



Implementing Best Practices & Educating Lawyers: Teaching Skills and Professionalism Across the Curriculum

Workshop IA

Best Practices and Positive Psychology: Teaching Law and Legal Practice with Justice in Mind

Colin James

University of Newcastle Legal Centre

Dr. Colin James, BA, BJuris, LLB, MPhil, GCertPTT, PhD. Dr. James is a solicitor at the University of Newcastle Legal Centre in Australia, and a senior lecturer at the Newcastle Law School. He supervises Professional Program students in their clinical legal education practice placement at the UNLC and currently teaches Legal System and Method, Trial Process and coordinates training for the National Family Law Mooting Competition. Dr. James graduated from Macquarie University with majors in philosophy and sociology, and worked for several years with Aboriginal communities in Central Australia. He qualified in Law at the University of Western Australia and worked for Legal Aid Western Australia. He then taught clinical legal education at SCALES for Murdoch University.

Dr. James completed a Master of Philosophy with a dissertation on the legal response to domestic violence, a Doctorate of Philosophy on the history of masculinity in Australian law, and a Graduate Certificate in the Practice of Tertiary Teaching.

Dr. James is a committee member of the Hunter Community Legal Centre and the Newcastle Law Society and convenes the Continuing Legal Education sub-committee of the NLS and the Strategic Development sub-committee of the Global Alliance for Justice Education. He is also a Research Ethics Advisor and a member of the University of Newcastle Australia, Human Research Ethics Committee.

Dr. James' current research interests are professional development, positive psychology and emotional intelligence, clinical legal education, human research ethics, and family law and domestic violence.

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‘Best Practices and Positive Psychology: Teaching Law and Legal Practice with Justice in Mind’

Dr Colin James
University of Newcastle Australia

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Introduction

Why are so many lawyers unhappy? This question bedevils us because lawyers occupy a high position of social power, status and financial reward. Even if it was true that many lawyers are unhappy, should we worry? Should we not be more concerned with the well-being of the less advantaged in society, and let well-off lawyers look after themselves?

We should be concerned because unhappy lawyers are likely to underperform. The systemic consequences of underperforming lawyers are difficult to overstate for democratic societies. Not only would justice be less real, it would be less visible – not seen to be done – undermining a pillar of the social order. At greatest risk would be that function of the legal system that targets inequality, fights discrimination, and defends the disadvantaged, the underprivileged and the voiceless against structural injustices in society.

Another reason we should be concerned, as legal educators, is that unhappiness in the legal profession begins in the law school. A narrow view would be that law school is the start a vetting process for the legal profession; those who can't cope may not be suited for legal practice and should look elsewhere for a career. A broader view, and thankfully that of a large majority, is our societies need all kinds of lawyers, not just those who are thick-skinned or have enlarged egos.

Unhappy lawyers and law students

Many lawyers are happy in their work; however, looking broadly at the profession, a large body of research shows significant deterioration in happiness levels (subjective well-being) in both lawyers and law students in the United States and Australia. Some findings suggest the problem is getting worse. A survey by the American Bar Association published in 1991 found the mental health and quality of life for lawyers declined significantly from 1984 to 1990. In a meta-analysis of the literature in 1999, Dammeyer and Nunnez found anxiety and depression were higher among law students than any of the comparison groups studied.

Susan Daicoff has argued the decline in lawyer satisfaction and mental health is only one aspect of a ‘tripartite crisis’ currently afflicting lawyers. The other two issues are related but different: the decline in professionalism and the deterioration in the public perception of lawyers.

Lawyers suffer significantly poor health compared to the general population in America, being at greater risk for clinical depression, heart disease, alcoholism and substance abuse. A survey conducted in Boston found lawyers ranked the most depressed out of 105 professions surveyed. Similarly in Australia, a survey in 2006 found lawyers were the second most unhappy profession,

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the first being patent attorneys. Many report an intention to leave the profession; in fact up to 70% of responding lawyers did not intend to continue in the profession until retirement.

Daicoff's second area of concern, the decline in professionalism, can be seen in the many high profile frauds and breaches of professional conduct. The historical example is the role of lawyers in the Watergate scandal, which led to the ABA requiring for the first time that lawyers be taught professional responsibility. More recent examples include the involvement of lawyers in the collapse of Enron, the collapse of insurance giant HIH, the behaviour of James Hardie Industries, the shredding of documents under subpoena by Australian law firm Clayton Utz to protect British American Tobacco, the setting up and protection of human rights abuses at Abu Ghraib and Guantanamo Bay, and perhaps on a lesser scale the apparent willingness of some lawyers in commercial firms to 'round up' their time recording to meet high billing targets.

Understandably, the wide-spread reporting of professional breaches has impacted on the reputation of lawyers and reinforced a negative stereotype of greedy, arrogant and dishonest people, as portrayed in common lawyer jokes. In 2005 the Harris Poll asked people in the United States whether they had 'a great deal of confidence' in a range of large institutions. Respondents rated law firms poorly, showing they had more faith in TV news and 'the press'. Similarly, in Australia, the Roy Morgan poll in 2008 found that people rated lawyers poorly for ethics and honesty, just higher than bank managers and public servants.

Viewed at large, these concerns loom as significant impediments in our mission to prepare students to enter and thrive in the legal profession. However, there are many brilliant, successful and ethical lawyers that not only contribute enormously to the cause of justice in our societies, but also achieve high civic office and serve as models for our ambitious students.

Reasons for unhappiness

- The reasons for unhappiness among law students have been discussed for several decades. Lawrence Krieger pointed out that many students begin law school with idealistic notions of 'doing good', being an instrument for justice and positive change in society. Very often those intrinsic goals change during law school and students become disillusioned as they learn the limitations of the legal system, and become influenced by other values and attitudes in the academy and the profession. Often the dominant values are extrinsic and relate to material parameters such as money, power, prestige and appearances, rather than intrinsic ideals of justice, equality and fairness.

Some law students change their values and attitudes towards law and legal practice when they experience the impact of commercialism on legal practice. Sheldon and Krieger have demonstrated how students' idealism diminishes at law school, reporting lower levels of intrinsic motivation and community service values, and reduced measures of subjective well-being. Some students may cope with that shift, or rationalise it, by adopting a cynical attitude towards being a lawyer, which they feel is more consistent with the extrinsic values of the profession.

- Some researchers have found that what makes for good legal practice, in many cases, makes for unhappy human beings. Pessimism is a psychological trait which appears to be maladaptive in most human endeavours, except in the practice of law. In 1993, Anthony Kronman identified 'prudence, or practical wisdom' as a virtue among lawyers. However this

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characteristic can extend to having a pessimistic world view – searching for what can go wrong – that is detrimental to the psyche.

According to Martin Seligman, a prudent perspective enables a good lawyer to see every conceivable snare and catastrophe that might occur in any transaction. However, carried into the lawyer's personal life, that focus can produce destructive psychological consequences.

- Lawrence Krieger has linked the loss of professionalism among lawyers to the rise in depression. Coinciding with the loss of professionalism is the rise of commercialism in legal practice. Instead of applying the legal analysis learnt at law school, often graduate lawyers spend long hours meeting document discovery requirements. In addition, many civil trials are settled out of court with non-disclosure terms, avoiding the justice system and empowering the party with the greatest commercial leverage.
- Some lawyers experience vicarious trauma from the situations they experience, especially those who work in criminal law. Researchers have found that both prosecutors and defence counsel are at risk of subjective distress, depression and cognitive changes in relation to safety and intimacy, plus higher levels of avoidance, intrusive thoughts and hyperarousal.
- Another reason for unhappy lawyers is bullying in the workplace. In a 2004 survey of lawyers in New South Wales about a third of respondents had experienced discrimination, harassment, intimidation or bullying. Anxiety in many graduate lawyers in Australia is caused by the pressure to meet unreasonably high billing targets. There is evidence Australian law firms are becoming more 'Americanised' due to globalisation, increasing competition and strict billing expectations on lawyers in large firms, raising the potential for work-related stress.
- Many law firms invest substantially in developing firm-specific skills in employed lawyers, although they fail to retain high-potential employees long term. Lawyers typically feel high demands on them at work, but few have sufficient decision-making latitude to meet those demands. Consequently there is high mobility among lawyers between firms, despite the lure of 'retention bonuses', and many leave the profession for good.
- Another problem for law students is anxiety. Law students show significantly elevated levels of stress compared with others, and it is likely that that stress interferes with academic performance. In the US many have critiqued the Socratic or 'case book' method, however the Carnegie Report (2007) confirmed the Socratic approach to be a 'signature pedagogy'.
- Many law students are accustomed to being high achievers and risk developing unhealthy habits of perfectionism and workaholism. Neither law schools nor the legal profession adequately recognise this as a problem; they seem to encourage it as healthy competition.
- Finally, many graduate lawyers in Australia have reported feeling unprepared for legal practice because their legal education concentrated too much on appellate decisions, rather than giving insights into the practice of law as a business. Arguably, this complaint targets the system of Practical Legal Training in Australia rather than legal education, as most law schools there do not yet have a clinical component.

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The Potential of Positive Psychology

Positive psychology is the study of positive emotions, positive character, and positive institutions. It has an empirical approach to the experience of life based on the intentional cultivation of well-being and character strengths. Rather than treating mental problems, positive psychology is available to improve the quality of life and productivity of people who are already happy and healthy. Briefly, it is the study of the conditions and processes that contribute to the flourishing or optimal functioning of people, groups and institutions.

Contemporary researchers such as Todd and Elizabeth Peterson and Martin Seligman, influenced by the work of humanist psychologists such as Maslow and Csikszentmihalyi, have reclaimed the insights of psychology developed over a century for treating mental illness in order to help healthy people maximise their strengths and virtues.

The theory of positive psychology is consistent with aspects of the comprehensive law movement, such as therapeutic jurisprudence, collaborative law, restorative justice and transformative mediation. Research is continuing on the potential of positive psychology for education however early success in schools and with trauma patients suggests that it has good potential in the education and training of lawyers.

For the purposes of empirical research happiness is generally understood as subjective well-being, or how much positive affect a person reports feeling, in general, most of the time. One study of Western countries found that about three quarters of most populations claim to be happy. The authors found that the determining factors for life satisfaction involve how people think in three ways: their self-esteem, the degree of control they have over their life and their degree of optimism. These are central themes of positive psychology.

Other studies have found that lack of control is the most commonly ascribed cause of unhappiness in a person's life, however it is not synonymous with lack of choice. In some cases having more choice can increase anxiety. In legal education, students have many options to consider, choosing between elective subjects, ways of study, directions for specialising, different career options, employment alternatives, plus decisions in their private lives. Ideally, law schools should consider restricting alternatives to a limited number of preferred and quality options. Sometimes less is more.

Ultimately the objective of positive psychology is to help everyone have a happier life. It has particular relevance to legal educators given what we know about the psychological risks of the legal profession. However, in many societies the notion of happiness seems shallow and has limited credibility; so it needs analysis here.

'Happiness'

Positive psychology authenticates happiness. Martin Seligman theorised human happiness with a hierarchy of three levels: pleasure, engagement and meaning. Arguably a successful lawyer should have a life of meaning, using the resources of social advantage to achieve broader social outcomes. However, it seems that all three types of happiness are important for a fulfilled life, and research has revealed the psychological importance of sincerely felt positive emotions.

Different cultural backgrounds tend to produce significant variation on what gives us happiness. Westerners tend to feel positive emotions from doing something that sets them apart from others

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and taking pride in accomplishments. Apparently East Asians more often feel positive emotions in situations that connect them with others; similarly for Latin cultures, which tend to *celebrate* positive emotions and passions. US personalities favour productivity, outcome and personal achievement. Despite these cultural differences, research on the effects of positivity seems to have cross-cultural significance. Studies found induced positive emotions consistently produced similar outcomes on people in the US, Japan and India.

Several studies have linked happiness to being healthy, to being more productive at work, and to longevity. In relation to longevity, researchers in the so-called 'Nun Study' concluded: 'This study found a very strong association between positive emotional content in autobiographies written in early adulthood and longevity six decades later.' Another study surveyed 2,564 elderly Mexican-Americans and found significant association between low blood pressure and positive affect, prompting the researchers to recommend programs to improve the emotional health of elderly people as part of the treatment for hypertension.

There is good evidence to believe the proportion of human happiness that is 'genetically fixed' in individuals is about 50%. Related studies show that what happens to us, the circumstances of our life, has about another 10% influence on our average levels of happiness. Consequently, the remaining 40% is subject to our intentional activity.

A meta-analysis of nearly 300 studies involving over 275,000 people, tested whether positive affect contributes to success and well-being in life. Examining three types of studies, cross-sectional, longitudinal and experimental, the researchers found that happiness precedes and is associated with numerous successful outcomes in life, leading them to conclude positive affect is 'the hallmark of well-being' and 'may be the cause of many of the desirable characteristics, resources and successes correlated with happiness'.

In a series of studies published with her research students, Barbara Frederickson has argued there is a 'positivity ratio', where the balance should favour positive affect over negative affect at the rate of three to one. The researchers concentrated on ten forms of positivity: joy, gratitude, serenity, interest, hope, pride, amusement, inspiration, awe and love. Examples of negativity include guilt, shame, anger, contempt, disgust and fear. In other words, over a period of time, if we have three positive thoughts or emotions to each negative one, a tipping-point is reached which will make it easier to stay in a positive mood and to achieve what the researchers call 'flourishing', a state of feeling more alive, creative and resilient. That is when, according to Frederickson, our mind broadens and we are able to build on the resources we have. Viewed this way, happiness is not a selfish goal; it has integrity and is a worthwhile pursuit.

Mindfulness

Since happiness is largely a function of how we think, the idea of mindfulness should be explored for its potential application in the law school. Mindfulness of course has ancient origins, but also growing scientific support as a way of coping with anxiety, achieving calmness, improving self-awareness and over time improving cognitive capacities including memory, concentration and analytical ability.

Mindfulness is not the same as meditation, but meditation seems to be the easiest way to achieve it. Meditation also has ancient origins, and again the empirical science is supportive and we ignore it to our loss. Meditation, like mindfulness, requires no faith or dogma, simply a

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willingness to be open-minded to experience. A regular practice of meditation will improve the experience of mindfulness and consequently the appreciation of daily life with its ups and downs.

There is increasing interest in incorporating mindfulness-based interventions in medicine and psychology; however it should not be seen as beneficial only for clinical purposes or responding to pathology. There is a clear role for mindfulness-based responses to the anxiety in lawyers and law students, however mindfulness also offers benefits for those who are not stressed, are already happy, confident and feel they are performing well in their work and life.

Mindfulness is best defined by Kabat-Zinn as ‘paying attention in a particular way: on purpose, in the present moment, and non-judgmentally’. The practice can be developed by formal meditation, or simply by sitting quietly and focusing on the breath, letting any thoughts pass. Other ways include ‘body scanning’, sitting quietly and running the mind through the body noticing how different parts feel and moving the attention on. There is also mindful movement such as yoga, tai chi and meditative walking. Ultimately anything in daily life can be done with mindfulness using a developed concentration, such as driving, brushing teeth, washing dishes, human interaction, reading, studying and arguably, legal practice.

In all practices of mindfulness, a key ingredient is being ‘non-judgmental’. This might seem contrary to the analytical analysis required by legal study and practice. However, if one begins at the beginning, and starts practicing being non-judgmental of thoughts that arise while simply concentrating on the breath, by the time one has developed the skills of practicing law with mindfulness, there is likely to be a better understanding of how one can use analytical critique, perhaps with devastating effect, without attaching to any judgements in the process.

Connectedness

Connectedness is that sense of connection with others, be they friends, family, neighbours, community or colleagues, where there is some kind of shared project that is considered ‘bigger than the individual’. Research on connectedness, otherwise known as social integration, shows it is closely related to well-being and personal happiness. As an example, in a survey of 44 countries, friends and family were found to be the greatest sources of life satisfaction.

The single most common finding from a half century’s research on the correlates of life satisfaction, not only in the US but around the world, is that happiness is best predicted by the breadth and depth of one’s social connections.

- Robert D Putnam (2000)

‘Best Practices’ emphasises the importance of fostering a supportive environment for law students and making them feel welcome and included. Basic spatial awareness can lead to significant improvements in the level of connectedness in the law school. Recreation areas and seating can be designed to maximise interaction between students. The law school can facilitate networking and promote self-esteem in students by encouraging informal interactions between students and faculty, and students and the local profession. Opportunities can be created for informal competitions, and the long-term benefits of moots, mentoring, games, sports, socials, film clubs, bush walks, and runs should not be undervalued.

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One method that has high pedagogical value is collaborative learning, which is a key ‘best practices’ theme. A meta-analysis of than 600 studies concluded: ‘cooperative learning produces higher achievement, more positive relationships among students, and psychologically healthier students than competitive or individualistic learning.’ Providing ways can be developed to discourage collusion in assessments, the research shows collaborative learning fosters engagement, deep learning, social connections as well as critical thinking.

Broader networks can be developed if law schools foster cross-enrolments with other schools, improving opportunities for staff and students to engage in interdisciplinary collaborations. Possibilities include integrating law courses with others in business, community development, psychology and social policy; creating legal clinics to develop teamwork and collaborations with others in responding to community needs; and helping law students develop compassion for others and build self-esteem, while expanding their experience and social networks. It seems likely that positive psychology approaches can assist clinical legal education by inviting law students to work towards solving problems for clients in ways that contribute to a broader community justice than local law normally allows.

Strengths focus

Initially a mental health response and a focus in social work, the concentration on personal strengths has been further developed by Martin Seligman and now has significant potential for adoption by law schools for the benefit of law students and lawyers. The theory involves first indentifying one’s particular strengths and then playing to them, rather than spending time and energy trying to improve in areas where we are less gifted.

The Serenity Prayer is particularly relevant to a strengths-based approach, in that it seeks the wisdom to accept what we cannot change. Re-framing is another valuable response to identifying an issue that is outside our control. The central message though, is captured by the motto: values-in-action. The Authentic Happiness site

<http://www.authentichappiness.sas.upenn.edu/Default.aspx> offers free access to the VIA Strengths Test and related research. We all have ‘signature strengths’, and if we identify them, celebrate them and frequently use them, we are likely to function and grow in areas of value and significance to us personally, and we will be more successful in our endeavours.

Conclusion

A study in 2004 examined the effects ‘stress inoculation training’ on first year law students. Compared to a control group all students who received the training experienced less anxiety, stress and ‘irrationality’. Further, the stress training had significantly beneficial effects on the academic performance of those students predicted to finish in the bottom 20% of their class. There is much we can do as legal academics and clinicians to help students sustain optimism and positive self-esteem through law school and into legal practice.

The Carnegie report recommends ways to integrate analytical and practical knowledge and to develop ‘a more robust professional integrity’. Research suggest that can be best achieved by encouraging and enabling students to identify and concentrate on their strengths. Similarly, Best Practices states law schools should aim to help graduates succeed and lead satisfied, healthy lives. These goals can be achieved by helping students to understand the importance of positivity

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in their lives, to understand the value of self-awareness and knowing their personal strengths, the benefits of practicing mindfulness and gratitude and maintaining positive self-esteem, the importance of networking and staying connected with significant others, the value of self-control, and the importance of making *all* decisions with integrity and how that contributes to a fulfilled life in law.

The problems in the legal profession are not new nor confined to North America. Bar associations and law societies in most Western democracies have started to address unhappiness among lawyers, providing counselling and wellness programs aimed at improving 'balance' in lawyers' lives; and arguably there is a renewed focus on ethical practice and responsibilities.

Law schools have also started to modify their approach to students: emphasising more the idea of a balanced life, discussing the stressors of legal education and legal practice with first year students, encouraging reflective exercises and providing counselling programs. There is now a momentum to further develop the supportive approach to law students, drawing on positive psychology, and this is likely to benefit the legal profession itself.

Colin.James@newcastle.edu.au