

Legal Education

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The *Legal Education Review* is an independent referred journal. Its objectives are (1) to encourage and disseminate within Australia and internationally high quality research into legal education, and (2) to inform and stimulate discussion, debate and experimentation on topics related to legal education. The *Review* was established in 1989 with the support of a grant from the Law Foundation of NSW. The editors of the *Review* are appointed by the Australasian Law Teachers Association (ALTA). Membership of ALTA includes a subscription to the *Legal Education Review* in electronic format. ALTA members may also purchase a hard copy of the *Review* for \$A15 + postage and handling. For enquiries about ALTA contact admin@alta.edu.

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Foreword

Welcome to the latest volume of the *Legal Education Review*. We are proud to be Australasia's leading source of legal education scholarship and one of the principal sites for academic discussion and debate about legal education issues. This volume of the *Legal Education Review*, Volume 24, is made up of ten articles that explore a variety of legal education topics.

The first three articles are concerned with the roles of place and power within legal education. In 'Educating Law Students for Rural and Regional Legal Practice: Embedding Place Consciousness in Law Curricula', Amanda Kennedy and colleagues from eight Australian law schools offer a way to address the declining rates of recruitment and retention of lawyers in rural and regional Australia. Research from other disciplines indicates that the challenges inherent in rural and regional professional practice can be alleviated, and benefits more easily harnessed, via a place-conscious discipline-specific curriculum that sensitises tertiary students to, and prepares them for, the rural and regional career context. Amanda and her colleagues argue that there is scope to incorporate 'place' within legal education, and they document an innovative curriculum development project that embeds place consciousness within the law curriculum. They describe how the project team designed a curriculum package that aims to sensitise students to the rural and regional legal practice context, and equip them with the skills to take advantage of the opportunities available in a rural or regional professional career.

Next, Heather Douglas and Monica Taylor in 'Understanding the Power of Law: Engaging Students in Criminal Law Casework' draw on students' evaluations and reflections to describe and evaluate a new legal clinic, the Criminal Law Matters Legal Clinic at the University of Queensland. They present an approach informed by the work of Carol Smart to encourage students to critique the power of law, and examine the ways in which the clinic prompts students to engage in a deeper critical understanding of power in the context of their clients' circumstances and their role as 'lawyers'.

The third article is by Angela Melville, and is titled 'Barriers to Entry into Law School: An Examination of Socio-Economic and Indigenous Disadvantage'. Angela argues that the Australian legal profession persistently remains the domain of the white middle-class. She identifies the barriers to entering and completing law school that act to prevent people from low SES backgrounds and Indigenous people from entering the legal profession. These barriers have persisted despite a long history of policies aimed at

diversifying Australia's university student population. Angela considers the various strategies that have been relied upon by universities to increase the proportion of students from disadvantaged backgrounds, and argues that many of the strategies that are most heavily relied upon are based on false common-sense assumptions rather than empirical evidence.

The next three articles in this volume examine the importance of general legal skills and capabilities. In 'Thinking like a Lawyer Ethically: Narrative Intelligence and Emotion', Lesley Townsley describes and evaluates the implementation and embedding of 'ethics and professional responsibility' as a graduate attribute into two subjects at the University of Technology Sydney. Her focus is upon the ways in which law students are taught to 'think like a lawyer' and make legal decisions that require ethical judgment, with a particular emphasis upon the development of narrative intelligence and the emotional content of ethical judgment.

In 'Employer Perspectives on Essential Knowledge, Skills and Attributes for Law Graduates to Work in a Global Context', Duncan Bentley and Joan Squelch present the results of a qualitative research project to assess employer perspectives on required graduate knowledge, skills and attributes. There is broad consensus among legal academics and practitioners that law schools need to deliver law programs that take cognisance of global developments and the increasing emphasis on internationalisation. Duncan and Joan ask how internationalisation is affecting what employers want from Australian law graduates and consequently what those law graduates need from their legal education both to secure jobs and to be as effective as possible as new employees, from the employers' perspective. Their findings provide a useful basis for law schools in the review, development and renewal of their own law curricula.

Carolyn Penfold in 'Developing Legal Communication Skills in a South Pacific Context' explains how the Law School of the University of the South Pacific is working to develop graduates who are 'able to communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences' and argues that both identifying the content of such communication skills, and the learning and teaching of them, require teachers to pay close attention to the context of the South Pacific environment. She concludes that while English language skills are important, skills in other languages and cross cultural communication skills are equally important for South Pacific lawyers.

Continuing the emphasis upon global contexts, Tihomir Mijatov in 'Why and How to Internationalise Law Curriculum Content' reappraises the justifications and the methods for implementation of internationalisation. He insists that it is only if institutions can be persuaded that internationalisation is valuable that they will consider changing their curricula. Tihomir presents arguments in support of the notion that internationalisation is

valuable, and proceeds to identify ways in which curriculum content can actually be internationalised.

The next article by Susannah Sage Jacobsen and Tania Leiman is timely given the increasing emphasis upon the embedding of clinical experiences within legal education. In 'Identifying Teaching and Learning Opportunities within Professional Relationships between Clinic Supervisors', they present the results of a critical evaluation of the Flinders Legal Advice Clinic, a small University student-staffed legal service based in the outer southern suburbs of Adelaide. An 'Appreciative Inquiry' process was used to evaluate the Clinic in 2013, and this identified a distinctive learning opportunity emerging within the strong relationships between the supervising solicitors. Susannah and Tania consider how recognising the nature, significance and value of the interactions and relationships between law supervisors in a student legal clinic can be instrumental in creating unique occasions for learning from practice.

The last two articles in this volume are concerned with legal research and research networks. Theunis Roux in 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' describes how legal academics' drive over the last 40 years to broaden their research horizons has exposed the quality of their research to extra-disciplinary scrutiny. Theunis argues that legal academics urgently need to respond to these developments, but that the way they respond depends on the distinction between traditional doctrinal research and the other types of legal research that have emerged over the last 40 years. The challenge in the former case is to defend doctrinal research against the charge that, as a form of applied social science research, its practitioners should conform to the research standards applicable in that set of disciplines. In the case of the other types of legal research that have emerged over the last 40 years, legal academics do need to conform to the research standards of the disciplines on which they are drawing. This is especially true of the particular variant of socio-legal research that legal academics produce, which mixes the internal perspective of the trained lawyer with the external perspective of the social sciences, but it is also true of the other main categories of legal research, including 'law and ___' research, legal philosophy, comparative legal research and critical approaches.

Finally, in 'Towards Growth and Sustainability: The Institutional and Disciplinary Dynamics of Postgraduate Law Research Groups', Felicity Bell, Rita Shackel and Linda Steele explain that while there is growing attention in the educational literature on the role of postgraduate student research groups in Higher Degree Research (HDR) student learning and experience, there is little research specifically on law HDR students, including research on the factors key to successful development and sustainability of HDR groups in law. Felicity, Rita and Linda

consider how academic involvement in these groups might be both limiting and productive and ask how the contours of legal scholarly inquiry might impact students' engagement in an inter-disciplinary HDR group and its sustainability. They conclude that while impermanence is a particular challenge given the transient nature of student populations and the sometimes onerous administrative burden placed on coordinators of groups, the development of academic independence in students is vital to achieving sustainability.

This volume of the *Legal Education Review* would not have been possible without the contributions of many committed academics, most of whom volunteered their time and expertise. Thanks are especially due to the members of the 2014 Editorial Committee for their hard work in bringing this volume together. Last year saw some important changes to the composition of the Editorial Committee. Wendy Larcombe (University of Melbourne) resigned from the Committee, and Associate Editor Anne Hewitt (University of Adelaide) took a leave of absence. The remaining members were Kate Galloway (James Cook University), Sonya Willis (University of Sydney), Allan Chay (Queensland University of Technology), Donna Buckingham (University of Otago) and Matthew Ball (Queensland University of Technology). I would like to thank all of them for their dedication, loyalty and commitment to the journal.

The other major change in 2014 related to the home of the *Legal Education Review*. In July 2014 the administrative base of the journal moved to Bond University. I would like to thank our former Administrator, Alysia Saker, for her many years of hard work, and welcome to the journal our new Administrator, Paula Hudson, who has for the past six months managed to successfully navigate a steep learning curve and now ensures that the *Legal Education Review* is administered to its usual high standards. It was Paula's hard work that ensured this volume successfully reached publication. I would also like to thank Helen Anderson, ALTA Treasurer, for her careful management of the journal's finances, and the ALTA Executive Committee for their ongoing financial support and encouragement.

Following the move to Bond University, the proofreading and typesetting for the journal now take place 'in-house'. I would like to thank our former typesetter Maureen Platt and our former proof-reader Trischa Manna at Inkshed Press, both of whom for many years worked closely with the Editorial Committee to ensure all of the articles in the journal were presented at an appropriately high standard. Maureen, in fact, has worked with the journal since its first volume 25 years ago and has made an important contribution to the success of the journal.

All of the articles in the *Legal Education Review* are double blind refereed. Our referees spend many hours reading and providing insightful feedback on our articles, and their efforts are

genuinely appreciated by both the editors and the authors. We are also grateful for the support of our Editorial Advisory Board, the members of which often serve as referees and provide overall guidance on the direction of the journal. The list of illustrious scholars and practitioners on our Advisory Board has this year been expanded to include former Editorial Committee member Wendy Larcombe.

The *Legal Education Review* has recently issued a call for submissions to Volume 25 of the journal, to be published in late 2015. Issue 1 will be a General Issue containing research articles on current issues in legal education from all jurisdictions. Issue 2 will be a Special Issue entitled 'Why do we do what we do? Re-evaluating the purpose of law school'. We are encouraging academics to submit scholarly articles that explore this theme by critically analysing and evaluating the goals of contemporary legal education. Potential topics include (1) career paths for law graduates; (2) knowing the law versus practising the law; (3) why so many law graduates choose not to practise law; and (4) whether all law schools should prioritise preparation for practice. Submissions are open until 30 May 2015. Please refer to the *Legal Education Review* website for more details: www.ler.edu.au.

Professor Nick James
Editor-in-Chief

THINKING LIKE A LAWYER ETHICALLY: NARRATIVE INTELLIGENCE AND EMOTION

LESLEY TOWNSLEY*

I INTRODUCTION

The Faculty of Law at the University of Technology Sydney (UTS) recently developed a new curriculum for both the Bachelor of Laws and the Juris Doctor. The new curriculum is designed, in part, to embed graduate attributes more pervasively across these degrees, allowing students to develop skills and acquire knowledge incrementally.¹ One of these graduate attributes is ‘ethics and professional responsibility’, and the development of the new curriculum has provided the opportunity to assess and develop the content of legal ethics education. This article reflects upon the embedding of the ethics graduate attribute into two UTS subjects: *Ethics and Professional Conduct* and *Evidence and Criminal Procedure*. The focus is upon one aspect of the way in which law students are taught to ‘think like a lawyer’ and make legal decisions that require ethical judgment: specifically, narrative intelligence and the emotional content of ethical judgment.

Two teaching and learning strategies to incorporate knowledge about emotion into the curriculum are explained. The purpose of the strategy in *Ethics and Professional Conduct* is to equip students with an understanding of the impact of emotions on ethical judgment and the need for emotional self-awareness. The purpose of the strategy in *Evidence and Criminal Procedure* is to equip students with an understanding of the ethical implications of the ways in which lawyers use emotion persuasively and tactically to influence juror judgment. In this respect, the article contributes to how legal academics can develop in students the theoretical understanding and professional skills required for ethical practice.

* Lesley Townsley, Lecturer, Faculty of Law, University of Technology, Sydney. I would like to thank the referees for their comments and suggested improvements. I also thank Professor Anita Stuhmcke for providing feedback on earlier drafts.

¹ There are six graduate attributes: (1) legal knowledge; (2) ethics and professional responsibility; (3) critical analysis and evaluation; (4) research skills; (5) communication and collaboration; and (6) self-management. The attributes were formulated to accord with the six Teaching and Learning Outcomes endorsed by the Council of Australian Law Deans in March 2012.

In the legal domain, emotion is generally viewed as having an irrational effect on judgment and therefore as something that should be excluded. However disciplines which offer cognitive theories of emotion, such as philosophy,² psychology,³ and neuroscience,⁴ challenge this view. These disciplines regard emotions as involving evaluative judgments that can be either appropriate or inappropriate, and thus as either assisting or impeding judgment. Understanding the evaluations contained in emotion leads to better self-awareness and the ability to educate oneself about emotional capacities and responses. With this awareness, decision-makers are better able to account for both the positive and the negative influences of emotion on judgment, including ethical judgment. This article applies cognitive accounts of emotion from contemporary philosophy in order to demonstrate how emotions can be analysed in a way that leads to better self-awareness and the ability to evaluate the moral justifiability of certain emotions.

Law and emotion scholarship seeks to demonstrate the interrelationship between law and emotion⁵ and between legal education and emotion.⁶ Abrams and Keren describe the legal

² See Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003).

³ See Magda Arnold, *Emotion and Personality* (Columbia University Press, 1960); Nico Frijda, *The Emotions* (Cambridge University Press, 1986); Richard S Lazarus, 'Cognition and Motivation in Emotion' (1991) 46 *American Psychologist* 362.

⁴ See Antonio Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (1994); Antonio Damasio, 'William James and the Modern Neurobiology of Emotion' in Dylan Evans and Pierre Cruse (eds), *Emotion, Evolution, and Rationality* (Oxford University Press, 2004); Antoine Bechara, Hanna Damasio and Antonio Damasio, 'Emotion, Decision Making and the Orbital Cortex' (2000) 10 (3) *Cerebral Cortex* 295; Antoine Bechara, 'The Role of Emotion in Decision-Making: Evidence From Neurological Patients with Orbitofrontal Damage' (2004) 55 *Brain and Cognition* 30.

⁵ See for example Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and Emotions?' (2010) 94 *Minnesota Law Review* 1997; Susan Bandes (ed), *The Passions of Law*, (New York University Press, 1999); Terry A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) *Law and Human Behaviour* 119; Eric A Posner, 'Law and Emotion' June (2001) *Georgetown Law Journal* 1; Erin Ryan, 'The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation' (2005) 10 *Harvard Negotiation Law Review* 231.

⁶ See for example Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011); Andrew H Benjamin et al, 'The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers' (1986) 11 (2) *American Bar Foundation Research Journal* 225; Laurel Fletcher and Harvey M Weinstein, 'When Students Lose Perspective: Clinical Supervision and the Management of Empathy' (2002-2003) 9 *Clinical Law Review* 135; Kristen B Gerdy, 'Clients, Empathy, and Compassion: Introducing First Year Students to the Heart of Lawyering' (2008-2009) 87 *Nebraska Law Review* 1; Gerald F Hess, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52 *Journal of Legal Education* 75; Ann Juergens, 'Practicing What We Teach: The Importance of Emotion and Community Connection in

academy's reception of this scholarship as 'ambivalent', and insist that this attitude is 'at sharp odds with its pragmatic potential'.⁷ Peter Goodrich argues that this attitude arises because subjective considerations such as emotion are not valued and recognised in the legal domain, because they are considered as belonging to 'a realm outside of law'.⁸

Legal training teaches the subject to separate the personal and the legal, demanding the repression of emotion and the privileging of the objectivity of rules over the subjectivities of the truth – Aristotle's wisdom without desire.⁹

Legal training promotes objectivity because the validity of legal judgment is premised on the perception of unbiased and consistent application of the law. If emotion is repressed then legal judgment appears to be objective. Legal training achieves the appearance of objectivity, in part, through 'legalism', where abstract logical reasoning applied to rules is privileged over contextual, social or personal factors. The emphasis on objectivity, logic and legalism fosters the rational attributes of law students by attempting to separate them from their moral and subjective experiences.¹⁰

Legalism manifests in legal education in the emphasis upon teaching students to 'think like a lawyer'.¹¹ Teaching students to 'think like a lawyer' has been described as the obligation of legal educators to 'exorcise' students' subjectivity,¹² and criticised as a

Law Work and Law Teaching' (2004-2005) 11 *Clinical Law Review* 413; Lawrence S Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2004-2005) 11 *Clinical Law Review* 425; Alan Lerner, 'Using our Brains: What Cognitive Science and Social Psychology Teach us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices' (2004) 23 *Quinnipiac Law Review* 643.

⁷ Abrams and Keren, above n 5, 2033.

⁸ Peter Goodrich, 'Law in the Courts of Love: Andreas Capellanus and the Judgments of Love' (1996) 48 (3) *Stanford Law Review* 633, 674.

⁹ Ibid 675.

¹⁰ Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (Lexis Nexis Butterworths, 2005) 29. See also Dennis Turner, 'Infusing Ethical, Moral, and Religious Values into a Law School Curriculum: A Modest Proposal' (1998-1999) 24 (2) *University of Dayton Law Review* 283, 286; Caroline Maughan, 'Why Study Emotion?' in Maharg and Maughan, above n 6, 22-23.

¹¹ See Larry O Natt Gantt, 'Deconstructing Thinking Like a Lawyer: Analysing the Cognitive Components of the Analytical Mind' (2006-2007) 29 *Campbell Law Review* 413; Alexander Scherr, 'Lawyers and Decisions: A Model of Practical Judgment' (2002) 47 *Villanova Law Review* 161.

¹² Gerald B Wetlauffer, 'Rhetoric and Its Denial in Legal Discourse' (1990) 76 *Virginia Law Review* 1545, 1577. See also Hess, above n 6; Note, 'Making Docile Lawyers: An Essay on the Pacification of Law Students' (1997-1998) 111 *Harvard Law Review* 2027; Kennon M Sheldon and Lawrence S Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261.

process that ‘steals one’s soul’.¹³ According to Gerdy, the focus of legal educators on logic and critical thinking and the exclusion of emotional and humanistic concerns send the message that dealing with emotions and personality is inconsistent with legal thinking.¹⁴ This is problematic for Gerdy because if ‘thinking like a lawyer’ does not involve a human context, it is being taught in a vacuum where there is little discussion on how the law impacts on the lives and emotions of the people being discussed.¹⁵ This human context includes law students and their values and emotions.

There is evidence that some Australian law students are concerned about and dissatisfied with this emphasis upon legalism. The student members of the Australian National University Law School Reform Committee published a report in 2010¹⁶ in which students provided their opinions about their experience of legal education. One student stated that they felt ‘disillusioned by a lack of intellectual and emotional engagement’ and wanted legal education to ‘make space for people with different experiences, talents and forms of intelligence.’¹⁷ Another stated that ‘as we learn how to ‘think like lawyers’, let’s also cultivate our capacity to think like human beings’.¹⁸ Other students wanted the curriculum to include ‘deep ethical inquiry’.¹⁹ The students criticised the absence of opportunities to develop the personal skills required in lawyering, and ‘found there was little attention given to the development of empathy, personal morality and values.’²⁰ The students identified the failure by their legal education to encourage subjective and humanistic concerns as affecting the quality of their education and their ability to develop professionally, personally and morally.

The analytical framework of ‘thinking like a lawyer’ is relevant to legal-ethical judgment and decision-making because this is another form of problem-solving undertaken by lawyers. Burton has articulated a model of ‘thinking like a lawyer’ that explicitly identifies two sites where emotion is relevant: the personal intelligences and narrative intelligence. This model is briefly

¹³ Fiona Cownie, ‘Alternative Values in Legal Education’ (2003) 6 (2) *Legal Ethics* 159, 159.

¹⁴ Gerdy above n 6, 30.

¹⁵ Ibid. See also Robert Granfield and Thomas Koenig, “‘It’s Hard to be a Human Being and a Lawyer’: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice’ (2002-2003) 105 *West Virginia Law Review* 495, 519-521. The authors conducted empirical research with law graduates and found that legal ethics courses ignored humanistic and contextual issues, reduced cases to their technical merits, and reduced ethics to compliance with professional standards of conduct.

¹⁶ ANU Law School Reform Committee, ‘Breaking the Frozen Sea: The Case for Reforming Legal Education at the Australian National University’ (Law School Reform ANU Law Students Society, 2010).

¹⁷ Ibid x.

¹⁸ Ibid v.

¹⁹ Ibid 4.

²⁰ Ibid 30.

outlined in Part II. The personal intelligences involve the psychological emotional intelligence frameworks of intrapersonal and interpersonal skills. The incorporation of emotional intelligence into the law curriculum is seen as an opportunity to strengthen the professionalism of lawyers²¹ and has been the subject of much academic interest.²² Part III focuses on the role of emotion in narrative intelligence and the relationship between personal intelligences and narrative intelligence. The teaching and learning strategies for the subjects *Ethics and Professional Conduct* and *Evidence and Criminal Procedure* are shown to demonstrate the kinds of emotional content that can be explored in conjunction with legal ethics. Cognitive philosophy is applied in these strategies to demonstrate how emotion within narratives can be the subject of analysis, and how lawyers use emotion to influence juror judgment. The article also considers whether, and in what circumstances, this is ethical.

II THINKING AND FEELING LIKE A LAWYER

‘Thinking like a lawyer’ can be broadly understood to mean the ability to undertake legal problem solving. The traditional approach to teaching legal problem solving focuses primarily on the development of written and oral communication skills and analytical skills such as analogical, deductive and inductive reasoning. Academics are now, however, starting to expand the range of cognitive processes and analytical frameworks that underpin ‘thinking like a lawyer’.²³ Some of these new frameworks draw upon scholarship examining less traditional forms of intelligence and the role of emotion. This scholarship is useful because it addresses issues that arise from a conception of professionalism which ignores or represses emotion, and expands the concept of ‘thinking like a lawyer’ to include emotion. For example, Scherr recognises that cognitive processes are important but emphasises the role of emotion and narrative in practical judgment. He argues that lawyering involves both legal and non-legal realities but ‘little work has gone into what those non-legal

²¹ John E Montgomery, ‘Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students’ (2007-2008) 39 *University of Toledo Law Review* 323, 323.

²² See for example Paul J Cain, ‘A First Step Toward Introducing Emotional Intelligence into the Law School Curriculum: The “Emotional Intelligence and the Clinic Student” Class’ (2003-2004) 14 *Legal Education Review* 1; Fletcher and Weinstein, above n 6; Marjorie A Silver, ‘Emotional Intelligence and Legal Education’ (1999) 5 (4) *Psychology, Public Policy and Law* 1173; Marjorie A Silver, ‘Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship’ (1999-2000) 6 *Clinical Law Review* 259; Barry Sullivan and Ellen S Podger, ‘Respect, Responsibility, and The Virtue of Introspection: An Essay on Professionalism in the Law School Environment’ (2001) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 117.

²³ Gantt, above n 11.

realities might be'.²⁴ Similarly, Burton contends that there has been a disproportionate focus on some lawyer intelligences, like rule-based inductive, deductive and categorical reasoning processes.²⁵ To counteract this tendency, Burton calls for a greater focus on 'multiple lawyering intelligences', a pedagogical construct 'designed to expand the terms of reference for what it means to "think like a lawyer" and thereby foster good judgment in students'.²⁶

Burton proposes the following lawyering intelligences model, which she describes as 'a set of distinct yet interconnected intellectual capacities that animate every kind of legal work'.²⁷

1. linguistic intelligence,²⁸
2. categorising intelligence,²⁹
3. logical-mathematical intelligence,³⁰
4. narrative intelligence;
5. the personal intelligences;³¹ and
6. strategic intelligence.³²

All six of the above intelligences are intellectual capacities and all are necessary to undertake effective legal problem-solving, reasoning and judgment.

The focus of this article is upon the development of narrative intelligence. Narrative intelligence involves 'structuring facts in the context of stories rather than in the context of legal rules, in an attempt to discover or demonstrate the meaning of the situation'.³³ For example, narrative intelligence permits consideration of contextual factors such as moral, political and social considerations. Narrative intelligence embraces facets of human reaction and judgment such as emotion and empathy as well as issues of right and wrong.³⁴ Lawyers use narrative reasoning to

²⁴ Scherr, above n 11, 229.

²⁵ Angela Olivia Burton, 'Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting' (2004-2005) 11 *Clinical Law Review* 15, 15.

²⁶ *Ibid.*

²⁷ *Ibid.* 25.

²⁸ *Ibid.* 27. General characteristics of this form of intelligence include 'sensitivity to the spoken and written word' and 'the ability to use language pragmatically'.

²⁹ *Ibid.* 29. 'Categorisation occurs when we order or classify concepts, people, things or events on the basis of significant generalisations or on patterns of difference and similarity.' Cognitive psychologists see this and stereotyping as an essential way to process information and assign meaning.

³⁰ *Ibid.* 33. Here legal educators typically emphasise inductive, deductive, and analogical reasoning.

³¹ *Ibid.* 38-41. These include intrapersonal and interpersonal intelligences. These intelligences shape our understanding of ourselves and others and relate to sensitivity to issues of personality, motivation, belief, values and emotion.

³² *Ibid.* 42. Lawyers use this form of intelligence when they imagine and generate alternative plans and choose the most effective course of action.

³³ *Ibid.* 34.

³⁴ *Ibid.* 37.

contextualise problems beyond legal rules, to gain an understanding of the perspective of their clients and others, and to construct stories that convey facts persuasively.

Narrative intelligence has both cognitive and emotional content. The cognitive content of narrative intelligence provides a way of organising, interpreting, evaluating, elaborating, remembering, learning and communicating information. Scherr observes that in law, narrative ‘has a dense pedigree ... narrative centres lawyering’.³⁵ Like Burton, Scherr claims that narrative provides ‘a cognitive frame for data’ and ‘a tissue of language through which decision-makers discern the certainty necessary for action’.³⁶ Similarly, Graham and McJohn claim that stories are ‘almost an ideal data structure for human cognition’ particularly in relation to learning and memory.³⁷ Graham and McJohn also contend that moral reasoning is involved in legal reasoning and that this form of reasoning involves narrative intelligence.³⁸ This is consistent with the research of the cognitive psychologists Rettinger and Hastie who argue that when making morally salient decisions, people undertake narrative processing (create stories) to identify, comprehend, evaluate and integrate material into a complex mental representation.³⁹ This suggests that the narrative analytical framework employed in ‘thinking like a lawyer’ is relevant to legal-ethical judgment. Narrative intelligence provides coherence and is essential in the process of judgment leading to legal and ethical decisions.

The following section is a detailed examination of the emotional content of narrative intelligence.

III THE EMOTIONAL CONTENT OF NARRATIVE INTELLIGENCE

Although Graham and McJohn, Burton, and Scherr recognise the role of emotion in narrative intelligence, none of them elaborates on it. For Burton, narratives embrace facets of human reaction and judgment such as emotion.⁴⁰ Graham and McJohn observe that narratives convey emotive content effectively. They argue that cognitive science supports the contention that the emotive aspects of narratives make them easier to remember and also makes them more persuasive.⁴¹ For Scherr, narratives contain

³⁵ Scherr, above n 11, 231.

³⁶ Ibid 232.

³⁷ Lorie M Graham and Stephen M McJohn, ‘Cognition, Law, Stories’ (2009) 10 (1) *Minnesota Journal of Law, Science & Technology* 255, 282.

³⁸ Ibid 258.

³⁹ David A Rettinger and Reid Hastie, ‘Comprehension and Decision Making’ in Sandra L Schneider and James Shanteau (eds), *Emerging Perspectives on Judgment and Decision Research* (Cambridge University Press, 2003) 175.

⁴⁰ Burton, above n 25, 37.

⁴¹ Graham and McJohn, above n 37, 283.

and express emotion and motivate the decision-maker toward choice and commitment to action.⁴² Scherr briefly considers cognitive philosophy, in particular the work of Nussbaum, to demonstrate that beliefs and emotions are related and are open to assessment and criticism.⁴³ He concludes that awareness and appraisal of emotion forms a natural activity of practical judgment because it recognises that emotion influences choices.⁴⁴ This section of the article expands upon two of these aspects of narrative intelligence: analysis of emotional narratives and the persuasive role of emotion in narrative intelligence.

Narrative intelligence involves the ability to recognise and evaluate emotional preferences, perspectives, beliefs, values and dispositions because these factors can influence judgment. Emotion is involved in the process of evaluation; for example, empathy gets narrative judgment underway. The perceptive capacity to see the suffering of another is said to precede 'the analytical, reflective and deliberative components of moral judgment'.⁴⁵ In cognitive neuroscience, empirical studies have identified the neurological basis for narrative understanding of self.⁴⁶ According to Nussbaum, narratives contain and express emotion and are essential in the process of practical reflection.⁴⁷ Narratives evoke emotional activity and reveal the structure of an emotion allowing for the analysis of the emotional experience. Emotions can be appropriate or inappropriate and can influence judgment positively and negatively. It is necessary to examine the judgments contained in emotion to understand how they influence narrative judgment and choice.

At the heart of contemporary cognitive theories of emotion is the notion that emotions are intellectual, and following the Stoics, cognitive theorists generally identify emotion with judgments or appraisals meaning affirmations or denials of propositions or appearances.⁴⁸ Cognitive theorists contend that the mental evaluative process involved in emotion produces thoughts.⁴⁹ According to Nussbaum the thought of the object, the belief about the object and the recognition of the object's salience enables a

⁴² Scherr, above n 11, 233.

⁴³ Ibid 237.

⁴⁴ Ibid. For a detailed account of love and ethics see Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001).

⁴⁵ Leslie Paul Thiele, *The Heart of Judgment: Practical Wisdom, Neuroscience, and Narrative* (Cambridge University Press, 2006) 183.

⁴⁶ Ibid 15.

⁴⁷ Martha C Nussbaum, 'Narrative Emotions: Beckett's Genealogy of Love' (1988) 98 (2) *Ethics* 225, 236.

⁴⁸ See Nussbaum, above n 44; Jerome Neu, *A Tear is an Intellectual Thing: The Meanings of Emotion* (Oxford University Press, 2000); Robert Solomon, 'Emotions and Choice' in Amelie Rorty (ed), *Explaining Emotions* (University of California Press, 1980).

⁴⁹ John Deigh, 'Primitive Emotions' in Solomon, above n 2, 10.

person to identify with the emotional experience and the object of the emotion.⁵⁰ Emotional beliefs if true justify the emotion and if false invalidate the emotion, and as such they can assist or impede judgment.⁵¹ Whether an emotion is deemed appropriate or inappropriate depends on whether a person ‘gets the appraisals right, using a defensible theory of value’.⁵² Accordingly, cognitive theorists refute the view that emotion is antithetical to reason and seek to establish emotion’s role in rationality. These aspects of Nussbaum’s theory are elaborated on and applied below in the context of a description and evaluation of the embedding of the graduate attribute ‘ethics and professional responsibility’ into two subjects in the new curricula at UTS.

A *Ethics and Professional Conduct: Analysing Emotional Narratives*

Ethics and Professional Conduct at UTS Law is a vocational subject in the Practical Legal Training (PLT) component of the degree.⁵³ Following the curriculum review, the subject will from 2014 become a first year foundational subject called *Ethics, Law and Justice*.⁵⁴ The ethics program at UTS Law actively encourages students to consider legal ethics broadly, including the role of emotion and personal values in ethical decision-making. All of the subject learning objectives in *Ethics and Professional Conduct* emphasise the ethics graduate attribute, and one of the subject learning objectives directly relates to emotional content in legal ethics:

Upon successful completion of this subject students should be able to:

Consider the impact of personal values, emotions and morals in ethical decision-making.

This learning objective is retained in the new subject *Ethics, Law and Justice*, and the content targeting the impact of emotions remains largely the same. The following teaching and learning strategy was devised for *Ethics and Professional Conduct* and the discussion focuses on how it was initiated in that subject.

There are several topics within *Ethics and Professional Conduct* where the emotional content of ethics is explored. The topic ‘Professional and Personal Conduct’ provides an example of how law students can be educated about the impact of emotion on ethical judgment and decision-making. The lecture for this topic

⁵⁰ Martha C Nussbaum, ‘Emotions as Judgments of Value and Importance’ in Solomon, above n 2, 27-31.

⁵¹ Cheshire Calhoun, ‘Subjectivity and Emotion’ in Solomon, above n 2, 116.

⁵² Nussbaum, above n 44, 372.

⁵³ The qualification on completing PLT is a Graduate Certificate in Legal Practice. The format of this subject is a one hour lecture and a two hour seminar each week for twelve weeks.

⁵⁴ The format of this subject is a three hour seminar each week for twelve weeks.

considers when conduct can be both professional and personal and the resulting professional responsibility issues that can arise. In relation to personal conduct and emotion, the case of *Legal Practitioners Board v Morel*⁵⁵ has been used as an example of where love and personal relations with clients can lead to a criminal lawyer being struck off for professional misconduct. Other emotions are involved in legal practice, but it is rare for emotions like love to be considered in the context of professional judgment and practice.⁵⁶

Morel has also been used as an exam question where students were asked to discuss the case with reference to values, emotions and morals and to explain how different standards and perspectives influence the ethical behaviour of lawyers and the decisions of courts and tribunals. This was consistent with the seminar materials where other cases that involved love were discussed. The following questions were used in relation to the cases of *Legal Practitioners Complaints Committee v Pepe*⁵⁷ and *Garde-Wilson v Legal Services Board*:⁵⁸

What was the basis for the determinations?

What values, emotions and moral codes were present in the Tribunal's determination?

Do you think the determinations were reasonable?

Where there any alternatives to the Tribunal's decisions?

The purpose of having students read and discuss the cases was to help them to understand the factors the disciplinary tribunals considered relevant and irrelevant to their determinations, including values, emotions and moral codes. However, the second question does not adequately prompt consideration of how love can be analysed within those legal narratives and how it impacts ethical judgment. The question encourages surface learning about the emotional content because it is framed in terms of identifying the emotions that were present. The questions place more focus on the Tribunal's determination than on the broader ethical issues. In

⁵⁵ [2004] SASC 168; (2004) 88 SASR 541 (hereinafter *Morel*).

⁵⁶ For example, the emotions of criminal lawyers have been considered in the context of resentment / forgiveness, outrage, pain, revulsion and joy. See David M Lerman, 'Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard To Find?' (1999-2000) 27 *Fordham Urban Law Journal* 1663; Derek A Denckla, 'Forgiveness as a Problem-Solving Tool in the Courts: A Brief Response to the Panel on Forgiveness in Criminal Law' (1999-2000) 27 *Fordham Urban Law Journal* 1613; Abbe Smith, 'Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of Empathic, Heroic Public Defender' (2003-2004) 37 *Davis Law Review* 1203; Susan Bandes, 'Repression and Denial in Criminal Lawyering' (2006) 9 (2) *Buffalo Law Review* 339; Abbe Smith and William Montross, 'The Calling of Criminal Defense' (1998-1999) 50 *Mercer Law Review* 443.

⁵⁷ [2009] WASC 39.

⁵⁸ [2008] VSCA 43.

the foundational subject *Ethics, Law and Justice* there will be less focus on professional responsibility, as these questions will be changed to refocus the discussion toward broader ethical issues, including emotions and how these affect ethical judgment. Some of the proposed new seminar questions are included in the discussion of the seminar content below.

In order to illustrate the emotional content of narrative intelligence and the way in which emotional content can be analysed, the case of *Morel* will again be used. This particular disciplinary case elicits a narrative of love and discloses how ethical judgment can be influenced by emotion. Morel was a criminal lawyer in South Australia who was struck off the Roll of Practitioners for deceptive and dishonest conduct. In 1989 she began a professional and personal relationship with a prisoner named McFarlane. They were married in 1990 and she ceased being his lawyer. They divorced in 1996 while McFarlane was still imprisoned. In 1997 Morel began a professional and personal relationship with another prisoner, Page. Morel lied to prison authorities, stating that she urgently needed to speak with Page about legal matters whereas in fact she wished to talk to him about personal matters. The prison authorities began monitoring Page's conversations with Morel, during which he admitted assaulting another prisoner. Morel was banned from visiting Page because the prison authorities considered that she was using the privilege of legal visits to further her personal relationship with him. Despite this, Morel continued to act for Page in a professional capacity.

This case is an example of personal and professional boundary violations by a legal practitioner. The analysis of the case that takes place in this part is not concerned with the breach of disciplinary rules. What is illustrated is how love within this narrative can be analysed for the purpose of demonstrating the influence of emotion on ethical judgment. There is limited information about the personal emotional narrative of Morel. However the psychologists report provides some insight into the narrative of love, and a salient aspect is as follows:

She described in the past either not trusting people or trusting them too much. Ms Morel told me she is aware that she is a person who has a large capacity of empathy for others, a tendency to absorb other's feelings and that this is what she has to be more careful about.

Ms Morel told me she now realises she got into trouble with these boundary issues as she did not know herself well enough to have a definite set of protective values.⁵⁹

The report discloses that Morel had a relationship with another prisoner who resided with her while he served a sentence in home detention. This took place after she was removed from the roll.

⁵⁹ *Legal Practitioners Board v Morel* [2004] SASC 168 [33]-[34].

In cognitive philosophy, narratives can reveal the meaning of the emotion.⁶⁰ Exposing emotional narratives to analysis can lead to better judgment when assumptions, beliefs, dispositions and perceptions are scrutinised. Accordingly, narrative is the way we examine, evaluate and make sense of the emotional experience. Love is implied in the above narrative because of the intimate relationships Morel engaged in. Nussbaum states that love is an emotion but it is also a relationship and cannot be understood unless it is examined ‘as part of the complex fabric of a story that extends over time.’⁶¹ Understanding this ‘complex fabric’ exposes the habits and dispositions towards engaging in certain kinds of relationships and thinking about love in certain ways. The case provides an incomplete narrative of love and there is no way of knowing the full historical and psychological features of that narrative and therefore the emotional habits and dispositions of Morel. As such, the analysis does not purport to represent Morel’s actual motivations, thinking and feelings. The application of emotion theory provides a reading of the case that is speculative, but which illustrates the kinds of analysis that emotional narratives can be the subject of and which are suggestive of dispositions to think and act in certain ways.

The philosopher Robert Solomon contends that complex emotions such as love ‘involve process and story’ and that the stories we tell are ‘important to the nature of love itself’.⁶² Different stories dictate different meanings of love, and if ‘love is a narrative, many of the wrong stories are told’.⁶³ There could be unacknowledged reasons for love in relation to Morel’s relationships with prisoners. Solomon claims that unacknowledged reasons can be amongst the worst reasons for love.⁶⁴ For example, people can enter into patterns and Solomon observes that there are several reasons for doing this. One reason is ‘the safety of such a relationship, the fact that it has built in limits of time and commitment’.⁶⁵ This is arguable: Morel did marry McFarlane, suggesting commitment to that relationship, but Morel knew that she could not conduct both professional and personal relationships at the same time, thus placing limits on the ability to commit and the longevity of future relationships. The tendency to choose partners in prison while providing with legal representation

⁶⁰ Nussbaum, above n 47, 236.

⁶¹ Nussbaum, above n 44, 473.

⁶² Robert C Solomon, ‘The Passions: Philosophy and the Intelligence of Emotions’ Lecture Series Part One, The Teaching Company Limited Partnership, 2006, 14 <<http://www.teachersyndicate.com/documents/oct/2010/TTC%20Guidebooks/Passions%20-%20Philosophy%20and%20the%20Intelligence%20of%20Emotions.pdf>>. See also Nussbaum, above n 47, 236.

⁶³ Solomon, above n 62.

⁶⁴ Robert C Solomon, *About Love: Reinventing Romance for Our Times* (Hackett Publishing Company, 2006) 156.

⁶⁵ *Ibid* 157. Solomon uses the example of a woman falling in love with married men.

suggests a certain safety in the knowledge that the men are dependant both professionally and personally. Morel eventually acknowledged this, stating:

I understand I am responsible for both creating such dependencies and the damaging effect this need has had on my life and the life of the other person involved.⁶⁶

Another unacknowledged reason for Morel's love is that the loved one satisfies 'more neurotic needs – the need to be punished or martyred, the desire to take care of a truly pathetic human being, the need to play God with someone'.⁶⁷ This provides a way of understanding Morel's 'large capacity' for empathy and absorbing the feelings of others and her own dependency in such relationships. The psychiatric review reported that Morel 'tended to act in the role of a "rescuer" in relation to three prisoners',⁶⁸ indicating a misguided sense of empathy, sympathy or compassion that led to unethical behaviour. Empathy and sympathy are seen as 'other-suffering' emotions.⁶⁹ However, these emotions are not about absorbing the feelings of others⁷⁰ and this highlights the need to develop appropriate emotional boundaries and detachment.

Characteristic of sympathy is a belief that the suffering of the other can be alleviated, but acting in the role of rescuer suggests the possibility of Morel's emotional needs surpassing the needs of the men she was involved with. Applying Nussbaum's explanation of the evaluative properties of emotion demonstrates this point in theory.⁷¹ The perception of the object of the emotion (a person, thing or event) is intentional, in that the thought of the object results in the emotion and the way the object is thought of depends on the person's interpretation of it. Emotions are further characterised by beliefs about and the value attached to the object. Nussbaum argues that emotional judgments are a subclass of value judgments⁷² and that not all beliefs are emotional. Emotional

⁶⁶ *Legal Practitioners Board v Morel* [2004] SASC 168 [22].

⁶⁷ Solomon, above n 64, 157.

⁶⁸ *Legal Practitioners Board v Morel* [2004] SASC 168 [41].

⁶⁹ Jonathan Haidt, 'The Moral Emotions' in Richard J Davidson, Klaus R Schere and H Hill Goldsmith, *Handbook of Affective Sciences* (Oxford University Press, 2002) 861.

⁷⁰ See Lauren Wispe, 'The Distinction Between Sympathy and Empathy: To Call Forth a Concept, a Word is Needed' (1986) 50 (2) *Journal of Personality and Social Psychology* 314, 314; Douglas Chismar, 'Empathy and Sympathy: The Important Difference' (1988) 22 *The Journal of Value Inquiry* 257; Julien Deonna, 'The Structure of Empathy' (2007) 4 (1) *Journal of Moral Philosophy* 99.

⁷¹ Nussbaum, above n 44, 27-31.

⁷² *Ibid* 30 (fn 21). Nussbaum explains that as a subclass of value judgment emotions 'pertain to objects that figure in the person's own scheme of goals and projects – and, in central cases, to objects that are seen as not fully controlled by the person. There will therefore be other value judgments that won't involve emotion.'

beliefs are those that define the emotion and, if true, justify it.⁷³ Thus, according to Nussbaum, the defining elements of an emotion are evaluative judgments based on intentionality, belief and value as related to the object of the emotion.

In *Morel* the objects of sympathy and love are the prisoners. The objects are intentional; they could be simultaneously perceived as helpless (sympathy) and desirable (love). Underpinning sympathy is a belief that the men are suffering and their suffering can be alleviated. The suffering possibly pertains to their confinement and lack of intimacy. Love is based on beliefs about the qualities of the object and the qualities of romantic relationships. On the evidence above, the relationships could be characterised by beliefs about care of the vulnerable and dependency. However, in relation to the possibility of *Morel*'s emotional needs, the most important aspect is the value attached to the intentional perception and belief characteristics. The value perceived in the prisoners and the relationship means that they were important for the role they played in the practitioner's life. This value relates to the perception and thought of the object: the perception of the prisoners as helpless and thoughts based on beliefs of dependency. In terms of helplessness the value is the thought that she is the one that can alleviate the suffering by being the rescuer. In this account the value of those relationships could be to the practitioner's ego because dependency implies power and this also relates to the object's desirability. The dependency seemingly allows *Morel* to trust the person she is having a relationship with, a significant issue, stated in the first quote above, also making them more desirable.

It appears that the 'wrong story' about love is being told. In *Morel* the potential unexamined reasons for love and misguided sympathy had a negative impact on *Morel*'s professional judgment leading to unethical behaviour. Emotional self-awareness in this example means the ability to evaluate the emotional narrative in order to better understand how emotion influences ethical judgment and choice. In the quotes above there is some evidence of the practitioner evaluating her own emotional narrative, but overall it could be concluded that she lacked emotional self-awareness and as a result both her personal and professional judgment was impaired leading to boundary violations. *Morel* identifies a large capacity for empathy as a reason for the boundary violations. Empathy is not a discrete emotion; it is an emotional process that can manifest in any emotion.⁷⁴ Empathy involves

⁷³ Calhoun, above n 51, 116.

⁷⁴ June Price Tangney, Jeff Stuewig and Debra J Mashek, 'Moral Emotions and Moral Behaviour' (2007) 58 *Annual Review of Psychology* 345, 362; Rand J Gruen and Gerald Mendelsohn, 'Emotional Responses to Affective Displays in Others: The Distinction between Empathy and Sympathy' (1986) 51(3) *Journal of Personality and Social Psychology* 609, 609.

understanding and evaluating the emotion and experience of another person through an affective connection. However there needs to be a balance between having a sufficient degree of empathy (engagement) and a sufficient degree of detachment (objectivity).⁷⁵ When there is too much objectivity, empathy can be inhibited leading to a lack of understanding of the other person. When there is too much engagement, boundary violations can occur.

The balance between engagement and detachment is necessary in order to prevent problems such as counter-transference. Counter-transference is a Freudian concept and means ‘unharnessed emotions – emotional responses gone awry... counter-transference may manifest itself in a variety of ways, as positive (love) or negative (hate)’.⁷⁶ In the current context it means the misplaced emotions of a lawyer on a client,⁷⁷ and occurs when there is an insufficient degree of detachment. Morel appears to be an example of counter-transference where too much empathic engagement manifested as love and led to boundary violations. Having emotional self-awareness enables a balance to be struck between engagement and detachment. Emotional self-awareness is the ability to recognise emotional responses and account for them in the lawyer/client relationship.⁷⁸ Emotional self-awareness is not only acknowledging feeling a certain way. Perception of feelings is important, but emotional self-awareness is also about acknowledging traits, habits of thought and action, examining the beliefs that underpin emotion, and educating emotional capabilities.⁷⁹ This is why it is important to emphasise the emotional aspects of legal practice with students and to provide them with opportunities to consider their own emotional capabilities with respect to ethical judgment.

Proposed seminar questions and discussion points drawing upon the material above include the following:

1. Morel knew that she could not enter both professional and personal relationships with clients. What do you think her motivations were for entering these relationships?

⁷⁵ Nigel Duncan, ‘Addressing Emotions in Preparing Ethical Lawyers’ in Maharg and Maughan, above n 6, 268.

⁷⁶ Silver, ‘Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship’, above n 22, 271.

⁷⁷ Ibid 270. See also Susan Daicoff, ‘Law as a Healing Profession: The Comprehensive Law Movement’ (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1.

⁷⁸ Silver, ‘Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship’, above n 22, 276.

⁷⁹ Peter Goldie, *The Emotions: A Philosophical Exploration* (Oxford University Press, 2000) 118. See also Amelie Oksenberg Rorty, ‘Explaining Emotions’ (1978) 75 (3) *The Journal of Philosophy* 139.

2. Apart from empathy, love is implied in Morel. What does the legal narrative reveal about the meaning of empathy and love in this situation?
3. The psychiatric review reported that Morel ‘tended to act in the role of “rescuer” in relation to the prisoners.’ How are sympathy and love related in this case? What does this indicate about having empathy or sympathy for clients?
4. A balance needs to be struck between empathic engagement and emotional detachment. Do you agree or disagree with this statement? Why / why not?
5. What is emotional self-awareness? What does the case of Morel indicate about emotional self-awareness? Is emotional self-awareness related to personal and professional judgment?
6. What are the implications when practitioners do not account for their emotion in ethical judgment?

These proposed seminar questions and discussion points are intended to examine the relationship between appropriate emotional detachment and self-awareness, how emotion can affect the lawyer/client relationship, how emotion can be analysed, and how emotion that is unaccounted for can lead to boundary violations. In participating in a seminar discussion, students will be engaging their narrative intelligence and exposing the emotions within the narratives to analysis. Students will be required to read the case and unless students are required to read some of the theoretical material, academics will need to guide and participate in the discussion by providing background information or asking further questions.

Emotional self-awareness assists in striking a balance between empathic engagement and detached objectivity.⁸⁰ Legal educators should encourage and develop the capacity of empathy in students but also encourage students to develop appropriate detachment in order to avoid problems such as counter-transference. Analysing legal narratives such as *Morel* is one way to expose students to emotional analysis. Narrative intelligence requires a capacity for emotional self-awareness, and with this capacity, people are more likely to approach and make judgments in a rational and ethical manner. This teaching and learning strategy is consistent with the learning objective because the aim is to develop awareness and skills that equip students to understand the impact of emotions on ethical judgment. The danger, however, is that this will reinforce attitudes that discount emotion leading to its repression or denial when making judgments. This is why it is important to emphasise the importance of emotional self-awareness. Appropriate emotional detachment does not simply mean acknowledging emotion and then attempting to exclude it from judgment. Appropriate emotional detachment requires emotional self-

⁸⁰ Duncan, above n 75, 268.

awareness and the ability to acknowledge, moderate and account for the negative and positive influences of emotion on judgment.

*B Evidence and Criminal Procedure: Using Emotion
Persuasively and Ethically*

From 2014, the ‘ethics’ graduate attribute will also be embedded within the core subject *Evidence and Criminal Procedure*. The following is a proposed teaching and learning strategy that pertains to the ethics of using emotion persuasively and whether emotional judgments are morally justifiable.

The relevant subject learning objective is as follows:

Upon successful completion of this subject students should be able to:

Evaluate and reflect on the roles of lawyers in the administration of justice.

This learning objective focuses on the roles of lawyers and provides the opportunity to discuss the ethics of advocacy and how lawyers use emotion to influence juror decision-making. The learning objective is not explicit about the role of emotion in legal ethics, but the subject matter is wide enough to incorporate that knowledge. For example, the subject allocates a seminar to types of privilege such as client legal privilege, the professional confidential relationships privilege and the sexual assault communications privilege.⁸¹ In relation to the latter two privileges, the subject matter involves the history leading up to the enactment of those privileges and the law itself. There is ample scope within that material relating to those two privileges to discuss legal ethical content and the related emotional content. One aspect of the emotional and ethical content is discussed below, but this material also raises other ethical issues such as the moral character of lawyers and role-detachment.⁸²

The learning strategy proposed below has three purposes: to understand the evaluative properties of emotion, to understand how emotion is used persuasively and strategically by lawyers, and to consider whether the use of emotion is morally justifiable and ethically defensible. In doing so, students are engaging narrative intelligence by critically analysing and reflecting on the role of emotion in legal-ethical judgment through an aspect of how lawyers may enact their role in the administration of justice. Proposed seminar questions follow the discussion of the seminar content below.

⁸¹ The format of this subject is a ninety minute lecture and a ninety minute seminar each week for twelve weeks.

⁸² For a discussion of these issues see Donald Nicholson and Julian S Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999) 160-181.

One of the prescribed readings for the seminar is an article by Mary Rose Liverani explaining the circumstances and the reasons why law reform was needed in relation to the subpoenaing of sexual assault counsellors' notes.⁸³ Lawyers in New South Wales were subpoenaing the notes in order to gain information that could be used to undermine the credibility of sexual assault complainants. Liverani discusses how some lawyers subverted the rape shield laws prior to the sexual assault communications privilege. Rape shield laws disallow lawyers from adducing evidence of the sexual reputation of the complainant to discredit them.⁸⁴ In order to subvert these laws, some lawyers started to subpoena counselling notes for the purpose of indirectly introducing evidence of the complainant's moral character.⁸⁵ The purpose of this strategy was to discredit the credibility of the complainant and to affect juror judgment.⁸⁶ In relation to using emotion to affect juror judgment and decision-making, lawyers could use information from counselling notes to support stereotypes and encourage jurors to act on biases. For example, Liverani quotes research by the Cossins and Pilkington⁸⁷ who found that jurors:

were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, drank or used drugs, or had been acquainted with the defendant – however briefly.⁸⁸

This research was published in 1996 and whilst some stereotypes and myths pertaining to sexual assault complainants have been exposed, it remains the case that some people who could be jurors adhere to those stereotypes or, in the least, are biased by the suggestion that the moral character of the complainant is dubious. Some lawyers have wanted access to counselling notes because they contain information including 'past sexual history, the existence of illegitimate children, drug, alcohol and psychiatric history' and self-blame.⁸⁹ Lawyers could use this information to support stereotypes, to distort the factual nature of the sexual assault and to impeach the moral character of the complainant.⁹⁰ In doing so they create a narrative⁹¹ and use the

⁸³ Mary Rose Liverani, 'Confidential Communications: Support for New Subpoena Law and Bouquets for the Attorney General from Sexual Assault Lobby' (1998) 36 (3) *Law Society Journal* 42.

⁸⁴ *Criminal Procedure Act 1986* (NSW), s 293.

⁸⁵ Liverani, above n 83, 44.

⁸⁶ *Ibid.*

⁸⁷ Annie Cossins and Ruth Pilkinton, 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials' (1996) 19 *University of New South Wales Law Journal* 222.

⁸⁸ Liverani, above n 83, 44.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ For an examination of the socio-linguistic characteristics of storytelling in court, and how storytelling is managed and organized by lawyers, see Diana

persuasive influence of emotion to direct the attention of jurors away from the moral obloquy of the defendant and toward impeachment of the moral character of the complainant. If jurors think that the complainant has a dubious moral character, they may sympathise with the accused and feel disdain towards the complainant. Emotions commonly attached to disdain are contempt and anger. For brevity, only contempt is considered below. Contempt also arises in the content and promotes consideration of the ethical justifiability of using emotion persuasively.⁹²

Contempt is related to anger and moral disgust.⁹³ Some theorists argue that contempt is a blend of these emotions, while others argue that these emotions are distinguishable from contempt.⁹⁴ Contempt involves a judgment about a moral or character defect in another person. As such, contempt involves 'looking down on someone and feeling morally superior' and is 'elicited by the perception that another person does not measure up'.⁹⁵ This can result in the object of contempt being treated with less respect and consideration or with derision or disregard.⁹⁶ Contempt is not always a negative emotion. Mason argues that in some situations contempt is understandable and morally justifiable. Mason prefers to refer to contempt as an attitude because of its quality as a form of regard that also involves an affective stance toward the other.⁹⁷ Feeling contempt involves perceiving and regarding the object as a person who ranks low in their worth because they fall short 'of some legitimate interpersonal'. The affective quality is feeling pained in the presence of the object thus making the object a source of

Eades, 'Telling and Retelling Your Story in Court: Questions, Assumptions, and Intercultural Implications' (Paper presented at Cultures and the Law, Australasian Institute of Judicial Administration, 25th Annual Conference, Melbourne, Sunday 14 October 2007). See also Diana Eades, *Sociolinguistics and the Legal Process* (Multilingual Matters, 2010) 42-46.

⁹² For the defining features and moral justifiability of anger see Gabriele Taylor, 'Justifying the Emotions' (1975) 84 (1) *Mind* 390; Aristotle, *Rhetoric*, Book II Part 1, translated by W Rhys Roberts (The Internet Classics Archive) <<http://classics.mit.edu/Aristotle/rhetoric.2.ii.html>>.

⁹³ As a basic emotion disgust relates to revulsion of contaminants in the environment and as a moral emotion it contains a judgment about the degrading behaviour of another person.

⁹⁴ For empirical research on the differentials of anger, disgust and contempt, and a review of the psychological literature, see Cendri A Hutcherson and James J Gross, 'The Moral Emotions: A Social-Functionalist Account of Anger, Disgust and Contempt' (2011) 100 (4) *Journal of Personality and Social Psychology* 719.

⁹⁵ Haidt, above n 69, 858. See also Kate Abramson, 'A Sentimentalist's Defense of Contempt, Shame and Disdain' in Peter Goldie (ed), *The Oxford Handbook of Philosophy of Emotion* (Oxford University Press, 2010).

⁹⁶ Haidt, above n 69, 858.

⁹⁷ Michelle Mason, 'Contempt as a Moral Attitude' (2003) 113 (2) *Ethics* 234, 239.

aversion.⁹⁸ According to Mason the conditions necessary for contempt's proper focus and moral justifiability are as follows:

1. It is directed at a person or persons (objects) as a response to violations of a legitimate interpersonal ideal. The object does not have to commit a personal offense against the person; the offense can be based on a belief about a class of people.
2. The violation stems from a morally evaluable character trait.
3. The object can appropriately be held responsible for the expression of the character trait.
4. There is a legitimate expectation or demand that the object can approximate the interpersonal ideal.
5. The attitude toward the object emanates from an agent who does not possess a similar fault otherwise they are also contemptible.
6. The agent is responsive to evidence that the object has repented or changed for the better thus being open to forgiveness or some other change in attitude. To be blind to that evidence would be a morally objectionable attitude.

All of the above conditions and justifications contain evaluations. Conditions 1 to 4 relate to the conditions necessary for the proper evaluative presentation of the object of contempt.⁹⁹ Conditions 5 and 6 relate to the moral justifiability of contempt.¹⁰⁰ The agent evaluates the object in relation to their actions, character traits and responsibility. In doing so the agent is also evaluating their standards, how the object does not meet them, and their beliefs toward the object and situation.

To appreciate the evaluative properties of contempt and its moral justifiability, students can be instructed to consider the following hypothetical:

The defendant (D) contends that they had consensual sexual intercourse with the complainant (C). A juror (J) thinks that D could have made an honest mistake about a belief in consent because C engaged D in conversation, was dressed provocatively, had allowed D to buy drinks, had been flirting with D, and accepted a lift home with D. Additionally, C did not scream or struggle during the alleged sexual assault. D's lawyer has deliberately introduced this evidence with the aim of influencing the juror's perception of C. As a result J feels contempt toward C.

In relation to Mason's first point above, in order to ascertain whether there has been a violation of a legitimate interpersonal ideal, it is necessary to examine the possible beliefs that underpin the interpersonal ideal and the perception of C. The beliefs that

⁹⁸ Ibid 241; see also Macalister Bell, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press, 2013) 57.

⁹⁹ Mason, above n 97, 250.

¹⁰⁰ Ibid 253.

could arise are that C invited the advance or if C did not want to have sexual intercourse C would have objected by screaming or struggling. The evaluations involved in these beliefs lead J to conclude that C is either lying or D has a reasonable belief in consent. Contempt toward C is attached to these evaluations. Further evaluation of the beliefs underpinning the emotion could reveal that the beliefs are based on stereotypes or a biases and this would invalidate the contempt. This however, requires the honest appraisal of one's beliefs. Without this kind of examination J considers that C has violated an ideal. The interpersonal ideal could be the thought that C is lying, that C should not have invited the advance, or that it was reasonable in the circumstances for D to believe there was consent. The interpersonal ideal could be based on misconceptions about sexual assault complainants and perhaps normative standards and perceptions related to the gender and the sexuality of the complainant. This calls into question the legitimacy of the ideal and the moral systems and norms that it is based on.

In relation to Mason's second and third points, J may consider the violation to have stemmed from a morally evaluable character trait. This would be the beliefs that C invited the advance or if C did not want to have sexual intercourse C would have objected. This element depends on the personal morality and perspective of J and the acceptance or rejection of information which contradicts the beliefs above. If C is lying then C would appropriately be held responsible for the expression of the character trait. However, whether the other beliefs raise morally questionable traits and whether C should be held responsible is debatable. The above beliefs could be based on stereotypes and attitudes that blame the complainant. Similarly, in relation to point four, J may consider that there is a legitimate expectation or demand that C can approximate the interpersonal ideal. That is, people should not flirt, accept drinks, dress provocatively, or accept lifts home, and should communicate non-consent clearly, because otherwise they are blurring boundaries. In those circumstances it is considered reasonable that D believed there was consent and this offends the interpersonal ideal. But again this ideal is problematic for the reasons above and because it adopts a moral standard that is not reflected in the law. For example, in New South Wales, when determining whether consent was 'freely and voluntarily' given, submission or a lack of resistance does not constitute consent.¹⁰¹ Moral standards do not have to be reflected in the law and people apply different norms and standards of behaviour depending on their moral and cultural perspectives. This is why some lawyers try to invoke negative emotions like contempt by reinforcing stereotypes in order to bias juror decision-making.

¹⁰¹ *Crimes Act 1900* (NSW), s 61HA (7).

Whether the emotion is morally justifiable depends on Mason's points five and six above. J could argue that the attitude toward the complainant is justifiable because they do not possess a similar fault. However, this depends on whether the evaluations J has made, based on their beliefs, are correct. If J's evaluations are questionable or incorrect because their beliefs are biased or based on stereotypes, their attitude could be considered contemptible, particularly if they are unwilling to change. J also needs to be responsive to evidence that the object of the emotion, in this example the complainant, has repented or changed for the better thus being open to forgiveness or some other change in attitude. To be blind to that evidence would be a morally objectionable attitude. In the hypothetical this will again depend on whether J gets the evaluation right and, if they get it wrong, whether J is willing to accept that C does not need to repent or change. If J's evaluations are wrong it means that the contempt is not morally justifiable.

The following seminar questions are based on the above content, the purpose of which is to elicit an analysis of contempt and the ethics of using emotion persuasively.

1. What was the purpose of subpoenaing sexual assault counsellor notes?
2. How was the information in the notes used?
3. How might this information affect the way the jury perceives the complainant?
4. Apply the six evaluations in Mason's theory of contempt to the hypothetical (see above), to determine whether the juror's attitude toward the complainant is proper and morally justifiable. Based on your analysis, do you think what D's lawyer did by introducing the evidence was ethical? Why / why not? Is that situation different from using information in counselling notes? Why / why not?

Questions 1 to 3 require students to identify and contextualise the problem of using the information in counselling notes to induce emotions such as contempt in the jury. The analysis above demonstrates how an answer to question 4 could be addressed by applying Mason's theory of contempt. In relation to question 4, Mason's six evaluative points could be shown to students so that they can work through them in the class discussion. The purpose of these questions is to engage students in an analysis of contempt, and to increase understanding of the evaluative nature of the emotion and its moral and ethical justifiability.

The idea for this teaching and learning strategy came from two student responses on an internet discussion board for the subject. In the subject students are actively encouraged to engage in

discussion based on books¹⁰² about the criminal trial process in Australia and documentaries such as 'The Staircase' and 'The Staircase 2: The Last Chance'. 'The Staircase' documents the trial of Michael Petersen, who was charged and convicted for the murder of his wife in the United States. 'The Staircase 2' documents his appeal and his subsequent release from prison pending a new trial. Student A commented on 'The Staircase' and student B on 'The Staircase 2'. The students recognised that emotion plays a role in the criminal justice system. Student A explicitly discussed emotion and its influence on juries but found it 'interesting/alarming' that emotion and human psychology has so much to do with jury decisions. Student B acknowledged that 'lawyers play on the emotions of juries' and that it is 'hard for juries to isolate their emotion.' It is assumed that student B meant that jurors should not let emotion affect their decision-making.

'Lawyers play on emotion' precisely because it is difficult for people to be unaffected by emotion for better or worse. This is why it is important to educate students about the responsibility of doing so and how it can be done ethically. If students continue to think that law, legal actors and legal judgment are free from emotion they are not learning about the reality of human decision-making or ethical persuasion. The content of this teaching and learning strategy is consistent with the subject learning objective because it focuses on the roles of lawyers in the administration of justice. By using a concrete example of how a lawyer can enact their role in the administration of justice, this activity requires students to critique the fulfilment of that role in the context of ethical behaviour. Additionally, students are engaging their narrative intelligence through a consideration of how lawyers control and construct narratives. This activity exposes students to the reality of advocacy and the tactics, including the use of emotion to influence juror decision-making, employed by lawyers. The purpose is to encourage students to evaluate the impacts of employing these tactics and the potential harm it can cause, and to encourage reflection on appropriate ethical boundaries.

IV CONCLUSION

This article argues that emotional, moral and humanistic concerns are not inconsistent with legal thinking and ethical judgment.¹⁰³ Emotion is situated within legal analytic and problem

¹⁰² For example Helen Garner, *Joe Cinque's Consolation* (Pan Macmillan, 2004); John Bryson, *Evil Angels* (Penguin, 1986); Malcolm Knox, *Secrets of a Jury Room* (Random House, 2005); Paul Sheehan, *Girls Like You* (Pan Macmillan, 2006).

¹⁰³ Cowrie, above n 13, 159; Andrew Boon, 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2002) 5 (1 & 2) *Legal Ethics* 34; Karen Barton and Fiona Westwood, 'Developing Professional

solving structures utilised in exercising legal judgment, in particular narrative intelligence and the personal intelligences. This article focuses on aspects of emotion within narrative intelligence because this is a relatively neglected area in legal education scholarship. Additionally, this article has sought to address the perceived failure in legal education to include the subjective and humanistic concerns involved in legal ethics. In relation to this problem, Gray suggests that the process of legal education and legal academics' attitude to legal education require new ways of thinking.¹⁰⁴ It is for this reason that this article has sought to demonstrate that emotion can be implemented in legal ethics education by utilising the existing analytical framework of 'thinking like a lawyer'.

Narrative intelligence involves the ability to recognise and evaluate emotional preferences, perspectives, beliefs, values and dispositions because these factors influence judgment. Accordingly, a component of narrative intelligence is the way people examine, evaluate and make sense of emotional experiences. Emotionally self-aware people subject their emotional narratives to analysis to examine and evaluate their experiences.¹⁰⁵ The legal narrative of *Morel* is used to demonstrate how an emotional narrative can be analysed. Elements of Solomon's narrative theory of love are applied to show how a lack of emotional self-awareness led to boundary violations and unethical behaviour. Nussbaum's theory on the evaluative properties of emotion is applied to better understand how Morel's need to be a rescuer and her prioritisation of this need exposed habits and dispositions to think and act on love in certain ways which led to the 'wrong story' of love being told. *Morel* is an example of how a lack of emotional self-awareness impaired the practitioner's personal and professional judgment. Self-awareness can be developed through acknowledging and evaluating personal emotional narratives and acknowledging how and when emotion is involved in broader narratives. Understanding emotion within these narratives can reveal what is important, what is valued and how emotion impacts on judgment.

Contempt is used in this article to demonstrate how lawyers use emotion persuasively and to ascertain whether emotional judgments are morally justifiable. Contempt involves the perception that the object has violated an interpersonal ideal and

Character: Trust, Values and Learning' in Maharg and Maughan, above n 6, 235-256; Duncan, above n 75, 257-282.

¹⁰⁴ James Gray, 'Thawing out the Law School: Why We Need Legal Education Theory' (2012) 37 (3) *Alternative Law Journal* 171, 174. See also Michael Coper, 'Legal Knowledge, The Responsibility of Lawyers, and the Task of Law Schools' (2007-2008) 39 *University of Toledo Law Review* 251.

¹⁰⁵ Silver, 'Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship' above n 22, 274-275. See also Michael Lacey, 'Emotional Self-Awareness and Ethical Deliberation' (2005) 18 (1) *Ratio* 65.

the evaluation of the object as having a morally evaluable character trait. Further, contempt involves evaluations about moral and personal standards, expectations and responsibility. The object of the teaching and learning strategy is for students to engage in a structured and thorough analysis of an emotion. This has three purposes: to understand the evaluative properties of emotion, to understand how emotion is used strategically by lawyers, and to consider whether the emotion is morally justifiable and ethically defensible. The Liverani article used in the subject *Evidence and Criminal Procedure* is not explicit about emotion, nor are many of the other resources used in legal ethics education. However, this example demonstrates that academics can use existing materials and with further analysis reveal emotional content. Incorporating emotional knowledge within legal ethics education also requires willingness on the part of academics to become more informed about the different ways in which emotion is involved in ethics and to incorporate knowledge from other disciplines.

The teaching and learning strategies outlined in this article are not especially innovative in terms of class discussions. However, the emotional content of those strategies enable students to think about legal ethics more broadly. It is argued that integrating emotion into learning how to 'think like a lawyer' will improve analytical skills and ethical judgment, and better prepare law students for the reality of making ethical judgments in legal practice.

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