

Introduction

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Affect

As a novelist and social critic, Dickens was an acute observer of professional life, its construction, its power and its effect on society. In *Great Expectations*, a classic *Bildungsroman* of social education, he explored the corrosive power of legal action separated from feeling in the professional lives of the lawyer Jaggers and his clerk, Wemmick, as seen through the eyes of Pip. Wemmick's strategy for survival in Jaggers' legal world is schizoid: the complete separation of feeling from professional acting, and this is enacted in almost every representation of him in the novel. Wemmick takes his cue from his capable employer, Jaggers, who throughout the novel eradicates all feeling from the law. 'Get out of this office', he tells a client at one point who is pleading that he can't help his emotions, 'I'll have no feelings here. Get out' (Dickens 1999: 524).

The collection of chapters that make up this volume can be seen as a response to Jaggers. To our knowledge *Affect and Legal Education* is the first book-length study of the subject in legal education. It's long overdue. The book's subject is an essential part of almost every aspect of education, and yet in legal educational literature it is relatively invisible. There are four reasons for this. First there is a problem with the subject's interdisciplinarity: finding the research in other disciplines, understanding it and then using it as a lever (Schaffer and Squire 2006) is difficult. How does one adapt other disciplines' methodological canons to law on this topic? Second, affect as a topic for research cuts across what might be termed the current technicisation of legal education – its deployment as outcomes, for example, organised into matrices, gridded into modules. This approach has a place in curriculum thinking, but often says little about the educational 'lifeworld' of situations, communities, actors and interactions. Third, and following on from the first two points, the lack of a recognisable body of research makes a topic relatively invisible, not just to academics and researchers but to funding bodies as well. It is significant that *Beyond Text*, one of the recent projects in law to focus on affect, was funded by the arts via AHRC (Arts and Humanities Research Council) as part of the funding body's wider *Beyond Text* initiatives. Fourth, affect itself is problematic because it is often seen as irrational, and antithetical to core Western ideals of rationality. As a result it is under-theorised, and the principal result of this is that legal education has operated principally in the

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domain of knowledge and reasoning and ignored the effect of feelings, attitudes and values in the learning process.

But what exactly do we mean by affect? What does it comprise? Martin and Briggs (1986), wryly admitting that the phrase ‘affective domain’ has become a ‘catch-all phrase’ for aspects of behaviour, list:

self-concept, motivation, interests, attitudes, beliefs, values, self-esteem, morality, ego development, feelings, need achievement, locus of control, curiosity, creativity, independence, mental health, personal growth, group dynamics, mental imagery, and personality. (Martin and Briggs 1986: 12)

Price, writing on educational technology and affect, defined the subject more generally:

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the affective domain involves the study of emotions: how they are expressed, how they are learned, how they arise, how they are experienced consciously and unconsciously, how they are influenced by and influence behaviour, how they relate to intelligence, language, reason and morality. (Price 1988: 19)

Price could have added that we are born with some of them – it is now accepted that some emotions are not learned but are biologically determined and can be identified across cultures, and in non-human species, too. He could also have noted that the affective domain (as Martin and Briggs’ list makes clear) involves much more than the term ‘emotion’ implies. Nevertheless, his definition is impressively comprehensive, and we have adopted it as the definition of the term that applies to work in this volume. The editors have not sought to impose this definition upon the work of authors (some distinguish between emotion and affect, others treat the terms as interchangeable); but we do believe that in many respects the volume as a whole examines aspects of the domain that are described by Price.

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Background to the Book

Around 10 years ago, a group of legal educators shared their disillusionment with some aspects of law learning – the arrival of first-year students, highly motivated, for instance, and their subsequent crash of confidence. The group obtained evidence of this from interviews with students that seemed to parallel critiques of US legal education from the 1980s. In April 2002 an expanded group of us began a three-year research project, known as the ‘Gage project’,¹ funded by

1 Phineas Gage was perhaps the most famous patient to have survived serious brain damage after an industrial accident. He was a foreman managing a gang of men building railroads in the US in the 1840s. His job was to bore holes in which dynamite was placed. This was then ‘tamped’ into the hole to push it well down. One day in 1848 the charge

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UKCLE (UK Centre for Legal Education). Its brief was to review modern research in the biological and behavioural sciences, to identify any possible influence on theories of adult professional learning and to disseminate findings to the wider legal education community.² This was achieved through the UKCLE conference workshops and elsewhere, and resources for the project can be found at www.ukcle.ac.uk/projects/past-projects/maguire/.

From the original workshops of the Gage Project it was clear that there was a growing interest in the subject of affect and emotion, and out of that interest the idea for this book was born. To help crystallise ideas, Maharg and Maughan organised a new conference genre at the 2009 ALT Conference in Amsterdam – a plenary poster workshop where, at the start of the conference, authors presented their ideas via posters in a workshop setting and discussed them with conference participants. From that poster workshop the structure of the book became fairly clear to us. What was also clear, again, was the interest stimulated by the topic.

Structure and Outline of the Book

Part I: Affect, Legal Education and Neuroscience

Teachers involved in adult learning – and perhaps particularly those involved in skills learning – are constantly asking: why does a skilled professional do things in a particular way at a particular time? Professionals themselves can offer some insight into their expertise but are not always able to articulate the tacit action theories they are using. Lately the biological and behavioural sciences have been giving us new insights into the function of brain activity in the learning process. The science is making us rethink some of our socially constructed categories of knowledge. Intelligence for instance was traditionally measured by observations of what happens in terms of observable outputs. Now that we can see much of what is going on inside the brain, the concept of an intelligence quotient as a measure of general intelligence is looking more fluid.

exploded while it was being tamped. The three-foot-long tamping iron shot through Phineas' skull, entering under the left cheekbone and exiting through the top of his head. Most of the front part of the left side of his brain was destroyed. Before the accident Gage had been a reliable, sociable, conscientious and popular worker. Afterwards he became 'fitful, irreverent, and grossly profane, ... impatient and obstinate, yet capricious and vacillating, unable to settle on any of the plans he devised for future action. His friends said he was "no longer Gage"' (Macmillan 2009). Consequently he was unable to hold down a job. He died in 1861.

2 The project was titled 'Applying Behavioural Science to Legal Education'; group members were Hugh Brayne, Chris Maguire, Caroline Maughan, Mike Maughan and Julian Webb.

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Maughan's chapter is at once introduction and a chapter in its own right. She opens with a brief example of the power and accuracy of the emotional brain and briefly summarises some of the recent approaches to research on our emotional selves. She then describes how the affective domain has largely been ignored in higher education (and especially at curriculum design level), in contrast to both primary and secondary education, where it is an integral part of teacher training and practice. She presents evidence from students and from academics (e.g. Peter Goodrich) talking of their experiences of legal education; and she comments on the relative lack of literature in the UK on the subject, in comparison with the research that has been carried out in the last 20 years in US law schools. Maughan argues the case for expanding our horizons in at least three directions: aligning student and tutor expectations, reviewing our attitudes and roles as tutors, and rethinking curriculum design.

Influenced by the matter of the original Gage Project, the editors invited two pieces from neuroscientists – the first (by Richard Roche) a summary of the latest research on brain science, and the second demonstrating the contribution of neuroscience to one aspect of the affective domain (Lorraine Boran's and David Delany's chapter). In addition to demolishing some common myths about the brain, Roche gives us a useful overview of our understanding of brain activity that contradicts many of our accepted linguistic formulations regarding memory. The summary of Elizabeth Loftus' work, and its important consequences for court testimony, calls to mind not just the work of other memory researchers working within the domain of law such as Amina Memon, but also the work of jurists such as Goodrich (1990), Jackson (1995) and Cotterill (2002). His final sections, on emotion and memory, with some practical guidelines arising therefrom, lead neatly to Chapter 2, where Boran and Delany discuss one aspect of the neuroscientific contribution to the study of emotion, namely the literature on self-control. They frame it in terms of 'attentional control' – the brain mechanisms by which we 'filter, process and analyse events'. Their analyses include impulse control, delay of gratification, self-control in academic performance and coping mechanisms (e.g. resilience in the face of stress); and they wind up with a helpful review of attentional training tools arising from neuroscientific literature. Their review holds valuable insights for legal educationalists in the areas of attentional control, fluid intelligence and academic performance.

Part II: Affect and Legal Educators

The second part of the book focuses on law teachers and the affective context within which they live and work. Collier (2002), Cownie (2004) and others have described aspects of this in the lives of academics. Part II opens with a study of a hitherto neglected cadre, namely law teachers at the professional end of legal education – more specifically, those involved as practitioner-supervisors in clinical legal educational programmes (Chandler). The study is, in effect, a pilot for more substantial analysis of this group of legal educators, and it is included

here because even at pilot stage it contains insights into the role that affect plays in the professional legal domain. Within her cohort of clinicians, Chandler focuses on how the feelings of clinic supervisors altered as their roles changed from being litigators to becoming educators. She reveals the conflicted role of the clinician and the responses to that of practitioner-supervisors who have, *inter alia*, duties to the client as regards legal service, and duties to the student as regards experience and education; and she describes their coping mechanisms. She points to the conflicted identities of these teachers, working as they do in the inter-tidal zones between the academy and legal practice.

By contrast, Bradney focuses his attention on the research that legal academics carry out, for its own sake, and in his construction of the academic as artist explores the consequences that the relationship between work and art in their lives has for them and others around them. He draws instances from Eliot's *Daniel Deronda*, Charles Lamb, Gabriel García Márquez and Montaigne, and describes some of the 'complexities and contradictions' that are unique to the academic condition. The final chapter in this section analyses what academics think and feel about a single concept, namely quality. Maguire explores the 'field of battle' that quality has become in higher education, quoting Power (1997: 123) to describe its trivial certificates and 'shallow rituals of verification'. Arguing against approaches such as total quality management and adducing Lyotard and Bourdieu, he describes the ritualised nature of quality events. The respondents in his study, though, do not echo the classic critiques of quality cultures: there is a more nuanced approach to the concept. As Maguire points out, what is important, particularly from an affective point of view, is that academics feel the environment is 'safe and supportive'.

Part III: Affect and Learning

Part III opens with Lerner's eloquent critique of the Langdellian orthodoxy in the US. Basing it upon a neuroscience approach together with an analysis of the role of emotions and values in judicial decision-making, Lerner claims that our belief that 'emotions and reason are entirely separate functions' is profoundly mistaken. He traces the research on implicit and explicit memory, citing Damasio and others, to show how our decision-making powers are affected by memory and emotion. He concludes that taking emotion into account is critical for the teaching process.

Del Mar, reaching the same conclusion, comes to it from a direction that is more jurisprudential and language-based, referencing the Hart/Fuller debate, Austinian approaches to speech acts and the like. Analysing the relation between understanding and imagination, and proceeding from the inherent ambiguity of language, he argues that imagination is critical to creative and active exploration of concepts, not least legal concepts; and that affect is integral to imagination. He puts this to the test in the second part of his chapter by taking the example of 'concerted action' in the domain of competition law. As he puts it, 'The life of the law is, to a great extent, about the emotional life of a community; about its emotional relationships, its troubles and temptations, its conflicts and forms of

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resolving them'. Del Mar finishes with some examples of what 'affective teaching' might be, drawing upon the work of Andy Clark, Martha Nussbaum and others.

Ferris and Huxley-Binns take a slightly different line, arguing for the hypothesis that 'legal education is most effective and enjoyable when reason and emotion co-operate'. Drawing upon the work of Harry Frankfurt, Damasio and the body of literature on law school distress that has been developed in the US, they focus on the issue of (quoting Frankfurt) 'what to care about'. The process is not simply cognitive: as they put it, 'reason without purpose is not a viable proposition'. In doing so they claim that Frankfurt can give teachers a way of understanding how to transfer the positive effects of educational initiatives such as clinic to elsewhere in the curriculum. The result of not paying attention to what students might care about, and more generally in not paying attention to affect, they argue, is evident in the research on student distress in the US. Their summary of the self-determination literature and cognitive evaluation theory points to interesting possibilities for the use of affect in the classroom: as they put it, 'what we care about determines both what we do and how we feel about it'.

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Webb takes another tack. Starting on varieties of classrooms where students engage in activities from the visual and performing arts, he calls for the realisation of '*humane* professionalism' through student-centred curricula and methods of learning. He also argues for an embodied approach that will refocus students on 'actively caring about what they are learning, and its consequences', not least because (quoting Prinz) 'emotions command attention and facilitate memory'. He proposes pointers to improving the situation – helping students to think somatically, so that they reason better and care about what they are learning, providing experiential and clinical opportunities for students in the law school curriculum; and the use of performance-based learning. Throughout his chapter there is an emphasis on the social aspects of legal learning, and the shift from teacher-centred activities to student and student-group activities.

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Barton and Westwood's chapter gives examples of Webb's embodied approach, and the role that affect plays in the development of professional character. They note the relationship between personal value system and professional value system, observing that this has been a theme in recent work on legal education, such as the Carnegie Report on Legal Education (2007). Their chapter offers a model for the development of professional character through social learning, where students work in 'firms' on transactions and other tasks, and updates earlier work carried out on this approach.

Duncan begins his chapter with a graphic illustration of ethics in practice, and the values that underpinned the choices made by the respondents to an ethical issue. His chapter analyses the part that emotion plays in ethical choices made by law professionals and students. He notes how the division of undergraduate and postgraduate legal programmes in England and Wales (and other jurisdictions in the UK, too) has too often stranded the study of ethics in the professional stage, where the dominant approach has been a 'didactic, code-compliance approach'. He outlines alternative methods in use and, drawing upon neuroscientific as well

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as more classical experimental literature, he points out how powerful the role of empathy can be in the learning of ethics, though acknowledging it is not without its problems. Emphasising the place of moral courage in the development of ethics, he concludes by outlining approaches that use affect in the curriculum.

In the final chapter of the book Maharg outlines an approach to curriculum design less as a process of building modules and knowledge structures and more as the creation of spaces, gaps and absences. Drawing on music and approaches to text and narrative such as *rezeptionaesthetik*, he illustrates through two case studies (one on writing conferences, the other on games and simulations) how affect may be embedded as an integral part of the curriculum by creating space for student dialogue and creativity.

Theme and Variations

If, to adopt a musical metaphor, Price's definition of affect above is our theme and the findings of neuroscience our ground base, the chapters are variations upon both. And indeed the connections between the chapters are many and rich. Boran and Delany's focus on fluid intelligence is useful for most chapters in this book. Their chapter, read in the context of the remarks made about legal practice by Chandler's respondents, point us to the necessity to make more of continuities between the learning experiences of legal education and legal practice.

Attentiveness surfaces as a key component of affect. For Boran and Delany it is critical; Bradney sees it as essential to friendship. Similarly, self-control became a theme in a number of chapters – Ferris and Huxley-Binns, for instance, in their use of Frankfurt's concept of second-order desires, cast an interesting light on the research outlined by Boran and Delany. The relations between acts of choosing and self-determination theory, important to Ferris and Huxley-Binns' chapter, is also the focus of Lerner's. Care and caring as constructs in legal education emerge as critical in a number of chapters (Webb, Ferris and Huxley-Binns). The volume (and this is a deliberate strategy of the editors for the book as a whole) reveal the contact points and continuities between different stages of the legal educational process and between the academy and practice.

Inevitably there are disagreements between authors. Bradney's concept of quality audit as measuring the unmeasurable is contested by the findings of Maguire's study, for instance. But overall what is striking about the chapters is the extent to which they agree on a broad range of approaches, often based upon variants of experiential learning theory that the authors discuss. The book also draws upon practical projects, on a variety of recent projects and initiatives. Del Mar's approach, for instance, is part of the theoretical underpinning of the Beyond Text project at Edinburgh University, which sought to explore extra-textual ways of understanding law and justice, drawn from a variety of visual and performing arts; and Webb draws upon the project in his chapter on embodiment.

These are some ways in which the book can be read by readers. For us editors, reading and re-reading the chapters, the dominant metaphor for the book was of a

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pressure valve opening. There were more authors who wanted to contribute than we could accommodate in the volume. Much more can be written on the subject, and we are sure that this book is but the first of many to explore the topic. If our book serves to illuminate how important affect is to a broad range of approaches to legal education, and to legal academics as well as law students, then it will have served its pioneering purpose. As Lerner points out, 'If we want our law students to make the most of their cognitive powers, we need to help them understand the power of their emotional minds'. The same applies to staff and staff development.

And it is fitting to draw to a close with a mention of Alan M. Lerner. He was a superb clinician, a wonderful teacher, witty, generous, living in the moment, utterly committed to learning, teaching and its research. He died soon after completing his chapter. This book is dedicated to his memory.

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