



## **COPYRIGHT AND USE OF THIS THESIS**

This thesis must be used in accordance with the provisions of the Copyright Act 1968.

Reproduction of material protected by copyright may be an infringement of copyright and copyright owners may be entitled to take legal action against persons who infringe their copyright.

Section 51 (2) of the Copyright Act permits an authorized officer of a university library or archives to provide a copy (by communication or otherwise) of an unpublished thesis kept in the library or archives, to a person who satisfies the authorized officer that he or she requires the reproduction for the purposes of research or study.

The Copyright Act grants the creator of a work a number of moral rights, specifically the right of attribution, the right against false attribution and the right of integrity.

You may infringe the author's moral rights if you:

- fail to acknowledge the author of this thesis if you quote sections from the work
- attribute this thesis to another author
- subject this thesis to derogatory treatment which may prejudice the author's reputation

For further information contact the University's Director of Copyright Services

**[sydney.edu.au/copyright](http://sydney.edu.au/copyright)**

THINKING AND FEELING LIKE A  
LAWYER: INTRODUCING  
KNOWLEDGE ABOUT EMOTION  
INTO LEGAL ETHICS EDUCATION

---

Lesley Townsley

A thesis submitted in fulfilment of the requirements  
for the degree of Master of Laws  
Faculty of Law, University of Sydney  
2014

## ABSTRACT

Emotion is commonly considered as a disruptive factor in legal judgment and this has impacted on educational approaches to law, legal judgment and ethics. The first overall aim of the thesis is to demonstrate *why* it is important to include knowledge about emotion in legal-ethical judgment and decision-making. This aim is achieved in Chapters two and three. Chapter two explains what emotions are, demonstrates how emotions involve judgment and evaluation, and how emotions are connected to moral and ethical judgment. It is acknowledged that emotion can be a disruptive factor in ethical judgment but it is argued that the ability to account for both the positive and negative influences of emotion leads to better ethical judgment. Chapter three demonstrates how emotion is involved in ‘thinking like a lawyer’. This chapter builds on Angela Olivia Burton’s model of ‘thinking like a lawyer’, focusing specifically on narrative intelligence and the personal intelligences (intrapersonal and interpersonal). These intelligences include emotion, making Burton’s a useful model from which to educate law students about how to make ethical judgments that recognise the role of emotion. In this chapter the knowledge about emotion from Chapter two is used to expand the understanding of how emotion is involved in ‘thinking like a lawyer’ and legal-ethical judgment. It is argued that including the emotional aspects of legal-ethical judgment, will make legal ethics education more comprehensive and better equip law students for the reality of making ethical judgments in practice.

The second overall aim of the thesis is to demonstrate *how* knowledge about emotion could be introduced into legal ethics education. This aim is achieved in Chapters four and five through the case study of the legal ethics curriculum at the Law Faculty, University of Technology Sydney. Chapter four explains the context for how legal ethics curricula have been implemented in Australian law schools and in particular UTS Law. The chapter argues that educating students about the role of emotion in legal-ethical judgment is best implemented via the pervasive and incremental approaches. It is further argued that the ethics graduate attribute, course intended learning outcome and subject learning objectives developed at UTS Law, provide the means from which to include knowledge about emotion from the previous chapters. Chapter five supports the second overall aim of the thesis by demonstrating how knowledge about the role of emotion in legal-ethical judgment can be introduced, via Burton’s model of ‘thinking like a lawyer’, into the content of specific teaching and learning strategies. Two subjects have been chosen in order to provide an in depth application of the knowledge about emotion and legal-ethical judgment from previous chapters. It is argued that by using concrete examples of how emotion is involved in legal-ethical judgment and how emotion can be integrated into teaching and learning strategies, this thesis will provide academics with a framework from which they can formulate their own teaching and learning strategies with a view to achieving learning outcomes for students such as: increased awareness and understanding of their own emotional capabilities and the ability to critically reflect on and analyse the role of emotion in ethical judgment.

## **DECLARATION**

I hereby certify that this thesis is my own work and that any material written by another person has been duly acknowledged in the text. No part of this thesis has been accepted for the award of any degree at the University of Sydney or any other institution.

# TABLE OF CONTENTS

Acknowledgements.....	iv
<b>1.0 INTRODUCTION</b>	
<b>1.1 Thesis Topic and Problem.....</b>	<b>1</b>
<b>1.2 Background and Scope .....</b>	<b>3</b>
<b>1.3 Aims.....</b>	<b>9</b>
<b>1.4 Methodology .....</b>	<b>10</b>
1.4.1 Case Study – Chapters 4 and 5 .....	10
1.4.1.2 Why UTS? .....	13
<b>1.5 Chapter summary .....</b>	<b>13</b>
<b>2.0 EMOTION AND JUDGMENT</b>	
<b>2.1 Introduction.....</b>	<b>17</b>
<b>2.2 Perception .....</b>	<b>20</b>
<b>2.3 Cognition.....</b>	<b>23</b>
<b>2.4 Emotional Dispositions .....</b>	<b>29</b>
<b>2.5 Emotion in moral judgment.....</b>	<b>32</b>
2.5.1 Empathy and Sympathy .....	33
2.5.2 Anger.....	36
2.5.3 Contempt.....	38
<b>2.6 Conclusion .....</b>	<b>41</b>
<b>3.0 THINKING LIKE A LAWYER: PROFESSIONALISM, ETHICS AND EMOTION</b>	
<b>3.1 Introduction.....</b>	<b>43</b>
<b>3.2 Thinking and feeling like a lawyer .....</b>	<b>46</b>
<b>3.3 Narrative Intelligence .....</b>	<b>49</b>
3.3.1 Cognitive content .....	50
3.3.2 Emotional content .....	51
<b>3.4 The Personal Intelligences.....</b>	<b>55</b>
3.4.1 Intrapersonal Intelligence.....	56
3.4.2 Interpersonal Intelligence.....	60
<b>3.5 Conclusion .....</b>	<b>63</b>

## **4.0 CASE STUDY PART ONE: UTS LAW LEGAL ETHICS CURRICULUM DEVELOPMENT**

<b>4.1 Introduction.....</b>	<b>65</b>
<b>4.2 Current approaches to teaching ethics and professional conduct in Australian Law curricula.....</b>	<b>68</b>
4.2.1 Single Foundational and Vocational subjects .....	68
4.2.2 Pervasive, Judgment and Incremental approaches.....	69
4.2.2.1 Australian pervasive approaches.....	71
4.2.3 Emotion, Judgment, Pervasive and Incremental learning.....	72
<b>4.3 Case Study: UTS Law Ethics Curriculum.....</b>	<b>73</b>
4.3.1 The 2007 Curriculum Review.....	73
4.3.2 The 2013 Curriculum Review.....	75
4.3.2.1 Graduate Attributes 2013 .....	76
4.3.2.2 Threshold Learning Outcomes (TLOs).....	78
4.3.2.3 Course Intended Learning Outcomes (CILOs) .....	79
4.3.2.4 Subjects embedding the ethics attribute.....	80
4.3.3 Embedding the ethics attribute in subject learning objectives.....	81
4.3.3.1 Subject learning objectives and incremental development.....	82
4.3.3.2 The content of the subject learning objectives.....	83
<b>4.4 Conclusion .....</b>	<b>87</b>

## **5.0 CASE STUDY PART TWO: INTRODUCING EMOTIONAL KNOWLEDGE INTO TWO CORE LAW SUBJECTS AT UTS LAW**

<b>5.1 Introduction.....</b>	<b>89</b>
<b>5.2 Subject: Ethics and Professional Conduct 2013.....</b>	<b>92</b>
5.2.1 Learning Objective.....	93
5.2.2 Teaching and Learning Strategies.....	94
5.2.2.1 Topic: Theoretical perspectives of values, morals and ethics.....	94
Current Delivery .....	94
Suggested Improvements .....	97
5.2.2.2 Topic: Professional and Personal Conduct .....	100
Current Delivery .....	100
Suggested Improvements .....	101
Suggested Alternate Seminar Content .....	102
The defining features of anger and its justifiability .....	104
Emotional dispositions and emotional beliefs.....	104

Emotional defence mechanisms and emotional self-awareness.....	105
New seminar questions .....	106
5.2.2.3 Topic: Duty to the Court - Criminal Law .....	107
Current Delivery .....	107
Suggested Improvements .....	108
Emotional motivations – compassion and sympathy .....	109
Emotion as a guide to ethical choice .....	110
5.2.3 Conclusion .....	111
<b>5.3 Subject: Evidence and Criminal Procedure .....</b>	<b>114</b>
5.3.1 Learning Objective.....	114
5.3.2 Teaching and Learning Strategy .....	115
5.3.2.1 Content.....	116
5.3.2.2 Analysis - Contempt .....	118
Violations of legitimate interpersonal ideals .....	118
Morally evaluable character traits and responsibility .....	119
The moral justifiability of contempt .....	119
5.3.3 Conclusion .....	120
<b>5.4 Conclusion .....</b>	<b>121</b>
<b>6.0 CONCLUSION.....</b>	<b>124</b>
<b>6.1 Part One – why it is important to include emotion in legal ethics education .....</b>	<b>125</b>
Emotion and Judgment .....	125
Thinking like a Lawyer: Professionalism, Ethics and Emotion.....	126
<b>6.2 Part Two: How emotion can be implemented in legal ethics education .....</b>	<b>129</b>
Emotion in the Legal Ethics Curriculum .....	129
Emotion in Core Law Subjects .....	131
<b>APPENDIX ONE .....</b>	<b>133</b>
Table 1 Graduate Attributes prior to 2013 curriculum review .....	133
Table 2 Graduate Attributes 2013 curriculum review for the Bachelor of Laws (LLB) .....	133
Table 3 Graduate Attributes 2013 curriculum review for Post Graduates including the Juris Doctor (JD) .....	134
Table 4 Level 7 and 9 Course Intended Learning Outcomes.....	135
<b>BIBLIOGRAPHY.....</b>	<b>137</b>

## **ACKNOWLEDGEMENTS**

I am privileged because in undertaking this work I have had the guidance, support and encouragement of colleagues, friends and family. I particularly acknowledge and thank my supervisors Professor Gail Mason and Dr Kevin Walton of the Faculty of Law, University of Sydney, who shared their knowledge, gave advice, provided valuable feedback on the drafts of this thesis and patiently guided me through this process of learning.

I would also like to thank academic colleagues at the Faculty of Law, University of Technology, Sydney for sharing their knowledge and experiences and giving encouragement and support, particularly Professors Shaunnagh Dorsett, Lesley Hitchens, Anita Stuhmcke and Ana Vrdoljak, Associate Professors Katherine Biber and Bronwyn Olliffe, and Thalia Anthony, Laurie Berg, Tracey Booth, Eloise Chandler, Penny Crofts, Ian Dobinson, Peter Edmundson, Maxine Evers, Nicole Graham, Leanne Houston, Michael Rawling, Marilyn Scott, Pamela Stewart and Karena Viglianti. I thank Dr Nicola Parker from the Institute for Interactive Media and Learning (UTS) for providing teaching and learning resources and insights into education theory.

I thank the students at UTS who shared their thoughts and feelings about their experiences at law school, and about my thesis, and left me with a sense of optimism.

I thank Julia Doyle for her proof-reading services.

My deepest gratitude goes to my partner, Althea Mackenzie, for inspiring me, reading and providing feedback on draft chapters and for steadfastly caring for me. I also thank my mother, Doreen Townsley, for always believing in me.

# 1.0 INTRODUCTION

## 1.1 Thesis Topic and Problem

This thesis addresses a common omission in legal education: teaching students about the role of emotion in legal-ethical judgment. This oversight has been acknowledged by Susan Bandes who has observed that ‘even the seemingly well-developed ethical discussion is impoverished by the failure to address emotional variables that are bound to affect ethical and legal choices.’<sup>1</sup> As discussed below, there are academics who are now considering the role of emotion in legal ethics and legal ethics education. This thesis contributes to that scholarship by considering what is important about emotion in legal-ethical judgment and how emotion can be implemented into a pervasive legal ethics curriculum. The thesis seeks to demonstrate that emotion is an integral part of legal-ethical judgment and that learning about emotion in such judgment is important.

An aspect of the problem that this thesis addresses was stated in the 1980’s by an American law student:

Legal education imbues its victims with a sense of importance of intellect, rationalism, and logic to the exclusion of feeling and caring. When we become aware of emotional stirrings we immediately strike out to rid ourselves of the transgressor – the intruder in our intellectual realm. We are unable to utilise both cognitive and emotional skills. From the day one attends that first law school class the relationship between head and heart is severed.<sup>2</sup>

This statement is indicative of the experience of students in many Australian law schools.<sup>3</sup> Legal education privileges rationalism and promotes disengagement from emotion because it is a ‘transgressor’, having no place in the intellectual realm of law. This disengagement comes about because contemporary legal doctrine and practice valorises the objective logic of law and as such, the predominant view of rationality is reason free from emotion. Thus, emotions are viewed suspiciously, as a factor not to be considered or weighed when making decisions because of their passivity, potential partiality and arbitrary nature.<sup>4</sup>

Erin Ryan has reviewed the ‘traditional segregation of emotion and cognition in Western thought’ and contends that this has ‘created a legal culture that disparages open consideration

---

<sup>1</sup> Susan Bandes, ‘Repression and Denial in Criminal Lawyering’ (2006) 9 (2) *Buffalo Law Review* 339, 344.

<sup>2</sup> James R Elkins, ‘The Pedagogy of Ethics’ (1985) 10 *The Journal of the Legal Profession* 37, 49.

<sup>3</sup> See for example 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). The Introduction in Chapter 3 recites comments from the students at ANU regarding a lack of emotional engagement in law school.

<sup>4</sup> David Pizarro, ‘Nothing More Than Feelings? The Role of Emotion in Moral Judgment’ (2000) 30 (4) *Journal for the Theory of Social Behaviour* 355, 356-357.

of emotional input'.<sup>5</sup> Further, she argues that lawyers 'continue to practice as though acknowledging emotionality in legal discourse is a betrayal of the profession.'<sup>6</sup> According to the student in the quote above, this attitude begins on the first day of law school and it is on this day that students are introduced to the practice of 'thinking like a lawyer'. Teaching students to 'think like a lawyer' is a manifestation of the rationalist practices of law and represents the ways in which students are separated from subjectivities such as emotion. However, there are conceptions of 'thinking like a lawyer' which include emotion and this thesis aims to expand on them.

Legal and ethical judgment, and legal education, are currently organised around discourses and practises that marginalise or negate the role of emotion in judgment.<sup>7</sup> This is problematic because there are several disciplines, including philosophy, neuroscience and psychology, that establish the cognitive nature of emotion and that emotion is an essential component of ethical judgment. Additionally, there are legal academics, drawing on a variety of disciplines, who explore the relationship between legal judgment, legal education and emotion.<sup>8</sup> For example, Karen Barton and Fiona Westwood claim that traditional legal education over-emphasises the cognitive domain at the expense of the affective domain and this results in students lacking preparation for all of the dimensions of legal practice, including the development of 'professional character' and conscience.<sup>9</sup> Nigel Duncan demonstrates how emotion, in particular empathy, is a significant factor in developing ethical behaviour and argues that 'those of us who are interested in preparing students for ethical practice as lawyers should be willing to address it.'<sup>10</sup> Paul Maharg makes the following observation in relation to curriculum design:

Learning a disciplinary discourse is of course a disciplined activity. But the process of learning a discipline need not be separated from the development of our students as persons – indeed the two are closely allied.<sup>11</sup>

---

<sup>5</sup> Erin Ryan, 'The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation' (2005) 10 *Harvard Negotiation Law Review* 231, 237-238.

<sup>6</sup> Ibid 239.

<sup>7</sup> See Dennis Lloyd, *The Idea of Law* (Penguin, 1964) 100-101; Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (Lexis Nexis Butterworths, 2005) 27; J Shklar, 'Law and Ideology' (1964) in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell Ltd, 7<sup>th</sup> ed, 2001) 24.

<sup>8</sup> See for example Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011); 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.

<sup>9</sup> Karen Barton and Fiona Westwood, 'Developing Professional Character – Trust, Values and Learning' in Maharg and Maughan, above n 8, 236.

<sup>10</sup> Nigel Duncan, 'Addressing Emotions in Preparing Ethical Lawyers' in Maharg and Maughan, above n 8, 257.

<sup>11</sup> Paul Maharg, 'Space, Absence, Silence: The Intimate Dimensions of Legal Learning' in Maharg and Maughan, above n 8, 284.

This thesis considers the disciplinary discourse and activity of legal ethics education, how a curriculum can be designed to include knowledge about emotion, and how such a curriculum can facilitate the development of students as persons. It is therefore important to make the following distinction between legal ethics and professional responsibility. Legal ethics is defined as the decisions lawyers make about the ethical aspects of their work lives, which are guided by objective considerations such as formal rules which embody norms and principles, and subjective considerations such as moral orientation, personal values and emotion. In this thesis the definition of professional responsibility by Christine Parker and Adrian Evans is adopted. Professional responsibility refers to ‘the law of lawyering, the published rules and regulations that apply to lawyers and the legal profession.’<sup>12</sup> The rules and regulations embody professional norms and principles relating to conduct and duty. The distinction is made because professional responsibility is conceptually narrower than legal ethics.<sup>13</sup> As defined above, legal ethics are not contingent on professional rules alone, but also require reference to the person’s subjectivity and the term ‘ethics’ also denotes the formally and informally adopted norms of the profession.<sup>14</sup> Accordingly, legal-ethical judgments are determined by reference to a lawyer’s subjectivity including personal values and emotion, informal norms, and formal norms as adopted in the professional responsibility rules.

It is acknowledged that legal ethics encompasses a broad range of factors and theories and that emotion comprises only a portion of the whole. However, given current attitudes towards emotion as a factor in legal-ethical judgment, the problem that this thesis addresses is the marginalisation of emotion in legal ethics education. It is acknowledged that emotion can be a disruptive factor in ethical judgment, but it is argued that the ability to account for both the positive and negative influences of emotion leads to better ethical judgment. This thesis demonstrates that thinking about emotion is consistent with exercising legal-ethical judgment and ‘thinking like a lawyer’. It is further argued, that introducing the role of emotion in legal-ethical judgment will make legal ethics education more comprehensive and better equip law students for the reality of making ethical judgments in practice.

## 1.2 Background and Scope

Law and emotions scholarship is said to explore ‘the reciprocal relations between emotions and the law’ and it ‘reflects pluralism along several dimensions.’<sup>15</sup> Kathryn Abrams and Hila Keren describe the legal academy’s reception of this scholarship as ‘ambivalent’ and state

---

<sup>12</sup> Christine Parker and Adrian Evans, *Inside Lawyers Ethics* (Cambridge University Press, 2007) 3.

<sup>13</sup> See for example Sally Kift, 21<sup>st</sup> Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law’ (2008) 18 *Legal Education Review* 1, 26-27; Gonzalo Villalta Puig, ‘Legal Ethics in Australian Law Schools’ (2008) *The Law Teacher* 29, 34; Douglas N Frenkel, ‘On Trying to Teach Judgment’ (2001) 12 *Legal Education Review* 19, 19.

<sup>14</sup> Donald Nicholson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999) 5.

<sup>15</sup> Kathryn Abrams and Hila Keren ‘Who’s Afraid of Law and Emotions?’ (2010) 94 *Minnesota Law Review* 1997, footnote 1.

that this attitude is ‘at sharp odds with its pragmatic potential.’<sup>16</sup> Despite this ambivalence there is increasing interest and acceptance of the role of emotion in legal ethics and the role of emotion in legal education more generally.<sup>17</sup> For example, when the emotional components of ‘thinking like a lawyer’ are discussed, psychological emotional intelligence frameworks are commonly utilised by legal academics to demonstrate the value of emotion in personal judgment and interpersonal skills.<sup>18</sup>

Abrams and Keren argue that law and emotion scholarship has three dimensions, namely ‘illumination, investigation, and integration’, and that the most fully realised forms of law and emotion scholarship will reflect all three.<sup>19</sup> The ‘investigation’ dimension is realised in this thesis by exploring the cognitive attributes of emotion and how emotion is implicated in legal-ethical judgment, drawing on cognitivist philosophy, cognitive psychology and cognitive neuroscience in Chapter 2 and legal scholarship on ‘thinking like a lawyer’ in Chapter 3. The ‘illumination’ dimension is realised in Chapter 4 by demonstrating how the inclusion of emotional knowledge in legal ethics education is consistent with the pervasive and incremental approaches to learning legal ethics and institutional and faculty statements of the ethics graduate attribute, and in Chapter 5 by developing practical examples of how to teach students about ethical judgment in ways that consider the role of emotion in such judgment. In relation to the ‘integration’ dimension the normative goal of this thesis is to modify legal ethics education by expanding the concept of ‘thinking like a lawyer’ and to provide concrete strategies that show how knowledge about emotion can be introduced into legal ethics education.<sup>20</sup>

---

<sup>16</sup> Ibid 2033.

<sup>17</sup> See for example Maharg and Maughan above n 8; Laurel E 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 Law Students to the Heart of Lawyering’ (2008-2009) 87 *Nebraska Law Review* 1; B A Glesner, ‘Fear and Loathing in Law Schools’ (1990-1991) 23 *Connecticut Law Review* 627; 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 Law Work and Law Teaching’ (2004-2005) 11 *Clinical Law Review* 413; 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; Marjorie A Silver, ‘Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship’ (1999-2000) 6 *Clinical Law Review* 259; Marjorie A Silver, ‘Therapeutic Jurisprudence / Preventative Law and Law Teaching: Emotional Intelligence and Legal Education’ (1999) 5 *Psychology, Public Policy and Law* 1173.

<sup>18</sup> See Chapter 3, 3.4.

<sup>19</sup> Abrams and Keren, above n 15, 2033-2034.

<sup>20</sup> Ibid footnote 1. The dimensions of law and emotions scholarship are: (1) Illumination – ‘attributes of cognition: law and emotions scholarship values the affective dimensions of cognition as fully as the classically rational, rather than understanding them as "other" or as potentially problematic departures from rationality’; (2) Investigation – ‘cognate literatures: law and emotions scholarship may draw on economics, biological science, and more objectivist social sciences, but it also draws on literature, history, philosophy and other humanist disciplines’; (3) Integration – ‘normative goals: law and emotions scholarship engages law not simply, or even primarily, to correct the cognitive responses of legal subjects in favour of greater rationality; it aims to modify

Terry Maroney explains the genesis and academic development of law and emotion scholarship.<sup>21</sup> Maroney divides this field of study into six interrelated but distinct approaches.<sup>22</sup> Relevant to this thesis are the legal actor and emotion theory approaches. The legal actor approach typically ‘focuses on the humans that populate legal systems and explores how emotion influences and informs, or should influence and inform, those persons’ performance of the assigned legal function.’<sup>23</sup> According to Maroney, the highest concentration of empirical work has been in relation to the legal actor approach with the focus of much of this research being primarily focused on jurors.<sup>24</sup> Lawyers as legal actors have also been considered. For example, the emotions of criminal lawyers have been considered in the context of resentment / forgiveness,<sup>25</sup> empathy,<sup>26</sup> outrage,<sup>27</sup> revulsion,<sup>28</sup> and joy.<sup>29</sup> These emotions are commonly appraised for the impact they have on other actors such as victims and defendants.

Emotion is also considered in the context of the problems experienced by some lawyers such as drug and alcohol abuse, depression, anxiety, divorce, suicide, stress, burnout, unhappiness, impaired physical health, and lack of personal satisfaction.<sup>30</sup> The elevated psychological

---

law more fully to acknowledge the role of specific emotions, or to use law to produce particular emotional effects.’

<sup>21</sup> Terry A Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) *Law and Human Behaviour* 119.

<sup>22</sup> *Ibid* 125-132. The approaches are emotion-centred, emotional phenomenon, emotion theory, legal doctrine, theory of law, and legal actor.

<sup>23</sup> *Ibid* 131-132.

<sup>24</sup> *Ibid* 132.

<sup>25</sup> 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.

<sup>26</sup> Charles J Ogletree, ‘Beyond Justifications: Seeking Motivations to Sustain Public Defenders’ (1992-1993) 106 *Harvard Law Review* 1239.

<sup>27</sup> 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.

<sup>28</sup> Bandes, above n 1.

<sup>29</sup> Abbe Smith and William Montross, ‘The Calling of Criminal Defense’ (1998-1999) 50 *Mercer Law Review* 443.

<sup>30</sup> Bandes, above n 1, 342; Patrick J Schiltz, ‘On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession’ (1999) 52 *Vanderbilt Law Review* 871; Marjorie A Silver, Sanford Portnoy and Jean K Peters, ‘Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer / Client Relationship’ [2002-2004] *Touro Law Review* 847; Martin Seligman, Paul R Verkuil and Terry H Kang, ‘Why Lawyers Are Unhappy’ (2005) 10 *Deakin Law Review* 49; Lawrence S Krieger, ‘The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness’ (2004-2005) 11 *Clinical Law Review* 425; G Andrew H Benjamin, Elaine J Darling and Bruce Sales, ‘The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers’ (1990) 13 *International*

distress of law students has also been examined. Some academics have expressed concern that law school environments, and approaches to education that privilege rationality over humanistic concerns, cause or contribute to student distress and depression.<sup>31</sup> Research, conducted at the Australian National University found that, after the first year of law school, students showing an increase in rational thinking and lower levels of experiential thinking reported increased symptoms of psychological distress and depression.<sup>32</sup> It is not within the scope of this thesis to examine lawyer or law student depression, anxiety, problematic behaviours, or the causes of these problems. Nor is it within the scope of this thesis to substantiate any claim that the inclusion of emotion in legal education will ameliorate the psychological problems experienced by some students. The focus of this thesis is on the implementation of emotional knowledge in legal ethics education by utilising one of the key models of rational thinking: ‘thinking like a lawyer’. It is argued that including knowledge about emotion in learning how to ‘think like a lawyer’ will enable students to make better judgments because they will be better equipped to understand the role of emotion in those judgments. It is argued that this will improve ethical judgment and analytical skills which will ultimately benefit students in legal practice. Therefore, this thesis is confined to considering the role of emotion in legal-ethical judgment and how students, as legal actors, can be educated about ethical judgment that includes emotion. Academics, as legal actors, are implicated in this process because they devise and deliver the means of educating students in the law, including its forms of reasoning and the methods by which legal judgments are to be reached.

The emotion theory approach typically examines a particular theory of emotion and analyses whether, or to what degree, the current law reflects that theory, and whether the theory should be adopted.<sup>33</sup> For example, in the field of emotion theory and criminal law, much of the

---

*Journal of Law and Psychiatry* 233; Connie Beck, Bruce Sales and G Andrew H Benjamin, ‘Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among A Sample Of Practicing Lawyers’ (1995-1996) 10 *Journal of Law and Health* 1; Lila Vrkleški and John Franklin, ‘Vicarious Trauma: The Impact on Solicitors Exposure to Traumatic Material’ (2008) 14 *Traumatology* 106; Beaton Consulting, ‘New Survey finds professionals have more depressive symptoms than general population’ (Media Release, 13 May 2007) [http://www.beyondblue.org.au/index.aspx?link\\_id=105.898&oid=921](http://www.beyondblue.org.au/index.aspx?link_id=105.898&oid=921) (12/11/09).

<sup>31</sup> Molly Townes O’Brien, Stephen Tang and Kath Hall, ‘Changing Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum’ (2011) 21 (2) *Legal Education Review* 149; James Alfini and Joseph Van Vooren, ‘Is There a Solution to The Problem of Lawyer Stress? The Law School Perspective’ (1995-1996) 10 *Journal of Law and Health* 61; Phyllis Beck and David Burns, ‘Anxiety and Depression In Law Students: Cognitive Intervention’ (1979-1980) 30 *Journal of Legal Education* 270; G 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; Glesner, above n 17; Marilyn Heins, Shirley Nickols Fahey and Lisa Lieden, ‘Perceived Stress in Medical, Law, and Graduate Students’ (1984) 59 *Journal of Medical Education* 169; Hess, above n 17; 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.

<sup>32</sup> Townes O’Brien, Tang and Hall, above n 31, 166.

<sup>33</sup> Maroney, above n 8, 128.

research has focused on victims, jurors and defendants, exploring emotions such as disgust, shame, remorse and the desire for revenge.<sup>34</sup> Whilst this thesis does not directly analyse whether a particular theory of emotion is reflected in particular laws, this approach is still relevant. This thesis falls within this approach because it utilises emotion theory to demonstrate how emotion influences ethical judgment and how this can be introduced into legal ethics education. It is argued that emotions are forms of evaluative judgment that encompass perceptions, beliefs, values and motivations. However it is impossible, given the vast array of theories, to include the perspectives of all the disciplines that deal with emotion and cognition. This thesis analyses and synthesises knowledge from cognitive neuroscience, cognitivist philosophy, and cognitive psychology. These disciplines have been chosen because they are compatible in some respects and because of the extensive research into the relationship between cognition and emotion establish the role of emotion in judgment.

Neuroscience is a branch of biological science and relates to the study of the nervous system. Cognitive neuroscience includes the study of language, emotion and decision-making. Antonio Damasio is a neurologist and neuroscientist and is a leading researcher on emotion and decision-making.<sup>35</sup> Damasio distinguishes between primary emotions which are instinctual, and secondary emotions which involve cognitive evaluations, are acquired through experience and can be modified by learning. These emotions are more social in that they require other people for their existence and they are a behavioural factor that can steer our interactions with the environment. Secondary emotions include moral emotions, such as contempt, anger and sympathy. Damasio's research 'has shown that emotion is integral to the process of reasoning and decision-making, for worse and for better' and the findings 'suggest that selective reduction of emotion is at least as prejudicial for rationality as excessive emotion.'<sup>36</sup>

There has been resurgence in the philosophical theories of emotion in the latter half of the twentieth century and into the twenty-first, many of which build on the Aristotelian and Stoic understandings of emotion. These theories refute the reason / emotion dichotomy and restore the role of emotion in moral judgment. For example, philosophers who offer cognitive theories of emotion contend that emotions are an essential element of intelligence, not just a support for intelligence.<sup>37</sup> In general, these philosophers consider emotion to be a form of judgment, composed of certain kinds of beliefs, values, and appraisals. The mental evaluative process involved in emotion produces thoughts. The thought of the object of the emotion, the belief about the object and the recognition of the object's salience enable people to identify

---

<sup>34</sup> For examples see Bades, above n 8.

<sup>35</sup> Damasio is also interested in the relationship between neurobiology and philosophy. See Antonio Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (Harper Collins, 1994); *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain* (Vintage, 2004).

<sup>36</sup> Antonio Damasio, *The Feeling of What Happens: Body, Emotion and the Making of Consciousness* (Vintage, 2000) 41.

<sup>37</sup> Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001) 3.

with the emotional experience and the object of the emotion.<sup>38</sup> These philosophers primarily focus on what they call higher cognitive emotions which include moral emotions. These emotions are the same as Damasio's classification of secondary emotions. In relation to ethical judgment, the philosopher Martha Nussbaum contends that emotion shapes our assessment of right and wrong. Nussbaum argues that emotions are forms of judgment<sup>39</sup> and the evaluations contained in them can be right or wrong, not just appropriate or inappropriate.<sup>40</sup>

Cognitive psychology examines mental processes often related to problem-solving, decision-making, memory and language.<sup>41</sup> A specific example of a theory within this paradigm is appraisal theory. Essentially, appraisal theorists contend that 'emotions are elicited by evaluations (appraisals) of events and situations.'<sup>42</sup> Appraisal theory takes a functional approach to emotion. Appraisals lead to reactions and the function of those reactions is to deal with specific situation types having some significance for the individual.<sup>43</sup> Appraisal theory resonates with Damasio's, and cognitivist philosophy's explanation of the evaluative function of emotion.

All of these disciplines recognise the role of emotion in cognition, judgment and decision-making. Additionally, they recognise that emotion is a form of knowledge because of its evaluative content. Because these disciplines see emotion as cognitive they also assist in expanding what is meant by 'thinking like a lawyer'. 'Thinking like a lawyer' is premised on cognitive processes and if emotion is cognitive, then emotion is involved in 'thinking like a lawyer'. Additionally, 'thinking like a lawyer' is a process in which judgments are made and because emotions are involved in judgment, emotion has a role to play in 'thinking like a lawyer'. Some literature on 'thinking like a lawyer' considers emotion and this thesis examines this more closely. The original contribution this thesis makes is to build on and expand conceptions of 'thinking like a lawyer' that include emotion by giving a more detailed and practical account and linking this to legal-ethical judgment and education. Further, this

---

<sup>38</sup> Ibid 27-31.

<sup>39</sup> Ibid 22.

<sup>40</sup> Ibid 47.

<sup>41</sup> See Rob Raynard (ed), *Decision Making: Cognitive Models and Explanations* (Routledge, 1997); Sandra L Schneider and James Shanteau (eds), *Emerging Perspectives on Judgment and Decision Research* (Cambridge University Press, 2003).

<sup>42</sup> Klaus R Scherer, Angela Schorr and Tom Johnstone (eds), *Appraisal Processes in Emotion: Theory, Methods, Research* (Oxford University Press, 2001) 3.

<sup>43</sup> Michael McEachrane, 'Emotion, Meaning, and Appraisal Theory' (2009) 19 (1) *Theory & Psychology* 33, 33. For specific theorists see Magda Arnold, *Emotion and Personality* (Columbia University Press, 1960); Richard Lazarus, 'Cognition and Motivation in Emotion' (1991) 46 *American Psychologist* 362; Nico Frijda, *The Emotions* (Cambridge University Press, 1986). For an example of how appraisal theory is applied to anger see Jennifer S Lerner and Larissa Z Tiedens, 'Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition' (2006) 19 *Journal of Behavioral Decision Making* 115.

thesis applies this knowledge and provides practical examples which demonstrate how emotion can be integrated into classroom teaching and learning strategies.

### 1.3 Aims

There are two overall aims of this thesis. The first is to demonstrate why it is important to include knowledge about emotion in legal-ethical judgment and decision-making. This aim is achieved in Chapters 2 and 3. Chapter 2, 'Emotion and Judgment' explains what emotions are, demonstrates how emotions involve evaluative judgments, and how emotions are implicated in moral and ethical judgment. Chapter 3, 'Thinking like a Lawyer: Professionalism, Ethics and Emotion' demonstrates how emotion is involved in 'thinking like a lawyer'. 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. This chapter builds on Angela Olivia Burton's model of 'thinking like a lawyer', focusing specifically on narrative intelligence and the personal intelligences (intrapersonal and interpersonal).<sup>44</sup> The knowledge about emotion from Chapter 2 is used to expand on the understanding of the involvement of emotion in legal-ethical judgment. It is argued that Burton's is a useful model from which to educate law students about how to make ethical judgments that recognise the role of emotion, thereby improving the ability of students to 'think like a lawyer'.

The second aim of the thesis is to demonstrate how knowledge about emotion could be introduced into legal ethics education. This aim is achieved in Chapters 4 and 5. These chapters involve a case study of the legal ethics curriculum at the Law Faculty, University of Technology Sydney. Chapter 4, 'Case Study Part One: UTS Law Legal Ethics Curriculum Development' explains the context for how legal ethics curricula have been implemented in Australian law schools and in particular UTS Law. It is argued that emotional knowledge in legal ethics education is best implemented via the pervasive and incremental approaches. The chapter demonstrates that the ethics graduate attribute, Threshold Learning Outcome (TLO), Course Intended Learning Outcome (CILO) and subject learning objectives developed at UTS Law provide the means from which to introduce knowledge about emotion from the previous chapters. Thus, it is argued that these factors provide the educational justification for including the role of emotion in legal-ethical judgment at an institutional and subject level. Chapter 5, 'Case Study Part Two: Introducing Emotional Knowledge into Two Core Law Subjects at UTS Law' demonstrates how knowledge about the role of emotion in legal-ethical judgment can be introduced, via Burton's model of 'thinking like a lawyer', into specific teaching and learning strategies in an educationally justified way. This is achieved by developing the content of teaching and learning strategies for the subjects Ethics and Professional Conduct, and Evidence and Criminal Procedure. Two subjects out of the five core law subjects embedding the ethics graduate attribute have been chosen in order to provide a detailed application of the emotional knowledge from previous chapters. It is

---

<sup>44</sup> 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.

argued that by using concrete examples of how emotion is involved in legal-ethical judgment and how emotion can be integrated into teaching and learning strategies, this thesis will provide academics with a framework from which they can formulate their own teaching and learning strategies with a view to achieving learning outcomes for students such as: increased awareness and understanding of their own emotional capabilities and the ability to critically reflect on and analyse the role of emotion in ethical judgment. It is further argued that by including emotion, students will gain a more comprehensive understanding of ‘thinking like a lawyer’ and that their ability to make ethical judgments will improve.

## 1.4 Methodology

In order to achieve the overall aims, the thesis is divided into two parts each comprising two chapters. As described above, the first part of the thesis demonstrates why it is important to include knowledge about emotion in legal-ethical judgment and decision-making. The content of this part of the thesis will be elaborated on in the chapter summary below. The second part of the thesis comprises a case study, the aim of which is to demonstrate how knowledge about emotion could be introduced into legal ethics education. The methodology employed in the second part of the thesis is outlined in this section.

### 1.4.1 Case Study – Chapters 4 and 5

The sociologist Randy Stoecker describes the qualitative case study, not as a method in the typical sense,<sup>45</sup> but as a ‘design feature’ or ‘frame’ that determines the boundaries of information gathering.<sup>46</sup> Stoecker defines a case study as ‘those research projects which attempt to explain holistically the dynamics of a certain historical period of a particular social unit.’<sup>47</sup> According to Stoecker, this definition takes into account multi-methodological approaches and places emphasis on the theoretical and historical components of the study.<sup>48</sup> The choice of theory determines the explanation of phenomena and history places emphasis on the explanation of process and context.<sup>49</sup> The qualitative case study has also been described as an approach ‘that facilitates exploration of a phenomenon within its context using a variety of data sources.’<sup>50</sup> This thesis combines these approaches and has the following scope:

- Consideration of the dynamics and phenomena involved in developing a legal ethics curriculum that includes the emotional aspects of legal-ethical judgment;

---

<sup>45</sup> For example, the investigation of individuals, organisations, communities or societies.

<sup>46</sup> Randy Stoecker, ‘Evaluating and Rethinking the Case Study’ (1991) 39 (1) *The Sociological Review* 88, 98.

<sup>47</sup> Ibid 97-98.

<sup>48</sup> Ibid 98.

<sup>49</sup> Ibid 93-94.

<sup>50</sup> Pamela Baxter and Susan Jack, ‘Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers’ (2008) 13 (4) *The Qualitative Report* 544, 544.

- during the 2013 curriculum review;
- within the social unit and context of the Faculty of Law, University of Technology Sydney (UTS); and
- using data sources such as UTS Course Intended Learning Outcomes and curriculum development policy, law subject outlines, teaching materials, and faculty coursework policies.

Therefore, this thesis places emphasis on the social unit of UTS Law and the historical process and context involved in developing the ethics graduate attribute and its implementation into core law subjects. The purpose of the case study is to demonstrate how knowledge about emotion and its relationship to ‘thinking like a lawyer’ and ethical judgment can be introduced into a pervasive legal ethics curriculum in an educationally justified way. The reason for choosing UTS Law Faculty will be elaborated on in the next section.

An instrumental case study provides a general understanding of a phenomenon using a particular case.<sup>51</sup> This type of case study has been chosen because the intent behind it is to gain insight and understanding.<sup>52</sup> The phenomenon that the case study considers is the question of how to recognise and critique the emotional aspects of ‘thinking like a lawyer’ in legal ethics education. This cannot be considered without the context of law school pedagogies. Thus, the particular case analysed is the substance and form of the program of legal ethics education at UTS Law. In summary, Chapter 4 provides the educational justifications for introducing knowledge about emotion into the legal ethics curriculum at UTS Law. Chapter 5 demonstrates how knowledge about emotion can be introduced into the content of specific teaching and learning strategies. Both chapters support the second overall aim of this thesis because they demonstrate how knowledge about emotion could be introduced into legal ethics education at an institutional and a subject level.

There are different approaches to the delivery of legal ethics education in Australian law schools. They include single foundational and vocational subjects, and the pervasive approach which embeds legal ethics in core legal subjects throughout the curriculum. From 2014, UTS Law uses a combination of a first year foundational subject and pervasively embeds legal ethics throughout the core law curriculum via the ethics graduate attribute. This curriculum change provides the opportunity to demonstrate the justifiability of introducing knowledge about emotion into this form of curriculum.

Literature in legal ethics education suggests that the preferred approach to teaching and learning ethics is the pervasive approach.<sup>53</sup> It is preferred because, when legal ethics pervades

---

<sup>51</sup> Kenneth Harling, ‘An Overview of Case Study’ [http://www.farmfoundation.org/news/articlefiles/284-1\\_harling.pdf](http://www.farmfoundation.org/news/articlefiles/284-1_harling.pdf) (09/07/2012).

<sup>52</sup> Baxter and Jack, above n 50, 550.

<sup>53</sup> See for example Deborah L Rhode, ‘Ethics by the Pervasive Method, (1992) 42 *Journal of Legal Education* 31; Deborah L Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (Aspen Publishers, 2<sup>nd</sup> ed, 1998); Steven Hartwell, ‘Promoting Moral Development Through Experiential Learning’ (1994-1995) 1 *Clinical Law Review* 505; Russell G Pearce, ‘Teaching Ethics Seriously: Legal Ethics as the Most Important

the curriculum, opportunities to explore ethical issues and to practice making ethical judgments are frequent and arise in different contexts. The pervasive approach should ideally coincide with the incremental approach.

The incremental approach allows time for students to recognise and reflect upon ethical issues and develop knowledge and skills gradually. In Chapter 3 it will be demonstrated that emotion is involved in ‘thinking like a lawyer’ and that this analytical framework is employed in legal-ethical judgment. ‘Thinking like a lawyer’ is relevant to legal-ethical judgment because this is another form of problem solving encountered by lawyers. It is generally accepted that learning how to ‘think like a lawyer’ needs to take place pervasively and incrementally. Similarly, allowing students to develop emotional awareness and acumen requires time to recognise, reflect, and develop insights and to make connections to values and beliefs.<sup>54</sup> In other words, if ethical judgment is best learned by a pervasive and incremental approach, then learning emotional judgment should also pervade the curriculum and be developed incrementally.

The ‘judgment approach’ is less of an approach to teaching and more of an approach to ethical decision-making.<sup>55</sup> This approach acknowledges that ethical questions arise in every subject and this provides opportunities to explore the ethical issues, rules and obligations, and the way judgments are made.<sup>56</sup> It is in this way that it is an approach to teaching because the approach recognises that ethics and learning how to make ethical judgments should pervade the curriculum. As an approach to ethical decision-making the judgment approach encompasses a broad conception of legal ethics. It emphasises the process of decision-making and encourages students to learn that discretion is inevitable in practice, that reflective deliberation and justification for choices are key professional attributes, that legal ethics and morality are not mutually exclusive, and that lawyers need to develop their own sense of morality.<sup>57</sup> In Chapter 2 it will be demonstrated that emotion is a form of judgment and that

---

Subject in Law School’ (1998) 29 (4) *Loyola University Chicago Law Journal* 71; Carrie Menkel-Meadow and Richard H Sander, ‘The Infusion Method at UCLA: Teaching Ethics Pervasively’ (1995) 58 (3-4) *Law and Contemporary Problems* 129.

<sup>54</sup> See Barton and Westwood, above n 9, 235-256; Silver, ‘Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship’ above n 17; Fletcher and Weinstein, above n 17; Burton, above n 44; Russell G Pearce, ‘Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School’ (1998) 29 (4) *Loyola University Chicago Law Journal* 719; Barry Sullivan and Ellen S Podgor, ‘Respect, Responsibility and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment’ (2001) 15 (1) *Notre Dame Journal of Law, Ethics and Public Policy* 117; Dennis Turner, ‘Infusing Ethical, Moral and Religious Values Into a Law School Curriculum: A Modest Proposal’ (1999) 24 (2) *University of Dayton Law Review* 283.

<sup>55</sup> Maxine Evers, Leanne Houston and Paul Redmond, ‘Good Practice Guide (Bachelor of Laws): Ethics and Professional Responsibility (Threshold Learning Outcome 2)’ 2011. Support for the original work was provided by the Australian Learning and Teaching Council Ltd, an initiative of the Australian Government Department of Education, Employment and Workplace Relations, 3.

<sup>56</sup> *Ibid.*

<sup>57</sup> Michael Robertson, ‘Renewing a Focus on ethics in Legal Education’ (2004), 3-4, [http://anulaw.anu.edu.au/sites/all/files/users/u4081600/Conference\\_docs/mikerobertson.pdf](http://anulaw.anu.edu.au/sites/all/files/users/u4081600/Conference_docs/mikerobertson.pdf) (17/05/13).

emotion is connected to morals and ethics. Therefore, emotion is implicitly related to the judgment approach to ethical decision-making.

#### **1.4.1.2 Why UTS?**

Graduate attributes are developed by individual universities and are standards that describe the capabilities, skills, qualities and characteristics graduates will have attained at a particular university and in a particular degree. Following a curriculum review in 2007, the first round of graduate attributes was embedded into core subjects at UTS Law. In 2013, the law faculty at UTS undertook another curriculum review for the purpose of developing new graduate attributes and embedding them in core law subjects in a more co-ordinated way. This was instigated by university policy that required each faculty to develop Course Intended Learning Outcomes (CILOs) that conformed with the Australian Qualifications Framework (AQF). At UTS the CILOs are based on graduate attributes and the standards in each degree are determined by the AQF. The ethics attribute that was embedded in the 2007 curriculum review has been retained under the recent curriculum review, although the statement of the attribute has been reformulated to accord with the AQF standards. At UTS embedding the attributes, including the ethics attribute, is done both incrementally and pervasively throughout the degree.

The UTS Law faculty is the context for the case study and was chosen for the following reasons. UTS Law has, prior to the 2013 curriculum review, attempted to develop a pervasive and incremental approach to legal ethics, by embedding the ethics graduate attribute in three core law subjects. However, it is questionable whether the pervasive and incremental approaches were fully realised in that attempt. The 2013 curriculum review provided an opportunity to analyse that problem and to consider the relevant educational factors and strategies that would improve the pervasive and incremental approaches and introduce the judgment approach to ethical decision-making. Because the legal ethics curriculum at UTS combines different approaches, the case study provides conclusions from which generalisations can be made about the inclusion of emotion in ethical judgment and legal ethics education. As such, the insight and understanding gained from this case study can be transferred and adopted in other law school settings where the pervasive and incremental approaches to legal ethics are utilised.

### **1.5 Chapter summary**

#### **Chapter 2: Emotion and Judgment**

The overall purpose of this chapter is to articulate how emotions contain evaluative judgments and why it is important to account for the influence of emotion on judgment, including ethical judgment. It begins by distinguishing emotional terminology (i.e. affect, mood, feeling, emotion) for the purpose of clarifying that this thesis is dealing with the concept of emotion. The thesis deals with emotion because of the specific kinds of evaluation involved which link emotion to judgment. The explanation of what emotions are, the kinds of evaluation involved in emotion, and why people have emotional responses, are placed into

three broad interrelated categories for the purpose of the thesis: perception, cognition, and emotional dispositions. This chapter looks at the content of emotion generally so that the specific application of emotion in legal thinking in Chapter 3 makes more sense. Following from this, emotion as a factor in moral judgment is briefly considered and then the specific moral emotions of empathy, sympathy, anger and contempt are examined. Empathy and sympathy are emotions associated by some legal academics in the interpersonal aspect of ‘thinking like a lawyer’ and are included in Chapter 3. Empathy, sympathy, anger and contempt arise in the materials used in Chapter 5 and are applied in the content of teaching and learning strategies in that chapter. It is for this reason that the evaluative content of these emotions are explained in Chapter 2.

### **Chapter 3: Thinking like a Lawyer: Professionalism, Ethics and Emotion**

This chapter demonstrates how emotion is involved in legal judgment, specifically ‘thinking like a lawyer’. Legal-ethical judgment and decision-making involves the same analytic and problem-solving structures as ‘thinking like a lawyer’. Some of the literature on ‘thinking like a lawyer’ considers emotion and this thesis builds on this scholarship by incorporating the knowledge about emotional from Chapter 2. This thesis adopts Burton’s model of ‘thinking like a lawyer’ and argues that this model is an appropriate vehicle from which to educate law students about how to make judgments, including ethical judgments that recognise the role of emotion. This chapter further argues that including the emotional aspects of ‘thinking like a lawyer’ in legal ethics education will enable students to make better judgments because they will be more equipped to understand and account for the role of emotion in those judgments. Burton’s model is appropriate because it is the most explicit in identifying the capacities involved in ‘thinking like a lawyer’ where emotion is relevant, specifically narrative intelligence and the personal intelligences. The cognitive content of narrative intelligence is explained briefly followed by a detailed explanation of the emotional content of narrative intelligence. The personal intelligences involve intrapersonal and interpersonal intelligences and a detailed explanation of the role of emotion in these intelligences is given. This thesis contributes to a better understanding of the role of emotion in legal-ethical judgment because it expands on the function of emotion contained in Burton’s model.

### **Chapter 4: Case Study Part One: UTS Law Legal Ethics Curriculum Development**

There are three overall aims of this chapter. Firstly, to explain the context of how legal ethics curricula have been implemented in Australian law schools and UTS in particular. This provides the context for the incremental and pervasive approach adopted by UTS Law. Second, it is argued that knowledge about emotion and judgment in legal ethics should be done pervasively and incrementally because learning about emotion is consistent with these approaches. Third, to demonstrate that the ethics graduate attribute, Course Intended Learning Outcome (CILO) and subject learning objectives developed at UTS Law, provide the means from which to incorporate knowledge about emotion from the previous chapters. This chapter initiates the case study by charting and analysing the development of the incremental and pervasive approach to legal ethics at UTS Law. The analysis of the 2007

curriculum review briefly critiques the attempt to embed the ethics attribute pervasively and incrementally in that period. The analysis of the 2013 curriculum review explains the development of the ethics graduate attribute, the corresponding CILO, the new subject learning objectives and the process of improving the pervasive and incremental approach to legal ethics at UTS. It is argued that these factors provide the educational justification for including the role of emotion in legal-ethical judgment at an institutional level and for implementing emotional knowledge into the legal ethics curriculum at UTS Law.

### **Chapter 5: Case Study Part Two: Introducing Emotional Knowledge into Two Core Law Subjects at UTS Law**

This chapter demonstrates how knowledge about the role of emotion in legal-ethical judgment can be introduced, via Burton's model of 'thinking like a lawyer', into specific teaching and learning strategies in an educationally justified way. This is achieved by developing the original content of teaching and learning strategies for two core law subjects: Ethics and Professional Conduct, Evidence and Criminal Procedure. The content of the teaching and learning strategies advanced in this chapter contribute to a better understanding about the different ways in which emotion is involved in legal ethics and how educators can incorporate knowledge from other disciplines. It is argued that by using concrete examples of how emotion is involved in legal-ethical judgment and how emotion can be integrated into teaching and learning strategies, this thesis will provide academics with a framework from which they can formulate their own teaching and learning strategies with a view to achieving learning outcomes for students such as: increased awareness and understanding of their own emotional capabilities and the ability to critically reflect on and analyse the role of emotion in ethical judgment. It is further argued that by including emotion, students will gain a more comprehensive understanding of 'thinking like a lawyer' and that their ability to make ethical judgments will improve.

There are five core subjects embedding ethics at UTS, however two have been chosen to provide an in depth application of the emotional knowledge from Chapters 2 and 3. The subject Ethics and Professional Conduct is an example of how emotion already features in the ethics curriculum at UTS Law. This subject began to include the role of emotion in legal-ethical judgment in 2013. In this subject there are three topics where emotion is considered in detail. The first topic is 'theoretical perspectives of values, morals and ethics' and the emotional themes and knowledge that arise here are: how narratives disclose and convey values and emotion; the relationship between morality, personal values and emotion; interpersonal intelligence, perspective taking and empathy; and Burton's model of 'thinking like a lawyer'. The second topic is 'professional and personal conduct' and the emotional themes and knowledge that arise here are: analysis of narratives to disclose the role of emotion in legal and ethical judgment; intrapersonal intelligence; the defining features of anger and its justifiability; emotional dispositions and emotional beliefs; and emotional defence mechanisms and self-awareness. The third topic is 'duty to the court – criminal law' and the emotional themes and knowledge that arise here are: emotional motivations, compassion and sympathy; and emotion as a guide to ethical choice. This subject will not be

running from 2015. However, the emotion and judgment content has been adapted for the new foundational subject Ethics, Law and Justice which commenced in 2014.

The subject Evidence and Criminal Procedure is an example of how emotion, as conceived in Chapters 2 and 3, could be implemented into a subject embedding the ethics graduate attribute. From 2014 this subject embeds the ethics attribute via a specific learning objective. However, ethics is not the substantive focus of the subject and as such the ethical content is not as comprehensive as it is in Ethics and Professional Conduct. It is for this reason that only one strategy in relation to the role of emotion in legal-ethical judgment has been formulated for this subject. The emotional themes and knowledge that arise here are: how emotion is used persuasively by lawyers to create narratives in order to influence juror decision-making; and an in depth analysis of the evaluative properties and moral justifiability of contempt.

### **Chapter 6: Conclusion**

The thesis concludes by summarising the arguments and outcomes of each chapter and how they relate to the overall aims of the thesis. The teaching and learning strategies advanced in this thesis demonstrate that emotion does not belong to a realm outside of law and legal thinking. Emotion is involved in ‘thinking like a lawyer’ and it is only a transgressor in the intellectual realm when it is not properly accounted for in judgment. Importantly, this thesis recognises that students have subjectivities that will influence the way they learn law and perform as ethical practitioners. Instead of ignoring or repressing the subjectivity and emotional experiences of students, it is important that students bring them into the classroom and identify their relevance in legal practice.

# 2.0 EMOTION AND JUDGMENT

## 2.1 Introduction

This chapter will primarily consider the evaluative judgments contained in emotion and this will be referred to as emotional judgment. It is argued that understanding emotional judgment leads to better self-awareness and the ability to educate ones-self about emotional capacities and responses. It is further argued that with this awareness decision-makers are better able to account for the positive and negative influences of emotion on judgment including ethical judgment. Theories about emotion are diverse but for the purpose of this thesis establishing emotions' role in judgment is done by drawing on knowledge primarily from the disciplines of neuroscience and cognitivist philosophy. This chapter will draw on elements of psychology albeit in a necessarily limited way, in order to supplement those other disciplines. This chapter does not purport to be a comprehensive review of the literature. The disciplines and theorists selected represent the most current or dominant thinking; they are compatible in some respects and their extensive research into the relationship between cognition and emotion establish the role of emotion in judgment. In order to demonstrate the role of emotion in judgment, the way in which emotion is defined, its evaluative properties and the reasons why people have emotional responses will be examined.

This thesis does not seek to provide an authoritative definition of emotion as this is an almost impossible task. In part, the problem of defining emotion relates to the variances between disciplines and 'many aspects of emotion are described differently depending on the context.'<sup>1</sup> Whilst acknowledging that feeling is a property of emotion, emotion is the central theme because the evaluations involved can be the subject of analysis leading to better self-awareness. For the purpose of this thesis the following distinctions are made between the terms mood, affect and feeling. A mood is defined as sustaining a feeling or an emotion over a long period of time.<sup>2</sup> Moods do not have to be directed toward a specific object and can include feelings of well-being or malaise, calm or tension.<sup>3</sup> Affect is defined as an accumulation of different but related emotional concepts, both in the sense of personal experience or internal emotional state (feeling / emotion / mood) and as an emotional display

---

<sup>1</sup> Robb O Stanley and Graham D Burrows, 'Varieties and Functions of Human Emotion' in Roy L Payne and Gary L Cooper, *Emotions at Work: Theory, Research and Applications in Management* (John Wiley & Sons Ltd, 2003) 3. For definitional problems acknowledged by legal academics see SH Pillsbury, 'Harlan, Holmes, and the Passion of Justice' in Susan Bandes (ed), *The Passions of Law* (New York University Press, 1999) 331; Jeremy Blumenthal, 'Law and the Emotions: The Problems of Affective Forecasting' (2005) 80 *Indiana Law Journal* 155.

<sup>2</sup> Antonio Damasio, *Looking For Spinoza: Joy, Sorrow and the Feeling Brain* (Vintage, 2004) 43. See also Dylan Evans, *Emotion: A Very Short Introduction* (Oxford University Press, 2001) 47.

<sup>3</sup> Antonio Damasio, *The Feeling of What Happens: Body, Emotion and the Making of Consciousness* (Vintage, 2000) 51.

or external emotional state (emoting).<sup>4</sup> This definition is consistent with definitions from psychology, where affect is used as a generic term to include several emotional concepts and distinguished from emotion. The primary distinction between emotion and affect in the psychological literature is that the defining feature of affect is the valence dimension: positive or negative, good or bad, pleasant or unpleasant.<sup>5</sup> Emotions can be affective but it is generally recognised that there is no one defining characteristic that applies to all emotions.<sup>6</sup> Feelings are defined as being sensory, in that they encompass bodily feelings and the perception of those feelings.<sup>7</sup> The relationship between perception and feeling will be elaborated on in Part 2.2 and the relationship between feeling and emotion in Part 2.3.

In addition to emotional terminologies there are also different categories of emotion often referred to as basic emotion and higher cognitive emotion. The basic emotions identified by the anthropologist Paul Eckman in the 1960-s include happiness, sadness, anger, fear, surprise and disgust. These emotions are considered as innate and they are further typically characterized by their rapid onset and short duration.<sup>8</sup> Higher cognitive emotions include love, guilt, shame, embarrassment, pride, envy and jealousy.<sup>9</sup> One factor that differentiates higher cognitive emotions from basic emotions is, as the name suggests, that they are more cortical and more capable of being influenced by conscious thoughts, and this also makes them more culturally variable.<sup>10</sup> The neurologist and neuroscientist Antonio Damasio classifies emotion into primary (or universal) emotion and secondary (or social) emotion.<sup>11</sup> Primary emotions involve innate emotional dispositions and have clear correlations to the basic emotions just described in that they are innate, pre-organised, physiological and psychological, and include happiness, sadness, fear, anger, surprise and disgust.<sup>12</sup> Secondary emotions involve acquired emotional dispositions and likewise have a correlation to higher cognitive emotions in that they are social and involve cognitive evaluation. For the purpose of consistency and clarity Damasio's terminology will be adopted throughout this thesis.

The evaluative properties of emotion and the reasons why people have emotional responses are considered in this chapter in three broad and interrelated categories: perception, cognition and emotional dispositions. In philosophy these categories are often considered separately with theorists giving accounts of emotion that emphasise one over the other. In essence there

---

<sup>4</sup> Ibid 342 (note 10).

<sup>5</sup> Marcel Zeelenberg et al, 'On emotion specificity in decision making: Why feeling is for doing' (2008) 3 (1) *Judgment and Decision Making* 18, 19.

<sup>6</sup> Ibid 20.

<sup>7</sup> Antonio Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (Harper Collins, 1994) 139.

<sup>8</sup> Evans, above n 2, 5.

<sup>9</sup> Ibid 21; Damasio, above n 3, 51.

<sup>10</sup> Evans, above n 2, 19-20.

<sup>11</sup> Damasio, above n 3, 50-51.

<sup>12</sup> Damasio, above n 3, 50.

is debate over the essential properties of emotion and how it should be defined.<sup>13</sup> However the neuroscientist Antonio Damasio's conception of emotion traverses all three categories. For example, Damasio demonstrates that perception informs the cognitive evaluation involved in emotion and that people can perceive an object of emotion in a certain way because of emotional dispositions. This thesis does not give preference to any one account because as will be shown, there is no one definition of what constitutes an emotion that is appropriate and applicable across contexts. The three categories are used as umbrella terms from which to synthesise knowledge about the evaluative properties of emotion and how they inform judgment. Further it will be established that perception, cognition and emotional dispositions are relevant to moral judgment.

The overall purpose of this chapter is to articulate how emotions contain evaluative judgments and why it is important to account for the influence of emotion on judgment, including ethical judgment. The aim of Part 2.2 is to demonstrate that the perception of the object of emotion has evaluative content and produces emotional responses. Perceptual theories primarily deal with primary emotion but as will be shown, perception is essential to the moral domain. In relation to cognition, the aim of Part 2.3 is to demonstrate that the thought of the object of emotion is evaluative and produces emotional responses. The belief and value attached to the object of the emotion can be influenced by how the object is perceived and by dispositional learning based on past emotional experience. Philosophers who offer cognitivist theories of emotion primarily deal with secondary emotion including moral emotions.

Emotional dispositions are habits of thought and action based on past emotional experience that produce emotional responses. The aim of Part 2.4 is to demonstrate how emotional dispositions influence the perception of the object of the emotion and the formation and retention of the beliefs that underpin emotion. In this way emotional dispositions influence the judgments that are made about the object of the emotion and emotional responses. Acquired emotional dispositions are focused on in Part 2.4 because they are more capable of re-education and relate to secondary emotions like moral emotions. This is important because it shows that engaging in emotional education is an ongoing process and leads to more rational judgment. Because this thesis deals with legal-ethical judgment the aim of Part 2.5 is to demonstrate how emotions are specifically situated within moral and ethical judgment. Here emotion has perceptive and evaluative functions. The part considers how emotion is implicated in moral judgment by considering the evaluative content of empathy, sympathy, anger and contempt. Empathy and sympathy were chosen because they are relevant to building on the understanding of the role of emotion in 'thinking like a lawyer' in the following chapter and all of these emotions are applied in the content of teaching and learning strategies in Chapter 5.

---

<sup>13</sup> For a summary of the different modern philosophical accounts of emotion see Peter Goldie, 'Emotion' (2007) *Philosophy Compass* 928.

## 2.2 Perception

Perception can be defined as ‘a sensory means of gathering information about our environment’.<sup>14</sup> Early theories about perception are closely related to the bodily changes that occur when an emotion is experienced. This part will briefly consider the inception of a non-cognitive theory of emotion and then consider how this theory has been developed to encompass cognition and therefore judgment.

The inception of non-cognitive theory of emotion, meaning non-conscious,<sup>15</sup> is attributed to the nineteenth century psychologist and philosopher William James. James argued that by itself a judgment or evaluation (thought) could not produce an emotional state.<sup>16</sup> According to James all emotions are feelings caused by physiological changes that arise through the unconscious perception of certain objects, and what distinguishes different emotions is that each involves the perception of unique bodily changes.<sup>17</sup> This account of emotion is problematic because, for example, it only relates to the perception of the immediate environment and the subsequent emotional response.<sup>18</sup> It does not account for emotional responses that arise through thinking and imagination and this is perhaps why the neuroscientist Antonio Damasio considers James’s theory as applicable only to primary emotions like fear or disgust.

Damasio uses James’s theory as a platform from which to develop his definition of primary emotion.<sup>19</sup> The kind of perception that James describes as emotion is distinguished as feeling by Damasio. According to Damasio, feeling is the perception of the changes to bodily sensations and thoughts when emotion is experienced.<sup>20</sup> Primary emotion involves firstly perception / feeling then a cognitive evaluation. Secondary emotion involves firstly a cognitive evaluation then bodily changes that accompany the emotion. Damasio recognises that emotions can involve simple or complex evaluations and that the physiological changes to the body, including the brain, result in further mental activity.<sup>21</sup> Damasio distinguishes between emotion and feeling but also acknowledges the relationship between them, considering feeling as an essential component of emotional experience. This is how perception is connected to emotion and judgment. That thoughts can trigger emotional

---

<sup>14</sup> Julien A Deonna, ‘Emotion, Perception and Perspective’ (2006) 60 (1) *Dialectica* 29, 29.

<sup>15</sup> Goldie, above n 13, 934.

<sup>16</sup> Jenefer Robinson, ‘Emotion: Biological Fact or Social Construction?’ in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003) 30.

<sup>17</sup> 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) 3-4.

<sup>18</sup> For other objections to this theory and a defence of it see Jesse Prinz, ‘Embodied Emotions’ in Solomon above n 16, 47-56.

<sup>19</sup> Damasio, above n 3, 50.

<sup>20</sup> Damasio, above n 7, 139.

<sup>21</sup> *Ibid* 139.

states<sup>22</sup> is a critical difference between James and Damasio. Damasio recognises that primary emotions usually arise from the perception of the immediate environment, but that secondary emotions usually arise through the cognitive evaluation of the object of the emotion.

The philosophers Jesse Prinz and Julien Deonna consider emotions as perceptions. Prinz has built on James's conception of emotion as the perception of somatic states. Prinz argues that emotions have somatic and semantic properties that can be perceived, meaning that emotions also appraise concerns such as danger, threat or loss in the environment.<sup>23</sup> Deonna acknowledges some important limitations in the theory of emotion as perception. For example in relation to the connection between feeling fear and appraising danger it is possible to be frightened of a mouse without believing it is dangerous; 'emotions can be triggered by real as well as imagined circumstances, while perception cannot.'<sup>24</sup> In recognising these limitations Deonna contends that not all emotions can be construed as perceptive because some, perhaps contempt and regret, are fully evaluative.<sup>25</sup> However, as will be demonstrated below in relation to empathy and in Part 2.5 in relation to contempt, perception is a property of moral emotion. Deonna addresses these limitations in his conception of emotion as perception, however only one aspect will be elaborated on below as it demonstrates the relationship between perception, evaluation and emotional dispositions.

Deonna considers perception as a way of tracking or gathering information about the world and observes that there are two dimensions to perception: factual and perspectival. The factual dimension is what James and Prinz consider in their concepts of perception of objects in the immediate environment. Perspective is how things look from the standpoint of the individual.<sup>26</sup> Deonna argues that this perspectival dimension is also relevant to emotion and that the contrast between emotion and perception ceases to be important if emotion is considered as a perspectival perception.<sup>27</sup> This means emotion evaluates what is significant in the environment according to the perspective of the person.<sup>28</sup> Perspective is influenced by emotional dispositions and this in turn affects the evaluation of the object or environment. Deonna makes a distinction between emotional dispositions which represent long-standing evaluative tendencies and character traits or temperaments. Both influence perception but emotional dispositions are more likely to relate to specific situations and specific emotions which lead to certain emotional reactions.

---

<sup>22</sup> Damasio, above n 2, 6.

<sup>23</sup> Jesse J Prinz, 'Is Emotion a Form of Perception?' (2006) 36 Supplement [vol. 32] *Canadian Journal of Philosophy* 137, 149. Like James's theory Prinz's conception more readily accommodates immediate, passive and short-term emotional responses see Goldie, above n 13, 934.

<sup>24</sup> Deonna, above n 14, 31.

<sup>25</sup> Ibid 32.

<sup>26</sup> Ibid 32.

<sup>27</sup> Ibid 34.

<sup>28</sup> Ibid 39.

The influence of emotional dispositions on perception is important because it assists in overcoming one of the limitations of emotion as perception as outlined above. To return to the example of being afraid of a mouse without believing it to be dangerous; the person's emotional disposition contains evaluative beliefs about mice so that whenever they see a mouse they automatically fear it even though this is not cognisant with their belief that mice are not dangerous. Deonna observes that emotion is subject to error and classifies this problem as a systematically defective emotional response or as a phobia.<sup>29</sup> In this example the perceptual system connected to emotion systematically induces fear, which is the disposition, and according to Deonna this can be corrected so that dispositional emotional beliefs become cognisant with fact.<sup>30</sup> This re-education is done by people engaging in an evaluation of their emotional responses and the beliefs that underpin them in order to change perception. This process of evaluation and re-education will be discussed further below in Part 2.4 on emotional dispositions and the educability of emotion.

Perception also directly relates to secondary emotions and the moral domain. This has less to do with somatic states and more closely resembles Deonna's perspectival dimension of perception. The philosopher Arne Johan Vetlesen contends that emotions, in particular empathy and sympathy, are perceptive and provide access to the moral domain.<sup>31</sup> Being moral according to Vetlesen involves how we relate to others and it is to perceive, judge and act with concern for the well-being and distress of others.<sup>32</sup> Perception, according to Vetlesen, is a way of seeing the suffering of others and this perceptive capacity depends on the emotional capacity of empathy. Without empathy the perceptive capacity to see suffering would be impaired or non-existent.<sup>33</sup> Accordingly, perception is to have the moral sensibility of recognising the suffering of others.

Vetlesen then states that it is our attitudes toward ourselves, not other's attitude towards us, that has to change if a change in moral conduct is to be effected. He gives the example of a racist person shifting from 'being a racist' to 'having once been a racist' and that this presupposes a shift in the nature of the attitude towards him or herself.<sup>34</sup> This is similar to what Deonna observes about emotional dispositions, character traits or temperaments and the influence they have on perspective. In order to change these qualities and attitudes it is also necessary to change the values and beliefs that underpin them because this influences how the object is perceived. Racist attitudes are typically coupled with the emotions of hate and anger and engaging in the re-education of attitudes also implies the re-education of these emotions.

---

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Arne Johan Vetlesen, *Perception, Empathy, and Judgment: An Inquiry into the Preconditions of Moral Performance* (The Pennsylvania State University Press, 1994) 308. See also Leslie Paul Thiele, *The Heart of Judgment: Practical Wisdom, Neuroscience and Narrative* (Cambridge University Press, 2006) 183-193.

<sup>32</sup> Vetlesen, above n 31, 312.

<sup>33</sup> Ibid 159.

<sup>34</sup> Ibid 161.

In this Part, perception and its relationship to emotion has been considered in an embodied sense and in an evaluative sense. For James the perception of bodily sensations is an emotion; for Damasio primary emotion involves the perception of feelings plus an evaluation; and for Prinz emotions have somatic and semantic appraisal properties which are perceptions. This kind of perceptual theory has been linked with gut reactions and intuition, and they appear to be limited to primary emotions. Deonna recognises the somatic and factual properties of perception but by introducing the idea of perspective his theory is a more plausible argument for emotions as perceptions. For Deonna emotion does not arise out of perception, it is a form of perception providing evaluative knowledge from the perspective of the person. Deonna's conception of emotion as perception appears to be able to accommodate more cerebral emotions. Vetlesen deals with secondary emotions, specifically moral emotions. Perception is to have the moral sensibility of seeing suffering in others and the ability to have this perspective is influenced by character traits and temperament. This aspect of perception will be returned to in Part 2.5.

### 2.3 Cognition

Amongst the different philosophical perspectives, the development of cognitivist theories of emotion have contributed significantly to understanding the properties of emotion and they have been described as 'currently the most widely favoured [theories] of emotion among philosophers'.<sup>35</sup> At the heart of such theories is the notion that emotions are intellectual and following the Stoics, philosophers who offer cognitivist theories of emotion generally identify emotion with judgment or appraisal, meaning affirmations or denials of propositions or appearances.<sup>36</sup> According to these philosophers the mental evaluative process involved in emotion produces thoughts, and these thoughts contain propositions and propositional attitudes.<sup>37</sup> That is, the thought of the object, the belief about the object and the recognition of the object's salience enables a person to identify with the emotional experience and the object of the emotion.<sup>38</sup> Emotional beliefs if true justify the emotion, if false invalidate the emotion, and thus they can assist or impede judgment.<sup>39</sup> It is clear that these philosophers diverge from the Stoic account of emotion in that emotions are not simply irrational beliefs that affect decision-making negatively. Whether an emotion is deemed appropriate or inappropriate depends on whether a person 'gets the appraisals right, using a defensible theory of value.'<sup>40</sup>

---

<sup>35</sup> Robinson, above n 16, 28. For an overview of the different perspectives and theorists see John Deigh, 'Cognitivism in the Theory of Emotions' (July 1994) *Ethics*, 824.

<sup>36</sup> See Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001); Jerome Neu, *A Tear is an Intellectual Thing: The Meanings of Emotion* (Oxford University Press, 2000); Robert C Solomon, 'Emotions and Choice' in Amelie Rorty (ed), *Explaining Emotions* (University of California Press, 1980).

<sup>37</sup> John Deigh, 'Primitive Emotions' in Solomon, above n 16, 10.

<sup>38</sup> Martha C Nussbaum, 'Emotions as Judgments of Value and Importance' in Solomon, above n 16, 27-31.

<sup>39</sup> Cheshire Calhoun, 'Subjectivity and Emotion' in Solomon, above n 16, 116.

<sup>40</sup> Nussbaum, above n 36, 372.

Accordingly, these philosophers refute the view that emotion is antithetical to reason and seek to establish emotion's role in rationality.

Another consistency between theories that are cognitivist and Stoic philosophy is that cognition is essential to the identity of emotions and feeling does not distinguish particular emotions. There are two primary reasons for the distinction between feeling and cognition: feelings are not intentional in that they are not directed toward an object and there is no propositional thought that accompanies them. Intentionality and propositional thought are concepts central to theories that are based on cognition and this will be elaborated on below. The consequence of this view is that feeling has no role in identifying the emotion or in the appraisal of the situation or experience. In this paradigm what distinguishes one emotion from another is the cognitive evaluation of the object or situation. Consequently, philosophers who are cognitivists have refuted William James's position that emotions can be distinguished through our perception and awareness of physiological changes only.<sup>41</sup> However, these philosophers are primarily concerned with secondary emotions whereas James's theory relates to primary emotions. In the following discussion, intentionality and propositional thought will be considered. Further, the criticisms of cognitivist theory that have arisen because it does not give adequate attention to feeling or primary emotion will be addressed.

In general, philosophers who are cognitivists contend that emotions are intentional because they are directed toward an object (a person, thing or event). Those intentional states of mind include thought, and the content of the thought is represented as a proposition.<sup>42</sup> Further, they maintain that in order to have an emotion, a person must have an attitude directed at a proposition. If, for example, Y's car has been stolen by X, X is the object and Y's thought that X stole the car is the proposition. Y is angry at X because Y believes X stole the car, Y's belief is the propositional attitude which is also a thought. Anger is connected to the propositional attitude and if the belief is true then the anger is justified. The propositional attitude has evaluative content because Y has to choose between accepting or rejecting the belief that X stole the car.

However there is disagreement amongst philosophers about the defining features of cognition and the evaluative properties of emotion. Martha Nussbaum contends that emotions are cognitive<sup>43</sup> because:

1. They have an *object*.
2. The object is an *intentional object* – emotion embodies a way of seeing, the intentional object figures in the emotion as it is seen or interpreted by the person whose emotion it is.

---

<sup>41</sup> Robinson, above n 16, 30.

<sup>42</sup> Deigh, above n 37, 10.

<sup>43</sup> By cognitive Nussbaum means 'concerned with receiving and processing information'. Nussbaum, above n 36, 23.

3. Emotions do not simply embody ways of seeing an object, but *beliefs* about the object. ‘Again, these beliefs are essential to the identity of the emotion: the feeling of agitation all by itself will not reveal to me whether what I am feeling is fear or grief or pity. Only an inspection of the thoughts discriminates.’
4. ‘Finally, we notice something marked in the intentional perceptions and the belief characteristic of emotions: they are concerned with *value*, they see their object as invested with value or importance... The value perceived in the object appears to be a particular sort. It appears to make reference to the person’s own flourishing. The object of the emotion is seen as *important* for some role it plays in the person’s own life.’<sup>44</sup>

Point 2 relates to perception and although Nussbaum refers to an embodied way of seeing, she is not referring to the sensory capacity of perception. The perception of the object 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. Deonna’s theory of perspectival perception is very similar because according to him emotion tracks how things are in the world and those evaluations depend on the person’s perspective. Following from intentional perception, emotions are further characterised by beliefs about the object. These beliefs or propositional attitudes are essential to the identity of the emotion with the distinction being clearly drawn in point 3 that feelings alone cannot delineate particular emotions. Point 4 relates to the recognition of the object’s salience denoting its value or importance. According to Nussbaum, emotional judgments are a subclass of value judgments<sup>45</sup> and not all beliefs are emotional. Emotional beliefs are those that define the emotion and if true, justify it.<sup>46</sup> 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.

Jerome Neu holds a similar view to Nussbaum in relation to the lack of intentionality in feeling. Neu contends that sensations or bodily feelings ‘may mark the difference between emotions and non-emotions, but generally they are not what marks the experience as the distinctive emotion it is.’<sup>47</sup> Like Nussbaum, Neu denies that feelings have any utility in understanding the identity of the emotion because they lack intentionality. That is, we can only discern or interpret whether our bodily feelings relate to an emotion by thinking and evaluating information about the object or situation creating those feelings. According to Neu, emotions are defined by certain kinds of thought. For example Neu makes the following distinction between envy and jealousy. Jealousy is typically about what one possesses and

---

<sup>44</sup> Ibid 27-31.

<sup>45</sup> Ibid 30 (fn 21), where 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.’

<sup>46</sup> Calhoun, above n 39, 116.

<sup>47</sup> Jerome Neu ‘Emotion and Freedom’ in Solomon, above n 16, 178-179.

fears to lose, whereas envy is about something that a person desires to possess.<sup>48</sup> These emotions are not just about fear and desire they are also distinguished by the object of the emotion and the thought of the object. Neu states that jealousy is directed toward a valued object (usually another person); a desiring as well as a desired object.<sup>49</sup> The fear, which involves the thought that a rival may possess the object, produces jealousy. Envy is directed toward an object, a person, who possesses a particular thing or quality that is desirable.<sup>50</sup> The thought of the value attached to the thing or quality and the lack of possession of the thing or quality, produces envy. This example also demonstrates that primary emotions are involved in secondary emotions and that there is additional thought in relation to how the object is perceived and valued. Importantly neither Nussbaum nor Neu discount the fact that people experience feelings and that they are related to emotion. Indeed, Nussbaum clearly states that ‘all human experiences are embodied, and thus realised in some kind of material process.’<sup>51</sup> The point these philosophers are making is that people know the emotion they are experiencing and why they are experiencing it because they think about it. Both Nussbaum and Neu equate emotional cognition with a mental evaluative process.

Robert Solomon argues that basing cognition on the properties of belief and thought is too narrow to encompass the gamut of emotional experiences. Solomon recognises that beliefs and emotions are related but contends that beliefs are too dispositional to capture the essence of emotion.<sup>52</sup> Solomon observes that ‘thoughts are too episodic for emotions, which often turn out to be enduring processes’ and that not all emotions are cerebral as implied by thought.<sup>53</sup> Solomon defines emotional cognition as a complex of evaluative judgments through which people are engaged in the world. In this way judgment can capture an array of emotional qualities. For example, if cognition is judgment widely construed then emotion can be perceptive and can apply to the immediate situation. Emotional judgments can also be made without perceiving an object and encompass thought and belief.<sup>54</sup> Solomon argues that defining emotion as judgment provides flexibility in the analysis of different kinds of emotion and the different kinds of cognition involved.<sup>55</sup> This includes feeling which is part of the complex of judgments that constitute emotion. In responding to the criticism<sup>56</sup> of

---

<sup>48</sup> Ibid 164.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Nussbaum, above n 36, 58.

<sup>52</sup> Robert C Solomon ‘Emotions, Thoughts, and Feelings: Emotions as Engagements in the World’ in Solomon, above n 16, 80.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid 82.

<sup>55</sup> Ibid 84.

<sup>56</sup> See Peter Goldie, ‘Emotions, feelings and intentionality’ (2002) 1 *Phenomenology and the Cognitive Sciences* 235; Peter Goldie “Emotion, Feeling and Knowledge of the World” in Solomon, above n 16; Peter Goldie, *The Emotions: A Philosophical Exploration* (Oxford University Press, 2000).

cognitivist philosophy for omitting or giving inadequate attention to the role of feeling in emotion Solomon argues, that feelings are ‘judgments of the body – felt bodily engagements with the world.’<sup>57</sup>

According to Solomon, cognition means judgment and judgment can be both non-propositional and pre-reflective. Therefore feeling can be a form of judgment. Recognising that emotional judgment can be non-propositional means that feeling is an internal communication and the ‘judgments of the body’ provide evaluative knowledge. Solomon is not specific about the content of this evaluative knowledge; however this characterisation seems to be close to the interrelationship of emotion and feeling recognised by Damasio. That is, the ‘felt bodily engagements’ described by Solomon are analogous to Damasio’s conception of feeling as the perception or awareness of the changes in our body state as well as our thoughts. Damasio recognises that dispositional learning influences the evaluations involved in emotion, likewise Solomon recognises that our ‘knowing responses’ may have more to do with habit and practice.<sup>58</sup> Damasio analogises that emotion and feeling are twins, so that ‘emotions play out in the theatre of the body’ and ‘feelings play out in the theatre of the mind.’<sup>59</sup> Solomon states that feelings are ‘not distinct from cognition... and they are not mere “read-outs” of processes going on in the body’.<sup>60</sup> Damasio states that ‘feelings are not a mere decoration added onto the emotions’ because our thoughts can trigger emotional states and engender feelings, so that ‘bodily emotions become the kind of thoughts we call feelings.’<sup>61</sup> This could be construed as meaning that bodily feelings require interpretation, interpretation requires thought, and thought involves evaluation. If this is so then feelings are evaluative and inform the cognitive evaluations involved in emotion through perception and awareness. The extent to which they do so would likely depend on the kind of emotion experienced.

It has been observed by the philosopher John Deigh that philosophers who are cognitivists have trouble in accounting for primary or ‘primitive emotions’ as he calls them, because they focus on emotions as intentional states and thoughts represented as propositions.<sup>62</sup> Deigh states that primitive emotions such as fear and anger are instinctive in the sense that they are an inherited trait, and that their development depends on environmental conditions and meeting basic biological needs.<sup>63</sup> Thus, if the thought content in every intentional state is a proposition, a belief or judgment, primary emotions cannot be accounted for because of their instinctual character.<sup>64</sup> According to Deigh another problem with propositional thought

---

<sup>57</sup> Solomon, above n 52, 87-88.

<sup>58</sup> Ibid 87.

<sup>59</sup> Damasio, above n 2, 28.

<sup>60</sup> Solomon above n 52, 88.

<sup>61</sup> Damasio, above n 2, 6-7.

<sup>62</sup> Deigh, above n 37, 10.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

applying to all emotions is that it presupposes linguistic capacities and it is apparent that primary emotion is common to both humans and animals, and is experienced in human infancy.<sup>65</sup> Belief and judgment are predicated on linguistic capacity and this is how they represent cognitively. Deigh contends that philosophers who advance cognitivist theories of emotion ‘must find a way to explain some of those thoughts as non-propositional so as to avoid making the possession of linguistic capacities a condition of being liable to emotions.’<sup>66</sup>

Deigh’s point about propositional thought presupposing linguistic capacities is an argument levelled at Stoic philosophy because Stoics denied emotion to children and non-human animals. Martha Nussbaum agrees that the Stoic account of emotion requires modification because it is ‘overly focused on linguistically formulable propositional content’ and this leads Nussbaum to explain an aspect of her neo-Stoic view.<sup>67</sup> Stoics saw judgment as an assent to an appearance and that assent was always a voluntary or deliberate act, they also had a demanding doctrine of self-monitoring.<sup>68</sup> Nussbaum responds to Deigh’s criticism by arguing that these aspects of Stoic philosophy do not have to be accepted in order to accept their general view on judgment, because assent can also be involuntary. Nussbaum explains that such things as ‘habit, attachment, and the sheer weight of events may frequently extract assent from us.’<sup>69</sup> Nussbaum is attempting to account for instinctual emotional properties. However habits and attachments are formed whereas instincts are innate. Further, even if it is accepted that assent can be involuntary, linguistic capacity is still a problem because in order to form habits and attachments, beliefs and judgments are made and retained for which linguistic capacity is required.<sup>70</sup>

Defining emotion as cognition alone is problematic as it does not fully account for embodied emotional experiences and the more instinctual emotions. However cognitivist theories of emotion provide valuable insights into the content of secondary emotions. The idea that these emotions are evaluative and are defined by belief, thought or judgment provides a framework from which to analyse the evaluations contained in emotions. As has been demonstrated above the belief, thought and judgment involved in emotion can be influenced by how the object is perceived. The way in which the object is perceived can be influenced by belief, thought and judgment. How the latter arises is related to emotional dispositions.

---

<sup>65</sup> Ibid.

<sup>66</sup> Ibid 11.

<sup>67</sup> Nussbaum, above n 36, 37.

<sup>68</sup> Ibid 38.

<sup>69</sup> Ibid 38.

<sup>70</sup> For detailed critiques of Nussbaum’s neo-stoic philosophy see David O’Brien, ‘Rescuing the Emotions from Neo-Stoic Theory: A Reply to Martha Nussbaum’ (April 2012) *Dialogue* 197; John Deigh, ‘On Nussbaum’s Defense of the Stoic Theory of Emotions’ (2000) 19 *Quinnipiac Law Review* 293.

## 2.4 Emotional Dispositions

Emotional dispositions are habits of thought and action based on past emotional experience that produce emotional responses. In Part 2.2, a connection was made between perception and emotional dispositions. Emotional dispositions influence the perspective taken about the object of emotion and they affect the way in which the object is perceived. Apart from perception, emotional dispositions influence how objects are valued and they influence the formation and retention of beliefs that underpin emotion. In this way, emotional dispositions influence the judgments that are made about the object and the consequent emotional response. This part explains the content of acquired emotional dispositions, how they cause certain emotional responses and how they can be re-educated. Acquired emotional dispositions, as opposed to innate dispositions,<sup>71</sup> are focused on because they relate to secondary emotion, and therefore moral emotion, and because they are more capable of being re-educated. Engaging in emotional education is an ongoing process and this is important because it can lead to judgment that is more rational.

Over an individual's life-time they will have an array of emotional experiences and through this accumulate knowledge, and become disposed to habits of thought and behaviour that produce certain emotional responses. In relation to the content of acquired emotional dispositions, Damasio states that when the mind evaluates the object of emotion it is informed by dispositional learning about the object of the emotion and past emotional experience.<sup>72</sup> Dispositional representations are related to recallable images and are acquired through experience, thus they constitute a memory.<sup>73</sup> Dispositional representations 'embody knowledge pertaining to how certain situations usually have been paired with certain emotional responses, in your individual experience.'<sup>74</sup>

Similarly David Arkush, drawing on research from social psychology, describes knowledge structures as 'the building blocks of cognition'; they are schemas which enable people to perceive, classify, interpret, communicate and reason.<sup>75</sup> There are two major ways in which emotion influences knowledge structures. Firstly, emotion influences the schemas that are applied to interpret events and when an emotion is activated, the schema associated with that emotion identifies and recalls (mood) congruent material from memory.<sup>76</sup> Secondly, emotion 'moderates the formation and reformation of knowledge structures'.<sup>77</sup> Arkush states, that if a

---

<sup>71</sup> Innate emotional dispositions relate to traits and temperament, some of which are genetically inherited and some of which are shaped by early developmental factors and they relate to primary emotion; Damasio, above n 3, 222.

<sup>72</sup> Damasio, above n 7, 136.

<sup>73</sup> Ibid 102.

<sup>74</sup> Ibid 136.

<sup>75</sup> David J Arkush, 'Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for the Law' (2008) 5 *Brigham Young University Law Review* 1275, 1317-1318.

<sup>76</sup> Ibid 1318.

<sup>77</sup> Ibid.

negative schema is formed through emotional association it is not readily undone by rationality; rather it is more effectively counteracted by altering the perceived emotional association.<sup>78</sup> According to Damasio and Arkush, emotional dispositions are acquired through experience and are constituted by memories and schematic knowledge structures that pair past emotional experiences to the current object of the emotion, thus influencing the evaluation of and the response toward the object of the emotion.

The philosopher Amelie Rorty theoretically examines the formation and causes of individuals' emotional dispositions. Individual dispositions can be characterized as the stable characteristics, including emotion, within people that produce behaviour.<sup>79</sup> What a person selects or omits from their consideration of the emotion's object is determined by their traits which in turn determine the beliefs and desires that are salient and important to them. This affects judgment because people are habituated toward thinking and acting on emotion in certain ways. Emotions can conflict with judgment or distort perception. Rorty asserts that people conserve emotions that are not rational to the immediate object of the emotion, because they conserve inappropriate or anomalous beliefs towards the intentional component of the emotion.<sup>80</sup> Accordingly, if a person changes their belief in relation to the object their reaction to it will go from being irrational to being rational. Like Aristotle, Rorty states that 'how people succeed in changing emotions that they judge inappropriate or irrational closely follows the more general explanation of how people change their habits.'<sup>81</sup>

Envy will be used to illustrate the content and influence of acquired emotional dispositions. A person is envious of a colleague who has just been given a promotion because that colleague is more qualified to do the job. Envy is directed toward the person (the object) who received the promotion and is based on the desire of possessing what the person does not possess (the propositional attitude). The schema involves two evaluations, that what the rival has is good and it is bad that they have it and you don't.<sup>82</sup> In this example the envious person has been denied promotions previously and has accumulated feelings of resentment as a result. The emotional disposition toward envy and the associated feeling of resentment was acquired through past experience and stored in autobiographical memory so that a negative emotional schema was formed. This means that the person will view the current situation through their negative emotional schema and will almost always feel resentment to some degree at another's success in similar situations. The feelings of envy and resentment may be based on beliefs that favouritism is involved or that the person is undervalued. In this example these beliefs are irrational; the other person was selected because they were more qualified.

---

<sup>78</sup> Ibid 1320.

<sup>79</sup> Amelie Oksenberg Rorty 'Explaining Emotions' (1978) 75 (3) *The Journal of Philosophy* 139, 142. See also Julien A Deonna and Fabrice Teroni, 'Taking affective explanations to heart' (2009) 48 (3) *Social Science Information* 358, 365.

<sup>80</sup> Rorty, above n 79, 153-154.

<sup>81</sup> Ibid 159.

<sup>82</sup> Justin D'Arms and Daniel Jacobson, 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61 (1) *Philosophy and Phenomenological Research* 61, 73.

Emotional self-awareness would allow a person to examine their emotional beliefs in light of their own qualifications and whether their colleague was in fact more qualified to do the job. In this way they are engaging in emotional education because they are analysing their beliefs, and recognising that their beliefs are not cognisant with fact. They are also making a further evaluation that the feeling of envy is unpleasant or being envious is an unpleasant state and because of that they want to change. Despite being overly simplified this example shows that the examination of emotional dispositions and reorienting emotional beliefs is not an easy process. Acknowledging that emotional schemas have been formed, and that this leads to emotional reactions in and of itself is difficult particularly when people are in turmoil. Additionally the insinuation in the example that the person may lack emotional self-awareness, is a value judgment because it pre-supposes that the envious person is in pain and because of that should want to change.

The philosopher Peter Goldie acknowledges that emotions can be misleading when people are in turmoil and where people are ignorant of emotion. Goldie argues that if people don't have the right 'prudential and moral' emotional dispositions then emotions can distort perception and reason and in this way emotions 'skew the epistemic landscape'.<sup>83</sup> Goldie's theory of the educability of emotion draws on Aristotle's explanation of character and weakness of will. Goldie also sees the educability of emotion as a matter of habituating emotional capabilities with practical reason as a lifelong lesson.<sup>84</sup> Goldie also describes the educability of emotion as

a matter of coming to understand your emotional capabilities, and the power of the emotional desires which are expressions of those capabilities. Once you do have this understanding, you are in a better position further to educate your capabilities over time, and in a better position to exercise authority on an occasion over your emotional desires.<sup>85</sup>

Goldie suggests that people begin with uncultured, genetically endowed psychological capabilities for emotion and, through education of the emotions in a culturally informed world, the capabilities for emotion will develop and change.<sup>86</sup> Further, people should not avoid responsibility for their emotions, although some are passive and cannot be controlled, because that is to be ignorant of the possibility of educating emotions so that emotional responses are consonant with deliberated rational choice.<sup>87</sup> This is significant for legal ethics education because it indicates that opportunities should be provided in that context for students to better understand their emotional capabilities and the impact of emotion on ethical judgment.

Acquired emotional dispositions influence the way that the object of the emotion is perceived and valued. They also influence the formation and retention of beliefs that underpin an

---

<sup>83</sup> Goldie, 'Emotion, Feeling and Knowledge of the World', above n 56, 92-93.

<sup>84</sup> Goldie, *The Emotions: A Philosophical Exploration*, above n 56, 118.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid 121.

<sup>87</sup> Ibid.

emotion. This means that emotional dispositions can influence what is evaluated and how it is evaluated in the emotional experience. The ability to trace and recognise the cause of an emotional disposition is an element of emotional self-awareness. The ability to examine the validity of the beliefs underpinning emotion forms the basis of educating emotional capabilities and this leads to more rational judgment. Engaging in emotional education leads to the ability to control emotion, experience emotion appropriately and to form habits of thought that enable people to see what is and is not relevant to their judgments and why.

## 2.5 Emotion in moral judgment

Definitions of morality, ethics and the properties of moral and ethical judgment are debated topics amongst philosophers<sup>88</sup> and it is not within the scope of this thesis to engage in those debates. For the purpose of this thesis the following definitions are adopted. Morals are related to a person's character, and their values and beliefs as to what is right or wrong. Moral judgment reconciles action to moral principles and beliefs.<sup>89</sup> Ethics denotes proper behaviour in the social system in which morals are applied. Ethical judgment reconciles normative standards and moral judgment. Thus there is a relationship between moral and ethical judgment. As with other forms of judgment, emotion is involved in moral judgment and can be 'subject to critical reflection and moral evaluation.'<sup>90</sup> As in the previous discussion of emotion, moral emotions can have perceptive, motivational and evaluative functions. As discussed in Part 2.2, Vetlesen considers the perceptive functions of empathy and sympathy as providing access to the moral domain. According to Vetlesen, the exercise of moral judgment is made possible by the ability to have certain emotions and the passing of a moral judgment requires a balance between the emotional and cognitive faculties.<sup>91</sup> Similarly the philosophers Justin D'Arms and Daniel Jacobson argue that the most important connection between ethics and emotion 'arises from the quasi-judgmental, quasi-perceptual character of emotional experience.'<sup>92</sup>

Many philosophers contend that a part of moral education is the education of the emotions.<sup>93</sup> It is for this reason that it is important to understand the functions and evaluative properties of emotion in this context. This will be done by considering the specific moral emotions of empathy, sympathy, anger and contempt. These emotions have been chosen because they

---

<sup>88</sup> Jennifer Nado, Daniel Kelly and Stephen Stich, 'Moral Judgment' in Paco Calvo and John Simons (eds), *The Routledge Companion to the Philosophy of Psychology* (Routledge, 2009) 621.

<sup>89</sup> David Pizarro, 'Nothing More than Feelings? The Role of Emotions in Moral Judgment' (2000) 30 (4) *Journal for the Theory of Social Behaviour* 356, 360.

<sup>90</sup> Diana Fritz Cates, 'Conceiving Emotions: Martha Nussbaum's Upheavals of Thought' (2003) 31 (2) *The Journal of Religious Ethics* 325, 326.

<sup>91</sup> Vetlesen, above n 31, 157. See also Nussbaum, above n 36, 392.

<sup>92</sup> D'Arms and Jacobson, above n 82, 68.

<sup>93</sup> Gabriele Taylor, 'Justifying the Emotions' (1975) 84 (1) *Mind* 390, 390.

arise in the content of teaching and learning strategies presented in Chapter 5.<sup>94</sup> Moral emotions are a category of secondary emotions and the cognitive evaluations outlined in Part 2.3 are the same but there are additional defining features of these emotions which will be discussed here.

While there is no one definition of moral emotion, it can be understood in the following ways.<sup>95</sup> According to the psychologists Pfister and Bohm, emotions are moral because of the contexts in which they arise.<sup>96</sup> Emotions can reflect pre-existing concerns such as beliefs and principles.<sup>97</sup> Emotions are responses ‘to moral violations’ or ‘motivate moral behaviour’.<sup>98</sup> Emotions have been said to influence ‘the link between moral standards and moral behaviour.’<sup>99</sup> Empathy is experienced toward the distress or joy of another, and thus empathy denotes concern for the welfare of others.<sup>100</sup>

### 2.5.1 Empathy and Sympathy

The terms empathy and sympathy are often used synonymously.<sup>101</sup> They are seen as other-suffering emotions,<sup>102</sup> commonly defined as being about concern for others and involving perspective about the other’s situation. For example empathy has been defined as having both cognitive and affective aspects. The cognitive aspect of empathy is the ability to understand

---

<sup>94</sup> Other emotions arise in legal practice. 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.

<sup>95</sup> For a summary of different philosophical perspectives see Ronald De Sousa, ‘Moral Emotions’ (2001) 4 *Ethical Theory and Moral Practice* 109.

<sup>96</sup> Hans-Rudiger Pfister and Gisela Bohm, ‘The multiplicity of emotions: A framework of emotional functions in decision making’ (2008) 3 (1) *Judgment and Decision Making* 5, 15.

<sup>97</sup> Pizarro above n 89, 358. See also June Price Tangney, Jeff Stuewig and Debra J Mashek, ‘Moral Emotions and Moral Behaviour’ (2007) 58 *Annual Review of Psychology* 345, 347.

<sup>98</sup> Jonathan Haidt, ‘The Moral Emotions’ in Richard J Davidson, Klaus R Schere and H Hill Goldsmith, *Handbook of Affective Sciences* (Oxford University Press, 2002) 853.

<sup>99</sup> Tangney, Stuewig and Mashek, above n 97, 345.

<sup>100</sup> Kevin Mulligan, ‘Moral Emotions’ in David Sander and Klaus Scherer (eds), *The Oxford Companion to Emotions and Affective Sciences* (Oxford University Press, 2009) 262.

<sup>101</sup> Douglas Chismar, ‘Empathy and Sympathy: The important difference’ (1988) 22 *The Journal of Value Inquiry* 257, 257.

<sup>102</sup> Haidt, above n 98, 861.

the point of view of another person and this is its perspective-taking role.<sup>103</sup> The affective aspect of empathy, which can be the result of perspective-taking, is ‘the vicarious emotional response that occurs when exposed to the emotions of another.’<sup>104</sup> However, being defined by perspectives and vicarious emotional responses is ambiguous and could equally be used to describe other emotions, including sympathy.

The psychologist Lauren Wispe makes a clear distinction between empathy and sympathy. The difference between them primarily involves the way the object of the emotion is perceived and this is related to the evaluative judgment made about the object. According to Wispe:

Sympathy refers to the heightened awareness of another’s plight as something to be alleviated. Empathy refers to the attempt of one self-aware self to understand the subjective experiences of another self. Sympathy is a way of relating. Empathy is a way of knowing.<sup>105</sup>

Sympathy is about increased sensitivity to another’s emotions and it relates to negative emotions because it involves the urge to mitigate the suffering of the other person.<sup>106</sup> If this definition is accepted then there are two evaluative beliefs that underpin sympathy. There is the belief that another person is suffering and the belief that the suffering can be alleviated. Sympathy is a response of compassion or concern and does not involve reproducing the emotion perceived in the other; it is a specific emotional state.<sup>107</sup> The emotional state of sympathy involves feelings of sorrow and concern and being motivated by these feelings to help.<sup>108</sup> Empathy can motivate people to help but not necessarily and this is why sympathy is seen as the more moral of the two emotions.<sup>109</sup>

Empathy requires self-awareness, imaginal and mimetic capacities, in order to comprehend non-judgmentally the positive or negative experiences of another person.<sup>110</sup> The object of

---

<sup>103</sup> Pizarro, above n 89, 359; see also Nancy Eisenberg, ‘Emotion, Regulation and Moral Development (2000) 51 *Annual Review of Psychology* 665.

<sup>104</sup> Ibid. See also Chismar, above n 101; Bert S Moore, ‘The Origins and development of Empathy’ (1990) 14 (2) *Motivation and Emotion* 75.

<sup>105</sup> 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.

<sup>106</sup> Ibid 318.

<sup>107</sup> 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. See also Chismar, above n 101, 257; Nussbaum, above n 36, 302. Nussbaum also differentiates between empathy and sympathy and equates sympathy with compassion because both are about a judgment that the other’s distress is bad. Empathy can include taking pleasure in another’s distress and therefore compassion and sympathy are ranked higher in moral philosophy according to Nussbaum.

<sup>108</sup> Haidt, above n 98, 862.

<sup>109</sup> Chismar, above n 101, 262.

<sup>110</sup> Wispe, above n 105, 318.

empathy is to understand the other person<sup>111</sup> thus empathy is not a discrete emotion but is an emotional process<sup>112</sup> and can be manifest in any emotion.<sup>113</sup> Because of this, the beliefs that are attached to empathy can vary. According to Deonna there are two interacting conditions which are necessary and sufficient for empathy: awareness of another person's emotion and feeling 'in tune' with the other person.<sup>114</sup> Awareness involves being conscious of the kind of circumstances the other is in and the way in which the other psychologically relates to those circumstances.<sup>115</sup> Feeling 'in tune' means experiencing a 'token emotion of the same type as experienced by the person empathised with'.<sup>116</sup> Although stated differently, Deonna and Wispe's definitions both involve evaluations about the object, the environment and the object's emotional experience.

In the above definitions the properties of sympathy include a response of compassion or concern and empathy includes the non-judgmental comprehension of another's experience. The assumption is that people can direct sympathy and compassion to anyone and they are always benevolent. However, even the defenders of compassion acknowledge that people are more likely to sympathise with people who are like them.<sup>117</sup> Further, Lauren Berlant observes that compassion

implies a social relation between spectators and sufferers, with the emphasis on the spectator's experience of feeling compassion and its subsequent relation to material practice.<sup>118</sup>

Berlant goes on to critique this view of compassion with regard to socio-political rhetoric. This view provokes consideration of how the object of the emotion is perceived and the motivations behind compassion, sympathy and empathy. Nussbaum defines compassion in part as 'occasioned by the awareness of another person's undeserved misfortune.'<sup>119</sup> Similarly, empathy involves a judgment that the other is worthy of concern. According to Nussbaum, if a person is at fault for their suffering then blame and reproach are the likely reactions. However the philosopher Diana Cates disagrees with Nussbaum. Cates observes that it is possible to make a moral judgment and have compassion for a person who is responsible for their misfortune, further the question of whether the person brought suffering

---

<sup>111</sup> Ibid.

<sup>112</sup> Tangney, Stuewig and Mashek, above n 97, 362.

<sup>113</sup> Gruen and Mendelsohn, above n 107, 609.

<sup>114</sup> Julien Deonna, 'The Structure of Empathy' (2007) 4 (1) *Journal of Moral Philosophy* 99, 99.

<sup>115</sup> Ibid 100.

<sup>116</sup> Ibid.

<sup>117</sup> Kathleen Woodward, *Statistical Panic: Cultural Politics and the Poetics of the Emotions* (Duke University Press, 2009) 116.

<sup>118</sup> Lauren Berlant, 'Introduction: Compassion (and Withholding)' in Lauren Berlant (ed), *Compassion: The Culture and Politics of an Emotion* (Routledge, 2004) 1. This is a collection of essays which provide a socio-political critique of compassion.

<sup>119</sup> Nussbaum, above n 36, 301. This is taken from Aristotle in *Rhetoric*.

on themselves is never straightforward.<sup>120</sup> Additionally ‘the spectator’s’ experience is orientated around the privilege of not being in the same situation as the sufferer and ‘compassion is figured in terms of unequal relations of power.’<sup>121</sup> Berlant alludes to this imbalance, it redirects focus to the motivations of the ‘spectator’ and requires acknowledgment that sympathy, empathy and compassion can be used strategically, rhetorically or insincerely.

### 2.5.2 Anger

Anger and contempt are seen as other-condemning emotions that judge the propriety of the actions of other people.<sup>122</sup> Anger as a basic emotion is a ‘response to goal blockage and frustration’ however it is also a moral emotion.<sup>123</sup> Anger is sometimes thought to be an immoral emotion that requires suppression or control because it can produce anti-social behaviour, but anger can also motivate people to stand against perceived injustices and to demand retaliatory or compensatory action and as such is not always a negative emotion.<sup>124</sup> Consideration needs to be given to whether the emotional response of feeling anger and any resulting actions are justified and proportionate.<sup>125</sup>

Aristotle recognised anger as a moral emotion defining it as

an impulse, accompanied by pain, to a conspicuous revenge for a conspicuous slight directed without justification towards what concerns oneself or towards what concerns one's friends... It must be felt because the other has done or intended to do something to him or one of his friends. It must always be attended by a certain pleasure-that which arises from the expectation of revenge.<sup>126</sup>

For Aristotle, anger is a social emotion caused by a belief that an unjustified offence has been directed toward the individual or their friends. Anger is apparently linked to honour because the expectation of revenge means that the individual believes they can rectify the unjustified wrong and restore their standing or well-being.<sup>127</sup> In a similar vein the philosopher Gabriele Taylor contends that there are three defining features of anger. Firstly anger is not just

---

<sup>120</sup> Cates, above n 90, 336.

<sup>121</sup> Woodward, above n 117, 124.

<sup>122</sup> Haidt, above n 98, 858.

<sup>123</sup> Ibid 856.

<sup>124</sup> Ibid.

<sup>125</sup> Like other moral emotions justifiability and proportionality can depend on context and history. For example, Kathleen Woodward provides an in depth analysis of feminised anger as hysteria in the 19<sup>th</sup> century, compared to feminist anger as a rational act of insubordination in the 20<sup>th</sup> century; Woodward, above n 117, Chapter 1 ‘Containing Anger, Advocating Anger: Freud and Feminism’.

<sup>126</sup> Aristotle, *Rhetoric*, Book II Part 1, translated by W Rhys Roberts (The Internet Classics Archive) <http://classics.mit.edu/Aristotle/rhetoric.2.ii.html> (28/01/2014).

<sup>127</sup> Daniel M Gross, *The Secret History of Emotion: From Aristotle’s Rhetoric to Modern Brain Science* (The University of Chicago Press, 2006) 3.

directed toward the object ‘it attracts our desire to hit back’ and so there must be a capacity for accountability; secondly anger is connected to human agency and responsibility and can be the result of intentional, stupid, clumsy or inconsiderate actions; and thirdly the loss of well-being is seen as undeserved and unfair.<sup>128</sup> Taylor argues that for anger to be justified it must also satisfy further conditions:

- a) The object of the anger must exist;
- b) The wrong suffered must actually be wrong and this involves:
- c) A well-founded notion of what is due to the individual or others, otherwise the wrong cannot be regarded as undeserved or unfair;
- d) A belief that the agent held responsible is capable of recognising dues either because the agent belongs to a class expected to conform to certain standards or because in the particular situation it is proper to make certain demands of them; and
- e) Anger toward X is justified if it is X and no-one else who brought about the harm.<sup>129</sup>

In order to illustrate the features and conditions of anger consider the example from Part 2.3 where Y is angry because X stole Y’s car. A moral (and a legal) standard been breached in the form of taking another’s property without their consent; this trespass is the injustice. X is the object and as a human agent has the capacity for accountability and responsibility and X’s actions have affected the well-being of Y. On the basis that (a) the object X exists, the wrong is justifiable (b) if:

- (c) Y has a well-founded notion of what is due, which could be the expectation that personal property should not be interfered with and that any interference, here a trespass, is unjust and wrong;
- (d) X is part of a class expected to conform to the standards of the criminal law, of which stealing is a breach; and
- (e) X, not anyone else, actually stole the car.

Conditions (c)-(e) involve evaluations. In (c) the evaluation involves a consideration of moral standards of right and wrong, in (d) the evaluation involves an assessment of whether the agent should comply with the standards, and in (e) the evaluation involves examining the belief that X stole the car and no-one else. This example considers the justifications for anger as an emotional response but what has not been considered are Y’s ensuing thoughts of revenge, retaliation or compensation. If Aristotle’s definition of anger is correct then Y will derive a certain pleasure from the thought of bringing X to justice and this may motivate Y to act against the injustice.

The philosophers Justin D’Arms and Daniel Jacobson accuse Taylor of falling into a ‘moralistic fallacy’ which is ‘to infer from the claim that it would be wrong or vicious to feel an emotion, that it is therefore unfitting.’<sup>130</sup> However, their argument is premised on an

---

<sup>128</sup> Taylor, above n 93, 394-395.

<sup>129</sup> Ibid 396.

<sup>130</sup> D’Arms and Jacobson, above n 82, 69.

improper interpretation<sup>131</sup> and a lack of contextualisation. D'Arms and Jacobson contend that Taylor:

expresses sympathy for the thought that anger might be systematically wrong to feel, on the grounds that 'it is wrong to be so concerned with what is due to one'...

Unfortunately, Taylor takes this moral objection to feeling anger as a demonstration that 'anger... should be classed among those emotions which one is never justified in feeling'.<sup>132</sup>

This is an unfair criticism given that the whole of Taylor's essay demonstrates the necessary conditions for anger's justifiability. Taylor acknowledges that justifying anger is 'a complicated process' and even if all the above conditions are satisfied it does not imply that a person 'ought to feel angry'.<sup>133</sup> Taylor then goes on to demonstrate situations where a lack of anger is evidence of a failing in perception or belief and it is reasonable to say that a person 'ought to' have felt anger.<sup>134</sup> The emotions of envy and jealousy are contrasted because it is difficult to say a person 'ought to' feel jealous or envious when these emotions are evidence of a character weakness.<sup>135</sup> Even if the premises of Taylor's arguments are not accepted, she cannot be accused of considering anger as an emotion that is never justified. Taking the quote in its entirety, Taylor is simply raising the possibility that this moral objection to anger is arguable but, as in the case of jealousy, 'amounts to a justification of the moral system adopted, and so is beyond the scope of this paper.'<sup>136</sup> Therefore Taylor has not committed a moralistic fallacy but has simply acknowledged that different moral systems impact on the justifiability of emotions.

### 2.5.3 Contempt

Contempt is related to anger and moral disgust.<sup>137</sup> Some theorists argue that contempt is a blend of these emotions; whilst others argue that they are distinguishable from contempt.<sup>138</sup> 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

---

<sup>131</sup> The quote D'Arms and Jacobson use is from one sentence but they have not included the entirety of the sentence which provides context. They have also re-ordered the words to support their argument and in doing so misrepresent Taylor's meaning. For the full quote see Taylor, above n 93, 401-402.

<sup>132</sup> D'Arms and Jacobson, above n 82, 79.

<sup>133</sup> Taylor, above n 93, 397.

<sup>134</sup> Ibid 397-400.

<sup>135</sup> Ibid 401.

<sup>136</sup> Ibid 402.

<sup>137</sup> 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.

<sup>138</sup> For empirical research on the differentials of these emotions 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.

by the perception that another person does not measure up'.<sup>139</sup> This can result in the object of contempt being treated with less respect and consideration or with derision or disregard.<sup>140</sup>

Like anger, contempt is not always a negative emotion. The philosopher Michelle 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, which also involves an affective stance toward the other.<sup>141</sup> Having contempt involves perceiving and regarding the object as a person who ranks low in their worth because they fall short 'of some legitimate interpersonal ideal' and the affective quality is feeling pained in the presence of the object thus making the object a source of aversion.<sup>142</sup> According to Mason the conditions necessary for contempt's proper focus and moral justifiability are:

1. It is directed at a person or persons (objects) as a response to violations of an 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.

Conditions 1-4<sup>143</sup> relate to the conditions necessary for the proper evaluative presentation of the object of contempt. Conditions 5 and 6<sup>144</sup> relate to the moral justifiability of contempt. To demonstrate the evaluation of the object of contempt and its moral justifiability, consider the example of law students X and Y who are friends at university. X pays other people to do her assignments knowing that it is wrong and consistently achieves high grades. Y is diligent and submits her own work and also achieves high grades. Y's ideal is that cheating is wrong and that students should earn their grades. Y learns that X is not submitting her own work, thus it becomes interpersonal and X has violated the ideal (1). The morally evaluable character trait that the violation stems from is a propensity to cheat (2) and X can be held responsible because X knows that this is wrong (3). There is a legitimate expectation that X can

---

<sup>139</sup> Haidt, above n 98, 858.

<sup>140</sup> Ibid.

<sup>141</sup> Michelle Mason, 'Contempt as a Moral Attitude' (2003) 113 (2) *Ethics* 234, 239.

<sup>142</sup> Ibid 241; see also Macalister Bell, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press, 2013) 57.

<sup>143</sup> Mason, above n 141, 250.

<sup>144</sup> Ibid 253.

approximate the ideal because X could and should submit her own work according to the norms and rules of academia (4). Y always does her own work and thus does not possess a similar fault (5). There is no evidence that X has changed and thus Y's attitude of contempt toward X is morally unobjectionable (6). Y is pained by thought of her friend cheating and feels a sense of aversion toward X, thus Y's perception of and attitude toward X has changed.

All of the above conditions and justifications contain evaluations. 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. This is what differentiates contempt from feelings of resentment. If X was getting good grades but not putting in as much work as Y, Y may feel resentment but this would not be a feeling that judges the character of X and would not necessarily lead to feelings and actions of aversion. Contempt is characterised by a judgment about the character of the object and represents a change in attitude toward the object. This is known as globalised contempt because it judges the person's character as a whole.

Kate Abramson contends that globalised attitudes are problematic because they preclude 'appreciation of someone's redeeming qualities' and such attitudes are morally inappropriate.<sup>145</sup> Connected to this objection is another regarding aversion, withdrawal or avoidance. Abramson argues these expressions of contempt communicate disinterest in the object defending themselves and an unwillingness to be held accountable for the feeling of contempt.<sup>146</sup> Accordingly these attitudes are morally objectionable.<sup>147</sup> However the role of forgiveness in point 6 above is not fully appreciated. On the basis that contempt is justifiable the ability to forgive implies an openness to see the redeeming qualities of the other. These redeeming qualities include, but are not limited to, evidence of change, repentance or in the least an apology. Additionally if the problem is communicated, the person is accountable for feeling contempt and is providing the opportunity for the other to defend their self.

In summary empathy, sympathy, anger and contempt all involve how the object of the emotions are perceived, which in turn influences the evaluation of the object. Empathy and sympathy are evaluative in the sense that they involve awareness of the object's situation and the emotion the object is experiencing. These emotions can also motivate people to alleviate the suffering of the object. Anger involves the perception of a wrong which is evaluated as being unfair or unjust and the wrongdoer is responsible and accountable. Anger can motivate people to seek revenge or compensation. Contempt involves the perception that the object has violated an interpersonal ideal and the object is evaluated as having a morally evaluable character trait. Further, contempt involves evaluations about moral and personal standards, expectations and responsibility. Therefore all of these emotions contain judgments about the object of the emotion. These emotions are implicated in moral judgment because of the

---

<sup>145</sup> 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) 194.

<sup>146</sup> Ibid 195.

<sup>147</sup> Ibid 196.

context in which they arise and the kinds of evaluation that underpin them and they are implicated in ethical judgment because it reconciles moral judgment with action.

## 2.6 Conclusion

The overall purpose of this chapter was to demonstrate that emotions involve evaluative judgments. In order to do this the evaluative properties of emotion and why people have emotional responses were considered under the categories of perception, cognition, emotional dispositions and moral emotion. This chapter illustrated the difficulty in defining emotion and that there is no one definition of what constitutes an emotion that is appropriate for all emotions, as they are highly subjective and context-dependent.

Perception includes both somatic and cognitive components both of which have evaluative properties. The way in which the object of emotion is perceived is influenced by perspective and perspective is influenced by emotional dispositions, traits and temperament. Non-cognitive theories define emotion through the perception of somatic states and are more useful in understanding primary emotion. Emotion as perception provides evaluative knowledge pertaining to the object and this theory can more readily accommodate secondary emotions. In terms of moral emotion, perception includes the ability to see the plight of others and this depends on the emotional capacity of empathy which involves evaluations about the object's situation and emotional response.

The way in which an object is cognitively evaluated can be influenced by perception and emotional dispositions. According to cognitivist theories, emotions are defined by beliefs, thoughts or judgments directed toward the object, all of which are evaluations. Notwithstanding the shortcomings of these theories, these conceptions provide a framework from which to analyse the content of emotion and shows how they are capable of re-education. The way in which the object is perceived can be influenced by the beliefs underpinning emotions that have been acquired through experience and this relates to emotional dispositions.

Emotional dispositions are habits of thought and action that can influence how the object is perceived and evaluated. Through experience and learning, people form beliefs and attitudes and these influence how people perceive the object of an emotion and how they create or respond to emotional situations. This affects judgment because people are habituated toward thinking and acting on emotion in certain ways. The discussion of the educability of emotion revealed that emotional dispositions can be modified through learning by changing the belief underpinning the emotion and the habit of thought and action associated with it. It was concluded that the ability to examine emotional responses and to develop emotional capabilities would lead to more rational judgment.

The evaluative content of moral emotions was demonstrated in the discussion of empathy, sympathy, anger and contempt. These emotions were characterised as moral because of the role they play in moral thinking and behaviour and because of the object of the emotion. Moral emotions have perceptive, motivational and evaluative functions in moral judgment. These emotions are also connected to ethical judgment because it reconciles normative

standards, moral judgment and action. Empathy and sympathy involve concern for others whereas anger and contempt are other-condemning emotions. Empathy and sympathy are perceptive because they involve recognising that another person is in distress. These emotions can also reveal moral values connected to concern for others. The evaluations contained within these emotions involve judgments about knowing what it would be like if *I* were the other person (empathy) or knowing what it would *be* like to be that other person (sympathy).<sup>148</sup> Hence empathy and sympathy both involve understanding and evaluating the experience of another. Anger involves the perception of a wrong which is evaluated as being unfair or unjust and that the wrongdoer is responsible and accountable. Contempt involves the perception that the object has violated an interpersonal ideal and the object is evaluated as having a morally evaluable character trait. Further, contempt involves evaluations about moral and personal standards, expectations and responsibility.

Emotions involve evaluative judgments and are implicated in moral and ethical judgments. The significance to this thesis is that emotion is also implicated in legal-ethical judgment. Emotions can impede and facilitate judgment and it is therefore necessary to account for the positive and negative influence of emotion. The ability to account for these influences requires an understanding and examination of the evaluative judgments that emotions contain. The purpose of demonstrating that emotions are forms of judgment is to complement and expand on the emotional themes that will arise in the following chapter and to do this in a way that makes the literature and knowledge about emotion accessible and relevant to legal academics. The selection of disciplines in this chapter was based on their compatibility to each other and also their compatibility to the cognitive frameworks employed in law. A major hypothesis of this thesis is that awareness of emotion and introducing knowledge about emotion into learning how to ‘think like a lawyer’ will improve analytical skills, ethical judgment and better equip law students for the reality of making ethical judgments in legal practice.

---

<sup>148</sup> Wispe, above n 105, 318.

# 3.0 THINKING LIKE A LAWYER: PROFESSIONALISM, ETHICS AND EMOTION

## 3.1 Introduction

The legal theorist Peter Goodrich argues subjective considerations such as emotion are not valued and recognised in the legal domain because they belong to ‘a realm outside of law’.<sup>1</sup> Further, Goodrich observes:

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.<sup>2</sup>

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.<sup>3</sup>

Legalism manifests in teaching students to ‘think like a lawyer’.<sup>4</sup> Teaching students to ‘think like a lawyer’ has been described as the obligation of educators to ‘exorcise’ students’ subjectivity.<sup>5</sup> Learning how to ‘think like a lawyer’ has been described as a process which ‘steals one’s soul’.<sup>6</sup> There is evidence that some Australian law students are concerned and dissatisfied with these aspects of legal training. Student members of the Australian National

---

<sup>1</sup> Peter Goodrich, ‘Law in the Courts of Love: Andreas Capellanus and the Judgments of Love’ (1996) 48 (3) *Stanford Law Review* 633, 674.

<sup>2</sup> *Ibid* 675.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> Gerald B Wetlaufer, ‘Rhetoric and Its Denial in Legal Discourse’ (1990) 76 *Virginia Law Review* 1545, 1577.

<sup>6</sup> Fiona Cownie, ‘Alternative Values in Legal Education’ (2003) 6 (2) *Legal Ethics* 159, 159.

University Law School Reform Committee published a report in 2010<sup>7</sup> in which students provided insights into their experience of legal education. A student observed

We discovered that the ‘law’ was a series of rules, handed down by old men on the bench to lawyers who ‘neutrally’ applied it. Law school was a process of learning and memorising what ‘is’ not dreaming of what could be, not arguing for what it should be. Our lived experiences were irrelevant to our learning.<sup>8</sup>

Others 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.’<sup>9</sup> Another stated ‘as we learn how to ‘think like lawyers’, let’s also cultivate our capacity to think like human beings’.<sup>10</sup> Others wanted the curriculum to include ‘deep ethical inquiry’.<sup>11</sup> In relation to the personal skills required in lawyering, students noted the absence of opportunities to develop these and ‘found there was little attention given to the development of empathy, personal morality and values.’<sup>12</sup> This sample of students identifies the omission of legal education to encourage subjective and humanistic concerns. They appear to believe that this omission affects the quality of their education and their ability to develop professionally, personally and morally. In order to address this problem the legal academic James Gray suggests that the process of legal education and legal academics’ attitude to legal education requires new ways of thinking.<sup>13</sup> It is for this reason that this chapter seeks to demonstrate that emotion can be implemented in legal ethics education by utilising the existing analytical framework of ‘thinking like a lawyer’.

‘Thinking like a lawyer’ represents the way in which students are instructed in the rationalist practices of law. The rationalist practices of law require lawyers to detach from emotion in order to perform their role and this practice is instituted in law school. According to Kristen B Gerdy the focus of legal educators on logic and critical thinking to the exclusion of emotional and humanistic concerns gives the message that dealing with emotions and personality is inconsistent with legal thinking.<sup>14</sup> This is problematic for Gerdy because if ‘thinking like a lawyer’ does not involve a human context, then legal analysis is being taught in a vacuum where there is little discussion as to how the law impacts on the lives and

---

<sup>7</sup> 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).

<sup>8</sup> *Ibid* iii. For similar comments from American students see James R Elkins, ‘The Pedagogy of Ethics’ (1985) 10 *The Journal of the Legal Profession* 37, 49-50.

<sup>9</sup> ANU Law School Reform Committee above n 7, x.

<sup>10</sup> *Ibid* v.

<sup>11</sup> *Ibid* 4.

<sup>12</sup> *Ibid* 30.

<sup>13</sup> 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.

<sup>14</sup> Kristin B Gerdy ‘Clients, Empathy, and Compassion: Introducing First Year Students to the Heart of Lawyering’ (2008-2009) 87 *Nebraska Law Review* 1, 30.

emotions of the people being discussed.<sup>15</sup> The human context also includes students and their values and emotions. It has been suggested that requiring students to ‘think like a lawyer’ is a denial of their previous experience which can lead to alienation from their emotions, values and ideals.<sup>16</sup> In this chapter it will be argued that emotional detachment does not mean the repression or denial of emotion. Appropriate emotional detachment means the ability to account for and moderate emotion and this ability requires emotional self-awareness.

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. There are some academics that analyse what it means to ‘think like a lawyer’ and include 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. When the emotion of lawyers and law students is discussed, psychological emotional intelligence frameworks are commonly utilised to demonstrate the value of emotion in legal practice. The incorporation of emotional intelligence into the law curriculum is seen as an opportunity to strengthen the professionalism of lawyers through the development of intrapersonal and interpersonal skills.<sup>17</sup> The ability to ‘think like a lawyer’ and to practice law ethically is related to professionalism. This chapter will argue that emotional, moral and humanistic concerns are not inconsistent with professionalism or legal and ethical judgment.<sup>18</sup> This is achieved by showing how emotion is situated within legal analytic and problem-solving structures utilised in exercising such judgment. Angela Olivia Burton has articulated a model which explicitly identifies the capacities involved in ‘thinking like a lawyer’ where emotion is relevant: narrative intelligence and the personal intelligences. As such, Burton’s model is an effective vehicle for the incorporation of emotional knowledge as discussed in Chapter 2. The relevant emotional concepts from Chapter 2 applied in this chapter are the evaluation of emotional judgments, beliefs and values; emotional dispositions and the educability of emotion; emotional self-awareness; and empathy and sympathy because these emotions are relevant to the capacity of interpersonal intelligence. This knowledge will be incorporated into Burton’s model to expand the understanding of how emotion is involved in ‘thinking like a lawyer’

---

<sup>15</sup> 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. Granfield and Koenig conducted empirical research with law graduates and found that legal ethics courses ignored humanistic and contextual issues and reduced cases to their technical merits and ethics was reduced to compliance with professional standards of conduct.

<sup>16</sup> Caroline Maughan, ‘Why Study Emotion?’ in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011) 22-23.

<sup>17</sup> 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.

<sup>18</sup> See Cownie, above n 6; 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 Character – Trust, Values and Learning’ in Maharg and Maughan, above n 16, 235-256; Nigel Duncan, ‘Addressing Emotions in Preparing Ethical Lawyers’ in Maharg and Maughan, above n 16, 257-282.

and legal-ethical judgment. It is argued that including the emotional aspects of legal-ethical judgment will make legal ethics education more comprehensive and better equip law students for the reality of making ethical judgments in practice.

This chapter focuses on how law students are taught to make legal decisions that require ethical judgment. The first overall aim of this chapter is to demonstrate firstly, how emotion is involved in legal judgment. This aim is achieved in Part 3.2 where models of ‘thinking like a lawyer’ and the cognitive processes and analytical frameworks employed in these models are discussed. Part 3.2 then introduces Burton’s model as it is the most explicit in identifying the capacities involved in ‘thinking like a lawyer’ where emotion is relevant.

The second and third overall aims of this chapter are to demonstrate that Burton’s model of ‘thinking like a lawyer’ is a useful model from which to educate law students about how to make judgments (including ethical judgments, that recognise the role of emotion); and to use the knowledge about emotion in Chapter 2 to expand the understanding of how emotion is involved in ‘thinking like a lawyer’. These aims are achieved in Parts 3.3 and 3.4. Part 3.3.1 briefly explains the cognitive content of narrative intelligence. This is followed by a detailed explanation of the emotional content of narrative intelligence in Part 3.3.2. In this Part the case of *Legal Practitioners Board v Morel*<sup>19</sup> is used to illustrate the emotional content of narrative intelligence and to demonstrate how emotional narratives can be the subject of analysis. This case is used in the UTS subject Ethics and Professional Conduct in relation to personal and professional conduct and will be returned to in Chapter 5. Part 3.4 begins by explaining that the personal intelligences involve intrapersonal and interpersonal intelligences as significant factors in emotional intelligence. Part 3.4.1 gives a detailed explanation of emotional self-awareness and detachment as these are important concepts in intrapersonal intelligence. Part 3.4.2 considers empathy and the balance between engagement and detachment as these are important concepts in interpersonal intelligence. *Legal Practitioners Board v Morel* is returned to in this Part to illustrate how too much emotional engagement can cause boundary violations.

### **3.2 Thinking and feeling like a lawyer**

Definitions of ‘thinking like a lawyer’ are contested; however, the concept can be broadly understood to mean the ability to undertake legal problem-solving. The traditional approach to legal problem-solving is mostly focused on skills such as written and oral communication and analytical skills such as analogical, deductive and inductive reasoning. Academics are now starting to focus on and expand the range of cognitive processes that underpin ‘thinking like a lawyer’. For example Larry O Natt Gantt contends that there are numerous general definitions of ‘thinking like a lawyer’ but these definitions ‘do not go beyond the tasks of lawyers to consider what underlying cognitive processes are involved when lawyers undertake these tasks.’<sup>20</sup> According to Gantt, legal problem-solving involves three broad

---

<sup>19</sup> [2004] SASC 168; (2004) 88 SASR 541.

<sup>20</sup> Gantt, above n 4, 414.

cognitive processes: analytical frameworks,<sup>21</sup> cognitive processes (the steps to legal problem-solving)<sup>22</sup> and logical reasoning.<sup>23</sup> Gantt's article illuminates these processes and offers a useful framework for educators who seek to be more explicit about them. However what is lacking in that framework is the exposition of other capacities and forms of judgment involved in legal thinking such as narrative and emotion.

Alexander Scherr agrees that cognitive processes, such as those identified by Gantt, are important but advances 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 realities might be.'<sup>24</sup> Similarly, Angela Olivia Burton contends that there has been a disproportionate focus on some lawyer intelligences like rule-based inductive, deductive and categorical reasoning processes.<sup>25</sup> To counteract this tendency Burton focuses on 'multiple lawyering intelligences' and this pedagogical construct is 'designed to expand the terms of reference for what it means to 'think like a lawyer'' and thereby foster good judgment in students.<sup>26</sup>

Burton proposes the following lawyering intelligences model, summarised below, which is said to be 'a set of distinct yet interconnected intellectual capacities that animate every kind of legal work'<sup>27</sup> and as such includes legal-ethical judgment decision-making. Narrative intelligence in point 4 and the personal intelligences in point 5 are built on in this chapter because they are intellectual capacities where emotion is explicitly involved.

1. Linguistic Intelligence – General characteristics of this form of intelligence include 'sensitivity to the spoken and written word' and 'the ability to use language pragmatically'.<sup>28</sup>
2. Categorising Intelligence – '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.<sup>29</sup>

---

<sup>21</sup> Ibid 438-445; according to Gantt the overall structure of legal thinking and involves mental problem-solving, asking questions, searching for coherence, thinking linearly, and crafting arguments.

<sup>22</sup> Ibid 445-456; this involves assessing relevance, dissecting thought and perceiving ambiguity.

<sup>23</sup> Ibid 457-460; this involves inductive, deductive and analogical reasoning. See also Mary Massaron Ross, 'A Basis for Legal Reasoning: Logic on Appeal' (2006) 3 *Journal of the Association of Legal Writing Directors* 179.

<sup>24</sup> Scherr, above n 4, 229.

<sup>25</sup> 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.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 25.

<sup>28</sup> Ibid 27.

<sup>29</sup> Ibid 29.

3. Logical-Mathematical Intelligence – Here legal educators typically emphasise inductive, deductive, and analogical reasoning.<sup>30</sup>
4. Narrative Intelligence – This cognitive process 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.’ Narrative reasoning permits consideration of contextual factors like moral, political and social considerations. Because of this, narrative reasoning embraces facets of human reaction and judgment such as emotion and empathy, issues of right and wrong.<sup>31</sup>
5. The Personal Intelligences – Intrapersonal and Interpersonal. These intelligences shape our understanding of ourselves and others and relate to sensitivity to issues of personality, motivation, belief, values and emotion.<sup>32</sup>
6. Strategic Intelligence – Lawyers use this when they imagine and generate alternative plans and choose the most effective course of action.<sup>33</sup>

All six of the above intelligences are intellectual capacities and all are necessary for the ability to undertake legal problem-solving, reasoning and judgment. In relation to the capacity of narrative intelligence Burton points out that narrative reasoning goes beyond legalistic problem-solving which primarily focuses on legal text, legal authority and analogical reasoning associated with facts. Therefore, lawyers use narrative reasoning to 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 reasoning also permits consideration of contextual factors like moral, political and social considerations, emotion and issues of right and wrong. These contextual factors are relevant in legal ethics making this model applicable to educating students about how to exercise legal-ethical judgment in order to solve problems.

Narratives cognitively represent as stories and Burton also argues that to be effective narrators, lawyers need to be familiar with the general elements of a good narrative, which are the focus on a central character, the protagonist faced with a dilemma, the dilemma developing into crisis, the crisis building to a climax, the climax, the crisis solved.<sup>34</sup> Narratives that involve these general elements will necessarily embrace human reaction and judgment including emotion.<sup>35</sup> Through another analogy with fictional narratives Suzanne

---

<sup>30</sup> Ibid 33.

<sup>31</sup> Ibid 34-37.

<sup>32</sup> Ibid 38-41.

<sup>33</sup> Ibid 42.

<sup>34</sup> Ibid 36. See also Teresa Godwin Phelps, ‘Narratives of Disobedience: Breaking/Changing the Law’ (1990) 40 *Journal of Legal Education* 133; Carolyn Grose, ‘Lawyers and Clients Telling Stories about Ethics (and Everything Else)’ (2009) 20 *Hastings Women’s Law Journal* 163.

<sup>35</sup> Burton, above n 25, 37.

Keen suggests that identification with the characters in a story promotes perspective taking and empathy.<sup>36</sup> Identification and empathy will be returned to in Part 3.4.2.

The personal intelligences identified by Burton in point 5 are capacities that arise in psychological emotional intelligence literature. These intelligences shape our understanding of ourselves (intrapersonal) and others (interpersonal). Integral to intrapersonal intelligence is the capacity for emotional self-awareness and awareness of the role of emotion in judgment.<sup>37</sup> Burton contends that ‘emotional sensitivity’ is essential to developing intrapersonal intelligence but that ‘it is how a person uses self-knowledge for personal and professional problem-solving that the full measure of an intrapersonal intelligence is actualised.’<sup>38</sup> Resolving ethical issues is a form of professional problem-solving which requires an understanding of personal values, morality and emotion. Interpersonal intelligence denotes the capacity to understand another person’s desires and motivations and to use that knowledge to effectively deal with other people.<sup>39</sup> Interpersonal intelligence also requires emotional self-awareness to prevent boundary violations which could lead to unethical conduct.

Intrapersonal intelligence includes the stories we tell ourselves about ourselves, while interpersonal intelligence includes the stories we tell ourselves about other people. This is how narrative intelligence and the personal intelligences are connected. As Burton has identified, these stories evoke emotion and require that emotion is accounted for in judgment. Therefore, in order to fully develop the capacities of narrative intelligence and the personal intelligences, the ability to recognise the influence of emotion within these capacities, to develop greater emotional self-awareness and to understand of the role of emotion in judgment is required. Each of these capacities is discussed in more detail below.

### 3.3 Narrative Intelligence

In cognitive neuroscience, empirical studies have identified the neurological basis for a narrative understanding of self.<sup>40</sup> In cognitive psychology, the researchers Rettinger and Hastie contend that when making morally salient decisions, people undertake narrative processing to identify, comprehend and integrate material into a complex mental representation.<sup>41</sup> According to the philosopher Martha Nussbaum, narratives contain and

---

<sup>36</sup> Suzanne Keen, ‘A Theory of Narrative Empathy’ (2006) 14 (3) *Narrative* 207, 214.

<sup>37</sup> Burton, above n 25, 38-41.

<sup>38</sup> *Ibid* 41.

<sup>39</sup> *Ibid* 38-41.

<sup>40</sup> Leslie Paul Thiele, *The Heart of Judgment: Practical Wisdom, Neuroscience, and Narrative* (Cambridge University Press, 2006) 15.

<sup>41</sup> 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.

express emotion and are essential in the process of practical reflection.<sup>42</sup> In Chapter 2, narrative examples of emotion were used to demonstrate the structure and content of anger, envy and contempt. Thus narratives evoke emotional activity and they can also reveal the structure of an emotion meaning that narrative intelligence is utilised in the appraisal of emotion. Emotion can also instigate narrative judgment. The perceptive capacity to see the suffering of another is said to precede ‘the analytical, reflective and deliberative components of moral judgment.’<sup>43</sup> The aim of this part is to explain both the cognitive and emotional content in narrative intelligence. This content is not mutually exclusive as both factors are necessary for narrative intelligence. A brief account of the cognitive content will be given followed by a more detailed account of the emotional content. The account of the emotional content of narrative intelligence will focus on the analytical and reflective aspects of narratives to demonstrate how emotions within those narratives can be analysed.

### 3.3.1 Cognitive content

Alexander Scherr observes that in law, narrative ‘has a dense pedigree... narrative centres lawyering.’<sup>44</sup> Like Burton, Scherr states that narrative provides ‘a cognitive frame for data’ and ‘a tissue of language through which decision-makers discern the certainty necessary for action.’<sup>45</sup> Similarly Graham and McJohn state that stories are ‘almost an ideal data structure for human cognition’ particularly in relation to learning and memory.<sup>46</sup> Graham and McJohn describe the cognitive value of narrative in the following way:

Focusing on the cognitive aspects of stories illuminates the cognitive tasks of law, such as reasoning, remembering, learning, persuading, and communicating. Relying on cognitive science concepts, we suggest that narrative plays a fundamental role in legal reasoning, in such areas as memory, moral decision-making, reasoning by analogy, explanation, and even the organisation of the vast amount of information that lawyers contend with.<sup>47</sup>

Graham and McJohn state that moral and legal reasoning involves the capacity for narrative intelligence and this suggests that this capacity is relevant to legal-ethical judgment. Further, the psychologists Rettinger and Hastie argue when moral factors and emotion are involved in a decision this leads to ‘elaborated narrative processing as subjects try to create stories about each outcome and evaluate the stories.’<sup>48</sup> The cognitive content of narrative intelligence provides a way of organising, interpreting, evaluating, elaborating, remembering, learning

---

<sup>42</sup> Martha Nussbaum, ‘Narrative Emotions: Beckett’s Genealogy of Love’ (1988) 98 (2) *Ethics* 225, 236.

<sup>43</sup> Thiele, above n 40, 183.

<sup>44</sup> Scherr, above n 4, 231.

<sup>45</sup> *Ibid* 232.

<sup>46</sup> Lorie M Graham and Stephen M McJohn ‘Cognition, Law, Stories’ (2009) 10 (1) *Minnesota Journal of Law, Science & Technology* 255, 282.

<sup>47</sup> *Ibid* 258.

<sup>48</sup> Rettinger and Hastie, above n 41, 180-181.

and communicating information. Narrative reasoning provides coherence and is essential in the process of judgment leading to legal and ethical decisions.

### 3.3.2 Emotional content

Although Graham and McJohn, Burton, and Scherr recognise the role of emotion in narrative intelligence none of them elaborates on it. 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.<sup>49</sup> For Burton, narratives embrace facets of human reaction and judgment such as emotion and empathy.<sup>50</sup> For Scherr, narratives contain and express emotion and motivate the decision-maker toward choice and commitment to action.<sup>51</sup> Scherr briefly considers cognitive philosophy, in particular Martha Nussbaum, to demonstrate that beliefs and emotions are related and are open to assessment and criticism.<sup>52</sup> He concludes that awareness and appraisal of emotion forms a natural activity of practical judgment because it recognises that emotion influences choices.<sup>53</sup> As was demonstrated in Chapter 2, the ability to account for the positive and negative influences of emotion in judgment requires an understanding of the evaluative judgments that emotions contain. The evaluative judgments contained in emotion and how this is related to the capacity of narrative intelligence will be dealt with here.

According to Nussbaum narratives can reveal the meaning of an emotion.<sup>54</sup> The capacity of narrative intelligence involves the ability to recognise and evaluate emotional preferences, perspectives, beliefs, values and dispositions because these factors can influence judgment. Accordingly a component of narrative intelligence is the way we examine, evaluate and make sense of emotional experiences. For example, 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.’<sup>55</sup> Different stories dictate different meanings of love and if ‘love is a narrative, many of the wrong stories are told.’<sup>56</sup> In order to illustrate the emotional content of narrative intelligence and how the emotional content can be analysed, the case of *Legal*

---

<sup>49</sup> Graham and McJohn, above n 46, 283.

<sup>50</sup> Burton, above n 25, 37.

<sup>51</sup> Scherr, above n 4, 233.

<sup>52</sup> Ibid 237.

<sup>53</sup> Ibid. For a detailed account of love and ethics see Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001).

<sup>54</sup> Nussbaum, above n 42, 236.

<sup>55</sup> Robert C Solomon, ‘The Passions: Philosophy and the Intelligence of Emotions’ Lecture Series Part One, The Teaching Company Limited Partnership, 2006, 14. Available from [http://www.teachersyndicate.com/documents/oct\\_2010/TTC%20Guidebooks/Passions%20-%20Philosophy%20and%20the%20Intelligence%20of%20Emotions.pdf](http://www.teachersyndicate.com/documents/oct_2010/TTC%20Guidebooks/Passions%20-%20Philosophy%20and%20the%20Intelligence%20of%20Emotions.pdf) (21/02/2011); see also Nussbaum, above n 41.

<sup>56</sup> Solomon, above n 55.

*Practitioners Board v Morel*<sup>57</sup> will be used as an example. This case involves personal relationships between a lawyer and some of her clients which led to poor ethical judgment and the solicitor being struck-off for professional misconduct. 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 whilst McFarlane was still imprisoned. In 1997 she began a professional and personal relationship with another prisoner Paul Page. Morel lied to prison authorities stating that she urgently needed to speak with Page on legal matters; whereas in fact she wished to talk on 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 authority 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 is an example of personal and professional boundary violations and the analysis here is not concerned with the breach of disciplinary rules. What will be illustrated is how love within this narrative can be analysed for the purpose of demonstrating the influence of that emotion on the ethical judgment of this practitioner. In other words, emotion influences judgments that are of an ethical nature and in order to understand those influences, the evaluative properties of the emotion must be examined. There is limited information about the personal emotional narrative of Morel. However the psychologist's report provides some insight into the narrative of love and a salient aspect is extracted here.

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.<sup>58</sup>

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

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.'<sup>59</sup> 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

---

<sup>57</sup> [2004] SASC 168; (2004) 88 SASR 541 (hereinafter *Morel*).

<sup>58</sup> *Legal Practitioners Board v Morel* [2004] SASC 168 [33]-[34].

<sup>59</sup> Nussbaum, above n 53, 473.

provides an incomplete narrative of love; 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 following analysis does not purport to represent Morel's actual motivations, thinking and feelings. The application of emotion theory to the legal narrative 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.

There could be unacknowledged reasons for love in relation to Morel's relationships with prisoners. Solomon contends that unacknowledged reasons can be amongst the worst reasons for love.<sup>60</sup> 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.'<sup>61</sup> 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 whilst also providing legal representation, suggests a certain safety in the knowledge that the men are dependent 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.<sup>62</sup>

Another unacknowledged reason for 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.'<sup>63</sup> 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'<sup>64</sup> indicating a misguided sense of empathy, sympathy or compassion which led to unethical behaviour. In the discussion of moral emotion in Chapter 2, empathy and sympathy were defined as relating to another's experience. Although Morel identifies having too much empathy as an issue, based on the definitions in Chapter 2, it is also possible that she was experiencing sympathy. Empathy is an emotional process and can manifest in any emotion, whilst sympathy is a discrete emotional state that is characterised by the desire to alleviate the suffering of another. Empathy and sympathy are not about absorbing the feelings of others and this highlights the need to develop appropriate emotional boundaries and detachment. This point will be returned to in Part 3.4.2.

---

<sup>60</sup> Robert C Solomon, *About Love: Reinventing Romance for Our Times* (Hackett Publishing Company, 2006) 156.

<sup>61</sup> *Ibid* 157. Solomon uses the example of a woman falling in love with married men.

<sup>62</sup> *Legal Practitioners Board v Morel* [2004] SASC 168 [22].

<sup>63</sup> Solomon, above n 60, 157.

<sup>64</sup> *Legal Practitioners Board v Morel* [2004] SASC 168 [41].

Characteristic of sympathy, and in some circumstances empathy, is a belief that the suffering of the other can be alleviated; however 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 from Chapter 2<sup>65</sup> demonstrates this point in theory. 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. The objects of sympathy and love are the prisoners with whom Morel had relationships. The objects are intentional; Morel simultaneously perceives them as helpless (sympathy) and desirable (love). Underpinning sympathy is the 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 vulnerable people 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. Thus in this account, the value of those relationships could be to the practitioner's ego, because dependency gives her 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 him more desirable.

It appears that the 'wrong story' about love is being told and that subconsciously empathy or sympathy is being used strategically because Morel's motives may not have been entirely benevolent.<sup>66</sup> 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 Morel 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. This example shows that the capacity for narrative intelligence also requires a capacity for emotional self-awareness and with these capacities, people are more likely to approach and make judgments in a more rational and ethical manner. *Morel* also indicates how a lack of emotional self-awareness impacts on the capacities of intrapersonal and interpersonal intelligence. Emotional self-awareness in the context of these capacities is discussed in detail below.

---

<sup>65</sup> See Chapter 2, 25.

<sup>66</sup> See Chapter 2, 35-36.

### 3.4 The Personal Intelligences

The personal intelligences shape our understanding of ourselves (intrapersonal) and others (interpersonal). These intelligences involve being aware of our own and other people's emotion, personality, motivations, beliefs and values. Intrapersonal intelligence is important for lawyering because emotional self-awareness contributes to personal and professional problem-solving. Interpersonal intelligence is the capacity to understand the desires and motivations of others and this is important for lawyering because contributes to effectively communicating and working with them. The delineation between intrapersonal and interpersonal intelligence is a feature of the psychological emotional intelligence framework. Paul J Cain states that there is more than one way to define emotional intelligence and that defining it 'is a slippery task'.<sup>67</sup> Cain describes the following indicia:

- The ability to sense, understand and effectively apply the power and acumen of emotions as a source of human energy, information, connection, and influence.
- Self-control, zeal and persistence, and the ability to motivate oneself.
- Being able to rein in emotional impulse; to read another's innermost feelings; to handle relationships smoothly.<sup>68</sup>

Marjorie A Silver provides the following definition:

Emotional intelligence includes knowledge and appreciation of one's own emotional life and sensitivity to and acceptance of the emotional lives of others. It is an attitude that acknowledges the legitimacy of emotions and their relevance to our actions, interactions and decisions. Its actualisation requires the intra- and interpersonal skills necessary to live a joyful and connected life, rich in personal relationships.<sup>69</sup>

The major themes that emerge from Cain's indicia and Silver's definition are emotional self-awareness, the ability to have appropriate emotional responses and detachment, and the capacity for empathic concern. The aim of this Part is to provide a more detailed account of the influence of emotion in intrapersonal and interpersonal intelligence and how these connect to legal-ethical judgment. This Part will begin by considering intrapersonal intelligence and the related concepts of emotional self-awareness and detachment. The Part will conclude by considering interpersonal intelligence, empathy and the need for balance between emotional engagement and detachment. Emotional self-awareness, empathy and detachment are examined for the purpose of demonstrating that they are essential to effective lawyer judgment and therefore learning how to 'think like a lawyer' in a more comprehensive way.

---

<sup>67</sup> 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, 2. For critiques on definitional issues on measuring EI in clinical psychological research see Kevin R Murphy (ed), *A Critique of Emotional Intelligence: What Are the Problems and How Can They Be Fixed?* (Lawrence Erlbaum Associates, 2006).

<sup>68</sup> Cain, above n 67, 2.

<sup>69</sup> Marjorie A Silver 'Emotional Intelligence and Legal Education' (1999) 5 (4) *Psychology, Public Policy and Law* 1173, 1178.

### 3.4.1 Intrapersonal Intelligence

Burton defines intrapersonal intelligence as ‘the ability to distinguish and respond to our own feelings, needs, desires and motivations, to build accurate mental models of ourselves, and to use these mental models to guide us in making important decisions about our lives.’<sup>70</sup> Intrapersonal intelligence requires emotional self-awareness. According to the philosopher Michael Lacewing, emotional self-awareness involves feeling the emotion, being aware of the feeling, feeling a ‘second order’ emotional response to the initial feeling (e.g. tension, anxiety or calm) and being open to these emotions.<sup>71</sup> This is similar to Damasio’s conception of feeling as the perception of changes to thoughts and bodily sensations when an emotion is experienced.<sup>72</sup> However, the discussion of emotional dispositions and the educability of emotion in Chapter 2 revealed that emotional self-awareness is not only the acknowledgement of 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. Silver states that emotional self-awareness is important because a person ‘cannot know whether a decision is rational or otherwise appropriate unless one looks within to examine the irrational forces bearing on that decision.’<sup>73</sup> However, as Goodrich and others have observed, legal education promotes the repression or denial of emotion meaning that if the emotion is an irrational force, it is not examined. There are several issues that arise from the repression and denial of emotion in the legal domain: self-representation, inappropriate emotional responses and inappropriate emotional detachment. These issues are discussed in turn below, in order to demonstrate how emotional self-awareness can lead to better ethical judgment.

Emotional self-awareness is distinguished from ‘self-representation’ which involves ‘reducing emotions to facts about ourselves.’<sup>74</sup> Treating emotion as a fact in deliberation is a way to acknowledge emotion without allowing the feeling or experience of the emotion to be a genuine part of deliberation. Consider the following contrast between a ‘technocratic lawyer’<sup>75</sup> and a ‘genuine ethical deliberator’.<sup>76</sup>

---

<sup>70</sup> Burton, above n 25, 38-41.

<sup>71</sup> Michael Lacewing, ‘Emotional Self-Awareness and Ethical Deliberation’ (2005) 18 (1) *Ratio* 65, 68.

<sup>72</sup> Chapter 2, 20.

<sup>73</sup> Marjorie A Silver ‘Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship’ (1999-2000) 6 *Clinical Law Review* 259, 274-275.

<sup>74</sup> Lacewing, above n 71, 68.

<sup>75</sup> Heidi Li Feldman, ‘Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?’ (1995-1996) 69 *Southern California Law Review* 885, 886. Feldman defines the technocratic lawyer as a ‘kind of legal minimalist – she aims essentially for instrumental efficacy in accomplishing goals set by her client.’ Modern black letter statutory language and structure tend to invite technocratic lawyering.

<sup>76</sup> *Ibid* 929. According to Feldman a good ethical deliberator possesses three features ‘willingness to consider but question established moral precepts, thereby displaying both humility and a sense of personal moral responsibility; willingness and ability to recognise ethical dilemmas; and capacity to respond to specific features with warranted sentiments and be guided by these sentiments in making ethical judgments.’

While the technocratic attorney uses certain sentimental capacities instrumentally to set the parameters for his strategic legal analysis, the attorney who engages in authentic ethical deliberation allows his sentimental responses to guide his practice independently of his client's goals. The technocratic lawyer deploys his sentimental capabilities strategically; the genuine ethical deliberator experiences and reflects upon his sentiments non-tactically.<sup>77</sup>

The sentiments being referred to are derived from Adam Smith's philosophy where sentiments are associated with ethical virtues and emotion.<sup>78</sup> Sentiments include feeling joy for a person's good fortune or anger directed at a person hurting another; the sentiments involve complexes of emotion, cognition and judgment.<sup>79</sup> This is not to say that all sentiments are appropriate because a part of ethical virtue is the ability to discern and have appropriate sentimental responses and to judge the appropriateness of other people's sentiments.<sup>80</sup> Genuine ethical deliberators bring their moral conscience to bear on the legal problem and their role as a lawyer.<sup>81</sup> Genuine ethical deliberators demonstrate emotional self-awareness because sentimental responses and the corresponding emotions are felt and guide legal practice and deliberation toward an ethical outcome. This is done independently of the client's goals and theoretically, this leads to better ethical judgment because the lawyer is relying initially on moral sentiments as to right and wrong which set parameters around the legal analysis. Conversely, technocratic lawyers initially set parameters around their sentimental responses so that the legal problem can be resolved in accordance with the client's goals and so that ethical issues are strategically accounted for. Technocratic lawyers treat emotion and sentimentality as a fact to be strategically accounted for in legal problem-solving, and emotion is not a genuine part of how the legal problem is dealt with ethically.

Lacewing argues that emotional self-awareness is essential to good ethical deliberation because emotions are evaluative responses.<sup>82</sup> Inappropriate emotional responses are vetted by emotional self-awareness and appropriate emotional responses guide people toward value and morally salient reasons for action.<sup>83</sup> When emotional responses signify difficulties within the person, denying the significance (lack of openness) and experience of an emotion (feeling), can lead to defence mechanisms which manifest as inappropriate detachment.<sup>84</sup> Defence mechanisms are mental processes that 'are used to defend the subject against a painful reality by perverting his or her experience of that reality' and are 'activated by painful or

---

<sup>77</sup> Ibid 943-944.

<sup>78</sup> Ibid 904.

<sup>79</sup> Ibid 904-905.

<sup>80</sup> Ibid 905.

<sup>81</sup> 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, 131.

<sup>82</sup> Lacewing, above n 71, 65.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid 75.

unacceptable emotions and desires and seek to prevent them from reaching consciousness.<sup>85</sup> As in Chapter 2, these defence mechanisms can be triggered by emotional dispositions or psychological schemas which encompass learned emotional reactions and behaviour.<sup>86</sup>

Suppressing emotion is a form of defence mechanism and can be appropriate where a task is emotionally difficult, like a doctor performing an autopsy, or a lawyer interviewing a sexual assault complainant.<sup>87</sup> The defence mechanism is activated because of the emotions being experienced and it prevents painful emotions from reaching consciousness through mental processes that seek to reduce anxiety.<sup>88</sup> It does not eliminate anxiety and the feeling of anxiety if detected alerts the person to a difficulty within themselves. A person who is emotionally self-aware is able to allow the feeling of anxiety, gain insight into the source of the anxiety and evaluate their emotions.<sup>89</sup> Emotional self-awareness of this kind is important because it provides information about the inner difficulty that could not be accessed without feeling and understanding the source of the emotion.<sup>90</sup> In other words, a person who is emotionally self-aware will inquire into what the defence mechanism is concealing and why, and be able to moderate the emotion appropriately.

Conversely, where emotion is the product of a defence mechanism, it is considered an inappropriate evaluative response.<sup>91</sup> Defence mechanisms here also reveal difficulties within the person but are used to project or rationalise feelings.<sup>92</sup> An example of projection is a homophobic person, who is unaccepting of their own homosexual feelings, projecting negative feelings onto homosexual people and responding ‘to homosexuals as though they are a threat.’<sup>93</sup> As discussed in Chapter 2, the perception or perspective taken about homosexuals will change if the homophobic person changes their attitude toward themselves.<sup>94</sup> This requires emotional self-awareness in order to acknowledge and re-educate the beliefs and values that underpin the attitude and the accompanying emotions such as hate and anger. An example of rationalisation is ‘someone not given a promotion, simply because he was not the best person for the job, may feel resentful of his boss, but comes to believe his boss resents or hates him.’<sup>95</sup> The example of envy and resentment in Chapter 2 and the discussion of emotional schemas and dispositions considered that an emotionally self-aware person would

---

<sup>85</sup> Ibid 71.

<sup>86</sup> Chapter 2, 30.

<sup>87</sup> Lacewing, above n 71, 73.

<sup>88</sup> Ibid 71.

<sup>89</sup> Ibid 72-73.

<sup>90</sup> Ibid 73.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 70.

<sup>93</sup> Ibid.

<sup>94</sup> Chapter 2, 22.

<sup>95</sup> Lacewing, above n 71, 70.

examine the beliefs underpinning their emotions and recognise those beliefs were not cognisant with fact.<sup>96</sup> Emotionally self-aware people also recognise the need to educate their emotional capabilities so that their emotional responses are appropriately directed toward the object of the emotion.<sup>97</sup> In these examples a lack of emotional self-awareness can lead to poor judgment because attention is not focused on examining the validity of the emotion that has been produced by the defence mechanism.

The ability to detach appropriately requires the emotional openness of emotional self-awareness.<sup>98</sup> According to Lacewing, appropriate detachment means that the emotion felt does not overwhelm the subject, but is moderated sufficiently to be questioned and understood, while still being engaged, for the emotion continues to be felt.<sup>99</sup> Detachment is not setting aside or ignoring emotion, it is the ability to experience and moderate it. A form of detachment related to self-representation is intellectualisation. According to Lacewing intellectualisation means:

Avoiding the affective force of one's emotions and one's second order responses to them is a tactic of intellectualization.

Intellectualization defends against anxiety partly by working with denial, isolation, or repression to simply not feel the emotion that arouses anxiety, and partly by using various means of avoiding the emotion's implications and personal significance.<sup>100</sup>

The kind of detachment that comes with intellectualisation has two aspects, firstly not allowing the feeling, and secondly avoiding the significance of having the emotion. A good example of this kind of intellectualisation in relation to lawyers is found in research conducted by the legal academic Abbe Smith. Smith interviewed several Australian criminal lawyers primarily around the question of 'how can you represent people you know to be guilty?'<sup>101</sup> One lawyer stated that their sense of professionalism enabled them 'to put aside personal feelings'.<sup>102</sup> Professionalism according to another lawyer was about 'being analytical, logical, and objective – regardless of how it personally affects you.'<sup>103</sup> Another lawyer when discussing a child sexual assault case that they were anxious to win stated: 'My own personal feelings about the outcome ought to influence the case much less than any other factor. I have been successful in establishing a way of operating where I suspend belief and judgment.'<sup>104</sup>

---

<sup>96</sup> Chapter 2, 30-31.

<sup>97</sup> Ibid.

<sup>98</sup> Lacewing, above n 71, 80.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid 75.

<sup>101</sup> Abbe Smith, 'Defending the Unpopular Down-Under' (2006) *Melbourne University Law Review* 495, 497.

<sup>102</sup> Ibid 515.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid 541.

Apparently these lawyers believe emotion affects legal judgment negatively and that they wouldn't be able to do their jobs effectively if they acknowledged their emotion. They are intellectualising because they appear to be avoiding the affective force of their emotions. Whilst they acknowledge experiencing emotions, they seem unwilling to feel them and account for them indicating a potential lack of emotional self-awareness. This suggests that these lawyers are engaging in self-representation because emotion is being treated as a fact to be excluded from deliberation. The inference from this example is that detachment means repressing, denying and isolating emotion thereby ignoring the personal significance of the emotion. An implication of treating emotion as a fact and avoiding the significance of emotion, is denying the significance of personal values and morality. It could be concluded that intellectualisation for these lawyers appears to be a form of defence mechanism, protecting them from having to rationalise their emotions, personal values and morality with the more unsavoury aspects of their jobs. However as Daniel L Shapiro observes, in relation to the reluctance of lawyers to acknowledge emotionality in legal practice, '[j]ust because we exclude something does not mean that it no longer affects us.'<sup>105</sup> Apart from the impact of this on the psyche of lawyers, unacknowledged and unappreciated emotion can impact on ethical judgment, as illustrated by *Morel*. In such circumstances, it is less likely that appropriate emotional detachment is being exercised, or that genuine ethical deliberation is being engaged in that would set wider ethical parameters around the legal analysis of the problem.

In this Part it has been argued that self-awareness means becoming more aware of emotions, feeling them, learning how to examine and account for them, and learning how to react to them effectively. A lack of emotional self-awareness manifests in self-representation, intellectualisation, inappropriate emotional responses and inappropriate emotional detachment. These issues can lead to poor judgment, unethical conduct and dissociation from personal values and morality. Therefore emotional self-awareness is an essential component of the intellectual capacity of intrapersonal intelligence, 'thinking like a lawyer' and ethical judgment.

### 3.4.2 Interpersonal Intelligence

Interpersonal intelligence denotes the capacity to understand another person's desires and motivations and to use that knowledge to effectively deal with other people.<sup>106</sup> The ability to understand the other requires a capacity for empathy.<sup>107</sup> Empathy is not a discrete emotion; it is an emotional process which can manifest in any emotion.<sup>108</sup> The legal academics Fletcher

---

<sup>105</sup> Daniel L Shapiro, 'A Negotiator's Guide to Emotion: Four 'Laws' to Effective Practice' (2001) 7 (2) *Dispute Resolution Magazine* 3, 3 in Erin Ryan, 'The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation' (2005) 10 *Harvard Negotiation Law Review* 231, 249. See also Susan Bandes, 'Repression and Denial in Criminal Lawyering' (2006) 9 *Buffalo Criminal Law Review* 339.

<sup>106</sup> Burton, above n 25, 38-41.

<sup>107</sup> Interpersonal intelligence requires other capacities such as communication and assertiveness.

<sup>108</sup> Chapter 2, 35.

and Weinstein contend that empathic communication is a critical dimension of lawyering and that without empathy, valuable affective and cognitive information in the client's case may be lost.<sup>109</sup> Fletcher and Weinstein state that empathy can be understood to mean feeling the emotion of another, and understanding the experience or situation of another, both affectively and cognitively.<sup>110</sup> This definition is consistent with the definitions in Chapter 2. However 'feeling the emotion of another' is overstated in comparison to Deonna's conception of feeling 'in tune' which only requires feeling a 'token emotion' of a similar kind as experienced by the other.<sup>111</sup> On either definition, empathy involves understanding and evaluating the emotion and experience of the other through an affective connection. As with intrapersonal intelligence, there needs to be a balance between having a sufficient degree of empathy (engagement) and a sufficient degree of detachment (objectivity).<sup>112</sup> When there is too much objectivity, empathy can be inhibited leading to a lack of understanding of the other. When there is too much engagement boundary violations can occur which can lead to unethical conduct. These issues are considered below.

According to Wispe, empathy requires self-awareness and the ability to understand the subjective experiences of the other.<sup>113</sup> A genuine capacity for empathy is distinguished from being a detached observer. This is when empathy is based on observation and labelling a person's feelings from which the lawyer is removed.<sup>114</sup> In this situation there is an insufficient degree of engagement. Observation is distinguished from perception. As discussed in Chapter 2, Vetlesen argues that the ability to recognise a situation as morally salient requires the ability to empathise and it is this interpersonal capacity that is the entry point into the domain of the moral.<sup>115</sup> Taking the detached observer stance lacks identification and inhibits empathy. A lack of identification can lead to labelling feelings, meaning that the observer may be aware of the circumstances of the other but by not engaging with the other's emotions, does not understand the significance of their motivations, values and goals. This is problematic because a lack of understanding means important information is discounted, thereby constraining the observer's capacity to deal effectively with the other. There can be different levels of identification, even barriers to empathy, because people have many differences including cultural, gender and socio-economic

---

<sup>109</sup> Laurel E Fletcher and Harvey M Weinstein 'When Students Lose Perspective: Clinical Supervision and the Management of Empathy' (2002-2003) 9 *Clinical Law Review* 135, 135.

<sup>110</sup> Ibid 139.

<sup>111</sup> Chapter 2, 35.

<sup>112</sup> Nigel Duncan 'Addressing Emotions in Preparing Ethical Lawyers' in Maharg and Maughan, above n 16, 268.

<sup>113</sup> Chapter 2, 34.

<sup>114</sup> Fletcher and Weinstein, above n 109.

<sup>115</sup> Arne Johan Vetlesen, *Perception, Empathy, and Judgment: An Inquiry into the Preconditions of Moral Performance* (The Pennsylvania State University Press, 1994) 308-309.

differences. It may not be possible to genuinely empathise because of these differences and in such cases self-awareness ensures that empathy is not used insincerely or strategically.<sup>116</sup>

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).’<sup>117</sup> In the current context it means the misplaced emotions of a lawyer on a client<sup>118</sup> and occurs when there is an insufficient degree of detachment. The case of *Morel* can be characterised as an example of counter-transference, where too much empathic engagement manifested as love and led to boundary violations. For boundary violations to be avoided, or dealt with if they arise, requires self-awareness, the ability to recognise emotional responses, habits and dispositions, and the ability to analyse how emotion can affect the lawyer/client relationship.<sup>119</sup> Practitioners, in situations like those in *Morel*, are more able to avoid boundary violations by acknowledging the reasons for experiencing certain emotions and engaging in the re-education of their emotional capabilities. This is why it is important to emphasise the emotional aspects of legal practice with students, and to provide them with opportunities where they can consider their own emotional capabilities with respect to ethical judgment.

Emotional self-awareness assists in striking the balance between empathic engagement and detached objectivity.<sup>120</sup> The intellectual capacity of interpersonal intelligence is more fully realised when emotional self-awareness is recognised as an essential component of that capacity. Legal education should therefore encourage and develop the capacity of empathy in students but also encourage students to develop appropriate detachment in order to avoid the consequences of a lack of identification, distant observation and counter-transference. Using cases such as *Morel* in teaching and learning strategies encourages students to consider appropriate emotional detachment. Kristin B Gerdy examined strategies from medicine that gave students experience with clients, empathy and compassion, and has suggested that teaching and learning empathy in law is similar.<sup>121</sup> The strategies include using the humanities, reflection techniques, and experiential learning. These techniques engage the capacities of narrative and personal intelligence and can reveal the need for a balance between empathy and detachment. Further explanation and application of some of these techniques are given in Chapter 5.

---

<sup>116</sup> Chapter 2, 35-36.

<sup>117</sup> Silver, above n 73, 271.

<sup>118</sup> Ibid 270. See Also Susan Daicoff ‘Law as a Healing Profession: The Comprehensive Law Movement’ (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1.

<sup>119</sup> Silver, above n 73, 276.

<sup>120</sup> Duncan, above n 112, 268.

<sup>121</sup> Kristin B Gerdy ‘Clients, Empathy, and Compassion: Introducing First Year Students to the Heart of Lawyering’ (2008-2009) 87 *Nebraska Law Review* 1, 52.

### 3.5 Conclusion

Resolving ethical issues is form of problem-solving which requires lawyers to exercise judgment. It is in this way that ‘thinking like a lawyer’ is utilised in exercising legal-ethical judgment and decision-making. This chapter has argued that emotion is involved in ‘thinking like a lawyer’ and that Burton’s model is an appropriate vehicle for recognising how emotion is implicated in or influences legal judgment. The knowledge of emotion from Chapter 2 has been integrated to expand the understanding of emotion in the capacities of narrative and personal intelligence. The analytical framework of ‘thinking like a lawyer’ is not antithetical to the analytical frameworks related to emotion. Indeed Burton’s model demonstrates that traditional analytical skills can be learned together with the analytical skills involved in the emotional aspects of ethical judgment. Fletcher and Weinstein contend that personal and professional growth influence lawyers’ emotional reactions to and engagement with legal practice and that ‘while frequently overlooked as a dimension of legal problem-solving, the progression of a law student into a legal professional entails attention to these two factors.’<sup>122</sup> The inclusion of emotion in ‘thinking like a lawyer’ reinstates the subjectivity of students and enables them to come to their own understanding of what ‘being a lawyer’ means. ‘Being’ in conjunction with ‘thinking’ encompasses a broader range of intellectual capacities, subjective and contextual realities.<sup>123</sup> This allows students to gain a more comprehensive understanding of what is involved in the cognitive processes of ‘thinking like a lawyer’ and better equip them to account for emotion and other humanistic concerns in exercising ethical judgment.

Narrative intelligence is an intellectual capacity that is required for legal and ethical judgment. Narratives evoke emotional activity and they can also reveal the structure of an emotion meaning that narrative intelligence is utilised in the appraisal of emotion. The emotional content of narrative intelligence involves the evaluation emotional preferences, perspectives, beliefs, values and dispositions. Emotionally self-aware people subject their emotional narratives to analysis to examine and evaluate their experiences. The legal narrative of *Morel*, and the emotional narrative within, was used to demonstrate how emotion can be analysed. *Morel* is an example of how a lack of emotional self-awareness impaired the practitioner’s personal and professional judgment. Using elements from Solomon’s narrative theory of love exemplified how a lack of emotional self-awareness led to boundary violations and unethical behaviour. Using Nussbaum’s theory on the evaluative properties of emotion demonstrated how *Morel*’s need to be a rescuer and the prioritisation of this need led to the ‘wrong story’ of love being told and exposed unacknowledged habits and dispositions to think and act on love in certain ways.

Emotion is also involved in the personal intelligences. These intellectual capacities are also integral to legal and ethical judgment. Intrapersonal intelligence requires emotional self-

---

<sup>122</sup> Fletcher and Weinstein, above n 109, 146.

<sup>123</sup> See Julian Webb, ‘Being a Lawyer / Being a Human Being’ (2002) 5 *Legal Ethics* 130; Julian Webb, ‘The Body in Emotion: Thinking Through Embodiment in Legal Education’ in Maharg and Maughan, above n 16, 214; Nancy B Raporort, ‘Is “Thinking Like a Lawyer” Really What We want to Teach?’ (2002) 91 *Journal of the Association of Legal Writing Directors* 91, 94.

awareness which involves becoming more aware of emotions, learning how to examine and account for them and learning how to react to them effectively. This is essential for developing appropriate emotional responses, exercising appropriate emotional detachment and leads to better ethical judgment, problem-solving and maintaining emotional well-being. This chapter demonstrated that when logical-mathematical and strategic intelligences are given precedence in legal education then the style of lawyering that is promoted is technocratic and legalistic. If ethical problems are equated with legal problems, students will naturally see their own emotions and the emotions of others as facts and will intellectualise their emotional experiences. This is problematic because it can lead to poor ethical judgment and discordance between personal values and professional roles. If legal educators, the profession and the public, want more genuine ethical deliberators then more focus on the personal intelligences should be incorporated into legal education generally and into legal ethics education specifically. This will involve educating students about the importance of emotional self-awareness and providing opportunities for them to develop and apply it in legal contexts.

Interpersonal intelligence requires empathy and this is important for identification with others. When a detached observer stance is taken there is too much objectivity resulting in empathy being inhibited and lack of understanding of the other. However, there needs to be a balance between empathic engagement and a sufficient level of objective detachment otherwise boundary violations may occur. Boundary violations include counter-transference and this can be avoided by developing emotional self-awareness and engaging in the education of the emotions. Equipping students with this knowledge and these skills is essential and should not be thought of as an ancillary skill to be acquired through experience in legal practice. Legal educators can develop teaching and learning strategies that develop the capacity of empathy and appropriate emotional detachment in students. This includes, but is not limited to, using the humanities, reflection techniques and experiential learning. All three strategies employ different forms of narrative, engage students in narrative intelligence and they support the development of intrapersonal and interpersonal capacities and skills. How emotion, narrative intelligence, intrapersonal and interpersonal intelligence can be implemented into a legal ethics curriculum is the subject of the case study in the following chapters.

# 4.0 CASE STUDY PART ONE: UTS LAW LEGAL ETHICS CURRICULUM DEVELOPMENT

## 4.1 Introduction

This chapter presents the first part of the case study by explaining the development of the legal ethics curriculum at UTS Law in 2013. In order to do this background is given on how ethics curricula have been implemented in Australian law schools and therefore the context in which UTS Law developed its legal ethics curriculum. There are different approaches to how legal ethics education is delivered in Australian law schools. They include single foundational and vocational subjects, and the pervasive approach which embeds legal ethics in core legal subjects throughout the curriculum. The pervasive approach coincides with the incremental approach. The incremental approach allows time for students to recognise and reflect upon ethical issues and develop knowledge and skills incrementally. The ‘judgment approach’ to legal-ethical decision-making acknowledges that ethical questions arise in every subject and that this provides opportunities to explore the ethical issues, rules and obligations, and the structural conditions that contribute to the ethical issues and the way judgments are made.<sup>1</sup> Chapter 2 showed that emotions contain evaluative judgments and are implicated in moral and ethical judgment. Emotions can have perceptive, motivational and evaluative functions in moral judgment and they are also connected to ethical judgment because it reconciles normative standards, moral judgment and action. Chapter 3 showed how 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. Therefore, emotion and the way in which it is involved in ‘thinking like a lawyer’ is relevant to the ‘judgment approach’ to legal-ethical decision-making. Ideally, learning about ethical judgment, as with learning how to ‘think like a lawyer’, would be built on from subject to subject allowing for the incremental development of student knowledge and skill. Approaching the teaching of ethical judgment in this way would also be beneficial to the development of emotional self-awareness in students as this requires time to recognise, reflect on and evaluate emotional experiences and dispositions.<sup>2</sup>

The purpose of the case study in this chapter is to demonstrate how knowledge about emotion and its relationship to ‘thinking like a lawyer and ethical judgment can be introduced into a pervasive legal ethics curriculum in an educationally justified way. As outlined in Chapter 1,

---

<sup>1</sup> Maxine Evers, Leanne Houston and Paul Redmond, ‘Good Practice Guide (Bachelor of Laws): Ethics and Professional Responsibility (Threshold Learning Outcome 2)’ 2011. Support for the original work was provided by the Australian Learning and Teaching Council Ltd, an initiative of the Australian Government Department of Education, Employment and Workplace Relations, 3.

<sup>2</sup> See Chapter 2, Part 2.4.

this is a qualitative case study that seeks to explain the ‘dynamics of a certain historical period of a particular social unit’<sup>3</sup> and places emphasis on the explanation of process and context.<sup>4</sup> The qualitative case study has also been described as an approach ‘that facilitates exploration of a phenomenon within its context using a variety of data sources.’<sup>5</sup> Instrumental case studies are qualitative. An instrumental case study provides a general understanding of a phenomenon using a particular case.<sup>6</sup> This type of case study has been chosen because the intent behind it is to gain insight and understanding.<sup>7</sup> The phenomenon that the case study considers is the question of how to recognise and critique the emotional aspects of ‘thinking like a lawyer’ in legal ethics education. This cannot be considered without the context of law school pedagogies. Thus, the particular case analysed is the substance and form of the program of legal ethics education at UTS Law.

This thesis combines these approaches and has the following scope:

- Consideration of the dynamics and phenomena involved in developing a legal ethics curriculum that includes the emotional aspects of legal-ethical judgment;
- during the 2013 curriculum review;
- within the social unit and context of the Faculty of Law, University of Technology Sydney (UTS);
- using data sources such as UTS Course Intended Learning Outcomes and curriculum development policy, law subject outlines, teaching materials, assessment items, and faculty coursework policies.

The UTS Law faculty is the context for the case study and was chosen for the following reasons. UTS Law has, prior to the 2013 curriculum review, attempted to develop a pervasive and incremental approach to legal ethics by embedding the ethics graduate attribute in three substantive law subjects. However, it is arguable whether the pervasive, judgment and incremental approaches were fully realised in that attempt. The 2013 curriculum review provides an opportunity to analyse that problem and to consider the relevant educational factors and strategies that will improve the pervasive and incremental approaches, including the role of emotion in legal-ethical judgment. As will be illustrated below the legal ethics curriculum at UTS combines different approaches and the case study provides conclusions from which generalisations can be made about legal ethics education and the inclusion of emotion in ethical judgment. As such, the knowledge gained from this case study can be transferred and adopted in other law school settings.

---

<sup>3</sup> Randy Stoecker, ‘Evaluating and Rethinking the Case Study’ (1991) 39 (1) *The Sociological Review* 88, 98.

<sup>4</sup> *Ibid* 93-94.

<sup>5</sup> Pamela Baxter and Susan Jack, ‘Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers’ (2008) 13 (4) *The Qualitative Report* 544, 544.

<sup>6</sup> Kenneth Harling, ‘An Overview of Case Study’ [http://www.farmfoundation.org/news/articlefiles/284-1\\_harling.pdf](http://www.farmfoundation.org/news/articlefiles/284-1_harling.pdf) (09/07/2012).

<sup>7</sup> Baxter and Jack, above n 5, 550.

After the 2013 curriculum review, UTS Law employs a combination of a foundational ethics subject in year one and the pervasive and incremental approaches throughout the Bachelor of Laws (LLB) and Juris Doctor (JD) degrees. The ethics curriculum at UTS Law utilises the incremental and pervasive approaches by embedding the ethics graduate attribute into core law subjects. Currently at UTS Law there are six graduate attributes.<sup>8</sup> The ‘ethics and professional responsibility’ attribute and its corresponding Course Intended Learning Outcome (CILO) is the focus of this chapter. The development of graduate attributes and CILOs is explained in Part 4.3. This Part demonstrates how emotion, although not explicitly stated, is captured in the statements of the ethics graduate attribute and the corresponding CILO. The graduate attributes and CILOs are integrated into the Bachelor of Laws and Juris Doctor degrees via subject learning objectives. Subject learning objectives provide the means from which to introduce knowledge about emotion within the subjects embedding the ethics attribute. I was a participant in the faculty workshop that developed the ethics attribute and the ethics attribute sub-committee.<sup>9</sup> This sub-committee devised the subject learning objectives implementing the ethics attribute and CILO into core law subjects.

There are three overall aims of this chapter. The first is to explain the context of how legal ethics curricula have been implemented in Australian law schools and UTS in particular. Second, to demonstrate that knowledge about emotion in legal ethics education is best introduced via the pervasive and incremental approaches. These aims are achieved in Part 4.2 where the current approaches to teaching ethics and professional conduct in Australian law schools is explained. This provides the context for the incremental and pervasive approach adopted by UTS Law. It is argued that the introduction of the emotional aspects of ‘thinking like a lawyer’ and legal-ethical judgment should be done pervasively and incrementally. The third aim is to demonstrate that the ethics graduate attribute, CILO and subject learning objectives developed at UTS Law, provide the means from which to introduce knowledge about emotion (as discussed in previous chapters). This aim is achieved in Part 4.3 which charts and analyses the development of the incremental and pervasive approach to legal ethics at UTS Law. The analysis of the 2007 curriculum review briefly critiques the attempt to embed the ethics attribute pervasively and incrementally in that period. The analysis of the 2013 curriculum review explains the development of the ethics graduate attribute, the corresponding CILO, the new subject learning objectives and the process of improving the pervasive and incremental approach to legal ethics at UTS. All of these factors enable the role of emotion in legal-ethical judgment to be included in the legal ethics curriculum at UTS in an educationally justified way.

---

<sup>8</sup> The six graduate attributes are: (1) Legal Knowledge; (2) Ethics and Professional Responsibility; (3) Critical analysis and evaluation; (4) Research skills; (5) Communication and collaboration; (6) Self-management. The attributes have been formulated to accord with the six Teaching and Learning Outcomes endorsed by the Council of Australian Law Deans in March 2012.

<sup>9</sup> The ethics attribute sub-committee was comprised of four law academics including the Director of Students and the Director of Courses and a lecturer from the UTS Institute for Interactive Media and learning.

## **4.2 Current approaches to teaching ethics and professional conduct in Australian Law curricula**

The aim of this part is to explain the current approaches to teaching ethics and professional responsibility in Australian law curricula. The part considers single foundational and vocational subjects, pervasive and incremental approaches and thereby providing the context in which UTS Law has developed its legal ethics curriculum. The part concludes by explaining why it is important to introduce knowledge about the role of emotion in legal-ethical judgment incrementally and pervasively.

### **4.2.1 Single Foundational and Vocational subjects**

In 2008 the Australian Council of Law Deans (CALD) produced a catalogue of teaching legal ethics and professional responsibility in Australian law schools for the purpose of ongoing analysis of the educational approaches in this area.<sup>10</sup> This strategy accords with CALD's goal to 'develop effective means to inculcate in Australian law students the values of professionalism, ethics and service.'<sup>11</sup> The catalogue discloses a range of subjects offered by Australian law schools. Ethics teaching in Australian law schools can be divided into academic (undergraduate legal studies) and vocational (legal practice course) phases.

Typically during the academic phase, universities offer foundation subjects in the first or second year of study. For example, according to the CALD catalogue, at the Australian National University students undertake the subject 'Lawyers, Justice and Ethics' in first year and at Macquarie University students undertake the subject 'Law, Lawyers and Society' in second year. In the vocational phase the majority of universities teach subjects in 'Professional Conduct', 'Ethics and Professional Conduct' or 'Legal Ethics and Trust Accounting'. Subjects such as these typically focus on professional responsibility rules. These universities may provide other learning opportunities or exposure to legal ethics. However the important point is, that whilst students undertaking such units of study are exposed to legal ethics or professional conduct, a single subject on its own, does not provide opportunities for pervasive and incremental learning about ethics and the development of judgment, skills and knowledge throughout the curriculum.

Apart from embedding graduate attributes in core legal subjects, UTS Law also had a separate vocational subject 'Ethics and Professional Conduct' as part of the Practical Legal Training (PLT) program<sup>12</sup> at the end of the curriculum. As a capstone subject it was here that ethics had its primary focus. It was decided under the 2013 curriculum review, and in accordance with the Priestly 11,<sup>13</sup> that students should have a focused and earlier exposure to

---

<sup>10</sup> Australian Council of Law Deans, 'A Catalogue of the Teaching of Legal Ethics, Professional Responsibility, etc. in Australian Law Courses', November 2008, 3. <http://www.cald.asn.au/docs/4.1Ethics.pdf> (16/05/2012).

<sup>11</sup> Ibid 1.

<sup>12</sup> On completion of the current PLT program students acquire a Graduate Certificate in Legal Practice which enables them to obtain a practising certificate.

<sup>13</sup> The Priestly 11 are the 11 law subjects required to be successfully completed for admission as a legal practitioner in Australia. Ethics and Professional Conduct is one of those subjects.

ethics and that this should be re-enforced throughout the degree. As such, with the implementation of the curriculum review at UTS in 2014, Ethics and Professional Conduct was disbanded and the professional responsibility aspect of it will now be taught in the PLT subject Legal Skills. The ethics aspect of the subject will be taught through a new first year foundational subject called ‘Ethics, Law and Justice’, which commenced in semester one 2014. That subject is a core subject and will cover the philosophical, social, professional and personal substance of ethics. The ethics program at UTS now comprises a first year foundational ethics subject, embeds ethics pervasively across select core law subjects and, for students enrolled in PLT, a vocational subject will cover professional responsibility and trust accounting.

#### 4.2.2 Pervasive, Judgment and Incremental approaches

Literature in legal ethics education suggests that the preferred approach to teaching and learning ethics is a pervasive and incremental approach.<sup>14</sup> The pervasive approach means that legal ethics is embedded throughout the law curriculum. The incremental approach means that knowledge and skills are developed in stages with increasing complexity. These approaches are preferred by many legal educators because students can practice exercising ethical judgment at different points during the curriculum, consider different ethical problems and perspectives, enhance skills and ethical analysis, gain awareness of structural and regulatory issues, and reflect on their values and how those influence ethical judgment.<sup>15</sup> This is intended to give students the opportunity to develop their capacity for ethical judgment and problem-solving.

Amongst the advocates of the pervasive approach to legal ethics there is divergence about how curricula should be designed to maximise student exposure and increase knowledge. Granfield and Koenig argue that legal ethics courses should impart three overriding skills:

- (1) An ability to recognise ethical considerations generated in various legal practice scenarios;
- (2) an ability to analyse such scenarios within a conceptual framework of ethical, jurisprudential, as well as legal, considerations;
- and (3) a capacity for and willingness to engage in reflective judgment.<sup>16</sup>

---

<sup>14</sup> See Deborah L Rhode, ‘Ethics by the Pervasive Method’ (1992) 42 *Journal of Legal Education* 31; Deborah L Rhode, ‘Into the Valley Of Ethics: Professional Responsibility and Educational Reform’ (1995) 58 *Law & Contemporary Problems* 139; Deborah L Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (Aspen Publishers, 2<sup>nd</sup> ed, 1998); Steven Hartwell, ‘Promoting Moral Development Through Experiential Learning’ (1994-1995) 1 *Clinical Law Review* 505; Russell G Pearce, ‘Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School’ (1998) 29 (4) *Loyola University Chicago Law Journal* 71; Carrie Menkel-Meadow and Richard H Sander, ‘The Infusion Method at UCLA: Teaching Ethics Pervasively’ (1995) 58 (3-4) *Law and Contemporary Problems* 129; Douglas N Frenkel, ‘On Trying to Teach Judgment’ (2001) 12 *Legal Education Review* 19; Gonzalo Villalta Puig, ‘Legal Ethics in Australian Law Schools’ (2008) *The Law Teacher* 29.

<sup>15</sup> Deborah L Rhode, ‘Ethics by the Pervasive Method’ above n 14, 32.

<sup>16</sup> 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, 520.

These skills are compatible with the framework of ‘thinking like a lawyer’ in Chapter 3. In that chapter legal-ethical judgment and the ability to undertake ethical analysis were connected to ‘thinking like a lawyer’. 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 identifies six intellectual capacities<sup>17</sup> that are necessary for the aptitude to undertake legal problem-solving, reasoning and judgment. Narrative intelligence and the personal intelligences are two of those capacities. Both narrative and the personal intelligence require the ability to perceive and analyse, and the capacity to engage in reflective judgment. This includes the emotional content of these intelligences. Incremental learning is implicit in the three overriding skills above, because acquiring and developing those skills, like learning how to ‘think like a lawyer’, is an ongoing process. Granfield and Koenig conclude that imparting these skills is best done by integrating ethics into the whole curriculum pervasively, because that approach enables a contextual perspective. But rather than embedding ethical components into substantive law subjects, these academics suggest that there should be ‘several specialised courses that address ethics across a range of professional practice areas.’<sup>18</sup>

In evaluating<sup>19</sup> the pervasive approach to legal ethics at the University of California, Los Angeles (UCLA), Menkel-Meadow and Sander found firstly, that the pervasive method should not be solely relied on, as students encountering ethics in up to six subjects would only cover a fraction of the material covered in a professional responsibility subject.<sup>20</sup> In addition to embedding legal ethics in substantive law subjects, having a professional responsibility subject at the end of the curriculum provides students with the time to learn and understand the unifying concepts and structure of professional responsibility laws, regulations and rules. Secondly they found that the more faculty members who participate in pervasive teaching using participatory and experiential techniques, then the more effective the method would be.<sup>21</sup> According to Menkel-Meadow and Sander, the more exposure students have to ethics, the more likely they are to draw connections to other subjects and other ethical topics.<sup>22</sup>

Granfield and Koenig favour specialised subjects throughout a degree that address ethics across a range of professional practice areas. Menkel-Meadow and Sander favour the embedding of legal ethics in substantive law subjects across the degree with a capstone subject in professional responsibility. This model was used at UTS Law prior to 2014.

---

<sup>17</sup> They are linguistic intelligence, categorising intelligence, logical-mathematical intelligence, narrative intelligence, the personal intelligences and strategic intelligence. See Chapter 3, Part 3.2.

<sup>18</sup> Granfield and Koenig above n 16, 522.

<sup>19</sup> Menkel-Meadow and Sander, above n 14, 135. Focus groups were conducted with students who volunteered. The authors acknowledge the limitations of this methodology.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

Cramton and Koniac differ from these approaches as theirs involves a first year foundational subject that is ‘supplemented with a well-designed and deliberate effort to-teach ethics through the pervasive method’.<sup>23</sup> In the 2013 curriculum review, UTS Law adopted a combination of the Cramton and Koniac, and Menkel-Meadow and Sander models. UTS Law now has a foundational ethics subject, embeds ethics pervasively into core law subjects and has a vocational subject where professional responsibility and trust accounting will be taught. This change was made in accordance with the Priestly 11 requirements, the Teaching and Learning Outcomes,<sup>24</sup> and the integration of the new ethics graduate attribute.<sup>25</sup>

#### 4.2.2.1 Australian pervasive approaches

In the last decade Australian law faculties have embarked on projects to increase the ethical and professional acumen of students. For example, many Australian universities and law faculties, including UTS, formulated graduate attributes<sup>26</sup> amongst them ethics and professionalism, with the aim of giving students the opportunity to develop these attributes throughout their degrees. Christensen and Kift, define graduate attributes as

the qualities, capabilities and understandings of a graduate which a university community agrees students should develop during their time at the institution, both for their future professions and to make a contribution as ordinary citizens.<sup>27</sup>

Graduate attributes include technical skills and knowledge and encompass broader skills such as communication, teamwork and self-management. Christensen and Kift observe that the majority of research indicates ‘the most effective way of developing skills within a graduate attribute is to embed those skills within the curriculum’ because this allows students to develop skills and acquire knowledge incrementally.<sup>28</sup> However, the success of this approach depends largely on the proper co-ordination and deployment of substantive material and skills components throughout the degree.<sup>29</sup> Part 4.3 analyses the co-ordination of the pervasive and incremental approach to embedding the ethics attribute at UTS Law.

---

<sup>23</sup> Roger C Cramton and Susan P Koniac, ‘Rule, Story, and Commitment in the Teaching of Legal Ethics’ (1996-1997) 38 *William & Mary Law Review* 145, 149.

<sup>24</sup> See Evers, Houston and Redmond, above n 1.

<sup>25</sup> See Appendix One, Table 1 for a full list of the attributes prior to 2013 and Table 2 for a full list of the new attributes developed in the 2013 curriculum review.

<sup>26</sup> For example Queensland University of Technology, Griffith University, University of Western Australia, Australian Catholic University, University of South Australia, University of Melbourne, University of Adelaide, University of Tasmania, Bond University, University of New South Wales, Newcastle University, University of Western Sydney, Australian National University.

<sup>27</sup> Sharon Christensen and Sally Kift, ‘Graduate Attributes and Legal Skills: Integration of Disintegration?’ (2000) 11 *Legal Education Review* 207, 207.

<sup>28</sup> *Ibid* 220.

<sup>29</sup> Sally Kift, ‘21<sup>st</sup> Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law’ (2008) 18 *Legal Education Review* 1, 16.

Griffith Law School has adopted vertical subjects into their law curriculum. A vertical subject is a separate subject, with separate learning objectives, content and assessment. The subject is pervasive because it is hosted by multiple substantive subjects<sup>30</sup> and learning is incremental because the learning objectives ‘increase in complexity from one host subject to the next.’<sup>31</sup> Areas of substantive law and practice are identified within the host subject where ethics is implicated and ethics learning objectives, teaching and assessment are aligned to the learning objectives of the host subject.<sup>32</sup>

Embedding graduate attributes is a partially vertical approach. Under the 2007 curriculum review at UTS Law, embedding graduate attributes within core subjects was the task of the individual subject co-ordinator, which involved writing a learning objective, deciding what content within the subject was relevant to the attribute, and deciding whether the graduate attribute would be assessed. In comparison, a vertical subject appears to be a more formalised and pedagogically considered approach. Whilst UTS is not implementing a vertical subject, there is considerable benefit from recognising an approach that develops learning objectives and assessment in a coordinated and incremental way and then applying this to the embedding of graduate attributes. If the implementation of graduate attributes into subjects is co-ordinated properly, then this model should achieve the same pervasive and incremental results as a vertical subject. The attempt to formally co-ordinate the embedding of the ethics attribute in the 2013 curriculum review is discussed in Part 4.3.2 below.

#### **4.2.3 Emotion, Judgment, Pervasive and Incremental learning**

The pervasive approach to teaching and the judgment approach to legal-ethical decision making, recognise that legal ethics should be embedded as broadly as possible across the curriculum.<sup>33</sup> This allows students to increase awareness as to when ethical judgment is required and to develop their capacity for exercising ethical judgment. The judgment approach also allows for the consideration of the role of emotion in legal-ethical judgment. For example, the ‘ethics-as-judgment approach’ recognises that ethical judgment is a process involving deliberation about ‘personal, moral, and political problems’ which requires the ability to synthesise the intellectual and emotional components of a problem.<sup>34</sup> The ability to account for the positive and negative influences of emotion on judgment, including ethical judgment, requires an understanding of the evaluative judgments that emotions contain. Recognising and understanding those evaluative judgments requires a capacity for emotional

---

<sup>30</sup> Michael Robertson, ‘Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective’ (2005) 8 *Legal Ethics* 222.

<sup>31</sup> *Ibid* 237.

<sup>32</sup> *Ibid* 238. The vertical subject is also acknowledged in the Good Practice Guide as a viable alternative to traditional law school education of legal ethics. The Guide does not provide assistance on the implementation of such an approach and at this point there is no evaluation on the vertical subjects offered at Griffith University; Evers, Houston and Redmond, above n 1, 4.

<sup>33</sup> Evers, Houston and Redmond, above n 1, 3; Puig, above n 14, 45.

<sup>34</sup> Puig, above n 14, 28.

self-awareness. Allowing students to acquire better emotional self-awareness and to practice making judgments that may involve emotion requires time to recognise, reflect, develop insights, and to make connections to personal values and beliefs. Therefore, the introduction of knowledge pertaining to role of emotion in legal-ethical judgment should ideally be taught across the curriculum and the complexity of such knowledge should increase from subject to subject.

The pervasive, incremental and judgment approaches complement teaching and learning strategies in relation to introducing knowledge about emotion. As stated above ‘thinking like a lawyer’ is connected to ethical judgment as this is another form of problem-solving encountered by lawyers. ‘Thinking like a lawyer’ involves the capacities of narrative intelligence and the personal intelligences and emotion is involved in both of those intelligences. Thus the role of emotion in legal-ethical judgment is implicated in learning how to ‘think like a lawyer’. This means that if Burton’s model of ‘thinking like a lawyer’ is applied in legal ethics education the emotional content of narrative intelligence and personal intelligences can be introduced pervasively into the subjects that embed the ethics attribute. As above, the complexity of the emotional content in those intellectual capacities should increase incrementally along with the substantive legal ethics material in each subject. This theme is reiterated in the following Parts.

### **4.3 Case Study: UTS Law Ethics Curriculum**

This part begins by charting the development of the pervasive and incremental approach to legal ethics at UTS Law. The analysis of the 2007 curriculum review in Part 4.3.1 explains the history of embedding the ethics attribute at UTS Law, and emphasises the process and context leading up to the 2013 curriculum review which is the main focus of the case study. Part 4.3.2 explains the contextual factors and the process of developing and implementing the ethics attribute under the 2013 curriculum review. This Part demonstrates that including knowledge about emotion within legal ethics education at UTS is consistent with student learning outcomes at institutional and faculty levels. In Part 4.3.3 the new subject learning objectives that embed the ethics graduate attribute are stated, in order to demonstrate how the subject learning objectives promote incremental learning of the emotional aspects of legal ethics, and how knowledge about emotion is either explicitly or implicitly included within the content of the learning objectives.

#### **4.3.1 The 2007 Curriculum Review**

In 2007, UTS Law undertook a curriculum review, one aim of which was to formulate and implemented graduate attributes into the curriculum. Ten graduate attributes were implemented covering the intellectual, professional and personal domains.<sup>35</sup> The ethics attribute was stated as the ‘capacity to value and promote honesty, accountability and ethical

---

<sup>35</sup> See Appendix One, Table 1 for a full list of the attributes prior to 2013.

standards.’ This formulation of the attribute is narrower than the current statement<sup>36</sup> and is not explicit about the skills and knowledge components of legal ethics. There were three core subjects in the LLB and JD that targeted the ethics attribute: Perspectives on Law, Torts and Corporate Law. In addition students undertaking Practical Legal Training (PLT) in the vocational phase undertook the subject Ethics and Professional Conduct.

Table 1 - 2007-2013 LLB/JD Progression – Ethics Attribute

<b>Year of Study</b>	<b>Semester</b>	<b>Core Subject</b>
One	One	Perspectives on Law
One	Two	Torts
Two or Three	One or Two	Corporate Law
Four	PLT	Ethics & Professional Conduct

As illustrated in Table 1, this curriculum was not completely pervasive because an entire year did not have ethics coverage in core subjects.<sup>37</sup> Further, the idea behind the pervasive approach is to allow incremental learning and development, but this depends largely on the systematic co-ordination and deployment of substantive ethics material and skills components throughout the degree. When the first round of graduate attributes was embedded in core law subjects in 2007, individual subject co-ordinators were given the task of matching the attribute with subject learning objectives and implementing teaching and learning strategies. Whilst this gave co-ordinators autonomy in respect of the content of ethics within their subjects, it meant that the implementation of the attribute was not co-ordinated. Although aspects of what Kift describes as ‘whole-of-program mapping’ were attempted, it was not fully realised.<sup>38</sup> Because subject co-ordinators were not supported and directed through the process, they focused on how the attribute was situated within their subject, as opposed to collaborating on how the attribute and corresponding learning objective sat within the program of ethics education as a whole.<sup>39</sup> The result of the unco-ordinated and unsupported implementation meant that incremental learning was not adequately considered.

---

<sup>36</sup> See Table 2 below.

<sup>37</sup> Under the 2013 curriculum review Perspectives on Law is now redundant and is being replaced with the subject Foundations of Law which will not target the ethics attribute. The PLT subject Ethics and Professional Conduct has been disbanded with the professional responsibility and trust accounting components being taught in the PLT subject Legal Skills, and the philosophical ethics components being taught in the foundational subject Ethics, Law and Justice which does target the ethics attribute.

<sup>38</sup> Kift, above n 29, 17.

<sup>39</sup> Ibid.

This process was more like what Kamvounias and Thompson describe as a ‘top-down approach’ leading to ‘mapping exercises where learning goals are matched with attribute categories’ as opposed to developing learning objectives that embed the attribute.<sup>40</sup> The result of the ‘top-down’ approach meant that ethics topics tended to be construed narrowly and this might be expected given the way in which the attribute was stated, the lack of teaching and learning support, and the attempt to fit more content into core law subjects without losing substantive material. This also meant that broader ethical factors, like personal values, morality and emotion were overlooked.

### 4.3.2 The 2013 Curriculum Review

In 2013, UTS Law finalised the curriculum review which began in 2012 and the new curriculum was implemented in 2014. The process involved reformulating the graduate attributes to accord with the Threshold Learning Outcomes (TLOs) recommended by the Council of Australian Law Deans in 2012.<sup>41</sup> Additionally, UTS required faculties to formulate Course Intended Learning Outcomes (CILOs) for degrees that reflected and complied with the Australian Qualification Framework (AQF) levels.<sup>42</sup> UTS Law appointed an academic to co-ordinate the Graduate Attributes Project. A faculty wide consultation and workshop reformulated the graduate attributes and sub-committees were formed to translate the attributes into subject learning objectives. The rationale behind dedicating a group of academics to formulate learning objectives was to ensure the pervasive and incremental implementation of the graduate attributes into core law subjects.<sup>43</sup> Subject outlines linked learning objectives to the relevant graduate attribute, so that students are aware of and can demonstrate the attainment of the attributes at the end of their degree.

Graduate attributes are distinguished from Course Intended Learning Outcomes (CILOs) and Threshold Learning Outcomes (TLOs), but all are factors that influence the formulation of subject learning objectives, assessment tasks and assessment criteria. UTS adopted the following hierarchy and relationship between graduate attributes, CILOs, TLOs and individual subjects within degrees:<sup>44</sup>

---

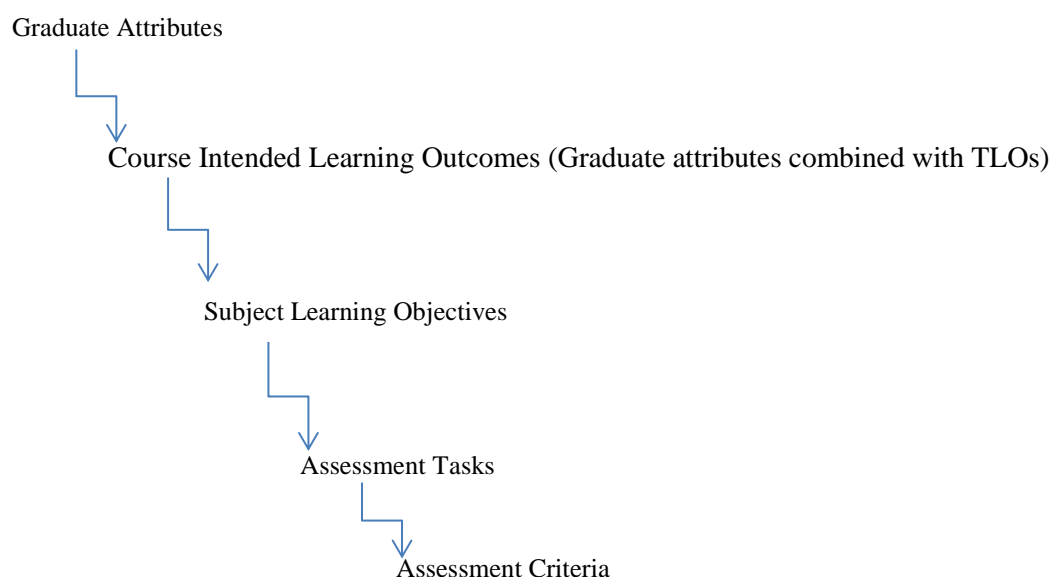
<sup>40</sup> Patty Kamvounias and Darrall Thompson, ‘Assessing Graduate Attributes in the Business Law Curriculum’ (2008) 1 (1) *Journal of the Australian Law Teachers Association* 181, 181.

<sup>41</sup> TLOs are defined in Part 4.3.2.2.

<sup>42</sup> CILOs are defined in Part 4.2.2.3.

<sup>43</sup> Kift, above n 29, 18.

<sup>44</sup> Diagram adapted from UTS: Terminology used in the Graduate Attribute Project – Institute for Interactive Media and Learning, <http://www.iml.uts.edu.au/curriculum/definitions.html>



In this Part, the broader context of developing graduate attributes and CILOs is described because specific subject learning objectives are derived from these. It is demonstrated that the statements of the ethics graduate attribute, TLO and CILO require judgment and include the intellectual capacities of narrative and the personal intelligences in ‘thinking like a lawyer’ and therefore the emotional content of those capacities. This Part begins by defining graduate attributes, TLOs, CILOs and then ends with an explanation of how the ethics attribute will be embedded into the LLB and JD at UTS. Part 4.3.3 states the subject learning objectives that embed the ethics attribute via the CILO. This Part focuses on how the learning objectives promote incremental learning and how emotion is included within the content of the objectives.

#### **4.3.2.1 Graduate Attributes 2013**

Prior to the 2013 curriculum review there were ten graduate attributes. This has been changed and there are now six graduate attributes. The attributes were reformulated to accord with the six TLOs and the differences between the LLB and JD in the Australian Qualifications Framework (AQF) levels.<sup>45</sup> The new attributes were merged with TLOs to formulate the CILOs discussed below. The differences between the outcome levels for the LLB and JD in Table 2 below pertain to the standards required under CILOs and reflect the different AQF levels. The content of the attributes remain largely the same although some have been merged under umbrella terms. This was done for two primary reasons. Firstly, merging some of the attributes simplified the process of drafting the CILOs and ensured that all the essential curriculum benchmarks were included in a coherent format. Secondly, the merge was

---

<sup>45</sup> See footnote 58 for a description of the differences between the AQF levels for a Bachelor’s and Master’s degree. See Appendix One, Tables 2 and 3 for a full list of the LLB and JD graduate attributes post 2013.

intended to make the task of drafting subject learning objectives, assessment tasks and assessment criteria more manageable.

Table 2 - Ethics Graduate Attribute 2013 curriculum review

<b>Course</b>	<b>Ethics Attribute</b>
LLB - AQF level 7	Ethics & professional responsibility - A capacity to value and promote honesty, integrity, accountability, public service and ethical standards including an understanding of approaches to ethical decision-making, the rules of professional responsibility and, an ability to reflect upon and respond to ethical challenges in practice.
JD - AQF level 9	Ethics & professional responsibility - An advanced and integrated capacity to value and promote honesty, integrity, accountability, public service and ethical standards including an understanding of approaches to ethical decision-making, the rules of professional responsibility, an ability to reflect upon and respond to ethical challenges in practice, and a developing ability to engage in the profession of law and to exercise professional judgment.

Although the attributes in Table 2 are not specific about the role of emotion in legal-ethical judgment, they capture this in the way they are framed. For example, in requiring ‘an ability to reflect upon and respond to ethical challenges’, the capacity of narrative intelligence may be engaged because constructing a story can contextualise the problem, assists in making sense of the ethical challenge and in understanding the perspectives of the people and factors involved. Such factors could include the personal feelings of the lawyer or accounting for the feelings of others. This also indicates that reflecting upon and engaging with ethical challenges involves intrapersonal and interpersonal intelligence because students may need to reflect and assess their own emotions, personal values and attitudes when faced with ethical challenges.<sup>46</sup> Students may also have to consider these factors in relation to others and the impact that their responses to ethical challenges can have on others. An ‘understanding of approaches to ethical decision-making’ requires consideration of the roles and responsibilities of lawyers and their obligations to society, and developing values about justice.<sup>47</sup> It also requires the ability to understand one’s own approach to ethical decision-making and the subjective and objective factors that influence ethical judgment. The ‘capacity to value and promote honesty...’ implies the relevance of intrapersonal intelligence because this requires awareness of personal values, such as honesty, and developing a sense of integrity.<sup>48</sup> Emotions are concerned with value because they can denote what is important about a person, thing or event, and emotions can reflect pre-existing concerns such as moral beliefs

<sup>46</sup> Diana Henriss-Anderssen, ‘Teaching Legal Ethics to First Year Law Students’ (2002) 13 *Legal Education Review* 45, 50.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

and principles. Arguably, the statements of the graduate attribute involve a broad conception of legal-ethical judgment and are capable of capturing the involvement of emotion in such judgment.

#### 4.3.2.2 Threshold Learning Outcomes (TLOs)

Threshold Learning Outcomes (TLOs) are a benchmark standard intended to apply to all Australian law faculties. Support for developing the TLOs was given by the Australian Learning and Teaching Council Ltd and TLOs pertaining to law were commissioned by the Law Associate Deans Network and endorsed by the Council of Australian Law Deans in March 2012.<sup>49</sup> Six TLOs<sup>50</sup> were developed having regard to national and international statements on the competencies, skills and knowledge that law graduates should have. TLO 2 relates to Ethics and Professional Responsibility and is stated as:

Graduates of the Bachelor of Laws<sup>51</sup> will demonstrate:

- (a) An understanding of approaches to ethical decision-making
- (b) An ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts
- (c) An ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community
- (d) A developing ability to exercise professional judgment.

Like the statements of the graduate attribute above, the TLO captures the inclusion of the role of emotion in legal-ethical judgment because of the way it is articulated. The statements of the competencies, skill and knowledge in (a)-(c) above are the same as in the graduate attribute and as such, the same argument that they capture the role of emotion in legal-ethical judgment is also applicable to the TLO. The JD graduate attribute in Table 2 above and point (d) in the TLO require the ability to exercise professional judgment. A Good Practice Guide was developed as a resource to assist legal educators to facilitate student learning and the development of skills as set out in TLO 2.<sup>52</sup> The Guide states that students should be encouraged ‘to learn that lawyers need constantly to make judgment calls that often involve personal choices’ and that the role of personal values need to be emphasised.<sup>53</sup> This statement recognises that ethical knowledge and the ability to engage in ethical judgment involves self-awareness. This can also involve emotional self-awareness, including how emotion is involved in personal choices and personal values and how these factors can play a role in legal-ethical judgment. Importantly for this thesis, there is recognition that ‘the best way to

---

<sup>49</sup> [http://www.cald.asn.au/media/uploads/JD%20TLOs%20\(March%202012\)%20Andrew%20Kenyon1.pdf](http://www.cald.asn.au/media/uploads/JD%20TLOs%20(March%202012)%20Andrew%20Kenyon1.pdf).

<sup>50</sup> TLO 1 Knowledge, TLO 2 Ethics and Professional Responsibility, TLO 3 Thinking Skills, TLO 4 Research Skills, TLO 5 Communication and Collaboration, TLO 6 Self-management.

<sup>51</sup> The Juris Doctor standard for the TLO requires ‘an advanced and integrated understanding of approaches to ethical decision-making.’ The differences in standard reflect the AQF levels for different degrees.

<sup>52</sup> Evers, Houston and Redmond, above n 1.

<sup>53</sup> Ibid 3.

teach legal ethics is to incorporate moral judgment'.<sup>54</sup> As demonstrated in Chapter 2, emotion can have perceptive, motivational and evaluative functions in moral judgment. Therefore, in order for the teaching of legal-ethical judgment to be comprehensive it should include moral judgment and the factors, such as emotion, that moral judgment encompasses.

#### 4.3.2.3 Course Intended Learning Outcomes (CILOs)

Course Intended Learning Outcomes (CILOs) are a statement of what students will be able to do as a result of successfully completing the course requirements of their degree.<sup>55</sup> At UTS, CILOs are based on a combination of graduate attributes<sup>56</sup> and TLOs. The CILOs reflect the level (e.g. Bachelors or Masters) of the disciplinary context.<sup>57</sup> Currently the Australian Qualifications Framework (AQF) determines learning outcome descriptors for different qualification types. For example a bachelor's degree is at AQF level 7 and a master's degree is at level 9.<sup>58</sup> The levels are contrasted in several indicia including knowledge, skills and application.<sup>59</sup> Table 3 states the CILO for ethics and professional responsibility and illustrates the combination of the graduate attribute and the TLO at AQF level 7.

Table 3 - Ethics Level 7 and 9 Course Intended Learning Outcome

	<b>CILO AQF Level 7 (LLB)</b>
Ethics & Professional Responsibility	<p>A capacity to value and promote honesty, integrity, accountability, public service and ethical standards including:</p> <p>An understanding of approaches to ethical decision-making and professional responsibility; and</p> <p>An ability to recognise, reflect upon and respond to ethical issues likely to arise in professional contexts in ways that evidence professional judgment, promote justice and serve the community.</p>

<sup>54</sup> Ibid 4.

<sup>55</sup> UTS: Terminology used in the Graduate Attribute Project – Institute for Interactive Media and Learning, <http://www.iml.uts.edu.au/curriculum/definitions.html>

<sup>56</sup> See Appendix One Table 2 and 3 for a full list of the new graduate attributes.

<sup>57</sup> UTS: Terminology used in the Graduate Attribute Project – Institute for Interactive Media and Learning, <http://www.iml.uts.edu.au/curriculum/definitions.html>

<sup>58</sup> The differences between outcome levels 7 and 9 can be broadly summarised in the following way: Level 7 knowledge is broad and coherent, level 9 knowledge is advanced and integrated including recent developments; level 7 skills are well developed and level 9 skills are expert, specialised; the indicia for level 7 application of knowledge are autonomy, well developed judgment, responsibility and self-direction within the broad parameters in a work context or as a learner, level 9 indicia are autonomy, expert judgment, adaptability, responsibility and self-direction as a practitioner or learner.

<sup>59</sup> See Appendix One Table 4 for all LLB and JD CILOs.

This CILO encompasses what has been described as the ‘whole student’ model because it engages the cognitive (intellectual), affective (values) and skill domains of legal ethics.<sup>60</sup> The affective domain includes ‘emotions, values, attitudes, habits and beliefs’.<sup>61</sup> Emotion can also be involved in the cognitive domain of legal ethics. For example, Chapter 2 established that some emotions are cognitive because they contain evaluative judgments, thereby tacitly engaging the intellectual domain of legal ethics. Emotion is also involved in ‘thinking like a lawyer’ and this is an element of the intellectual domain of legal ethics. Therefore the ‘whole student’ model explicitly and implicitly recognises emotion as a factor in legal ethics.

CILOs inform the formulation of subject objectives. In order for students to attain the CILO, subject learning objectives need to be formulated to increase in complexity so that students can learn incrementally, including the emotional factors contained in the CILO. The application of the ethics CILO in the subject learning objectives embedding the ethics attribute is explained in Part 4.3.3. Because the CILO encompasses the whole student approach, the content of subject learning objectives would ideally include the cognitive, affective and skill domains of legal ethics.<sup>62</sup> However, as discussed in Part 4.3.3.2, whether the affective domain is included at the subject level depends on how the subject objectives are interpreted and applied.

#### 4.3.2.4 Subjects embedding the ethics attribute

Under the 2013 curriculum review the ethics attribute sub-committee, of which I was a member, embedded the attribute more pervasively by increasing the number of subjects spread across the core curriculum.

Table 4 - 2014 LLB/JD Progression – Ethics Attribute & CILO

Semester	Core Subject
One (year 1)	Ethics, Law and Justice
Two (year 1)	Torts
Three (year 2)	Civil Practice
Four (year 2)	Evidence and Criminal Procedure
Five (year 3)	Corporate Law
PLT (year 3 or 4)	Legal Skills

<sup>60</sup> Henriss-Anderssen, above n 46, 49. See also Puig, above n 14, 52.

<sup>61</sup> Henriss-Anderssen, above n 46, 50.

<sup>62</sup> Ibid.

Ethics, Law and Justice was an obvious place to embed the ethics attribute, and the sub-committee decided to retain Torts and Corporate Law, because these substantive subjects already embed the attribute. The procedural subjects of Civil Practice and Criminal Procedure and Evidence were added to make the program more pervasive. Consideration had to be given to distributing the six graduate attributes equitably between core subjects and this is a reason why one semester, in year 3 or 4, does not have ethics coverage. This limitation was unavoidable however; ethics coverage has been improved from the previous curriculum.<sup>63</sup> Articulating incremental learning is achieved through subject learning objectives and this is discussed in the following Part.

### 4.3.3 Embedding the ethics attribute in subject learning objectives

The aim of this part is to explain how learning objectives for the core subjects that embed the ethics attribute were formulated by the ethics attribute sub-committee at UTS Law. This process involved the application of the constructionist learning theory of the educational psychologist John Biggs.<sup>64</sup> This theory focuses on the learner and refers to the idea that learners construct knowledge for themselves. Teaching therefore, is about providing the environment that supports learners in constructing knowledge. For the purpose of this thesis it is not necessary to describe the entire process and the theory that was applied by the sub-committee in formulating the learning objectives. This Part instead focuses on how emotion is included within the content of the learning objectives and how they promote the incremental learning of the emotional aspects of legal-ethical judgment and. Table 5 below contains the subject learning objectives embedding the ethics attribute via the CILO in core law subjects.

Table 5 – Subject learning objectives - Ethics Attribute & CILO 2014

<b>Subject</b>	<b>Learning Objectives</b> - On successful completion of the subject students should be able to:
Ethics, Law & Justice	Develop an ethical framework for the practice of law together with the ability to recognise ethical questions.  Recognise the relationship between personal and professional attitudes and values and approaches to ethical decision-making.  Consider the impact of personal values, emotions and morals in ethical decision-making.
Torts	Recognise the perspectives of various stakeholders and to satisfactorily reconcile these differing perspectives.
Civil Practice	Evaluate the components and processes of ethical decision-making in a context of alternative modes of problem-solving.
Evidence	Evaluate and reflect on the roles of lawyers in the administration of justice.

<sup>63</sup> See Table 1 above.

<sup>64</sup> Constructionist learning theory is applied at UTS in developing learning objectives and aligning teaching and learning strategies and assessment to those objectives.

Corporate Law	<p>LLB – Reflect on the professional responsibilities of lawyers and demonstrate the capacity to exercise ethical judgment.</p> <p>JD – Reflect on the professional responsibilities of lawyers and demonstrate and advanced and integrated capacity to exercise ethical judgment.</p>
---------------	--

#### 4.3.3.1 Subject learning objectives and incremental development

Subject learning objectives are a statement of learning outcomes<sup>65</sup> that ideally include the standard at which knowledge and skills are to be demonstrated. Biggs makes a distinction between quantitative learning objectives that are intended to increase knowledge and qualitative objectives that are intended to deepen understanding.<sup>66</sup> By focusing on the qualitative, deep learning approaches are encouraged, and the challenge is to highlight qualitative aims in subject learning objectives and support this through teaching and assessment methods.<sup>67</sup> Qualitative objectives state relational outcomes (the orchestration between facts and theory, action and purpose) or extended abstract outcomes (conceptualisation beyond what is taught).<sup>68</sup> Qualitative objectives are the intended learning outcomes, but within teaching and learning strategies and assessment some quantitative aims may be appropriate. This is because quantitative learning happens first and progresses to qualitative learning.<sup>69</sup> Quantitative objectives state uni-structural outcomes (simple, minimalistic, referring to one learning aspect) or multi-structural outcomes (descriptive).<sup>70</sup>

Levels of understanding are communicated in subject learning objectives by verbs that indicate what students need to do in order to demonstrate the level of understanding.<sup>71</sup> For example, multi-structural verbs include ‘enumerate, describe, list, and combine’ and extended abstract verbs include ‘theorise, generalise, hypothesise, and reflect.’<sup>72</sup> The subject learning objectives in Table 5 contain verbs that denote the increase in complexity from subject to subject and therefore the ascension of levels of understanding. This was a deliberate attempt by the sub-committee to ensure incremental learning between the subjects and is illustrated in Table 6 below.

<sup>65</sup> John Biggs and Catherine Tang, *Teaching for Quality Learning at University* (Open University Press, 4<sup>th</sup> ed, 2011) 118. Biggs previously used the term ‘objective’ but now prefers the term ‘outcome’. As UTS uses the term ‘objective’ that is the language that will be applied in this thesis. See also Joanna Allan, ‘Learning outcomes in higher education’ (1996) 21 (1) *Studies in Higher Education* 93.

<sup>66</sup> Biggs and Tang, above n 65, 90.

<sup>67</sup> John Biggs, *Teaching for Quality Learning at University* (Open University Press, 2<sup>nd</sup> ed, 2003) 41.

<sup>68</sup> Biggs and Tang, above n 65, 91.

<sup>69</sup> John Biggs, *Teaching for Quality Learning at University* (Open University Press, 1999) 37.

<sup>70</sup> Biggs and Tang, above n 65, 91.

<sup>71</sup> Biggs and Tang, above n 65, 90.

<sup>72</sup> *Ibid* 91.

Table 6 – Incremental subject learning objectives

Subject	Verbs used	Levels of understanding
Ethics and Professional Conduct and Ethics Law and Justice	Develop Recognise Consider	Relational Uni-structural Relational
Torts	Recognise Reconcile	Uni-structural Relational
Civil Practice	Evaluate	Relational
Evidence	Evaluate Reflect	Relational Extended abstract
Corporate Law	Reflect	Extended abstract

The overall purpose of embedding ethics pervasively is the incremental development of knowledge and understanding over the degree. The intended outcome of this process is that students attain the graduate attribute via the Course Intended Learning Outcome (CILO). The ultimate aim of the CILO and graduate attribute is that students acquire an extended-abstract level of understanding. These standards are reflected in the CILO which describes competency by using verbs such as ‘reflect’ and ‘engage’. Therefore, in order to achieve these outcomes the pervasive and incremental approaches have been employed at the subject level in the learning objectives. The incremental progress of learning in the subject learning objectives also applies to the role of emotion in legal-ethical judgment. For example, one of the objectives in the foundational subject Ethics, Law and Justice requires students to ‘consider the impact of emotions’ in ethical decision-making. Later in Corporate Law the objective requires students to demonstrate the ‘capacity to exercise ethical judgment’. Therefore, students should advance from considering the role of emotion in legal-ethical judgement in the beginning of their degree, to being able to account for it in such judgment toward the end of their degree. This will depend on whether emotional content is adopted in each subject and this issue is discussed further below.

#### 4.3.3.2 The content of the subject learning objectives

Biggs cautions educators to be aware of the ‘inevitable tension between coverage and depth of understanding.’<sup>73</sup> The result of having too much content is over-teaching at the expense of giving students the time to perform understanding in different situations.<sup>74</sup> Accordingly,

<sup>73</sup> Biggs above n 69, 44.

<sup>74</sup> Ibid.

breadth of coverage results in surface learning and quantitative learning outcomes.<sup>75</sup> Conversely, depth of coverage results in deep learning and qualitative outcomes.<sup>76</sup> Apart from Ethics and Professional Conduct (and Ethics, Law and Justice) where the entire subject deals with ethics, it is important to remember that the ethics content, in other UTS subjects that embed the ethics attribute, is learned in conjunction with the substantive legal topics. This means that the core law subjects that embed the attribute will have to consider the amount of formalised ethics content in order to encourage depth of understanding. Additionally, the ethics topics within individual subjects need to align with the content in the subject learning objective. Similarly, the opportunities to introduce emotion in this content will have to be relevant to the substantive material and the learning objective and therefore not every emotional topic, as conceived in Chapters 2 and 3, should be covered in each subject.

As Table 5 above shows, the third learning objective in Ethics and Professional Conduct and Ethics, Law and Justice explicitly refers to emotion. Because several learning objectives in these subjects refer to the ethics attribute, the ethics attribute sub-committee thought it important to explicitly refer to emotion. There are several topics within these subjects where emotion is actively discussed, and its inclusion in the learning objective, promotes emotion from the outset as a valid intellectual pursuit and consideration in ethical judgment. This subject is also where students will begin to make the connection between ‘thinking like a lawyer’, legal-ethical-judgment and emotion.

The subject learning objectives for Torts, Civil Practice, Evidence and Criminal Procedure, and Corporate Law, make no reference to the role of emotion in legal ethics or in legal-ethical judgment. The tension here was between clarity, in the sense that learning objectives should accurately convey what is to be learned and what standard it is to be learned at, and the idea that emotion and thinking are not separate so that specifying the role of emotion could make it seem distinct from ethical judgment. A decision was made by the ethics attribute sub-committee in favour of keeping the objectives broad enough to encapsulate many components, including emotion, without making explicit reference to them. This is also consistent with the way the CILO is stated, which explicitly includes emotion in the affective domain and implicitly in the cognitive domain. For example, the learning objective in Evidence and Criminal Procedure states that students should be able to ‘evaluate and reflect on the roles of lawyers in the administration of justice’. The focus on the roles of lawyers provides the opportunity to discuss the ethics of advocacy and how lawyers use emotion to influence juror decision-making. The aim of this topic is to encourage students to evaluate how lawyers can enact their role in the administration of justice, to reflect on what it means to ‘think like a lawyer’ ethically, and to examine the evaluations and moral justifiability of emotions such as contempt and anger. Additionally, students are engaging both the cognitive and emotional aspects of narrative intelligence, through a consideration of how lawyers control and construct narratives and use emotion persuasively.

---

<sup>75</sup> Ibid.

<sup>76</sup> Ibid 45.

However, the lack of explicit reference to emotion in the subject learning objectives can create a situation where emotion continues to be marginalised. For example, in the subject Torts, I wrote the content for a teaching and learning strategy that included the role of emotion in legal-ethical judgment.<sup>77</sup> This was given to the subject co-ordinator of Torts at the end of 2013. It was the intention of the subject co-ordinator to implement this content in 2014. The new content and teaching and learning strategy built on the ethics content already covered. In this subject, substantive cases on the advocates' immunity are used to explore the tortious area of professional negligence and to reveal the ethical issues involved in these circumstances. In 2013, students were asked to consider several questions relating to the readings, but only one covered the ethical aspects of professional negligence: 'What are the boundaries of advocates' immunity as clarified in *D'Orta-Ekenaike*?' This case centres on the advice given to the client and how the client acted on it.<sup>78</sup> The topic of legal ethics appears to have only been given token consideration and that a wider range of ethical factors, such as emotion, were not considered at all. However, this case provided the opportunity to introduce the consideration of the emotional aspects of legal-ethical judgment into this seminar through the use of further discussion questions. The discussion questions I suggested and gave to the subject co-ordinator would encourage students to identify and consider how the emotions of various actors impacted on their decision-making, including the role of sympathy and empathy in giving ethical legal advice.

Those suggested questions were not included in the 2014 materials. The subject co-ordinator explained

At a meeting (before the semester commenced) of torts teachers and [name omitted] (who was coordinating the Grad Attributes integration into core subjects) the issue of the way in which the materials reflected the Subject Learning Outcomes was discussed and it was thought that the questions for discussion of advocates immunity should specifically address the subject learning outcome of "Recognise the perspectives of various stakeholders and how the law of tort attempts to reconcile these." Accordingly the following more general discussion question was substituted in place of the questions concerning emotions:

*Consider the perspectives of the parties to this case. Does the law of tort adequately reconcile these?*<sup>79</sup>

In relation to addressing the subject learning objective, the emotional content and questions I formulated were consistent with the learning objective. The questions encouraged students to recognise and articulate the perspectives of the primary stakeholders in the case and to satisfactorily reconcile these differing perspectives through a consideration of the different

---

<sup>77</sup> I do not teach in this subject.

<sup>78</sup> The applicant was charged with rape and was advised that the charge was legally indefensible. He was also advised that if he pleaded guilty he would get a suspended sentence as opposed to a custodial sentence if he pleaded not guilty and was convicted. He pleaded guilty and was given a custodial sentence and on appeal the applicant was acquitted. *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 9-10.

<sup>79</sup> Email communication received on 14 May 2014. Permission was given via email on 15 May 2014 to reproduce these comments.

emotional perspectives of those stakeholders. Interpersonal intelligence is an essential skill in lawyering and the strategy I proposed provided students with the opportunity to understand the ethical implications of not developing and practising that skill.

This example indicates that, although the inclusion of emotion is educationally justifiable, more work has to be done in order to convince academics that it is so. If some of the subjects embedding legal ethics omit emotion from the subject learning objectives and content, then it is less likely to pervade the curriculum and students are less likely to be given the opportunity to develop their knowledge and skills incrementally. Thus, similar problems to the embedding of the graduate attribute in the 2007 curriculum review are being repeated in relation to embedding emotion in the legal ethics curriculum.

Despite the lack of formalised emotional content in Torts, the subject co-ordinator stated

In my own class discussion of the *D'Orta-Ekenaike case*, students expressed some disquiet, having considered the circumstances outlined by Kirby J and they recognised that Mr D'Orta must have felt very pressured to give the instructions sought by his legal advisors. I was particularly struck by the students' empathy for Mr D'Orta. I pressed them for their thoughts on how the lawyers might have better dealt with the situation. They recognised that the lawyers should have been alert to their client's difficult situation – both emotional and social – and that there might have been a very different outcome if they had been more empathetic. So the discussion was a positive one and I thought that it highlighted the issues well.<sup>80</sup>

Whilst it is encouraging to hear that some students have the ability to identify and consider the role of emotion in ethical questions, this quote indicates that in the current circumstances it is largely the influence of individual academics 'pressing' students 'for their thoughts' about the emotional content. Without specific discussion questions relating to the role of emotion in legal-ethical judgment, it is likely that many academics will not include that content. The subject co-ordinator could see the benefits of opening up the ethical discussion to include emotion and when students were engaged with their own feelings of empathy, they were able to perceive and relate to the ethical problem differently.

Apart from communicating the educational justifiability of including the emotional components of legal ethics, this example makes it apparent that the attitude of academics to this material also needs to be considered. In implementing the pervasive approach to legal ethics at UCLA the law faculty undertook significant faculty re-education in both ethics and education techniques. It was found that this had a 'clear and positive effect upon the law school's faculty.'<sup>81</sup> This thesis seeks to address an aspect of academic re-education in ethics, by providing an extended discussion of emotional factors in ethics, and by giving examples of teaching and learning strategies that introduce knowledge about emotion into ethics material. However it is acknowledged, that without formalised faculty re-education that addresses attitudes to emotional content and the educational techniques that can be utilised, emotion will continue to be marginalised in legal ethics education.

---

<sup>80</sup> Ibid.

<sup>81</sup> Menkel-Meadow and Sander, above n 14, 133. See also Christensen and Kift, above n 27, 233-235, where the authors advocate for staff development and support in implementing graduate attributes into law subjects.

## 4.4 Conclusion

This chapter has introduced the case study by providing an overview of the contextual and institutional factors that influenced the development of the legal ethics curriculum at UTS Law. In discussing the context of how ethics curricula have been implemented in Australian law schools and the context in which UTS Law has developed its ethics curriculum, it was demonstrated that UTS uses a combination of a foundational ethics subject, the pervasive approach by embedding the ethics attribute into core law subjects and a vocational subject which covers the professional responsibility rule and trust accounting. This approach ensures that students have a focused and early exposure to legal ethics and that this exposure is continued throughout the degree. The pervasive and incremental approaches are beneficial in allowing students to develop their capacity for ethical problem-solving by exercising ethical judgment in different contexts, and by reflecting on their values and how this impacts on ethical judgment. By using Burton's model of 'thinking like a lawyer' students are also learning about the role of emotion in legal-ethical judgment via the capacities of narrative intelligence and the personal intelligences. Utilising these capacities allows students to consider a broader range of factors in ethical judgment and this is consistent with the way the graduate attribute, TLO, CILO are stated.

In discussing the historical context of embedding the ethics graduate attribute at UTS Law, it was noted that under the 2007 curriculum review, the model was not entirely pervasive and there was a lack of co-ordination in implementing and embedding the ethics attribute into subject learning objectives. The lack of coordination meant that incremental learning was not adequately considered. Additionally, graduate attributes tended to be matched with existing subject learning objectives as opposed to developing learning objectives that embedded the attribute. This meant that ethics topics tended to be construed narrowly and broader ethical factors like personal values, morality and emotion were not emphasised.

The discussion of the 2013 curriculum review showed the relationship between graduate attributes, course intended learning outcomes, teaching and learning outcomes, and subject learning objectives. It was here that the relevant factors outside of UTS (AQF and TLOs) and within UTS were contextualised and applied in developing graduate attributes and CILOs at UTS Law. The main reason for co-ordinating the implementation of the graduate attributes pervasively and incrementally is so students can achieve the learning outcomes and demonstrate how they have achieved them across the degree. Importantly, this Part revealed how the emotional aspects of legal-ethical judgment are consistent with the content and aims of the graduate attribute, CILO, TLO thus providing the educational justification for the inclusion of emotional knowledge in the legal ethics curriculum.

The learning outcomes of the CILO are achieved through incremental learning because the content of the subject learning objectives applying the CILO are different and the levels of understanding become more complex. A concerted effort was made by the ethics attribute sub-committee to implement the ethics attribute pervasively and to formulate subject learning objectives that incrementally increased in complexity. The learning objectives were formulated by utilising the pedagogical framework of John Biggs. The new learning objectives are criterion referenced and aim to encourage qualitative understandings of legal

ethics. The content of the subject learning objectives is broad enough to encompass wider ethical issues, such as the role of emotion in ethical judgment. This is consistent with the way in which the ethics graduate attribute and CILO explicitly and implicitly include emotion into ethical capacities such as judgment. However, whether the affective domain is included in the content of teaching and learning strategies will depend on how the subject objectives are interpreted and applied at the subject level.

Whilst the 2013 curriculum review has improved pervasive and incremental development of legal ethics, it remains to be seen whether ethics will be construed more widely to include factors such as emotion. This case study has revealed a major limitation in the introduction of knowledge about emotion in legal ethics education at UTS. This could be attributed to ineffective communication about the educational justifiability of including emotion and the attitude toward the inclusion of emotion by some academics. This highlights the need for formalised faculty re-education that addresses attitudes to emotional content and the educational techniques that can be utilised.

Having provided the educational justifications for including knowledge about emotion in legal ethics education the following chapter builds on the process explained in this chapter. It shows how knowledge about the role of emotion in legal-ethical judgment can be introduced via Burton's model of 'thinking like a lawyer' in the content of teaching and learning strategies for two core law subjects: Ethics and Professional Conduct and Evidence and Criminal Procedure. However, it is important to note, that the focus will not be on developing general content for each subject that targets the ethics attribute but on developing content that will enable students to consider and analyse the role of emotion in legal-ethical judgment.

# 5.0 CASE STUDY PART TWO: INTRODUCING EMOTIONAL KNOWLEDGE INTO TWO CORE LAW SUBJECTS AT UTS LAW

## 5.1 Introduction

This chapter supports the second overall aim of the thesis by demonstrating how the knowledge about emotion and legal-ethical judgment from Chapters 2 and 3 can be introduced into the content of teaching and learning strategies. The proposed strategies outlined in this chapter can be used in two (of five) core law subjects embedding the ethics attribute: Ethics and Professional Conduct, and Evidence and Criminal Procedure.<sup>1</sup> Chapter 4 stated the learning objectives for each core subject which embeds the ethics graduate attribute. It was argued that the content of those objectives, even if not explicit, were stated broadly enough to include consideration of the role of emotion in legal-ethical judgment. This chapter proposes content which is consistent with the learning objectives for Ethics and Professional Conduct, and Evidence and Criminal Procedure, and which advances the aim of providing students with the opportunity to consider and analyse the role of emotion in legal-ethical judgment.

The content I have developed in this chapter is designed to contribute to a better understanding about the different ways emotion is implicated in legal-ethical judgment and how legal educators can include knowledge about emotion from other disciplines. The purpose of providing a detailed explanation of the content of the teaching and learning strategies is to display how emotional analysis can be undertaken in class-room learning strategies and to promote deep learning approaches to learning. It is argued that by using concrete examples of how emotion is involved in legal-ethical judgment and how emotion can be integrated into teaching and learning strategies, this thesis will provide academics with a framework from which they can formulate their own teaching and learning strategies with a view to achieving learning outcomes for students such as: increased awareness and understanding of their own emotional capabilities and the ability to critically reflect on and analyse the role of emotion in ethical judgment. Additionally, it is argued that students will gain a more comprehensive understanding of ‘thinking like a lawyer’ and that this should improve their ability to make legal-ethical judgments, if an understanding of the role of emotion in such judgment is included.

---

<sup>1</sup> The core subjects are Ethics, Law and Justice; Torts; Civil Practice; Evidence and Criminal Procedure; and Corporate Law. See Chapter 4, Table 4.

Chapter 2 demonstrated that emotions involve evaluative judgments and are implicated in moral and ethical judgment. The evaluative properties of emotion and the reasons people have emotional responses were considered under three broad and interrelated categories: perception, cognition and emotional dispositions. To recap, the properties of and the relationship between these categories are as follows. The perception of the object of emotion has evaluative content, produces emotional responses and is essential to the moral domain. Perception is having the moral sensibility to see the suffering of others. This moral capacity depends on the emotional capacity of empathy. According to philosophers who advance cognitive theories emotions are defined by beliefs, thoughts or judgments directed toward the object, all of which are evaluations. The way in which the object is evaluated can be influenced by perception and emotional dispositions. Emotional dispositions are habits of thought and action that can influence how the object is perceived and evaluated. Emotional dispositions affect judgment because people are habituated toward thinking and acting on emotion in certain ways. The evaluative content of moral emotions was demonstrated in the discussion of empathy, sympathy, anger and contempt. Moral emotions have perceptive, motivational and evaluative functions in moral judgment. These emotions are also connected to ethical judgment because it reconciles normative standards, moral judgment and action. The categories of perception, cognition, emotional dispositions, and moral emotion are applied to the content of teaching and learning strategies in this chapter and in doing so, this chapter proposes materials which will enable students to consider and analyse the role of emotion in legal-ethical judgment.

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. Chapter 3 demonstrated how emotion is involved in ‘thinking like a lawyer’ and suggested that Burton’s model of ‘multiple lawyering intelligences’ is an appropriate vehicle for the inclusion of emotion in teaching legal-ethical judgment. In Burton’s model, narrative intelligence and the personal intelligences were identified as the intellectual capacities where emotion is explicitly involved. The capacity of narrative intelligence involves the ability recognise and evaluate emotional preferences, perspectives, beliefs, values and dispositions because these factors influence judgment. Emotionally self-aware people analyse their emotional narratives to examine and evaluate their experiences and to account for the impact of their emotions on judgment. Intrapersonal intelligence denotes the capacity to understand ourselves and requires emotional self-awareness. Self-awareness involves becoming more aware of emotions, learning how to examine and account for them and learning how to react to them effectively. Interpersonal intelligence denotes the capacity to understand and identify with others. This requires a balance between empathic engagement and a sufficient level of objective detachment, otherwise boundary violations may occur. Therefore the role of emotion in these intellectual capacities is essential to the way in which lawyers relate to themselves, their clients and other legal actors, and to developing ethical-problem solving skills and judgment. Both narrative intelligence and the personal intelligences feature in the content of teaching and learning strategies discussed in this chapter.

The subject Ethics and Professional Conduct provides an example of how emotion *already* features in the ethics curriculum at UTS Law. As stated in Chapter 4, Ethics and Professional Conduct has been disbanded and will not exist from 2015. However, much of the content regarding emotion in this subject, the teaching and learning strategies outlined below, and the ethics components are used in the new foundational subject Ethics, Law and Justice, and as such they remain relevant.<sup>2</sup> The professional responsibility aspect of the subject is now situated in the Practical Legal Training subject Legal Skills.<sup>3</sup> The subject Evidence and Criminal Procedure is used as a second example, of how emotion and judgment *could* be introduced into a subject that has not previously embedded the ethics attribute but does from the beginning of 2014.<sup>4</sup>

Part 5.2 outlines the learning objective and the content of teaching and learning strategies for the subject Ethics and Professional Conduct, and hence the replacement subject Ethics, Law and Justice. The learning objective targeting emotional content, the topics where emotion is considered, and the teaching and learning strategies are the same in each subject. The discussion focuses on how knowledge about emotion and its role in legal-ethical judgment was introduced in this subject and how it could be improved. There are three topics within Ethics and Professional Conduct where the emotional components of ethics are considered in detail, and as such content has been developed for each topic.<sup>5</sup> The current delivery of each topic and how it links to emotion and the capacities of narrative intelligence and the personal intelligences is explained. This is followed by recommendations for expanding on and improving the content to clarify the links between emotion and legal-ethical judgment and to encourage deep learning approaches. Whilst the focus is on the content of teaching and learning strategies, assessment tasks will be mentioned when they relate to the content being discussed. However, due to limited space assessment tasks will not be covered in depth.

My original contributions in the development of the content pertaining to emotion in each topic in Ethics and Professional Conduct are explained throughout the Part 5.2. The first topic is ‘theoretical perspectives of values, morals and ethics’. The seminar involves students participating in a perspective-taking activity by adopting the role of an actor in the criminal justice system. Perspective-taking is involved in ‘thinking like a lawyer’ via the capacities of interpersonal intelligence, empathy and narrative intelligence. Additionally, this activity

---

<sup>2</sup> In 2014, both subjects are running concurrently so that students, who enrolled prior to 2014 and who did not undertake the foundational subject will still do an ethics subject at the end of their degree.

<sup>3</sup> See Chapter 4, 4.2.1.

<sup>4</sup> See Chapter 4, Table 6.

<sup>5</sup> The content of Ethics and Professional Conduct is as follows: Topic 1 Theoretical perspectives of values, morals and ethics; Topic 2 Legal Ethics; Topic 3 The Legal Profession; Topic 4 Professional and Personal Conduct; Topic 5 Duty to the Court - Criminal Law; Topic 6 Duty to the Client - Civil Law; Topic 7 Duty to the Client - The retainer; Topic 8 Duty to the Client - Duty to account and costs; Topic 9 Duty to Colleagues, third parties and the public; Topic 10 Regulation and discipline; Topic 11 Emerging Issues; Topic 12 Conclusions and exam briefing. The corresponding topics where the emotional aspects of legal ethics are considered in Ethics, Law and Justice are: Topic 1 Ethics, Theory and the Law; Topic 2 Legal Players – Lawyers; and Topic 5 Ethics and Criminal Law.

introduces students to how narratives disclose and convey values and emotion and the relationship between morality, personal values and emotion. The second topic is ‘professional and personal conduct.’ In the seminar for this topic, disciplinary cases that involve emotion are analysed for the purpose of demonstrating how specific emotions, such as love and anger, can impact on ethical judgment. The suggested framework for this analysis applies cognitivist theories of emotion generally and the specific evaluations involved in moral emotion from Chapter 2. This activity is also designed to elicit the relationship between intrapersonal intelligence and emotional self-awareness. The third topic is ‘duty to the court – criminal law’. In the seminar for this topic, a criminal appeal case where the prosecutor was criticised for lacking objectivity and detachment is analysed. The purpose of the analysis is to demonstrate the role of sympathy and compassion in legal-ethical judgment and how these emotions can guide ethical behaviour. This activity also considers the relationship between emotional self-awareness and appropriate detachment.

Part 5.3 outlines the learning objective, and the content of a teaching and learning strategy for the subject Evidence and Criminal Procedure. Legal ethics is not the substantive focus of this subject and, as a result, the ethical and emotional content is not as comprehensive as it is in Ethics and Professional Conduct. It is for this reason that only one strategy in relation to the role of emotion in legal-ethical judgment has been proposed for this subject. This subject embeds the ethics graduate attribute via a specific learning objective which is being implemented for the first time in 2014. I devised the content of the teaching and learning strategy in this chapter for the purpose of formalising the ethics content to accord with the subject learning objective and to include knowledge about emotion. I created this ethics content by building on the existing substantive legal content and materials used in the seminar about the sexual assault communications privilege. This topic provides the opportunity to evaluate how emotion is used persuasively by lawyers when they create narratives intended to influence juror decision-making, and whether and in what circumstances this is ethical. In order to ascertain the ethical justifiability of using emotion persuasively, students participate in an evaluation of the moral justifiability of contempt.

## **5.2 Subject: Ethics and Professional Conduct 2013**

In 2013, Ethics and Professional Conduct began its transition from a Practical Legal Training subject<sup>6</sup> into a first year foundational core law subject; Ethics, Law and Justice. Substantial portions of Ethics and Professional Conduct were rewritten to comply with Priestly 11 requirements and so that material could be transferred over to the new foundational subject, which began in 2014. The reason that knowledge about emotion has already been introduced within Ethics and Professional Conduct is because the subject learning objectives changed because of the 2013 curriculum review, and one of those new objectives explicitly refers to emotion. Given my interest in legal ethics and emotion theory, I was asked by the subject co-

---

<sup>6</sup> 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.

ordinator in 2013 to assist in developing content pertaining to the role of emotion in legal ethics. The content I provided included primary sources such as cases which disclose the role of emotion in legal-ethical judgment,<sup>7</sup> newspaper articles,<sup>8</sup> and a summary of Burton's multiple lawyering intelligences model and how that related to the content provided. This content was used by the subject co-ordinator to devise teaching and learning activities, assessment and marking criteria,<sup>9</sup> and some of the material was included in the teaching notes for tutors.

Part 5.2.1 outlines how the subject learning objective relates to the role of emotion in legal-ethical decision-making. Part 5.2.2 examines the teaching and learning strategies which target this aspect of the learning objective. There are three topics where the emotional components of legal ethics are considered in detail and each topic is considered separately below. The discussion of each topic begins by explaining the current delivery and how the content links to the emotion theory discussed in Chapter 2, and how the content links to the capacities of narrative and the personal intelligences in Burton's model of 'thinking like a lawyer from Chapter 3. This is followed by suggestions for expanding on and improving the content to clarify these links.

### **5.2.1 Learning Objective**

All of the subject learning objectives in Ethics and Professional Conduct embed the ethics graduate attribute<sup>10</sup> and one of the subject learning objectives directly relates to the role of emotion in legal-ethical decision-making.

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

- Consider the impact of personal values, emotions and morals in ethical decision-making.<sup>11</sup>

The level of understanding is relational as denoted in the verb 'consider' meaning that in order to achieve the learning outcome, students have to demonstrate their ability to orchestrate between facts and theory, action and purpose.<sup>12</sup> Therefore learning strategies need to provide students with the opportunity to identify and consider the impact of emotion in

---

<sup>7</sup> See Part 5.2.2.2.

<sup>8</sup> See Part 5.2.2.1.

<sup>9</sup> There are three assessment tasks in Ethics and Professional conduct: class participation (20%), reflective journal (30%) and final exam (50%). There are three assessment tasks in Ethics, Law and Justice: reflective journal (30%), collaboration and discussion (20%) and final exam (50%).

<sup>10</sup> See Chapter 4, Table 5.

<sup>11</sup> Ethics and Professional Conduct 2013 Subject Outline. This objective is the same for Ethics, Law and Justice, 2014 Subject Outline.

<sup>12</sup> Chapter 4, Part 4.3.3.1.

ethical decision-making and to demonstrate their ability to integrate and explain the relationship between facts and theory, action and purpose.

In this subject, students are actively encouraged to consider legal ethics broadly, including the role of emotion and personal values in ethical decision-making. In Chapter 4, it was argued that the learning objectives for this subject were consistent with the ‘whole student’ approach in the ethics graduate attribute and Course Intended Learning Outcome.<sup>13</sup> The learning objective above engages the affective domain because it refers explicitly to values and emotion, and it engages the intellectual domain because emotions contain evaluative judgments and ‘thinking like lawyer’, which involves emotion, is an intellectual capacity which is utilised in ethical decision-making.

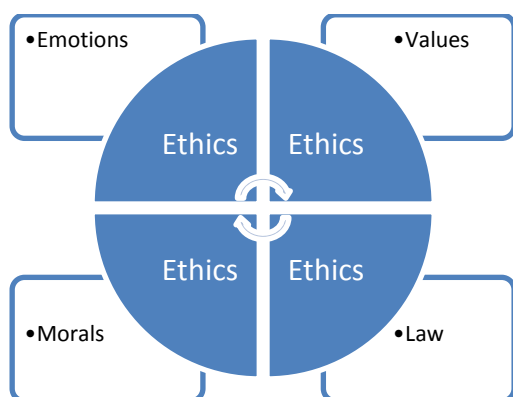
## 5.2.2 Teaching and Learning Strategies

Students have three hours of face-to-face contact in Ethics and Professional Conduct; divided between a 1 hour lecture and a 2 hour seminar. The materials I provided for the three topics below were intended for use in seminars; however, the subject co-ordinator also included some of the content in some of the lectures. Following is a brief description of those lectures, either to illustrate where the content about emotion was included, or for the purpose of contextualising the seminar material. There is a more in depth analysis of the content of seminars because the new foundational subject Ethics, Law and Justice is composed of a three hour seminar each week with no lectures, and the teaching and learning strategies outlined are currently being implemented in this subject.

### 5.2.2.1 Topic: Theoretical perspectives of values, morals and ethics

#### *Current Delivery*

In the first lecture students are introduced to the concepts of values, emotions, morals, and ethics and the relationships between them. These topics are returned to in the seminar content below.



Lecture slide

<sup>13</sup> The ‘whole student’ approach engages the cognitive, affective and skills domains of legal ethics; see Chapter 4, Part 4.3.2.3.

The lecture slide above illustrates that law, morals, emotions and values are connected to ethics and that all influence ethical judgment. A significant portion of the lecture explains the value of reflective practice and how this relates to a reflective journal, which is an assessment for the subject. This assessment was devised by the subject co-ordinator and it engages both the cognitive and emotional elements of narrative intelligence, interpersonal and intrapersonal intelligence. Students are actively encouraged to reflect on:

- Awareness of their own emotions, values, morals and ethics;
- How the above are formed;
- Identification of social values, morals and ethics;
- Relationships between personal and societal values, moral and ethics;
- Awareness of how as individuals we make decisions; and
- How the law, legal ethics and the study of law impacts on decision-making.

The reflective journal assessment requires students to demonstrate consideration of emotion and other factors in ethical decision-making. Further, this assessment enables students to recognise and account for their own emotions.

The first seminar consists of:

1. Introductions
2. Two small-group exercises
3. Reflective writing

I wrote the content pertaining to ethics and emotion myself whilst the class-room activities were devised by the subject co-ordinator. Although the foundational subject Ethics, Law and Justice has a three hour seminar, the amount of content and activities may still need to be revised in order to encourage deep approaches to learning.

This seminar is used as an opportunity to discuss the wider aspects of ethics and values, emotions, morality and ethics in legal practice. I proposed the following activity: students introduce themselves and share an example of a recent movie, news item, book, or a conversation where a value impacted on them. This introduction exercise is intended to show to students that knowledge and awareness of values is within their personal experience.

The purpose of the two small-group exercises is to introduce students to the idea that emotions and values can influence moral standards, moral behaviour and ethics. Students were allocated into small-groups for both. The first activity involves perspective-taking and the second activity is a role play. Although the activities are different in form, the content and purpose is largely the same. As such, only the first exercise will be elaborated on here. The content of the activity below is consistent with the subject learning objective because students are required to consider the impact of emotions in ethical decision-making.

The first small-group exercise pertains to actors in the criminal justice system. Students read a newspaper article about the conviction for murder and manslaughter of Kathleen Folbigg.<sup>14</sup> Four of Folbigg's babies died and she was accused of causing their deaths. The newspaper article questioned the reliability of the prosecution evidence against Kathleen Folbigg. The case was primarily based on circumstantial evidence and the prosecution supported their theory as to how the children died with the expert evidence of discredited science and scientists. I used this case study because it raises questions about the ethics involved in criminal prosecutions and elicits the relationship between moral standards, values and emotion. The subject co-ordinator devised the following learning strategy with my input.

This summary was given to students in the seminar:

- In 2003, Kathleen Folbigg was convicted of the murder of her three babies and the manslaughter of one.
- Possibility that sudden infant death syndrome (SIDS) was the cause of death for two of the babies, one baby from epilepsy-related causes and one from a heart condition.
- Questions have recently emerged as to the reliability of the prosecution evidence – the SIDS /murder debate (women overseas convicted of similar deaths have had convictions overturned, two cases in Australia have been dismissed).
- The prosecution evidence had a common theme that is consistent with co-incidence and circumstantial evidence – ‘One sudden infant death is a tragedy, two is suspicious and three is murder unless there is proof to the contrary’ – coined by a British paediatrician, Sir Roy Meadow, and known as ‘Meadow’s Law’. In 1977, Meadows identified and named a syndrome, for parents who faked illness in their children to gain attention - Munchausen’s syndrome.
- Although evidence of this syndrome was not directly tendered in the trial, it, along with other statistically-faulty evidence, influenced the presentation of the prosecution evidence.<sup>15</sup>

In each small-group students were allocated a role of a person involved, either directly or indirectly, in the trial:

Accused	Expert witnesses
Prosecutor	Police
Defence	Media

---

<sup>14</sup> Mark Whittaker, ‘Did She Do It? Why Kathleen Folbigg May Not Have Killed Her Four Babies’ Sydney Morning Herald, 2 February 2013 <http://www.smh.com.au/national/did-she-do-it-why-kathleen-folbigg-may-not-have-killed-her-four-babies-20130128-2dfnw.html>

<sup>15</sup> Ethics and Professional Conduct, Seminar Materials, Autumn semester 2013. The summary above was written by the subject coordinator.

This activity is not a role-play;<sup>16</sup> rather the activity involves introducing students to perspective-taking. The group discussed the following questions from the perspective of the role allocated to them:

- What are the emotions that may have determined the behaviour of your role in the investigation and trial?
- What do you see as the moral standards involved in the trial?
- What are the values that underlie these standards?

By asking the above questions, the subject co-ordinator included the perceptive and perspectival functions of emotion. In identifying particular emotions that may have determined the behaviour of the actors in any of the roles above, students are perceiving what is significant in the circumstance from the emotional perspective of the person. However, these emotional functions were not used to guide the discussion. A suggestion is made below for improving this activity, which includes an analysis of the perceptive and perspectival functions of emotion and their connection to moral standards and values.

In the final part of the class, tutors communicated expectations in relation to reflective writing for the purpose of assessment, including the content of reflections and the additional resources students could use such as newspaper articles, literature, film, art etc. (all of which are narratives). Writing a reflection involves the capacity of narrative intelligence and intrapersonal intelligence because students are constructing stories about their own experiences. The purpose of such reflections are to encourage students to undertake self-examination of their learning and their own psychic life, including their emotions. For example, in the assessment instructions students are encouraged to begin sentences in their reflective journals with the words 'I feel'. Importantly, such instruction confirms the relevance of considering emotions and prompts self-examination and emotional self-awareness. Drawing on additional narrative materials requires students to interpret the narrative they have chosen and explain its significance. This technique focuses attention on the lives of other people and therefore engages the empathic aspect of interpersonal intelligence.<sup>17</sup>

### ***Suggested Improvements***

The teaching and learning strategies and the reflective journal assessment involve the capacities of narrative and the personal intelligences from Burton's model. When the materials for this subject were written I suggested that tutors explicitly introduce students to

---

<sup>16</sup> A role play typically has four stages: The teacher preparing and explaining the activity; student preparation; the role-play; and debriefing. See Stephanie Nickerson, 'Role-Play: An Often Misused Learning Strategy; (2007-2008) 19 (4) Essays on Teaching Excellence. <http://cte.udel.edu/sites/cte/udel.edu/files/u7/TE19-04.htm> (26/09/13).

<sup>17</sup> Nigel Duncan 'Addressing Emotions in Preparing Ethical Lawyers' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011) 268; Kristin B Gerdy 'Clients, Empathy, and Compassion: Introducing First Year Students to the Heart of Lawyering' (2008-2009) 87 *Nebraska Law Review* 1, 57.

the entirety of Burton's Multiple Lawyering Intelligence Paradigm (MLIP) in 'thinking like a lawyer'.<sup>18</sup> However, this was omitted from the teaching materials and was not covered in the class. It should be included because both the discussion on reflective practice and Burton's model relates to and builds on the introductory exercise, the perspective-taking activity, and the discussion of reflective practice in this seminar. The model is also utilised throughout this subject to educate students about the role of emotion in ethical judgment. It is therefore important that the model is explicitly referenced and understood by students.

Burton's model was outlined in Chapter 3 with the role of emotion in the capacities of narrative intelligence and personal intelligence as the focus. Tutors should discuss with students what is involved in narrative reasoning and how it can be expressed in narrative writing. The cognitive content of narrative provides a way of organising, interpreting, evaluating, elaborating, remembering, learning and communicating information.<sup>19</sup> The emotional content of narrative intelligence involves acknowledging how emotion signifies preferences, perspectives, beliefs, values and dispositions to think and act in certain ways.<sup>20</sup> Additionally tutors should also explain that the capacities for the personal intelligences, involve intrapersonal and interpersonal intelligence. The personal intelligences shape our understanding of ourselves (intrapersonal) and others (interpersonal). These intelligences involve being aware of our own and other people's emotions, personality, motivations, beliefs and values. Both intrapersonal and interpersonal intelligence requires emotional self-awareness.<sup>21</sup> These intelligences are important for lawyering because emotional self-awareness contributes to personal and professional problem-solving and understanding the desires and motivations of others, contributes to effectively communicating and working with them.

The introductory exercise in the seminar utilises knowledge within the experience of the learner and non-legal narratives to encourage reflection that utilises both the cognitive and emotional aspects of narrative intelligence. Additionally, the small-group exercise involves both interpersonal and narrative intelligence. Given the nature of these exercises, students could be involved in creating their own understanding of the content of narrative intelligence and the personal intelligences. For example, students could be asked to consider and articulate how narrative and the personal intelligences are engaged in the perspective-taking exercise during the group discussion. This would give the emotional aspects of 'thinking like a lawyer' more validity and therefore begin to break down any psychic resistance to engaging with emotion. As such, my suggestion is that the discussion of reflective practice is moved to the beginning of the seminar, and an explanation of Burton's model is given immediately after the introduction activity so that students can identify the relevance of the model throughout the seminar.

---

<sup>18</sup> See Chapter 3, Part 3.2.

<sup>19</sup> See Chapter 3, Part 3.3.1.

<sup>20</sup> Chapter 3, 51.

<sup>21</sup> See Chapter 3, Part 3.4.

The small-group exercise is about perspective-taking and the discussion can be further guided so that the connections between perspective-taking and ‘thinking like a lawyer’, and the connection between emotions, moral standards and values is made more apparent. As discussed in Chapter 2 emotions can be perceptive. This means that emotions assist in evaluating what is significant in the environment, or about the object of the emotion, from the perspective of the person experiencing the emotion.<sup>22</sup> In this activity perspective-taking is involved in ‘thinking like a lawyer’ via interpersonal intelligence and narrative intelligence. A component of interpersonal intelligence is the capacity to perceive and understand another person’s desires and motivations and in order to do this empathy is required.<sup>23</sup> Empathy is an emotional process enabling a person to non-judgmentally comprehend the experiences of another, and can manifest in any emotion.<sup>24</sup> In order to do this, stories are created to make sense of the events and circumstances from the perspective of the person involved in those events. Thus the cognitive and emotional content of narrative intelligence is engaged.

Perspective-taking activities such as the one above reflect Julien Deonna’s conception of empathically feeling ‘in-tune’ with another person and being aware of how the other person psychologically relates to their circumstances.<sup>25</sup> Feeling ‘in tune’ involves experiencing a token emotion of the same type as the other person. For example, students considering the Folbigg case from the perspective of the accused may identify emotions such as fear, grief, guilt, shame and anger. These emotions arise out of the circumstances which include the moral standards and values that underpin them. Students may then identify moral standards such as being judged for being a bad mother (guilt, fear, shame, anger) and values such as the protection of children and punishment for those who fail to do so (fear).

Students may require some guidance in connecting the emotions to the moral standards and values and to how they can inform ethical judgment.<sup>26</sup> This can be done by identifying the beliefs, values and judgments that underpin the various emotions and this also highlights the relationship between emotion and judgment. For example, if Nussbaum’s theory about the evaluative properties of emotion is applied to Folbigg’s hypothetical guilt and shame it reveals how emotion is connected to moral standards and values. 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.<sup>27</sup> Ascertaining the intentional object of the emotion is similar to understanding the perspective of the person experiencing the emotion. In relation to feelings of guilt and shame, the intentional object is being judged for being a bad mother. The belief could be, even if she did not criminally cause the death of the children, that she has failed them by not looking after them adequately. Therefore the value

---

<sup>22</sup> See Chapter 2, 21.

<sup>23</sup> See Chapter 3, 61.

<sup>24</sup> See Chapter 2, 35.

<sup>25</sup> *Ibid.*

<sup>26</sup> See Chapter 2, Part 2.5.

<sup>27</sup> See Chapter 2, 24-25.

judgment is not meeting the ideal of being a good mother, resulting in feelings of guilt and shame. This example demonstrates how emotion, judgment and moral standards are related.

If a student was considering the case from the perspective of a prosecutor they may identify emotions such as sympathy (toward the victims), and contempt and anger (toward the accused). Students may identify similar moral standards and values as above, but the corresponding emotions will be different because of the perspective being taken. Further, the combination of a lack of direct evidence proving the guilt of Folbigg, the questionable reliability of other evidence and circumstantial nature of the case, should indicate to students how emotions, moral standards and values contribute to narratives of legal guilt. In other words, the emotions connected to the different perspectives inform how events and circumstances are interpreted and evaluated, even where similar moral standards and values apply. In this way, students are engaging in critically evaluating the role of emotion in moral and ethical judgment.

### **5.2.2.2 Topic: Professional and Personal Conduct**

#### ***Current Delivery***

The lecture for this topic considered when conduct can be both professional and personal and the resulting professional responsibility issues that can arise. In the lecture, personal conduct was defined as behaviour as a citizen unrelated to clients and legal work. Professional conduct was defined as acting in the capacity of a lawyer (or other professional). My contribution to the content of this topic was to give the subject co-ordinator summaries of disciplinary cases that involved the impact of emotions such as love, fear and anger on legal-ethical judgment. The subject co-ordinator devised the teaching and learning strategies and exam questions based on those case summaries. All of the cases mentioned in this chapter and used in the teaching and learning activities, demonstrate how emotion can have a negative impact on ethical judgment, but they also highlight the importance of emotional self-awareness and the ability to account for emotion. The seminar described below provided the opportunity to consider specific emotions more closely in the context of narrative and intrapersonal intelligence and how emotion can impact on ethical decision-making. This activity enabled students to critically reflect on and analyse the role of emotion in legal-ethical judgment.

In relation to personal conduct and emotion the subject co-ordinator chose the case of *Legal Practitioners Board v Morel*<sup>28</sup> as an example in the lecture, but not in the seminar, of how personal relations with clients led to a criminal lawyer being struck off for professional misconduct. This particular disciplinary case elicits a narrative of love, sympathy and empathy and discloses how ethical judgment can be influenced by emotion. It was used in Chapter 3 to illustrate the emotional content of narrative intelligence, how emotion contains evaluative judgments and can be analysed, and how the analysis of emotional and ethical

---

<sup>28</sup> [2004] SASC 168; (2004) 88 SASR 541 (hereinafter *Morel*).

narratives involves intrapersonal intelligence, emotional self-awareness, reflection and appropriate detachment.<sup>29</sup>

*Morel* was also used in 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 involving love were discussed.

The seminar consisted of:

- Class discussion, and
- Small-group discussion.

The subject co-ordinator devised these learning strategies with my input. The class discussion in the first part of the seminar considered questions and scenarios about the conflict between self-interest and duty. The small-group discussion focused on personal conduct, in particular the disciplinary cases of *Legal Practitioners Complaints Committee v Pepe*<sup>30</sup> and *Garde-Wilson v Legal Services Board*.<sup>31</sup> Like *Morel*, these cases involved love, dependency and boundary violations. However *Morel*, which was not used in the seminar, is a better example of how love and sympathy influenced the practitioner's judgment and led to breaches of the disciplinary rules. The discussion of *Pepe* and *Garde-Wilson* built on the previous topic where narrative intelligence and the relationship between emotion, values, morals, ethics and interpersonal intelligence were considered. Students were given the summaries and commentary of these cases, written by me, and were asked to consider and discuss the following questions.

1. What was the basis for the determinations?
2. What values, emotions and moral codes were present in the Tribunal's determination?
3. Do you think the determinations were reasonable?
4. Were there any alternatives to the Tribunal's decisions?

### ***Suggested Improvements***

The seminar questions above were posed by the subject co-ordinator and their purpose appears to be for students to demonstrate an understanding of the factors the disciplinary tribunals considered relevant and irrelevant to their determinations including values, emotions and moral codes. However, question two does not adequately prompt consideration of how specific emotions, such as love, could be analysed within those legal narratives and how it impacts on ethical judgment. The question encourages surface learning about the emotional content, because it is framed in terms of simply identifying the emotions that were

---

<sup>29</sup> See Chapter 3, Part 3.3.2.

<sup>30</sup> [2009] WASC 39.

<sup>31</sup> [2008] VSCA 43.

present, whereas the learning objective requires consideration of the impact of emotion. The questions place more focus on the Tribunal's determination rather than the broader ethical issues. In the foundational subject Ethics, Law and Justice there is less focus on professional responsibility, as such these questions can be changed to refocus the discussion toward broader ethical issues, including emotion, and how these affect ethical judgment.

Additionally, the content that is currently used could be refined so that less material is considered but in more depth. It is suggested that only one case is focused on for the purpose of discussion in the seminar and that students read the actual case so they can identify the relevant issues. For example, if *Morel* was used as the case under discussion in the seminar the following questions could be asked to prompt a deeper enquiry of how emotions affect ethical decision-making. The proposed questions are based on the analysis of *Morel* in Chapter 3, which highlighted the emotional content of narrative intelligence and emotional self-awareness. That analysis could be provided to tutors as part of their teaching materials.

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?
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?

The questions are intended to elicit 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. By participating in the seminar discussion students will engage the capacity of narrative intelligence by considering the role of emotion in legal-ethical judgment.

### ***Suggested Alternative Seminar Content***

The exam questions in semester two 2013 contained disciplinary cases that involved the impact of anger on ethical decision-making.<sup>32</sup> However, the emotion of anger was not discussed meaningfully in any of the seminars. If students are asked to articulate their consideration of values, emotions and morals in the exam question, then they should be given opportunities prior to the exam to consider the emotion that arises in the case in some detail.

---

<sup>32</sup> *Legal Practitioners Conduct Board v Jones* [2010] SASFC 51; *Law Society of NSW v Madden* [2008] NSWADT 210.

Having identified this limitation, I have developed an in depth analysis of a case involving anger and suggested seminar questions. The case study is provided in its entirety and tutors could be given the following material to use in this seminar as an alternative to discussing *Morel*. The purpose of giving this level of detail is to provide tutors with an example of an analysis that promotes deep approaches to learning about the role of emotion in legal-ethical judgment. *Law Society of NSW v Madden*<sup>33</sup> illustrates the emotional content of narrative intelligence, intrapersonal intelligence, the defining features of anger, emotional dispositions, emotional defence mechanisms, and how the beliefs underpinning anger can be analysed. *Madden* is a case where there was explicit evidence of anger affecting the practitioner's ability to make professional judgments. There are other emotions involved in this case such as jealousy and fear and these emotions contributed to Madden's anger. However, only anger is considered in detail here, because it was the impact of that emotion on the practitioner's judgment that led to the disciplinary proceedings.

### ***Facts***

Madden a sole practitioner, was suspended from practice and fined for professional misconduct and misappropriation. Madden had acted in an apprehended violence order, which was outside of his area of expertise. His client was his cousin Hill, who was the President of an Association that had agreed to pay costs. Madden instructed a barrister, Hood, and the Association paid Madden the full costs including Hood's fees. Madden deposited the money into his general office account and withheld Hood's fees. Hood initiated a recovery claim in the Local Court. Madden issued a cross-claim alleging negligence on behalf of Hood in the conduct of the matter and made a complaint to the Bar Association about Hood which was dismissed. The Local Court subsequently ordered Madden to pay Hood and when he did not, the matter was referred to the Legal Services Commissioner and the Law Society.

Madden eventually admitted to having an arrogant and defensive approach toward Hood which manifested in anger when Hood complained to the Law Society. Madden also admitted that he had withheld Hood's fees as 'a form of punishment.'<sup>34</sup> His attitude and behaviour was explained by reference to his relationship with his cousin Hill, and the emotions of jealousy and humiliation that arose as a consequence of their history. These aspects of the case will be explained further in the analysis below.

### ***Analysis***

The analysis below reveals that Madden's anger toward Hood was misdirected. This conclusion is reached by considering the lack of justification for Madden's anger toward Hood, and the impact of Madden's emotional dispositions and defence mechanisms on his ability to exercise professional judgment.

---

<sup>33</sup> [2008] NSWADT 210 (hereinafter *Madden*).

<sup>34</sup> *Ibid* [78].

### **The defining features of anger and its justifiability**

As stated in Chapter 2, the philosopher Gabriele Taylor contends that there are three defining features of anger. Firstly, anger is not just directed toward the object who has committed an offence 'it attracts our desire to hit back' and so the object must be accountable; secondly, anger is connected to human agency and responsibility and can be the result of intentional, stupid, clumsy or inconsiderate actions; and thirdly, the loss of well-being to the person feeling anger was caused by the offence and is seen as undeserved and unfair.<sup>35</sup> Additionally Nussbaum states, that to understand anger 'one must mention the object to which it is directed, what it is *about* and *for*'.<sup>36</sup> In doing so the object is characterised 'as it is seen by the person experiencing the emotion, whether that view is correct or not: my anger depends upon the way I view you and what you have done, not on the way you really are or what you have really done.'<sup>37</sup> Hood is the object of Madden's anger. Madden's anger toward Hood was apparently 'about' his belief that Hood had been negligent in the carriage of the AVO matter and that Hood referred Madden to the Law Society because of his conduct. As such, Madden felt justified in his retaliation by withholding the fees, issuing a cross-claim, and complaining to the Bar Association. Because Hood's actions were perceived as undeserved, Madden's actions were intended as retaliation against Hood and intended to make him accountable. Therefore, Taylor's three defining features of anger exist according to Madden's perception of Hood and the situation. However, this perception becomes problematic when consideration is given to what the anger is 'for' and its strategic qualities in this situation.<sup>38</sup> Madden's anger is strategic because he is avoiding responsibility for his own poor judgment in the AVO proceedings, the inability to deal with his anger toward himself and his feelings toward the true object of the emotion, his cousin Hill.

### **Emotional dispositions and emotional beliefs**

Madden felt that an injustice had occurred according to the theory above. However, his resulting anger was apparently based on a false belief as to the cause of the emotion and object of the anger. Consequently, there was misdirected retaliation and poor professional judgment. Madden's distorted perception of the injustice and object apparently arise out of Madden's emotional dispositions and lack of emotional self-awareness. For several months prior to the misconduct hearing Madden had been seeing a psychiatrist, Professor Zuessman, whose evidence was relied on in the disciplinary proceedings to explain Madden's behaviour. In evidence, Professor Zuessman said that Madden's mother had directed her attention and affection toward his cousin Hill, and that Madden experienced jealousy and humiliation as a

---

<sup>35</sup> Gabriele Taylor, 'Justifying the Emotions' (1975) 84 (1) *Mind* 390, 394-395.

<sup>36</sup> Martha C Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press, 1994) 80.

<sup>37</sup> *Ibid.*

<sup>38</sup> Robert C Solomon, 'The Passions: Philosophy and the Intelligence of Emotions' Lecture Series Part One, The Teaching Company Limited Partnership, 2006, 8. Available from [http://www.teachersyndicate.com/documents/oct\\_2010/TTC%20Guidebooks/Passions%20-%20Philosophy%20and%20the%20Intelligence%20of%20Emotions.pdf](http://www.teachersyndicate.com/documents/oct_2010/TTC%20Guidebooks/Passions%20-%20Philosophy%20and%20the%20Intelligence%20of%20Emotions.pdf) (21/02/2011).

result.<sup>39</sup> Expressing anger was considered inappropriate in the family context and Madden ‘began to inwardly chastise himself for not being good enough and he set about living a life where he would strive to achieve to make up for a sense of not being good enough’.<sup>40</sup> As a result Madden had developed ‘some sense of righteousness in his approach to things and possibly an element of entitlement based on his good behaviour.’<sup>41</sup> These facts explain how Madden’s emotional disposition toward reacting with anger began and evolved.

It was Professor Zuessman’s view that when Hill persistently and emotionally appealed to Madden to help him that it

activated a whole series of dynamics within Mr Madden. He essentially took on a heroic role to save Mr Hill... from that point onward he continued to make error after error in judgment. This is really because of the maelstrom of emotions that were going on within him, in particular anger towards Mr Hill...<sup>42</sup>

This passage identifies Madden’s disposition toward anger in relation to himself and Hill and how that affected his professional judgment. Emotional dispositions were defined in Chapter 2 as habits of thought and action based on past emotional experience that produce emotional responses.<sup>43</sup> Emotional dispositions influence how the object of the emotion is perceived and the formation and retention of beliefs that underpin emotion. Therefore, emotional dispositions influence the judgments that are made about the object of the emotion and emotional responses. According to Professor Zuessman, when things went wrong in Madden’s representation of Hill, that elevated his anger and humiliation and Madden began to displace that anger onto everyone involved in the process. Madden could not admit his mistakes because of his sense of righteousness and could not retaliate against Hill, because that would expose his jealousy and humiliation. Driving the displacement was an unacknowledged ‘experience of anger with self for being inadequate in the process for not doing what it is that ought to be done either heroically or otherwise.’<sup>44</sup> Therefore, because of Madden’s emotional dispositions, he had to direct his anger toward Hood to maintain his righteous attitude, to avoid further humiliation and to prove himself as ‘good enough’ in his perception of self and the perception of his family.

### **Emotional defence mechanisms and emotional self-awareness**

In relation to explaining Madden’s conduct during the investigations and complaints, Professor Zuessman stated that the psychological processes he had been describing

---

<sup>39</sup> *Law Society of NSW v Madden* [2008] NSWADT 210, [102].

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* [103].

<sup>43</sup> Chapter 2, 29.

<sup>44</sup> *Law Society of NSW v Madden* [2008] NSWADT 210, [103].

were so powerful and so all-consuming that for every push that came towards him of confrontation it would either cause his entire defensive structure - psychological defensive structure to crumble or his response would be to revalidate his world views from previously.<sup>45</sup>

This statement indicates that Madden's anger toward Hood was a product of a defence mechanism used to project or rationalise his feelings of inadequacy onto Hood. The discussion of intrapersonal intelligence in Chapter 3 showed that this kind of defence mechanism is an inappropriate evaluative response.<sup>46</sup> Madden's anger toward Hood was unjustified because it was an inappropriate evaluative response arising out of an unexamined defence mechanism and emotional disposition. It was based on false beliefs and a misplaced perception about the object of and reason for the anger.

Arguably, with better self-awareness and the capacity to exercise appropriate emotional detachment, Madden could have avoided the errors in judgment that he made. Indeed, Madden stated that he thought his therapy had been 'positive and life enhancing' and he described the experience 'like scales falling from [my] eyes and I could see, not only in this matter but other things of a personal nature and other things within my life that I could understand my motivations and the - some of the irrational threats I felt.'<sup>47</sup> For Madden his therapy with Professor Zuessman exorcised 'the demons that this matter contained' resulting in understanding his weaknesses where family were concerned and improved professional judgment.<sup>48</sup> These statements indicate that Madden gained insight into his emotional disposition and defence mechanism and their impact on his judgment. However, in order for Madden to have improved his judgment, he would have to apply those insights which require emotional self-awareness and the education of emotional capabilities. Engaging in emotional education leads to the ability to control emotion, experience emotion appropriately and to form habits of thought that enable people to see what is and is not relevant to their judgments and why.<sup>49</sup>

### *New seminar questions*

The analysis of *Madden* above demonstrates the kinds of evaluations that are involved in emotion and the role of emotion in legal-ethical judgment. The seminar questions I created below attempt to elicit the relationship between intrapersonal intelligence and emotional self-awareness, how emotion can affect judgment, how emotion can be analysed, and how emotion that is unaccounted for can lead to ethical violations. Additionally, students participating in the seminar discussion are engaging in the emotional aspects of narrative intelligence by evaluating the role of emotion on Madden's professional judgment. In order to

---

<sup>45</sup> Ibid [106].

<sup>46</sup> Chapter 3, 58-59.

<sup>47</sup> *Law Society of NSW v Madden* [2008] NSWADT 210, [100].

<sup>48</sup> Ibid [101].

<sup>49</sup> See Chapter 2, 30-31.

conduct a meaningful analysis of the impact of emotion, students need to read the relevant aspects of the case under discussion. It is suggested that a brief summary of the defining features of anger is also provided to assist in interpreting and answering the discussion questions.

The seminar questions and discussion points that arise out of this material include:

1. Anger is a significant emotion in *Madden*. What does the legal narrative reveal about the reasons for Madden's anger toward the barrister Hood?
2. Madden's anger toward Hood was as a product of a defence mechanism that was used to project or rationalise his feelings of inadequacy onto Hood. Is this a reasonable assessment? Why / why not?
3. Emotional dispositions are defined as habits of thought and action based on past emotional experience that produce emotional responses. What does the legal narrative reveal about Madden's emotional disposition? How, if at all, did this impact on his professional judgment?
4. Was Madden's anger toward Hood justifiable? Why / why not?
5. What is emotional self-awareness? What does the case of *Madden* 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?

The content of this topic is consistent with the learning objective because the aim is to provide students with the opportunity to consider the impact of emotion in ethical decision-making. Analysing legal narratives, such as *Morel* and *Madden*, is one way to expose students to the analysis of emotion and how it can be implicated in legal-ethical judgment. The danger in using cases where the emotion has had a negative impact, may reinforce attitudes that discount emotion leading to its repression or denial when making judgments, which is why emotional self-awareness must also be emphasised. Appropriate emotional detachment does not mean acknowledging emotion then attempting to exclude it from judgment; it requires emotional self-awareness, that is, the ability to acknowledge, moderate and account for the negative and positive influences of emotion on judgment.

### **5.2.2.3 Topic: Duty to the Court - Criminal Law**

#### ***Current Delivery***

The focus of the lecture was on criminal law and ethics and the additional ethical obligations and issues that can arise in criminal law practice. The seminar topic below builds on the content of previous seminars by considering specific emotions, the relationship between emotion, morality and personal values, and appropriate detachment. The content of this topic and seminar is consistent with the subject learning objective, because students consider the role of compassion and sympathy in ethical judgment and the impact those emotions have on ethical decision-making.

The seminar consisted of:

- Class discussion, and
- Small-group activity.

The subject co-ordinator devised these learning strategies and I provided the materials. Students read a speech given by the prosecutor, Margaret Cunneen, to law students in 2005<sup>50</sup> which was reported in the press.<sup>51</sup> In that speech Cunneen recounted details of legal proceedings in which she was involved, notably the infamous Bankstown gang rape trials. Students also read *MG v R*<sup>52</sup> which contains sections of the speech and comments Cunneen made in the press. *MG* was a co-accused, in a separate trial, and an application was made at the inception of the trial to have Cunneen excluded as the prosecutor; however the trial judge refused. An appeal was made to the New South Wales Court of Criminal Appeal (NSWCCA) to have Cunneen excluded. The appeal was upheld and Cunneen was criticised for publicly supporting the complainant, lacking detachment from the case, and undermining the ability of the accused to have a fair trial.

Students considered the following questions in small-groups.

- (a) Is there a place for compassion in ethical decision-making and in the law?
- (b) Is there a difference between sympathy and compassion? How did the judiciary appear to deal with Cunneen's motivation to express her feelings for the victims?

### ***Suggested Improvements***

I suggest restructuring the above questions to guide students into a discussion of the role of compassion and sympathy in ethical judgment as these emotions arise in the materials. The questions I have developed below directly relate to the criticisms of the NSWCCA pertaining to the prosecutor lacking detachment and undermining the ability of the accused to have a fair trial. The significant emotional themes that arise are the motivational force of emotion and emotion as a guide to ethical choice and these themes are related to each other within the context of the analysis below. This activity engages narrative intelligence because students are analysing the emotional themes within the legal narrative and it engages interpersonal intelligence as students examine the emotional motivations behind the speech.

Proposed small-group questions:

1. Cunneen seems to express compassion for the victims of crimes and to evoke sympathy for those victims. What do you think her motivations were for expressing these feelings? What does this say about the evaluations underpinning her sympathy?

---

<sup>50</sup> Sir Ninian Stephen Lecture at Newcastle University.

<sup>51</sup> 'Margaret Cunneen's Lecture: Living Within the Law' Sydney Morning Herald, September 24, 2005 <http://www.smh.com.au/news/national/margaret-cunneens-lecture/2005/09/23/112698> (23/03/11).

<sup>52</sup> *MG v R* [2007] NSWCCA 57.

2. What was the problem with Cunneen expressing these emotions according to the NSWCCA?
3. Is there a place for compassion and sympathy in legal-ethical decision-making?

### Analysis

#### **Emotional motivations – compassion and sympathy**

The first proposed question requires an examination of the motivations behind Cunneen's comments in relation to the administration of justice and the victims of crime. This discussion should raise the relationship between emotion, morality and personal values. Cunneen expresses concern over what she perceives as an imbalance in the criminal justice system:

For some victims the anguish continues in a justice system which can give the impression that it is increasingly focussed on the rights of the accused person to the complete exclusion of the right of the victims, many of whom... have found themselves bound up in the criminal justice system through absolutely no fault of their own.<sup>53</sup>

This statement provides insight into Cunneen's values around justice and fairness and how these values are connected to sympathy and compassion. In publicly supporting the victims of crime, Cunneen is apparently seeking to redress the perceived unfairness in the exclusion of victim's rights and this is the act of compassion. In noting the anguish of victims and their lack of fault for their circumstances, Cunneen is expressing her sympathy. As discussed in Chapter 2, sympathy is not only characterised by a belief that another person is suffering, it is also characterised by a belief that the suffering can be alleviated.<sup>54</sup>

In her speech to students at Newcastle University, Cunneen challenged the audience to bring their 'humanity' and their 'conscience' in the practice of criminal law.<sup>55</sup> By appealing to the audience in this way, Cunneen is enlisting the conscience of future lawyers to alleviate the suffering of victims when they encounter the criminal justice system. This statement also provides an insight into the relationship between morality and ethics in legal practice according to Cunneen. Asking the audience to bring their humanity and conscience to the practice of law, is a reminder that professional ethics are related to morality and that personal morality and values should inform professionalism. However, as will be discussed shortly, there needs to be a balance between competing values in the legal system, something that Cunneen apparently did not achieve according to the NSWCCA.

---

<sup>53</sup> Ibid [18].

<sup>54</sup> Chapter 2, 34.

<sup>55</sup> *MG v R* [2007] NSWCCA 57 [31].

### **Emotion as a guide to ethical choice**

The second and third questions are intended to encourage students to address the role of compassion and sympathy as guides to ethical judgment and action.<sup>56</sup> The court indicates that they understand why sympathy is felt toward the complainant in this case.<sup>57</sup> However, the court regards Cunneen's compassion and sympathy as an inappropriate guide to ethical judgment and action because her conduct lacked impartiality and objectivity. The court's account focuses on the justice values of fairness and detachment as guides to ethical judgment and action:

The statements... demonstrate a lack of detachment from the case she was required to prosecute. There is no difficulty in Ms Cunneen privately holding the view that the applicant is guilty. However, her public expression of that view displayed partiality and potentially compromised her capacity to fairly prosecute on behalf of the Crown.<sup>58</sup>

In relation to Cunneen's experience of compassion there are two potential problems. As the NSWCCA identify, Cunneen did not find a balance between her feelings of sympathy and the detachment required of an ethical prosecutor. Cunneen brought her moral conscience to bear on her role as a lawyer, but did not effectively balance this with the other values that bear on that role.<sup>59</sup>

The second problem alludes to the possibility of a less altruistic motivation although it is not suggested that the following was Cunneen's actual or deliberate motivation. It is arguable that Cunneen's actions place more emphasis on her 'experience of compassion and its subsequent relation to material practice.'<sup>60</sup> Although Cunneen brings the plight of victims to the forefront, a major premise of her speech relates to the observations she has made in her lengthy career as a prosecutor:

Perhaps it is time for us to consider whether public confidence in the courts is now being eroded by the perception that the pendulum has swung rather too far in the direction of the protection of the rights of an accused person.<sup>61</sup>

Whilst Cunneen's expression of sympathy is apparently benevolent, it also seems to be placed strategically in a broader argument about the perceived proliferation of the rights afforded to accused people. It is arguable that Cunneen's opinions relating to victim rights and fairness to them, is an attempt to reorientate the rhetoric of the criminal justice system in a way which would ultimately benefit the prosecution. Any diminishing of the rights of an

---

<sup>56</sup> See Chapter 3, Part 3.3.2.

<sup>57</sup> *MG v R* [2007] NSWCCA 57 [22].

<sup>58</sup> *Ibid* [86].

<sup>59</sup> See Chapter 3, 57.

<sup>60</sup> Lauren Berlant, 'Introduction: Compassion (and Withholding)' in Lauren Berlant (ed), *Compassion: The Culture and Politics of an Emotion* (Routledge, 2004) 1; in Chapter 2, 35-36.

<sup>61</sup> *MG v R* [2007] NSWCCA 57 [32].

accused means that the pendulum swings in favour of the prosecution. Additionally, the suffering of victims may not be alleviated as they will still be a part of the criminal justice system through no fault of their own. Further, diminishing the rights of an accused does not necessarily mean that victim rights will improve. On the contrary, it is more likely to increase the combative nature of the defence tactics and questioning of victims.

The discussion pertaining to the third seminar question requires consideration of whether there is a place for compassion in law. Compassion is important because it can provide a motivation to seek justice and rectify perceived imbalances but caution is required in case the exercise of compassion creates other forms of injustice or imbalance, as in the example above. Nussbaum states that ‘compassion is controversial’ with defenders who consider this emotion as ‘the bedrock of ethical life’ and opponents ‘who denounce it as ‘irrational’ and a bad guide to action.’<sup>62</sup> However, there can be a middle ground between these views; it does not have to be one or the other. There are times when compassion and sympathy are appropriate guides to ethical action and can be balanced with other ethical considerations. Students should be encouraged to discuss whether they think a balance could have been achieved in the example above in light of the answers to the previous questions.

### 5.2.3 Conclusion

The subject Ethics and Professional Conduct provided several opportunities for the emotional components of legal ethics to be considered, including the relationship between: personal values, morals and emotion; intrapersonal intelligence and emotional self-awareness; interpersonal intelligence and empathy, sympathy and compassion; narrative intelligence and evaluating emotion; and the impact of emotion in ethical judgment and decision-making. The content of the teaching and learning strategies was intended to encourage students to acquire functioning knowledge by orchestrating between facts and theory, action and purpose. The purpose of all three activities was to demonstrate how emotion can and does impact on legal-ethical judgment and decision-making. The use of legal narratives elicited how emotions within those narratives could be analysed. Thus students were presented with facts and theory and activities which required them to integrate and explain the relationship between emotion and ethical decision-making.

There are two aspects of my original contribution to the content of teaching and learning strategies within this subject. The first is researching and providing examples and materials where emotion is relevant. The second is proposing suggestions for improvement and developing the extended analysis of the materials integrating emotion theory and the framework of ‘thinking like a lawyer’ which includes the emotional aspects of narrative intelligence and the personal intelligences. As such, this chapter has demonstrated how the knowledge from Chapters 2 and 3 expands conceptions of ‘thinking like a lawyer’ that include emotion, and how this knowledge can be introduced at a subject level. This is an aspect of the overall original contribution this thesis makes to legal ethics education.

---

<sup>62</sup> Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001) 354.

The extended analysis of emotional knowledge in this chapter is intended to provide academics with a detailed understanding of the ways emotion can impact on ethical decision-making. This enables academics to create learning environments which engage students in deep learning approaches about emotion. The above analysis shows the importance of explicitly stating the capacities involved in 'thinking like a lawyer' where emotion is relevant. This is important because it communicates the significance of emotion in legal judgment to both students and academics and demonstrates the legitimacy of considering the role of emotion in legal ethics. All of the suggested learning strategies above consider the relationship between values, morals and emotions. In participating in them students engage the capacity of narrative intelligence. As stated in Chapter 3, the psychologists Rettinger and Hastie contend that when making morally salient decisions, narrative processing is undertaken to identify, comprehend and integrate information.<sup>63</sup> These activities also engage the capacities in the personal intelligences and, significantly, understand the need for emotional self-awareness. Explicitly stating the content of these intellectual capacities and the cognitive processes that underpin legal thinking exhibits the mechanics of these processes to students. Allowing students to engage those capacities through perspective taking and analysis of narratives that involve emotion, should give students a more comprehensive understanding of how to 'think like a lawyer' and make ethical judgments.

Additionally, the inclusion of emotional knowledge prompts consideration of other ethical factors and encourages students to think about their own approach to ethical decision-making. I asked the subject co-ordinator about her observations of the reception of emotional content by students, whether she thought emotional content enhanced their learning experience, and what she thought of the content as a teacher. The subject co-ordinator made the following observations:

Students are comfortable with discussing emotions, values and morals when they read and discuss cases where they can identify emotions (love, regret, fear), values (honesty, integrity) and morals (obedience to the law, being a 'good' person) and when they read and discuss resources relating to ethical decision-making. Through building on emotions, values and morals, students draw out the connection with legal ethics and the rules that regulate lawyer conduct, for example, the duties of prosecutors based on impartiality, the focus of family law on the child's best interests. The material and resources on the emotional context in ethics adds a layer of richness to the subject as students are very willing to discuss the impact of values and morals on lawyers and the administration of justice and their feedback has a consistent theme of the value of discussions and reflection on their personal responses to their future role as a lawyer.<sup>64</sup>

According to the subject co-ordinator, the educational goals set in this subject, specifically the relationship between emotion, values and morals and the ways in which they can impact on ethical decision-making, appears to have been achieved. Most encouraging are the comments about the reception of emotional content by students. Students were 'comfortable

---

<sup>63</sup> See Chapter 3, Part 3.3.

<sup>64</sup> Subject co-ordinator of Ethics and Professional Conduct. Statement made in an email 19 May 2013.

with discussing emotions' particularly when they were discussing legal narratives containing emotional themes. Additionally, the discussion of emotion added 'a layer of richness' indicating that the discussion of emotion prompted consideration of other ethical factors, encouraged students to consider their own values, and provided a perspective on ethical issues which enabled students to reflect on their own decision-making processes. These observations are consistent with comments made by some students in their student feedback surveys from the first and second semester in 2013.<sup>65</sup> In response to the statement 'My learning experiences in this subject were interesting and thought provoking' students stated:

There is a different approach to this subject, compared with others I've completed, that was more reflective on how I personally would react to the ethical and conduct issues in each topic. I thought this was a valuable way of teaching.

It made me think outside the square...it was different to any law subject I've done before.

I really liked the reflection based assessment; it made me engage with subject and think about issues personally. I liked the variety of discussion questions in class, I think these made the material really accessible and showed different people's points of view.

I liked the interactive nature of class discussion, prepared tutorial discussion questions and consistent reference to case studies.

The dilemmas were thought provoking and engaging.

Overall, the subject is interesting as it delves into our own ethical standards - something which we don't get to do in our other subjects. We need a subject like ethics to allow us to reflect how we as future lawyers can become better lawyers.

These comments indicate that the subject as a whole, which includes emotional content, allowed students to explore their own subjective experiences, values, ethical standards, decision-making processes, and to engage their reflective and analytical skills. In terms of the content and the class activities, students appear to appreciate being given the opportunity to discuss real situations which were considered from different perspectives. The teaching and learning strategies pertaining to emotion have these qualities and are aimed at enabling students to consider their own values and decision-making processes. In doing so, the content of these teaching and learning strategies may help achieve the aim of better equipping students for the reality of making ethical judgments in practice.

---

<sup>65</sup> These statements were selected by the subject co-ordinator who had access to the student surveys. The subject co-ordinator did not forward comments where students expressed resistance to learning about emotion.

### 5.3 Subject: Evidence and Criminal Procedure

This core subject covers the practice and procedures governing the law of evidence and certain pre-trial criminal procedures. It is taught in a 1.5 hour lecture and 1.5 hour tutorial per week over 13 weeks. The subject embeds the ethics graduate attribute from 2014. I teach in this subject and developed the content of a teaching and learning strategy for the purpose of formalising the ethics content to accord with the subject learning objective below and to include emotional knowledge. This teaching and learning strategy will be implemented in second semester 2014. I developed new ethics and emotion content by building on the existing substantive legal content and materials used in a particular seminar. The seminar about sexual assault communications privilege provides the opportunity to evaluate how emotion is used persuasively by lawyers, and whether and in what circumstances this is ethical. In order to ascertain the ethical justifiability of using emotion persuasively, students undertake an evaluation of the moral justifiability of contempt. Contempt was chosen because it arises in the content and the analysis of this emotion enables students to evaluate the ethical justifiability of using emotion persuasively. Additionally, students engage in narrative intelligence because they evaluate how lawyers control and construct narratives and the ethical issues involved in this process, and students identify and analyse emotional preferences, perspectives, beliefs and values.

Unlike Ethics and Professional Conduct where emotion has already been introduced into the subject, this subject is used as an example of how emotion *could* be introduced into a subject embedding the ethics attribute.<sup>66</sup> Part 5.3.1 explains that the subject has the capacity to introduce knowledge about emotion because of the learning objective and the content the subject covers. Part 5.3.2 presents the content of the teaching and learning strategy I developed in order to accord with the subject learning objective. The content of this learning strategy uses emotional knowledge and narrative intelligence as a vehicle from which to educate students about ethical advocacy.

#### 5.3.1 Learning Objective

The subject learning objective in Evidence and Criminal Procedure embedding the ethics graduate attribute is:<sup>67</sup>

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

- Evaluate and reflect on the roles of lawyers in the administration of justice.<sup>68</sup>

This learning objective is not explicit about the role of emotion in legal ethics. However as stated in Chapter 4, the objective is consistent with the ‘whole student’ approach in the ethics graduate attribute, Threshold Learning Outcome and the Course Intended Learning

---

<sup>66</sup> The teaching and learning strategy below will be introduced in semester two 2014 when I am the subject coordinator.

<sup>67</sup> Chapter 4, Table 5.

<sup>68</sup> Evidence and Criminal Procedure 2014 Subject Outline.

Outcome.<sup>69</sup> This learning objective engages the affective domain because evaluating the roles of lawyers requires consideration of the values attached to those roles. It engages the intellectual domain because of the analysis of the evaluative judgments contained in emotion and it engages the intellectual capacity ‘thinking like lawyer’ ethically.

There are three subjects that embed the ethics graduate attribute prior to this subject: Ethics, Law and Justice, Torts, and Civil Procedure.<sup>70</sup> In those subjects the intended learning outcomes for students are relational levels of understanding. In Evidence and Criminal Procedure the learning objective requires both a relational level of understanding, denoted in the verb ‘evaluate’, and an extended abstract level of understanding, denoted in the verb ‘reflect’.<sup>71</sup> Therefore learning strategies need to provide students with the opportunity to evaluate the roles of lawyers’ in the administration of justice and to demonstrate their ability to integrate and explain the relationship between facts and theory, action and purpose. Learning strategies also need to provide students with the opportunity to reflect on the roles of lawyers’ in the administration of justice and to demonstrate their ability to communicate and apply perspective changes. Demonstrating reflection and perspective changes can happen through learning activities in class but the reflection component could also be demonstrated in an assessment task.<sup>72</sup> The incorporation of emotional content, as applied to ethical issues in the teaching and learning strategy below, requires students to evaluate and reflect on how emotion impacts on lawyers performing their role in the administration of justice. However, as discussed in Chapter 4, the expectation that students will be able to demonstrate this level of understanding will depend on whether emotional knowledge has been incrementally introduced into the subjects preceding Evidence and Criminal Procedure.

### 5.3.2 Teaching and Learning Strategy

This subject allocates a seminar to the professional confidential relationships privilege and the sexual assault communications privilege. In relation to these privileges the subject matter involves the history leading up to the enactment of these privileges and the law itself. There is ample scope within this material 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.<sup>73</sup> The learning strategy I propose below has three purposes: to understand the evaluative

---

<sup>69</sup> The ‘whole student’ approach engages the cognitive, affective and skills domains of legal ethics; see Chapter 4, 80.

<sup>70</sup> See Chapter 4, Table 4 for the pervasive and incremental progression of the ethics graduate attribute.

<sup>71</sup> Relational understanding means that students demonstrate their ability to orchestrate between facts and theory, action and purpose. Extended abstract understanding means that students can conceptualise beyond what is being taught at higher levels of abstraction and apply perspective changes to new or broader problems. See Chapter 4, Table 6 for the incremental subject learning objectives and levels of understanding.

<sup>72</sup> Assessment could include students participating in an online blog or reflective journal.

<sup>73</sup> For a discussion of these issues see Donald Nicholson and Julian S Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999) 160-181.

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 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.

### 5.3.2.1 Content

The aim of this teaching and learning strategy is to have students consider ethical behaviour more broadly and whether the narratives strategically created by lawyers are morally defensible. One way of doing this is to evaluate the moral justifiability of the emotions evoked by lawyers in order to influence juror judgment.

One of the prescribed readings for the seminar is an article by Mary Rose Liverani,<sup>74</sup> explaining the circumstances and the reasons why law reform was needed in relation to the subpoenaing of sexual assault counsellors' notes. This reading will continue to be used because it raises interesting ethical issues pertaining to defence tactics in sexual assault cases. 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.<sup>75</sup> 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.<sup>76</sup> The purpose of this strategy was to discredit the credibility of the complainant and to affect juror judgment.<sup>77</sup>

Counselling notes may contain information including 'past sexual history, the existence of illegitimate children, drug, alcohol and psychiatric history' and self-blame.<sup>78</sup> 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.<sup>79</sup> In doing so they created a narrative<sup>80</sup> that used the persuasive influence of emotion to direct the attention of jurors away from the moral obloquy of the defendant, and toward impeaching the moral character of the

---

<sup>74</sup> 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.

<sup>75</sup> *Criminal Procedure Act 1986* (NSW), s 293.

<sup>76</sup> Liverani, above n 74, 44.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> For an examination of the sociolinguistic characteristics of storytelling in court, and how storytelling is managed and organized by lawyers, see Diana 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, 25<sup>th</sup> Annual Conference, Melbourne, Sunday 14 October 2007). See also Diana Eades, *Sociolinguistics and the Legal Process* (Multilingual Matters, 2010) 42-46.

complainant. If jurors think that the complainant has a dubious moral character they may sympathise with the defendant and disdain the complainant. Emotions commonly attached to disdain are contempt and anger. Contempt is examined below because it arises in the content and because it promotes consideration of the ethical justifiability of using emotion persuasively.

As stated in Chapter 2, contempt is related to anger and moral disgust.<sup>81</sup> Contempt involves a judgment about a moral or character defect in another person. Feeling contempt involves perceiving and regarding the object as a person who ranks low in worth, because they fall short ‘of some legitimate interpersonal ideal’ and the affective quality is feeling pained in the presence of the object thus making the object a source of aversion.<sup>82</sup> This can result in the object of contempt being treated with less respect and consideration or with derision or disregard.<sup>83</sup> According to Mason, the conditions necessary for contempt’s proper evaluative presentation and moral justifiability are:

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. The purpose of this activity is to engage students in an analysis of contempt to increase understanding of the evaluative nature of the emotion and whether, and in what circumstances, it is morally and ethically justifiable. As such, this activity promotes an understanding of how emotion is involved in the broader judgments people make. Mason’s six conditions will be applied to the following hypothetical.

The defendant (D) contends that the sexual intercourse with the complainant (C) was consensual. 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, allowed D to buy

---

<sup>81</sup> See Chapter 2, Part 2.5.3.

<sup>82</sup> Michelle Mason, ‘Contempt as a Moral Attitude’ (2003) 113 (2) *Ethics* 234, 241; see also Macalister Bell, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press, 2013) 57. In Chapter 2, 39.

<sup>83</sup> Jonathan Haidt, ‘The Moral Emotions’ in Richard J Davidson, Klaus R Schere and H Hill Goldsmith, *Handbook of Affective Sciences* (Oxford University Press, 2002) 858.

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.

The seminar questions below are designed to elicit how lawyers use emotion to influence juror judgment and whether, and in what circumstances, this is ethical. This activity engages students in narrative intelligence through an analysis of how lawyers construct narratives including the persuasive role of emotion. Additionally, students consider whether certain emotions are morally justifiable. The first three questions address the article by Liverani and the last addresses the hypothetical case study.

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 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 1-3 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 below demonstrates how an answer to question 4 could be addressed by applying Michelle Mason's theory of contempt from Chapter 2 to the hypothetical facts.<sup>84</sup> The following analysis will be given to tutors in this subject to enable them to guide the discussion and analysis involved in question 4.

### **5.3.2.2 Analysis - Contempt**

#### ***Point 1: Violations of legitimate interpersonal ideals***

In relation to Mason's first point above, it is necessary to examine the possible beliefs that underpin the interpersonal ideal and the perception of C. The beliefs that could arise are that C invited the advance, and 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 biases and that this would invalidate the contempt. This, however, requires the honest appraisal of one's beliefs. Without this kind of appraisal, J considers that C has violated an ideal. The interpersonal ideal could be the thought that C is lying, or 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

---

<sup>84</sup> See Chapter 2, Part 2.5.3.

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.

***Points 2, 3 and 4: Morally evaluable character traits and responsibility***

In relation to Mason's second and third points, J considers the violation has stemmed from a morally evaluable character trait. This is the beliefs that C invited the advance, and if C did not want to have sexual intercourse C would have objected. This element again 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 of lying. 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, accept lifts home, and should communicate non-consent clearly, otherwise they are blurring boundaries. In those circumstances it is reasonable that D believed there was consent and C has offended 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.<sup>85</sup> 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.

***Points 5 and 6: The moral justifiability of contempt***

Whether the emotion is morally justifiable depends on Mason's fifth and six points. J could argue that the contemptible attitude toward the complainant is justifiable because J does 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 those beliefs. 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 evidence of change would be a morally objectionable attitude. In the hypothetical this will again depend on whether J gets the evaluation right, and if wrong, 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.

---

<sup>85</sup> *Crimes Act 1900* (NSW), s 61HA (7).

After considering the evaluative properties and moral justifiability of contempt, question 4 asks students whether introducing evidence like this is ethical. In a technical sense, lawyers who use emotion and create narratives such as the one above are not breaking professional responsibility rules. However, compliance with professional responsibility rules does not necessarily make the strategy ethical as the above analysis suggests.

### 5.3.3 Conclusion

The content of the teaching and learning strategy I have proposed above 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 will engage narrative intelligence through a consideration of how lawyers control and construct narratives. The content of 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 also to encourage reflection on appropriate ethical boundaries. The level of understanding in the learning objective is relational, requiring students to demonstrate the orchestration between facts and theory, action and purpose when they engage in analysing the ethical issues involved in creating narratives and using emotion persuasively. By considering the moral justifiability of certain emotions, students are exposed to extended abstract reasoning, as it provides them with an alternate perspective on the tactical use of emotion and its relationship to ethical boundaries.

I developed the idea for this teaching and learning strategy from two student responses on an internet discussion board for this subject. In this subject students are actively encouraged to engage in discussion based on books<sup>86</sup> 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 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. But ‘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

---

<sup>86</sup> 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).

emotion, they are not learning about the reality of human decision-making or ethical persuasion.

## 5.4 Conclusion

This chapter argues that by using concrete examples of how emotion is involved in legal-ethical judgment and how emotion can be integrated into teaching and learning strategies, this thesis provides academics with a framework from which they can formulate their own teaching and learning strategies with a view to achieving learning outcomes for students such as: increased awareness and understanding of their own emotional capabilities and the ability to critically reflect on and analyse the role of emotion in ethical judgment. It is further argued that students will gain a more comprehensive understanding of ‘thinking like a lawyer’ and their ability to make ethical judgments will improve by including emotion. The literature reviewed in Chapters 2 and 3 demonstrated that people, including lawyers, can be educated to recognise the impact of their emotions on judgment and to better account for their emotional responses. This chapter has shown how teaching and learning strategies can facilitate education about the role of emotion in legal-ethical judgment by applying the emotional knowledge from Chapter 2 to examples where emotion impacted on the judgment of various legal actors. The present chapter has also shown how Burton’s model of ‘thinking like a lawyer’ can be applied in educating students about making ethical judgments that recognise the role of emotion. Thus, the teaching and learning strategies proposed in this chapter aim to provide students with the opportunity to identify how emotion is involved in legal-ethical judgment, to practise emotional analysis and to improve their ability to ‘think like lawyers’ ethically.

The subject Ethics and Professional Conduct provided an example of how emotion already features in the legal ethics curriculum at UTS Law. One of the learning objectives and three topics within Ethics and Professional Conduct directly addresses the emotional content of legal ethics. Additionally, the reflective journal assessment encourages students to identify their own emotions for the purpose of gaining a better understanding of their own emotional capabilities. The content of all three teaching and learning strategies are aligned to the learning objective because in each of the strategies students have to consider the impact of emotions on ethical decision-making. The perspective-taking activity in the seminar for the topic ‘theoretical perspectives of values, morals and ethics’ demonstrates how emotions are connected to moral standards and values. This is important in the context of legal ethics education as a whole because it promotes the understanding that ethics is not based on legal rules alone and that personal moral orientations, including emotion and values, influence ethical judgments. In participating in the perspective-taking activity students engage both narrative intelligence and interpersonal intelligence by exercising their capacity for empathy and identifying and evaluating the emotions of the various actors involved in the scenario. The activity encourages students to consider the evaluative judgments contained in emotion and how they can reflect moral standards and values. However, the examination of the way in which this activity was initially implemented in the class-room, emphasised the need to explicitly introduce students to the idea that ‘thinking like a lawyer’ involves both narrative

and personal intelligences and how emotion is implicated in these capacities. If this is not done students may fail to see the relevance and significance of the role of emotion in exercising legal-ethical judgment.

The small-group discussions for the topics ‘professional and personal conduct’ and ‘duty to the court – criminal law’ again engage students in narrative intelligence and intrapersonal intelligence. The content of these topics involved analysis of specific emotions such as love, anger and sympathy; the relationship between morals, values and emotion; emotion as a guide to ethical judgment; and consideration of emotional self-awareness, emotional dispositions, the educability of emotion and appropriate emotional detachment. Again, the content of these topics demonstrate that the knowledge about emotion in Chapter 2 is relevant to legal ethics and can be applied by using the narrative and personal intelligence aspects of ‘thinking like a lawyer’. By analysing specific emotions such as anger and sympathy, these activities also encourage students to consider the evaluative judgments contained in emotions. Additionally, the inclusion of emotional knowledge prompts consideration of other ethical factors such as duty and impartiality, and encourages students to think about their own approach to ethical decision-making and the importance of emotional self-awareness.

The content pertaining to emotion was written for Ethics and Professional Conduct in its transition from a Practical Legal Training subject into a foundational core law subject Ethics, Law and Justice. In the foundational subject, students begin to explore the relationship between personal attitudes, values and emotion, the educability of emotion and the role of emotion in morality and ethical decision-making. This is important because introducing emotion in stage one assists in breaking down any resistance to what students may initially perceive as a pursuit tangential to law. However, I argue that by exposing students at an early stage to the role of emotion in ‘thinking like a lawyer’ the status of emotion in legal thinking and legal ethics will gain legitimacy. The challenge for educators is to provide opportunities for students to acquire an understanding of the relationship between personal values, emotion and ethics, and further that emotions are related to justice, rationality, judgment and professional relationships. The emotional content of the learning strategies discussed in this chapter demonstrates that these opportunities can be provided and how they can be introduced. Further, as the student feedback in Ethics and Professional Conduct indicates, students appreciate opportunities to expand their understanding of ethics and to develop their own capacity for ethical judgment. This includes allowing students to explore and understand what they bring, in terms of life experience and subjectivity, to making ethical judgments and the practice of law.

The subject Evidence and Criminal Procedure provided an example of how emotion could be introduced into the legal ethics curriculum at UTS Law. The content of the teaching and learning strategy in this subject was created in order to formalise the ethics content and to include knowledge about emotion and its role in legal-ethical judgment. The teaching and learning strategy has three intended learning outcomes: to understand the evaluative properties of emotion, to understand how emotion is used persuasively and strategically by lawyers, and to consider whether the emotion is morally justifiable and ethically defensible. In order to achieve these outcomes contempt was used in the strategy with the aim of

involving students in a structured and thorough analysis of the evaluative properties of this emotion and its moral justifiability. This analysis provides the basis for considering whether and when the persuasive use of emotion by lawyers is ethical.

The activity is consistent with the aim of this thesis to use the emotional content in ‘thinking like a lawyer’ to educate students about ethical judgment. The activity does this by engaging students in the cognitive and emotional content of narrative intelligence through a consideration of how lawyers construct and control narratives and how the narrative conveys and expresses emotion. This process is designed to allow students to practise ‘thinking like a lawyer’ ethically because they are subjecting the emotional narrative to analysis in order to ascertain its moral justifiability. The content for this teaching and learning strategy was developed by building on existing seminar materials. The article on the sexual assault communications privilege used in this subject is not explicit about emotion; however, this example demonstrates that academics can use existing materials and with further analysis, reveal emotional content. Again, the benefit of drawing out the emotional content is that other ethical factors are considered, in this example those would include how lawyers enact their role and the boundaries of ethical advocacy.

The examples of disciplinary cases used in this chapter provide support for the argument that emotion does influence legal-ethical judgment and decision-making. Although the examples mostly show the negative impacts of emotion they also emphasise the need for emotional self-awareness. As such, it is important to educate students about how to account for emotion as opposed to ignoring it or excluding it from judgment. The teaching and learning strategies proposed in this chapter are not especially innovative in terms of class discussions; however, the emotional content of those strategies are designed to enable students to think about legal ethics more broadly and to consider their own ethical perspectives. Additionally, the teaching and learning strategies proposed in this chapter, are intended further the aim of providing students with a more comprehensive and realistic understanding of what it means to ‘think like a lawyer’ and to allow students to develop their capacity for making legal-ethical judgments.

## 6.0 CONCLUSION

This thesis examined the role of emotion in legal-ethical judgment and developed practical examples of how to teach students about ethical judgment in ways that consider the role of emotion in such judgment. Academics, as legal actors, are implicated in this process because they devise and deliver the means of educating students in the law, including its forms of reasoning and the methods by which legal judgments are to be reached. ‘Thinking like a lawyer’ is one of the key models of rational thinking and can be used to incorporate material on the role of emotion in legal-ethical judgment, decision-making and legal ethics education. Including knowledge about emotion in learning to ‘think like a lawyer’ will improve students’ judgment because they will be better equipped to understand the role of emotion in legal-ethical judgment and decision-making.

The overall aims of this thesis were to demonstrate why it is important to include knowledge about emotion in legal-ethical judgment and decision-making and how knowledge about emotion could be introduced into legal ethics education. As stated in Chapter 1, these aims were reflected in the ‘investigation, illumination and integration’ dimensions of law and emotion scholarship.<sup>1</sup> The ‘investigation’ dimension was realised by exploring the cognitive attributes of emotion and emotion’s role in legal-ethical judgment, drawing on cognitivist philosophy, cognitive psychology and cognitive neuroscience in Chapter 2 and legal scholarship on ‘thinking like a lawyer’ in Chapter 3. The ‘illumination’ dimension was realised in Chapter 4 by demonstrating how the inclusion of emotional knowledge in legal ethics education is consistent with the pervasive and incremental approaches to learning legal ethics and institutional and faculty statements of the ethics graduate attribute, and in Chapter 5 by developing practical examples of how to teach students about ethical judgment in ways that consider the role of emotion in such judgment. In relation to the ‘integration’ dimension the normative goal of this thesis was to modify legal ethics education by expanding the concept of ‘thinking like a lawyer’ and to provide concrete strategies that show how knowledge about emotion can be introduced into legal ethics education.<sup>2</sup> It is in this way that this thesis contributes to the field of law and emotions scholarship and legal ethics education. In order to achieve the overall aims the thesis was divided into two parts each comprising two chapters.

---

<sup>1</sup> Kathryn Abrams and Hila Keren ‘Who’s Afraid of Law and Emotions?’ (2010) 94 *Minnesota Law Review* 1997, 2033-2034.

<sup>2</sup> Ibid footnote 1. The dimensions of law and emotions scholarship are: (1) Illumination – ‘attributes of cognition: law and emotions scholarship values the affective dimensions of cognition as fully as the classically rational, rather than understanding them as "other" or as potentially problematic departures from rationality’; (2) Investigation – ‘cognate literatures: law and emotions scholarship may draw on economics, biological science, and more objectivist social sciences, but it also draws on literature, history, philosophy and other humanist disciplines’; (3) Integration – ‘normative goals: law and emotions scholarship engages law not simply, or even primarily, to correct the cognitive responses of legal subjects in favour of greater rationality; it aims to modify law more fully to acknowledge the role of specific emotions, or to use law to produce particular emotional effects.’

## **6.1 Part One – why it is important to include knowledge about emotion in legal ethics education**

### **Emotion and Judgment**

Chapter 2 focused on scholarship from cognitivist philosophy, cognitive neuroscience and cognitive psychology. That scholarship establishes the relationship between emotion, cognition, judgment and ethical reasoning. Emotions involve thought and they contain evaluative judgments in the form of beliefs and values. Given the status of emotion in these disciplines, it is no longer appropriate for the discipline of law to ignore emotion, to do so would be to remain ignorant to the reality of human decision-making. In excluding material on emotion, legal education fails its students by not taking into account an influential factor in ethical and legal judgment and decision-making. The extent to which emotion is involved in such judgment depends on the situation and the person experiencing the emotion. Whether emotion plays a major or minor role, it is important for people, including lawyers, to be aware of the influences of emotion in judgment. This is why legal education should enable students to understand and analyse the evaluations contained in emotion. This understanding leads to increased self-awareness and the ability to account for the positive and negative impact of emotion on judgment. Because the aforementioned disciplines recognise the role of emotion in cognition, judgment, ethics and decision-making they are compatible with the cognitive frameworks employed in law and therefore are useful in expanding the understanding of how emotion is involved in ‘thinking like a lawyer’.

The ability to account for the positive and negative influences of emotion requires comprehension of the evaluative judgments that emotions contain. In order to understand the general defining features of emotion, three interrelated categories were considered: perception, cognition, and emotional dispositions. Emotional perceptions provide evaluative knowledge by revealing what is significant about the object of the emotion according to the perspective of the person. A person’s perspective is influenced by emotional dispositions which affect the evaluation of the object of the emotion.<sup>3</sup> The approaches of three philosophers who offer cognitivist theories of emotion were considered in order to discern the defining features of cognition and the evaluative properties of emotion.<sup>4</sup> In general these philosophers argue that emotions are evaluations based on belief, value, thought and judgment as directed toward the object of the emotion. The framework to analyse emotional experiences comes from understanding the evaluative properties of emotion. Emotional dispositions are habits of thought and action based on past emotional experience that produce emotional responses.<sup>5</sup> Emotional dispositions influence the way in which the object is perceived and valued and the formation and retention of beliefs that underpin emotion. In this way, emotional dispositions influence the judgments that are made about the object of the

---

<sup>3</sup> See Chapter 2, Part 2.2.

<sup>4</sup> Martha Nussbaum, Jerome Neu and Robert Solomon; see Chapter 2, Part 2.3.

<sup>5</sup> See Chapter 2, Part 2.4.

emotion. In chapter 2 the analysis of perception, cognition and emotional dispositions leads to the conclusion that the ability to understand and analyse the evaluations involved in emotion results in better emotional self-awareness. This is the ability to analyse emotion, experience emotion appropriately and to form habits of thought that enable people to see what is and is not relevant to their judgments.

Moral emotions were then considered in order to elaborate on the additional defining features of these emotions, the evaluations involved and their connection to ethical judgment. Moral emotions involve perceptive, motivational and evaluative functions in judgment.<sup>6</sup> The moral emotions of empathy, sympathy, anger and contempt were examined to demonstrate the structure of these emotions and their moral justifiability. Moral emotions involve moral evaluations which can be constituted by beliefs about right and wrong, and evaluations about the experiences, actions or character traits of the object of the emotion. It is important to examine the evaluative judgments contained in these emotions because when the evaluations are wrong or unjustifiable the emotion can impact on ethical judgment negatively. For example, the disciplinary cases used in this thesis demonstrate the perceptive and motivational functions of emotions, such as sympathy, love and anger, as well as the negative impact on judgment when these emotions are not scrutinised. Instead of ignoring or excluding the emotion from judgment, it was argued that if the practitioners in these cases had better emotional self-awareness and had accounted for the impact of their emotions they would have exercised sounder ethical judgment.

### **Thinking like a Lawyer: Professionalism, Ethics and Emotion**

‘Thinking like a lawyer’ can be broadly understood to mean the ability to undertake legal problem-solving.<sup>7</sup> 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. However traditionally, ‘thinking like a lawyer’ is indicative of the rationalist practices of law because of the focus on logical reasoning. This practice effectively attempts to exclude humanistic concerns such as emotion in legal problem-solving. Chapter 3 argued that including the emotional aspects of ‘thinking like a lawyer’ would make legal ethics education more comprehensive and better equip law students for the reality of making ethical judgments in practice. Angela Olivia Burton’s model of ‘thinking like a lawyer’ was adopted in Chapter 3 because it explicitly identifies the intellectual capacities where emotion is involved: narrative intelligence and the personal intelligences.<sup>8</sup> The inclusion of emotion in Burton’s model is significant because it demonstrates that students can learn traditional analytical legal skills, such as inductive and deductive reasoning, together with the analytical skills involved in the emotional aspects of ethical judgment. This thesis contributes to a better understanding of the role of emotion in legal judgment because it expanded on the function of

---

<sup>6</sup> See Chapter 2, Part 2.5.

<sup>7</sup> See Chapter 3, Part 3.2.

<sup>8</sup> See Chapter 3, Part 3.2.

emotion in narrative intelligence and the personal intelligences contained in Burton's model by applying the knowledge about emotion from Chapter 2.

The scholarship considered in Chapter 3 emphasised that humanistic concerns, such as emotion, are consistent with the ability to 'think like a lawyer' and moreover, they are a necessary element of this skill. Lawyers use narrative intelligence to 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. Narratives also express emotional content and in doing so can reveal the structure of emotions and their impact on judgment, makes stories easier to remember and more persuasive, and allows empathic identification and perspective taking. The personal intelligences are important for lawyering because emotional self-awareness contributes to personal and professional problem-solving. Understanding the desires and motivations of others contributes to effectively communicating and working with them. As such, a legal ethics curriculum that includes the emotional content of narrative intelligence and the personal intelligences in 'thinking like a lawyer' is more comprehensively preparing students for the human context of legal practice.

The capacity of narrative intelligence involves the ability 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. Although several academics advocate the importance of emotion in narrative intelligence they do not go into detail about it.<sup>9</sup> This thesis expanded on the emotive content of narrative intelligence in Chapter 3 by providing a detailed application of narrative analysis and cognitivist theories of emotion to the disciplinary case of *Morel*.<sup>10</sup> That analysis revealed how *Morel's* experience of love impacted on her professional judgment. Solomon's narrative theory of love was 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 was applied to better understand how *Morel's* need to be a rescuer and her prioritisation of this need exposes habits and dispositions to think and act on love in certain ways which led to the 'wrong story' of love being told. *Morel* was used as an example of how a lack of emotional self-awareness impaired the practitioner's personal and professional judgment.

In Chapter 5 a similar form of narrative analysis was applied in the case of *Madden*<sup>11</sup> which revealed the impact of anger on the practitioner's professional judgment. Gabriele Taylor's conception of anger from Chapter 2 was applied to ascertain the defining features of *Madden's* anger and its moral justifiability.<sup>12</sup> The analysis demonstrated that *Madden's* emotional dispositions, beliefs and defence mechanisms<sup>13</sup> contributed to the misguided

---

<sup>9</sup> See Chapter 3, Part 3.3.2.

<sup>10</sup> [2004] SASC 168; (2004) 88 SASR 541. See Chapter 3, Part 3.3.2.

<sup>11</sup> [2008] NSWADT 210. See Chapter 5, 103-106.

<sup>12</sup> See Chapter 2, Part 2.5.2.

<sup>13</sup> See Chapter 3, Part 3.4.1.

judgments he made about the object of the emotion. It was suggested that if Madden had better emotional self-awareness he may have avoided making poor ethical judgments. The disciplinary cases illustrated how narratives can reveal the structure of an emotion, how emotions contain evaluative judgments that can be analysed, and the need for emotional self-awareness in legal practice. The teaching and learning strategies involving *Madden* and *Morel* exemplify how engaging the capacity of narrative intelligence can assist in the analysis of emotion. All of the teaching and learning strategies in Chapter 5 utilise narratives because importantly, the evaluation of ethical and emotional narratives also engages the personal intelligences.

The personal intelligences shape our understanding of ourselves (intrapersonal) and others (interpersonal). These intelligences involve being aware of our own and other people's emotion, personality, motivations, beliefs and values. Intrapersonal intelligence requires emotional self-awareness. It was argued that self-awareness means developing better awareness of emotions, experiencing them, learning how to examine and account for them, and learning how to react to them effectively. This thesis expanded on the emotive content of intrapersonal intelligence by giving a detailed description of how a lack of emotional self-awareness can manifest in self-representation, intellectualisation, inappropriate emotional responses and inappropriate emotional detachment.<sup>14</sup> In turn, these issues can lead to poor judgment, unethical conduct and dissociation from personal values and morality. Interpersonal intelligence denotes the ability to understand another person's desires and motivations and to use that knowledge to effectively deal with other people and this requires a capacity for empathy. The analysis of empathy from Chapter 2 was applied to expand the understanding of what it means to have a genuine capacity for empathy in legal practice. However it was acknowledged that a balance between empathic engagement and detachment is necessary in order to prevent boundary violations such as counter-transference.<sup>15</sup> It was argued that the ability to recognise emotional responses, habits and dispositions, and the ability to analyse how emotion can affect the lawyer/client relationship is required in order for boundary violations to be avoided, or dealt with if they arise.<sup>16</sup> Thus emotional self-awareness assists in striking the balance between empathic engagement and detached objectivity.<sup>17</sup>

The disciplinary cases used as examples in this thesis provide support for the argument that emotion does influence legal-ethical judgment. These cases illustrate how emotion is involved in judgment, ethics and legal practice and this is why it is important to include emotion in legal ethics education. The cases demonstrate the negative impacts of unexamined emotion and the analysis of them emphasises the need for emotional self-awareness, so that

---

<sup>14</sup> See Chapter 3, Part 3.4.1.

<sup>15</sup> See Chapter 3, Part 3.4.2.

<sup>16</sup> Marjorie A Silver 'Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship' (1999-2000) 6 *Clinical Law Review* 259, 276.

<sup>17</sup> Nigel Duncan 'Addressing Emotions in Preparing Ethical Lawyers' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011) 268.

the positive and negative effects of emotion are accounted for in exercising ethical judgment and legal practice. Legal ethics education should therefore provide students with the opportunity to develop the capacities of emotional self-awareness, empathy and appropriate emotional boundaries.

In order to provide students with such opportunities, teaching and learning strategies would ideally be designed so that students could gain an understanding of their own emotional capabilities, practice making judgments that include emotion, and critically reflect on and analyse the role of emotion in legal-ethical ethical judgment. Including knowledge about emotion can also prompt consideration of other ethical factors, such as duty and impartiality, how a lawyer enacts their role and the boundaries of ethical advocacy, and encourages students to think about their own approach to ethical decision-making. The observations of the subject co-ordinators of Ethics and Professional Conduct<sup>18</sup> and Torts<sup>19</sup> lend support for the claim that when the emotional aspects of legal ethics are included, students consider their own values and apply empathy in order to understand the perspectives of others. Therefore, the inclusion of knowledge about emotion into the teaching of legal ethics, orients problems away from rigid legal perspectives, and in so doing encourages students to account for a broader range of factors in ‘thinking like a lawyer’ and legal ethics.

## **6.2 Part Two: How knowledge about emotion could be introduced into legal ethics education**

### **Emotion in the Legal Ethics Curriculum**

Chapter 4 used a case study to describe the historical context and processes for developing the legal ethics curriculum at UTS Law. In chapter 5 the case study explained the introduction of the knowledge about emotion from previous chapters in the content of teaching and learning strategies for two core law subjects. Chapter 4 considered how the emotional aspects of judgment in legal ethics education were consistent with the pedagogical approaches and policies on learning outcomes at an institutional and faculty level. The particular case analysed was the substance and form of the program of legal ethics education at UTS Law. UTS Law uses a combination of the pervasive and incremental approaches by embedding the ethics attribute into five core law subjects together with the foundational subject Ethics, Law and Justice and the vocational subject Legal Skills where professional responsibility is considered. This approach ensures that students have a focused and early exposure to legal ethics and that this exposure is continued throughout the degree.

The pervasive and incremental approaches are beneficial because they allow students to develop their capacity for ethical judgment in different contexts and from different perspectives, enhance their analytical skills, gain awareness of structural and regulatory issues, and encourage reflection on the multitude of factors influencing ethical judgment

---

<sup>18</sup> See Chapter 5, Part 5.2.2.

<sup>19</sup> See Chapter 4, Part 4.3.3.2.

including personal values, and morals. It was argued that emotional knowledge in legal ethics education is best implemented via the pervasive and incremental approaches.<sup>20</sup> These approaches allow students to acquire an understanding of how emotion is involved in ethical judgment and to develop emotional self-awareness incrementally and with increasing levels of complexity. The intended outcome is that students are better equipped to make ethical judgments in practice.

However, the case study showed that achieving that outcome depends on the way in which the pervasive and incremental approaches are deployed in the curriculum. The analysis of the 2007 curriculum review identified two significant issues. The first issue was that the ethics curriculum was not completely pervasive because an entire year did not have ethics coverage in core subjects. The second issue was the lack of co-ordination in deploying ethics content and skills components throughout the degree. These were problematic because students were not continually exposed to legal ethics material, and their ability to learn incrementally and to practice making ethical judgments across a broad range of subject areas with increasing levels of complexity was limited. As discussed below, there are similar issues with the introducing knowledge about emotion in the current legal ethics curriculum.

Chapter 4 also argued that the incorporation of material on the role of emotion in legal-ethical decision-making and legal ethics education is educationally justified at the institutional level and subject levels. The analysis of the 2013 curriculum review demonstrated how the ethics graduate attribute, Threshold Learning Outcome (TLO), Course Intended Learning Outcome (CILO) and subject learning objectives developed at UTS Law provide the means to introduce the knowledge about emotion from the previous chapters.<sup>21</sup> These factors are framed in such a way as to be able to include narrative intelligence and the personal intelligences and emotion is an element in each of these intelligences. Additionally, the ethics attribute, CILO and subject learning objectives encompass the judgment and whole student approaches which recognise the affective domain in legal ethics.

However, with the exception of the subjects Ethics and Professional Conduct, and Ethics, Law and Justice where the learning objective is explicit about the relationship of emotion to ethics, there have been difficulties in implementing the emotional components of legal ethics pervasively and incrementally in other subjects. For example, in the subject Torts the content pertaining to emotion in the legal ethics learning strategy was omitted from the materials even though that content, as outlined in chapter 4, was designed to engage students in exercising both narrative and interpersonal intelligence and was consistent with the learning objective.<sup>22</sup> The inclusion of the content pertaining to emotion in the legal ethics curriculum has not been approached in a co-ordinated, pervasive or incremental way.

Thus, similar problems as those experienced with the embedding of the graduate attribute in the 2007 curriculum review are being repeated in relation to introducing the emotional

---

<sup>20</sup> See Chapter 4, Part 4.2.3.

<sup>21</sup> See Chapter 4, Part 4.3.2.

<sup>22</sup> See Chapter 4, Part 4.3.3.2.

aspects of legal ethics in the curriculum. This means that students will not be continually exposed to considering the role of emotion in legal-ethical judgment and this will impact on their ability to develop emotional insight incrementally. This highlights the need for formalised faculty re-education that addresses attitudes to including the role of emotion in legal-ethical judgment and which develops teaching and learning strategies that are relevant to the ethics content in specific subjects. Without this it is likely that emotion will continue to be marginalised in legal ethics education.

### **Emotion in Core Law Subjects**

Chapter 5 concluded the case study by demonstrating how knowledge about emotion can be implemented via Burton's model of 'thinking like a lawyer'. The original contribution in this chapter was developing the content of teaching and learning strategies for two core law subjects, Ethics and Professional Conduct and Evidence and Criminal Procedure. The content of those strategies were developed with the aim of providing students with the opportunity to consider and analyse the role of emotion in legal-ethical judgment. The application of the knowledge from chapters 2 and 3 to the teaching and learning strategies for these subjects demonstrated the different ways in which emotion is involved in legal ethics, how the narrative intelligence and personal intelligence components of Burton's model can be used as a vehicle from which to educate students about the role of emotion in ethical judgment, and how educators can introduce knowledge from other disciplines that deal with emotion and judgment.

It was argued that by using concrete examples of how emotion is involved in legal-ethical judgment and how emotion can be integrated into teaching and learning strategies, this thesis provides academics with a framework from which they can formulate their own teaching and learning strategies with a view to achieving learning outcomes for students such as: increased awareness and understanding of their own emotional capabilities and the ability to critically reflect on and analyse the role of emotion in ethical judgment. The main support for this argument came from the scholarship of cognitive philosophy, cognitive neuroscience and cognitive psychology examined in Chapter 2. By applying the knowledge about emotion from these disciplines to the content of the teaching and learning strategies, the role of emotion in 'thinking like a lawyer' is illuminated and integrated into practical educational content. For example, students participating in perspective taking activities would gain a better understanding of their own emotional capabilities, specifically their capacity for sympathy and empathy, and practice making judgments that involve emotion.<sup>23</sup> Students can engage in critical reflection and analysis of the role of emotion in ethical judgment when they discuss the role of sympathy and compassion in ethical judgment,<sup>24</sup> and the persuasive use of emotions such as contempt.<sup>25</sup> It was further argued that students would gain a more comprehensive understanding of 'thinking like a lawyer' and improve their ability to make

---

<sup>23</sup> See Chapter 5, Part 5.2.2.1.

<sup>24</sup> See Chapter 5, Part 5.2.2.3.

<sup>25</sup> See Chapter 5, Part 5.3.2.1.

ethical judgments by introducing the role of emotion in legal-ethical judgement. The main support for this argument came from the scholarship of legal educators, examined in Chapter 3, who advocate the important role emotion has in legal thinking and legal education. The application of this scholarship demonstrated how emotional analysis could be incorporated into ethical analysis via the narrative and personal intelligence components of ‘thinking like a lawyer’.

The design of the teaching and learning strategies demonstrated that emotion does not belong to a realm outside of law and legal thinking. Emotion is involved in ‘thinking like a lawyer’ and it is only a transgressor in the intellectual realm when it is not properly accounted for in judgment. The teaching and learning strategies advanced in this thesis confirm that the objective aspects of legal ethics can be learned in conjunction with subjective aspects such as emotion. Importantly, this thesis recognises that students have subjectivities that will influence the way they learn law and perform as ethical practitioners. Instead of ignoring or repressing the subjectivity and emotional experiences of students, it is important that students bring them into the classroom and identify their relevance in legal practice. By articulating the emotional aspects of ‘thinking like a lawyer’ legal educators not only acknowledge the humanity involved in legal practice, we also allow our students to develop as people, who will practice law with a better awareness of their own emotional capabilities and a more comprehensive understanding of the factors that can impact on ethical judgment.

## APPENDIX ONE

**Table 1 Graduate Attributes prior to 2013 curriculum review**

INTELLECTUAL	PROFESSIONAL	PERSONAL
1. Critical thinking	5. Disciplinary knowledge	8. Self & cooperative work management
2. Analysis and evaluation	6. Lifelong learning	9. Cultural awareness & global outlook
3. Spoken & written communication	7. Ethics	10. Social justice
4. Legal research & technology literacy		

**Table 2 Graduate Attributes 2013 curriculum review for the Bachelor of Laws (LLB)**

NEW ATTRIBUTES (LLB)	PREVIOUS ATTRIBUTES
1. Legal knowledge - A coherent understanding of fundamental areas of legal knowledge including the Australian legal system, social justice, cultural and international contexts and the principles and values of ethical practice.	5, 7, 9, 10
2. Ethics & professional responsibility - A capacity to value and promote honesty, integrity, accountability, public service and ethical standards including an understanding of approaches to ethical decision making, the rules of professional responsibility and, an ability to reflect upon and respond to ethical challenges in practice.	7
3. Critical analysis & evaluation - A capacity to think critically, strategically and creatively including an ability to identify and articulate legal issues, apply reasoning and research, engage in critical analysis and make reasoned choices.	1, 2
4. Research skills - Well-developed cognitive and practical skills necessary to identify, research, evaluate and synthesise relevant factual, legal and policy issues.	4
5. Communication & collaboration - Effective and appropriate communication skills including highly effective use of the English language, an ability to inform, analyse, report and persuade using an appropriate medium and message and an ability to respond appropriately.	3, 8
6. Self-management - The ability to implement appropriate self-management and lifelong learning strategies including initiating self-directed work and learning, judgment and responsibility, self-assessment of skills, personal wellbeing and appropriate use of feedback and, a capacity to adapt to and embrace change.	8, 6

**Table 3 Graduate Attributes 2013 curriculum review for Post Graduates including the Juris Doctor (JD)**

NEW ATTRIBUTES (PG)	PREVIOUS ATTRIBUTES
1. Legal knowledge - An advanced and integrated understanding of a complex body of legal knowledge including the Australian legal system, social justice, cultural and international contexts, the principles and values of ethical practice, and contemporary developments in law and its professional practice.	5, 7, 9, 10
2. Ethics & professional responsibility - An advanced and integrated capacity to value and promote honesty, integrity, accountability, public service and ethical standards including an understanding of approaches to ethical decision making, the rules of professional responsibility, an ability to reflect upon and respond to ethical challenges in practice, and a developing ability to engage in the profession of law and to exercise professional judgment.	7
3. Critical analysis & evaluation - A capacity to think critically, strategically and creatively including an ability to identify and articulate complex legal issues, apply reasoning and research to generate appropriate theoretical and practical responses, and, demonstrate sophisticated cognitive and creative skills in approaching complex legal issues and generating appropriate responses.	1, 2
4. Research skills - Well-developed cognitive and practical skills necessary to identify, research, evaluate and synthesise relevant factual, legal and policy issues and demonstrate intellectual and practical skills necessary to justify and interpret theoretical propositions, legal methodologies, conclusions and professional decisions.	4
5. Communication & collaboration - Effective and appropriate professional communication skills including highly effective use of the English language, an ability to inform, analyse, report and persuade using an appropriate medium and message and an ability to respond appropriately.	3, 8
6. Self-management - A high level of autonomy, accountability and professionalism, the ability to implement appropriate self-management and lifelong learning strategies including initiating self-directed work and learning, judgment and responsibility, self-assessment of skills, personal wellbeing and appropriate use of feedback and, a capacity to adapt to and embrace change.	8, 6

**Table 4 Level 7 and 9 Course Intended Learning Outcomes**

	CILO Level 7 (LLB)	CILO Level 9 (JD)
Legal Knowledge	<p>A coherent understanding of fundamental areas of legal knowledge including:</p> <p>The Australian legal system, international and comparative contexts, theoretical and technical knowledge;</p> <p>The broader contexts within which legal issues arise and the law operates including cultural awareness, social justice and policy; and</p> <p>The principles and values of justice and ethical practices in lawyers' roles.</p>	<p>An advanced and integrated understanding of a complex body of legal knowledge including:</p> <p>The Australian legal system, international and comparative contexts, theoretical and technical knowledge;</p> <p>The broader contexts within which legal issues arise and the law operates including cultural awareness, social justice and policy;</p> <p>The principles and values of justice and ethical practices in lawyers' roles; and</p> <p>Contemporary developments in law and its professional practice.</p>
Ethics & Professional Responsibility	<p>A capacity to value and promote honesty, integrity, accountability, public service and ethical standards including:</p> <p>An understanding of approaches to ethical decision making and professional responsibility; and</p> <p>An ability to recognise, reflect upon and respond to ethical issues likely to arise in professional contexts in ways that evidence professional judgment, promote justice and serve the community.</p>	<p>An advanced and integrated capacity to value and promote honesty, integrity, accountability, public service and ethical standards including:</p> <p>An understanding of approaches to ethical decision making and professional responsibility;</p> <p>An ability to recognise, reflect upon and respond to ethical issues likely to arise in professional contexts in ways that evidence professional judgment, promote justice and serve the community; and</p> <p>A developing ability to engage in the profession of law and to exercise professional judgment.</p>
Critical Analysis & Evaluation	<p>A capacity to think critically, strategically and creatively, including the ability to:</p> <p>Identify and articulate legal issues in context;</p> <p>Apply reasoning and research to generate appropriate responses;</p> <p>Engage in critical analysis and make a reasoned choice amongst alternatives; and</p> <p>Think creatively in approaching legal issues and generating appropriate responses.</p>	<p>A capacity to think critically, strategically and creatively, including the ability to:</p> <p>Identify and articulate complex legal issues in context;</p> <p>Apply reasoning and research to generate appropriate theoretical and practical responses;</p> <p>Engage in critical analysis and make a reasoned choice amongst alternatives; and</p> <p>Sophisticated cognitive and creative skills in approaching legal issues and generating appropriate responses.</p>
Research Skills	<p>Well-developed cognitive and practical skills necessary to identify, research, evaluate and synthesise relevant factual, legal and policy issues.</p>	<p>Well-developed cognitive and practical skills necessary to identify, research, evaluate and synthesise relevant factual, legal and policy issues and demonstrate intellectual and practical skills necessary</p>

		to justify and interpret theoretical propositions, legal methodologies, conclusions and professional decisions.
Communication & Collaboration	<p>Effective and appropriate communication skills including:</p> <p>Highly effective use of the English language to convey legal ideas and views to different audiences and environments;</p> <p>An ability to communicate to inform, analyse, report and persuade.</p> <p>An ability to strategically select an appropriate medium and message;</p> <p>An ability to assess how messages are received and alter communication strategies accordingly;</p> <p>An ability to be responsive and adaptive to the perspectives of collaborators, clients, counter parties and others; and</p> <p>An ability to generate a sustained and logical argument.</p>	<p>Effective and appropriate professional communication skills including:</p> <p>Highly effective use of the English language to convey legal ideas and views to different audiences and environments;</p> <p>An ability to communicate to inform, analyse, report and persuade.</p> <p>An ability to strategically select an appropriate medium and message;</p> <p>An ability to assess how messages are received and alter communication strategies accordingly;</p> <p>An ability to be responsive and adaptive to the perspectives of collaborators, clients, counter parties and others; and</p> <p>An ability to generate a sustained and logical argument.</p>
Self-management	<p>The ability to implement appropriate self-management and lifelong learning strategies including:</p> <p>An ability to undertake and initiate self-directed work and learning;</p> <p>Well-developed judgment and responsibility as a legal professional in a broader social context;</p> <p>The ability to support personal and professional development by:</p> <p>Reflecting on and assessing their own capabilities, wellbeing and performance;</p> <p>Making use of feedback as appropriate;</p> <p>Identifying and accessing appropriate resources and assistance; and</p> <p>Making use of resources and support in developing resilience.</p> <p>A capacity to adapt to and embrace change and a commitment to ongoing learning.</p>	<p>A high level of autonomy accountability and professionalism, and, the ability to implement appropriate self-management and lifelong learning strategies including:</p> <p>An ability to undertake and initiate self-directed work and learning;</p> <p>Well-developed judgment and responsibility as a legal professional in a broader social context;</p> <p>The ability to support personal and professional development by:</p> <p>Reflecting on and assessing their own capabilities, wellbeing and performance;</p> <p>Making use of feedback as appropriate;</p> <p>Identifying and accessing appropriate resources and assistance; and</p> <p>Making use of resources and support in developing resilience.</p> <p>A capacity to adapt to and embrace change and a commitment to ongoing learning.</p>

# BIBLIOGRAPHY

## **A. Books and Book Chapters**

- Abramson, Kate, 'A Sentimentalist's Defense of Contempt, Shame and Disdain' in Peter Goldie (ed), *The Oxford Handbook of Philosophy of Emotion* (Oxford University Press, 2010)
- Aristotle, *Rhetoric*, Book II Part 1, translated by W Rhys Roberts (The Internet Classics Archive) <http://classics.mit.edu/Aristotle/rhetoric.2.ii.html> (28/01/2014)
- Arnold, Magda, *Emotion and Personality* (Columbia University Press, 1960)
- Bandes, Susan (ed), *The Passions of Law* (New York University Press, 1999)
- Barton, Karen, and Fiona Westwood, 'Developing Professional Character – Trust, Values and Learning' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011)
- Bell, Macalister, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press, 2013)
- Berlant, Lauren (ed), *Compassion: The Culture and Politics of an Emotion* (Routledge, 2004)
- Berlant, Lauren, 'Introduction: Compassion (and Withholding)' in Lauren Berlant (ed), *Compassion: The Culture and Politics of an Emotion* (Routledge, 2004)
- Biggs, John, *Teaching for Quality Learning at University* (Open University Press, 1999)
- Biggs, John, *Teaching for Quality Learning at University* (Open University Press, 2<sup>nd</sup> ed, 2003)
- Biggs, John and Catherine Tang, *Teaching for Quality Learning at University* (Open University Press, 4<sup>th</sup> ed, 2011)
- Calhoun, Cheshire, 'Subjectivity and Emotion' in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003)
- Calvo, Paco, and John Simons (eds), *The Routledge Companion to the Philosophy of Psychology* (Routledge, 2009)
- Dalgleish, Tim, and Mick Powers (eds), *Handbook of Cognition and Emotion* (Wiley, 1999)
- Dal Pont, GE, *Lawyers' Professional Responsibility* (Lawbook Co, 3<sup>rd</sup> ed, 2006)
- Damasio, Antonio, *Descartes' Error: Emotion, Reason and the Human Brain* (Harper Collins, 1994)
- Damasio, Antonio, *The Feeling of What Happens: Body Emotion and the Making of Consciousness* (Vintage, 2000)
- Damasio, Antonio, *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain* (Vintage, 2004)

- Damasio, Antonio, 'William James and the Modern Neurobiology of Emotion' in Dylan Evans and Pierre Cruse (eds), *Emotion, Evolution, and Rationality* (Oxford University Press, 2004)
- Davidson, Richard J, Klaus R Schere and H Hill Goldsmith, *Handbook of Affective Sciences* (Oxford University Press, 2002)
- Deigh, John, 'Primitive Emotions' in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003)
- Del Mar, Maksymilian, 'Legal Understanding and the Affective Imagination' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011)
- Duncan, Nigel, 'Addressing Emotions in Preparing Ethical Lawyers' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011)
- Eades, Diana, *Sociolinguistics and the Legal Process* (Multilingual Matters, 2010)
- Eckman, Paul, 'Basic Emotions' in T. Dalgliesh and M. Powers (eds), *Handbook of Cognition and Emotion* (John Wiley & Sons, 1999)
- Evans, Dylan, *Emotion: A Very Short Introduction* (Oxford University Press, 2001)
- Evans, Dylan, and Pierre Cruse (eds), *Emotion, Evolution, and Rationality* (Oxford University Press, 2004)
- Melissa L Finucane, Melissa L, Ellen Peters and Paul Slovic, 'Judgment and Decision Making: The Dance of Affect and Reason' in Sandra L Schneider and James Shanteau (eds), *Emerging Perspectives on Judgment and Decision Research* (Cambridge University Press, 2003)
- Freeman, MDA, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell Ltd, 7<sup>th</sup> ed, 2001)
- Frijda, Nico, *The Emotions* (Cambridge University Press, 1986)
- Goldie, Peter, *The Emotions: A Philosophical Exploration* (Oxford University Press, 2000)
- Goldie, Peter (ed), *Understanding Emotions: Mind and Morals* (Ashgate, 2002)
- Goldie, Peter, 'Emotion, Feeling and Knowledge of the World' in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003)
- Goldie, Peter (ed), *The Oxford Handbook of Philosophy of Emotion* (Oxford University Press, 2010)
- Greenspan, Patricia, *Practical Guilt: Moral Dilemmas, Emotions, and Social Norms* (Oxford University Press, 1995)
- Griffiths, Paul E, 'Is Emotion a Natural Kind?' in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotion* (Oxford University Press, 2004)
- Gross, Daniel M, *The Secret History of Emotion: From Aristotle's Rhetoric to Modern Brain Science* (The University of Chicago Press, 2006)

- Haidt, Jonathan, 'The Moral Emotions' in Richard J Davidson, Klaus R Schere and H Hill Goldsmith, *Handbook of Affective Sciences* (Oxford University Press, 2002)
- Hughes, Gerard J, *Routledge Philosophy Guide to Aristotle on Ethics* (Routledge, 2001)
- Kemdal, Anna Blom, and Henry Montgomery, 'Perspectives and Emotions in Personal Decision Making' in Rob Reynard (ed), *Decision Making: Cognitive Models and Explanations* (Routledge, 1997)
- Koehler, Derek J, and Nigel Harvey (eds), *Blackwell Handbook of Judgment and Decision Making* (Blackwell Publishing Ltd, 2004)
- Lamb, Ainslie, and John Littrich, *Lawyers in Australia* (The Federation Press, 2007)
- Lane, Richard D, and Lynne Nadel (eds), *Cognitive Neuroscience of Emotion* (Oxford University Press, 2000)
- Le Brun, Marlene and Richard Johnstone, *The Quiet Revolution: Improving Student Learning in Law*, (The Law Book Company, 1994)
- Lerner, Alan M, 'From Socrates to Damasio, from Langdell to Kandel: The Role of Emotion in Modern Legal Education' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011)
- Lewis, Michael, and Jeanette Haviland-Jones (eds), *The Handbook of Emotions* (Guilford Press, 1999)
- Lloyd, Dennis, *The Idea of Law* (Penguin, 1964)
- Luban, David, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988)
- Maharg, Paul, and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011)
- Maharg, Paul, 'Space, Absence, Silence: The Intimate Dimensions of Legal Learning' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011)
- Maughan, Caroline, 'Why Study Emotion?' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011)
- Kevin Mulligan, 'Moral Emotions' in David Sander and Klaus Scherer (eds), *The Oxford Companion to Emotions and Affective Sciences* (Oxford University Press, 2009)
- Murphy, Kevin R (ed), *A Critique of Emotional Intelligence: What Are the Problems and How Can They Be Fixed?* (Lawrence Erlbaum Associates, 2006)
- Nado, Jennifer, Daniel Kelly and Stephen Stich, 'Moral Judgment' in Paco Calvo and John Simons (eds), *The Routledge Companion to the Philosophy of Psychology* (Routledge, 2009)
- Neu, Jerome, *A Tear is an Intellectual Thing: The Meanings of Emotion* (Oxford University Press, 2000)
- Neu, Jerome, 'Emotion and Freedom' in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003)
- Nicholson, Donald, and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999)

- Nussbaum, Martha C, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press, 1994)
- Nussbaum, Martha C, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001)
- Nussbaum, Martha C, 'Emotions as Judgments of Value and Importance' in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003)
- Nussbaum, Martha C, *Hiding From Humanity: Disgust, Shame and the Law* (Princeton University Press, 2004)
- Oakley, Justin, and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001)
- Parker, Christine, and Adrian Evans, *Inside Lawyers Ethics* (Cambridge University Press, 2007)
- Payne, Roy L, and Gary L Cooper (eds), *Emotions at Work: Theory, Research and Applications in Management* (John Wiley & Sons Ltd, 2001)
- Pillsbury, SH, 'Harlan, Holmes, and the Passion of Justice' in Susan Bandes (ed), *The Passions of Law* (New York University Press, 1999)
- Prinz, Jesse, 'Which Emotions Are Basic?' in Dylan Evans and Pierre Cruses (eds), *Emotion, Evolution and Rationality* (Oxford University Press, 2004)
- Ramsden, Paul, *Learning to Teach in Higher Education* (Routledge Falmer, 2<sup>nd</sup> ed, 2003)
- Rettinger, David A, 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)
- Reynard, Rob (ed), *Decision Making: Cognitive Models and Explanations* (Routledge, 1997)
- Rhode, Deborah L, *Professional Responsibility: Ethics by the Pervasive Method* (Aspen Publishers, 2<sup>nd</sup>ed, 1998)
- Robinson, Jenefer, 'Emotion: Biological Fact or Social Construction?' in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003)
- Ross, Ysaiah, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (Lexis Nexis Butterworths, 2005)
- Rorty, Amelie Oksenberg (ed), *Explaining Emotions* (University of California Press, 1980)
- Sander, David, and Klaus Scherer (eds), *The Oxford Companion to Emotions and Affective Sciences* (Oxford University Press, 2009)
- Scherer, Klaus R, Angela Schorr and Tom Johnstone (eds), *Appraisal Processes in Emotion: Theory, Methods, Research* (Oxford University Press, 2001)
- Scherer, Klaus R, and H Hill Goldsmith, *Handbook of Affective Sciences* (Oxford University Press, 2002)

- Schneider, Sandra L, and James Shanteau (eds), *Emerging Perspectives on Judgment and Decision Research* (Cambridge University Press, 2003)
- Silverman, David (ed), *Qualitative Research: Issues of Theory, Method and Practice* (Sage Publications, 3<sup>rd</sup> ed, 2011)
- Shklar, J ‘Law and Ideology’ (1964) in MDA Freeman, *Lloyd’s Introduction to Jurisprudence* (Sweet and Maxwell Ltd, 7<sup>th</sup> ed, 2001)
- Solomon, Robert C, *The Passions* (Doubleday, 1976)
- Solomon, Robert C, ‘Emotions and Choice’ in Amelie Rorty (ed), *Explaining Emotions* (University of California Press, 1980)
- Solomon, Robert C, *Not Passion’s Slave: Emotions and Choice* (Oxford University Press, 2003)
- Solomon, Robert C (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003)
- Solomon, Robert C, ‘Emotions, Thoughts, and Feelings: Emotions as Engagements in the World’ in Robert C Solomon (ed), *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford University Press, 2003)
- Solomon, Robert C, *About Love: Reinventing Romance for Our Times* (Hackett Publishing Company, 2006)
- Spinoza, Benedict De, *Ethics*, edited and translated by Edwin Curley, (Penguin Books, 1996)
- Sripada, Chandra Sekhar, and Stephen Stich ‘Evolution, Culture and the Irrationality of the Emotions’ in Dylan Evans and Pierre Cruses (eds), *Emotion, Evolution and Rationality* (Oxford University Press, 2004)
- Stanley, Robb O, and Graham D Burrows, ‘Varieties and Functions of Human Emotion’ in Roy L Payne and Gary L Cooper, *Emotions at Work: Theory, Research and Applications in Management* (John Wiley & Sons Ltd, 2003)
- Stroud, Sarah, and Christine Tappolet (eds), *Weakness of Will and Practical Irrationality* (Clarendon Press, 2003)
- Terada, Rei, *Feeling in Theory: Emotion after the “Death of the Subject”* (Harvard University Press, 2001)
- Thiele, Leslie Paul, *The Heart of Judgment: Practical Wisdom, Neuroscience, and Narrative* (Cambridge University Press, 2006)
- Vetlesen, Arne Johan, *Perception, Empathy, and Judgment: An Inquiry into the Preconditions of Moral Performance* (The Pennsylvania State University Press, 1994)
- Webb, Julian, ‘The Body in Emotion: Thinking Through Embodiment in Legal Education’ Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011)
- Wolski, Bobette, *Skills, Ethics and Values for Legal Practice* (Lawbook Co, 2<sup>nd</sup> ed, 2009)
- Woodward, Kathleen, *Statistical Panic: Cultural Politics and the Poetics of the Emotions* (Duke University Press, 2009)

## **B. Journal Articles**

- Abrams, Kathryn and Hila Keren, 'Who's Afraid of Law and Emotions?' (2010) 94 *Minnesota Law Review* 1997
- Alfini, James and Joseph Van Vooren, 'Is There a Solution to The Problem of Lawyer Stress? The Law School Perspective' (1995-1996) 10 *Journal of Law and Health* 61
- Allan, Joanna, 'Learning outcomes in higher education' (1996) 21 (1) *Studies in Higher Education* 93
- Anderson, Christopher J, 'The Psychology of Doing Nothing: Forms of Decision Avoidance Result From Reason and Emotion' (2003) 129 (1) *Psychological Bulletin* 139
- Anleu, Sharyn R, and Kathy Mack, 'Magistrates Everyday Work and Emotional Labour' (2005) 32 (4) *Journal of Law and Society* 590
- Arkush, David J, 'Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for the Law' (2008) 5 *Brigham Young University Law Review* 1275
- Bagaric, Mirko, and Penny Dimopoulos, 'Legal Ethics is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics' (2003) 3 (2) *Queensland University of Technology Law Journal* 367
- Bandes, Susan, 'Repression and Denial in Criminal Lawyering' (2006) 9 (2) *Buffalo Law Review* 339
- Baxter, Pamela and Susan Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (2008) 13 (4) *The Qualitative Report* 544
- Bechara, Antoine, Hanna Damasio and Antonio Damasio, 'Emotion, Decision Making and the Orbital Cortex' (2000) 10 (3) *Cerebral Cortex* 295
- Bechara, Antoine, 'The Role of Emotion in Decision-Making: Evidence From Neurological Patients with Orbitofrontal Damage' (2004) 55 *Brain and Cognition* 30
- Beck, Connie, Bruce Sales and G Andrew H Benjamin, 'Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among A Sample Of Practicing Lawyers' (1995-1996) 10 *Journal of Law and Health* 1
- Beck, Phyllis, and David Burns, 'Anxiety and Depression in Law Students: Cognitive Intervention' (1979-1980) 30 *Journal of Legal Education* 270
- Benjamin, G Andrew H, Alfred Kaszniak, Bruces Sales and Stephen Shanfield, 'The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers' (1986) 11 (2) *American Bar Foundation Research Journal* 225
- Benjamin, G Andrew H, Elaine J Darling and Bruce Sales, 'The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers' (1990) 13 *International Journal of Law and Psychiatry* 233
- Bennet, Hayley, and GA Broe, 'Judicial neurobiology, Markarian synthesis and emotion: How can the human brain make sentencing decisions?' (2007) 31 *Criminal Law Journal* 75
- Blake, Meredith, and Andrew Ashworth, 'Some Ethical Issues in Prosecuting and Defending Criminal Cases' [1998] *Criminal Law Review* 16

- Blasi, Augusto, 'Emotions and Moral Motivation' (1999) 29 *Journal for the Theory of Social Behaviour* 1
- Blumenthal, Jeremy A, 'Does Mood Influence Moral Judgment? An Empirical Test With Legal and Policy Implications' (2005) 29 *Law and Psychology Review* 1
- Blumenthal, Jeremy A, 'Law and the Emotions: The Problems of Affective Forecasting' (2005) 80 *Indiana Law Journal* 155
- Boon, Andrew, 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2002) 5 (1 & 2) *Legal Ethics* 34
- Bornstein, Brian H, Lahna M Rung and Monica K Miller, 'The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case' (2002) 20 *Behavioural Sciences and the Law* 393
- Brooks, Brian, 'Ethics and Legal Education' (1998) 28 *Victoria University Wellington Law Review* 157
- Burns, Kelly, and Antoine Bechara, 'Decision Making and Free Will: A Neuroscience Perspective' (2007) 25 *Behavioral Sciences and the Law* 263
- Burton, Angela Olivia, 'Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting' (2004-2005) 11 *Clinical Law Review* 15
- Cain, Paul J, '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
- Cassidy, R Michael, 'Character and Context: What Virtue Theory Can Teach Us about a Prosecutor's Ethical Duty to "Seek Justice"' (2006) 82 (2) *Notre Dame Law Review* 101
- Cates, Diana Fritz, 'Conceiving Emotions: Martha Nussbaum's Upheavals of Thought' (2003) 31 (2) *The Journal of Religious Ethics* 325
- Chismar, Douglas, 'Empathy and Sympathy: The Important Difference' (1988) 22 *The Journal of Value Inquiry* 257
- Christensen, Sharon and Sally Kift, 'Graduate Attributes and Legal Skills: Integration of Disintegration?' (2000) 11 *Legal Education Review* 207
- Clarke, Ben, 'An ethics survey of Australian criminal law practitioners' (2003) 27 *Criminal Law Journal* 142
- Cocks, Russell, 'Ethics a Lifelong Journey' (July 2004) 78 (7) *Law Institute Journal* 61
- Connolly, Terry, and Marcel Zeelenberg, 'Regret in Decision Making' (2002) 11 (6) *Current Directions in Psychological Science* 212
- Corbin, Lillian, 'Professionalism Redefined: More Than Ethics' (2001) 26 (3) *Alternative Law Journal* 139
- Coper, Michael, 'Legal Knowledge, The Responsibility of Lawyers, and the Task of Law Schools' (2007-2008) 39 *University of Toledo Law Review* 251
- Cossins, Annie, 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

- Cownie, Fiona, 'Alternative Values in Legal Education' (2003) 6 (2) *Legal Ethics* 159
- Cramton, Roger C, and Susan P Koniac, 'Rule, Story, and Commitment in the Teaching of Legal Ethics' (1996-1997) 38 *William & Mary Law Review* 145
- Daicoff, Susan, '(Oxymoron?) Ethical Decision Making By Attorneys: An Empirical Study' (1996) 48 *Florida Law Review* 197
- Daicoff, Susan, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1996-1997) 46 (5) *American University Law Review* 1337
- Daicoff, Susan, 'Law as a Healing Profession: The Comprehensive Law Movement' (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1
- D'Arms, Justin, 'Empathy and Evaluative Inquiry' (1998-2000) 74 *Chicago Kent Law Review* 1467
- D'Arms, Justin, and Daniel Jacobson, 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61 (1) *Philosophy and Phenomenological Research* 61
- Deigh, John, 'Cognitivism in the Theory of Emotions' (July 1994) *Ethics* 824
- Deigh, John, 'On Nussbaum's Defense of the Stoic Theory of Emotions' (2000) 19 *Quinnipiac Law Review* 293
- Denckla, Derek A, '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
- Deonna, Julien A, 'Emotion, Perception and Perspective' (2006) 60 (1) *Dialectica* 29
- Deonna, Julien A, and Fabrice Teroni, 'Taking affective explanations to heart' (2009) 48 (3) *Social Science Information* 358
- De Sousa, Ronald, 'Moral Emotions' (2001) 4 *Ethical Theory and Moral Practice* 109
- Doring, Sabine A, 'Seeing What to Do: Affective Perception and Rationalist Motivation' (2007) 61 (3) *Dialectica* 363
- Edwards, Kari, and Tamara S Bryan, 'Judgmental Biases Produced By Instructions to Disregard: The (Paradoxical) Case of Emotional Information' (1997) 23 (8) *Personality and Social Psychology Bulletin* 849
- Eisenberg, Nancy, 'Emotion, Regulation, and Moral Development' (2000) 51 *Annual Review of Psychology* 665
- Elkins, James R, 'The Pedagogy of Ethics' (1985) 10 *The Journal of the Legal Profession* 37
- Entwistle, Noel, 'Learning Outcomes and ways of thinking across contrasting disciplines and settings in higher education' (2005) 16 (1) *The Curriculum Journal* 67
- Etienne, Margareth, 'The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers' Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 05-06, March 21 2005, available at SSRN: <http://ssrn.com/abstract=690721>
- Etzioni, Amitai, 'Normative-Affective Factors: Toward a New Decision-Making Model' (1988) 9 *Journal of Economic Psychology* 125

- Evans, Adrian, 'Lawyer's Perceptions of Their Values: An Empirical Assessment of Monash University Graduates in Law, 1980-1998' (2001) 12 *Legal Education Review* 209
- Feldman, Heidi Li, 'Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?' (1995-1996) 69 *Southern California Law Review* 885
- Fletcher, Laurel E, and Harvey M Weinstein, 'When Students Lose Perspective: Clinical Supervision and the Management of Empathy' (2002-2003) 9 *Clinical Law Review* 135
- Frenkel, Douglas N, 'On Trying to Teach Judgment' (2001) 12 *Legal Education Review* 19
- Gantt, Larry O Natt, 'Deconstructing Thinking Like a Lawyer: Analysing the Cognitive Components of the Analytical Mind' (2006-2007) 29 *Campbell Law Review* 413
- Gerdy, Kristin B, 'Clients, Empathy, and Compassion: Introducing First Year Students to the Heart of Lawyering' (2008-2009) 87 *Nebraska Law Review* 1
- Giddings, Jeff, 'Teaching the ethics of criminal law and practice' (2001) 35 (2) *The Law Teacher* 161
- Glesner, B A, 'Fear and Loathing in Law Schools' (1990-1991) 23 *Connecticut Law Review* 627
- Goldie, Peter, 'Emotions, feelings and intentionality' (2002) 1 *Phenomenology and the Cognitive Sciences* 235
- Goldie, Peter, 'Emotion' (2007) *Philosophy Compass* 928
- Goodrich, Peter, 'Law in the Courts of Love: Andreas Capellanus and the Judgments of Love' (1996) 48 *Stanford Law Review* 633
- Graham Lorie M, and Stephen M McJohn, 'Cognition, Law, Stories' (2009) 10 (1) *Minnesota Journal of Law, Science & Technology* 255
- Granfield Robert, 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
- Gray, James, 'Thawing Out the Law School: Why we need legal education theory' (2012) 37 (3) *Alternative Law Journal* 171
- Green Bruce A, 'The Role of Personal Values in Professional Decision Making' (1998) 11 *Georgetown Journal of Legal Ethics* 19
- Greenspan, Patricia S, 'Emotional Strategies and Rationality' (2000) 110 *Ethics* 469
- Grose, Carolyn, 'Lawyers and Clients Telling Stories about Ethics (and Everything Else)' (2009) 20 *Hastings Women's Law Journal* 163
- Gruen, Rand J, 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
- Harris, Angela P, and Marjorie M Schultz, 'A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education' (1993) 45 *Stanford Law Review* 1773
- Harris, Lloyd C, 'The Emotional Labour of Barristers: An Exploration of Emotional Labour by Status Professionals' (2002) 39 (4) *Journal of Management Studies* 553

- Hartwell, Steven, 'Promoting Moral Development Through Experiential Teaching' (1995) 1 *Clinical Law Review* 505
- Hartwell, Steven, 'Moral Growth or Moral Angst? A Clinical Approach' (2004-2005) 11 *Clinical Law Review* 115
- Heins, Marilyn, Shirley Nickols Fahey and Lisa Lieden, 'Perceived Stress in Medical, Law, and Graduate Students' (1984) 59 *Journal of Medical Education* 169
- Henriss-Anderssen, Diana, 'Teaching Legal Ethics to First Year Law Students' (2002) 13 *Legal Education Review* 45
- Hess, Gerald F, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52 *Journal of Legal Education* 75
- Hussey, Trevor and Patrick Smith, 'Learning outcomes: a conceptual analysis' (2008) 13 (1) *Teaching in Higher Education* 107
- Hutcherson, Cendri A, 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
- Juergens, Ann, 'Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching' (2004-2005) 11 *Clinical Law Review* 413
- Kafetsios, Konstantinos, 'Aristotelian Affinities with Contemporary Emotion Research' (2005) 15 (5) *Theory and Psychology* 639
- Kahan, Dan M, and Martha C Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 (2) *Columbia Law Review* 269
- Kamvounias, Patty and Darrall Thompson, 'Assessing Graduate Attributes in the Business Law Curriculum' (2008) 1 (1) *Journal of the Australian Law Teachers Association* 181
- Keen, Suzanne, 'A Theory of Narrative Empathy' (2006) 14 (3) *Narrative* 207
- Kift, Sally, '21<sup>st</sup> Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law' (2008) 18 *Legal Education Review* 1
- Koniac, Susan P, and Geoffrey C Hazard Jr, 'Paying Attention to the Signs' (1995) 58 (3 & 4) *Law and Contemporary Problems* 117
- Kovach, Kimberlee K, 'Lawyer Ethics must Keep Pace With Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards' (2003) 39 *Idaho Law Review* 399
- Krieger, Lawrence S, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2004-2005) 11 *Clinical Law Review* 425
- Lacewing, Michael, 'Emotional Self-Awareness and Ethical Deliberation' (2005) 18 (1) *Ratio* 65
- Landwehr, Lawrence J, 'Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers' (1982) 7 *Law and Psychology Review* 39
- Langevoort, Donald C, 'Behavioural Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review' (1998) 51 *Vanderbilt Law Review* 1499

- Lazarus, Richard, 'Cognition and Motivation in Emotion' (1991) 46 *American Psychologist* 362
- Lerner, Alan, '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
- Lerner, Jennifer, and Larissa Tiedens, 'Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition' (2006) 19 *Journal of Behavioural Decision Making* 115
- Lerman, David M, '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
- Liverani, Mary Rose, 'Confidential Communications: Support for new subpoena law and bouquets for the Attorney General from sexual assault lobby' (1998) 36 (3) *Law Society Journal* 42
- Luban, David, 'Reason and Passion in Legal Ethics' (1999) 51 *Stanford Law Review* 873
- Maroney, Terry A, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) *Law and Human Behaviour* 119
- Mason, Michelle, 'Contempt as a Moral Attitude' (2003) 113 (2) *Ethics* 234
- McEachrane, Michael, 'Emotion, Meaning, and Appraisal Theory' (2009) 19 (1) *Theory & Psychology* 33
- McPhail, Ken, 'The Other Objective of Ethics Education: Re-humanising the Accounting Profession – A Study of Ethics Education in Law, Medicine, Engineering and Accounting' (2001) 34 *Journal of Business Ethics* 279
- Mellers, Barbara A, Alan Schwartz, Katty Ho and Ilana Ritov, 'Decision Affect Theory: Emotional Reactions to the Outcomes of Risky Options' (1997) 8 (6) *Psychological Science* 423
- Menkel-Meadow, Carrie, and Richard H Sander, 'The "Infusion" Method at UCLA: Teaching Ethics Pervasively' (1995) 58 *Law and Contemporary Problems* 129
- Montgomery, John E, 'Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students' (2007-2008) 39 *University of Toledo Law Review* 323
- Moore, Bert S, 'The Origins and development of Empathy' (1990) 14 (2) *Motivation and Emotion* 75
- Mortensen Reid, 'Lawyers' Character, Moral Insight and Ethical Blindness' (2002) 22 *The Queensland Lawyer* 166
- Nickerson Stephanie, 'Role-Play: An Often Misused Learning Strategy (2007-2008) 19 (4) Essays on Teaching Excellence 1 <http://cte.udel.edu/sites/cte/udel.edu/files/u7/TE19-04.htm> (26/09/13)
- Note, 'Making Docile Lawyers: An Essay on the Pacification of Law Students' (1997-1998) 111 *Harvard Law Review* 2027
- Nussbaum, Martha C, 'Narrative Emotions: Beckett's Genealogy of Love' (1988) 98 (2) *Ethics* 225

- Nussbaum, Martha C, 'The Use and Abuse of Philosophy in Legal Education' (1993) 45 *Stanford Law Review* 1627
- O'Brien, David, 'Rescuing the Emotions from Neo-Stoic Theory: A Reply to Martha Nussbaum' (April 2012) *Dialogue* 197
- O'Brien, Molly Townes, Stephen Tang and Kath Hall, 'Changing Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 (2) *Legal Education Review* 149
- Ogletree, Charles J, 'Beyond Justifications: Seeking Motivations to Sustain Public Defenders' (1992-1993) 106 *Harvard Law Review* 1239
- O'Shea, Paul, 'The Complete Law School: Avoiding the Production of 'Half-lawyers'' (2004) 29 (6) *Alternative Law Journal* 272
- Parker, Christine, 'What Do They Learn When They Learn Legal Ethics?' (2001) 12 *Legal Education Review* 175
- Parker, Christine, 'A Critical Morality For Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 (1) *Monash University Law Review* 49
- Pearce, Russell G, 'Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School' (1998) 29 (4) *Loyola University Chicago Law Journal* 719
- Pfister, Hans-Rudiger, and Gisela Bohm, 'The multiplicity of emotions: A framework of emotional functions in decision making' (2008) 3 (1) *Judgment and Decision Making* 5
- Phelps, Teresa Godwin, 'Narratives of Disobedience: Breaking/Changing the Law' (1990) 40 *Journal of Legal Education* 133
- Pizarro, David, 'Nothing More Than Feelings? The Role of Emotion in Moral Judgment' (2000) 30 (4) *Journal for the Theory of Social Behaviour* 355
- Posner, Eric A, 'Law and Emotion' (2000-2001) 89 (6) *Georgetown Law Journal* 1977
- Prinz, Jesse J, 'Is Emotion a Form of Perception?' (2006) 36 Supplement [vol. 32] *Canadian Journal of Philosophy* 137
- Puig, Gonzalo Villalta, 'Legal Ethics in Australian Law Schools' (2008) *The Law Teacher* 29
- Rand, Joseph W, 'Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making' (2002-2003) 9 *Clinical Law Review* 731
- Raporort, Nancy B, 'Is "Thinking Like a Lawyer" Really What We want to Teach?' (2002) 91 *Journal of the Association of Legal Writing Directors* 91
- Rhode, Deborah L, 'Ethics by the Pervasive Method, (1992) 42 *Journal of Legal Education* 31
- Rhode, Deborah L, 'Into the Valley Of Ethics: Professional Responsibility and Educational Reform' (1995) 58 *Law & Contemporary Problems* 139
- Rhode, Deborah L, 'If Integrity is the Answer, What is the Question?' (2003-2004) 72 *Fordham Law Review* 333
- Robertson, Michael, 'Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective' (2005) 8 *Legal Ethics* 222

- Robinson, Dawn T, Lynn Smith-Lovin and Olga Tsoudis, 'Heinous Crime or Unfortunate Accident? The Effectes of Remorse on Responses to Mock Criminal Confessions' (1994) 73 (1) *Social Forces* 175
- Rorty, Amelie Oksenberg, 'Explaining Emotions' (1978) 75 (3) *The Journal of Philosophy* 139
- Rosenberg, Joshua D, 'Interpersonal Dynamics: The Importance of Human Relationships in the Practice of Law' (2003-2004) 58 *University of Miami Law Review* 1225
- Ross, Mary Massaron, 'A Basis for Legal Reasoning: Logic on Appeal' (2006) 3 *Journal of the Association of Legal Writing Directors* 179
- Ryan, Erin, 'The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation' (2005) 10 *Harvard Negotiation Law Review* 231
- Scherr, Alexander, 'Lawyers and Decisions: A Model of Practical Judgment' (2002) 47 *Villanova Law Review* 161
- Schiltz, Patrick J, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession' (1999) 52 *Vanderbilt Law Review* 871
- Seligman, Martin, Paul R Verkuil and Terry H Kang, 'Why Lawyers Are Unhappy' (2005) 10 *Deakin Law Review* 49
- Semmler, Caroline, and Neil Brewer, 'Research Report: Effects of Mood and Emotion on Juror Processing and Judgments' (2002) 20 *Behavioural Sciences and the Law* 423
- Shapiro, Daniel L, 'A Negotiator's Guide to Emotion: Four 'Laws' to Effective Practice' (2001) 7 (2) *Dispute Resolution Magazine* 3
- Sheldon, Kennon M, 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
- Silver, Marjorie A, 'Emotional Intelligence and Legal Education' (1999) 5 (4) *Psychology, Public Policy and Law* 1173
- Silver, Marjorie A, 'Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship' (1999-2000) 6 *Clinical Law Review* 259
- Silver, Marjorie A, Sanford Portnoy and Jean K Peters, 'Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer / Client Relationship' [2002-2004] *Touro Law Review* 847
- Silver, Marjorie A, 'The Professional Responsibility of Lawyers: Emotional Competence, Multiculturalism and Ethics' (2006) 13 (4) *Journal of Law and Medicine* 431
- Simon, William H, 'Reply: Further Reflections on Libertarian Criminal Defense' (1992-1993) 91 *Michigan Law Review* 1767
- Smith, Abbe, 'Defending Defending: The Case for Unmitigated Zeal On Behalf Of People Who Do Terrible Things' (2000) 28 *Hofstra Law Review* 925
- Smith, Abbe, '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
- Smith, Abbe, 'Defending the Unpopular Down-Under' (2006) *Melbourne University Law Review* 495

- Smith, Abbe, and William Montross, 'The Calling of Criminal Defense' (1998-1999) 50 *Mercer Law Review* 443
- Solomon, Robert C, 'The Logic of Emotion' (1977) 11 (1) *Nous* 41
- Stoecker, Randy, 'Evaluating and Rethinking the Case Study' (1991) 39 (1) *The Sociological Review* 88
- Sturdy, Andrew, 'Knowing the Unknowable? A Discussion of Methodological and Theoretical Issues in Emotion Research and Organizational Studies' (2003) 10 (1) *Organization* 81
- Sullivan, Barry, and Ellen S Podgor, 'Respect, Responsibility and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment' (2001) 15 (1) *Notre Dame Journal of Law, Ethics and Public Policy* 117
- Szaniawski, Klemens, 'Philosophy of Decision Making' (1980) 45 *Acta Psychologica* 327
- Tangney, June Price, Jeff Stuewig and Debra J Mashek, 'Moral Emotions and Moral Behaviour' (2007) 58 *Annual Review of Psychology* 345
- Tapp, June Louin, and Felice Levine, 'Legal Socialization: Strategies for an Ethical Legality' (1974) 27 *Stanford Law Review* 1
- Taylor, Gabriele, 'Justifying the Emotions' (1975) 84 (1) *Mind* 390
- Tsoudis, Olga, and Lynn Smith-Lovin, 'How Bad Was It? The Effects of Victim and Perpetrator Emotion on Responses to Criminal Court Vignettes' (1998) 77 (2) *Social Forces* 695
- Turner, Dennis, 'Infusing Ethical, Moral and Religious Values Into a Law School Curriculum: A Modest Proposal' (1999) 24 (2) *University of Dayton Law Review* 283
- Valentine, Sean R, and Terri L Rittenburg, 'The Ethical Decision Making of Men and Women Executives in International Business Situations' (2007) 71 *Journal of Business Ethics* 125
- Volpp, Leti, 'Lawyering at the Margins: On Reason and Emotion' (2002-2003) 11 *Journal of Gender, Social Policy and the Law* 129
- Vrkleski, Lila, and John Franklin, 'Vicarious Trauma: The Impact on Solicitors exposure to Traumatic Material' (2008) 14 *Traumatology* 106.
- Waldman, Ellen, 'Mindfulness, Emotions, and Ethics: The Right Stuff?' (2010) 10 (2) *Nevada Law Journal* 513
- Webb, Julian, 'Being a Lawyer / Being a Human Being' (2002) 5 *Legal Ethics* 130
- Wetlaufer, Gerald B, 'Rhetoric and Its Denial in Legal Discourse' (1990) 76 *Virginia Law Review* 1545
- Willging, Thomas E, and Thomas G Dunn, 'The Moral Development of the Law Student: Theory and Data on Legal Education' (1981) 31 *Journal of Legal Education* 306
- Wispe, Lauren, '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

Zeelenberg, Marcel, Rob MA Nelissen, Seger M Breugelmans and Rik Pieters, 'On emotion specificity in decision making: Why feeling is for doing' (2008) 3 (1) *Judgment and Decision Making* 18

### **C. Cases and Legislation**

*Garde-Wilson v Legal Services Board* [2008] VSCA 43

*Law Society of NSW v Madden* [2008] NSWADT 210

*Legal Practitioners Board v Morel* [2004] SASC 168; (2004) 88 SASR 541

*Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39

*Legal Practitioners Conduct Board v Jones* [2010] SASCF 51

*MG v R* [2007] NSWCCA 57

*R v Skaf* [2005] NSWCCA 297

*Crimes Act 1900* (NSW)

*Criminal Procedure Act 1986* (NSW)

### **D. Other**

Australian Council of Law Deans, 'A Catalogue of the Teaching of Legal Ethics, Professional Responsibility, etc. in Australian Law Courses', November 2008, 3. <http://www.cald.asn.au/docs/4.1Ethics.pdf> (16/05/2012)

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)

Beaton Consulting, 'New Survey finds professionals have more depressive symptoms than general population' (MediaRelease, 13 May 2007) [http://www.beyondblue.org.au/index.aspx?link\\_id=105.898&oid=921](http://www.beyondblue.org.au/index.aspx?link_id=105.898&oid=921) (12/11/09)

'Margaret Cunneen's Lecture: Living Within the Law' Sydney Morning Herald, September 24, 2005 <http://www.smh.com.au/news/national/margaret-cunneens-lecture/2005/09/23/112698> (23/03/11)

Eades, Diana, 'Telling and retelling your story in court: Questions, assumptions, and intercultural implications' (Paper presented at Cultures and the Law, Australasian Institute of Judicial Administration, 25<sup>th</sup> Annual Conference, Melbourne, Sunday 14 October 2007)

Evers, Maxine, Leanne Houston and Paul Redmond, 'Good Practice Guide (Bachelor of Laws): Ethics and Professional Responsibility (Threshold Learning Outcome 2)' 2011. Support for the original work was provided by the Australian Learning and Teaching Council Ltd, an initiative of the Australian Government Department of Education, Employment and Workplace Relations

Harling, Kenneth, 'An Overview of Case Study' [http://www.farmfoundation.org/news/articlefiles/284-1\\_harling.pdf](http://www.farmfoundation.org/news/articlefiles/284-1_harling.pdf)

Michael Robertson, 'Renewing a Focus on ethics in Legal Education' (2004) [http://anulaw.anu.edu.au/sites/all/files/users/u4081600/Conference\\_docs/mikerobertson.pdf](http://anulaw.anu.edu.au/sites/all/files/users/u4081600/Conference_docs/mikerobertson.pdf) (17/05/13)

Solomon, Robert C, 'The Passions: Philosophy and the Intelligence of Emotions' Lecture Series Part One, The Teaching Company Limited Partnership, 2006, 14. Available from [http://www.teachersyndicate.com/documents/oct\\_2010/TTC%20Guidebooks/Passions%20-%20Philosophy%20and%20the%20Intelligence%20of%20Emotions.pdf](http://www.teachersyndicate.com/documents/oct_2010/TTC%20Guidebooks/Passions%20-%20Philosophy%20and%20the%20Intelligence%20of%20Emotions.pdf) (21/02/2011)

UTS Institute for Interactive Media and Learning,  
<http://www.iml.uts.edu.au/curriculum/definitions.html>

Mark Whittaker, 'Did She Do It? Why Kathleen Folbigg May Not Have Killed Her Four Babies' Sydney Morning Herald, 2 February 2013 <http://www.smh.com.au/national/did-she-do-it-why-kathleen-folbigg-may-not-have-killed-her-four-babies-20130128-2dfnw.html>