and norms

The reference to self-care leads into the next element of 'challenge and growth', which is the need to be able to identify potentially harmful norms and approaches. This could be represented by a student who does not engage in self-care but instead spends a week prior to an assessment attempting to work twenty hours a day, snacking on junk food and caffeine-filled drinks and dropping all contact with friends and families to focus upon passing their assignment.

However, this element of the LWP framework also refers to some of the more insidiously, but no less potentially harmful, norms within legal studies which are shaped by the perceived culture and expectations of law. One key example within the UK (which is also found in many other countries including Australia) is a high level of academic competitiveness, including the notion that only a honours law degree has any real value.[129] Competitiveness at law school is fuelled, amongst other things, by the high demand for legal jobs and the recruitment requirements of many law firms that require a high class honours degree for successful applicants. Such an approach also perpetuates a rigid focus upon a traditional legal career route as the ultimate goal of law students and fails to acknowledge the wider value of a law degree and the

[127] Emma Jones et al, *Student Wellbeing and Assessment in Higher Education: The Balancing Act,* 46(3) ASSESS. EVAL. HIGH. EDUC. 438 (2021).
[128] Christine E. Doucet, *Law Student, Heal Thyself: The Role and Responsibility of Clinical Education Programs in Promoting Self-Care,* 23 J.L. & SOC. POL'Y. 136 (2014).
[129] See, in the US-context, Kreiger & Sheldon (2004), *supra* note 6. See also, Helen M Stallman, *A Qualitative Evaluation of Perceptions of the Role of Competition in the Success and Distress of Law Students,* 31(6) HIGH. EDUC. RES. DEV. (2012) 891-904.

potential for an extensive variety of careers both within the legal profession as well as external to law.

Another, often related, approach is one driven by a sense of perfectionism and a strong desire to achieve and be successful.[130] Of course, striving to do your best can be beneficial in legal studies. Aiming for success suggests a form of intrinsic (or at least internalised) motivation and can lead to high quality work and a sense of achievement. However, if a focus on being successful becomes too rigid it can also be detrimental to both wellbeing and the quality of study. It can lead to students setting themselves unattainable goals, ignoring smaller accomplishments, and internalising a sense of failure if they do not meet their self-imposed standards. This in turn can impact negatively on motivation and wellbeing and eventually lead to a student disengaging with their studies.[131]

The reference to 'responding to' such potentially harmful approaches and norms is important. It is possible for a student to be aware that their approach or a perspective they hold is unhealthy, but they may consciously or unconsciously opt to retain it. As legal educators, we can certainly encourage students to reflect upon such notions and approaches, we can suggest alternatives and model healthy behaviours. However, we cannot force students to change their behaviours and indeed many commentators would argue it is not part of our role to do so.[132] Therefore, we argue it is necessary to accept that we cannot compel students to embrace 'challenge and growth', but we can encourage students to make conscious and informed responses and choices.

Developing and applying individual criteria for success

The final element of 'challenge and growth' identified within the model requires each individual student to be able to develop and apply their own individual criteria for success. In other words, the type of intrinsic goals envisaged by Goal Content Theory.[133] This element suggests a student has the intellectual maturity and abilities of self-examination to critique external

[130] Susan S. Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism,* 46(5) AM. U.L. REV. 1337 (1997).
[131] Bromberger, *supra* note 95.
[132] Anthony Bradney, CONVERSATIONS, CHOICES AND CHANCES: THE LIBERAL LAW SCHOOL IN THE TWENTY-FIRST CENTURY (2003); Stanley Fish, SAVE THE WORLD ON YOUR OWN TIME (2008).
[133] Edward L. Deci & Richard M. Ryan, INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR (2013).

standards of success (such as the aforementioned honours law degree classification) and to decide whether or not these standards will be adopted as their own personal criteria. For example, in terms of academic success, a student may prioritise their experience of CLE over their study of traditional academic legal subjects. A student may seek to obtain a higher grade in a particular module because it aligns with their interests or future career plans. The key is that in doing so they have made a conscious and informed choice.

In some cases, a student may make the decision to prioritise their wellbeing over their grades, for example, limiting their study time to ensure they have time to engage with friends or to recover from a past trauma. They could choose to take time out, such as a leave of absence, or consider transferring programs or universities.

University study has close links to wider life choices, including career choices and destinations and geographic mobilities.[134] Therefore, it is probable that a law student will apply a similar critical lens to other aspects of their life, including work and personal aspects. For students with an interest in joining the legal profession, this is arguably particularly critical as it is well-documented that many legal professionals feel that, having 'succeeded' in obtaining a legal career, to step away, change direction or simply quit would constitute a form of personal failure.[135] Equipping students with the competence to devise and apply their own criteria could ameliorate the impacts of their exposure to potentially harmful cultural and structural norms within law.

Independence and meaning

The notions of 'independence and meaning' are captured in the LWP model within the circle of engagement titled 'experiential engagement'. Experiential engagement relates to the concept of autonomy within SDT. As described previously, autonomy involves an individual having the sense of being in control of their own fortunes – being able to make their own choices, decisions and judgements. As Ryan and Deci describe it, autonomy incapsulates '… a

[134] See, in the UK-context, Walter W. McMahon & Moses Oketch, *Education's Effects on Individual Life Chances and on Development: An Overview,* 61(1) BR. J. EDUC. STUD. 79 (2013).
[135] Emma Jones et al, MENTAL HEALTH AND WELLBEING IN THE LEGAL PROFESSION (2020).

sense of initiative and ownership in one's actions'.[136] Within the law school context, autonomy support requires the creation of a learning environment in which students have a sense of freedom and independence, and an ability to appreciate the meaningful nature of their studies.

The structure of higher education, typically comprising standardised formats of programs, a reliance on learning outcomes, and detailed marking rubrics and assessment criteria,[137] together with the requirements imposed by legal regulators in a number of jurisdictions, may seem to militate against the notion of autonomy. However, there are still various ways to promote autonomy, even within these confines. For example, including students in the process of setting learning outcomes, allowing students to devise their own assessment and facilitating independent learning, as well as explicitly providing students with a meaningful rationale where choice is not possible. It is important that autonomy-supportive actions are done in a scaffolded, reassuring manner.[138] This sphere of development seeks to identify and explore key elements involved in achieving the goals of independence and meaning, thus promoting positive wellbeing.

Identifying and understanding personal values

The term 'personal values' refers to an individual's fundamental beliefs and attitudes which may (or will) influence their behaviours and choices.[139] Despite being traditionally overlooked within legal education, in recent years there has been a growth of interest in the role values play and their relationship with law student wellbeing.[140] As core influences upon an individual, it is necessary for a student to be able to identify and understand their personal values if they are to be able to achieve autonomy. For example, a student who remains strictly

[136] Richard M. Ryan & Edward L. Deci, Intrinsic and Extrinsic Motivation from a Self-Determination Theory Perspective: Definitions, Theory, Practices, and Future Directions, 61 CONTEMP. EDUC. PSYCHOL. 101860 (2020), 101860.
[137] Bone, *supra* note 107.
[138] Niemiec & Ryan, supra note 66, 139; Anna Huggins, Autonomy Supportive Curriculum Design: A Salient Factor in Promoting Law Students' Wellbeing, 35(3) UNSW. L.J. 683 (2012).
[139] Kellum A. Gamage, D. M. S. C. P. K. Dehideniya & Sakunthala Ekanayake, *The Role of Personal Values in Learning Approaches and Student Achievements,* 11(7) BEHAV. SCI. 102 (2021).
[140] Vivian Holmes et al, *Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers,* 15(1) LEG. ETH. 29 (2012); Graham Ferris, USES OF VALUES IN LEGAL EDUCATION, Intersentia, (2014).

adherent to the values of their parents without questioning this allegiance will simply apply those values even if offered situations where they could make different, equally valid choices. This could include deciding to study law and pursue a legal career, despite having a stronger interest in another discipline. Similarly, personal values are key to providing meaning. For example, if a student believes strongly in social justice, they are likely to be engaged with legal topics which align with that value (such as family law).

Therefore, for a student to be independent and understand what has meaning to them, they need to be cognisant of their personal values. Without this awareness, they are more likely to conform to dominant values and norms within their environment (such as needing to obtain a high-class honours degree or having to revise 24/7) without being equipped to discern whether these things are congruent with their own personal beliefs. Identifying and understanding personal values aligns with the Goal Content Theory aspect of SDT which emphasizes the link between intrinsic goals and autonomous motivation.[141] Understanding, and following, their own values will enable students to formulate goals which are congruent with those values and stimulate motivation to achieve those goals.

Creating a personal legal identity

Once a student has identified their personal values, those values form a part of their wider identity as a law student and (potentially) as a legal professional going forward. We have chosen to term this as a 'legal' rather than 'professional' identity here to avoid an assumption that all students' identity formation is predicated upon a desire to enter the legal profession, and to recognise the problematic connotations of current professional identity formation within law.[142] There is evidence that, at present, both the process of legal education and the process of entering the legal profession can contribute to the formation of a form of professional identity which is potentially harmful to wellbeing.[143] This harm relates partly to traditional forms of professional identity within the legal profession which function to exclude so-called 'outsiders', often on the grounds of class, gender and ethnicity, but it also

[141] Deci & Ryan, *supra* note 133.
[142] Aric Short, *Putting the Lawyer First: Framing Well-Being in Law as an Ethical Dilemma,* 75(5) MERCER L. REV. 1409 (2023); Jones et al, *supra* note135, Chapter 2.
[143] For example, see Kathryne M. Young, Understanding the Social and Cognitive Process in Law School that Creates Unhealthy Lawyers, 89(6) FORDHAM L. REV. 2575 (2020).

relates to the ways in which forms of exclusion have frequently been reproduced within contemporary characterisations of law.[144] To succeed, aspiring legal professionals may think that they have to adopt a professional identity which conflicts with their personal identity, leading to a potentially harmful sense of dissonance.[145] There is also evidence that part of a 'typical' professional identity within law is the need for individuals to portray themselves as strong and invulnerable to enable them to succeed, resulting in the perception of wellbeing issues as a form of weakness and vulnerability.[146] Such an attitude perpetuates shame and stigma in response to mental health and wellbeing issues and negatively influences help-seeking behaviours amongst law students and legal professionals alike.[147]

In contrast, forming a positive legal identity, one which prioritises wellbeing and enables personal values to be operationalised, will have long-term benefits.[148] Such an identity can have a protective function in enabling law students (and lawyers) to withstand potentially harmful norms and influences within the law. It can also lead to such individuals modelling healthy behaviours relating to wellbeing in a way that encourages their peers to do the same, challenging stigma, encouraging inclusive communities and acting as a lever for wider cultural change. Once again, links with Goal Content Theory become apparent, allowing for a congruence between values, goals and identity.[149]

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[144] For example, see Hilary Sommerlad, 'A Pit to Put Women In": Professionalism, Work Intensification, Sexualisation and Work–Life Balance in the Legal Profession in England and Wales, 23(1) INT'L J. LEGAL PROF. 61 (2016); Lydia Bleasdale & Andrew Francis, Great Expectations: Millennial Lawyers and the Structures of Contemporary Legal Practice, 40(3) J. LEG. STUD. 376 (2020); Swethaa S. Ballakrishnen, Rethinking Inclusion: Ideal Minorities, Inclusion Cultures, and Identity Capitals in the Legal Profession, 48(4) L. & SOC. INQUIRY 1157 (2023).

[145] Hilary Sommerlad, *Researching and Theorizing the Processes of Professional Identity Formation,* 34(2) J. L. SOC. 190 (2007).

[146] Jones et al, *supra* note 135.

[147] Joan Bibelhausen, Katherine M. Bender & Rachael Barrett, *Reducing the Stigma: The Deadly Effect of Untreated Mental Illness and New Strategies for Changing Outcomes in Law Students,* 41(3) WM. MITCHELL L. REV. 918 (2015).

[148] Rachael M. Field, James Duffy & Anna Huggins, LAWYERING AND POSITIVE PROFESSIONAL IDENTITIES (2nd ed., 2020).

[149] Deci & Ryan, *supra* note 133.

Developing self-esteem and self-efficacy

Drawing on a firm foundation of personal values and a positive legal identity equips students with the tools to develop a healthy and stable sense of self-esteem – or in other words, a positive view of themselves and their value.[150] The importance of self-esteem within education generally has been widely debated.[151] However, there is a strong argument that a form of 'justified domain-specific self-esteem', is valuable.[152] Supporting the development of self-esteem in law students requires legal educators to assist students to:

1. set themselves worthwhile… goals…
2. estimate their achievements correctly, and
3. experience proper satisfaction with their achievements.[153]

While self-esteem is generally important to both wellbeing and academic learning in terms of both confidence and motivation, in relation to law students, its inclusion also has several specific benefits. One of these benefits is its potential to challenge 'imposter syndrome' or 'imposter phenomenon'. This syndrome involves an unjustified 'internal feeling of distrust in one's own abilities and accomplishments along with the fear of being exposed as an "imposter"'.[154] Such feelings can be particularly strong for law students whose voices are less well-represented in law, as, for example, is the case for Indigenous law students in Australia.[155] Developing a positive sense of self-esteem can ameliorate this sense of being an imposter by providing an individual with a realistic and accurate perception of their own worth.

Another benefit of promoting self-esteem relates to the connections that exist between these notions and resilience. The term 'resilience' is frequently used in narratives around wellbeing within law, particularly in relation to the legal profession. The term has been criticised as a way of individualising wellbeing

[150] Matt Ferkany, *The Educational Importance of Self-Esteem,* 42(1) J. PHILOS. EDUC. 119 (2008).
[151] Ecclestone & Hayes, *supra* note 119.
[152] Kristján Kristjánsson, *Justified Self-Esteem,* 41(2) J. PHILOS. EDUC. 247 (2007), 247.
[153] Kristjánsson, *supra* note 152, 258
[154] Janet Thompson Jackson, *Wellbeing and Law: Reforming Legal Education to Support Student Wellbeing* 65(1) HOW. L.J. 45 (2021), 79.
[155] Melanie Schwartz, *Retaining our Best: Imposter Syndrome, Cultural Safety, Complex Lives and Indigenous Student Experiences of Law School,* 28(2) LEGAL ED. REV. 1 (2018).

issues, placing the onus on individual students to improve their resilience, rather than focusing on addressing the underlying cultural and structural issues within the profession that impact negatively upon mental health.[156] At the same time, the importance of being able to adapt to, and recover from, challenges and setbacks is valuable for both law students and lawyers. For example, a student receiving a lower grade than expected on an assignment will need the ability to reflect on their feedback and to motivate themselves to draw upon this experience to prepare subsequent assignments. Therefore, the inclusion of self-esteem recognises that this is a powerful tool in fostering resilience, without skewing the model to potentially harmful misapplications of the notion of resilience.[157]

Self-esteem is key to law students in terms of self-worth, but a sense of self-efficacy is also vital.[158] Self-efficacy refers to an individual's sense of being able to 'produce and to regulate events in their lives'.[159] It aligns well with Dweck's notion of a 'growth mindset' which posits that students perform better when they view their intellectual capacity as something which can be developed, rather than as 'fixed' and unchanging.[160] Where law students do not experience a sense of self-efficacy, they are less well-equipped to navigate academic challenges and may abandon their efforts, due to a lack of effort and persistence.[161] Higher levels of self-efficacy promote the adoption of adaptive coping strategies and better wellbeing, whereas lower levels can be predictors of increased depression and anxiety.[162]

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[156] Richard Collier, *Wellbeing in the Legal Profession: Reflections on Recent Developments (Or, What Do We Talk About, When We Talk About Wellbeing?),* 23(1) INT'L J. LEGAL PROF. 41 (2016).
[157] David Miller & Brigid Daniel, *Competent to Cope, Worthy of Happiness? How the Duality of Self-Esteem Can Inform a Resilience-Based Classroom Environment,* 28(5) SCH. PSYCHOL. INT. 605 (2007).
[158] Leah M Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students,* 33 L. & PSYCHOL. REV. 57 (2009).
[159] Albert Bandura, *Self-Efficacy Mechanism in Human Agency,* 37(2) AM. PSYCHOL. 122 (1982), 122.
[160] Carol Dweck, *Carol Dweck Revisits the Growth Mindset,* 35(5) EDUC. WEEK 20 (2015).
[161] Jason S. Palmer, *The Millennials are Coming: Improving Self-Efficacy in Law Students Through Universal Design in Learning,* 63(3) CLEV. ST. L. REV. 675 (2014).
[162] Carlos Freire et al, *Eudaimonic Well-Being and Coping with Stress in University Students: The Mediating/Moderating Role of Self-Efficacy,* 16(1) INT'L. J. ENVIRON. RES. PUB. HEALTH 48.

Being authentic

To be authentic is to feel and act in a manner which is congruent with your personal values.[163] Authenticity suggests being your own person, having the ability to be independent and to understand what you find meaningful and why. For a law student, this can take many forms, from choosing modules of study which align with their personal beliefs, to challenging materials they find inappropriate or biased, to deciding upon a career path which reflects their convictions most closely.

It should be noted that there can be pitfalls with the notion of authenticity – as it can be used as a way to demand emotional labour from individuals.[164] This is reflected in the neo-liberal notion of 'bringing your whole self to work'.[165] We cannot require a student to 'bring their whole self' to the classroom or campus if that is framed as requiring them to share experiences for the benefit of others, involving them in the type of unpaid labour referred to previously. Therefore, as educators we have a responsibility to ensure that authenticity is encouraged but not exploited, including by demonstrating how and when to set such boundaries. Doing so will enable students to retain their authenticity in a manner which is healthy whilst avoiding forms of cognitive dissonance.

Connection and collaboration

Connection and collaboration are captured within the circle titled 'affective engagement'. They are associated with the notion of relatedness within SDT. As described earlier, relatedness involves a sense of belonging – '… the desire to feel connected to others - to love and care, and to be loved and cared for'.[166] This description clearly demonstrates the relevance of affect to relatedness – it is the experience of specific emotions and feelings which lead to a sense of belonging and a positive experience of connection and collaboration. This circle acknowledges that '… learning is embedded in the emotional life of learners, a relational experience that gives rise to identification with peers,

[163] Mikko Salmela, *What is Emotional Authenticity?,* 35(3) J. THEORY SOC. BEHAV. 209 (2005); Charles Guignon, *Authenticity*, 3(2) PHILOS. COMPASS 277 (2008), 278; David W. Lehman et al, *Authenticity,* 13(1) ACAD. MANAG. ANN. 1 (2019), 1.
[164] Arlie Russell Hochschild, THE MANAGED HEART: THE COMMERCIALIZATION OF HUMAN FEELING (1983).
[165] Lehman et al, *supra* note 163, 5.
[166] Ryan & Deci (2000), *supra* note 1, 231.

tutors and the subject discipline'.[167] This sphere of development seeks to identify and explore key elements involved in achieving the embedding of learning in students' emotional lives.

Reaching out for support

At a basic level, for connections to be possible, it is usually necessary for individual students to be able to reach out. In the context of legal studies, this is likely to involve a student explaining to people in student support roles what help and support they need and why. Reaching out in this way might involve a student contacting their tutor or module convenor, a fellow student or central university support services for assistance and support. The assistance requested could be specifically about academic support with issues like essay writing, finding, reading and understanding journal articles or clarifying understanding of a specific legal concept. It could be about broader issues with both academic and pastoral implications, such as time management and diary organisation. It could also be about managing a specific wellbeing-related issue such as a bereavement in the family.

The process of reaching out requires a student to be able to identify and voice their need for connection and support. It therefore requires a sense of psychological safety which allows them to feel secure in doing this.[168] For example, if a student feels that reaching out for academic support with an assessment task may lessen a tutor's opinion of them and, in turn, may have a negative impact upon the evaluation of the student's work, the student could be less likely to reach out for assistance. Consequences such as these emphasize the need for academic staff to foster inclusive and safe learning environments.[169]

[167] Mark Murphy & Tony Brown, *Learning as Relational: Intersubjectivity and Pedagogy in Higher Education,* 31(5) INT. J. LIFELONG EDUC. 643 (2012), 645.
[168] Amy C. Edmondson & Zhike Lei, *Psychological Safety: The History, Renaissance, and Future of an Interpersonal Construct,* 1(1) ANNU. REV. ORGAN. PSYCHOL. ORGAN. BEHAV. 23 (2014).
[169] Adelaide H. McClintock, Tyra L. Fainstad & Joshua Jauregui, *Creating Psychological Safety in the Learning Environment: Straightforward Answers to a Longstanding Challenge,* 96(11S) ACAD. MED. S208 (2021).

Creating and fostering personal connections

The notion of reaching out for help relates to getting assistance with managing quite specific issues or situations. However, on a broader level, creating general connections is also important for wellbeing. For law students, a lack of social connectedness has been identified as a contributor to lower levels of wellbeing and higher levels of mental health problems.[170] The competitive nature of law, with students striving to attain one of a limited number of roles within the legal profession, can lead to a disregard for connectedness. Students may focus on their academic success at the expense of time and communication with family, friends and others which can lead to a sense of isolation and a lack of support networks, detrimentally impacting upon wellbeing. A clear indication of the importance of such connectedness became evident during the Covid-19 global pandemic when the 'online pivot' that was required within higher education across many countries led to students experiencing a lack of relatedness, leading to negative psychological impacts.[171]

For legal educators, there is a need to encourage connection within learning and teaching. Fostering connection between law students in learning and teaching environments can take many forms, from a whole module revolving around a piece of groupwork, to smaller adjustments within individual lectures and seminars. For example, holding an informal 'meet the team' event at the start of a module, having 'pauses' within lectures where students can discuss a question or topic with their neighbours, and allowing time in seminars for interaction and discussion. Ensuring students have your contact details, know how and when they can contact you and what to expect in terms of wait times for responses is also an important part of this. Facilitating connections can also be about fostering a wider sense of community within the law school, for example, via staff-student social events and inclusive student societies.

Connections between students can arise via groupwork, however, this is not always the case. Fostering connectedness can also be about one-to-one connections, such as via a mentoring or 'buddy' scheme or through the

[170] Tani & Vines, *supra* note 8; Bergin & Pakenham, *supra* note 122; Michael Fay & Yvonne Skipper, *'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,* 56(1) L. TEACH. 20 (2022).
[171] For example, see Timon Elmer, Keiron Mepham & Christoph Stadtfeld, *Students Under Lockdown: Comparisons of Students' Social Networks and Mental Health Before and During the COVID-19 Crisis in Switzerland,* 15(7) PLOS ONE e0236337 (2020).

allocation of a 'personal tutor' to each student (this is standard practice within the UK but is not, for example, in Australia or the USA). Individual connections such as these can provide valuable academic support, allowing more open dialogue and a sense of relationality which promotes both psychological safety, self-recognition and understanding and self-confidence.[172]

Collaborating well with others

The notion of collaborating well with others is one that could refer to groupwork situations or one-to-one engagements. The importance of such collaboration is widely recognised within legal education (for example, in the UK Quality Assurance Agency's Subject Benchmark Statement for Law and in Australia in the Threshold Learning Outcomes for Law).[173] Recognition of the importance of collaboration at law school is partly due to the recognition of its importance within the legal profession, both in terms of working in teams and as a vital element in forms of non-judicial dispute resolution.[174] It is also partly due to the relevance of collaboration in all areas of life, from non-legal careers to voluntary roles and interacting with family and friends.

However, positive collaboration requires enacting and managing a challenging blend of interpersonal skills which have not traditionally been emphasized or explicitly taught within the law curriculum.[175] Achieving positive collaboration can also present specific challenges for neurodivergent students or for students who have a diagnosed mental health condition (such as social anxiety). There is therefore a need for legal educators to explicitly acknowledge and address issues with collaboration by specifically teaching collaborative methods and techniques through a 'wellbeing' lens.[176] This can range from asking teams in group work settings to set 'ground rules' and draw up a 'constitution' or group contract; to including specific exercises to promote 'bonding' and thinking carefully about the allocation of students to groups; to evaluating the physical

[172] Murphy & Brown, *supra* note 167.
[173] Quality Assurance Agency, SUBJECT BENCHMARK STATEMENT LAW (March 2023) <https://www.qaa.ac.uk/docs/qaa/sbs/sbs-law-23.pdf?sfvrsn=c271a881_6> accessed 4 Oct 2024, section 3.4; Kift et al, *supra* note 62.
[174] Anne Ardagh & Guy Cumes, *The Legal Profession Post-ADR: From Mediation to Collaborative Law,* 18(4) AUST DR. J. 205 (2007); Greg Rooney, *The Value of Mediator Soft Skills to Modern Commercial Practice,* 6(1) J. MEDIATION APPL. CONFL. ANAL. 781 (2019).
[175] Guth, *supra* note125.
[176] Jones et al, *supra* note 127.

spaces and layouts being used as to their efficacy for collaborative learning contexts; to implementing forms of problem-based learning. More broadly, legal educators need to consider how they are scaffolding collaboration, both across a module and across a program and ensure that they are equipping students to work together in healthy and effective ways.

Contributing positively to the law school community

Connection and collaboration are integral aspects of living, working and studying within communities (and within society more generally). In the context of legal education, there is a growing body of work which emphasizes the need for law students to be equipped to contribute to such communities and society generally in positive and constructive ways. For example, Nicolson argues that legal education should foster 'activists for justice',[177] whilst Brownsword refers to 'intelligent participation in the politico-legal life of the community'.[178] Similarly, Burridge and Webb refer to 'rational participants in the life of the community' whilst highlighting some of the complexities which emerge when trying to identify whether the focus should be on developing students as 'better people' or 'good citizens' and what each of those aspirations might entail.[179] In this context, significant questions arise in relation to whether legal educators should seek to instil specific values (such as a commitment to social justice), or instead equip students to make reasoned choices and take responsibility for those decisions, whatever they may be.[180] Rather than attempt to be prescriptive about such notions, the LWP model focuses instead upon the students' experience of community within the law school, as a community of practice that includes both students and staff.

We suggest that within the law school, when considering notions of community and citizenship through a 'wellbeing' lens, it is possible for legal educators to identify certain values and qualities which will enhance student (and staff) wellbeing. These include inclusivity, respect and empathy - in essence, the counter-values and qualities to those which have been identified as pervasive

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[177] Donald Nicolson, *Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World,* 22(1) INT'L. J. LEGAL PROF. 51 (2015), 64.
[178] Roger Brownsword, *Law Schools for Lawyers, Citizens, and People* in THE LAW SCHOOL - GLOBAL ISSUES, LOCAL QUESTIONS (Fiona Cownie ed., 1999), 29.
[179] Roger Burridge & Julian Webb, *The Values of Common Law Legal Education Reprised,* 42(3) L. TEACH. 263 (2008), 264.
[180] Anthony Bradney, *Elite Values in Twenty-First Century, United Kingdom Law Schools,* 42(3) L. TEACH. 291 (2008).

and potentially harmful within legal education and the legal profession, such as the level of competitiveness, the individualistic and adversarial modes of thinking and the disregard for the affective domain.[181] Achieving a positive shift in focus requires legal educators to discern, unpack and challenge the hidden messages and norms within the law curriculum and actively seek to instil different viewpoints. There may be variations in these between law schools and jurisdictions.

Some members of the legal academy might, of course, argue that doing so will not prepare law students for entry to the legal profession, where the realities of legal practice can be harsh and uncompromising.[182] However, even if it were to be accepted that a law degree should focus upon vocational preparation, there is a strong argument that the legal profession of the future requires a different set of skills and competencies which are best served by different approaches to legal education.[183] Fostering emotional resilience and preparedness for working life should not be equated with a particular response to a difficult and detrimental law school experience. Instead, fostering emotional resilience should be considered through the lens of supporting students to thrive and develop in a way which enables them to contribute positively to the law school community.

Fostering emotional resilience is, in turn, likely to equip law students to be better citizens in society more broadly. Such resilience is associated with the skills, attitudes and actions that facilitate communities which are psychologically and emotionally healthy for individuals and for the wider group as a whole. It also gives students the tools to critically reflect upon notions of community and citizenship. For legal educators, supporting the development of notions of community and citizenship requires a two-part approach. First, law teachers must act as role models by demonstrating healthy behaviours within the law school community setting and by devising teaching approaches which actively foster the creation of community.[184] Second, law

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[181] For example, see Townes O'Brien, *supra* note 4.
[182] Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession,* 44(1) CAL. W. L. REV. 219 (2007); Jones et al, *supra* note 135.
[183] Susan S. Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law,* 52(3) SANTA CLARA L. REV. 795 (2012).
[184] Ann Juergens, *Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching,* 11(2) CLINICAL L. REV. 413 (2004).

teachers must ensure the curriculum includes open dialogue around notions of citizenship and the types of decisions and choices that positive responses to the duties and obligations of citizenship can entail. On a micro-level, psychologically attuned interventions can be used to promote psychological safety and to facilitate a sense of belonging.[185]

Inter-connecting concepts

The LWP model has three inter-connecting concepts – 'values and ethics', 'reflection' and 'empathy'. Each of these are positioned between the two 'circles of engagement' where they are arguably most relevant within legal education. However, they also inter-connect on occasion with the remaining 'circle of engagement'. As such, it is likely that, to some extent at least, the LWP requires that the three inter-connecting concepts will be inter-woven across the curriculum and throughout the pedagogical approaches adopted.

However, part of the value of locating each inter-connecting concept at specific points within the LWP model diagram is to ensure that they are not simply inter-woven in a way that is opaque or invisible to students (or staff). Instead, there is a need to both synthesise and integrate relevant topics, but also to explicitly explore each of these concepts as important parts of the curriculum in their own right. It is important that this is done in a way which enhances recognition of their presence and value and equips students with the vocabulary to discuss, explore and apply these concepts fully, challenging law schools' traditional focus on language which can be narrow and rigid.[186]

Values and ethics

The inter-connecting concept of 'values and ethics' sits between 'challenge and growth' and 'independence and meaning' because it acts as a key concept in both. Values are explicitly referred to under 'independence and meaning' as the foundation of a student becoming independent and understanding what has meaning to them. Values are also integral to the other elements of this circle of engagement. A student cannot develop their own views, ideas and opinions and

[185] Victor D. Quintanilla & Sam Erman, *Mindsets in Legal Education,* 69(2) J. LEGAL EDUC. 412 (2020).
[186] Deborah L. Rhode, *Ethics by the Pervasive Method,* 42(1) J. LEGAL EDUC. 31 (1992); Elizabeth Mertz, THE LANGUAGE OF LAW SCHOOL: LEARNING TO 'THINK LIKE A LAWYER' (2007).

identify what is meaningful to them unless they understand the underpinning values and ethics involved.

In relation to 'challenge and growth' there are several ways in which 'values and ethics' interact with them. One of these is in a purely intellectual sense. The study of law requires students to consider the myriad ethical issues which arise within the discipline of law. For example, should the death penalty be applied in criminal cases? Where should the balance lie between freedom of expression and privacy? Should freedom of contract be prioritised over consumer protection? Can judges be replaced by robots? There is also an increasing emphasis upon professional ethics as part of vocational legal education and training, with students being required to have a sound knowledge and understanding of the type of ethical dilemmas which may arise within practice.[187]

Another interaction between 'values and ethics' and 'challenge and growth' is more implicit. It focuses on the sometimes hidden or obscured role of values and ethics within law. This relates to the interaction between law and the political and philosophical domains, and the ways in which laws are influenced by (and can also influence) societal values and ethics. For example, the evolution of laws around sexuality in many jurisdictions over the past one hundred years. Examining these interactions assists students in understanding not just substantive legal topics, but also the importance of values and ethics and their relevance at both individual and societal levels.[188]

Reflection

The inter-connecting concept of 'reflection' sits between 'independence and meaning' and 'connection and collaboration'. The importance of reflection is perhaps most immediately obvious in relation to 'experiential engagement', with Kolb's experiential learning cycle requiring individuals to reflect upon an experience before using that reflection to learn from it and adjust their behaviour or reactions to similar experiences accordingly.[189] However, reflection is also important with regard to 'affective engagement'. To be able

[187] For a range of discussions on ethics in legal education see Michael Robertson et al, THE ETHICS PROJECT IN LEGAL EDUCATION (2011).
[188] For example see Rosemary Hunter, Clare McGlynn & Erika Rackley (eds.), FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (2010); THE QUEER JUDGMENTS PROJECT < https://www.queerjudgments.org/> accessed 14 Oct 2024.
[189] Kolb, *supra* note 109.

to identify, understand, interpret and incorporate emotions and affect within a student's studies (and life more broadly), it is necessary for them to reflect upon affective experiences and learn from them.[190] Reflective practice is required in both situations of experiential and affective engagement. In other words, reflective practice is a positive cognitive process that can be used by law students to support their learning and life success at law school through strategically and thoughtfully identifying gaps between existing knowledge, skills and attitudes, and those aspects of knowledge, skills and attitudes that they want to gain.

The importance of reflection within higher education learning and teaching more generally is well-established, leading to its use in a wide variety of ways.[191] There has also been an increasing acknowledgment of the importance of reflection within legal education, often stemming from work done in CLE and a desire to develop law students' professional attributes.[192] For example, Roebuck et al incorporated reflection with their first-year undergraduate law students as both a learning activity and a means of assessment. This was done with the aims of enhancing students' written communication skills and scaffolding their development of 'critical literacy skills'.[193] Reflective practice enables law students to engage more fully and deeply with topics, increasing their intrinsic motivation.[194] It equips them with the tools to think about broader issues within law (and, indeed, the very place of law in society). It also enables them to ascertain and explore their own values and ethics (as required by 'independence and meaning' discussed above) and their place within the community (as required by 'connection and collaboration' also discussed above). Reflective practice also has links to 'challenge and growth', facilitating

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[190] Gobinder Singh Gill, *The Nature of Reflective Practice and Emotional Intelligence in Tutorial Settings,* 3(1) J. EDUC. & LEARN. 86 (2014).
[191] Laura Van Beveren et al, *We All Reflect, But Why? A Systematic Review of the Purposes of Reflection in Higher Education in Social and Behavioral Sciences,* 24(1) EDUC. RES. REV. (2018).
[192] Michele M. Leering, *Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism,* 95(1) CAN. B. REV. 47 (2017). See also, Michele M. Leering, *Conceptualizing Reflective Practice for Legal Professionals*, J. L. & SOC. POL'Y 23 (2014); Michele M. Leering, *Perils, Pitfalls and Possibilities: Introducing Reflective Practice Effectively in Legal Education*, 53(4) L. TEACH. 431 (2019).
[193] Joanne Roebuck, Lisa Westcott & Dominique Thiriet, *Reflective Narratives: A Useful Learning Activity and Assessment for First Year Law Students*, 41(1) L. TEACH. 37 (2007), 40.
[194] Deci & Ryan (2000), *supra* note 1.

insights into skills and abilities (not least of which is the importance of self-care).

There is also an important role for reflection within learning and teaching for educators themselves. For example, Spencer discusses her changes in approach to more introverted students following her reflection upon their experience.[195]

There are many different types and models of reflection which legal educators can draw upon (see, for example, Schön's seminal approach).[196] There are also many different ways in which reflection can be incorporated into the legal curriculum, from individual portfolios to group reflection in activities, to reflection prompted by a reading or a film or other source material. However, the key is to ensure that reflection is not treated as the 'poorer relation' of more traditional forms of learning and teaching tasks, with its importance being emphasized throughout programs of legal studies.

Empathy

The concept of empathy can be defined in many different ways, but it involves both cognitive and affective elements. In other words, empathy not only involves putting yourself in someone else's shoes by thinking about how they would feel (sometimes referred to as cognitive perspective-taking), it is also about experiencing an affective response to someone else's plight.[197] In some ways, the common notion associated with empathy of 'putting yourself in someone else's shoes' is misleading, because a key component of empathy is the continued understanding that it is not 'your' experience, instead, you are imagining the thoughts, emotions and experiences of another.[198]

In the LWP model, empathy sits between 'connection and collaboration' and 'challenge and growth'. Empathy is linked to 'connection and collaboration' because of its affective elements, without which it can become a passive,

[195] Rachel Spencer, *'Hell is Other People': Rethinking the Socratic Method for Quiet Law Students,* 56(1) L. TEACH. 90 (2022).
[196] Donald A. Schön, THE REFLECTIVE PRACTITIONER. HOW PROFESSIONALS THINK IN ACTION (1991).
[197] Amy Coplan, *Understanding Empathy: Its Features and Effects* in EMPATHY: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES (Amy Coplan & Peter Goldie eds., 2011).
[198] Coplan, *supra* note 197.

instrumental activity.[199] It relates to 'challenge and growth' because of its cognitive aspects, which separate it from more basic forms of emotional contagion and sympathy. Without a cognitive element it is not possible to retain a sense of separation from the experience of another which characterizes empathy. By combining both cognitive and affective elements, fostering empathy can form a type of bridge or pathway between the two, demonstrating their wider links and inter-connectedness.[200]

There is evidence that empathy can be taught and learnt as a set of skills.[201] Indeed, empathy forms a well-established part of medical education and there have been increasing efforts to integrate it into legal education. For example, Rosenberg, in the US context, discusses the success of a course titled 'Interpersonal Dynamics for Lawyers' designed to develop students' empathy. The development of students' empathy in that course involved the use of frequent small group work, where strict boundaries were set around confidentiality to promote open communication and encourage facilitators to model appropriate behaviours. Rosenberg also notes that his original motivation for introducing this class was to assist students in achieving their own goals through the use of affective behaviours, such as empathy, demonstrating the link to 'challenge and growth'.[202]

As with reflection, there has been a tendency for the introduction of empathy into law school programs to focus upon CLE and professional skills. However, again, reflection also has a much wider value, for example, in encouraging students to challenge potentially damaging forms of adversarialism, foster co-operation and have greater insight into the experiences of others (such as the

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[199] Peter Margulies, *Reframing Empathy in Clinical Legal Education,* 5(2) CLIN. L. REV. 605 (1999); Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays,* 39 WASH. U.J.L. & POL'Y 189 (2012).

[200] Chalen Westaby & Emma Jones, *Empathy: An Essential Element of Legal Practice or 'Never the Twain Shall Meet'?,* 25(1) INT'L J. LEGAL PROF. 107 (2018).

[201] Rajvinder Samra & Emma Jones, *Fostering Empathy in Clinical Teaching and Learning Environments: A Unified Approach,* 6(1) AUST. J. CLIN. EDUC. 1 (2019).

[202] Joshua D. Rosenberg, *Teaching Empathy in Law School,* 36(3) U.S.F.L. REV. 621 (2002); see also Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the 'Heart' of Lawyering,* 87(1) NEB. L. REV. 1 (2008); Amy Lawton, Kathryn Saban & Sadie Whittam, *Do We Want a Human First, and a Lawyer Second? Developing Law Student Empathy Through Clinical Legal Education,* 29(1) INT'L J. CLIN. LEGAL EDUC. 4 (2022).

parties in existing case law).[203] That is not to suggest that greater empathy will necessarily lead to a more compassionate response – as Nussbaum points out, the best torturers need to have empathy with their victims to know how to cause maximum suffering.[204] However, it does give law students the opportunity for greater insight into the consequences of their actions and has been characterised by some commentators as necessary to inspire compassion.[205]

Applying LWP

This part offers two brief examples of how the LWP can be applied in practice by legal academics in law schools. To do so, it explores how LWP can be integrated into, and positively influence, learning and teaching approaches in both the law of obligations and CLE.

LWP and the law of obligations

The teaching of the law of obligations provides an example of how the LWP model can be integrated into a well-established subject area. To address the 'circle of cognitive engagement' and the 'challenge and growth' sphere of development, it is possible to include relevant content which intentionally explores issues relating to wellbeing, equipping students with an understanding of its relevance in all aspects of life and society, and providing them with appropriate vocabulary and insights. For example, the topic of non-pecuniary losses in contract or of damages for pain, suffering and loss of amenity in tort can be used to discuss notions around quality of life, personal and societal values and financial security.[206] It is also important to provide students with explicit advice on healthy ways of studying and preparing for assessments. This could include adding lecture content giving advice, putting activities into seminars, or adding additional content online. One example of this could be giving students guidance and support on dealing with sensitive content prior to discussing cases on personal injury and medical negligence.

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[203] John Deigh, *Empathy, Justice and Jurisprudence,* 49(s1) SOUTH. J. PHILOS. 49, 73 (2011).
[204] Martha Nussbaum, *Reply to Amnon Reichman,* 56(2) J. LEGAL EDUC. 320 (2006).
[205] Martin L. Hoffman, EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE (2000).
[206] Emma Jones, *Integrating Wellbeing into the Law School Curriculum* in HOW TO OFFER EFFECTIVE WELLBEING SUPPORT TO LAW STUDENTS (Lydia Bleasdale ed., 2024)).

With regard to integrating the 'circle of experiential engagement' and the 'independence and meaning' sphere of development, the law of obligations could offer opportunities for students to consider the legal identity of those who work in legal practice areas relating to contracts and tort, considering the professional identity implications and relating these to students' own beliefs and values. For example, examining the notion that corporate lawyers have a high status within the profession, considering what 'success' looks like in that context and exploring whether students ascribe to that definition. Such an approach also builds upon the initiatives suggested above in relation to topics such as non-pecuniary loss.

Whilst the circle of affective engagement and the 'connection and collaboration' sphere of influence may seem particularly challenging in a subject such as the law of obligations which often appears highly doctrinal in nature, there are still ample opportunities to incorporate these aspects. One way to do this could be to explore the notion of 'relational contract theory', which represents long-term contractual relationships (such as employment contracts) as being based on shared values such as trust and respect in addition to the legal formalities.[207] Such an exploratory approach could lead to wider debates around notions such as 'good faith' and the values enshrined within contemporary contract law. Another potential approach is to devise group tasks within seminars, from working together on a problem scenario to simulating a contractual negotiation or collaborating on a presentation of a core doctrinal issue.

While the introduction of new content and styles of delivery into a course can be challenging for educators, it can also provide them with opportunities for growth and development across all aspects of the LWP model. Engaging with new ideas and concepts, if part of an appropriate workload and supported by the wider law school, can foster autonomous motivation and therefore flourishing.[208]

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[207] Ian R. Macneil, *Relational Contract Theory: Challenges and Queries,* 94(3) NW. U.L. REV. 877 (1999), 877; see also Hugh Collins, *Is a Relational Contract a Legal Concept?* in CONTRACT IN COMMERCIAL LAW (Simone Degeling, James Edelman & James Goudkamp eds., 2016).

[208] Robert H. Stupnisky et al, Faculty Members' Motivation for Teaching and Best Practices: Testing a Model Based on Self-Determination Theory Across Institution Types, 53 CONTEMP. EDUC. PSYCHOL. 15 (2018).

The 'inter-connecting concepts' of values and ethics, reflection and empathy are all also relevant in the law of obligations. Contracts are 'one of the basic building blocks of our social and economic life'.[209] Tort law illuminates what and who is protected by private law, illustrating the priorities of society and its legal system.[210] As such, the value system underpinning tort law is heavily intertwined with wider societal values and ethics. This value system provides an effective starting point for developing individual student self-awareness and reflection on such issues. Reflection could also include explicit consideration of both the content involved in the course and the emergence and development of relevant skills, such as critical thinking. The rich case law that makes up the law of obligations can also be used to foster greater empathy. While cases focused upon personal injury are perhaps the most obvious mechanism to explore the experience of claimants, many seemingly innocuous cases involving other forms of damage can also be used in this way, from a family home being so badly damaged as to be uninhabitable,[211] to an employee removed from their post in a humiliating fashion.[212]

LWP and CLE

There are many variations of CLE and this has resulted in a variety of definitions.[213] Consistent features include: addressing a societal issue experienced by an individual or a collection of individuals; working in teams to develop practical and professional skills; collaboration with the local community; and highlighting the need for change in order to improve access to justice. Most commonly, clinics involve staff supervisors and students working with clients on a pro bono basis. Some clinics are situated within the curriculum and are assessed, and others are mixed or entirely voluntary. The majority of clinics seek to provide legal advice to private individuals or community groups,

[209] Hanoch Dagan, *Two Visions of Contract*, 119(6) MICH. L. REV. 1247 (2020), 1247.
[210] Gregory C. Keating, *Form and Substance in the 'Private Law' of Torts*, 14(1) J. TORT L. 45 (2021).
[211] See the English case of *Murphy v Brentwood District Council* [1991] 1 AC 398.
[212] See the English case of *Addis v Gramophone Co Ltd* [*1909*] AC 488.
[213] See Omar Madhloom & Hugh McFaul (eds.), THINKING ABOUT CLINICAL LEGAL EDUCATION: PHILOSOPHICAL AND THEORETICAL PERSPECTIVES (2021).

but there is a growth in business law clinics that seek to advise fledgling enterprises, and also in social policy clinics.[214]

Such clinics form an obvious experiential learning environment. One where past experience is brought to the fore and examined, forming the basis of further learning. Within the 'circle of experiential engagement', the sphere of development focused upon 'independence and meaning' is crucial. Students observe human nature in live client clinics and are able to compare their own selves and social context with that of their clients. CLE students should be encouraged to reflect on their CLE work, recognising what they have learned about their own identities, personal values and self-confidence; in other words, the development of their autonomy.[215] Whether assessed or not, the clinic environment provides supervisory staff with the opportunity to hold conversations in a safe and constructive manner to enable students to understand concepts ranging far beyond the relevant legal issues per se. These conversations can be used as a teaching tool to enhance meta-cognitive skills, advance learning, assist students to identify their personal values and goals, and help them to understand their own motivations or lack of interest.

In terms of the 'circle of cognitive engagement' and the 'challenge and growth' sphere of development, students must be supported by staff through the client's matter by clear protocols – for example, to check that the relevant legal issue has been correctly identified and defined, the research has been appropriately targeted and applied, and the oral and written communication of the advice to the client is accurate. The provision of legal advice to the public requires supervision of the clinic by a practitioner with a practising certificate. The focus is not upon 'throwing the student in at the deep end' but rather upon

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[214] For example, see Frank S. Bloch (ed.), THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE (2010). For recent developments in CLE that compare the UK and the US see Richard Grimes, *Experiential Learning and Legal Education – The Role of the Clinic in UK Law Schools* in KEY DIRECTIONS IN LEGAL EDUCATION: NATIONAL AND INTERNATIONAL PERSPECTIVES (Emma Jones & Fiona Cownie eds., 2020) and Seán Arthurs, *Clinical Legal Education in The United States: Emerging Trends, Challenges and Opportunities* in KEY DIRECTIONS IN LEGAL EDUCATION: NATIONAL AND INTERNATIONAL PERSPECTIVES (Emma Jones & Fiona Cownie eds., 2020). For a discussion of policy clinics see Rachel Dunn, Lyndsey Bengtsson & Siobhan McConnell, *The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students*, 27(2) INT'L J. CLINICAL LEGAL EDUC. 68 (2020).

[215] Anna Cody, Reflection and Clinical Legal Education: How Do Students Learn About Their Ethical Duty to Contribute Towards Justice, 23(1-2) LEG. ETH. (2020).

promoting the students' gradual and incremental development of competence. Achieving this requires the design of a CLE program to intentionally manage the balance between meeting necessary deadlines and over-work. Providing opportunities for students to master new skills and take on new responsibilities with appropriate support can ensure that the experience of stress in clinical contexts falls within healthy boundaries.[216]

CLE also provides a learning context where students can acquire greater competence in self-care. Most clinics offer a form of debriefing where students and staff share their daily clinic experience in a safe and confidential space. The opportunity to speak freely about thoughts, emotions and behaviour provides an opportunity to develop the ability to share concepts not usually discussed in the black letter classroom. Thus, CLE can explicitly provide a framework for discussions about self-care. This safe space also provides a chance to address the harmful level of competitiveness which can be found in law schools.[217] Students in clinic often work in teams. The time that students spend together in clinic and the shared aim of supporting the client can support the development of a non-competitive environment. This can be mismanaged if the CLE program focuses upon aspects such as the highest number of clients seen, the most damages recovered, or the longest hours worked. Instead, there is a need to purposefully model collaborative behaviours and establish healthy ground rules for teamwork, using explicit reference to the LWP model's tenets to minimise potentially maladaptive practices.

The 'circle of affective engagement' is of relevance as CLE has the propensity to evoke strong emotions in students, especially anxiety in the early stages, when faced with live client interviews with the unexpected dialogue that inevitably forms part of that experience. Thus, many CLE educators integrate opportunities to discuss emotions to a greater extent than in other legal learning environments. The 'connection and collaboration' sphere of development emphasizes how these emotional experiences interact with both teamwork and client interactions in CLE settings. The work of students in clinic is almost universally undertaken in teams with each team being allocated a staff supervisor. The broad nature of the legal issues presented by clients results in staff and students meeting new problems weekly, with flexible collaboration required between students, and between staff and students. The practicality of

[216] Hans Selye, THE STRESS OF LIFE (1956).
[217] Townes O'Brien, *supra* note 4, 4.

this process can be enhanced by the express understanding and acknowledgement of the LWP model. Creating strong connections fosters a sense of belonging, encourages support seeking and counterbalances competitiveness.[218] Supervisors can use the 'connection and collaboration' sphere of development to address the blend of skills needed to work together successfully.[219] This close way of working can also explicitly raise students' awareness of being part of a clinic community and highlight values that enhance wellbeing such as inclusivity, respect and empathy.

Although this discussion of the LWP model has focused largely upon students, staff can also benefit directly from the application of the model in the CLE setting. For example, fostering 'independence and meaning' by designing the program in a manner which facilitates staff's sense of choice and ability to act in accordance with personal values. This could include aspects such as processes that enable staff to make decisions about which clients to accept, and which and how many students to work with. These forms of engagement with program design and development could also assist in promoting 'challenge and growth' amongst staff, for example, by encouraging them to explore new practice areas and undertake regular Continuing Professional Development training. As CLE educators may have transitioned to law school from legal practice, rather than coming via traditional academic routes, fostering 'connection and collaboration' could involve intentionally providing opportunities for connection with the wider law school faculty, for example, through reading groups, shared research and scholarship opportunities and organised sessions to disseminate good practice in working with students.

The 'inter-connecting concepts' of values and ethics, reflection and empathy can all also be developed within CLE, for both students and staff. The importance of reflection has already been highlighted. It is arguable that empathy is key to both working with clients and supervising such work, to enable an in-depth insight into the experience of clients, their needs and wants and to be able to facilitate the effective provision of advice.[220] Values and ethics also permeate CLE work, for example from formal Codes of Conduct which bind supervisors to the ethos and culture which permeates the individual CLE

[218] Fay & Skipper, *supra* note 170.
[219] Guth, *supra* note 125, section 1.
[220] Westaby & Jones, *supra* note 200.

setting. This all provides rich material to explore and implement the LWP model.

Conclusion

This article introduced a model for a novel pedagogy in legal education, the LWP, designed to purposefully promote thriving and flourishing within law schools. It has set out the aspects of the LWP model to explain why each element has been included, and why it is important. In doing so, the article presents a theoretical framework for the practical implementation of the LWP into core aspects of legal education. The article has given two brief examples applying the LWP model to both a substantive legal topic (law of obligations) and to CLE, to demonstrate the breadth of the model's potential integration into the law curriculum. Overall, the implementation of the LWP model can broadly take two forms. First, for existing curricula and programs, a review can be undertaken using the LWP model to identify both strengths and weaknesses and implement evidence-based and sustainable change. Second, the LWP model can form an integral part of the planning for new curricula and educational initiatives, providing a foundational model upon which the detail can be developed. Such detail will vary between modules, programs and institutions. However, situating wellbeing at the centre will enable the design of initiatives to promote the thriving and flourishing of both students and staff through intentional, wellbeing-focused curriculum initiatives which meet students' basic psychological needs and support students' autonomous self-regulation without compromising the wellbeing of staff.

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

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Abstract

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

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

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

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

Introduction

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

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

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

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

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

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

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

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

[10] Ibid at 11

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Theory to inform practice

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

Bronfenbrenner's ecology of human development

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

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

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

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

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

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

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

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

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

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

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

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

Conflict and dispute transformation

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

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

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

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

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

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

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

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

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

The transformation of disputes

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

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

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

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

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

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

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

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

[51] Ibid xii

The comprehensive law movement and therapeutic jurisprudence

Lawyers as agents in the dispute resolution process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[70] Ibid

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

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

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

A multidisciplinary approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The report comments that:

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

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

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

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

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

[84] Ibid para 304

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

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

Conclusion

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

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

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

[86] Ibid 315

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

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

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

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

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Liberty and the Legal Services Act: the new qualifying regime for solicitors in England

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Abstract

Seeking to assure consistent standards, and to promote diversity, the solicitors profession in England has adopted two different approaches to qualification, terminating in a capstone examination. One is by a funded government apprenticeship of 5-6 years, and the other is almost entirely open. Candidates in the latter may in principle choose how to prepare for the examinations and compile the necessary work experience in up to four different organisations. This article shows how the two routes are characterised by different concepts of "liberty". Further, it uses Fraser's axis of recognition and retribution and Youngs' concept of oppression to interrogate the extent to which each is capable of contributing to a statutory obligation to promote diversity in the profession. Whilst there are overlaps, it concludes that, in principle, an apprentice achieves qualification because of their job, but a candidate in the open route may need to do so despite their job.

Keywords: apprentice, qualification, regulation, solicitor.

Introduction

The legal services market in England and Wales is both highly deregulated and highly fragmented. Multiple legal professions each have separate regulators under the statutory Legal Services Board (LSB) and different qualification frameworks. The Legal Services Act 2007 (LSA 2007) demands that the professions compete, but also that their membership should be 'diverse' and 'effective'. In parallel with this is a longstanding government commitment to workplace apprenticeships as an alternative to university study (albeit now under review). This article examines the attempts by the solicitors' profession

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to balance these dictats when licensing domestic applicants.[1] Since 1993, the route to qualification has been essentially threefold: an academic stage (degree or conversion course); a vocational course delivered and assessed by independent providers to a curriculum set by the Solicitors Regulation Authority (SRA) and two years of mandatory work experience in a pre-authorised organisation. The focus of this article is on two significant changes instituted in 2021. The first replaces the vocational course with a centrally-administered Solicitors Qualification Examination (SQE). The intention is to assure consistent standards aligned to a Statement of Solicitor Competence,[2] whilst widening choice in how applicants prepare for those examinations.

The second is a loosening of the regulation of the two-year prequalification work experience requirement (training contract).[3] The solicitors' profession remains strongly attached to the workplace as a venue for authentic learning and socialisation.[4] That is, as an apprenticeship both culturally and in the Carnegie report sense of an integration of knowledge and reasoning, practice skills and the 'identity and purpose' of the profession.[5] The regulatory intention of what is now known as 'qualifying work experience' (QWE)[6] is to release a bottleneck as, in principle, it gives applicants some control over how they satisfy this condition. The apprenticeship is now absorbed, as we shall see, into the new system. Although these changes are wrapped up in widespread desires to widen the diversity of the profession, the extent to which they can do so is not, however, without question. To this one might now add concerns about differential attainment amongst different social groups in the examination

[1] Transfer of qualified lawyers is outside the scope of this article.
[2] Solicitors Regulation Authority, 'Statement of Solicitor Competence' (*Solicitors Regulation Authority*, 9 August 2022) <https://www.sra.org.uk/solicitors/resources/continuing-competence/competence-statement/ > accessed 25 March 2025.
[3] The other requirements, of a character and fitness assessment and a degree level qualification in any subject are outside the scope of this article.
[4] Anon, 'Ditching Training Contract Could "Undermine UK Law"' [2015] *Law Society Gazette* <http://www.lawgazette.co.uk/news/ditching-training-contract-could-undermine-uk-law/5050076.article> accessed 25 March 2025.
[5] William M Sullivan and others, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007), 28.
[6] Solicitors Regulation Authority, 'Qualifying Work Experience for Candidates' (*Solicitors Regulation Authority*, 26 January 2024) <https://www.sra.org.uk/become-solicitor/sqe/qualifying-work-experience-candidates/> accessed 25 March 2024.

itself[7] as well as the extent to which the assessment model prejudices the neurodiverse and others.[8]

Aside from the moral imperative to increase the diversity of the profession, the overarching LSA 2007, s 1(1)(f) explicitly requires regulators to 'encourage[e] an independent, strong, *diverse* and effective legal profession' [my italics]. This obligation is wider than that of the Equality Act 2010[9] which covers only a list of protected characteristics although in ss 158 and 159 it permits certain kinds of affirmative action. Law Society statistics suggest there are improvements in respect of some of the protected characteristics in the profession as a whole.[10] However, except in Scotland[11] and Wales,[12] the Equality Act as implemented omits socio-economic factors.[13] In the context of

[7] Research commissioned by the SRA after differential attainment related to ethnicity in the SQE was shown to exist has already identified a number of ways in which this is endemic to professional qualification: Greta Bosch and others, 'The Ethnicity Attainment Gap in Legal Professional Assessments: A Systematic Literature Review and next Steps' (University of Exeter 2023) <https://www.sra.org.uk/globalassets/documents/sra/research/ethnicity-attainment-gap-legal-professional-assessments-literature-review.pdf?version=49c157> accessed 25 March 2025; Greta Bosch and others, 'Final Report for Solicitors Regulation Authority on the Potential Causes of Differential Outcomes in Legal Professional Assessments' (University of Exeter 2024) <https://ore.exeter.ac.uk/repository/handle/10871/136180> accessed 25 March 2025.

[8] Joanna Goodman, 'Exam Graded' [2022] *Law Gazette* <https://www.lawgazette.co.uk/features/exam-graded/5113643.article> accessed 25 March 2025; Joanna Goodman, 'One Size Fits All' [2023] *Law Gazette* <https://www.lawgazette.co.uk/features/one-size-fits-all/5117328.article> accessed 25 March 2025; John Hyde, 'News Focus: Multiple Questions on the SQE' [2023] *Law Gazette* <https://www.lawgazette.co.uk/news-focus/news-focus-multiple-questions-on-the-sqe/5115648.article> accessed 25 March 2025.

[9] This act largely impacts on 'public authorities'. By Schedule 19, the Law Society of England and Wales, of which the SRA is the regulatory arm, is a public authority 'in respect of its public functions'.

[10] Women are 47% of those practising. Those practising who declared a minority ethnic background are 13% of the profession (28% did not declare an ethnicity): Law Society of England and Wales, 'Annual Statistics Report 2023' (Law Society of England and Wales 2025) < https://www.lawsociety.org.uk/topics/research/annual-statistics-report-2023> accessed 25 March 2025, tables 2 and 3 . See also Solicitors Regulation Authority, 'Diversity in law firms' workforce' (*Solicitors Regulation Authority*, 3 January 2025) <https://www.sra.org.uk/sra/equality-diversity/diversity-profession/diverse-legal-profession/> accessed 25 March 2025.

[11] S1 of the act is in force in Scotland as the 'Fairer Scotland Duty'.

[12] S1 is also in force in Wales, supplemented by the Socio-Economic Duty Equality Act 2010. Only limited sections of the act apply to Northern Ireland: s 217.

[13] Some English local authorities have in their own strategies, however, treated s1 as if it were in force. For data on those characteristics, and some social mobility factors, as reported by the legal professions, see Legal Services Board, 'Diversity Dashboard' (*The Legal*

a profession marked by perceptions of eliteness,[14] socio-economic issues must, I suggest, be part of the mischief at which the wider language of the LSA 2007 is directed.

Those socio-economic factors, particularly as to university tuition fees, also underpin the government-sponsored apprenticeships, providing a paid, employer-led route to qualification, often from entry immediately on leaving school. In England,[15] the Trailblazer solicitor apprenticeship[16] embeds the SQE and QWE in a 5-6 year programme for school-leavers (a shorter apprenticeship is available for graduates). The sequence of these components, and how the support, learning and assessment of apprentices is organised, is, however, rather different from that of other candidates. There were 4,952 new two-year training contracts in 2021-2022.[17] In comparison, by 2024, there were 1,653

Services Board, 2023) <https://legalservicesboard.org.uk/research/diversity-dashboard-0> accessed 25 March 2025. It should not be assumed that law firms themselves are inactive in pursuing increased diversity: Jill Treanor, 'Slaughter & May Seeks More Working-Class Lawyers' (*The Times*, 24 July 2023) <https://www.thetimes.co.uk/article/magic-circle-firm-hires-lawyers-from-working-class-gr3hb852w> accessed 25 March 2025.

[14] See for example, repeated reports on this topic by the Sutton Trust: Sutton Trust, 'Sutton Trust Briefing Note: The Educational Backgrounds of the UK's Top Solicitors, Barristers and Judges' (Sutton Trust 2005) < https://www.suttontrust.com/our-research/educational-backgrounds-uks-top-solicitors-barristers-judges/ > accessed 25 March 2025; Sutton Trust, 'The Educational Backgrounds of Leading Lawyers, Journalists, Vice Chancellors, Politicians, Medics and Chief Executives' (Sutton Trust 2009) < https://www.suttontrust.com/our-research/educational-backgrounds-leading-lawyers-journalists-vice-chancellors-politicians-medics-chief-executives/ > accessed 25 March 2025; Philip Kirby, 'Leading People 2016 The Educational Backgrounds of the UK Professional Elite' (Sutton Trust 2016) < https://www.suttontrust.com/our-research/leading-people-2016-education-background/> accessed 25 March 2025; Sutton Trust and Social Mobility Commission, 'Elitist Britain 2019 The Educational Backgrounds of Britain's Leading People: Summary Report' (Sutton Trust, Social Mobility Commission 2020) <https://www.suttontrust.com/wp-content/uploads/2020/01/Elitist-Britain-2019-Summary-Report.pdf> accessed 25 March 2025.

[15] Education is devolved to the Senedd Cymru/Welsh Parliament and so arrangements for Welsh apprenticeships differ. While there are Welsh apprenticeships in the legal sector, at the time of writing a solicitor apprenticeship was not amongst them. The non-apprenticeship route is, however, identical, albeit with increasing opportunities to take the SQE in the Welsh language: Solicitors Regulation Authority, 'SQE in Welsh' (*Solicitors Regulation Authority*, No date) < https://sqe.sra.org.uk/exam-arrangements/assessment-information/taking-the-sqe-in-welsh> accessed 25 March 2025.

[16] Solicitors Regulation Authority, 'Solicitor Apprenticeships' (*Solicitors Regulation Authority*, 18 October 2024) <https://www.sra.org.uk/become-solicitor/sqe/solicitor-apprenticeships/> accessed 25 March 2025.

[17] Law Society of England and Wales, 'Annual Statistics Report 2023' (Law Society of England and Wales 2025) < https://www.lawsociety.org.uk/topics/research/annual-statistics-report-2023> accessed 25 March 2025, 8.

solicitor-apprentices in total.[18] By April 2024, approximately 5,000 people had applied to log QWE under the new system.[19]

Isaiah Berlin's concepts of 'negative liberty' and 'positive liberty'[20] provide a useful way of characterising the structures of the apprentice- and open, non-apprentice routes. Broadly, the former emphasises the removal of external constraint on the individual's actions and the latter the removal of internal constraint preventing action. Borrowing from Flood, I will refer to the open route(s) as 'polycentric' and the more structured apprenticeship as essentially 'monocentric'.[21] Both nevertheless involve choices and distribution of opportunities, but of different kinds, and intersect differently with the individual's openness to self-determination on the one hand and capitulation to authority on the other.

I also draw on two scholars in the wider field of social justice whose work has not yet been used in this context in considering how the two routes address the diversity objective (to the extent that they do). Nancy Fraser's dialectic of recognition and redistribution,[22] and affirmative and transformative responses to these and Iris Marion Young's treatment of 'oppression'[23] provide powerful means by which to understand some of the potential effects of these liberties on underrepresented and disadvantaged groups in the light of the statutory diversity obligation. Taken together, the regulatory objectives of the LSA 2007 contrive not only to emphasise homogeneity and normativity (public interest, constitution, professional principles) but also heterogeneity (competition

[18] Monidipa Fouzder, 'Solicitor-Apprenticeship Numbers Promising", Says Education Minister' [2024] *Law Gazette* <https://www.lawgazette.co.uk/news/solicitor-apprenticeship-numbers-promising-says-education-minister/5118781.article> accessed 25 March 2025.

[19]Solicitors Regulation Authority, 'Experiences of Qualifying Work Experience: Survey Findings' (*Solicitors Regulation Authority*, 10 April 2024) <https://www.sra.org.uk/sra/research-publications/qualifying-work-experience-survey-findings/> accessed 25 March 2024. This figure probably includes apprentices.

[20] Isaiah Berlin, *Liberty* (Henry Hardy ed, Oxford University Press 2013). I do not make any distinction in meaning between 'liberty' and 'freedom' in this article.

[21] John Flood, 'Legal Education in the Global Context: Challenges from Globalization, Technology and Changes in Government Regulation' (Legal Services Board 2011) <http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/lsb_legal_education_report_flood.pdf> accessed 25 March 2025.

[22] Nancy Fraser, *Justice Interruptus: Rethinking Key Concepts of a Post-Socialist Age* (Routledge 1997).

[23] Iris Marion Young and Danielle S Allen, *Justice and the Politics of Difference* (Princeton University Press 2011).

between providers of regulated services, a 'diverse' profession). The qualification routes also contrive to emphasise both homogeneity (through the SQE and competence statement) and heterogeneity (polycentrism in achieving the competences and preparing for the examinations). It is assumed, but not yet demonstrated, that that heterogeneity of input by way of redistribution of opportunities also improves the diversity of the profession (on entry at least) without compromising or changing the homogeneity of the outcome.[24]

Consequently, this article begins with a brief overview of the regulatory and professional context. The second part outlines the parallel routes for non-apprentices (polycentric) and apprentices (monocentric), characterising each by reference to the key conceptual framings of negative and positive liberty and the extent to which, for the disadvantaged, they offer redistribution of opportunity; recognition of difference between societal groups and greater or lesser risks of oppression. I conclude that whilst both routes ostensibly offer 'liberty', they are liberties of two diametrically opposed kinds. Both, in principle, offer Fraser's redistribution of opportunity to a wider group in accordance with the statutory objective, but the extent to which they offer recognition of difference between groups, and avoid Young's 'oppression' is less clear. The avoidance of oppression may, for the individual, come to be the most significant difference between them.

The regulatory and professional context

An emphasis on competition (that is, heterogeneity), is embedded in the regulatory framework. The LSA 2007 was the culmination of a sequence of reports questioning lawyers' monopolies.[25] Divisions between legal professions and between rights to conduct different legal activities are blurred.

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[24] In a survey after the first year of SQE, respondents' views were "mixed" as to whether the new regime promoted diversity: Solicitors Regulation Authority, 'SQE Year One: Initial Perceptions and Experiences' (*Solicitors Regulation Authority*, 16 March 2023) <https://www.sra.org.uk/sra/research-publications/sqe-year-one/> accessed 25 March 2025.

[25] For example: Department for Constitutional Affairs, 'Competition and Regulation in the Legal Services Market A Report Following the Consultation "In the Public Interest?"' (Department for Constitutional Affairs 2003) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/general/oftreptconc.htm> accessed 25 March 2025; David Clementi, 'Report of the Review of the Regulatory Framework for Legal Services in England and Wales' (Ministry of Justice 2004) <http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/> accessed 25 March 2025.

This competitive landscape poses unique problems for the solicitors' profession. It is the largest regulated profession.[26] It is also the most disparate, in terms of the work that its members do, and are authorised to do. Whilst *individual* solicitors or organisations are highly specialist, the profession as a whole has to maintain a broad identity and assurance of competence across a vast range of activity to maintain its differential and to justify the SRA's claim to regulate all its members.[27]

In the recent past this breadth was facilitated for most entrants first through the 'qualifying law degree' required to contain seven 'foundation' subjects (or a conversion course covering the same ground). The vocational Legal Practice Course (LPC) was designed to equip graduates for the first day of their work experience. Its core curriculum mixed business law, property law, civil litigation, ethics and accounts with practice skills.[28] It also contained specialist elective modules and, for larger firms, an opportunity to create bespoke content.[29] The subsequent training contract used a benchmark (the Practice Skills Standards[30]) to assure consistency and protect trainees from exploitation. Trainees were required to keep records, to have appraisals, and the SRA made monitoring visits. Regulations under Solicitors Act 1974, s 2 dictated its length, its content, in which organisations it could be served and eligibility of supervisors.

The LSB, required to approve the proposed new regime, was cautious about its effect on diversity:

> on the basis of the SRA's commitments to monitor, publish and respond to identified issues with differential attainment [between candidates from different groups], we do not

[26] Legal Services Board, 'How Many Lawyers Are There?' (*The Legal Services Board* 2022) <https://legalservicesboard.org.uk/about-us/who-we-are> accessed 25 March 2025.
[27] Discussions at the time of writing about whether the SRA should regulate the legal executive profession are outside the remit of this article.
[28] Drafting/writing, research, advocacy, client interviewing. Negotiation appeared in its earlier iterations but was then removed.
[29] James Faulconbridge, 'Alliance Capitalism and Legal Education: An English Perspective' (2011) 80 Fordham Law Review 2651. The need to teach to the centralised SQE test removes this option.
[30] Solicitors Regulation Authority, 'Practice Skills Standards' (*Solicitors Regulation Authority*, September 2021) <https://www.sra.org.uk/trainees/period-recognised-training/managing-trainees/practice-skills-standards/> accessed 25 March 2025.

> consider that this issue sufficiently engaged the refusal criteria so as to merit refusing the application. [31]

The burden of increasing diversity (heterogeneity) whilst maintaining or enhancing standards (homogeneity) is, therefore, firmly in the SRA's court. That homogeneity is articulated in the Statement of Solicitor Competence, an 'external' [32] model of competence statement setting out the tasks, skills or behaviours that go to make up 'the ability to perform the tasks and roles required'[33] 'to the expected standard'[34] at the point of initial qualification. It was developed by a combination of expert input and consensus; initially employed for post-qualification 'continuing competence',[35] and is now embedded into the ethical code for both solicitors and SRA-regulated organisations.[36] Its significance for our purposes is that it is the basis of the SQE. That said, its 18 competences each have subsidiaries, not all of which are explicitly assessed[37] or, indeed, capable of being demonstrated in such an assessment. This is, as we shall see, a practical point of divergence for apprentice and non-apprentice candidates. There is nothing in the competence statement dictating scope of activity across legal fields. There is, however, a threshold statement of level and a 'foundations of legal knowledge' component

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[31] Legal Services Board, 'Decision Notice: The Solicitors Regulation Authority Rule Change Application for Approval of Alterations to Its Regulatory Arrangements Relating to the Solicitors Qualifying Examination' (*Legal Services Board* 2020) <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/10/20201027-Decision-Notice-SQE.pdf> accessed 25 March 2025, para 118.

[32] Stan Lester and Jolanta Religa, '"Competence" and Occupational Standards: Observations from Six European Countries' (2017) 59 Education and Training 201.

[33] Anne McKee and Michael Eraut, *Learning Trajectories, Innovation and Identity for Professional Development* (Springer 2013), 3.

[34] Ibid.

[35] Its scope, therefore, involves tasks that senior solicitors may no longer carry out, and omits tasks that junior solicitors do not carry out. See Julian Webb and others, 'Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales' (SRA, BSB, CILEx Regulation 2013) < https://letr.org.uk/the-report/index.html> accessed 25 March 2025, recommendation 9.

[36] Solicitors Regulation Authority, 'SRA Code of Conduct for Firms' (*Solicitors Regulation Authority*, last amended 6 April 2023) <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/> accessed 25 March 2025; Solicitors Regulation Authority, 'SRA Code of Conduct for Solicitors, RELs and RFLs' (*Solicitors Regulation Authority*, 6 June 2023) <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> accessed 25 March 2025.

[37] See the discussion of one omission in Jane Ching, 'Solicitors' Rights Of Audience, Competence And Regulation: A Responsibility Rights Approach' (2021) 41 Legal Studies 1.

to SQE1 which replicates some of the contents of the law degree and LPC. SQE2 then assesses, in simulation, legal skills across a similar range of practice areas to that of the LPC,[38] but, critically, at the level to be expected of a newly qualified solicitor.

QWE must be served in 'legal services' as defined in the LSA 2007,[39] but it can take place in up to four different organisations (including as a student or unpaid volunteer), inside or outside the jurisdiction. It must provide opportunities to develop 'the minimum number [of] two' of the 18 competences[40] under the supervision of a solicitor of England and Wales.[41] The retention of the work experience component represents a recognition of its cultural importance to the profession.[42] Perhaps as a result, its quality assurance rests in the hands of the employer who certifies its completion. There is no regulatory requirement that anything is demonstrably learned during the period. For the SRA, learning is established entirely by the SQE.[43] As we shall see, however, superimposing the apprenticeship on QWE creates a rather different learning environment. This brings us to the theoretical perspective.

Liberty, redistribution, recognition and oppression

The two routes treat candidates very differently in terms of choice and structure (liberty). Berlin suggests negative freedom answers the question 'How much am I governed?' It is '… a function of what doors, and how many, are open to [the individual], upon what prospects they open; and how open they are'.[44] It

[38] Criminal Litigation (including police station advice); [Civil] Dispute Resolution; Property; Wills and Intestacy, Probate Administration; Business Organisations,: Solicitors Regulation Authority, 'SQE2 Assessment Specification' (*Solicitors Regulation Authority*, April 2024) <https://sqe.sra.org.uk/exam-arrangements/assessment-information/sqe2-assessment-specification> accessed 25 March 2025.
[39] The advice is in fact less definitive than it first seems. The statutory definition 'can help candidates decide whether their role involves delivering legal services' but work within that definition 'is likely to be' QWE: Solicitors Regulation Authority, n 6.
[40] Ibid.
[41] An organisation's compliance officer for legal practice is also able to certify completion.
[42] Law Society of England and Wales, 'Global Competitiveness of the England and Wales Solicitor Qualification' (Law Society of England and Wales 2015).
[43] Even if the SQE was passed months or years before qualification.
[44] Isaiah Berlin, *Isaiah Berlin Liberty* (Henry Hardy ed, Oxford University Press 2013), 41.

is about choice (and consumerism and neoliberalism[45]) and, hence, seems an appropriate way to characterise the polycentric route.

Positive freedom, by contrast, answers the question 'By whom am I governed?'. For Berlin, the choice was between the individual and the collectivity. Given the significance of the employer, and the training organisation, as well as the requirements for their active support towards achieving the competences, this seems appropriate to describe the monocentric apprenticeship. Once the choice to pursue an apprenticeship has been converted into acquisition of the relevant job, the route to qualification is determined, and determined largely by others.

The social justice theories of Fraser and Young help us to understand the effect of those choices and differing structures, especially in this context, on candidates and on the diversity of the profession. The assumption underlying the polycentric route is that barriers such as lack of economic capital to spend on courses, or the social capital facilitating employment in high-status organisations, or outright discrimination by employers,[46] would be reduced. Opportunities to qualify would be increased, and more equally distributed in a more socially just system. This assumes, of course, that the standards expressed in the competence statement and terminal assessment are themselves diversity-neutral. Young perceives standards as problematic in this respect unless they are 'defined in terms of technical skills and competence, independently of, and neutral with respect to, values and culture'.[47] The latter seems to be what the SRA sought to achieve in its drafting. However, assessment can be more challenging: 'most criteria of evaluation in our society, including educational credentials and standardised testing have normative and cultural context'.[48] An attainment gap has already been identified in the SQE, and is under investigation.[49]

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[45] Russell G Pearce and Sinna Nasseri, 'The Virtue of Low Barriers to Becoming a Lawyer: Promoting Liberal and Democratic Values' (2012) 19 International Journal of the Legal Profession 357.

[46] See, for example, application portals whose drop-down menus exclude less prestigious universities, referred to in Solutions Research, 'The lived experiences of legal professionals: Barriers to getting in, being in and getting on' (*Legal Services Board*, 2023) <https://legalservicesboard.org.uk/wp-content/uploads/2023/05/The-lived-experiences-of-legal-professionals.pdf> accessed 25 March 2025, 8.

[47] Iris Marion Young and Danielle S Allen, n 23, 201.

[48] Ibid, 193.

[49] See sources cited in nn 7 and 8.

It also remains to be seen whether cheaper courses are as effective as more expensive courses in equipping candidates to pass the SQE or, in absolute terms, a false economy. Candidates are expected to exercise their negative liberty to 'make their own enquiries to satisfy themselves as to the quality and suitability of training, and the products and services that organisations on the list offer'.[50] A league table is proposed, but this is of little comfort to those simply unable to purchase in a market where strong success rates can translate into premium fees.[51] The final assumption is, of course, that if more solicitors are created, then there will also be more jobs for solicitors, perhaps in a wider range of working contexts. That, especially with growing use of technology, remains to be seen.

Fraser's work has been criticised, especially by Young, but what is relevant here is her contrast between redistribution and recognition as 'analytical perspectives'[52] in her treatment of economic and cultural injustice. Her seminal work, *Justice Interruptus*, suggests that a potential remedy for economic injustice is 'redistributing income, reorganising the division of labor':[53] the remedy for social class injustice is distributive (affirmative).[54] Benefiting from opportunities may, however, require assimilation to (e.g.) androcentric, Eurocentric or heteronormative norms,[55] and the blanking of difference (i.e. failures in recognition of different societal groups), which might also be characterised as cultural injustice (or oppression). Fraser argues that transformative remedies are required to fundamentally change the 'underlying generative framework'[56] so as to preserve the integrity of the differentiated

[50] Solicitors Regulation Authority, 'SQE Training Providers List' (*Solicitors Regulation Authority*, 10 May 2023) <https://www.sra.org.uk/become-solicitor/sqe/training-provider-list/> accessed 25 March 2025.
[51] And the reverse: SRA advice to candidates includes the risk of providers going out of business: 'Choosing an SQE Training Provider' (*Solicitors Regulation Authority*, 25 October 2023) <https://www.sra.org.uk/become-solicitor/sqe/training-provider-list/choosing-sqe-training-provider/> accessed 25 March 2025.
[52] Nancy Fraser, *Adding Insult to Injury: Nancy Fraser Debates Her Critics* (Kevin Olson ed, Verso Books 2008) 109.
[53] Nancy Fraser, n 22, 15.
[54] Ibid, 17.
[55] In a survey of 'over 10,000' Black British respondents, 98% responded always, often or sometimes to the question 'Do you believe that Black employees have to compromise who they are and how they express themselves to fit in at work?', Kenny Monrose, 'Black British Voices' (I-Cubed; The Voice, University of Cambridge 2023) <https://www.cam.ac.uk/sites/www.cam.ac.uk/files/bbvp_report_pdf_final.pdf> accessed 25 March 2025, 52
[56] Nancy Fraser, n 22, 24.

group. This recognition is not, as Young identifies, a task that can be achieved by isolating commonalities: 'the nub of the injustice is failure to recognise and accommodate differences … it cannot be remedied by "stressing what everyone shares"'.[57]

If redistribution prevails, the competence statement is a *sine qua non*. It either defines the only appropriate way of practising as a solicitor or is sufficiently generous to encompass different acceptable theories of practice. If recognition prevails, then we must interrogate not only assessments but also any biases in the competence statement itself, as well as the extent to which it is accepting of variation in theory of practice, cultural difference and of capability as well as competence. As Young puts it, in a context relevant to the articulation of the competence statement at a macro level and criteria for recruitment and progression by employers at the micro level:

> Criteria of merit assume that there are objective measures and predictors of technical work performance independent of culture and normative attributes. But I argue that no such measures exist; job allocation is inevitably political in the sense that it involves specific values and norms which cannot be separated from issues of technical competence.[58]

Fraser's poles of redistribution and recognition represent extremes and she acknowledged that there was a middle ground.[59] What is significant for this article, and the statutory objective, is the extent to which the two routes lean towards one axis or the other.

Young's contrasting approach to social justice, envisaged as a response to Rawls' and others' perspective that social justice can be achieved by distribution (alone),[60] is to consider criteria of 'oppression': exploitation,

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[57] Nancy Fraser, n 52, 86.
[58] Iris Marion Young and Danielle S Allen, n 23, 12.
[59] Nancy Fraser, n 52, 107. Sen's capability approach, indeed, does so: Elaine Unterhalter and Melanie Walker, 'Conclusion: Capabilities, Social Justice and Education' in Melanie Walker and Elaine Unterhalter (eds), *Amartya Sen's Capability Approach and Social Justice in Education* (Palgrave Macmillan 2007), 251. Ingrid Robeyns makes the same point in 'Is Nancy Fraser's Critique of Theories of Distributive Justice Justified?' in Nancy Fraser, n 52, 176 albeit arguing that Sen pays more attention to diversity than Fraser (ibid, 191).
[60] Iris Marion Young and Danielle S Allen, n 23, chapter 1.

marginalisation, powerlessness, cultural imperialism and violence.[61] That is, questions of power. Exploitation, marginalisation and powerlessness, she says, are functions of the division of labour. Cultural imperialism relates to the culture and mores of a dominant group, and violence to intimidation and harassment as an accepted social practice.[62] Violence, here, is analogous to Sommerlad's adoption of Bourdieu's concept of 'symbolic violence' for the ways in which the hierarchies of the legal professions impact on women and minorities.[63] Oppression, Young says, 'consists in systematic institutional processes which prevent some people from learning and using satisfying and expansive skills in socially recognised settings'.[64] Oppression can therefore impact on our context in three ways: i) preventing the take up of (redistributed) opportunity in the first place; ii) taking up opportunities but being damaged in the process, or iii) being handicapped in the labour market, or confined to mundane work as a result of earlier decisions (e.g. to undertake QWE through volunteering rather than in a law firm).

Whilst, as we shall see, both the apprentice route and the non-apprentice route both offer 'freedom' of different kinds, in the pursuit of diversity, it is also instructive to consider whether one route is inherently more oppressive to the individual, or some groups of individuals, than the other. Although it might be argued that all qualification models that involve a period of humble service as a novice are open to an element of oppression ii)[65] a route that ostensibly offers greater freedom, but at greater risk of subjection to oppression is, I suggest, inherently compromised. This is certainly the case in oppression iii), where the ostensible promise of a 'freer' system is dashed, not on qualification, but immediately thereafter. The norm, at present, however, is the polycentric route, to which we now turn.

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[61] Fraser, it should be said, treats exploitation, marginality and powerlessness as related to political/economic injustice and the remainder as cultural injustice: ibid 198; Nancy Fraser, n 52, 14-15.

[62] For some manifestations of such violence in the context of ethics, see Jane Ching, Graham Ferris and Jane Jarman, '"To Act Is to Be Committed, and to Be Committed Is to Be in Danger": The Vulnerability of the Young Lawyer in Ethical Crisis' (2022) 25 Legal Ethics 44.

[63] Hilary Sommerlad, 'Minorities, Merit, and Misrecognition in the Globalized Profession' (2011) 80 Fordham Law Review 2481, 2495.

[64] Iris Marion Young and Danielle S Allen, n 23, 38.

[65] See Jane Ching, 'Making A Virtue Of Necessity? An Opportunity To Harness Solicitors' Attachment To The Workplace As A Place For Learning.' (2015) 24 Nottingham Law Journal 36.

Negative liberty: the non-apprentice (polycentric) route

Like the LSB, the SRA's consultants were cautious about the diversity effects of the new regime.

> Wider range of choice is both an important opportunity to support diversity, since it will enable students to chart more flexible pathways, and a risk. It will make the routes to qualification harder to navigate, especially for those students without access to good advice, and a tiered system may become quickly apparent, because some legal employers will give continued (or possibly increased) currency to traditional pathways, through which high performing candidates have been recruited for many years.[66]

I have described this route as a negative liberty, because it is characterised by choice for the candidate (what Taylor describes as an 'opportunity concept').[67] An optimistic view treats negative liberty as the removal of restrictions imposed by others, in this context resulting in redistribution of, and an assumed increase in, opportunities to qualify. [68] These include being able to choose between alternatives[69] (as preparation for the SQE and in satisfying the QWE requirement). It has been said, indeed, that this new model 'shifts power from

[66] Bridge Group, 'Introduction of the Solicitors Qualifying Examination: Monitoring and Maximising Diversity' (Solicitors Regulation Authority 2017) <https://www.sra.org.uk/sra/research-publications/introduction-sqe-monitoring-maximising-diversity/> accessed 25 March 2025, 4.
Following implementation, the concern continues: Monidipa Fouzder, 'Doubts Remain over SQE's Social Mobility Objectives' [2023] *Law Gazette* <https://www.lawgazette.co.uk/news/doubts-remain-over-sqes-social-mobility-objectives/5116680.article> accessed 25 March 2025; Mary Horobin 'Access to the Legal Profession: The SQE and Its Discontents' (*Greater Manchester Law Centre*, 12 July 2023) <https://www.gmlaw.org.uk/2023/07/12/access-to-the-legal-profession-the-sqe-and-its-discontents/> accessed 25 March 2025.

[67] Charles Taylor, *Philosophical Papers: Volume 2: Philosophy and the Human Sciences*, (Cambridge University Press 1985), 213.

[68] See, for example, Russell G Pearce and Sinna Nasseri, 'The Virtue of Low Barriers to Becoming a Lawyer: Promoting Liberal and Democratic Values' (2012) 19 International Journal of the Legal Profession 35 treating low barriers as concomitant with democracy.

[69] See SI Benn and WL Weinstein, 'Being Free to Act, and Being a Free Man' (1971) 80 Mind 194, 197; John N Gray, 'On Negative and Positive Liberty' (1980) 28 Political Studies 507, 519.

employers to students'.[70] Non-apprentices may take the SQE exams before, during or after their QWE and many use their QWE experience as preparation for SQE 2.[71] Candidates, their sponsors or employers, can choose which preparatory course to follow, for which cost[72] or, indeed, no course at all.[73] Such courses are only externally quality-assured (other than by market forces) if they are embedded into a university degree.

My reference to employers and sponsors is both deliberate. Having – and knowing about – an opportunity is different from being able to take it up (an 'exercise-concept' in Taylor's terms[74]). This is why I have not used MacCallum's algorithm of '*x* is (is not) free from *y* to do (not do, become, not become) *z*' as a template.[75] It has the advantage over Berlin of emphasising *x*, who aspires to become a solicitor (*z*); but fails to identify *who is responsible for y*.[76] The initial architect of negative liberty is the SRA in removing a number of regulatory constraints, but despite asseverations of a change in the power dynamic, the question of potential domination - of coercion and the exercise of oppression - by employers remains.

Critics have, indeed, used the analogy of the worker's ostensible freedom to contract with employers as an example of the iniquity of a purely negative liberty approach.[77] Power has not entirely been shifted away from employers.

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[70] Crispin Passmore, '"Get on with It - Uncertainty Costs", SQE Co-Creator Tells Regulators at LegalEdCon North' (*Legal Cheek*, 6 February 2020) <https://www.legalcheek.com/2020/02/get-on-with-it-uncertainty-costs-sqe-co-creator-tells-regulators-at-legaledcon-north/> accessed 25 March 2025.

[71] A majority of respondents in the first year planned to do so. Some employers, however, require SQE1 and sometimes SQE2 to have been completed before QWE is started: Solicitors Regulation Authority, n 19. See also John Hyde, 'Firms Urged Not to Drop Aspiring Solicitors Who Fail SQE1' [2024] *Law Gazette* <https://www.lawgazette.co.uk/news/firms-urged-not-to-drop-aspiring-solicitors-who-fail-sqe1/5119154.article> accessed 25 March 2025.

[72] The Lawyer Portal, 'Your Guide to SQE Funding' (*The Lawyer Portal*, 2024) <https://www.thelawyerportal.com/solicitor/sqe/your-guide-to-sqe-funding/> accessed 25 March 2025. Comments on funding also appear in Solicitors Regulation Authority, nn 19, 24.

[73] The regulator does, however, provide information to 'help your decision-making': Solicitors Regulation Authority, n 51.

[74] Charles Taylor, n 67, 213.

[75] Gerald C MacCallum Jr, 'Negative and Positive Freedom' (1967) 76 The Philosophical Review 312, 314.

[76] Except by glossing the concept of *y*, which MacCallum refrains from doing.

[77] See, for example, 'The peasant farmer is scarcely more free to contract with his landlord than is a starving labourer to bargain for good wages with a master who offers him work'; Thomas Hill Green, *Works of Thomas Hill Green Volume 3: Miscellanies and Memoirs*

Nor will it be. Apprentices still have to compete for apprenticeships; non-apprentices have to obtain places in suitable QWE work (context i)). Personal and internal constraints that could hinder someone obtaining an apprenticeship, QWE or post-qualification employment, could include state school education;[78] weak careers guidance; disability; lack of confidence or finance; the 'wrong' accent[79] or university;[80] and lack of social capital (aspects of cultural imperialism).[81] These would not always have been regarded as rendering someone *unfree* by negative liberty theorists, even if they render them practically *incapable* of, for example, qualifying (or succeeding[82]), or make it much more difficult for them to do so.

Some writers, however, include in their framing of negative liberty the concept of guaranteed freedom from coercion[83] a concept that seems aligned with Young's concepts of exploitation and powerlessness. In the model known as 'republican liberty', which seeks to reconcile negative liberty with conceptions of the state as a public good otherwise attached to the positive liberty I discuss below,[84] dependence (e.g. on an employer),[85] or the exercise of arbitrary

(Cambridge University Press 2015) 382. Although not in the language of liberties *per se*, Freire uses the same example in the context of the ways in which subjugation of the oppressed is achieved: 'the myth that all men [sic] are free to work where they wish, that if they don't like their boss they can leave him and look for another job', Paulo Freire, *Pedagogy of the Oppressed* (Myra Bergman Ramos tr, Penguin Books 1972), 109.

[78] See sources cited at n 14.

[79] James Dean, 'Firms Reject Candidates on the Basis of Their Accents, Research Suggests' [2010] *Law Gazette* <https://www.lawgazette.co.uk/news/firms-reject-candidates-on-the-basis-of-their-accents-research-suggests/58563.article> accessed 25 March 2025, referring to: Louise Ashley, 'Making a Difference? The Use (and Abuse) of Diversity Management at the UK's Elite Law Firms' (2010) 24 Work, Employment & Society 711.

[80] See Anna Mountford-Zimdars and John Flood, 'The Relative Weight of Subject Knowledge and Type of University Attended: A Comparison of Law Higher Education in England and Germany' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2865074 <https://papers.ssrn.com/abstract=2865074> accessed 25 March 2025.

[81] See Louise Ashley, n 80 and the factors listed as hindrances to obtaining QWE in Solicitors Regulation Authority, nn 19, 24.

[82] Bridge Group, 'Socio-Economic Background and Progression to Partner in the Law' (Bridge Group 2020) <https://static1.squarespace.com/static/5c18e090b40b9d6b43b093d8/t/5f6c69ea4d0d1b29037581f3/1600940523386/BG_SEB_Partner_Law_Sep2020_SUMMARY_FINAL.pdf> accessed 25 March 2025.

[83] FA Hayek, *The Constitution of Liberty* (University of Chicago Press 1960).

[84] Quentin Skinner, 'A Third Concept of Liberty' (2002) 117 Proceedings of the British Academy 237.

[85] Although ultimately a proponent of republican liberty, Skinner relates constraints to 'personal dependence and servitude', Quentin Skinner, 'The Paradoxes of Political Liberty' (The Tanner Lectures on Human Values, Harvard University, 24 October 1984)

power[86] (by, for example, an employer refusing to 'sign off' a period of QWE) are included in the category of constraints that are inimical to negative liberty.

Some employers, perhaps unhappy to manage the risk of employees failing the examinations,[87] or the disruption caused by releasing candidates to study for the examinations, require both examinations to be passed (possibly at the candidate's expense) before the QWE begins.[88] At least one firm has adopted the approach of sandwiching a SQE study year between the two years of QWE.[89] There is nothing to prevent an employer asking apprentice and non-apprentice candidates to serve the whole two years in the same department or practice area, and in a specialist practice area that is not covered in the SQE. There is nothing to prevent QWE being unpaid[90] and therefore subsidised by entrants (exploitation).

However, provided the basic thresholds are met for the kind of experience obtained, it is in fact very difficult for a supervising solicitor to refuse to certify completion of QWE. Even if SQE 2 is to be taken towards the end of QWE there is no formal obligation on the employer to provide any support other than an opportunity to develop two of the competences, to support candidates,[91] or to confirm their readiness to attempt the examinations if they have not already taken them.[92] The reverse is true, as we shall see, for apprentices.

<tannerlectures.org/lectures/the-paradoxes-of-political-liberty/> accessed 25 March 2025, 240.

[86] Quentin Skinner, 'Freedom as the Absence of Arbitrary Power' in Cécile Laborde and John Maynor (eds), *Republicanism and Political Theory* (John Wiley & Sons 2009).

[87] John Hyde, n 8.

[88] Solicitors Regulation Authority, nn 19, 24.

[89] Joanna Goodman, n 8. This approach bears some similarity with that used in Northern Ireland and the Republic of Ireland.

[90] A minority of respondents expect to be unpaid: Solicitors Regulation Authority, nn 19, 24.

[91] That said, many respondents do offer structured support: Solicitors Regulation Authority, nn 19, 24.

[92] Much resource has been expended in reassuring supervising solicitors that they are not certifying what has been learned, but only that the period has been served. It is ironic therefore, that it is recommended that if a supervising solicitor is refusing to certify, the candidate's strategy to persuade them to do so should include demonstrating what has been learned: Solicitors Regulation Authority, 'Dealing with a Refusal to Confirm Qualifying Work Experience' (*Solicitors Regulation Authority*, 19 February 2025) <https://www.sra.org.uk/become-solicitor/sqe/qualifying-work-experience-candidates/refusal-confirm-qualifying-work-experience/> accessed 25 March 2025. Some employers do, however, refuse to certify because of concerns about competence: Solicitors Regulation Authority, n 19.

Still more troublesome is the question of progression after qualification (context iii above).[93] If all applicants have passed the SQE, and there remain more applicants than posts, what will be the attitude of employers to, for example, a candidate whose QWE was in an unpopular field, across a variety of organisations and in a context exposing them to a small number of the competences, by contrast with a candidate whose QWE is more coherent, and represented a greater number of the competences? QWE may not be explicitly assessed by the regulator, but its quality will undoubtedly continue to be assessed by the recruiting profession.[94] This may well not be apparent to candidates, anxious to record QWE quantitively in order to speed qualification, when exercising their liberty to decide how to qualify. As employment as a solicitor has regulatory and cost implications (the annual practising certificate), the pre-qualification bottleneck will simply shift to be a post-qualification bottleneck, in which an increasing number of solicitors are obliged to deregister to take on paralegal employment (marginalisation). Apprentices, hired from the outset to fulfil a role in the organisation, or already in place in a paralegal position, and embedded in its mores and practices, may, possibly, be in a more secure position.

Positive liberty: the (monocentric) solicitor apprenticeship[95]

As Miller explains,[96] Berlin characterises positive freedom, before ultimately rejecting it, in a number of (possibly conflicting) ways: a) 'the power or capacity to act' by contrast with the absence of interference, b) 'rational self-direction'; and c) collective, rather than individual, self-determination.

Positive liberty approaches therefore include active steps to convert opportunity concepts into exercise concepts.[97] Consequently, some negative libertarians see them as unwarranted incursions on individual integrity and self-

[93] Katharine Freeland, 'A Step Too Far?' [2023] *Law Gazette* <https://www.lawgazette.co.uk/features/a-step-too-far/5117477.article> accessed 25 March 2025; Solutions Research, n 48.

[94] Respondents who would not employ those who had completed QWE in another organisation cited, inter alia, a desire to establish competence: Solicitors Regulation Authority, nn 19, 24.

[95] Amyas Morse, 'Adult Apprenticeships' (National Audit Office 2012) HC 1787 Session 2010-2012 <https://www.nao.org.uk/report/adult-apprenticeships/> accessed 25 March 2025, 18. Some adult apprentices will, however, be career-changers rather than those wishing to progress in an existing employment.

[96] David Miller, *Liberty* (Oxford University Press 1991), 10.

[97] Typical examples include education, health and welfare support.

determination.[98] Indeed, Blau adds a fourth, 'doing what one should want, as opposed to doing what one does want' [99] which has resonance for either socialisation (positive) or coercive institutionalisation (negative) depending on one's perspective.

I treat the apprenticeship as an example of positive liberty, because of the contribution of the collectivity that is designed into it. Apprenticeships are offered competitively, in the labour market, so the supply is limited but increasing,[100] but once secured, the apprentice is in principle absorbed into the community of practice of the employing organisation and its collaborators for a planned period of several years. In Law, nevertheless, there is evidence that the familiarity and acceptability of the university route acted as a disincentive to the most disadvantaged in undertaking a Trailblazer apprenticeship.[101]

There is – at present – a clear financial incentive on larger law firms, councils, departments and organisations such as the Crown Prosecution Service to offer apprenticeships. Part 7A of the Income Tax (Pay As You Earn) Regulations 2003[102] implements an apprenticeship levy created by Part 6 of the Finance Act 2016. The levy is charged on employers (or groups of employers) at a rate of 0.5% of their annual pay bill that exceeds £3m. This tax is refunded, with an additional 10% contributed by the government, if is it used to provide apprenticeships within the organisation. Research suggests that the impact of the levy has been an increased focus on offering higher level apprenticeships,[103] such as the solicitor apprenticeship. This is often embedded

[98] For example Quentin Skinner, nn 85-87.
[99] Adrian Blau, 'Against Positive and Negative Freedom Critical Exchange' (2004) 32 Political Theory 547, 548.
[100] Monidipa Fouzder, 'City Firms Unite to Boost Solicitor-Apprenticeship Numbers' [2023] *Law Gazette* <https://www.lawgazette.co.uk/news/city-firms-unite-to-boost-solicitor-apprenticeship-numbers/5116325.article> accessed 25 March 2025; Sutton Trust and UCAS, 'Where next: What Influences the Choices of Would-Be Apprentices?' (Sutton Trust 2023) <https://www.suttontrust.com/our-research/where-next-what-influences-the-choices-of-would-be-apprentices/> accessed 25 March 2025.
[101] Caroline Casey and Paul Wakeling, 'University or Degree Apprenticeship? Stratification and Uncertainty in Routes to the Solicitors' Profession' (2022) 36 Work, Employment and Society 40.
[102] SI 2003 No 2682.
[103] Pietro Patrignani and others, 'The Impact of the Apprenticeship Levy on Apprenticeships and Other Training Outcomes' (Centre for Vocational Education Research 2021) Discussion Paper 034 <https://cver.lse.ac.uk/textonly/cver/pubs/cverdp034.pdf> accessed 25 March 2025.

into a degree provided in partnership between a law firm and a university.[104] An alternative is a 'graduate apprenticeship' where the entrant joins the employer after completing (and in principle incurring the cost of) a degree and the overall apprenticeship period is curtailed.[105] Some organisations recruit both.[106] There is specific external quality assurance of apprenticeships, beyond the remit of the SRA.[107] Following a change of government in July 2024, however, changes to the levy and the organisation of apprenticeships are proposed, on a broader basis, to, amongst other things 'address the rigidity of the current apprenticeships levy'.[108]

The solicitor apprenticeship articulates with the SRA licensing process as apprentices must pass both SQE 1 and 2, and their period of work experience is treated as QWE. Apprentices are entitled to a minimum of 20% off the job training in order to prepare for the examinations.

The apprenticeship model, however, demands that SQE 2, as the end point assessment, be taken *only* at the end of the work experience. That is, at, or close to, the point of qualification to which its level is pegged. Unlike their peers, apprentices are also required to provide evidence of having acquired the

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[104] A&O Shearman, 'Solicitor Apprenticeships' (*A&O Shearman UK graduate and student careers*, 2024) <https://earlycareersuk.aoshearman.com/solicitor-apprenticeships)> accessed 25 March 2025; Law Society of England and Wales, 'Legal Sector Apprenticeships' (*Law Society of England and Wales*, 12 February 2025) <https://www.lawsociety.org.uk/career-advice/becoming-a-solicitor/qualifying-without-a-degree/apprenticeships> accessed 25 March 2025.

[105] Aidan Lambert, 'My Experience as a Graduate Solicitor Apprentice' (*GovWire News*, 6 February 2024) <http://www.govwire.co.uk/news/government-legal-department/my-experience-as-a-graduate-solicitor-apprentice-78799> accessed 25 March 2025; Weightmans, 'Graduate Solicitor Apprenticeship' (*Weightmans*, 2024) <https://www.weightmans.com/careers/early-careers/apprenticeships/graduate-solicitor-apprenticeship/> accessed 25 March 2025.

[106] Minster Law, 'Solicitor Apprenticeships' (*Minster Law*, 2024) <https://www.minsterlaw.co.uk/careers/solicitor-apprenticeships/> accessed 25 March 2025.

[107] Office for Students, 'Checking the Quality of Apprenticeships' (*Office for Students*, 22 September 2023) <https://www.officeforstudents.org.uk/advice-and-guidance/skills-and-employment/degree-apprenticeships/degree-apprenticeships-for-providers/checking-the-quality-of-apprenticeships/> accessed 25 March 2025.

[108] Department for Education, 'Skills England Report: Driving Growth and Widening Opportunities' (*GOV.UK*, 24 September 2024) < > accessed 25 March 2025, 19; Department for Education and others, 'Prime Minister Overhauls Apprenticeships to Support Opportunity' (*GOV.UK*, 24 September 2024) <https://www.gov.uk/government/news/prime-minister-overhauls-apprenticeships-to-support-opportunity> accessed 25 March 2025.

relevant competences in a 'gateway review' before they are eligible to take the SQE 2 as their end point assessment.[109] This may help to militate against the exploitation risked by their polycentric peers entitled merely to an opportunity to develop a pair of competences. Apprentices need not, however, demonstrate competence in all the practice areas covered in SQE2 and, as many apprenticeships are in highly specialist organisations, doing so, whilst educationally valuable in terms of preparation for the examinations, would erect a very distinct and problematic difference between the two routes. It would also represent something close to the three areas of law and both contentious and non-contentious work requirement that were required for the training contract, that prevented some organisations taking on trainees altogether.

It is, however, at the intersection between this gateway – in principle demonstrating all the competences in the workplace (over time), and the examination, demonstrating most of the competences (again) in simulation (on one occasion) – that the difference between the two routes is at its starkest. All course and examination fees are covered by the employer and the apprentice is paid.[110] Although they are fewer than 10% of those attempting the SQE examinations so far, apprentices perform better than non-apprentices:[111]

[109] Completing SQE 1 is also part of the gateway to the end point assessment. The required confirmation is that the apprentice 'has achieved the minimum requirements of the apprenticeship set out in the apprenticeship standard', Solicitors Regulation Authority, 'Apprentices' (*Solicitors Regulation Authority*, No date) <https://sqe.sra.org.uk/about-sqe/who-is-the-sqe-for/apprentices> accessed 25 March 2025. This is cross-referenced to, but is framed more loosely in relation to the subsidiary competences, than, the SRA competence statement assessed in the SQE: Institute for Apprenticeships and Technical Education, 'Solicitor' (*Institute for Apprenticeships and Technical Education*, 11 January 2024) <https://www.instituteforapprenticeships.org/apprenticeship-standards/st0246-v1-1> accessed 25 March 2025; Solicitors Regulation Authority, n 2.

[110] Many in the polycentric route are also paid, and payment of SQE fees is a factor for applicants in choice of QWE venue.

[111] Solicitors Regulation Authority, 'Solicitors Qualifying Examination Annual Report 2021/22' (Solicitors Regulation Authority 2023) <https://sqe.sra.org.uk/docs/default-source/pdfs/reports/sqe-annual-report-2022.pdf?sfvrsn=ce29cd5c_2> accessed 25 March 2025,, table 16; Solicitors Regulation Authority, 'Solicitor Qualifying Examination Annual Report 2022/23' (*Solicitors Regulation Authority*, 2024) <https://sqe.sra.org.uk/exam-arrangements/sqe-reports/sqe-annual-report-2023> accessed 25 March 2025, table 17; Solicitors Regulation Authority, 'Solicitors Qualifying Examination Annual Report 2023/24' (Solicitors regulation Authority 2025) <https://sqe.sra.org.uk/docs/default-source/pdfs/reports/sqe-annual-report-2024.pdf?sfvrsn=2ce59e1a_2> accessed 25 March 2025, tables 18. 19.

converting the initial opportunity concept into an exercise concept in a marked and measurable way. Given the gateway, this is perhaps not surprising.

The polycentric candidate is, then, given choice and may be given support (and pay for it). The apprentice might be said to sacrifice choice (powerlessness) in exchange for support and exemption from fees. Nevertheless, prolonged immersion in a single employer's milieu, culture and ethics – for up to three times as long as their non-apprentice peers – provides opportunities for exploitation and cultural imperialism, given the intensity and duration of the relationship. There are draining, unproductive and unethical communities of practice as well as positive ones.[112] Empirical material is only just beginning to emerge about the experiences, and identities of solicitor apprentices, notably in two recent doctorate theses.[113] This work indicates that, as a comparatively new initiative, and framed in concepts that are associated with crafts and trades rather than professions, there is a lack of understanding amongst aspirants and colleagues, and a 'stigma' such that 'apprentices and paralegals are right at the bottom' (marginalisation).[114] There is, however, at least anecdotal evidence that apprentices are not necessarily passively institutionalised.[115]

The scope for oppression, then, is not moot, but may be of a different character and emphasis. This brings us back, then, to the extent to which the apprenticeship can offer not merely redistribution of opportunity but also recognition of difference.

Ostensibly, as a form of affirmative action, it is capable of both, by way of what Fraser describes as 'affirmative' remedies.[116] An employer may decide to frame its apprenticeship offering explicitly in terms of increasing diversity. So, for example, a CPS apprenticeship was available only to those satisfying at least one of a number of criteria for socio-economic disadvantage.[117] An

[112] Jane Ching, Graham Ferris and Jane Jarman, n 62; Jane Ching, n 65.
[113] Caroline Casey, 'The Degree Apprenticeship Pathway into the Legal Profession: A Game Changer?' (PhD, University of York 2020) <https://etheses.whiterose.ac.uk/28273/> accessed 25 March 2025; Gail Cunningham, 'Solicitor Apprenticeships- a New and Improved Education and Training Route to Qualification as a Solicitor? A Study of the Perceptions of Solicitor Apprentices and Trainee Solicitors' (EdD, University of Sheffield 2021) <https://etheses.whiterose.ac.uk/29863/> accessed 25 March 2025.
[114] Gail Cunningham, ibid, 146.
[115] John Hyde, 'All the Young Guns' [2023] *Law Gazette* <https://tinyurl.com/3mvt5pvxp> accessed 9 October 2024, 7.
[116] Nancy Fraser, n 22, 27.
[117] Kevin Donnelly, 'Solicitor Apprenticeship with the CPS' (*AEBP*, 28 September 2021) <https://theaebp.co.uk/solicitor-apprenticeship-with-the-cps/> accessed 25 March 2025.

initiative of the City of London Law Society to offer an increased number of apprenticeships[118] refers not only to the economic benefit to individuals but also to 'empowering students from diverse backgrounds to pursue a career they may have never thought possible'. What is less often surfaced is the question of recognition, or whether apprentices from such groups are supported more extensively, or in a different way. Nevertheless, foundation courses and other interventions have been developed to support English, or address other educational needs of individual apprentices.[119]

That said, anecdotal evidence has suggested that some employers at least welcome the different perspectives brought to the organisation by apprentices from societal groups traditionally recruited into the profession.[120] This is laudable, but is not quite the 'recognition' that Fraser envisaged, connected not to individuals but to societal groups. Fraser contrasts affirmative remedies with those that are 'transformative': in the redistributive sphere fundamental restructuring of the 'relations of production' and in recognition, a 'deep restructuring' that 'destabilises group differentiation'.[121] This is not without difficulty: affirmative action can lead to backlash; recognition of some groups can lead to their elimination. The reallocation of power between polycentric aspirant and employer in the new form of QWE lauded as a restructuring of power may be a mirage.

The question then is whether in fact the positive liberty afforded by the apprenticeship is more likely to produce effective redistribution and recognition. The profession has certainly welcomed it as a key, and possibly the principal means, of increasing diversity in the profession.[122] That said, in

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[118] City of London Law Society, 'City Century' (*City Century*, 2023) <https://citycentury.co.uk/> accessed 25 March 2025.
[119] Joanna Goodman, n 8.
[120] Diana Bentley, 'The Long View' (*Communities - The Law Society*, 14 January 2020) <https://communities.lawsociety.org.uk/january-2020/the-long-view/6000683.article> accessed 25 March 2025.
[121] Nancy Fraser, n 22, 27.
[122] See, for some early examples: Tabby Kinder, 'Eversheds Launches Apprenticeship Route to Solicitor Status' (*The Lawyer Jobs*, 16 March 2016) <http://jobs.thelawyer.com/article/eversheds-launches-apprenticeship-route-to-solicitor-status/> accessed 25 March 2025; Katie King, 'ITV Launches New Training Scheme That Allows Students to Qualify as Solicitors' (*Legal Cheek*, 8 December 2015) <http://www.legalcheek.com/2015/12/itv-launches-new-training-scheme-that-allows-students-to-qualify-as-solicitors/> accessed 25 March 2025; Neil Rose, 'Actually We Don't Mind Non-Graduates Becoming Solicitors, Says Law Society' (*Legal Futures*, 17 February

the apprenticeship sector as a whole, at least in Trailblazer apprenticeships, those from wealthier areas are more likely to be able to find information about apprenticeships,[123] obtain support in application,[124] have parents sufficiently knowledgeable to advise,[125] and are disproportionately represented in apprenticeships themselves.[126] Approximately a third of apprenticeships are, in fact, offered to existing employees[127] in our context, possibly existing paralegals whom the employer wishes to retain. Apprenticeships may also be offered to career changers whose underpinning knowledge is of value to the employer.[128] Those two factors change the power relationship between employer and apprentice, and may, perhaps, ameliorate the problem of oppression. As may the required link with an external training body, the external quality assurance and, as we have seen, the gateway.

It seems possible that, given the extent of investment, both financial and in time and support, apprentice graduates may be more attractive as employees, at least to their initial employer, than a peripatetic polycentric candidate is to any of the organisations in which they have had brief service. Nevertheless, the fear of stigma when there are different routes, is a real one. And not a new one: practitioners will be familiar with historical discrimination against solicitors

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2016) <http://www.legalfutures.co.uk/latest-news/actually-we-dont-mind-non-graduates-becoming-solicitors-says-law-society> accessed 25 March 2025.

[123] Sutton Trust and UCAS, n 102, 29. In the solicitor apprenticeship: Caroline Casey and Paul Wakeling, n 103, 54.

[124] Sutton Trust and UCAS, ibid, 36 and figure 13.

[125] Rebecca Montacute and Carl Cullinane, 'Parent Power 2018' (Sutton Trust 2018) <https://www.suttontrust.com/wp-content/uploads/2019/12/Parent-Power-2018.pdf> accessed 25 March 2025.

[126] Alison Fuller and others, 'Better Apprenticeships: Access, Quality and Labour Market Outcomes in the English Apprenticeship System' (Sutton Trust 2017) <https://discovery.ucl.ac.uk/id/eprint/10094159/1/Better-Apprenticeships-1.pdf> accessed 25 March 2025, p 48ff; Sarah O'Connor, 'Why the Middle-Class Capture of Apprenticeship Matters' *Financial Times* (12 April 2022) < https://www.ft.com/barrier/corporate/da9702e5-43ae-40f8-9fc7-19e564a63b75 > accessed 25 March 2025; Sutton Trust and UCAS, n 102, 6, 23.

[127] Department of Education, 'Apprenticeships Evaluation 2021 - Employers Research Report' (Department of Education 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1077985/Final_AEvS_Employer_Report.pdf> accessed 25 March 2025, 13.

[128] Applications from those with a medical background are, for example, especially sought by this firm: Hempsons, 'Graduate Solicitor Apprenticeships' (*Hempsons*, 2024) <https://www.hempsons.co.uk/careers/graduate-solicitor-apprenticeships/> accessed 25 March 2025.

who had qualified through the CILEx route, a work-based, non-degree route that is not dissimilar to the apprenticeship in structure.

Conclusion

Both routes, then, offer liberty, but of two diametrically opposed kinds. Both, in principle, provide redistribution of opportunity to a wider group of aspirants in accordance with the statutory objective, but the extent to which they offer recognition of difference between groups, and avoid Young's 'oppression' is less clear. What happens to graduates of either route, once they have qualified, and in the remainder of their careers, remains an unknown.

Legal professional education carries with it two immediate overlapping apparent promises over which it has, in fact no control. The first is that graduates proceed into regulated and accredited, successful and profitable professional practice. The second is that such practice is a valid, useful and satisfying endeavour for the individual lawyer. These two promises underlie a third: that even if it is lengthy, expensive, personally damaging and sometimes demeaning (oppressive), the process of professional legal education is worth undertaking.

The early promise of the new regime then, was of choice, flexibility and freedom for applicants to make decisions about how to achieve their qualification goals and for employers and the academy to decide how to support them in doing so. That will, of course, be frustrated if the *route* to qualification, rather than the *fact* of qualification, comes to be more closely interrogated by post-qualification employers of polycentric route candidates than it was when it was more overtly regulated. Ironically a move away from treating status of university as a proxy for suitability may be reversed, or evolve into a close examination by the profession, if not by the regulator, into precisely what was done during QWE. One can envisage, for example, an aspiring solicitor facing a choice between logging QWE of limited quality, knowing that it will entitle them to qualify, but may not be valued by a subsequent employer, or delaying qualification so as to use the limited quality QWE as a springboard to better quality QWE that will not only allow them to qualify but will be looked on more positively by subsequent employers. Such choices made by people often in their late teens and early twenties in exercise of a purported 'freedom' may come to backfire. It seems much more morally and economically risky for an employer, having invested many years of inducting

an apprentice into their own ways and culture, to let them go on qualification, though it is of course not impossible.

Whilst many employers and educators provide highly supportive environments, at its extreme, however, we might say that a non-apprentice might succeed in achieving qualification *despite* their job, and an apprentice *because* of their job. The polycentric route in its most fluid manifestation demands considerable self-reliance. It offers negative liberty but the risk of oppression is not absent. The more sheltered monocentric route demands commitment to the culture of a single organisation. It offers positive liberty and external quality assurance. The effect of the gateway on the work that an appreciate is asked to do may help militate against some of the worst excesses of oppression.

A middle ground, in which an employer offers a supportive, structured, path through the polycentric route, is of course available. Unless such an employer imposes it unilaterally, the critical 'gateway' and SQE assessment that is both chronologically and educationally at the level of a newly qualified solicitor, is not guaranteed.

In principle, both new routes offer redistribution of opportunity. However, telling someone that they are 'free' to take up an opportunity that they cannot afford, did not know about or would not be recruited for renders the concept of freedom nugatory.[129] In treating personal barriers as (merely) questions of capacity, the effect is to place blame for the incapacity on the individual, irrespective of its causes,[130] whether these are social, political or economic or exacerbated by the academy, the regulator or the profession. This is particularly the case when the pervading rhetoric of the authorities harnesses the language of choice and freedom to its own ends.

In some forms, particularly in the apprenticeship, nevertheless, both routes may offer transformative remedies linked both to redistribution and to recognition. This is of limited value if the terminal assessments present a barrier that impedes recognition or when the barrier shifts from getting in to getting on. Fraser's approach to transformative recognition of different societal groups

[129] See in the context of litigation, the example in Ian Duncanson, 'Out of the Enlightenment's Shadow: The Rule of Law in the Politics of Knowledge' (1994) 12 Law in Context: A Socio-Legal Journal 20, 43.
[130] Ibid, 29.

may require revolution rather than evolution. Current investigation into attainment gaps in the SQE is a significant step forward. However, until we see how the expression of the two kinds of liberty translate into meaningful, non-oppressive, post-qualification work, the experiment will not be complete.

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Law in historical fiction: a research-based approach to legal history and legal philosophy

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Abstract

This paper presents teaching experiences in a course offered to bachelor students at a faculty of law in the Netherlands. It aims to enable educators to replicate or utilise (parts of) the experiences in other environments. The paper explores the various characteristics of the course: its niche within the Law and Literature-movement; it being research-based (for students as well as tutors), rather than content- (or canon) based; its structure and objectives; and its role in terms of legal education with an academic context. In that last regard, the paper connects to legal history, thought, and philosophy.

Keywords: Law and Literature; legal education; research-based learning; experimentation in teaching

Introduction

Law plays a fundamental role in society. Law, likewise, plays an important role in fictional scenarios. The literary genre of historical fiction, for example, many times outreaches to law as part of its narrative or expository framework. This paper embraces the claim that literature occupies a place of pre-eminence in the intellectual life of the law.[1] It does so by addressing historical fiction as a tool for legal education. Historical fiction is a flexible and malleable pedagogical tool. It can be useful when trying to achieve the flexibility that law so often lacks, providing an infinite universe of possible solutions, since the various fictional creations can be considered laboratories to study and

* Both Maastricht University. The authors are indebted to the students that took the course over the years and that offered a playfield to develop legal education. Special gratitude goes to Nicole Binder and Sofia Ghezzi for allowing the reproduction of passages of their papers.
[1] John D. Ayer, *The Very Idea of 'Law and Literature'*, 85 MICH. L. REV. 895, 896 (1987).

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understand legal systems.[2] Indeed, historical fiction can offer insights into legal systems or the practice of law.[3] Those insights can help in the process of turning potential lawyers into jurists. Jurists do not limit their studies to the current law as it is, removed of its scientific and social context. Jurists, on the contrary, seek amongst other qualities the origins and the reception of legal institutions in different geographical points and time periods.[4] Reading and studying literature, it can be claimed after all, can lead to judges and lawyers arguing and judging better.[5]

Law is present in fictional settings. Fyodor Dostoevsky's *Crime and Punishment* presents an unsettling narrative of a life haunted by crime; an account echoed in Franz Kafka's *The Trial*, wherein the existential and criminal experience appear to blend even further. Leo Tolstoy, in turn, has shown the limitations of the legal professional, by his indelible, unfortunate judge Ivan Ilyich Golovin:

> Everything was just as he had expected; everything was done just as it always is. The doctor's pretentious self-importance was familiar – he had seen the same in himself at court – and the sounding, and listening, the needless questions with obvious answers, and a heavy look that seemed to say, *Listen, just leave it to us, we'll take care of everything we know precisely how to make the arrangements, it's the same for anybody*. It was exactly the same as at court. This famous doctor cut exactly the same figure to Ivan Ilych that he himself must have cut presiding before the accused.[6]

Literary authors–such as those mentioned above–can skillfully transport readers to foreign lands or distant periods, depicting a certain society at a certain time. These authors enrich the genre of historical fiction (e.g., epics, novels), a genre that existed already in Ancient Greece. Thus, law is an

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[2] Agustín Parise, *Notas sobre la ficción como herramienta para la enseñanza del derecho,* 7:2 ANAMORPHOSIS: REVISTA INTERNACIONAL DE DIREITO E LITERATURA 355, 356 (2021).
[3] Jorge L. Contreras, *Science Fiction and the Law: A New Wigmorian Bibliography*, 13 HARV. J. SPORTS & ENT. L. 65, 65 (2022).
[4] Agustín Parise, *La imperiosa remisión al derecho comparado en las investigaciones de carácter jurídico*, 4:6 REVISTA UNIVERSITARIA LA LEY 36, 37 (2002).
[5] Ronald Tinnevelt, *Literatuur, verhaal en recht: enkele inleidende bemerkingen, in* LITERATUUR EN RECHT: LIBER AMICORUM VOOR PROF. DR. T.J.M. MERTENS 1, 2 (Ronald Tinnevelt ed. 2021).
[6] Leo Tolstoy, THE DEATH OF IVAN ILYICH (2008) 43.

important component in the creation of these fictional settings. Law often serves as an anchor to a reality that is familiar to readers of a fictional setting and is thus instrumentalized by authors of fiction to bridge fiction and reality.[7] Law students can benefit from exploring that interaction between law and fiction.

Legal education calls for students to take a leading role in their own learning process. Instructors must facilitate activities that stimulate student participation and the acquisition of skills and competences that will be of value throughout their professional life.[8] This paper is divided into two parts, and it shares teaching experiences that took place in a bachelor course in law that involves historical fiction, legal history, and legal philosophy. First, the paper offers information on the context in which such a course can be placed. There, attention is devoted to two fundamental pillars of the course: law in literature and research-based learning. Second, the paper presents the teaching experiences in that course as a case study. There, information is provided about the course, including its structure and aims. That part also elaborates on the constant need to revisit and improve legal education through the lens of the course. Above all, the paper aims to reflect and to engage in a dialogue with the reader on the place of (historical) fiction in legal education, as a pedagogical instrument, and shares insights, best practices, and takeaways to this end.

Nurturing Context

Historical fiction, legal history, and legal philosophy can interact to produce a pedagogical tool. Students can indeed benefit from that interaction. This

[7] Parise, *supra* note 2, at 357.
[8] M.C. Saavedra Serrano, *Aprendizaje Cooperativo basado en la Investigación en la Educación Superior*, 16:1 REDU. REVISTA DE DOCENCIA UNIVERSITARIA 235, 236 (2018).

benefit has been claimed by scholars that embrace the law in literature movement and that endorse the research-based learning method of education.[9]

Law in Literature

Law and literature offers a fertile ground for the exploration of legal history and legal philosophy. Courses that embrace the tenets of law and literature can be termed reflexive courses, where students are invited to reflect on how the law relates to its context.[10] In such courses, the students are ultimately invited to evaluate human actions.[11] For example, to address the already mentioned Dostoevsky's *Crime and Punishment* or Kafka's *The Trial* in a course at law school, participants must inevitably engage with the question of the rationality and morality of the protagonists in the novels. A reflexive approach to education from the law and literature perspective can be traced back in time, with an impetus triggered by the 1970s seminal work of James Boyd White.[12] There, the author indeed invited students to pursue the following instinct:

> I am asking you not to follow direction and example but to trust and follow your own curiosity; to work out in your imagination various future possibilities for yourself, defined by the real and imagined performances of your mind at its best; and to subject what you discover to criticism and speculation.[13]

[9] Richard Posner highlighted how law and literature has become an established field, to the extent that it is under threat because of its own popularity. That advocate for an alternative approach to legal science stated that: "law and literature is a rich and promising field; and if the first edition of this book had rather a negative and even defensive character […] that was more than 20 years ago and the negative tone was gone by the second edition. But the further development of the field is endangered" RICHARD POSNER, LAW AND LITERATURE (2009) 6. More recently, though, François Ost saw the need to shield "those poets and dramatists' from Plato's legislators who would ban them from the city, and explain the various advantages made possible in the field: aesthetic and humanist, moral and civic, and technical." François Ost, *Prologue, in* MARÍA JOSÉ FALCÓN Y TELLA, LAW AND LITERATUREXi, xii (2015).

[10] Bald de Vries, *Law, Imagination and Poetry: Using Poetry as a Means of Learning*, LAW AND METHOD 1, 2, 12 (2019).

[11] E. Irem Aki, *Teaching Philosophy and Ethics through a Law and Literature Course in Today's Turkey*, LAW AND METHOD 1, 4 (2018).

[12] See JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION – 45TH ANNIVERSARY EDITION (2018).

[13] *Id.* at xliv.

An initial distinction has to be made when looking at law and literature as a pedagogical tool in legal education. On the one hand, there is law in literature, where scholars can explore legal themes within historical fiction. John H. Wigmore was one of its main proponents,[14] and had stated already in 1913 that to explore legal history and to "appreciate the bitter conflicts and their lessons for today this deepest sense of reality for the past we shall get only in the novels, not in the statute books or the reports of cases."[15] On the other hand, there is law as literature, where scholars can explore the literary merits of a legal text. Benjamin N. Cardozo was one of its main proponents,[16] with a special interest in the expressions within court decisions.[17]

Law in literature–being central to this paper–invites to view how the larger culture or the *outside world* perceives law and the legal profession.[18] Attention here can be devoted to – amongst others – the role of advocates, the proceedings followed, and the impact of legal doctrines.[19] If perceptions are accurate (but also if being inaccurate) the student can learn of biased, exaggerated, and/or stereotyped portrayals of legal actors and events.[20] After all, law finds its way into the interstices of culture[21] and an excursion into law in literature can assist in understanding the larger role of law in society.[22] Here, the *schönen Literatur* or the *belles lettres* that tell a story with a legal reference

[14] See, for example, John H. Wigmore, *List of Legal Novels*, 2 ILL.L.R. 574 (1908).
[15] John H. Wigmore, *Introduction*, *in* J.M. GEST, THE LAWYER IN LITERATURE vii, viii-ix (1913). Indeed, John H. Wigmore spoke of: "[…] a higher standpoint yet. For the novel–the true work of fiction–is *a catalogue of life's characters*. And the lawyer must know human nature." See John H. Wigmore, *List of One Hundred Legal Novels*, 17:1 ILLINOIS LAW REVIEW 31 (1922-1923).
[16] See, for example, Benjamin N. Cardozo, *Law and Literature,* 14 YALE REVIEW 699 (1925).
[17] Michael Pantazakos, *Ad Humanitatem Pertinent: A Personal Reflection on the History and Purpose of the Law and Literature Movement,* 7 CARDOZO STUD. L. & LITERATURE 31, 38 (1995).
[18] Lucia A. Silecchia, *Things are Seldom what they Seem: Judges and Lawyers in the Tales of Mark Twain,* 35 CONN. L. REV. 559, 571 (2003); and Carolyn Heilbrun and Judith Resnik, *Convergences: Law, Literature, and Feminism,* 99 YALE L.J. 1913, 1936 (1990).
[19] William H. Page, *The Place of Law and Literature,* 39 VAND. L. REV. 391, 393 (1986).
[20] Silecchia, *supra* note 18, at 571
[21] David A. Skeel, Jr., *Lawrence Joseph and Law and Literature*, 77 U. CIN. L. REV. 921, 922 (2009).
[22] Debora L. Threedy, *The Madness of a Seduced Woman: Gender, Law, and Literature*, 6 TEX. J. WOMEN & L. 1, 15 (1996).

can be examined by readers as a means to learn something about the law:[23] valuable legal lessons can be drawn from historical fiction.[24]

Research-Based Learning

Engaging students and tutors in research activities can result in a method of active learning that offers a playing field for the exploration of legal historical and legal philosophical aspects of the law. Methods of active learning such as those including research- and problem-based learning empower students by placing them as active entities in the learning process, being the ones that create rather than receive knowledge.[25] Advocacy for a research component in education has been traced back to the early-nineteenth century reforms in education proposed by Wilhelm von Humboldt.[26] More recently, the research component has been divided into four clusters: research led, research oriented, research tutored, and research based.[27] All clusters involve students and tutors engaging in different capacities and in different manners with research.

Research-based learning–being central to this paper–expects active and authentic research from students.[28] Students ought to be empowered to explore their research interests and to address questions that emerge in that exercise.[29] In the learning process, students are trained on the skills needed to become researchers and the divide between instructor and students is therefore

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[23] Edward Schramm, *Law and Literature*, JA 2007 581, 584 (2007).
[24] John M. DeStefano, *On Literature as Legal Authority,* 49 ARIZ. L. REV. 521, 542 (2007).
[25] Julieta Marotta and Agustín Parise, *El aprendizaje basado en problemas (ABP) y su aplicación en un ámbito multicultural*, 38 REVISTA ACADEMIA 115, 124 (2021); and MAGGI SAVIN-BADEN AND CLAIRE HOWELL MAJOR, FOUNDATIONS OF PROBLEM-BASED LEARNING 35-37 (2004).
[26] See WILHELM VON HUMBOLDT, DER KÖNIGSBERGER UND DER LITAUISCHE SCHULPLAN (1809), *available at* https://germanhistory-intersections.org/de/wissen-und-bildung/ghis:document-7 (last visited: June 25, 2024). See also Dirk Ifenthaler and Maree Gosper, *Research-Based Learning: Connecting Research and Instruction, in* CURRICULUM MODELS FOR THE 21ST CENTURY: USING LEARNING TECHNOLOGIES IN HIGHER EDUCATION 73, 74 (Maree Gosper and Dirk Ifenthaler eds. 2014); and Kristi Joamets and Maria Claudia Solarte Vasquez, *Regulatory Framework of the Research-Based Approach to Education in the EU,* 10:3 TALTECH JOURNAL OF EUROPEAN STUDIES 109, 112 (2020).
[27] For more information on these clusters see generally, Mick Healey*, Linking Research and Teaching: Exploring Disciplinary Spaces and the Role of Inquiry-Based Learning, in* RESHAPING THE UNIVERSITY: NEW RELATIONSHIPS BETWEEN RESEARCH, SCHOLARSHIP AND TEACHING 67 (Ronald Barnett ed. 2005); and MICK HEALEY AND ALAN JENKINS, DEVELOPING UNDERGRADUATE RESEARCH AND INQUIRY (2009).
[28] EDLAB, THE UM HANDBOOK FOR PBL & RESEARCH SKILLS 72 (2017).
[29] Ifenthaler and Gosper, *supra* note 26, at 74.

minimized.[30] This type of learning also invites for student engagement,[31] a fundamental aspect when undertaking research activities. Further, this method of active learning increases professional qualifications, including presentation and communication skills,[32] since the students are no longer the audience but become participants.[33] However, it is not only the student's proactive role in the course, but also a certain passivity of the student that is an asset here. More and more, the role of affect and emotion in the legal profession and in legal education is acknowledged.[34] Literature is arguably the greatest treasure trove for reaching understanding and attaining empathy.

Students are expected to be part of a community of thinkers that can engage in a critical way towards the development of scientific truth.[35] Therefore, a research-based learning experience can further benefit from teamwork, where students work together towards a common objective[36] (for example, participating in a round-table, creating an exhibit). Previous studies showed that students that work as part of a team were able to gain the ability to enhance analytical skills, problem solving, data management, and research skills.[37] In brief, the positive effects of research-based learning can be enhanced by means of collaborative efforts.

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[30] *Id.* at 75.
[31] Roeland van der Rijst, *The Transformative Nature of Research-Based Education: A Thematic Overview of the Literature, in* RESEARCH-BASED LEARNING: CASE STUDIES FROM MAASTRICHT UNIVERSITY 3, 18 (Ellen Bastiaens et al. eds. 2017).
[32] Janina Thiem et al., *How Research-Based Learning Affects Students' Self-Rated Research Competences: Evidence from a Longitudinal Study Across Disciplines*, 48:7 STUDIES IN HIGHER EDUCATION 1039, 1039 (2023).
[33] *Id.* at 1040.
[34] Alan M. Lerner pointed towards an affective environment in which learning develops. See Alan M. Lerner, *From Socrates to Damasio, from Langdell to Kandel: The Role of Emotion of Modern Legal Education*, *in* AFFECT AND LEGAL EDUCATION: EMOTION IN LEARNING AND TEACHING THE LAW 168 (Paul Maharg and Caroline Maughan eds., 2016).
[35] Joamets and Solarte Vasquez, *supra* note 26, at 112.
[36] Saavedra Serrano, *supra* note 8, at 237.
[37] *Id.* at 237-238.

Case Study

Structure

Law in Historical Fiction sits in the context of Maastricht University's (The Netherlands) MaRBLe-programme (Maastricht Research Based Learning).[38] MaRBLe is an honors programme that allows students to do interdisciplinary research, while being supervised by instructors.[39] *Law in Historical Fiction* is imbedded in the curriculum of the Law Faculty. It combines law in literature, legal history, and legal philosophy. The course was designed in 2016 and took place for the first time in 2020.

Law in Historical Fiction spreads over one academic semester. An overview of the structure of the course is provided in Figure 1 below. Students work in close collaboration during the 24 weeks of the course, it should be noted.

Week	Meeting	Week	Meeting
1	Seminar 1	13	Writing Focus Time 1
2	Research Focus Time 1	14	Mid-Term Check Point
3	Visit to Special Collections	15	Seminar 6
4	Research Focus Time 2	16	Writing Focus Time 2
5	Seminar 2	17	Movie-Debate
6	Research Focus Time 3	18	Seminar 7
7	Wiki Session	19	Writing Focus Time 3
8	Seminar 3	20	"Dress Rehearsal"
9	Research Focus Time 4	21	Round-Table Presentations
10	Seminar 4	22	Seminar 8
11	Research Focus Time 5	23	Editing Focus Time 1
12	Seminar 5	24	Deadline Research Paper

Figure 1: Structure of the Course

The course offers eight, 90 minute, sessions that resemble the structure of a seminar. Ideas are exchanged and developed during these sessions. In the first part of each seminar, one of the course coordinators or a guest lecturer presents a perspective on a topic related to the course, either on methodology or on substantive research. These guest lecturers are legal scholars working either at

[38] For information on MaRBLe see, https://edlab.nl/excellence/marble/; and https://edlab.nl/excellence/marble/#1510222472632-b1465980-ea7f (last visited: June 25, 2024).

[39] On other experiences implementing MaRBLe courses at the Law Faculty see, Bram Akkermans, *Faculty of Law: MaRBLe for Lawyers, in* RESEARCH-BASED LEARNING: CASE STUDIES FROM MAASTRICHT UNIVERSITY 135 (Ellen Bastiaens et al. eds. 2017).

Maastricht University, or other institutions from across the globe.[40] Presentations from recent years homed in on themes such as the legal reasoning in Shakespeare's historical tetralogies, the 1834 Poor Law and *Oliver Twist*, and James Baldwin's *The Fire next Time*. The presentations by guest lecturers help students to articulate further lines of research or approaches to their own materials. In the second part of each seminar, the guest lecturer interacts with students to offer insights and perspectives on the different projects of the students. Besides these seminars, this course offers a mid-term check point. On that occasion, students have a plenary session with the course coordinators to soundboard and test the progress of their projects. Feedback is offered and students are able to share the challenges and advantages that they encountered so far in their projects.

The conclusion of the course aligns with an annual roundtable on law and popular culture, on which students present the results of their projects. This roundtable is open to the Maastricht community at large, and offers a forum for students to present their results in a stimulating and enriching environment. Importantly, the roundtable is not restricted to fiction or literature, but calls for contributions within the law and popular culture-movement at large, thus increasing the interdisciplinary exposure on the students.[41] Students are offered feedback on their projects and are able to reflect on the paths to follow during the final steps of their projects. The roundtable is anticipated with a "dress rehearsal" session with the course coordinators in which students share their presentations and receive timely feedback.

The various seminars and checkpoints of the course are punctuated with weeks devoted to autonomous study, or "focus time." This course allows for nine focus-time weeks. The five first focus time weeks are devoted to research, while the three that follow are set aside for writing, leaving the last one for

[40] Guest lecturers were affiliated, for example, with Universidad de Buenos Aires (Argentina), Keele University (England), and University of Glasgow (Scotland). Seminars take place in small seminar rooms, via an online platform, or in a hybrid format, depending on the availability of the guest lecturers.

[41] The importance of interdisciplinary education for the legal profession was underlined in Mireille Hebing et al., *Human Trafficking and the Law: The Importance of Interdisciplinarity in Learning and Teaching*, *in* MODERNISING EUROPEAN LEGAL EDUCATION: INNOVATIVE STRATEGIES TO ADDRESS URGENT CROSS-CUTTING CHALLENGES 34–35 (2023). See also, Tomas Berkmanas, *Innovative and Interdisciplinary Contents and Programmes in Graduate Legal Studies: Lessons Learned*, in LEGAL EDUCATION AND JUDICIAL TRAINING IN EUROPE - THE MENU FOR JUSTICE PROJECT REPORT 93–105 (Tomas Berkmanas et al. eds., 2013).

editing. This division of focus time weeks responds to the needs of a research-based project, in which the research phase is more extensive than the writing and editing phases.

One element deserving particular attention is the collaboration with the university library. Maastricht University Library has been collaborating since 2014 with Wikimedia Nederland in the development of several educational programmes.[42] By participating in these programmes, students are given the opportunity to improve their academic information literacy skills,[43] as well as developing their academic citizenship, by gaining experience in analysing historical literature and by writing and publishing a Wiki-entry on their subject. Recent studies indeed pointed that "opportunities to integrate Wikipedia as both a societal benefit and pedagogical tool only increase in higher-level courses."[44] *Law in Historical Fiction* includes a Wiki session with the Maastricht University Special Collections curator. Another way to collaborate with the university library consists in a guided tour of its special collections. This visit is also offered by the special collections curator and provides insights on the value of books as tools to explore the law across time and space. Furthermore, in opening up this historical perspective on the book and the law, it invites students to imagine law, not only as a standing practice, but also as a conversation over time, in which they can participate.

A final point relates to law and cinema. Students are invited as part of the course to participate in the screening of a movie, as a further example of the interaction of law and historical fiction. The screening is open also to students and staff beyond the course. The event is followed by an informal debate about the movie. The course coordinators guide the debate and raise questions that trigger academic dialogue. After all, fiction – in any of its forms – serves as a lens to see the world from a different perspective[45] and lawyers should learn

[42] For more information on these efforts see, Odin Essers et al., *Where History Meets Modern: An Overview of Academic Primary Source Research-Based Learning Programs Aggregating Special Collections and Wikimedia, in* WIKIPEDIA AND ACADEMIC LIBRARIES: A GLOBAL PROJECT 35 (Laurie M. Bridges et al, eds. 2021).
[43] Similarly to some of the arguments presented in the context of the ongoing debate on artificial intelligence, instructors should devote efforts to teach how to use Wikipedia appropriately. See Diane Murley, *In Defense of Wikipedia,* 100 LAW LIBR. J. 593, 595 (2008).
[44] Eun Hee Han et al., *Disrupting Data Cartels by Editing Wikipedia*, 25 YALE J. L. & TECH. 123, 142 (2023).
[45] Ande Davis, *Lessons from the Future: What the Law Stands to Learn from Science Fiction*, 90-DEC J. KAN. B.A. 22, 23 (2021).

from other non-legal storytellers, even when having to leave behind their "often self-serving ethnocentrism."[46]

There is an essential dynamic operative in *Law in Historical Fiction*. On one level, students are engaged in identifying between law as represented in works of fiction, and comparing it to the relevant historical law.[47] Inevitably, this work leads to questions about the historical accuracy of the fictional legal accounts.[48] On another level, students are confronted with the question whether any misrepresentation or distortion of historical law in a novel is in fact a deliberate fictional intervention, whereby fiction assumes the role of the legal critic. This means that the legal historical project is always married to an exegetical-critical question. The fundamental reason for the inevitability of this double focus is that it is impossible for any fiction to *completely* coincide with actual historical law. Indeed, that impossibility derives – as with Marcel Duchamp's *Fountain* of 1917 – already from the context or the register to which fiction will invariably lead readers. The further advantage of this avenue is to begin to see how *law itself* does not coincide with itself, which would bring readers beyond the propaedeutic stages of the development expected from any jurist. Indeed, the course underlines legal education as an academic scholarship that responds to twenty-first century needs.[49]

Aims

The course has multiple aims. The course is designed to train students in doing authentic research, in a very hands-on, practical way. In particular, this means

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[46] Philip N. Meyer, *Law Students Go to the Movies*, 24 CONN. L. REV. 893, 894 (1992).
[47] James Boyd White already in 1973 invited to look into the past. He stated in an exercise dealing with Edmund Burke: "What century, what place in English history fits [Burke's] description? He speaks of the fourteenth century: do you believe that the British Constitution, British values, were then in existence? What does Burke mean when he speaks of the past? Is what he says of it true or false?" WHITE, *supra* note 12, at 898.
[48] Russ VerSteeg correctly stated that: "one is left to wonder whether the social and legal landscape that [works of fiction] depict reflects the social and legal landscape that existed at the time in which the stories are supposed to have taken place or at the time that the works were written. This problem is perhaps inherent in any study of law that relies on historical literature. Nevertheless, it is a problem that must be acknowledged. Therefore, it is difficult, if not impossible, at this juncture, to say what law is reflected […]."
Russ VerSteeg, *Law in Ancient Egyptian Fiction*, 24 GA. J. INT'L & COMP. L. 37, 43 (1994).
[49] A possible foundation for this figure of thought that adds fiction to law can be found in Emmanuel Lévinas's foray into aesthetics in his remarkable essay *Reality and its Shadow*. See EMMANUEL LÉVINAS, COLLECTED PHILSOPHICAL PAPERS 1 (1987).

archival, library research: students have to investigate the law of a certain jurisdiction at a specific preterit time. In the process of acquiring these capabilities, students also learn–at the substantive level–about legal history and legal philosophy. They read about legislation and jurisprudence; they compare between preceding and successive eras or between relevant jurisdictions, or between legal history and contemporary law. Finally, by doing this research on the representation of law in fiction, students are exposed to the idea, already mentioned, that the law does not coincide with itself. The law is not what it says in a legislative document, as it always requires interpretation and thus involves an experiential dimension.[50] For any academic working with legal materials (and for any academic and their materials altogether), there has to be a moment to come to terms with the fact that these materials do not speak for themselves, and demand interpretative acts. Indeed, the possibility of fiction is prior to law.

Experimentation

The course embraces and enhances the tenets of research-based learning. *Law in Historical Fiction* is a law and literature course offered in the Netherlands that does not commit to a particular canon.[51] Instead, it provides in *examples* of research done within the field of law in historical fiction: the seminars presented by the course coordinators and guest lecturers introduce students not to a particularly established pre-existing knowledge, but to the business of research. Indeed, the seminars establish a consecutive "essay clinic" wherein students have the opportunity to discuss their work along its various stages: from choosing the right piece of fiction, to deciding on the pertinent research question/s, to selecting relevant primary and secondary materials, to writing and editing, and, finally, to presenting the research to an audience. Reflection on the research and writing processes takes place during the entire course.

The course is highly experimental. It recommends experimentation at different levels, of which a few will be mentioned here. The students and educators within the course are virtually free at deciding on their core materials; the sole requirement is that a plausible connection to historical fiction can be made. The

[50] There is ample philosophical support for this hermeneutical argument, that, through Giorgio Agamben, Jacques Derrida, and Walter Benjamin, perhaps finds its original source in Tyconius' *Liber Regularum* (c. 382 AD). The connection is established in GIORGIO AGAMBEN, THE MYSTERY OF EVIL: BENEDICT XVI AND THE END OF DAYS 24 (2017).
[51] See, for other Dutch experiences, a list of courses available at https://lawandliterature.nl/nl-nl/onderwijs (last visited: June 25, 2024).

student should be able to find a legal dimension in the historical fiction and contrast it to the law and/or legal philosophy in reality, at that time and place. Experimentation takes place in different ways in the course. For example, starting in the academic year 2021-2022, collaboration started with the University Library. As already mentioned, the curator offered one session exploring the Special Collections of the library. One year later, collaboration with University Library was increased by including the already mentioned Wikipedia session. In the academic year 2023-2024, an alumnus of the course joined as guest lecturer, showing an additional way of gaining competencies and skills, including teaching, presenting to an audience, and dealing with substantive questions. Experimentation continued in that same year, when the course included a movie-debate around the screening of *Twelve Angry Men* (Sidney Lumet, 1957). There, students were exposed to another way of looking at law through the lens of historical fiction, enlarging the scope towards a manifestation of popular culture. These features – the liberty of choosing the topic of research papers, the experience of seeing peers teach, exchanging ideas after screening a movie, leafing through rare books in the library, the idea of writing a Wiki-entry about a novel – highlight to students how doing research involves this principle of natality,[52] of new beginnings, and the way in which it lies within their grasp. All these elements of *Law in Historical Fiction* encourage doing research at a very practical level.

Awareness

The success of the course relies heavily on the wherewithal of the students to "play the game," particularly regarding their capacity to inspire and enthuse one another. In that respect, it is important that the group is small,[53] in order for there to emerge the tight-knit collaborations wherein young researchers can mutually bounce off ideas. A student-faculty ratio of 5:1, hence working in close interaction, would presumably be ideal, with instructors accompanying the learning process. Instructors prepare in light of the law and legal ideas that are presented in the historical fictions that students address in their different projects. Guidance is therefore tailor-made for each project. Triggering actions

[52] The phrase is from HANNAH ARENDT, THE HUMAN CONDITION 9 (1958). The concept was anticipated, though, in her earlier THE ORIGINS OF TOTALITARIANISM (1951), as well as in her doctoral thesis *Der Liebesbegriff bei Augustin. Versuch einer philosophischen Interpretation* (1929).

[53] For example, in past years, the number of students has been set at four. It is worth repeating that students are selected from the honors programmes, and hence have an intrinsic motivation to learn and to excel in their experiences.

and awareness by the instructors on the strengths and limitations is of the essence in this course.

Challenges can relate to the setting of expectations. The course works on the basis of research-based learning. Accordingly, students must be made aware that they cannot afford to remain passive within the environment provided by the course. Indeed, the success of students in the course is probably determined over the course of the first two seminars when important decisions about the projects are made and when students set the approach they will take to the course. Arguably, the course would have to ward off the objection of eclecticism: can it sustain the freedoms given to students and instructors? It would be a conversation worth having whether and how the scope could either be narrowed down, or defined in some other way, up front. Perhaps, a meta-historical argumentation that explains the different components of the course and their place in the course and in the development of skills could be presented during the first seminar. Such an argumentative approach–explaining the rational within the course structure–could instigate an early discussion on the expectations of all members in the course. Educators wanting to create a similar course could make their own choices in light of their learning objectives, it should be noted.

One discussion that proved particularly challenging was the inclusion of historical legal philosophy in the course. One position was to allow for any examination of legal philosophy through historical fiction. The argument here was that the validity of works of thought, unlike those exclusively of law, bears no connection to state sovereignty and the power to legislate; fiction and philosophy both are the work of the imagination. For this reason, the assumption that the dynamic between law and historical fiction will repeat itself when fiction and philosophy are at stake seems implausible (e.g., if a student were to examine George Orwell's *1984* and legal theory). Yet the countering position, to insist on legal thought contemporary to the historicity of the fiction, was ultimately decisive. The reason for this is that the central conceit of the course is to demand that students make an intra-historical comparison: from historical fiction to historical law, or, if preferable, to historical legal thought or intellectual legal history. Indeed, the very justification of the course lies in the old humanist conviction that law, like an historical fiction, should be read as representative of a particular society: it is

the timeliness, not a supposed timelessness, of law that *Law in Historical Fiction* offers as an experience.[54]

Academic Development

Law in Historical Fiction generates a number of activities and deliverables. The course is assessed on the basis of individual, 8000 word research papers that students, optionally, may submit as a Bachelor's essay. Nevertheless, the course includes many activities designed to appeal to the student's taste for experimentation. For one, the conclusion of the course coincides with the (already mentioned) roundtable. Importantly, the roundtable enhances the element of experimentation within the course, as it gives students a forum to present, and invites students to claim ownership of their research, while also introducing students to the broader law and popular culture-movement.[55] Students and instructors are partners in the learning and teaching experience, and this partnership has been deemed "one of the most important issues facing higher education in the 21st century."[56] In addition, the stimulating academic dialogue that takes place in the context of the roundtable can trigger interdisciplinary integration that may be instrumental in the flourishing of disciplines,[57] such as law in literature. All these activities triggered peer-motivational spirals that led to successful experiences for students and educators, alike. No members want to miss out of the experiences, being all involved in the different activities and confirming an unwillingness to leave members behind.

The course experiments with Wiki-writing, as already mentioned. Students receive instruction on the creation of Wiki-entry, but the work itself remains optional.[58] On the one hand, within the Wiki-community, there exists a good sense of responsibility, so presumably the step to publish an entry should not be taken lightly. On the other hand, Wikipedia is a very prominent channel for

[54] In light of the abovementioned meta-historical argumentation, the course could do more to gather and interpret shared motifs and ideas between legal historical periods and narrative fictions. This could further bolster the connection to the course with legal philosophy.
[55] This movement includes beside literature other fields such as cinema, fine arts, comic books, and games.
[56] Joamets and Solarte Vasquez, *supra* note 26, at 125.
[57] *Id.* at 126.
[58] For an example of the integration of Wiki into the law curricula see, John C. Kleefeld and Katelyn Rattray, *Write a Wikipedia Article for Law School Credit--Really?*, 65 J. LEGAL EDUC. 597, 598 (2016).

popular culture, and creating the entry would further synchronize the course with the research being done on law and popular culture at the Law Faculty. For this reason, developing the session further would appear valuable.[59] The movie-debate provides another nexus between historical fiction, legal history, and legal philosophy. Much less exacting on the students compared with the Wiki-exercise, its uses can be developed further, for instance by adding an introductory lecture to the movie, and allowing more space for the debates that follow the screening.

Students that successfully complete the course demonstrate academic growth. This is evident from the quality of the oral presentations during the round-table and from the argumentative lines presents in their research papers. A brief overview of a sample of representative research papers seems warranted at this point. *Oliver Twist* was already mentioned. This remarkable piece of research put Dickens' second novel as the hinge between the old, Elizabethan Poor Law and its successor of 1834, the new Poor Law, demonstrating how *Oliver Twist* offers a damning critique of the injustices of Industrialized, Victorian age. The work by the student did everything the course aims for: it explained historical law (in this case two eras of historical law), demonstrated its representation within fiction (in this case, the law and law enforcement's cruelty was sometimes exaggerated, yet also sometimes euphemized), and explained how a piece of fiction satirizes or critiques the law. As expressed by the student in the conclusions of the paper that she wrote for the course:

> however heavy-handed and melodramatic Dickens' depiction of Oliver's experience in the Mudfog workhouse and at the hands of its officers may be, he still effectively portrays the very real cruelties and indignities of the New Poor Law. *Oliver Twist* thus offers a shocking and memorable critique of

[59] Indeed, as noted by Normann Witzleb: "Wikipedia assignments are a welcome addition to the traditional writing tasks for students. Requiring students to engage actively with the content of Wikipedia, its production and limitations will enable students to become more critical and self-aware in their use of this now ubiquitous online resource. It also improves student skills in writing in a different environment and for a wider audience, while at the same time improving student engagement through a 'real world' exercise." Normann Witzleb, *Engaging with the World: Students of Comparative Law Write for Wikipedia*, 19 LEGAL EDUC. REV. 83, 96 (2009).

> the key legislative changes to poor relief wrought by the infamous 1834 New Poor Law.[60]

Another excellent research paper examined Shakespeare's *The Merchant of Venice* in the context of historical Venetian law. The question about the enforceability of the "pound of flesh" contract was raised. Particularly impressive in this case was how the student engaged in archival research, and was able to create new collaborations with colleagues in Italy. The student stated in her paper that she:

> analysed *The Merchant of Venice*'s representation of the contract bond between fiction and reality. [Her paper] aimed at renewing the possibility of legal-literary analysis of Shakespeare's comedy by applying to it the reality of its Venetian context, instead of the largely used Elizabethan context. [...] As a matter of fact, the intention of the paper was to evaluate to what extent the inviolability and enforcement of Shylock's bond stemmed from popular culture and legal historical reality of Venetian law in the sixteenth century. […] For the purpose of evaluating to what extent Shakespeare stemmed from legal historical reality, the essay found that the first depiction of the bond by the characters of the play was in line with Liber I Chapter XXXIII [of the *Statutum Novum* by Jacopo Tiepolo of 1242], as the bond was seen as inviolable. Nonetheless, the second interpretation of the bond, namely Portia's literal interpretation, and Shakespeare's choice of court were not in accordance with the legal historical reality of its Venetian setting.[61]

These various activities in the course constitute an entry point to a nebulous, dynamic field of research. By engaging in as many of such points of access as possible, students acquire practical expertise of academic life. Indeed, the

[60] Nicole Binder, *Barbarism begins at Home. "Oliver Twist" and the 1834 New Poor Law: Dickens' Critique of the Institutional Victimization of the Poor under the Early Victorian System of Poor Relief*, paper submitted for the course *Law in Historical Fiction* at Maastricht University on 14 July 2023 (copy on file with the authors of this paper).
[61] Sofia Ghezzi, *The Inviolability and Enforcement of Shylock's Bond: A Look into Sixteenth-Century Venetian Contract Law through Shakespeare's Eyes*, paper submitted for the course *Law in Historical Fiction* at Maastricht University on 9 July 2020 (copy on file with the authors of this paper).

course aspires to help students navigate their own, individual crossings of the Rubicon.

Improvement

Law in Historical Fiction is particularly strong as a space to experiment with change. This way of being under-determined can just as easily be interpreted as a lack. Courses can (and should) always be improved. *Law in Historical Fiction* can improve further, for instance by foregrounding better the dynamic between research and experimentation. It appears that the latter component, which is essential to the course, is not sufficiently conveyed to students. Course coordinators could attempt to offload some of the possible anxieties around experimentation by placing limitations on the scope of projects. Indeed, the limitation on the uses of legal philosophy is a case in hand. Implementing changes to the structure of the course could also offer a field for improvement, for example by placing seminars in chronological order. So while guest lecturers would still be free to choose their subjects, the course coordinators would curate these choices in a way that is historically plausible. This would have the further advantage of allowing for literary traditions and influences to be exposed and addressed within the course, while keeping with a line-up that is flexible.

The course coordinators invite students to offer feedback halfway through the course and towards the end. Those timely interventions can help students (re)direct their learning experiences. They can also preserve the notion of continuous improvement which is at the heart of the course. Dialogue amongst students and educators is indeed paramount when aiming to attain a successful experience. Students have expressed an encouraging degree of enthusiasm over the course in past years. Course coordinators have experienced gratifying moments when witnessing that students take ownership over their material and speak with authority about historical fictions, during seminars, and especially in the roundtable.[62]

[62] Course coordinators have no information about how the course has influenced the performance of students beyond the course. Speculation is possible when considering the transfer of skills related to, for example, the development of lines of argumentation, the working with primary and secondary sources, and the attaining of writing and presentation techniques. These skills are fundamental tools when pursuing academic and/or professional careers.

Concluding Remarks

White mentioned back in 1994 – in the context of teaching law and literature – that instructors learn from the work of each other.[63] Sharing best practices and ideas is of the essence in that learning process. This paper shared teaching experiences that took place in a bachelor course in law that involves historical fiction, legal history, and legal philosophy. The course benefits from subscribing to the narratives of law in literature and research-based learning. The paper pointed to structure, aims, and potential improvements. The course coordinators use the course as a sandbox where innovation is always at hand, benefiting from the ample time with students provided by the 24 weeks of the course and the student-faculty ratio. The paper indeed invited readers to reflect on the place of historical fiction as a tool for legal education by sharing an experience that combines research-based learning and a law in literature approach.

Considering legal education primordially as vocational training risks obscuring its significance as academic development and *Bildung* of researchers. It is therefore crucial to spend every effort at introducing and emphasizing the elements of fiction and possibility, of empathy and contingency, and of experimentation and subjective experience. Indeed, more and more, legal education has a stake in comparative law, on global law, rather than exclusively on domestic jurisdictions.[64] The focus on fiction is, in fact, the next step within this development, as it demands that students compare between current law and legal history and philosophy, between law in a preterit reality and law in historical fiction. Ultimately, students will be able to evaluate how law is a fiction, and how fiction inaugurates law.

[63] James Boyd White, *Teaching Law and Literature*, 27:4 MOSAIC: AN INTERDISCIPLINARY CRITICAL JOURNAL 1, 1 (1994).
[64] See, for example, Jan M. Smits, *European Legal Education, or: How to Prepare Students for Global Citizenship?*, 45 LAW TEACHER 163 (2011).

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The role and impact of relying on digital technologies in contemporary legal education: an empirical study

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Abstract:

This paper critically evaluates the role and impact of relying upon digital technologies to deliver legal education within Higher Education Institutions (HEIs). HEIs now use and rely on digital technologies as a key component of their delivery of teaching and learning. However, despite this, many students do not have digital access. Therefore, there is the risk that some students become digitally excluded and thus unable to (fully) participate and engage with their learning. While HEIs had to rely exclusively on this delivery method during the global COVID-19 pandemic, many have now moved to a hybrid or blended approach to teaching and learning, retaining many of the digital provisions used during the pandemic. The paper seeks to investigate the risk of digital exclusion: its causes, nature, and effects.

To do this, we engage in qualitative and quantitative research to examine whether providing students with a tablet computer affects students' perception of the learning environment, student satisfaction, student performance and attainment, and removes barriers to learning owing to digital exclusion. We critically examine our findings. Notably, we offer tangible and practical recommendations to providers and teachers of legal education to ensure that all students have digital access to promote a more inclusive and supportive learning environment for students.

Keywords: Legal education; digital technologies; digital access; digital exclusion; student equity.

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Introduction

The landscape and provision of legal education within Higher Education Institutions (HEIs) have changed substantially over recent years.[1] In particular, systemic changes at HEIs mean that HEIs now use and rely upon digital technologies as a key component of their delivery of teaching and learning. Consequently, digital participation by students is now an *obligation*, not a choice. However, with this development comes the risk that some students become digitally excluded and thus unable to (fully) participate and engage with their learning. It is our view that it is the responsibility of HEIs to ensure that there is equity of learning for *all* students. Therefore, in the context of digital participation, this means a commitment to ensuring that all students have digital access in order to complete their studies satisfactorily.

The academic literature and governmental policy reports that discuss digital technologies within HE have typically focused on either specific technology as pedagogic tools (e.g., Virtual Learning Environments (VLEs)) or digital access/learning in the context of, and in response to, the global COVID-19 pandemic. Unfortunately, little within the pedagogic discourse critically examines the role and impact of using and relying upon digital technologies to deliver legal education from an access perspective. This is what this paper seeks to do.

This paper uses qualitative and quantitative research to examine the implications of embedding digital technologies in legal education. In doing so, we offer tangible and practical recommendations to providers and teachers of legal education to ensure that *all* students have digital access to promote a more inclusive and supportive learning environment for students. To do this, the paper is divided into five parts. First, we evaluate the status quo and implications of contemporary legal education. Second, we introduce our research study; we conducted a study with 42 final-year law students at the University of Leicester to determine whether providing students with a tablet computer affects students' perception of the learning environment, student satisfaction, student performance and attainment, and removes barriers to learning owing to digital exclusion. Third, we outline how we modified the teaching materials on the chosen module (Bioethics) to integrate a varied digital diet throughout the students' learning journey. Fourth, we critically

[1] Throughout this paper we use 'HEIs' and 'providers' interchangeably.

examine the results of our study. In the final section, we combine our findings to offer our recommendations to help ensure that *all* students have equity of learning.

Contemporary legal education

Until recently, legal education in England and Wales, and the rest of the world, could be described (and criticised) as generally being overly 'traditional'. Law schools tended to place an overreliance on analogue materials to deliver their teaching and learning. However, in England and Wales at least, gone are the days when students would attend lectures physically sat in a lecture theatre with nothing more than a notepad and pen, studying with only print textbooks, law reports, and journal articles loaned from the library, and sitting examinations sat in an exam hall for three to four hours with no reference materials, save from perhaps a statue book.[2]

This no longer represents an accurate depiction of the current landscape of contemporary legal education. We now live in a digital world, and as such, there has been a growing tendency to expect students reading law to engage with digital technology in nearly all aspects of their learning.[3] Furthermore, due to the measures imposed by governments worldwide in response to the COVID-19 pandemic, the trajectory towards digital learning was unnaturally accelerated. Moreover, evidence suggests a desire across the higher education ecosystem to capitalise on opportunities offered by digital teaching and learning.[4] It is for this reason that this topic remains worthy of continued discussion and debate.

During the pandemic, HEIs had to resort to digital technologies and online platforms exclusively to enable staff and students to continue their day-to-day activities.[5] Consequently, lockdowns and restrictions caused by the pandemic

[2] See David I C Thomson's prescient book, *Law School 2.0: Legal Education for a Digital Age* (LexisNexis, 2009). For criticism that, in the context of Australian legal education, there is a systemic failing to equip graduates to be digitally literate, see K Galloway, 'A rationale and framework for digital literacies in legal education' (2017) 27 (1) *Legal Education Review* 1.
[3] M Pinto and C Leite, 'Digital technologies in support of students learning in Higher Education' (2020) 37 *Digital Education Review* 343.
[4] D Alton et al, 'A tech-tonic shift: the complex dance of technology-enabled-learning and academic identity work in higher education' (2024) *Studies in Higher Education* 1.
[5] R Watermeyer et al, 'COVID-19 and digital disruption in UK universities: afflictions and affordances of emergency online migration' (2021) 81 *Higher Education* 623

exacerbated the digitisation of HE.[6] Many of those technological changes are here to stay and affect everyone, disproportionally affecting those who do not have reliable and consistent access to technology.[7] Because of this, digital participation in HE is now an obligation. From when a student enrols on their programme of study to their graduation, and for most stages in between, HEIs require students to engage with digital technology. This is because teaching events (lectures and tutorials), learning materials, and assessments are increasingly online.[8] Thus, those without proper access to technology suffer a significant disadvantage.[9]

In the UK, the potential for disadvantage was acknowledged by the government at an early stage during the pandemic. The Secretary of State for Education commissioned a review by the Office for Students (OfS) into digital teaching and learning in HEIs in the context of the rapid shift to scaling up online delivery during the pandemic.[10] One of the principal objectives of the review was to examine the relationship between 'digital poverty' and students' digital teaching and learning experience'. For the review, a student has 'digital access' if they have 'appropriate hardware, appropriate software, reliable access to the internet, robust technical infrastructure, a trained teacher or instructor and an appropriate study space'.[11]

Findings by the OfS were that 18% of students did not have access to appropriate hardware, 71% of students did not have access to a quiet study

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[6] Watermeyer (n 5) 624.
[7] K Allman, 'UK Digital Poverty Evidence Review 2022' (*Digital Poverty Alliance*, 2022) www.digitalpovertyalliance.org/wp-content/uploads/2022/06/UK-Digital-Poverty-Evidence-Review-2022-v1.0-compressed.pdf accessed 05 May 2023. (Hereafter *Digital Poverty Alliance*).
[8] For a discussion of online assessment in law see D Bansal, 'Open book examinations: modifying pedagogical practices for effective teaching and learning' (2022) 56 *The Law Teacher* 354.
[9] J Butcher and G Curry, 'Digital poverty as a barrier to access' (2022) 24(2) *Widening Participation and Lifelong Learning* 180; *Digital Poverty Alliance* (n 7) 36.
[10] Office for Students, 'Digital teaching and learning in English higher education during the coronavirus pandemic: Call for Evidence' (*Office for Students*, 2020) 3 https://www.officeforstudents.org.uk/publications/digital-teaching-and-learning-in-english-higher-education-during-the-coronavirus-pandemic-call-for-evidence/ accessed 05 May 2023.
[11] M Barber, 'Gravity assist: Propelling higher education towards a brighter future' (*Office for Students*, February 2021) 111 <https://ofslivefs.blob.core.windows.net/files/Gravity%20assist/Gravity-assist-DTL-finalforweb.pdf> accessed 05 May 2023. (Hereafter, Gravity)

space, 56% lacked access to appropriate online course materials,[12] and 30% of students did not have adequate internet access during the pandemic.[13] These findings are crucial because students need access to equipment, technology infrastructure, and a space to engage in digital teaching and learning; however, during the pandemic, many students did not have such access.[14] Those affected students could not access the 'digital infrastructure', negatively impacting their learning experience. Consequently, of all the components necessary to achieve successful digital teaching and learning within HE,[15] ensuring digital access is imperative.[16]

While many HEIs implemented several short-term measures to ensure students had digital access during the pandemic, a sustainable solution to digital access needs to be built in a long-term strategic way. This is because there is a problematic assumption that HE students do not suffer from 'digital exclusion'.[17] This is of fundamental importance; we must look beyond the assumption that young people are 'digital natives' and unaffected by digital exclusion.[18] Moreover, the data from our study (discussed below) explicitly refutes this assumption. The picture is also nuanced, with exclusion based on disability, income, and self-confidence.[19] Thus, if HEIs do not adequately respond to this issue, digital exclusion will maintain, reinforce, and perpetuate socio-economic inequalities in HE.[20]

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[12] Office for Students, OfS, '"Digital poverty' risks leaving students behind' (*Office for Students*, 2020) <https://www.officeforstudents.org.uk/news-blog-and-events/press-and-media/digital-poverty-risks-leaving-students-behind/> accessed 07 June 2023.
[13] *Gravity* (n 11) 10, 65.
[14] *Gravity* (n 11) 65-66.
[15] The components are redesign pedagogy, curriculum, and assessment; ensure digital access; build digital skills; harness technology effectively; embed inclusion and plan strategically. See *Gravity* (n 11) 9.
[16] *Gravity* (n 11) 3.
[17] The term 'digital exclusion' is used throughout this paper. In our view, a student suffers from digital exclusion if they do not have elements of the definition of 'digital access'.
[18] E Helsper and R Eynon, 'Digital natives: where is the evidence?' (2010) 36(3) *British Educational Research Journal* 517.
[19] *Digital Poverty Alliance* (n 7) 21.
[20] The British Academy, 'Understanding digital poverty and inequality in the UK' (November 2022) <https://www.thebritishacademy.ac.uk/documents/4428/Executive_Summary_Briefing_Understanding_Digital_Poverty_and_Inequality_in_the_UK.pdf> accessed 05 May 2023; L Robinson et al, 'Digital inequalities and why they matter (2015) 18(5) *Information, Communication & Society* 570.

As we noted at the outset, the HE learning landscape has changed. In particular, post-pandemic HE has yet to see a wholesale return to the status quo. Many HEIs have adopted a hybrid or blended approach to teaching and learning, retaining varying degrees of digital learning and teaching provisions.[21] It is arguable, given HEIs have retained a degree of digital learning and teaching provisions, that issues and concerns borne out of the pandemic may be ongoing, with many of the 'socio-technological inequalities' continuing to be visible amongst student populations.[22] We acknowledge that much of the academic literature and policy reports discussed above concern our jurisdiction of England and Wales. However, there is evidence that instances of digital exclusion similarly affect the international HE community more broadly.[23] It is therefore arguable that challenges to digital access are not country- or geographically-specific, though the nature and causes of challenges to digital access may be.[24] Some have been critical of stakeholders in HE for ignoring digital exclusion and the structural injustice it represents based on neoliberal conceptions of education.[25] To resolve this, it is our view that HEIs should place emphasis on the concept of *equity*, that all students, irrespective of their background, have digital access to succeed in their programme of study.[26] In this paper, we suggest how HEIs could realise this. Our aim is that this paper, particularly the recommendations contained herein, will benefit and be of interest to the international community more broadly. Principally, to act as a catalyst for other law schools to investigate their own assumptions and implications of relying on digital technologies within legal education.

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[21] E De Nito et al, 'E-learning experiences in tertiary education: patterns and trends in research over the last 20 years' (2023) 48(4) *Studies in Higher Education* 595, 611.
[22] D Z Belluigi et al, 'Deeply and deliciously unsettled'? Mis-reading discourses of equity in the early stages of Covid19' (2022) *Higher Education* 2.
[23] O Zawacki-Ritcher, 'The current state and impact of COVID-19 on digital higher education in Germany' (2021) *Human Behaviour & Emergency Technology* 221; S Cesco et al, 'Higher Education in the First Year of COVID-19: Thoughts and Perspectives for the Future' (2021) 10(3) *International Journal of Higher Education* 286-287; E Diez-Gutierrez & K Gajardo-Espinoza, 'Online assessment in higher education during Spanish confinement by Covid-19: The view of students' (2021) 18(5) *Journal of University Teaching & Learning Practice* 18.
[24] M E Addadzi-Koom, 'A survey on e-learning experiences of law students during Covid-19 in Ghana' (2023) 57(1) *The Law Teacher* 38; KA Soomro et al, 'Digital divide among higher education faculty' (2020) 17 *International Journal of educational Technology in Higher Education*.
[25] Belluigi (n 22) 2.
[26] J Willems, H Farley, and C Campbell, 'The increasing significance of digital equity in higher education: An introduction to the Digital Equity Special Issue (Editorial)' (2019) 35(6) *Australasian Journal of Educational Technology* 1.

Project aims and methodology

For the reasons outlined above, we engaged in qualitative and quantitative research to evaluate the effects of digital exclusion within law curricula and understand how law schools can promote a more inclusive and supportive learning environment for students. To explore these issues, we designed a study that assessed whether (1) providing students with a tablet computer affects students' perception of the learning environment, student satisfaction, student performance and attainment, and (2) removes barriers to learning owing to digital exclusion.

To achieve this, we (a) secured internal funding from our HEI to provide all students enrolled on a final-year LLB Law module at the University of Leicester with a tablet computer upon the commencement of the module, (b) invited students to complete two anonymous questionnaires, and to participate in focus groups to share their experiences of the module and tablet initiative, and (c) modified the teaching materials on that module to integrate a varied digital diet throughout the students' learning journey.

The module that we selected to pilot this initiative was Bioethics. It is an optional final-year module on the LLB Law curriculum at Leicester Law School, which typically enrols thirty to forty students annually. The module runs for one semester, with teaching delivered through lectures and workshops. For these reasons, we determined that it would be an ideal candidate for this study – the module size and mode of delivery allowed for greater flexibility for modifying pedagogical practices and including in-class digital formative learning opportunities, which we further detail in section three below.

One of the principal motivations for choosing Bioethics to conduct this study was to ensure that *all* students could receive a tablet computer and participate in the study. This was an essential consideration for us since we wanted all students on the module, regardless of whether they participated in the study, to receive a tablet to ensure that there is no loss or learning for any student on the module, which is, in our view, an essential equity, diversity and inclusion (EDI) commitment. We could not have achieved this had we implemented the study in a larger compulsory core module due to the limited internal funding allocated to teaching development studies. Therefore, conducting this study in the future with a first-year core module would be beneficial for several reasons: to increase sample size, investigate issues unique to large-group teaching,

obtain information from students before they develop their preferred study methods, and to 'catch' those students who might have discontinued by the third year because of the aforementioned challenges associated with digital exclusion. This would allow for a detailed comparative analysis of the impact of digital technologies on small optional modules *and* larger compulsory modules. We discuss the institutional resource implications of mitigating digital exclusion in our reflections and recommendations section at the end of the paper, particularly in light of the challenging financial circumstances facing HEIs.

For the study, we procured HUAWEI MatePad T10 tablets. The tablets were purchased for £126.00 per unit. For the 43 students enrolled on the module and four academic staff, the total cost of the devices was £5992.00. The rationale for purchasing this device over others was primarily three-fold: its platform utilises the Android 10 operating system (OS) for the greatest compatibility with other devices on campus, it has a large full-size display (9.7") to allow students to use the device as a standalone device, and its relatively low cost. We reflect on the suitability of this (and other similar) device(s) towards the end of this paper.

The methodology adopted for this study was a mixed-methods approach, gathering data through questionnaires and focus groups. Ethical approval was sought and cleared by our institution.[27] Two questionnaires were given to students; one before the distribution of the tablets and one after students participated in the project. Between the pre-tablet questionnaire and the post-tablet deployment questionnaire/focus groups, there was a period of nine weeks.[28] This was intentional to allow students to reflect on and consider the impact the tablets and digital activities had on their learning experience.

Participation in the study was both optional and anonymous. Students were informed about the project in their first lecture, and those students that wished to participate signed consent and participation forms. Both questionnaires were handed out during workshops. We used paper questionnaires rather than online surveys since these generally generate higher response rates.[29] The response

[27] Ethics reference number: 37295-db434-ss/ll:law.
[28] J Bourner, M Hughes and T Bourner, 'First-year Undergraduate Experiences of Group Project Work' (2001) 26(1) *Assessment and Evaluation in HE* 22.
[29] D Nulty, 'The Adequacy of Response Rates to Online and Paper Surveys: What Can Be Done' (2008) 33 *Assessment & Evaluation in HE* 301.

rate for the pre-tablet questionnaires was 98% (n=42) and 63% (n=27) for the post-tablet questionnaires. The completion rate decreased for the post-tablet questionnaires because attendance during the final teaching event was low.

The focus groups were implemented to explore issues relating to digital access at a deeper and richer level than the questionnaires. They allowed students to discuss topics/issues we had not considered/included within the questionnaires.[30] The focus groups were conducted in two timetabled one-hour workshop sessions, with 23 students in attendance. Recordings were taken with the permission of all present, and the transcripts were analysed using a Braun and Clarke thematic analysis.[31] The focus groups were structured using questions displayed on PowerPoint slides. These prompted students to discuss their experiences of digital access/exclusion, the module's teaching and learning, and their general experiences of digital technologies while reading law in HE. The themes arising from these focus groups, along with the questionnaire data, are analysed in section five.

Before discussing the results of the study, in the next section, we explain *how* the teaching practices and pedagogy on the module were modified to integrate in-class digital learning activities throughout the students' learning journey. We think this is imperative to understand and contextualise the data obtained.

Bioethics: a case study

In this section, we outline how we integrated the project into the module and embedded various digital learning activities. In doing so, we present and evaluate (a) how we modified the pre-existing learning activities to accommodate digital learning using the tablets provided, (b) the software and platforms chosen for the learning activities, (c) the benefits and disbenefits of using technological learning aids, and (d) the barriers that we faced. Though a control group would have been beneficial, the module was redesigned along

[30] M Denscombe, The Good Research guide for Small-Scale Social Research Projects (OUP 2007) 179-183.
[31] V Braun and V Clarke 'Using Thematic analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.

with providing students with a tablet.[32] This was to make full use of the digital learning technology to investigate the impact of relying upon digital technologies to deliver legal education, and whether systemic issues affected individual experiences of digital exclusion.

All of the teaching events for this module, including when the digital activities were employed, were conducted in-person. As part of the project's logistics, a two-hour workshop was scheduled at the start of the module to introduce students to the project, its aims, and the implications it would have on their teaching and learning. The workshop was designed for students to see value in the project, facilitating student engagement, and in the process, encouraging learning through using the tablet.[33] In addition to introducing students to Bioethics, the module's learning objectives and assessment components, this introductory session also aimed to ensure that students were course-literate about Bioethics, given the wide variety of students' prior learning experiences in the classroom, both pre-and during their law degree.[34] Following this introduction, informed consent and participation forms were distributed and signed by student participants. For those who agreed to participate, we then distributed the pre-tablet questionnaires. The tablet computers were then distributed to all students.

There were already several digital elements to the module, including online reading lists, lecture recordings, and utilisation of the VLE. However, we also created some additional bespoke activities to maximise students' usage of the tablets. Here we outline these learning activities, along with some reflections as to their efficacy and suitability.

The first digital learning activities were delivered in the second substantive topic concerning 'moral status'. Moral status considers to whom obligations are owed, why we have obligations to some entities and not others, and which

[32] If a follow-up study were to be conducted, we would suggest the introduction of a control group to further analyse and review the efficacy of providing a tablet or device to students. Such a control group would be able to provide a more accurate picture with regard to any elements of bias within the study. Such a group would allow, for example, for random selection of the particular groups, and randomisation of the deployment of pre- and post-intervention questionnaires.
[33] J Biggs and C Tang, *Teaching for Quality Learning at University* (4th edn, McGraw-Hill 2011) 34-35.
[34] T Haggis, "Pedagogies for Diversity: Retaining Critical Challenge Amidst Fears of 'Dumbing Down'" (2006) 31(5) *Studies in Higher Education* 521.

entities do/not have moral rights.[35] Two learning activities were implemented within the tutorial on moral status (tutorial two). This comprised of a polling activity in Microsoft Teams and a Padlet activity which asked students to rank various entities according to their differing degrees of moral status, and note their principles involved in this ranking.[36]

Both platforms were considered appropriate for students and teachers due to the few barriers to entry and simplicity of each platform relative to other platforms licenced by our institution (e.g., TopHat). For students, these barriers include the additional time required to download and sign on using University credentials. For teachers, whilst TopHat provides visually elegant learning solutions, the functions needed from an online learning platform to design activities to facilitate learner completion of the learning objectives meant that Microsoft Teams and Padlet were more time-efficient options for designing and delivering the learning activities.[37] Although using Kahoot was explored, institutional licencing issues prevented us from using this. Such licencing and time-cost issues are important considerations for teachers to bear in mind; they are more technical and logistical and should be considered during the early planning stages of a module/project. Such issues also have the potential to undermine important aspects of teacher autonomy in the creation of learning tasks. As we have highlighted above, key to 'digital access' is that students have access to the software to engage with all aspects of course content effectively. Thus, students must have access to the proper digital infrastructure. However, this also raises issues of appropriate hardware, software, and infrastructure allocation at an *institutional* level, which may impact *individual* students at a module level.

Before the tutorial, these learning activities were shared via a link on our institution's VLE, Blackboard (BB), and email. The polling activity in Teams consisted of seven questions. The polling activity was designed this way for three main reasons. The first was to allow students to reflect on their initial intuitions regarding the relative importance of different candidate properties for moral status.[38] Second, polling in Microsoft Teams allows for a variety of

[35] T L Beauchamp and J F Childress, *Principles of Biomedical Ethics* (8th edn, OUP 2019) 65.
[36] A Padlet is a virtual collaborative bulletin board.
[37] The time-intense nature of designing high-quality, activity-oriented digital learning is acknowledged in *Gravity* (n 11) 108.
[38] Biggs and Tang (n 33) 26-27; D A Kolb, *Experiential learning: experience as the source of learning and development* (Prentice-Hall 1984) 21.

ways in which to collate and display responses to students in a visually appealing way to catalyse debate within the class. For example, it shows the number of responses provided, the average time taken to complete the question, and a series of pie charts to collate responses.[39] Third, the activity was designed to provoke curiosity; therefore, speed of access to polling and results was vital.

The Padlet was designed to facilitate discussion of the main reflective question in the second hour of the tutorial. Students, having conceptualised the theories of species membership, sentience, and personhood in assigning moral status, were invited to employ their abstract conceptualisations of moral status to determine which entities matter morally.[40] Issues of moral status also arise in discussions concerning abortion,[41] assisted dying,[42] and the value of life.[43] Students were asked to rank a series of entities according to their level of moral status, including non-morally relevant beings.

Reflecting on the experience of delivering this in the classroom, the Padlet activity ranking the moral status of different entities was successful. All groups could rank at least eight of the entities in question. The Padlet clearly displayed, on one screen, each group's ranking. Therefore, similarities and differences in the rankings of entities could be explored in the learning session.[44] The exercise conducted using this software provided the opportunity for a qualitatively richer learning experience. It allowed students to consider their peers' ranking and reasoning whilst concurrently constructing and reflecting on their own ranking and reasoning. Consequently, the Padlet provided an opportunity to foster a sense of a learning community. The Padlet also meant students had a link to this learning activity available immediately, rather than having to upload photographs of handwritten lists (for example) after the tutorial. Finally, student rankings of which entities should be rescued in a prior task undertaken in the previous tutorial, whereby entities are trapped in a cave with a working

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[39] For a detailed learning activity based on the multisensory understanding of objects, see L Morgan, 'Understanding Dworkin through art: object-based learning and law' (2018) 52(1) *The Law Teacher* 53.

[40] For the importance of a base of interconnected knowledge as a characteristic of a rich teaching and learning context, see Biggs and Tang (n 33) 67-68.

[41] See J Finnis, 'Abortion and Healthcare Ethics' in R Gillon (ed) *Principles of Healthcare Ethics* (Wiley 1994) 547-557.

[42] See S W Smith, End of Life Decisions in Medical Care (CUP 2011) Ch 2.

[43] See J Keown, 'Restoring Moral and Intellectual Shape to the Law after *Bland*' (1997) 113 *LQR* 481.

[44] Biggs and Tang (n 33) 68-69; J Hattie, *Visible Learning For Teachers* (Routledge 2012) 100-107.

lift that is likely to fail before all can be rescued, had been captured on another Padlet. Student groups had stayed the same from the previous tutorial to this moral status tutorial, so it was possible to examine the differences in rankings *within* groups. It was then possible to ask student groups to reflect on *why* such variation in moral status had occurred from one week to the next. This provided another opportunity for students to reconstruct their knowledge by connecting old and new knowledge to bring further opportunities to reflect and bear their subjective experiences (of learning and reflection) inside and outside both learning sessions.[45]

The second learning activity was designed and delivered in the theories of autonomy, beneficence, and paternalism tutorial (tutorial three). This topic marked the transition from foundational considerations within Bioethics to more specific ethical concepts and principles. The learning activity consisted of a Padlet, whereby students were invited to submit their responses to a series of vignettes. The vignettes were designed to introduce students to a structured process through which they can reflect, analyse, and evaluate ethical problem questions.[46] Specifically, the vignettes invited students to consider whether the decisions in the vignettes are autonomous and whether the proposed paternalistic interventions are ethically justified.

The structured process of answering ethical problem questions uses Beauchamp and Childress's method for justifying and resolving moral conflict in ethical dilemmas.[47] Reflecting on the relative experiences of this Padlet exercise compared to the moral status Padlet exercise, this exercise could have been more successful. There are two main reasons for this. First, the level of detail provided in each section of answering the problem question varied *within* and *between* groups. This meant that certain sections had to be filled in during discussions. The Padlet was set up so answers could be provided anonymously, albeit within groups. For certain groups, this appeared to lower barriers to the discussion; there seemed to have been less concern about needing to develop or elaborate on a point if asked. However, overall, the Padlet was information-heavy and less accessible than the moral status Padlet. Second, the less accessible nature of the autonomy Padlet also meant it was harder to quickly

[45] Biggs and Tang (n 33) 67; Kolb (n 38) 36-38.
[46] Ethical problem questions (case studies) are a common method to teach and learn about bioethics. See RM Veatch, AM Haddad & DC English, *Case Studies in Biomedical Ethics: Decision Making, Principles and Cases* (2nd edn, OUP 2014).
[47] Beauchamp and Childress (n 35) 80-82.

identify similarities in reasoning throughout the vignettes, as was possible with the moral status Padlet.[48]

The final learning activities were designed and delivered in the abortion tutorial (tutorial five). This topic considered the moral status of the foetus, the interests of the pregnant person, and whether and how a balance should be struck when the two interests come into conflict. Students were invited to determine whether the current English and Welsh legal position strikes an ethically acceptable balance and whether changes could be made to the Abortion Act 1967 in light of the material covered on the moral permissibility of abortion. To facilitate this, students were divided into groups and asked to revise the English and Welsh legal framework, using the Irish legal position to draw a comparative analysis.

Each group had access to a Google Document. This document contained section 1 of the Abortion Act 1967 and sections 9-12 of the Health (Regulation of Termination of Pregnancy) Act 2018 (Irish Act). This latter Irish Act was introduced during the abortion lecture to highlight how comparative legislation works in practice, is differently framed, and the language used. Each group had editing permissions with their Google Documents. Google Documents was considered an appropriate tool to use in this instance, given that the licence is free. This presented one less barrier for teachers and students.[49] As noted above, Android 10 OS is the platform of the tablets used as part of the project, meaning that Google Documents was pre-loaded on the device.

Reflecting on the delivery of this learning exercise, Google Documents had benefits and disbenefits. It was possible to see the editing history of the sections of the document while ensuring the anonymity of students editing it. The editing history clarified which sections of the Abortion Act had been revised and if similar language had been used from the Irish legal framework, which in one instance had been. This also meant it was possible to investigate the ethical and conceptual underpinnings of any revisions made to the Abortion Act. Anonymity was particularly beneficial for an ethically sensitive topic and ensured that the focus remained on this being a group submission. However, the comparison *between* groups regarding the changes to the Abortion Act 1967

[48] For further discussion as to the benefits of deliberate practice, see Hattie (n 44) 108-110.
[49] BJ Jutte et al, 'Zooming in on Education: An Empirical Study on Digital Platforms and Copyright in the United Kingdom, Italy, and the Netherlands' (2022) 13(2) *European Journal of Law and Technology* 15-16.

was more complicated than with Padlet; different windows had to be navigated, and not all information could be displayed simultaneously. Substantively, the activity also threw into sharp relief different perceptions regarding the distinctions between law and ethics, in terms of how they are different collections of norms, with a much greater emphasis on the institutional nature of the former collection of norms, as well as the different actions which are morally permissible or impermissible, and which conduct should be subject to legal regulation.[50]

The purpose of this section has been to explain the types of in-class digital learning activities that students engaged in with their tablets on this module. This, we hope, helps to provide a contextual backdrop against which the data from the questionnaires and focus groups can be interpreted and understood. Having explained these learning activities, we now move to discuss the results that we obtained in this study.

Results

This section discusses and evaluates the results of pre- and post-tablet deployment questionnaires and student focus groups.

Results: Pre-tablet Data

98% of students completed this questionnaire in their introductory lecture at the start of the module. The following provides a breakdown of the key questions and results.

Digital access:

The first question, comprised of five parts, explored the extent to which students had access to digital provisions necessary for their studies *before* the tablets were distributed (see *Figure 1*). The question used a 5-point Likert scale, where 1 indicated '*almost always',* and 5 indicated *'never'*. The results show that while students have access to appropriate hardware, software, and internet access, many do not have sufficient technical support (46%), and some only have access to an appropriate study space sometimes (21%). These results

[50] See D Boonin, *A Defence of Abortion* (CUP 2002) Ch 1.

clearly illustrate that many of the students who participated in this study would not, by the OfS' definition, have 'digital access' for differing reasons.

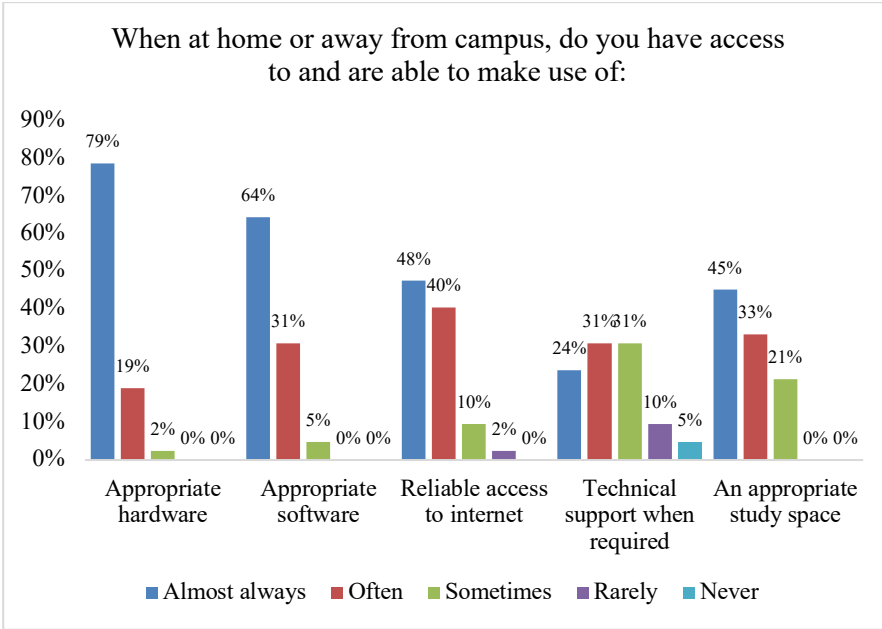

Figure 1

Tablet deployment:

Questions 2-6 sought to evaluate how students felt about receiving a tablet and the impact that it *might* have on their learning and teaching. Interestingly, all students already owned personal electronic devices for their university studies (Q2). However, upon reflection, it would have been beneficial to enquire what *type* of device they owned – i.e., a PC, laptop, tablet, or mobile phone, and how *suitable* it is for their studies. This would help determine whether the hardware is 'appropriate' for their studies. If this study were replicated, we would recommend that these questions and definitions of terms be included. We recognise that had we asked these revised questions, students' responses to Q1 regarding whether they had access to 'appropriate hardware' might have been different.

98% of students were 'very happy' or 'somewhat happy' about being given a tablet (Q3), and 95% were 'very comfortable' or 'comfortable' using a tablet computer without any training (Q4). Most students also said that being

provided with a tablet would positively affect/improve their digital skills (Q5) (see *Figure 2*). However, many students were sceptical regarding the *extent* to which the tablet provided and planned digital learning activities would positively affect their confidence during the module (Q6), with 40% being either 'neutral' or 'negative'.

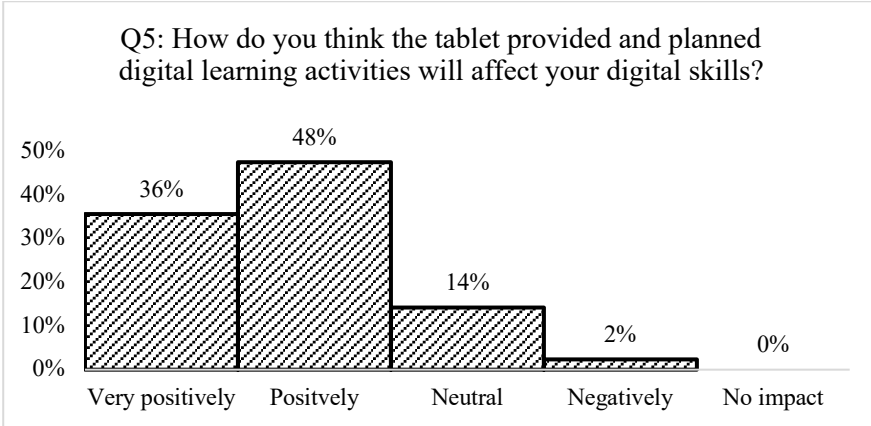

Figure 2

Digital learning at university:

Questions 7-9 evaluated the extent to which students relied on digital technologies for their studies, and what digital technologies *help* with. Unsurprisingly, all students said they had to engage with digital learning at university (Q7). This has been primarily positive, with only 10% of students reporting a negative experience with the digital provisions offered (Q8). Q9 evaluated the extent to which digital technology *helped* with their learning at university, and students responded overwhelmingly positively (see *Figure 3*).

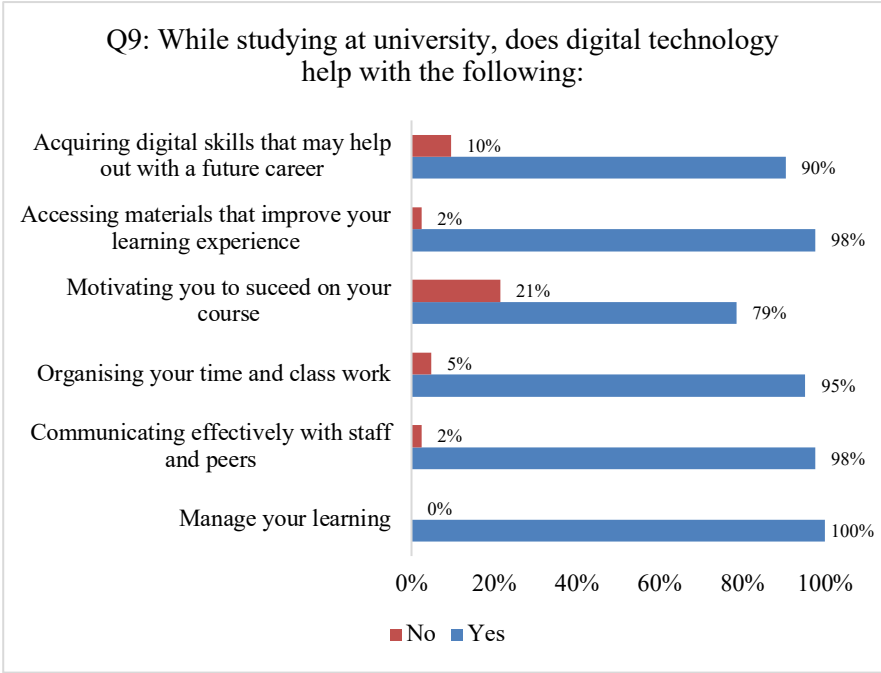

Figure 3

Perceptions of the project:

The remaining questions were focused on assessing the extent to which students thought the tablet initiative was positive, and how it might impact the experience and delivery of the module. Nearly all students (90%) thought that being provided with a tablet would meet their basic technological needs to succeed in the module (Q10). Similarly, most students (93%) also thought that the planned digital activities in lectures and tutorials would help improve their digital technology literacy for their future profession (Q11). Pleasingly, nearly all students thought that the tablet initiative made the module more inclusive (95%) and innovative (100%).

Results: Post-tablet Data

In total, 63% of students took part in the post-tablet survey.

Tablet usage:

One of the primary objectives of this study was to find out *how* students used their tablets in terms of their studies and non-study-related activities. Therefore, questions were asked to explore their experience using a 5-point Likert scale where 1 indicated '*almost always*', and 5 indicated '*never'*. *Figure 4* shows the results below.

The results show that students did not use the tablet frequently during their studies on the module. This was also confirmed during the student focus groups. However, when students did use their tablet, it was principally for using internet search engines to find information relating to the module (70%), doing non-module work (e.g., games and streaming services) (67%), reading proscribed module reading (45%), and watching or listening to lecture recordings (52%).

The data revealed that the majority of students rarely or never used the tablet for downloading module materials (74%), taking down notes during lectures and tutorials (78%), storing materials (71%) and retrieving materials (66%), interacting with their peers on social media (82%), emailing university staff (66%), completing assessments (100%), checking assessment grades (89%), nor participating in discussion boards (85%).

	Almost always	Often	Sometimes	Rarely	Never
Downloading module materials.	0%	11%	15%	37%	37%
Taking down notes during lectures and tutorials.	0%	11%	11%	30%	48%
Storing module-related materials.	0%	7%	22%	30%	41%
Retrieving stored module-related materials.	0%	11%	22%	33%	33%
Interacting on social networking sites	4%	11%	4%	26%	56%

with other students on the course.					
Doing non-module related work (e.g., Netflix and games).	4%	26%	37%	19%	15%
Emailing University staff.	0%	22%	11%	22%	44%
To complete an assessment.	0%	0%	0%	22%	44%
Check assessment grades.	0%	0%	11%	22%	78%
Watching or listening to lecture recordings.	19%	7%	26%	11%	37%
Using internet search engines to find information relating to the module.	0%	26%	44%	11%	19%
Participating in discussion boards on Blackboard.	0%	4%	11%	22%	63%
Reading prescribed module reading.	11%	19%	15%	15%	41%

Figure 4

Tablet experience:

In addition to surveying students to ascertain how they used their tablets, we also wanted to explore their *experience* using the tablet throughout the module. Therefore, questions were asked to investigate their experience using a 4-point Likert scale where 1 indicated '*strongly agree*', and 4 indicated '*strongly disagree*'. Students could also answer '*not applicable*' to these questions. *Figure 5* shows the results below.

Students responded positively in several areas. The data shows that the tablet increased collaboration (56%), helped with their research (41%), increased their independence (48%), and improved their flexibility in learning (56%).

Students also expressed their negative experiences with using the tablet. The areas that students did not engage with the tablet positively are that it was difficult to take notes with the tablet (74%), students were already accustomed to another device (74%), find the tablet complicated to use (59%), prefer to study with another device (97%), are not enthusiastic about learning with their tablet (67%), and still needed to visit the library for their tutorials and assessments (55%).

That there were mixed experiences and usages is evidenced by the split regarding the helpfulness and usefulness of using tablets for teaching and learning. This was similarly reported in Q5, which asked whether, because of the tablets, students could engage more with their studies than before. As with the data detailed in *Figure 5*, students responded divisively (48% yes; 52% no).

	Strongly agree	Agree	Disagree	Strongly disagree	Not applicable
I find learning with a tablet very helpful	4%	48%	22%	15%	11%
The use of a tablet has reduced my cost of printing module materials	7%	22%	30%	19%	22%
The tablet helps me do my tutorial and assessment preparation effectively	7%	26%	26%	22%	19%
The tablet has increased my collaboration with my peers and lecturers	0%	56%	7%	19%	19%
I find it difficult to take notes with my tablet	22%	52%	11%	7%	7%
I'd rather play games and use social networking	11%	37%	26%	15%	11%

sites on my tablet than study					
I have grown accustomed to using the tablet computer for my studies	0%	19%	37%	37%	7%
I am able to complete my tutorial preparation and assessments efficiently using the tablet	0%	15%	41%	33%	11%
I am able to better meet my module deadlines with my tablet	7%	15%	26%	41%	11%
The tablet helps me in my research	11%	30%	22%	26%	11%
My tablet helps me to study independently	7%	41%	19%	22%	11%
The tablet allows for flexible access to online resources for my study	4%	48%	19%	22%	7%
With a tablet, I do not need to go to the library to do my tutorial preparation and research	0%	30%	33%	22%	15%
The tablet allows me the flexibility to learn anytime, anywhere	4%	48%	19%	26%	4%
I find it easy to take notes during lectures with my tablet as it allows flexible annotation of lecture notes	0%	22%	22%	44%	11%
I find the tablet complicated to use	11%	48%	22%	7%	11%
I rarely use my tablet for my studies	19%	48%	22%	7%	4%

I am enthusiastic about learning with my tablet	0%	26%	52%	15%	7%
I prefer to study with another device (e.g., laptop) than my tablet	67%	30%	0%	0%	4%
I am not convinced about the usefulness of tablets in my studies	19%	22%	26%	11%	22%

Figure 5

We also asked students to complete four open-ended questions. Q3 asked students to list the most constructive uses of their tablets for learning on the module. The common themes arising from the responses were – watching lectures, completing the required reading, using the tablet as a secondary device (for reading/watching lectures), participating in collaborative exercises in class, and increased flexibility in learning.

Q4 asked students what activities they could do with their tablet that they could not do before. Given that many students already have their own electronic devices, the responses here were limited. However, some students commented that they enjoyed using the device in class (e.g., with Padlet activities) and for easier access to reading.

Q5 evaluated the extent to which students engaged with their studies *because* of the tablet initiative. While some students responded positively, this was mainly linked to in-class activities, collaboration, and icebreakers. However, students were critical of the *specific* tablet provided. Many students commented that they did not use the tablet fully because it was slow, inefficient for note-taking, and incompatible with their devices (different OS). In many cases, these comments were duplicated in Q6, where students were able to provide additional comments or suggestions on the tablet initiative. While many students appreciated using the device in class, and for Bioethics specifically, and as a secondary screen/device, the consensus was that the device needed to be more highly specified to enable students to use the tablet as their sole device for their teaching and learning. Several students also commented that the initiative would have been better implemented with first-year students, who have not yet established individual study preferences and styles.

Results: Focus groups

As indicated above, students on the module were divided into two groups corresponding with their workshop teaching groups. We used two of the timetabled workshop sessions to conduct our focus groups, which ran towards the end of the semester once teaching had finished. The purpose of the focus groups was to, much like the questionnaires, establish whether providing students with a tablet computer affected students' perception of the learning environment, student satisfaction, student performance and attainment, and removed barriers to learning owing to digital exclusion. The benefits of using focus groups as a data-gathering method are well documented, including allowing for more instinctive, detailed, and rich answers. Since students had studied together on the module, the discussions were comfortable, interactive, peer-group conversations.[51] The aim was to uncover issues we had not considered when designing the project.

We asked students six questions about the project, followed by an open-ended/general question. These were displayed on a large monitor using a PowerPoint presentation, and the sessions were recorded with the permission of all those present. These questions were:

(a) How do you think digital inequality affects student inclusivity and success while studying at university?

(b) Besides this tablet initiative, does the university appropriately accommodate students without appropriate access to hardware and software for their studies?

(c) Explain how you used the tablet to assist in your learning of the module. What features of the tablet engage you the most? Can you provide some examples?

(d) Do you think modules should include digital learning within lectures and tutorials as we incorporated in Bioethics?

(e) Have you encountered any problems that have affected the usage of the tablet? E.g., issues relating to hardware and software? What are the challenges faced in using the tablet on and off campus?

(f) In what ways do you use the tablet when you are off campus?

[51] D Morgan, Focus Groups as a Qualitative Research (London, 1988) 77.

(g) Do you have any other comments or suggestions you would like to share?

Following an analysis of the focus groups, the main themes that emerged relate to access to (a) appropriate equipment, (b) technical support, (c) digital learning activities, and (d) appropriate study spaces. We consider these in more detail below.

5.3.a. Access to equipment

The results of the post-tablet questionnaire revealed that all students owned a personal electronic device for their studies prior to this project. In both focus groups, students vocalised the importance of having appropriate access to digital technologies to succeed in their studies. This is principally because law schools have transitioned from delivering their teaching and learning using analogue materials to a stage where most materials (if not all) are online. As one of our students commented:

> All our books are online, lectures are online, and articles are online. So, if you do not have access to devices, I feel like you will be at a disadvantage.

However, while owning or having access to appropriate equipment can help "bridge inequalities", as one student commented, it is often not enough in and of itself. Devices need to be maintained and charged frequently, and students need access to a data plan or WI-FI for devices to be of utility. Moreover, devices must be compatible with hardware and software, which can present an issue with older/obsolete models. Moreover, even if compatible, learning may be negatively affected if the device is slow. Importantly, these considerations cannot be resolved by simply distributing devices to students; the other elements of digital access must also be present. As such, ingrained and systemic inequalities serve as roadblocks and barriers to equity of learning. Inequality may stem from (1) the differing resources (financial and technological) that students have access to, (2) the assumption, erroneously made, that students *do* have the latest devices for their learning, and (3) the lack of provision and help for students from their HEI when it turns out that the premise in (2) is untrue. This was explicitly commented on within the focus groups. One student, who described their device as being 'older', explained the stress and anxiety of using a slow device, particularly for assessments:

> Exams are not in person; [I had] a mini panic attack [while submitting assessments] because my computer is slow, and [my assessments] are getting submitted way later than they should.

During both focus groups, it transpired that while students were grateful for receiving a tablet to help with their studies, the *type* and *quality* of the tablet supplied could have been better. Students made a variety of comments to this effect:

> I think they went for the cheapest tablets they could get and, therefore, they don't work. They crashed on Blackboard, and on anything really. So, I used it for candy crush, to be honest. And that's it. It is not useful for work. I wouldn't bother [giving students this tablet], or I would bother with a more expensive tablet.

Despite these comments, some students used the tablet, even if it was not their main device:

> I would use it for reading. I would have it next to me while typing; as a second screen, it really works.

Indeed, for one student, providing them with a tablet resulted in a tangible and positive change:

> I associated my tablet with reading. Instead of associating my phone with reading. I have everything else on my phone and I will be distracted by it. But the tablet is only for reading so I focus on that. [There were no] notifications to distract me. The tablet is a 'quality of life' improvement.

Overall, despite initial satisfaction, students reflected that the tablet deployment would have been more beneficial if (a) the *type* and *quality* of the device were improved, (b) a keyboard was provided, and (c) if it was introduced at an earlier stage. On this final point, one student commented:

> [This] wasn't the best cohort to give [the tablets] to because we are all in our final year. We all gone through what [learning style] works best for us. [Your final year] is not the time when you switch up to try new things.

These results, coupled with the questionnaire data, illustrate the significant importance of accessing appropriate hardware for students to succeed on their course. Therefore, law schools cannot assume that students come to university with reliable and appropriate access to hardware. Or, that during their programme of study, their hardware (if they do have access) will *continue* to be reliable and appropriate from year to year. Recent studies have found that many students only have access to a smartphone, which makes watching lecture recordings, reading learning materials, and completing assessments difficult.[52] Additionally, for students living in their familial home or privately rented student accommodation, reliable access to home broadband is similarly problematic, with many students relying on mobile phone internet connectivity.[53] All of these issues become compounded for those students from low-income households.[54]

5.3.b Technical support.

A prominent theme that arose during the focus groups pertained to the availability of technical support from the University. In particular, the comments related to the reliability of the WIFI and technical support while on campus. Regarding the WIFI on campus (Eduroam), one student commented that:

> The WIFI on campus sucks sometimes. So, if you do not have proper WIFI at home, you come to school, and the WIFI doesn't always work properly. The reading you need or the lecture you want to watch cannot be accessed.

Students had similar comments regarding the availability of technical support too:

> I didn't have WIFI on my computer for two months. For September and October. I kept taking my computer to IT, and they were running diagnosis checks, but nothing was working. During that period, I was hot-spotting during class

[52] Nominet Social Impact, 'Digital Youth Index' (2021) < https://digitalyouthindex.uk/wp-content/uploads/2021/12/Nominet-Digital-Youth-Index-report-2021.pdf> accessed 05 June 2023. (Hereafter Nominet)
[53] Ofcom, 'Adults' Media Use and Attitudes report 2022' <https://www.ofcom.org.uk/__data/assets/pdf_file/0020/234362/adults-media-use-and-attitudes-report-2022.pdf> accessed 05 June 2023.
[54] Nominet (n 52) 17.

> and could not go into Blackboard or other platforms. It was so annoying!

However, since this student's device was personal, not one loaned/provided by the institution, the options available to the technical support department will likely be limited if the problem is with hardware.

Where students did not have access to their own device for their studies, some students commented that there were frequently no laptops available for loan via the library (a service offered at the University of Leicester on a short-loan basis). This is unsurprising given the number of students enrolled at the University. While there are frequently libraries and other learning spaces within HEIs where students can access a desktop computer, many students undertake employment and/or caring responsibilities alongside their learning, meaning that the flexibility of a laptop or tablet is an attractive proposition and may provide an explanation as to why library or campus-based study is increasingly not practical for many students.

Additionally, some of the comments made by students supported the claim that not all students are 'digital natives' who need little to no technical support. In particular, students explained that they would have liked to have received explicit guidance within induction or introductory lectures regarding the technical support available. While this information *is* available to students, it is almost exclusively online. Thus, *finding* such information is problematic if you do not have digital access, which only serves as a barrier to resolving digital exclusion.

5.3.c. Digital activities for digital learning

Students also used the focus groups as an opportunity to discuss their experience of the digital learning activities that were used in Bioethics. The overall perception was that students found the digital activities beneficial to their learning. The comments from students were that they helped to foster a community feel, and enabled students who were less confident to speak openly in class to share their ideas in a constructive and safe learning environment, making group work more enjoyable for all students. Some of the comments from students were:

> I liked the digital interactions; I think they are great for learning because many people don't like to raise their hands and participate. If you give students the option to type their answers, there will be greater interaction with the students.

> Padlet generated different discussions [between the assigned groups], and since you can see it afterwards, it does not get mixed up with your notes.

However, unsurprisingly, not all students thought that digital learning activities offered significant and tangible benefits over more 'traditional' and analogue teaching methods. For example, one student said that:

> I feel like it's more interactive when it's verbal rather than all being on a screen.

Nonetheless, it was felt amongst some students that in larger cohorts (e.g., core/compulsory modules), digital learning activities would be a valuable teaching and learning aid for students *and* teachers. One student said:

> I think [digital teaching tools] are also helpful for teachers because they can see and check students' answers in real-time, [and review material] if the entire class is getting those questions incorrect. [Teachers might think] "maybe this is something I need to discuss more and go over and see why everybody is getting it wrong".

The comment above evidences that digital learning aids can effectively provide frequent and informal formative assessments for students to check and monitor their learning progress. Online multiple-choice questions (MCQs) are an effective way of doing this in-class.[55] Moreover, for students in England and Wales who desire to qualify as a solicitor, MCQs offer some preparation for students completing the Solicitors Qualifying Exam, since SQE1 is examined solely through MCQs. The feedback in focus groups was that:

[55] S Whittaker & T Olcay, 'Multiple-choice questionnaire assessments: do they have a role in assessing law students?' (2022) 56(3) *The Law Teacher* 335.

> MCQs help as you can self-assess. And it's nicer that way because you know if your answer was right or wrong while in class.

> MCQs are helpful, [and they] give us an insight into what the SQE assessments will be like.

5.3.d. Study spaces to engage with (digital) learning.

One of the key findings from the OfS's report was that many students suffered negatively when libraries, cafes, and other alternative study spaces closed during the pandemic.[56] Students had to continue their studies in their homes, many of which did not provide individual and private study spaces, and some did not have reliable internet access, providing roadblocks to their learning.[57] Following the easing of lockdowns and restrictions, many students still struggle to find appropriate places to study. Moreover, research shows that nearly half of all young people (45%) rely on other ways to connect to the internet instead of through home broadband (or laptop/ desktop computer).[58] Our students reported similar concerns:

> Students have problems with their WIFI in their accommodation. If they need to get work done, they have to go to the closest coffee shop to get work done. They are forced to go and study in those environments when they would prefer not to do so.

> In the library, the WIFI is problematic if it is not early in the morning. And you need your own device if you want to use the quiet study spaces, so I have given up on using the library.

These responses, coupled with the data captured from the questionnaires, explicitly evidences that if students do not have reliable and consistent internet access, the space that they occupy is not an adequate *learning* space. This has the unfortunate consequence of forcing students to seek alternative spaces to conduct their learning, which may be uncomfortable, noisy, and costly.

[56] Gravity (n 11) 67
[57] *Gravity* (n 11) 67.
[58] Nominet (n 52) 26.

Previously, teaching and learning at HE was predominantly analogue, and this was not a prerequisite for learning.

5.3.e. Other findings

In addition to the findings discussed above, we allowed students during the focus groups to discuss and raise any other issues they thought were important. Many of these final comments related to two things – (a) a desire to retain *some* analogue materials in their teaching and learning and (b) that HEIs should be proactively seeking to minimise, and eventually resolve, digital exclusion. We consider both in turn.

It is clear from the focus groups that students expressed a desire to retain *analogue* learning materials. While students enjoyed digital learning activities and technologies, they said there needed to be *more* analogue options to support their learning. For instance, students noted that, given the large number of students at the University, there are frequently not enough print copies of the essential/recommended textbooks in the library for short- and long-term loans. Many HEIs subscribe to online learning portals that provide unlimited digital access to textbooks and other materials. These resources are expensive for HEIs, and although it means that all students *can* access them online, there is likely a disinvestment in print texts. However, in addition to some students having difficulty accessing these resources because of digital exclusion, some prefer analogue materials to learn:

> I prefer reading a [physical] book to reading it on my laptop. For Bioethics, there were six copies available in the library; I wanted one, but no more physical copies were left. And if I didn't have my laptop, I wouldn't have that book. That is why [online textbooks] can exclude students.

Moreover, while students were conscious of the environmental benefits of online learning resources, and that mass printing materials is not environmentally sustainable, students nonetheless associated print textbooks, journals, and law reports with in-depth learning. They associated these analogue materials with a quieter and undistracted way of learning, since they would not see or hear any notifications on their devices while learning with paper copies. Indeed, the academic literature on this point demonstrates that most students *prefer* reading print text and are more engaged when their

learning material is in this form.[59] However, we recognise that online learning resources that contain textbooks etc., are now the norm within HEIs, especially within England and Wales.[60] This is despite studies showing that many students obtain a deeper understanding of the material when reading print and analogue materials compared to reading the same resources online.[61] Our students offered similar comments echoing these concerns:

> Digital is making me blind. I am used to taking notes, highlighting, and underlining. That is a physical process. Reading is part of that learning journey, and when it is in paper form, it is very much hands-on. It helps.

> I think the option [of having learning materials in a physical format] should be there. Some people prefer physical copies of the PowerPoint slides and law reports. But many students do not even get the help to print material. We do not know how or where to print things.

In addition to expressing a desire for analogue materials, many students felt that it was the responsibility of the University to help minimise and resolve digital exclusion for students. For example, students felt that HEIs should ensure that students had digital access prior to and during their programme of study. Moreover, they were of the opinion that, were necessary, HEIs should provide appropriate devices to students, included within their tuition fees, that they can use for the duration of their studies.

> Universities should offer devices to students once they are accepted [onto their programme of study] if they need it. The University holds data about its students, and they know if they are from a disadvantaged background, so should ensure they have a device.

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[59] P Delgado et al, 'Don't throw away your printed books: a meta-analysis on the effects of reading media on reading comprehension' (2018) 25 *Educational Research Review* 23, 24.
[60] H Hargreaves, S Robin and E Caldwell, 'Student perceptions of reading digital texts for university study' (2022) 24 *Journal of Learning Development in Higher Education*. Doi:10.47408/jldhe-vi24.817
[61] G Ben-Yehudah and Y Eshet-Alkalai, 'Print versus digital reading comprehension tests: does the congruency of study and test medium matter?' (2021) 52(1) *British Journal of Educational Technology* 426, 428.

> Students should not come to university unprepared; at the point of admission, students should be told that a device is a necessity.

Reflections

This paper has critically evaluated the role and impact of digital technologies within legal education. More specifically, it has sought to elucidate the importance of reflecting, in a student-centric manner, on the implications of the obligations to participate digitally in HE. In our discussions, we have observed an important asymmetry. On the one hand, *any* impact upon the elements of digital access affects students' learning. However, the *solutions* to digital exclusion are interconnected. Therefore, providers should proactively assess their students' digital access on an individual basis to develop personalised action plans to mitigate any issues identified. However, digital access should not only be investigated *before* students arrive but frequently re-evaluated, allowing students to inform providers of changes to their digital access. Given the importance that digital technology plays in HE, in this final section, we offer several recommendations for providers and teachers to improve the learning experiences of students in HE.

Looking first at what providers can/should do to mitigate digital exclusion, we offer three provider-level recommendations:

(1) that providers commit to ensuring that *all* students have digital access while enrolled on their programme of study;

(2) that providers are transparent to prospective and incoming students before their programme of study commences regarding what digital equipment will be needed to complete their studies successfully;

(3) where students cannot meet these minimum digital requirements, providers should offer personalised, iterative approaches to resolving and mitigating digital exclusion in a constructive and supportive manner.

If providers adhered to these recommendations, HE would be an equitable, collaborative, and supportive environment for students to reach their potential, irrespective of their socioeconomic background or personal hardship. To expand on these recommendations, an overarching commitment to ensuring that *all* students have digital access is imperative in ensuring that students are not digitally excluded, enabling them to engage with and thrive in their

teaching and learning. In practical terms, this means that students have (a) appropriate hardware, (b) appropriate software, (c) robust technical infrastructure, (d) reliable access to the internet, (e) trained teachers, and (f) appropriate study spaces.

We acknowledge that providers can only ensure that students have digital access when they are physically on campus. It would be too onerous, and truthfully impossible, to try and ensure that students *always* have digital access on *and* off campus. Many providers likely meet *most* of these definitional elements, particularly (b) through (f). Unfortunately, as the academic literature, policy reports, and our research study illustrates, students become digitally excluded if *any* definitional elements are missing. In particular, our research shows that the element of digital access that many students do not have reliable and consistent access to is (a) appropriate hardware,[62] even when on campus, and this is where providers should place their immediate attention. This is because digital learning is now a constituent part of HE, such that hardware is needed for practically all aspects of students' learning, meaning that fixed-study spaces with access to appropriate hardware only solves *some* of the problems identified within this article; a portable device is now a necessity to *fully* engage within their teaching and learning.

Consequently, to ensure that providers meet recommendation (1), providers should include within students' tuition fees appropriate hardware for students upon the commencement of their programme of study, either in the form of a laptop computer or tablet computer (with keyboard), that is of the specification required for that programme.

This approach has tangible benefits for providers, teachers, and students. It ensures true equity of learning; that all students, irrespective of their background, are given the necessary tools to succeed in their studies. It also gives teachers the knowledge and confidence that all students can actively participate in and engage with their course/module learning resources without disadvantaging any student.

Suppose this recommendation is too ambitious/costly for providers. In that case, providers should ensure that all students who are unable to

[62] To reiterate, 'appropriate hardware' means hardware that allows students to access all course content effectively and is of the specification required to ensure that students are not disadvantaged in relation to their peers.

obtain/purchase appropriate hardware themselves, and therefore fail to meet minimum digital requirements, should be appropriately supported by their provider. Thus, providers should offer personalised, iterative approaches to resolving and mitigating digital exclusion; the pre- and post-data results overtly support this. In doing so, providers should be transparent to prospective and incoming students before their programme of study commences regarding what digital equipment will be needed to complete their studies successfully. This transparency will enable students to self-evaluate their circumstances; if they are, at any point during their studies, unable to meet these minimum digital requirements, HEIs must provide resources authentically and constructively to avoid any (perceived) stigma from students without access and not discourage them from notifying their provider of their exclusion.

Providers can be proactive in this regard and use, for example, contextual data and information from students' UCAS applications to reach out to students who may need additional support.[63] This might include self-declared information regarding (say) care system experience to enable providers to reach out for consultation into a student's digital learning needs. This approach would be similar to the process of contextual admissions used at HEIs, whereby contextual information and data can be used to assess an application for admission in light of, for example, a student's socio-economic background and geo-demographic data such as school code, and/or postcode. This may also help investigate if assistive software is needed should a student disclose an impairment on their application. It is also understood that this may not capture an entire cohort, given that applications may come through channels other than the UCAS system. Of course, any support offered should be available to *all* students at any point throughout their programme of study.

However, it is our view that drawing a line of 'hardship' between those suffering from such hardship, meaning they warrant/qualify for provider-level support, and those expected to purchase their own hardware is inherently problematic. Moreover, if students are expected to explain/apply why they suffer from such hardship, this may deter them from vocalising their digital exclusion. For this reason, and to further promote and embed a genuine commitment to EDI, we believe *all* students should be provided with appropriate hardware when they join.

[63] UCAS, the Universities and Colleges Admissions Service, is an independent charity, and the UK's shared admissions service for HE.

Alternatively, HEIs could offer interest-free loans to students (e.g., through a University Loan Fund) to enable students to purchase appropriate hardware necessary for their programme of study. However, the disbenefit of this approach is that students will have to start repaying the loan after an agreed term, even if they cannot do so. Consequently, defaulting on an unsecured loan will have significant negative implications for students (who are now graduates), such as poor credit scores, further perpetuating and embedding the entrenched socio-economic inequalities discussed throughout this paper. Instead of HEIs providing student loans, Student Finance England (or jurisdictional equivalent) could provide specialist finance to facilitate the purchase of appropriate hardware. The benefit of this approach is that graduates repay the 'loan' through income taxation, which is only triggered once graduates earn a specified minimum annual income.[64] The benefit of a 'graduate tax' system is that it can help prevent a HE market where students choose what to study based on their ability to pay. It can also ensure that high-earning graduates subsidise lower-earning graduates.

The authors would like to acknowledge that these final suggestions are far from ideal; they place the burden on (disadvantaged) students to absorb additional debt (or loss of income through taxation) to participate, engage, and, therefore, succeed in their programme of study. For these reasons and those outlined above, we are of the view that HEIs should be ultimately responsible for absorbing these costs, just in the same way that they are responsible for financing physical resources (e.g., campus lecture theatres, libraries, study spaces) and human resources (academic, professional, and support staff). Indeed, digital exclusion is, nonetheless, something HEIs will *have* to respond to. Institutions will be exposed to growing environmental expectations that no student is digitally excluded and that HEIs should assist in the provision of these resources. Succeeding in satisfying such expectations may lend legitimacy to the HEI's commitment to mitigating digital exclusion, which may benefit HEIs in the long term; resources for mitigating digital exclusion may

[64] At the time of writing, in November 2024, the repayment threshold for student loans in England, Northern Ireland, and Wales is £27,295 per year. For Scottish students, the threshold is £25,000. Once a graduate earns above the repayment threshold, they repay 9% of their gross income above the threshold.

then become more readily available through initiatives with other public and private organisations.[65]

Teacher-level recommendations

We offer the following teacher-level recommendations:

(1) that academic teaching staff should include a diverse range of digital learning tools to enhance the learning experience;

(2) co-create digital learning materials with students to provide engaging and collaborative learning experiences;

(3) consider those students with poor/reduced digital access when designing digital teaching and learning materials;

Digital technologies provide many possibilities for teachers in HE to enhance their teaching and learning practices.[66] However, there is also a danger that teachers use and rely upon analogue teaching methods within a digital environment. For instance, if teachers reproduce their learning materials in a digital format (e.g., handouts and presentations) and make them available online, the VLE becomes an online information/document repository and nothing more. However, VLEs *should* be social spaces where students interact with teachers, become co-creators of their learning, enrich classroom activities, and integrate heterogeneous technologies and pedagogical approaches.[67] As evidenced by the data from this study, the students surveyed were overwhelmingly positive regarding including embedded digital learning tools to aid their learning in and outside of the classroom (e.g., using Padlet, Google Docs, MS Teams polls etc.). Teachers should embrace this move to digital learning and embed such practices into their learning, especially within a discipline like law where there is a tendency to place an overreliance on traditional learning methods.[68] That is not to say that all learning should be digital; our students were vocal in requesting that a mixed diet be incorporated

[65] Saskia Köpsell and Simon Oertel, 'Digitalization attempts in higher education: the role of imprinting and the effect of business departments' (2024) Studies in Higher Education 1.
[66] S McKenzie et al, 'A team-teaching approach for blended learning: an experiment' (2022) 47(4) Studies in Higher Education 860-861; De Nito (n 21) 595; Pinto and Leite (n 3) 343.
[67] McKenzie (n 66) 871-872.
[68] A W Shavers, 'The Impact of Technology on Legal Education' (2001) 51(3) *Journal of Legal Education* 409.

into their learning, utilising *both* digital and analogue learning materials. However, this recommendation is subject to the following caveats.

First, teachers should co-create digital learning materials with their students where possible to provide engaging and collaborative learning experiences.[69] The idea of engaging 'students as partners' to co-create the curriculum has been commended for promoting more active and deeper engagement for both teachers and students in the learning and teaching experience.[70] The practice facilitates an open dialogue between teachers and students about meaningful best practices, redistributes classroom power dynamics, and empowers students to actively participate in pedagogical decision-making.[71] Despite support for this practice within the pedagogical and academic literature, research suggests it is not yet widespread.[72] This is likely because of the increased time and effort for all parties to meaningfully co-create the curriculum, including logistical problems regarding potentially asynchronous opportunities and times for teachers and students to engage in meaningful co-creation,[73] and that this practice challenges entrenched power dynamics as well as institutional structures and processes within HE.[74] Notwithstanding these barriers, empirical research illustrates that when students co-create learning materials, there is an increased sense of enjoyment and community in class.[75] While not all aspects of a student's curriculum need to be co-created, doing so with digital and in-class learning activities is a meaningful way to improve the student learning experience, which can be done without re-designing the programme. For example, teachers could work with students to decide (a) the

[69] McKenzie (n 66) 860. For the importance of reflecting teaching as it relates to improved teaching practice, see Biggs & Tang (n 33) 45-51. Co-creation can take many forms; for example, in-class formative exercises can be used to shape lesson plans.
[70] T Lubicz-Nawrocka, 'From Partnership to Self-Authorship: The Benefits of Co-Creation of the Curriculum' (2018) 2(1) *International Journal for Students as Partners* 47, 48.
[71] C Bovill, A Cook-Sather, P Felten and others, 'Addressing potential challenges in co-creating learning and teaching: Overcoming resistance, navigating institutional norms and ensuring inclusivity in student-staff partnerships (2016) 71(2) *Higher Education* 195.
[72] T Lubicz-Nawrocka, 'From Partnership to Self-Authorship: The Benefits of Co-Creation of the Curriculum' (2018) 2(1) *International Journal for Students as Partners* 47, 49.
[73] See: A Cook-Sather, C Bovill, and P Felten, Engaging Students as Partners in Learning and Teaching: A Guide for Faculty (Jossey-Bass, 2014).
[74] A Brew, 'Integrating research and teaching: Understanding excellence' in A Skelton (ed) *International perspective on teaching excellence in higher education: Improving knowledge and practice* (Routledge, 2007) 77.
[75] T Lubicz-Nawrocka and C Bovill, 'Do students experience transformation through co-creating curriculum in higher education?' (2023) 28)7 *Teaching in Higher Education* 1744.

area or topic that they would like to focus on within a particular teaching event, (b) the type of activity, and (c) the (digital) learning tool to be used. Had we followed this advice, we suspect this would have mitigated some of the issues faced in this study.[76]

Secondly, when designing learning and teaching materials, teachers need to consider the extent to which their provider supports digital access. If providers do not support *all* their students with digital access, then teachers need to have regard for those students in their classroom who might have poor/reduced digital access. For example, asynchronous alternatives could be made available for students with bad internet connections. As is demonstrated by the focus group comments, it may be the case that internet connectivity problems are not restricted to off-campus sites; WIFI connectivity problems may afflict students *on campus*, too.[77] However, the issue of poor connectivity on campus becomes more complex when planning synchronous and asynchronous learning materials for forthcoming academic years. This is because the timetabling of learning sessions may not appropriately fit with the planning cycle of learning materials. Therefore, if the responsibility is on teachers to understand the strength of connectivity in specific spaces and plan their synchronous and asynchronous materials appropriately, modules and courses must be timetabled sufficiently in advance of the academic year to provide an appropriate lead-in time for academics to plan for synchronous and asynchronous activities on-campus, as well as off-campus. As a small, final practical point, this also reiterates that teachers should upload all recorded materials in a timely fashion to ensure the inclusion of students with poor connectivity off-campus.

This is why our provider-level recommendations are so important. If providers do not follow these (or similar) recommendations to prevent digital exclusion, then teachers cannot, in good conscience, ask their students to participate

[76] We consider this to be the case as it would have allowed for a quantitative change in learning, in allowing students to spend more time on relevant tasks, as well as a qualitative change in learning, in making meaning of the learning activity, through reflection and sharing of experiences as to (a) how students learn best with digital technologies, and (b) how this may have applied to the particular module. See A Kirkwood and L Price, 'Technology-enhanced learning and teaching in higher education: what is 'enhanced' and how do we know? A critical literature review' (2013) 39(1) *Learning, Media and Technology* 6, 16-17.

[77] One solution currently implemented in our institution is to provide clear signage highlighting the strength of WIFI connectivity in that particular space on campus; students can then plan their learning activities appropriately or find spaces with good connectivity.

digitally. Consequently, our project clearly illustrates the need to build learning and procure technology around digital access currently available to students.[78]

Conclusion

This paper has reflected on some of the implications of contemporary legal education. More specifically, the implications caused by relying on digital technologies as a fundamental and obligatory component of how HEIs deliver their teaching and learning. It has shown that while there are many benefits to moving away from 'traditional' and analogue legal education, there are also dangers. In particular, some students might be/or become digitally excluded, resulting in an inequitable learning (and social) experience. It is our view that HEIs should commit to ensuring that *all* students have digital access during their programme of study. To do this, we have offered several pragmatic and practical recommendations at the provider level. If implemented, these would make strides in the right direction to ensure equity of learning. However, these changes are unlikely to be wholesale and immediate. Therefore, we have also offered several teacher-level recommendations that can be implemented to mitigate digital exclusion, which can and should be implemented with regard to their HEI's approach to digital exclusion. In summary, unless HEIs proactively resolve to ensure that all students have digital access, they will continue to maintain and reinforce social-economic inequalities within HE.

[78] *Gravity* (n 11) 23.

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Why allowing law students to use GenAI for writing assignments is a bad idea: some reflections on the labour market orientation on HLE curriculum decisions

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Abstract

Curriculum decisions in Higher Education (HE) regarding students' use of Generative AI (GenAI) are often substantiated by arguments such as graduate employability. This labour market orientation dictates that, because GenAI will inevitably play a crucial role in their future jobs, we should prepare our students by allowing or even encouraging them to use GenAI tools for their writing assignments. A quick scan of Dutch policy documents shows that the labour market perspective dominates the agenda related to GenAI on the governmental level and in Universities of Applied Sciences. In all HE institutions, the use of GenAI is allowed (sometimes conditionally, sometimes reluctantly) or even encouraged. We observe that the regulation of GenAI in Higher Legal Education (HLE) is virtually absent and fragmented, perhaps because the labour market orientation does not always align with local HLE education objectives. In our view this regulatory gap could only be filled if room is made for other orientations on curriculum decisions related to Gen AI, such as: focus on the legal discipline itself, on students' self-development and on societal reform. This will enable HLE to make curriculum decisions aimed at training law students' writing skills and teaching them to 'think as a lawyer'.

Keywords: curriculum orientations, generative AI, graduate employability, writing to learn, institutional education policy.

Introduction

Ambivalence seems to be the adequate term to describe the sentiment in Higher Legal Education (HLE) from the moment Generative AI (GenAI) was made

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available in late 2022.[1] On the one hand, teaching staff and policy makers were enthused by its opportunities for enhancing teaching and learning[2] and impressed by the (later partly refuted) claim of OpenAI that ChatGPT had passed the bar exam.[3] On the other hand, there were serious worries about the disadvantages and risks of this new technology.[4] Increasingly, teachers were confronted with a dystopia that had become reality: they would spend hours of reading and grading written assignments or students' theses that later turned out to be not the product of a genuine writing process but had instead been 'written' by ChatGPT in a few minutes. The need to reconsider proper assessment of intended learning outcomes regarding writing skills in HLE became urgent.

By now, GenAI has proven to be a powerful driver for change in society as well as in education. But the character and direction of the changes in HLE have not yet fully crystallised.[5] Various Large Language Models (LLMs) seem to have penetrated HLE in a structural manner, especially through our students, who use it mainly as a search engine and a useful tool to write texts. In many places, there seems to be little guidance from official institutional policy to prevent 'dystopic' situations like those described above. On the contrary, at central, institutional levels, GenAI seems to be adopted in a seemingly uncritical and *ad hoc* way. Teaching staff are encouraged to adopt GenAI in HLE and to use it in all kinds of 'creative ways' in their courses, and by doing

[1] Duuk Baten, *How big can the impact of Language Models on Education be?* SURF Communities, 8 December 2022, How big can the impact of Language Models on Education be? | SURF Communities (accessed 20 April 2025).
[2] Jack Nelson, 'The Other 'LLM': Large Language Models and the Future of Legal Education', *European Journal of Legal Education* 5.1 (2024): 127-155.
[3] Jonathan Choi, Kristin Hickman, Amy Monahan, Daniel Schwarcz, 'ChatGPT goes to Law School', *Journal of Legal Education* 71 (2022):387-400. Eric Martínez, ´Re-evaluating GPT-4's bar exam performance´, *Artificial Intelligence and Law* (2024). https://doi-org.vu-nl.idm.oclc.org/10.1007/s10506-024-09396-9 (accessed 20 April 2025).
[4] As observed in other disciplines and sectors as well: Rachel Toncelli & Ilka Kostka, 'A Love-Hate Relationship: Exploring Faculty Attitudes Towards GenAI and Its Integration into Teaching', *International Journal of TESOL Studies* Vol. 6(3) (2024): 77-94.
[5] Marjan Ajevski et al. 'ChatGPT and the future of legal education and practice.' *The Law Teacher* 57.3 (2023): 352-364. Aswathy Prakash G and Vishnu Nair, 'Integrating Generative AI into Legal Education: From Casebooks to Code, Opportunities and Challenges', *Law, Technology and Humans* 6 (2024): 60-79. For a more critical view: Juergen Rudolph, Mohamed Fadhil Bin Mohamed Ismail & Stefan Popenici. 'Higher education's generative artificial intelligence paradox: The meaning of chatbot mania', *Journal of University Teaching and Learning Practice* 21.6 (2024): 1-35.

so *de facto* to make essential curriculum reforms, in response to this new technology.[6]

Formal policy on GenAI, especially on a faculty level, seems to lag behind. Discussions on students' use of GenAI for writing assignments on this level often lead to a deadlock and, as a result, students' use of GenAI is tolerated for the time being. Official bans for students to use GenAI for their writing assignments seem out of the question, at least in some institutions, as bans are considered to be unenforceable. Still, a certain degree of unease among teaching staff prevails. And in the meantime, the Dutch student union understandably argues for (uniform) national guidelines, clarity and legal certainty for students in HE.[7]

In this paper we explore this problematic situation. We argue that stricter rules should apply to students' use of GenAI for writing assignments such as take-home exams, papers, case notes, essays and theses. We are under the impression that the absence of stricter policies can be explained by a one-dimensional perspective on the use of GenAI by students: GenAI is primarily seen as a useful and indispensable tool in the (future) legal practice and labour market: the employability argument.

We carried out a survey of policy documents by HE and HLE institutions in the Netherlands to analyse the origin of the indecisiveness and ambivalence towards GenAI and education in the HE/HLE policy landscape. We integrated our own experiences and observations on a local programme management level, faculty discussions on students' use of LLMs especially for writing assignments and the outcome of various faculty AI working groups in which we participated insofar as the outcomes were not confidential.

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[6] NPULS, *Slimmer Onderwijs met AI. Een handreiking voor docenten en andere onderwijsprofessionals*, September 2023, https://npuls.nl/wp-content/uploads/2023/09/Slimmer-onderwijs-met-AI-Npuls.pdf, (accessed 20 April 2025). Barend Last and Thijmen Sprakel, *Chatten met Napoleon. Werken met generatieve AI in het onderwijs*, Den Haag: Boom, 2024. Omid Noroozi et al, 'Generative AI in Education: Pedagogical, Theoretical, and Methodological Perspectives' *International Journal of Technology in Education* 3(7), 2024, 373-385.

[7] NOS 24 August 2024, 'Plagiaat met ChatGPT? Studenten vallen maar moeilijk door de mand', Plagiaat met ChatGPT? Studenten vallen maar moeilijk door de mand (accessed 20 April 2025).

We will use the terms GenAI, ChatGPT and LLMs interchangeably and by doing so we are referring to the same thing, including the tools specifically tailored for use by lawyers and trained exclusively on reliable legal sources.[8]

Both authors work in HLE (at an Academic University Law School and a University of Applied Sciences Law School, respectively); both are involved in local education management and innovation of legal education, and both teach courses on law and technology. Nevertheless, in this paper we aim to abstract from the specific situations at our own educational institutions and discuss challenges that every institution of HLE is confronted with.

One of the goals of the survey is to find out whether a dominant orientation on HLE curriculum decisions has determined the attitudes and policy choices regarding HLE students' use of GenAI for writing assignments. We begin by explaining the theoretical framework on curriculum decisions that we use, and the role of technology as a driver of curriculum change. We then proceed to offer an overview of the available information used in our survey: a selection of education policy documents on the use of GenAI in H(L)E published on different levels (national, institutional, local) in the Netherlands. The next section focuses on the results of the analysis of our findings through the lens of the theoretical framework on curriculum decisions described earlier. We then present the outcomes of our analysis regarding regulation of students' use GenAI for writing assignments and discuss our hesitations. We emphasise the relevance of writing skills in HLE and the importance of teaching critical thinking on the law-technology nexus – instead of encouraging or even training students to utilise these technologies. We strongly recommend writing assignments for students without GenAI to allow them to learn and to think like a lawyer. We conclude with some recommendations for future research and with the answer to the question how, in our view, different orientations on curriculum decisions could help formulating better (and less ambivalent) HLE policies on students' use of GenAI for writing assignments.

[8] Such as Lexis+AI, see Lexis +AI | The generative AI for Lawyers, Harvey, see https://www.harvey.ai/legal, CoCounsel, see https://casetext.com/, DeepJudge, see https://www.deepjudge.ai/, Libra, see https://libratech.ai/, Nostua, see https://www.noxtua.ai/, Bryter, see https://bryter.com/, Legal GenAI in other languages (and for other jurisdictions) include: OttoSchmidtAnswers, see https://www.otto-schmidt.de/online/otto-schmidt-answers, Jupus, see https://www.jupus.de/?r=0, Septio, see https://www.septeo.com/fr/metier/avocat, GenIA-L, see https://www.rechtsorde.nl/genial/ (all accessed 20 April 2025).

Theoretical framework

Educational context: curriculum orientations

Decisions on allowing or prohibiting students' use of GenAI come down to reforms of the curriculum. Curriculum changes can be driven by several reasons, varying from new insights in pedagogical research, to declining student numbers or the results of course evaluations.[9] Also the emergence of new technological tools, like GenAI, can be an external driver of curriculum change. The scope and direction of that change depend first and foremost on the dominant view on the purpose of education.

In curriculum theory literature, views on the purpose of education are generally classified into four different perspectives:[10]

1. The scholar academic orientation, which aims to introduce students to the discipline, and where curriculum decisions focus on students' acquisition of the academic knowledge and ways of knowing,
2. The social efficiency orientation, where curriculum development and reform revolve around what society (especially the labour market) needs,
3. The learner-centred orientation which aims to help the individual student to make sense of their experiences for the purposes of self-understanding and personal growth, and
4. The social reconstruction orientation, which aims to develop students' understanding and resolving social, economic and environmental issues.[11]

Similar perspectives to curriculum change were also identified by Roberts.[12] Her study affirmed that beliefs of participants about educational purposes

[9] Louise McAteer, Joseph Roche and Aine M. Kelly, 'Renewing an undergraduate science curriculum for the 21st century', *Frontiers in Education* 2023, https://doi.org/10.3389/feduc.2023.1270941 (accessed 20 April 2025).
[10] K. Zweeris, E.H. Tigelaar & F.J.J.M. Janssen, 'Studying curriculum orientations in teachers' everyday practices: A goal systems approach', *Teaching and Teacher Education* 122 (2023) 103969. For a critical note on conceiving academic education in instrumental terms, also Bart van Klink, 'Critical thinking in Academic Legal Education. A Liberal Conception', *Law and Method* (2023) doi:10.5553/REM/.000076 (accessed 20 April 2025).
[11] K. Zweeris, E.H. Tigelaar & F.J.J.M. Janssen (2023), p. 2-3.
[12] Pamela Roberts, 'Higher education curriculum orientations and the implications for institutional curriculum change', *Teaching in Higher Education* 20.5 (2015): 542-555 at p. 544.

defined a number of distinctive philosophical orientations or 'ideologies' to curriculum change. The most relevant curriculum orientations she discerned were the discipline-based orientation, the professional orientation, the personal relevance orientation and the social relevance and reform orientation.[13] What makes Roberts' framework interesting and also more complex, is the observation that teachers in higher education (and educational management on a faculty level, we would add) inevitably are influenced by and respond to external higher education change drivers, like institutional educational change agendas and socio-political context. Roberts identified several of such external change drivers, such as graduate employability and the skills agenda.[14] The emphasis on generic skills in the curriculum of most participants in her study suggested, according to Roberts, that these participants were indeed responding to government agendas requiring that higher education should aim at employment opportunities for graduates, even if the participants were not aware of this influence (or in any case did not explicitly mention it).[15]

We take this framework as the starting point for our own analysis of the current situation regarding the students' use of GenAI. Through a non-exhaustive, qualitative analysis of relevant policy documents, we try to unravel the underlying assumptions and perspectives on GenAI and possible dominant orientations on curriculum decisions that led to GenAI being adopted in HLE in the haphazard manner it is today, as described above.

Views on GenAI: between fear and fascination

Sentiments towards GenAI vary considerably, not only in practice (on the HLE work floor, as discussed above) but also in the literature. Some authors

[13] Pamela Roberts, 'Higher education curriculum orientations and the implications for institutional curriculum change', *Teaching in Higher Education* 20.5 (2015): 542-555 at p. 544-545.
[14] Roberts 2015, p. 550
[15] Roberts 2015, p. 550-551.

demonstrate defeatism and fear.[16] Others show enthusiasm[17] (although it cannot be ruled out that optimistic determinist attitudes towards GenAI are to a great extent shaped by the ubiquitous lobbying and marketing strategies of the tech companies themselves).[18] Interestingly, these opposing sentiments can coexist, even in one and the same person, institution or policy document. The three sleepless nights, 'equal parts excited and nervous', as described by Mollick after his first encounter with GenAI, illustrate this.[19] We label this phenomenon as techno-ambivalence.

What most authors share is the *techno-deterministic* belief that 'these technological innovations can no longer be stopped'. Such inevitability discourse translates into statements such as 'all law firms already use GenAI' and 'if we don't allow them to use ChatGPT, our students will miss the boat in

[16] A. Balan, 'Examining the ethical and sustainability challenges of legal education's AI revolution.' *International Journal of the Legal Profession*, 2024, 31(3), 323–348, https://doi.org/10.1080/09695958.2024.2421179 (accessed 20 April 2025); Tina van der Linden, 'AI! In het recht, in het werk van juristen en in de juridische opleiding', *Tijdschrift voor Internetrecht,* 1 (2025), pp. 13-18.
[17] Sahibpreet Singh and Pawanpreet Kaur, 'AI in Legal Education: An Ambedkarite Perspective '(April 24, 2024). *Conference: Legacy of Dr. Babasaheb Ambedkar: Analysis and Appraisal*, https://ssrn.com/abstract=5123080 (accessed 20 April 2025). K. Sloan, 'Law schools boost their AI offerings as industry booms' *Reuters* (June 18, 2024), https://www.reuters.com/legal/transactional/law-schools-boost-their-ai-offerings-industry-booms-2024-06-18/ (accessed 20 April 2025). Oli Nassau, 'Exploring generative ai and legal education', *Centre for Legal Innovation*, September 4, 2024, https://www.cli.collaw.com/latest-news/2024/09/04/exploring-generative-ai-and-legal-education (accessed 18 April 2025). Maria Paola Velásquez Restrepo, 'Proactivity in legal education for Generations Z and Alpha: a case study'. *TalTech Journal of European Studies* (2025) 15:1, 253-281. Laura Hood, 'AI transformation in the legal sector begins in law schools', March 25, 2025, https://theconversation.com/ai-transformation-in-the-legal-sector-begins-in-law-schools-252007 (accessed 20 April 2025).
[18] Marietje Schaake, *The Tech Coup: How to Save Democracy from Silicon Valley*. Princeton University Press, 2024.
[19] Ethan Mollick, *Co-Intelligence, Living and Working with AI*, WH Allen, 2024, p. xi.

their future jobs'.[20] Distinct expressions of critique or even refusal of GenAI in general are rarer.[21]

The various attitudes towards GenAI and emerging technologies in general are summarised in table 1 below.

Table 1: Attitudes towards (emerging) technologies

	Determinism	*Constructivism*
	Technology is a driving force in the development of society and mankind.	People have a choice to utilise technology as a tool for societal change, in certain ways, for certain goals.
Tech-optimism	Technology is inevitable, powerful and autonomous, humans can only be passively grateful.	There are so many ways to make the world a better place and technology is going to help us reach our goals.
Tech-pessimism	Technology is inevitably taking over and we cannot stop it however much we may want to.	People choose to use technology in certain ways for certain goals and decide when it should be stopped.

[20] M. de Oliveira Fornasier, 'Legal education in the 21st century and the artificial intelligence', *Revista Opinião Jurídica*, (2021) 19, 1-32. PYMNTS, 'Lawyers Who Use AI Will Replace Those Who Don't', January 12, 2024, https://www.pymnts.com/news/artificial-intelligence/2024/lawyers-who-use-ai-will-replace-those-who-dont/ (accessed 20 April 2025). Michael Cross, 'In depth: AI revolution is 'inevitable' - the challenge is to embrace it ethically', *The Law Society Gazette*, February 9, 2025, https://www.lawgazette.co.uk/news-focus/in-depth-ai-revolution-is-inevitable-the-challenge-is-to-embrace-it-ethically/5122298.article (accessed 20 April 2025).

[21] See, however, I. Van Rooij et al, 'Reclaiming AI as a theoretical tool for cognitive science', *Computational Brain & Behavior*, 2024 7(4), 616-636, https://link.springer.com/article/10.1007/s42113-024-00217-5. Siri Beerends, 'Waarom we de AI-boot prima kunnen missen', *iBestuur*, April 10, 2025, https://ibestuur.nl/artikel/waarom-we-de-ai-boot-prima-kunnen-missen/. Useful sources on GenAI refusal: M. Fernandes et al, 'Resources on refusing, rejecting, and rethinking generative AI in writing studies and higher education' (2024), https://refusinggenai.wordpress.com/resources/. On responsible use of AI: International Organization for Standardization ISO, *Building a responsible AI: How to manage the AI ethics debate*, https://www.iso.org/artificial-intelligence/responsible-ai-ethics (accessed 20 April 2025). Unesco, *Ethics of Artificial Intelligence, The Recommendation*, https://www.unesco.org/en/artificial-intelligence/recommendation-ethics (all accessed 20 April 2025).

Hypothesis, materials and methods

Hypothesis

Policy decisions with regard to the utilisation of GenAI for writing assignments in HLE have thus far, in our experience, been characterised by ambiguity, by lack of clarity or have been absent altogether. It may be argued that this regulatory gap is attributable to some degree of indecision, or perhaps even techno-ambivalence. The present study assumes that there is a relationship between curriculum orientation, the attitude towards emerging technologies and the way students' use of GenAI in HLE is regulated. We hypothesise that fundamentally opposing views with respect to the objectives of curriculum change and with respect to technological developments (as described above) render consistent policy a priori impossible and therefore have a delaying effect on the development of GenAI policy especially on the local (HLE) administrative level.

Materials & methods

To test our hypothesis we utilised the qualitative information from a selection of policy documents available on three levels: the central (governmental and intermediary) level, the institutional level of Higher Education (HE: Academic Universities and Universities of Applied Sciences or UoAS) and the local (or law faculty) level (HLE).[22] We examined a total of 35 texts (webpages and documents) on GenAI, more specifically on the regulation of students' use of GenAI in higher (legal) education related to writing assignments. The selected texts were coded by hand to identify the occurrence of text elements referring to:

- specific rules on GenAI use by students (especially for writing assignments),
- the possibility or desirability of limiting students' use of GenAI, fraud, plagiarism, and the possibilities of detecting GenAI use,
- the importance of training and assessing HLE students' writing skills,
- teaching other (legal) skills like critical thinking (among others about the risks and challenges related to GenAI),

[22] We had access to information from five of the twelve Dutch universities of applied sciences (UoAS), and all ten academic universities that offer programmes in law.

- the role and importance of GenAI in future jobs.###

Where possible we also captured and interpreted the more general tone and the sentiments towards the use of GenAI within these texts. This could help establishing an assumed direct link between a strong belief in the inevitability of GenAI (techno-determinism) and the tendency to embrace it in education, regardless of whether it was deemed as a positive addition or as 'something we cannot escape from' (see table 1). Therefore a 'light version' of content analysis was executed whereby we identified text elements regarding:

- the inevitability of GenAI (expressed by words such as: fast, swift introduction, rise, disruptive development, no holding back, including arguments such as 'a ban has no use, they will use it anyway')
- positive connotations, opportunities and advantages of GenAI,
- negative connotations, risks and disadvantages of GenAI.

Documents from the local HLE level

Our study was inspired by the situation on the faculty work floor, as we ourselves were struggling with the matter in our daily work, both as teachers and as members of faculty AI working groups. Therefore, we decided to collect more and other local data, through an online search and by using our personal networks of colleagues from law faculties of fifteen Dutch HE institutions. Our quick scan showed that only in a handful of law faculties such policy documents were available. Most faculties did not have any written policy documents on the topic, others were still working on the topic or would rely on the general GenAI and education policies at the institutional (HE) level.

Where faculty policy documents were available, they were rarely made public online. Apparently, most faculties prefer to keep their GenAI policy confidential and distribute it for internal use only. As the starting point of our study, therefore, we only had confidential information from four Dutch (academic) law faculties at our disposal.

Documents from the institutional HE level

HE institutional policy documents and guidelines are mostly composed by education policy officers from teams at the central level such as Centres for Teaching and Learning or by central AI working groups. Most of this institutional policy information on students' use of GenAI is freely available

online. For this study, we selected a total of 21 policy documents and information webpages from 15 Dutch HE institutions that offer a law degree (ten academic universities and five universities of applied sciences – UoAS's, see Appendix).[23]

Some guidelines were simply posted on the university website, others were published and available as a PDF document. The difference between webpage and PDF documents may be indicative for the extent to which GenAI policies were seen as temporary and unstable by some institutions and more consistent and sustainable by others. As Maastricht University puts it:

> 'Recognising the rapid evolution of GenAI and its accompanying legislation, this policy framework will remain a living document. Static guidelines will be supplemented by regularly updated annexes, supporting materials, and training, to reflect new developments and best practices.'[24]

The selection as shown in the table in the Appendix consists of institutional guidelines for both teachers/supervisors and students.

[23] From seven UoASs that offer a law programme no information was available or accessible.
[24] https://www.maastrichtuniversity.nl/news/policy-framework-generative-ai-officially-published (accessed 11 August 2025)

Documents from the central, national level

To complete our survey, we incorporated six policy documents from a national education policy level (NPULS and SURF) and from the central, governmental level.[25]

As far as we are aware, no specific policy or guidelines on students' use of GenAI for writing assignments have been developed (at this moment) by umbrella organisations such as the Council of Deans of the Dutch Law Faculties, or the Coordinating Committee of UoAs Law Curricula, the Universities of the Netherlands (UNL) or Association of Universities of Applied Sciences (VH).

Limits of the research

It should be noted that this study must be seen as a first pilot. Especially documents from the Dutch law faculties were for the most part not available. We recommend that a systematic survey of policies and attitudes on students' use of GenAI in HLE be carried out in a more structural way in the future. Based as they are on a non-exhaustive selection of sources, the results, analysis, and conclusions in the next sections can only be of a preliminary nature.

Results and analysis

In this section we present the results of our survey regarding the following major themes: the perception of GenAI as an inevitable technological

[25] The Ministry of Education, Culture and Science, *Strategische agenda hoger onderwijs en onderzoek: Houdbaar voor de toekomst*, 2019: www.rijksoverheid.nl/documenten/publicaties/2019/12/02/strategische-agenda-hoger-onderwijs-en-onderzoek. Rathenau Instituut, *Rathenau Scan Generatieve AI*, 2023: Generatieve AI | Rathenau Instituut. The Ministry of the Interior and Kingdom Relations, *The government-wide vision on Generative AI of the Netherlands*, 2024: Government-wide vision on generative AI of the Netherlands | Parliamentary document | Government.nl. Eimers, T. (red.) *Vandaag is het 2040. Toekomstverkenning voor middelbaar beroepsonderwijs, hoger onderwijs en wetenschap*. 2023, Nijmegen/Utrecht/Enschede/Amsterdam: KBA Nijmegen, ResearchNed, Andersson Elffers Felix, CHEPS, Kohnstamm Instituut: Vandaag is het 2040 Deel 1 | Rapport | Rijksoverheid.nl. Duuk Baten, Matthieu Laneuville, Bertine van Deyzen, *The state of AI and the modern educational institution. AI explained in the context of the educational sector*, 27 November 2023, https://npuls.nl/wp-content/uploads/2024/04/Npuls-Startnota-State-of-AI-B5-EN.pdf. NPULS, *Slimmer Onderwijs met AI. Een handreiking voor docenten en andere onderwijsprofessionals*, September 2023: Slimmer-onderwijs-met-AI-Npuls.pdf (all accessed 20 April 2025).

development and the associated 'techno-ambivalence'; the relationship between GenAI and graduate employability and the labour market orientation as dominant perspective on curriculum reforms caused by the rise of GenAI; and the various regulatory measures of students' use of GenAI for writing assignments.

Understanding GenAI: inevitability and techno-ambivalence

The majority of the investigated HE webpages and guidelines qualified GenAI as a fast, autonomous and inevitable development and more or less 'a fact of life'. This is a relevant observation as we earlier presumed that there is a direct correlation between these techno-deterministic beliefs and a labour market orientation on education. Ten out of the fifteen institutions in our survey produced evidence of clear expressions of this presumed inevitability:

> 'The use of GenAI, especially ChatGPT, is currently spreading like an oil slick among HU students. Colleagues are becoming aware of the – sometimes even disruptive – impact of GenAI on education and assessments.' (Utrecht UoAS)

> 'Generative AI will play an increasingly important role in our world and therefore also in education. VU Amsterdam therefore believes it is important that you as a student learn to use AI well.' (VU Amsterdam)

In a few sources a certain degree of techno-negativism resounded about the lack of human agency or influence on that unstoppable process:

> 'The reality is that this technology is here to stay, and we need to find a way to relate ourselves to it. The availability of these types of language models can make a positive contribution to different forms of education, but mostly also requires us to reconsider how we assess students' knowledge and insight.' (Radboud University)

An absolute majority of texts that we studied were clearly ambiguous: weighing up advantages and disadvantages, threats and opportunities, high expectations and profound concerns about GenAI in education. These elements of techno-ambivalence (otherwise a very common phenomenon in the

discourse on new technologies, in general)[26] occur so regularly that they run the risk of becoming platitudes and losing all their meaning.

> 'It is important that users of GenAI be aware of the benefits and opportunities that come with its use, while at the same time being aware of the potential risks and drawbacks.' (Maastricht University).

This kind of 'on-the-one-hand-on-the-other-hand-isms'[27] can be traced back throughout the entire chain of policy documents, starting with 'The government-wide vision on Generative Al of the Netherlands' which is so full of similar hollow phrases on 'risks and opportunities' that this led to critical questions from Members of Parliament:

> 'The members read a detailed explanation of the opportunities and risks of generative AI, but miss a clear choice between those interests (…). In her letter, the State Secretary mentions that the desirability of generative AI depends on the development, technology and intentions of the user. The members believe that this [government-wide] Vision document should serve to establish protection against undesirable use. How do you ensure that the risks are mitigated, and the opportunities are used in a responsible manner?'[28]

About one third of the institutional documents on GenAI and education that we investigated pay attention to criticisms of GenAI in general, underpinned with sometimes elaborate lists of objections to GenAI use. The most frequently mentioned objections are well known: lack of reliability of output of GenAI, lack of accountability, privacy and data protection issues,[29] intellectual property issues, bias and discrimination. Some institutions refer to the labour

[26] On-the-one-hand-on-the-other-hand-ism: already described by Joseph Weizenbaum, 'On the impact of the computer on society' *Science* 12 May 1972 Vol 176, Issue 4035 pp. 609-614, DOI:10.1126/science.176.4035.609 (accessed 20 April 2025).
[27] Term coined by Joseph Weizenbaum, op. cit.
[28] Parliamentary documents, translation by the authors - Antwoorden op Kamervragen (SO) over Overheidsbrede visie op generatieve artificiële intelligentie (AI) | Kamerstuk | Rijksoverheid.nl 27 June 2024.
[29] Taner Kuru, 'Lawfulness of the mass processing of publicly accessible online data to train large language models', *International Data Privacy Law*, Volume 14, Issue 4, November 2024, 326-351, https://doi.org/10.1093/idpl/ipae013 (accessed 20 April 2025).

circumstances of moderators and annotators of training data (Utrecht UoAS).[30] Another university qualifies GenAI as 'boring' (EUR). A major objection against the use of GenAI is its unsustainable nature,[31] both in terms of energy consumption,[32] water use,[33] and requirements of scarce minerals.[34] In that light, encouraging or allowing students to use LLM's is hardly defensible given the fact that many Dutch HLE institutions claim to endorse the UN Sustainable Development Goals.[35] Such conclusions, however, were lacking from the texts we examined.

There are students in HE and HLE who endorse these objections - and some of the documents in our study explicitly refer to that group:

> 'Students who do not want to use AI should not be disadvantaged compared to students who do use it.' (University of Groningen)

Others emphasise that students should be told about the detrimental effect of using AI, preferably at the beginning of a course, or included in the syllabus – to simply raise students' awareness:

> 'Students receive training and instructions on the use of GenAI. (…) the trainings and instructions will include

[30] Niamh Rowe, '"It's destroyed me completely": Kenyan moderators decry toll of training of AI models', *The Guardian* 2 August 2023, 'It's destroyed me completely': Kenyan moderators decry toll of training of AI models | Artificial intelligence (AI) | The Guardian, (accessed 20 April 2025). See for an excellent overview: M. Fernandes et al, 'Resources on refusing, rejecting, and rethinking generative AI in writing studies and higher education' (2024), https://tinyurl.com/ewwaibib (accessed 20 April 2025).
[31] For a meta-study on AI sustainability see Niklas Humble and Peter Mozelius, 'Generative Artificial Intelligence and the Impact on Sustainability.' *International Conference on AI Research (ICAIR 2024)*. ACI Academic Conferences International, 2024. https://link.springer.com/content/pdf/10.1007/s43681-023-00259-8.pdf (accessed 20 April 2025).
[32] Vries, A. de, 'The growing energy footprint of artificial intelligence', *Joule* (2023), https://doi.org/10.1016/j.joule.2023.09.004 (accessed 20 April 2025). Mél Hogan, 'The fumes of AI.' *Critical AI* 2.1 (2024). https://doi.org/10.1215/2834703X-11205231 (accessed 20 April 2025).
[33] Pengfei Li et al, 'Making ai less' thirsty': Uncovering and addressing the secret water footprint of ai models' (2023), arXiv preprint, https://arxiv.org/abs/2304.03271 (accessed 20 April 2025).
[34] Crawford, Kate. *The Atlas of AI: Power, Politics, and the Planetary Costs of Artificial Intelligence*. Yale University Press, 2021, p. 44 https://www.jstor.org/stable/j.ctv1ghv45t# (accessed 20 April 2025).
[35] See https://sdgs.un.org/goals.

> information on common misconceptions of GenAI tools, such as potential bias, subjective, and discriminatory output.' (Maastricht University)

It is typical of this techno-ambivalence towards GenAI, however, that the concerns are never regarded of such urgence that they lead to the complete rejection of GenAI in education. The concerns are mentioned and even acknowledged – but not one institution in our survey was brave enough to follow up on them. Not using AI, or as little as possible, simply does not appear to be an option.

Embracing GenAI: skill for future jobs?

Explicit reference to the need to include GenAI in education because of fear of losing the connection with the future labour market was found regularly in the investigated sources. Not surprisingly, especially in the investigated policy documents from the institutions of applied sciences considerations about the importance of an optimal alignment with future employers' demands were found. By their nature, these institutions are more focused on the demands coming from the professional field.

> 'An important starting point for tests at HU is (…) that our assessment is a reflection of what students will have to be able to do in professional practice. For some professions, the use of ChatGPT will have a major impact on what professionals do. ChatGPT, for example, generates policy advice or computer code (..) and will only get better and better at this. (…) This means that we need to find assessment methods that fit those professional activities.' (Utrecht UoAS)

Other UoASs, however, produced more restrained statements – without hardly any direct reference to the interests of the professional field:

> '(…) the HAN, where AI systems are given a place in the classroom, the professional field, research and business operations. This has major implications, both in terms of opportunities for new learning strategies and for student support. In a negative sense, it can have consequences for the values of educational quality, justice, humanity and autonomy (...) AI systems are part of our society and will continue to grow in size and potential in the near future. (…) it seems

> important to be critical of this.' (HAN UoAS)

Only in three out of ten academic institutions similar references to graduate employability and the connection with and expectations from the labour market were found. In the documents of the seven other academic institutions no such references were made.

At academic universities with a relatively strong focus on professional practice we see similar arguments for implementing GenAI in education and allowing students to use it for writing assignments:

> 'The effect of GenAI on the intended learning outcomes must be evaluated per programme. The evaluation should aim to complement traditional academic skills with relevant learning outcomes that fit the developments of GenAI and to determine the relevance of the current learning outcomes in relation to the changing requirements from the professional field (work processes that are redundant or changed). (…) GenAI contributes to preparing students for a rapidly developing and changing job market.' (Maastricht University).

> 'The technology of (generative) AI is developing rapidly and the impact on our education is profound. Adjustments are required, both regarding how we shape our education and how our programmes can continue to connect with the professional field.' (OU)

Obviously, linking the deployment of GenAI to novel requirements from the professional field has major potential repercussions for current learning outcomes, and inevitably also for the continuation of learning, teaching and assessing the more traditional academic skills.

This is fully in line with the national agenda, where the employability and skills agenda are central. In the Government-wide vision on GenAI it is stated:

> 'Matching the skills of the workforce to the labour market of the future is essential.[36] (…) The government is actively promoting the acquisition of knowledge and skills. This

[36] The Ministry of the Interior and Kingdom Relations, *The government-wide vision on Generative AI of the Netherlands*, 2024, p. 36 Government-wide vision on generative AI of the Netherlands | Parliamentary document | Government.nl (accessed 20 April 2025).

> allows us to take full advantage of the opportunities provided by generative AI. (…) the government recognizes the significance of enhancing generative AI knowledge and skills throughout society. This is achieved by supporting education to enable an adequate response to technological developments.'[37]

This labour market orientation trickles down to the institutions via documents at the intermediary level, for example from the organisation NPULS (which essentially establishes a liaison between governmental ambitions with AI and the education sector and is financed by the National Growth Fund).[38]

> 'AI impacts the expectations and requirements of education (learning about AI and preparing for AI). There is a growing societal demand for broader AI literacy or AI wisdom in which education has an important role. In addition to this, AI changes the professional fields, creating new needs and expectations of future employees. Which elements of these societal demands we see as the duty of educational institutions and how (…) the educational system [can] adjust its education to align with social and labour market needs is a crucial question and requires a holistic approach across all educational levels.'[39]

NPULS leaves no doubt: technology in education needs a boost by programmes such as 'Expedition AI' – where dealing with GenAI is seen as 'a joint journey of discovery towards the education of the future, in which we take advantage

[37] The Ministry of the Interior and Kingdom Relations, *The government-wide vision on Generative AI of the Netherlands*, 2024, p. 40 Government-wide vision on generative AI of the Netherlands | Parliamentary document | Government.nl (accessed 20 April 2025).
[38] The National Growth Fund programme NPULS is developing a national AI point and AI vision for secondary vocational education (MBO), higher vocational education (HBO) and university education (WO). The aim is to prepare the sectors for the transformation of education and to help shape these changes in collaboration with partners and institutions: The Ministry of the Interior and Kingdom Relations, *The government-wide vision on Generative AI of the Netherlands*, 2024, p. 20 Government-wide vision on generative AI of the Netherlands | Parliamentary document | Government.nl (accessed 20 April 2025).
[39] NPULS, T*he state of AI and the modern educational institution. AI explained in the context of the educational sector*, 27 November 2023, p. 12, https://npuls.nl/wp-content/uploads/2024/04/Npuls-Startnota-State-of-AI-B5-EN.pdf, (accessed 20 April 2025).

of the opportunities that AI offers and do not shy away from challenges that AI poses.'[40]

Here, it is not a question *whether* (higher) education should embrace AI: it is considered to be the central spider in the web of the curriculum.[41] And these ambitions set the stage, as their techno-optimism and labour market orientation inevitably seeps through to the institutional education policy levels, as demonstrated above.

Regulating GenAI use for writing assignments

Setting rules regarding students' use of GenAI for writing assignments appears to be a hazardous task. It seems that all guidelines we analysed in this study have difficulty reconciling opposite objectives. Offering the opportunity to students to learn how to work with GenAI in order to be better prepared for the labour market, and at the same time offering them the opportunity to practice writing (writing to learn) and to improve their writing skills (learning to write) is virtually impossible. Especially when it is taken for granted (without any real indications to that effect) that students use LLMs for their writing anyway and that a simple ban is supposed to be ineffective, because detection of the use of GenAI in students' writing is claimed to be technically impossible.

This complexity results in a variety of lengthy, sometimes unclear, ambiguous or even paradoxical guidelines and in noticeable differences between institutions. Within the scope of this paper, we can only discuss a few aspects.

In general, we observed two major policy principles: either GenAI is allowed unless otherwise indicated by the teacher or in the course manual (found in most of the institutions), or alternatively, GenAI is not allowed unless explicitly stated otherwise (in approximately 30 per cent of the investigated guidelines). Several texts however were not clear in this respect. Our impression is that the principle of 'not allowed, unless otherwise stated' was slightly more prevalent at the academic universities than at the universities of applied sciences.

[40] NPULS, *Expeditie AI van start*, 9 April 2024, https://npuls.nl/actueel/expeditie-ai-van-start/ (accessed 20 April 2025).
[41] NPULS, *Slimmer Onderwijs met AI. Een handreiking voor docenten en andere onderwijsprofessionals*, September 2023, p. 8 Slimmer-onderwijs-met-AI-Npuls.pdf (accessed 20 April 2025).

Moreover, allowing GenAI use can take on different forms and various degrees ranging from mere tolerating to actively encouraging students' use.

> 'You must create your text yourself: in other words, write it yourself. Therefore, keep being careful not to copy and paste information *verbatim*.' (VU Amsterdam)

> 'Saxion encourages you to use AI tools responsibly (...) Saxion certainly does not opt for a ban but for integrating it.' (Saxion UoAS)

The conditions that apply for the use of GenAI are sometimes elaborated and sometimes summarized in a couple of bullet points. Most of the time they are open to interpretation:

> 'Always *indicate whether* you used AI tools in an assignment or a test. So *not only when you have used AI to write parts of a report* but also mention that you have used AI to brainstorm and form your thoughts, for example. In addition to *using ChatGPT for writing assignments*, you can also use it as a learning tool. (…) Submitting your own work is essential for academic integrity. Do not rely on ChatGPT to write your work *entirely*. Make sure that the ideas and *the wording of the assignment are yours* and justify what you have written. It is important to be honest with yourself and others. *If you used ChatGPT when writing your assignment, mention it in your work and indicate which parts were generated by ChatGPT*. (Saxion UoAS)

> 'While programs like ChatGPT can be a useful tool, similar to spell checker or Wikipedia, *they cannot replace your own*, original work. *If you use an AI program such as ChatGPT for a writing assignment and do not mention it*, you are committing fraud and violating scientific integrity. This can have serious consequences for your studies.' (Leiden University)

Most of the texts included elaborate rules concerning fraud and plagiarism. Institutional documents typically emphasise that the use of GenAI could constitute fraud and a breach of academic integrity.

> 'The use of a chatbot can be seen as fraud. You should not hire a ghostwriter to have your essays written for you either.' (Utrecht University)

> 'Fraud occurs when GenAI is used when this is not allowed or when GenAI is used in another way than is permitted by the instruction. Plagiarism occurs when GenAI is used without or with incomplete or incorrect citation or when work generated by GenAI is presented as one's own work.' (Amsterdam UoAS)

Confusion lurks where some institutions expect students to refer to the (academic) sources mentioned within content generated by GenAI, and others expect students to also refer to GenAI as a source on its own (in which case it should be mentioned in the body of the text or in a footnote).

Detection and prevention

It is generally stated that detection of fraud with (*i.e.* unauthorized use of) GenAI by using digital tools is unfeasible. And such statements were indeed found in the majority of the teachers' guidelines included in our survey (but were for obvious reasons omitted by students' guidelines):

> '(…) The student can then easily have these texts translated and paraphrased or have new versions generated. However, the teacher cannot, or can hardly, detect that the text was (partly) created by a computer. And AI detectors cannot be used to detect such processing as they pose a privacy risk and are very unreliable.' (VU Amsterdam)

It is unclear whether these statements refer to insufficiencies of the plagiarism tools that are currently in use in HE or to *all* AI detection tools in general, but they are often presented as a fact of general knowledge. Apart from the question whether policing GenAI use should be aspired in HE, we note that the decisiveness by which automatic detection of GenAI use is excluded from the 'toolbox' has a major impact on the development of guidelines on GenAI.

Some institutions do, however, prescribe with some caution the use of tools, such as Turnitin to detect AI:

> 'When students submit an assignment, you can check for the

> use of generative AI using Turnitin. Note that the score generated by Turnitin can only be used as an indication that generative AI was used but does not provide certainty. (…) Check the AI writing indicator. (...) If the AI writing indicator shows a positive percentage, click this percentage to open the AI writing report. In the report, the sections that were likely written using generative AI are highlighted. This can give you a better understanding on how students may have used generative AI.' (Erasmus University Rotterdam)

Alternative ways of recognizing plagiarism are described by focussing on indicators such as: factual inaccuracies, incorrect assertions, internally inconsistent reasoning, meaningless passages, overly structured or unnatural looking texts, sentences ending abruptly, differences in style, remarkably few or no spelling errors, a list of sources that contains many or exclusively English sources (in the case of a Dutch legal text), or URLs with a dead end or incorrect or fictitious references, or that do not mention page numbers.

More preventive measures mentioned by the HE institutions include alternative types of formative assessments such as requiring students to hand in writing assignments in multiple phases, or to give an (interim) oral presentation, or to keep a log.

The advice given by one of the UoAS to gradually move away from writing assignments *tout court* and focus on assessing other skills would in our eyes have a detrimental effect on the quality of HLE education.[42]

The ample attention to detection, prevention and rules on GenAI use for writing that we found in the documents studied suggests that great importance is attached within the institutions to the training and testing of writing skills, and that the use of GenAI for writing assignments stands in the way of the development of these writing skills.

Some guidelines take the opportunity to explain the importance of developing writing skills for the students and why GenAI should not be used for generating texts:

> 'GenAI can support as a writing aid: to start up faster, to generate ideas, as a translation aid, *etc*. But be aware that

[42] Confidential source.

> writing is more than just making a written product. The writing process helps to think critically, analyze, formulate, organize, structure and communicate. Writing is therefore a valuable (learning) process. Enough reason for many programmes to give human writing skills a permanent place in the curriculum.' (Amsterdam UoAS)

> 'In the end, of course, you are at the University to learn something. You do not learn anything by letting a chatbot do your work for you.' (Utrecht University)

> 'The other important reason not to have your assignments written by AI programs is that it hinders your academic development. After all, relying on artificial intelligence for your writing assignments will not help you develop the skills you need to graduate. For your bachelor's or master's thesis, you will have to demonstrate that you can do research and write about it under intensive supervision. If you have not developed these skills sufficiently, you will fall behind in your studies or you will not be able to graduate at all.' (Leiden University)

> 'The purpose of studying at VU Amsterdam is that you learn to acquire and process knowledge on your own. The writing process is important to organise your thoughts and process knowledge. You must also be able to report on this in a persuasive text (essay, written pleading, research report, *etc*.). This requires teachers and examiners to be able to assess your own level of knowledge and skill and your contribution to such a product.' (VU Amsterdam)

But none of the examined policy documents explicitly qualified GenAI as a threat to the quality of (legal) education and therefore encouraged slowing down the adoption or end the use of LLMs altogether.

Discussion

The analysis of the results of our survey led to the insight that in general policies regarding GenAI in HLE fit into a relatively strong inevitability, techno-positivist and graduate employability framework. This specific perspective on GenAI seems to have seeped downwards from the

governmental, national level where the red carpet was rolled out without any hesitation:

> 'Generative AI can be considered a powerful extension of human analytical and creative abilities. When coupled with related technologies, it has great potential to address societal and scientific issues.'[43]

Broadly speaking, we found that the greatest unease and concerns related to the use of GenAI and writing skills were felt at the faculty level (although so far little substantial policy has been developed or published):

> 'It is a fact that the students' use of AI for writing assignments does not serve any learning outcome of our teaching programmes. It deprives students of the opportunity to practice and improve their writing skills, and teachers to test that skill. On balance, no one will win from this.'[44]

Until now, only a small minority of Dutch (teaching) academics publicly demonstrated their worries, as Professor of Computational Cognitive Science Van Rooij (@Iris) did on Mastodon:

> 'Deeply troubled by seeing my Dutch colleagues — both at @Radboud_uni and elsewhere in the country — hyping up ChatGPT rather than help curb the hype, which I think is our responsibility as academics. Why do we let money-motivated AI tech dictate our academic research and debate agendas. We need rather to resist and educate on critical reflection. '[45]

This divergence in views could be a possible explanation for the striking regulatory gap and the indecisiveness on the institutional and local (HLE) administrative level. It was observed above that because of this stagnation some HLE faculties started making their own guidelines themselves.

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[43] The Ministry of the Interior and Kingdom Relations, *The government-wide vision on Generative AI of the Netherlands*, 2024, p. 3 Government-wide vision on generative AI of the Netherlands | Parliamentary document | Government.nl (accessed 20 April 2025).
[44] Confidential source.
[45] Iris van Rooij, *Stop feeding the hype and start resisting*,14 January 2023, https://irisvanrooijcogsci.com/2023/01/14/stop-feeding-the-hype-and-start-resisting/ (accessed 20 April 2025).

Critically reflecting upon the nature and effects of GenAI

We fully agree with Van Rooij's urgent appeal that HE should educate on critical reflection. At all policy levels *critical AI literacy* should be developed, as policy makers, faculty board members, teaching staff and students should be made aware what GenAI really is: applied statistics. [46]

Law students must develop an understanding of how GenAI really works, rather than learning how to work with GenAI. That GenAI does not have moral sense, for example. That GenAI can suggest all kinds of solutions for legal disputes, but that, crucially, a human needs to take responsibility (and accountability and ultimately liability) for that decision.[47] Being able to take responsibility for a moral decision ultimately requires a moral compass, a conscience, the ability to look at yourself in the mirror – that humans have, but that GenAI lacks.

Students should learn that GenAI does not have the capability to 'understand' language or human behaviour, but that many people (not only students!) do tend to attribute understanding to it.[48] And that also lay people do this, people our students will be representing in their future jobs.[49] Already before the launch of ChatGPT insiders warned that the outputs [of LLMs] resemble human understanding, and that 'this rhetorical slippage is particularly harmful in educational contexts'.[50]

As Van Rooij puts it:

> 'Academics should be a voice of reason; uphold values such as scientific integrity, critical reflection, and public responsibility. Especially in this moment in history, it is vital

[46] Also, AI literacy is required by the AI Act (Regulation (EU) 2024/1689) in art. 4.
[47] W.B. Wendel, 'Public Values and Professional Responsibility.' *Notre Dame L. Rev.* 75 (1999): 1, https://heinonline.org/HOL/P?h=hein.journals/tndl75&i=13 (accessed 20 April 2025).
[48] See e.g. The Siren's Song of GenAI: Why legal practitioners still fall for fabricated content - Law Society Journal (accessed 23 April 2025).
[49] Frank Pasquale and Gianclaudio Malgieri, 'Generative AI, Explainability, and Score-Based Natural Language Processing in Benefits Administration', *Journal of Cross-Disciplinary Research in Computational Law* 2024; Sayash Kapoor, Peter Henderson and Arvind Narayanan, 'Promises and pitfalls of artificial intelligence for legal applications', *Journal of Cross-Disciplinary Research in Computational Law* 2024.
[50] Su Lin Blodgett and Michael Madaio. 'Risks of AI foundation models in education', arXiv preprint (2021), p. 3, https://arxiv.org/abs/2110.10024 (accessed 20 April 2025).

> that we provide our students with the critical thinking skills that will allow them to recognise misleading claims made by tech companies and understand the limits and risks of hyped and harmful technology that is made mainstream at a dazzling speed and on a frightening scale.'[51]

Moreover, there is empirical evidence that use of GenAI impacts critical thinking skills negatively. Critical thinking is reduced to 'information verification, response integration, and task stewardship,' according to an empirical study interviewing 319 knowledge workers (including an undisclosed number of lawyers).[52]

The afore-mentioned aspects of 'techno-ambivalence' and criticisms on GenAI offer interesting possibilities for educational purposes and are therefore, in our view, well suited for all kinds of curriculum changes. At least two academic institutions agreed with us on integrating critical thinking on GenAI in their teaching programme:

> 'The most important thing is that students learn about the limitations and reservations of AI: digital literacy 2.0.' (Radboud University)

> 'Explore the possibilities of turning [GenAI] and its possible consequences for education, research and society as a whole into a subject of education in an educational unit (for example, in the short term already in electives).' (University of Amsterdam)

These types of curriculum reforms which fit GenAI into teaching programmes as a topic for a legal course or a class, and not as another skill or education tool, align better with the importance of critical thinking, and curriculum

[51] Iris van Rooij, *Stop feeding the hype and start resisting*, 14 January 2023, https://irisvanrooijcogsci.com/2023/01/14/stop-feeding-the-hype-and-start-resisting/ (accessed 20 April 2025).

[52] Hao-Ping (Hank) Lee et al, 'The Impact of Generative AI on Critical Thinking: Self-Reported Reductions in Cognitive Effort and Confidence Effects From a Survey of Knowledge Workers', *CHI Conference on Human Factors in Computing Systems* (CHI '25), April 26–May 01, 2025, Yokohama, Japan. ACM, New York, NY, USA. https://hankhplee.com/papers/genai_critical_thinking.pdf (accessed 20 April 2025).

orientations such as personal and social relevance and an academic orientation in (academic) legal education.

Why writing is important for law students

In law schools, we teach students to become lawyers. Lawyers need to be equipped by both a critical attitude (see previous section) and domain knowledge – whether they use GenAI or not. Students need to understand the difference between different legal domains, and they need to be able to solve cases, construct a legal argument, debunk a legal argument, play around with the law, in other words: 'think like a lawyer'.[53]

The traditional proven way to learn this is by writing and getting constructive feedback on one's writings: writing to learn.[54] Writing about a topic forces you to engage with the topic, structure your thoughts, and put them into words enabling others to follow your line of reasoning. Articulating your views by putting them into written words necessarily sharpens them and reinforces the cognitive structures inside your brain, deepening your understanding of the topic.[55]

Writing on a legal topic is fundamentally different from writing on (most) other topics. First, for legal research, writing is in a sense a research method: the argument is developed by writing it down (and again and again) and then reviewing and editing the result. We do not report in writing on research that was done elsewhere, for example by experiments or interviews. So, in a way, if we outsource the writing to GenAI, we outsource ourselves.

Secondly, thinking like a lawyer by writing involves arguing about normative concepts that resist precise definitions, such as justice, fairness, right and wrong, equality, but that are not matters of opinion or subjective taste. Normative reasoning involves analysis, carefully crafted arguments to avoid

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[53] Kenneth J. Vandevelde, *Thinking like a lawyer: An introduction to legal reasoning*. Routledge, 2018.
[54] Michael J. Madison, 'Writing to Learn Law and Writing in Law: An Intellectual Property Illustration.' *Louis ULJ* 52 (2007): 823. https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=1128312 (accessed 20 April 2025).
[55] Laurel Currie Oates, 'Beyond communication: Writing as a means of learning.' *Legal Writing: J. Legal Writing Inst.* 6 (2000): 1. https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1337&context=faculty (accessed 20 April 2025).

fallacies and expose fallacies in your opponent's argument.[56] Composing a legal argument involves a skilled use of the tools in a lawyer's toolbox including: finding and citing relevant precedents, referring to the real or ascribed intention of the rule-makers, pointing to favourable or undesired consequences of a certain interpretation, etc.[57] Use of these tools can only be mastered by practicing with them, by making oral and written arguments yourself.

Writing is not necessarily a painless or joyful experience. It requires effort, perseverance, dedication and patience. A writing process *without* the use of AI forces a student not only to practice language skills, but also simply to struggle and come up with a good text of their own.[58] In essence, therefore, writing also contributes to the development and personal growth of students. The use of GenAI is at odds with that learning process. On the contrary, allowing students to use GenAI for writing entails the risk that they will fear writing any texts on their own, cannot muster up the energy to do so (impressed as they may mistakenly be by the level of AI generated texts), or simply out of laziness or lack of time.[59]

Writing for law students is thus an effective way for them to learn. Teaching law, therefore, includes teaching law students how to write.[60] We do so by giving them examples of good writing for them to study, and by giving them constructive feedback on writing assignments, on structure, contents, wording and referencing.[61] Challenging writing assignments enable students to hard-wire the art of 'thinking like a lawyer' into their brain.[62] Encouraging or even

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[56] Arend Soeteman, *Logic in Law: Remarks on logic and rationality in normative reasoning, especially in law*. Vol. 6. Springer Science & Business Media, 2013.
[57] Kenneth J. Vandevelde, *Thinking like a lawyer: An introduction to legal reasoning*. Routledge, 2018.
[58] Cynthia Liem, 'ChatGPT berooft ons van waardevol denkwerk. Wanneer zijn we gestopt met ergens moeite voor doen?', *Trouw* 4 maart 2023.
[59] Jaures Jip, 'A teacher caught students using ChatGPT on their first assignment to introduce themselves. Her post about it started a debate', *Business Insider Nederland,* 8 September 2024, https://www.businessinsider.nl/a-teacher-caught-students-using-chatgpt-on-their-first-assignment-to-introduce-themselves-her-post-about-it-started-a-debate/ (accessed 20 April 2025).
[60] I. Curry-Sumner et al, *Research skills. Instruction for lawyers*, Ars Aequi Libri, 2010.
[61] Michael J**.** Madison, 'Writing to Learn Law and Writing in Law: An Intellectual Property Illustration.' *Louis ULJ* 52 (2007): 823. https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=1128312 (accessed 20 April 2025).
[62] Laurel Currie Oates, 'Beyond communication: Writing as a means of learning.' *Legal Writing: J. Legal Writing Inst.* 6 (2000): 1, at p. 24.

allowing students to leave the writing to LLMs in that sense does them a disservice.

In the sources from the local level that we investigated we noticed a clear emphasis on the importance of writing skills, and the possibilities of fraud detection. The ample attention on these specific aspects suggests that curriculum orientations based on individual intellectual development and the legal discipline as such are given more importance – as writing and language proficiency are considered essential elements of the legal discipline and of becoming a good lawyer.

This is why we argue that GenAI should not be embraced unconditionally in HLE – but rather that strict rules are required regarding use of GenAI in writing assignments. We cannot educate lawyers without writing assignments, and we cannot tolerate that students use GenAI for these assignments while we look the other way. Banning GenAI for writing assignments sends out a strong message: rather than a ban on GenAI we can call it a Code of Conduct for writing assignments: solemnly declare that what you hand in was written by you and only by you, as a matter of academic integrity.[63]

Critical thinking and writing as key legal skills for the future

We do not want to argue against preparing students for the future labour market. However, there is room for discussion about the way in which this should be done. We are not convinced that this should involve allowing students to use LLMs for their writing assignments – let alone training students how to use them. LLMs evolve rapidly, and it is to be expected that future employers will use their own dedicated applications, and that it will not be hard at all for graduates to master their use.

Instead, we are convinced of the importance of making students (and teaching staff, for that matter) digitally literate and critical on AI technology and its applications. Future employers, we think, need well-educated, critical, writing-

[63] In line with the MIT Management STS Teaching and Learning Technologies, *AI Detectors Don't Work. Here's What to Do Instead*, https://mitsloanedtech.mit.edu/ai/teach/ai-detectors-dont-work/, (accessed 20 April 2025). See for an example of a Code of Conduct Law KU Leuven (Belgium): https://www.law.kuleuven.be/onderwijs/leuven/studentenportaal/reglementen/fac_reg_beleid/code-of-conduct-gen-ai_draft_ma-rechten-en-crim_poc4october.docx (accessed 20 April 2025).

proficient future employees. At the end of the day, good writing skills and critical thinking skills are typically also in the interest of future employers. They too will profit from critical lawyers with a keen sense of language, who can write and analyse texts – because that is where a human lawyer has the edge over AI.[64] This is acknowledged even in a tech company *pur sang* like ASML that welcomes young lawyers as they 'are naturally textually strong and trained to work accurately. This comes in handy in implementations of AI tooling – which are often based on language models'[65] – an unexpected plea to restrict students' use of GenAI for writing assignments from the professional field.

We believe that HLE institutions should not in any way have imminent prospects of 'missing the boat' propagated by policy makers affect their own curriculum decisions too much:

> '(…) Meanwhile students, market parties and the labour market are embedding [GenAI] in their activities. If we do not educate all the involved stakeholders, the sector will fail to navigate this societal change for the good of students and society. Take students seriously, both in demystifying AI as well as to prepare them for future work.'[66] (NPULS)

Interestingly, students themselves do not share these views *per se*. A recent survey showed that students when asked 'To me, education in 2040 should mainly be a place for students to….' replied: 'to have the opportunity for personal development' (76 per cent), and 'to find out who I am' (64 per cent).

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[64] Peter Immink, *GenAI op de campus: in gesprek met hoogleraar en advocaat Dirk Visser*, 25 september 2024, https://www.wolterskluwer.com/nl-nl/expert-insights/gen-ai-on-campus-in-conversation-with-professor-and-lawyer-dirk-visser (accessed 20 April 2025).

[65] Douwe Groenevelt, Head Legal HQ and Deputy General Counsel at ASML, as cited in: Martijn Kroese, 'Bedrijfsjurist wordt innovator dankzij AI: 'Legal unicorn is goud waard' - *Mr. Online*,16 December 2024 (accessed 20 April 2025).

[66] NPULS, T*he state of AI and the modern educational institution. AI explained in the context of the educational sector*, 27 November 2023, p. 22, https://npuls.nl/wp-content/uploads/2024/04/Npuls-Startnota-State-of-AI-B5-EN.pdf, (accessed 20 April 2025).

Only 40 per cent considered education as the preparation for a successful career and only 34 per cent as 'learning a profession'.[67]

Some final thoughts

One good thing about GenAI is that it has forced us to become even more aware of the importance of writing in legal education. It has also exposed the dominant (labour market) orientation on HE and HLE, at least on a central and intermediate level. So far, this perspective has led to the absence of consistent policies on the institutional and faculty levels regarding students' use of GenAI for writing assignments. Shifting the policy focus to students' personal development, societal interests, and especially the discipline-based orientation for which writing and critical thinking are pivotal, we argue, might help us out of this impasse.

We are aware of the limitations of this first survey. The diversity and dynamics of the 'GenAI and education' policy landscape require more systematic and no doubt also other types of studies for which we make some suggestions.

Firstly, more research on the actual extent of students' use of GenAI and their attitudes towards using LLMs in the writing process is welcomed. We know of one study comparing educators' and students' perceptions that found that both groups generally agree that using AI to brainstorm ideas or model answers is acceptable, but that using AI to complete writing tasks, with or without disclosure, is not.[68] It would be interesting to repeat a similar survey in a European or Dutch HLE context. Also, we believe that involving students in GenAI policy making and curriculum decisions could be beneficial, whereas students' voices have been largely absent in discussions about GenAI until now.

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[67] Eimers, T. (red.) *Vandaag is het 2040. Toekomstverkenning voor middelbaar beroepsonderwijs, hoger onderwijs en wetenschap*. 2023, Nijmegen/Utrecht/Enschede/Amsterdam: KBA Nijmegen, ResearchNed, Andersson Elffers Felix, CHEPS, Kohnstamm Instituut, p. 150. Vandaag is het 2040 Deel 1 | Rapport | Rijksoverheid.nl (accessed 20 April 2025).

[68] Alex Barrett and Austin Pack, 'Not quite eye to AI: student and teacher perspectives on the use of generative artificial intelligence in the writing process', *Int J Educ Technol High Educ* (2023) 20:59 https://doi.org/10.1186/s41239-023-00427-0 (accessed 20 April 2025).

Future research could explore the possibilities of involving students in policy development and curriculum decisions on GenAI.[69]

Some scholars are not convinced by the claim that it is impossible, now and in the future, to have tools detecting whether AI has been used.[70] The scientific discussion about this seems to acknowledge that it is complicated, but the discussion is not yet closed.[71] It is important to explore what detection options there are, and how they can be used to detect the use of GenAI. In the Netherlands, this might be a task for an organisation like Universities of the Netherlands (UNL).

Furthermore, we would recommend a systematic investigation of whether (legal) employers are really so eager to hire legally trained graduate prompt engineers. The claim that AI is set to redefine the legal profession is not supported by the current evidence.[72] For those who think that the employability-based curriculum orientation is all there is, the results of such a survey could possibly give room to other perspectives.

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[69] Malcolm Tight, 'The curriculum in higher education research: A review of the research literature', *Innovations in Education and Teaching International,* 2024, 61:2, 315-328, DOI: 10.1080/14703297.2023.2166560 (accessed 20 April 2025).

[70] A. Knott et al, 'Generative AI models should include detection mechanisms as a condition for public release', *Ethics and Information Technology*, 2023, 25(4), 55. C. Mao, C. Vondrick, H. Wang, and J. Yang, 'Raidar: generative ai detection via rewriting', *ICLR 2024*, arXiv preprint arXiv:2401.12970 (accessed 20 April 2025).

[71] V.S. Sadasivan et al, *Can AI-generated text be reliably detected?* 2023, preprint https://ui.adsabs.harvard.edu/abs/2023arXiv230311156S/abstract (accessed 20 April 2025).

[72] There are large employers, such as the municipality of Amsterdam, that prohibit the use of LLMs by their employees altogether. See also Sayash Kapoor, Peter Henderson and Arvind Narayanan, 'Promises and pitfalls of artificial intelligence for legal applications', *Journal of Cross-Disciplinary Research in Computational Law* 2024, https://arxiv.org/pdf/2402.01656 (Accessed 20 April 2025).

Appendix: GenAI policy documents published by Dutch HE institutions

Institution	Source	Link
VU Amsterdam	Web page 1	https://vu.nl/en/employee/didactics/how-to-deal-with-chatgpt-as-a-teacher
VU Amsterdam	Web page 2	https://vu.nl/en/student/examinations/generative-ai-your-use-our-expectations
University of Groningen	Web page 1	https://www.rug.nl/about-ug/organization/quality-assurance/education/artificial-intelligence-ai/
University of Groningen	Policy on AI in teaching	https://edusupport.rug.nl/2365784080/Instructor/Artificial+Intelligence+(AI)+in+education
Utrecht University	Web page 1	https://www.uu.nl/en/education/educational-vision/teaching/generative-ai
Utrecht University	Web page 2	https://students.uu.nl/en/homepage/academics/chatgpt-in-education/a-chatbot-as-study-aid
Radboud University	Web page 1	https://www.ru.nl/en/staff/lecturers/designing-education/ai-in-education
Maastricht University	Policy Framework Generative AI	https://www.maastrichtuniversity.nl/news/policy-framework-generative-ai-officially-published
Leiden University	Web page 1	https://www.staff.universiteitleiden.nl/education/it-and-education/ai-in-education?cf=law
Leiden University	Web page 2	https://www.student.universiteitleiden.nl/en/announcements/2023/02/using-chatgpt-for-written-assignment-be-aware-of-the-risks?cf=university&cd=guest
Leiden University	Web page 3	https://www.staff.universiteitleiden.nl/announcements/2023/02/chatgpt-faculty-strategy?cf=law (Faculty of Law)
Erasmus University Rotterdam	Web page 1	Generative AI Usage Guidelines | Erasmus University Rotterdam
Erasmus University Rotterdam	Policy GenAI PhD-trajectory	2024-07-policyontheuseofgenaiandthephd-trajectory
University of Amsterdam	Web page 1	https://tlc.uva.nl/en/article/unsupervised-written-assignments/?faculty=54

University of Amsterdam	Beleidsmemo AI	https://www.uva.nl/over-de-uva/beleid-en-regelingen/onderwijs/beleidsmemo-ai-in-het-onderwijs.html (only in Dutch)
Tilburg University	Web page 1	https://www.tilburguniversity.edu/intranet/education-support-portal/ai-education
Open University	Web page 1	AI-tools in het OU-onderwijs - Open Universiteit - Open Universiteit (only in Dutch)
Utrecht UoAS	Handreiking GenAI en toetsing	ChatGPT-handreiking.pdf (only in Dutch)
Amsterdam UoAS	Generatieve AI in onderwijs	AI regels - HvA (only in Dutch)
HAN UoAS	Framework gebruik AI	Framework_gebruik_AI_binnen_de_HAN-(juni-2024).pdf *HAN-Handreiking-ChatGPT-en-toetsing-okt-2023.pdf (only in Dutch)
InHolland UoAS	Generatieve Artificiële Intelligentie in het Hoger Onderwijs	https://www.inholland.nl/nieuws/werkgroep-ai-publiceert-update-student--en-inholland-statements-ai/ (only in Dutch)
Saxion UoAS	Handreiking AI/ChatGPT voor studenten	https://www.saxion.nl/binaries/content/assets/nieuws/2023/juli/handreiking-ai-chatgpt-studenten-saxion-voor-saxionnl.pdf (only in Dutch)

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