

**THE ROLE OF PSYCHOLOGY IN LEGAL EDUCATION:
INCORPORATING COGNITIVE SCIENCE INTO LEGAL PEDAGOGY**

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Submitted in fulfilment of the requirements for the degree:
DOCTOR OF PHILOSOPHY IN LAW (PhD)
at
THE UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

Under the study leadership of:
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Submitted for consideration to:
The Postgraduate Studies Committee
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September, 2024

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“The psyche’s job is to keep us blissfully ignorant of who we are, what we think and how we [will] behave in any situation. We [are] all operating in a dense fog of mutual reinforcement. Our thoughts are shaped primarily by legacy hardware that evolved to assume that everyone else must be right.”

- The Overstory, Richard Powers

ACKNOWLEDGEMENTS

Thank you to Richard Powers, an author whose novels rooted in psychology and the human condition inspired this topic and re-ignited my passion for psychology in a manner which serves law, legal practice and the academic enterprise.

Thank you to Riette du Plessis, the Supervisor of this research. You laid the foundation for academics with a passion for experiential learning and legal education in Africa. Your achievements, magnitude of knowledge and wealth of experience are a continuous source of motivation and inspiration to me. This research would not have been possible without your example, guidance, patience, encouragement and understanding.

Thank you to all the other brilliant academics, psychologists, lawyers and clinicians who paved the way in this field of discourse and whose work is cited in this thesis. Without you, my work would have no credible foundation or merit.

Thank you to my husband without whose unwavering support and grounding influence, this work would not have been completed. I started the first pages of this thesis bouncing ideas off you as my friend and colleague and I wrote the concluding parts of this work as your wife and life partner. Your belief in my ability is constant and unwavering.

Lastly, thank you to the students who continue to both inspire and infuriate my passion for teaching in equal measure. Without you, this work would have been without purpose.

DEDICATION

To those who are no longer with us, but remain an ever present part of us.

Mother and Father, I am because you were.

1956.08.17 - 2011.06.29 * 1954.01.11 - 2019.06.23

DECLARATION

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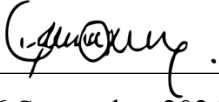
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Declaration:

I, the undersigned, hereby declare that the above-mentioned thesis is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

Signature:  _____

Date: 26 September 2024

ABSTRACT

Prevailing criticisms of legal education suggest that students enter clinical programmes ill equipped to solve problems and that they leave law school without learning the lawyering competencies of effective legal practitioners. This thesis is broadly premised on the idea that exposing law students to cognitive science and basic psychology would better equip them to achieve life-long learning and to acquire enduring practical lawyering skills.

Psychology – the science of how people think and behave – has a great deal to teach us about the core competencies of lawyering. People who understand how others think, feel and behave, make better lawyers, decision makers and problem-solvers. Psychologists have conducted extensive research into psychological phenomena which are integral to effective lawyering. This research can be effectively incorporated into legal pedagogy, including how we teach law students to practice law.

The proposal underpinning this research is the need for an undergraduate course on how psychology operates *within* the law, specifically designed to make students aware of how cognitive science and psychological phenomena affect and impact on the learning and practice of law. Developmental discourse regarding legal curricula entrenches the notion that law schools teach students how to *think* like lawyers but not how to *be* lawyers. The proposed response to this criticism is that metacognition – the awareness and understanding of one's own thought processes – and the concomitant development of higher order thinking skills is key to the development of effective legal training, but this is presently absent in South African legal curricula. This thesis posits that experiential learning should begin before a student ever steps foot into a Law Clinic or a courtroom and that the reason why students leave law school unable to truly *think* like lawyers is because the notion is only truly introduced to them in their final year of law school, usually in the form of a clinical or experiential learning programme. The work contained herein is premised on the idea that legal educators ought to draw on the gains made by cognitive psychologists in understanding what happens when people learn and what neuroscience has to say about how people think and to introduce this to students at a relatively early point in their legal studies. The hypothesis underpinning this research is thus, that harnessing the science of psychology and allowing it to permeate legal pedagogy would be beneficial because the processes involved in both learning and lawyering are intricately linked to innate psychological processes and responses. Thus, the proposal is for an introductory course in basic legal psychology oriented at producing graduates who can think critically and solve problems pragmatically – graduates who are able to not only *think* like lawyers but also

to *act* like lawyers. The research is significant as it explores the viability of such a course within the LLB curriculum at the University of the Witwatersrand and considers what such a course would look like in the South African context. An undergraduate course on psychology *within* the law would give students a sense of understanding themselves before they try to make sense of the actions and motivations of others (like clients, judges and opponents) when they enter their clinical programme. It is my contention that currently, legal education fails to adequately bridge the gap between law and practice because students are never taught to factor in the feelings, fears, concerns and motivations of themselves or others. A course, which exposes students to their own psychological motivations, as well as those of other players in the litigation arena, would give students the context of how to approach the acquisition of skills and the competencies required to practice law in a more pragmatic manner.

Chapter 1 introduces the basic premise behind the research and orients the research focus. Chapter 2 explores both the theoretical and practical criticisms of traditional legal education locally and internationally. This chapter explores the need for the development of the South African LLB degree in the context of recommendations made by the Council for Higher Education (CHE). The chapter proposes the use of cognitive learning theory to maximise law school learning by drawing on research related to metacognition and the influence of learning styles. Chapter 3 introduces the importance of psychology *within* the law and orients the role of psychology in legal practice in the context of skills acquisition in undergraduate study. The chapter proceeds to isolate five indispensable legal skills required of law graduates to practice law and gives insight on how psychology impacts on the acquisition and use of those skills. This chapter advocates for the need for a stand-alone course on the study of basic psychology (including metacognitive learning) to improve lawyering skills. Chapter 4 focuses on the first part of course design, namely, the values, goals and outcomes of the proposed course on psychology *within* the law. This chapter engages with the values which underpin the course design process, the need to focus on law as being grounded in the humanities as opposed to being viewed as a science and the ultimate exorcism of the theory-practice divide. A proposal is made for the use of the unified learning model (ULM) in the development of the proposed course and lessons from experiential learning are used to set goals and outcomes for the syllabus. Lastly, the chapter focuses on the proposed placement of the intended course within the broader LLB curriculum. Chapter 5 focuses on the course methodology, course content and assessment of the proposed course. The chapter describes numerous teaching methodologies and their implications on the choice of course design model. Lessons on proposed course content from similar courses offered in the United States of

America (USA) and Australia are used to construct a proposed syllabus, course outline and assessment plan for the course. Essentially, this chapter constructs a hypothetical pilot course for adaptation within the undergraduate LLB curriculum based on the goals, outcomes and placement referred to in chapter 4. Chapter 6 contains concluding remarks, reflective findings and proposals for the extension of this research.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

The Hippocratic oath is based on the idea that a skilled physician must be able to tell the antecedents, understand the present, and foretell the future.¹ Since a skilled diagnostician must know how the body works, by analogy, a skilled attorney must know how the mind works. This is the foundational basis and inspiration for this research. If the goal of a good doctor is to diagnose symptoms with a view to treat or cure illness, then the ultimate goal of an attorney would be to diagnose and solve legal problems. Prevailing criticisms of legal education suggest that students enter clinical programmes ill equipped to solve problems and that they leave law school without learning the lawyering competencies of effective legal practitioners.² This thesis is broadly premised on the idea that exposing law students to cognitive science and basic psychology would better equip them to achieve life-long learning and to acquire enduring practical lawyering skills.

Psychology – the science of how people think and behave³ – has a great deal to teach us about the core competencies of lawyering.⁴ It has been posited that attorneys who understand how people think, feel and behave, make better lawyers, decision makers and problem-solvers.⁵ Psychologists have conducted extensive research into perception, memory, communication, individual and group decision-making, conflict resolution, planning, motivation and self-assessment, all of which are integral to effective lawyering.⁶ This research can be effectively incorporated into how we teach law students to practice law.⁷ For instance, inattentional blindness shows us that our capacity to perceive is limited – witnesses often fail to accurately account for what they saw during assaults in progress,⁸ or the way in which motor collisions

¹ Hippocrates, Comments on Medicine, Section 3: Of Epidemics, line10. https://pages.ucsd.edu/~dkjordan/arch/greeks/Hippocrates.html#:~:text=The%20physician%20must%20be%20able,or%20to%20do%20no%20harm.&text=%5B*Translator%27s%20note%3A%20Galen%2C%20in%20his%20Commentary%2C%20... Accessed on 21.08.2023.

² This is the focus of Chapter 2 of this work.

³ Boyack K *et al*, *Mapping the Backbone of Science*, Scientometrics, Vol. 64 (2005) 351 at 368.

⁴ Sternlight J & Robbennolt K, *Psychology and Effective Lawyering: Insights for Legal Educators* (2015) Scholarly Works. Paper 921 at 366. [Hereinafter Sternlight & Robbennolt I]

⁵ Ibid.

⁶ Sternlight & Robbennolt I n4 *supra* at 366.

⁷ See generally Burgess H, *Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning*, 29 Quinnipiac Law Review Vol. 29 (2011).

⁸ Generally, see Chabris C *et al*, *You Do Not Talk About Fight Club if You Do Not Notice Fight Club: Inattentional Blindness for a Simulated Real-World Assault*, 2 Perception 150 (2011).

occurred.⁹ Attorneys who understand the nuances of inattentional blindness and the workings of memory are better equipped to develop strategies for more self-aware practice.¹⁰ For instance, attorneys who are able to effectively manage and interpret emotions are more likely to be effective negotiators since emotions often reveal an opponent's priorities and limitations, thus allowing the psychologically attuned lawyer to make better predictions in trials and negotiations.¹¹ With respect to communication, knowledge of psychology can help lawyers become better listeners, build rapport, manage communication difficulties and elicit basic facts and motivations more accurately.¹² This is particularly useful in a heterogeneous society where clients, lawyers and judges may differ in how they respond to notions of justice, dignity, respect and retribution. Better understanding these differences can help future lawyers to tap into specific client concerns and to become better interviewers, counselors and litigators.¹³ Furthermore, understanding behavioural ethics creates awareness of practice vulnerabilities and is more likely to lead to the development of ethical practice management, or, to mechanisms which serve to avoid ethical weaknesses, which in turn, creates more accountable lawyers.¹⁴

The proposal underpinning this research is the need for an undergraduate course in legal psychology, *within* the South African law curriculum, which is specifically designed to make students aware of how cognitive science and psychological phenomena affect and impact on the learning and practice of law. The phraseology psychology *within* the law is used throughout the thesis and the choice to use this phraseology instead of the more commonly used psychology *in* the law is explained at 3.2 below under the heading "Psychology in context".

This introduction is comprised of three parts. Part A deals with the contextual background, significance, and motivation for why the research was necessary. Part B sets out the objectives and the corresponding research questions that were considered in the course of this research. A brief theoretical framework for the research is then provided and some key concepts relevant to this research are introduced. Finally, a brief introductory literature overview is provided to introduce the subject matter of the research. Part C focuses on the structure of this thesis including a summary of the successive chapters into which this body of work is divided.

⁹ Generally, see Jaeger CB, Levin D & Porter E, *Justice is (Change) Blind: Applying Research on Visual Metacognition in Legal Settings, Psychology, Public Policy, and Law*, Vol 23(2), May 2017, 259-279.

¹⁰ Sternlight & Robbennolt I n4 supra at 369.

¹¹ Ibid at 370.

¹² Sternlight & Robbennolt I n4 supra at 371.

¹³ Ibid at 372.

¹⁴ Sternlight & Robbennolt I n4 supra at 370.

1.2 PART A: RESEARCH CONTEXT AND MOTIVATION

1.2.1 Contextual background to the research

For many years it was thought that one could only learn law by undertaking doctrinal study and engaging in the Langdellian case-method,¹⁵ however, several authors have highlighted flaws in this theory, positing rather, that *learning by doing* is the preferred approach to learning in a number of disciplines.¹⁶ Developmental discourse regarding legal curricula founded in the MacCrate¹⁷ and Carnegie¹⁸ reports entrench the notion that law schools teach students how to *think* like lawyers but not how to *be* lawyers.¹⁹ The proposed response to this criticism is that metacognition – the awareness and understanding of one’s own thought processes – and the development of higher order thinking skills is key to developing legal training.²⁰

This thesis posits that practical legal training begins *before* a student ever steps foot in a Law Clinic or a courtroom and that the reason why students leave law school unable to truly *think* like lawyers, is because the notion is only truly introduced to them in their final year of study, usually in the form of a clinical or experiential learning programme.

The Clinical Legal Education’s *Best Practices in Legal Education*²¹ expressly calls for legal educators to base their substantive teaching on “research about effective teaching, or at least hypotheses grounded in research.”²² This thesis is premised on the idea that legal educators ought to draw on the gains made by cognitive psychologists in understanding what happens when people learn and what neuroscience has to say about how people think and to

¹⁵ Christopher Langdell, previous Dean of Harvard Law School is thought to be the creator of the case method (also known as the dialogue or Socratic method which purports to teach law by way of analysis and reflection upon past court cases.) Franklin N, *The Clinical Movement in American Legal Education* (1990) Natal University Law and Society Review 2, 55-58.

¹⁶ Richard Grimes coined the phrase “learning by doing” in his article: Grimes R, *Learning Law by Doing Law in the UK*, (2000) 1 International Journal for Clinical Education 54.

¹⁷ MacCrate R, American Bar Association, Section of Legal Education and Admissions to the Bar (July 1992) Report of The Task Force on Law Schools and the Profession: Narrowing the Gap [hereinafter the *MacCrate Report*]. So called in recognition of Robert MacCrate, Chair of the task force that produced the report.

¹⁸ Sullivan W et al, *Educating Lawyers: Preparation for the Profession of Law*, Carnegie Foundation for the Advancement of Teaching (2007) – Summary [The Carnegie Report].

¹⁹ Franzese P, *Law Teaching for the Conceptual Age*, Seton Hall L. Rev. Vol. 44 (2013) 967 at 968. This concept is expanded on in Chapter 3 of this work.

²⁰ Lee JA, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 Drexel L. Rev. (2020) 227 at 237. Lee’s work on metacognition has been referenced by: Ryder R, *With Great Power Comes Great Responsibility: Improving Your Feedback and Hallmarks of Effective Feedback*, Saint Louis University Law Journal, Vol. 68, Issue 3, Spring 2024, 537-556; Gundlach J, *Understanding the Metacognitive “Space” and its Implications for Law Students; Learning*, Hofstra Law review, Vol. 50, Issue 4, Summer 2022, 769-828.

²¹ Stuckey R et al, *Best Practices for Legal Education: A Vision and a Road Map* (2007).

²² Ibid at 97.

introduce this to students at a relatively early point in their legal studies.²³ Most legal educators still rely solely on the Socratic mode of legal instruction, which has been criticised for failing to teach students how to effectively apply the law,²⁴ and is generally seen as an ineffective way to teach other more practical legal skills.²⁵ The proposal in this thesis is for a course or module designed around a different approach to teaching and learning which would beneficially address the prevailing concerns without requiring changes from already established legal educators teaching doctrinal courses.

The research contained in this thesis is primarily underpinned by the constructivist approach to legal education. Constructivism is a learning theory supported by proponents such as Vygotsky,²⁶ Piaget²⁷ and Dewey,²⁸ all of whom support the view that learning is a process of knowledge construction by which learners build their own personal understandings through their experiences.²⁹ Constructivists posit that an individual constructs knowledge from his or her own experiences.³⁰ According to the theory, an individual continually constructs and reconstructs his own images of the world from his experiences and his interpretation of those experiences.³¹ The constructivist theory can be likened to the hypothesis taken from cognitive science, that learning is a process of interactive schemata.³² Schemata are models; they embody prototypical expectations about objects, situations and actions.³³ This is elaborated upon in successive chapters of this work but ultimately, the motivation for this research operates from the presumption that students acquire “default schemata” for legal problems based on what they learn during their doctrinal studies, but they do not appreciate how psychological phenomena can affect default schemata to hinder or improve their lawyering competencies.

The hypothesis underpinning this thesis is that harnessing the science of psychology and allowing it to permeate legal pedagogy could be beneficial to students because the process

²³ Fruehwald S, *How to Become an Expert Law Teacher by Understanding the Neurobiology of Learning*, LegEdDig 43; (2013) 21(3) Legal Education Digest 1-57.

²⁴ Madison B, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, University of Detroit Law Review Vol. 85 (2008) 293.

²⁵ Stuckey n21 supra at 2. See also Lustbader P, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. Rev. 839, 855 (1997). These issues are expanded upon in Chapter 2 of this work.

²⁶ Lev Semyonovich Vygotsky (1896–1943).

²⁷ Jean Piaget (1896–1980).

²⁸ John Dewey (1859–1952).

²⁹ Kift S, *Lawyering Skills: Finding their Place in Legal Education*, (1997) 8 Legal Educ. Rev. 60 at 63.

³⁰ Schwartz M, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Teaching*, (2001) 38 San Diego L. Rev. 379.

³¹ Ibid at 380.

³² Reiman P & Chi M, *Human Expertise in Human and Machine Problem Solving* (1989) K. J. Gilhooly 161 at 172. For more on schemata see Friedland S, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, (1996-1997) 20 Seattle University Law Review 1, 5.

³³ Ibid n32 Reiman supra at 172.

of both learning and lawyering are intricately linked to innate psychological processes and responses.

1.2.2 Significance of the research

In November 2018, the Council on Higher Education (CHE) released a 98-page report on the national review of the Bachelor of Laws (LLB) programme in South Africa (the CHE Review).³⁴ The report was compiled as a result of repeated complaints by professional lawyers, that law graduates were of a poor quality and highlighted a range of shortcomings in the Bachelor of Laws (LLB) degree offered by South African universities. This is elaborated upon in Chapter 2. According to the report, there was a serious lacuna in the legal education system with regard to the inculcation in students of critical thinking skills.³⁵ The research contained in this thesis compares the LLB Qualification Standard's competencies with those mentioned in the MacCrate and Carnegie Reports to isolate a number of key skills which a good law graduate should possess for future practice. An undergraduate course on "psychology *within* the law" is then developed around these skills with a focus on how cognitive science and psychology can aid in the acquisition of those skills. This thesis will demonstrate how psychological precepts underpin, affect or help to develop the acquisition of the competencies mentioned in these reports and highlighted in the CHE Review. The overarching aim of the research contained in this thesis is concerned with the provision of an introductory course in basic legal psychology oriented at producing graduates who can think critically and solve problems pragmatically. One of the key questions that is considered in the course of the research is at what stage of the students' development would such a course be most beneficial and why. The research contained in this thesis is significant as it will explore the viability of such a course within the LLB curriculum at the University of the Witwatersrand and consider what such a course would look like in the South African context. Of central concern, is whether this could be a stand-alone course within the undergraduate LLB curriculum, to what extent it could form the foundation for future clinical experiences and whether the course itself could qualify as a capstone experiential experience.

³⁴ The document titled "The State of the Provision of the Bachelor of Laws (LLB) Qualification in South Africa" [hereinafter CHE Review] is available at: https://www.derebus.org.za/wp-content/uploads/2019/06/CHE_LLBNational-Report_2018.pdf

Accessed on 02.09.2023.

³⁵ CHE Review n34 supra at 57.

1.2.3 Purpose of and motivation for the research

Whilst there is a wealth of international research on the link between psychology and legal education, the concept is a novel one in the South African context. There are few legal academics engaged in research pertaining to legal education and experiential learning, with the supervisor of this research being the first academic in Africa to be awarded a PhD in the field. The fact that South African law students are, for the most part, undergraduate students with no grounding in the humanities, makes the prospect of a course in legal psychology as part of the LLB curriculum not only attractive but possibly necessary. The CHE Review confirmed the importance of non-law subjects being woven into legal training.³⁶ In evaluating the programmes at the various universities, the panels drew attention to instances where the programmes (or some of the core modules within the programmes) were considered (sometimes by students and/or alumni) to provide inadequately for access to sufficient non-law related modules.³⁷ Recent curriculum reform at the University of the Witwatersrand requires the completion of two non-law subjects towards the Bachelor of Laws degree³⁸ and this creates a perfect opportunity for the piloting of a course rooted in a non-law based discipline but pitched from a legal perspective.

Varied notions of justice in a cross-cultural society and an ever-present obligation on parliament and the judiciary to reflect social change, makes the task of lawyering for the next generation far more complicated than the conservative rule-based pedagogies of the past would suggest. A module linking basic psychology to legal learning has the potential to address the CHE's concerns regarding non-law related subjects, but also to offer much needed innovation in legal education more broadly and to prepare undergraduates for clinical training more specifically. Cross-cultural consciousness about race, custom, gender inequality and fiscal disparities is a unique feature of lawyering in a heterogeneous society such as South Africa. The way in which psychology interacts with lawyering and how it can be used to teach legal skills to a modern generation of lawyers should inform legal pedagogy in order to build cross-cultural competence. Having practiced as clinician at the University of the Witwatersrand Law

³⁶ CHE Review n34 supra at 23.

³⁷ Ibid at 32.

³⁸ The 2023 Senate Rules for the faculty of Commerce, Law and Management confirming the requirements for the undergraduate four-year LLB stream can be accessed at:

<https://www.wits.ac.za/media/wits-university/students/academic-matters/2023%20Commerce%20Law%20Management%20Rules%20and%20Syllabuses-Final.pdf>

Accessed on 06.09.2023.

Clinic from 2009 until 2020, as well being an undergraduate law lecturer from 2007 to date, I am well placed to contribute to the South African discourse on this topic. The research contained in this thesis is likely to be of material interest and benefit to legal educators, students, and future legal practitioners.

1.3 PART B: RESEARCH OBJECTIVES AND SIGNIFICANCE

1.3.1 Objectives and corresponding research questions

Blasi explains the concept of problem solving in cognitive science as “a search through the web of possible paths from the current situation to the desired outcome through a problem space.”³⁹ Simon and Newell, who are thought to be the fathers of the cognitive science theory,⁴⁰ hypothesise that problem-solving consists of four stages: an ‘initial state’, describing the starting state of affairs; a ‘goal state’, describing the desired state of affairs; a set of ‘operators’ describing the possible steps that can be taken to change the current state of affairs and then a set of ‘path constraints’ which may impose additional problems or conditions.⁴¹ All these components are thought to make up a ‘problem space’ through which any problem solver navigates and a solution is a sequence that leads from the initial state through a number of operators to the goal state in any given scenario.⁴² The objective of this research has been to navigate the problem space (that South African law graduates leave university ill equipped to practice law) and to offer an innovative solution premised on the marriage between cognitive science, psychology and legal (including experiential) pedagogy.

The broad research questions and sub questions arising from the research contained in this thesis are as follows:

³⁹ Blasi G, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, (1995) 45 *Journal of Legal Education* 313 at 331. Blasi’s work on cognition continues to be referenced by legal scholars, most recently, his work was used by the following authors: Fried A, *Unstructuring for Insight: The Legal Profession in an Age of AI and Social Change*, *Law Teacher*, Vol. 58, Issue 1, 2024 74-91; Oxhorn M, *A Heuristic Approach to Solving Complex Litigation Problems*, *University of Cincinnati Law Review*, Vol. 92, Issue 3, 2024, 668-700; Meyer C & Noel N, *The Gray Box of Legal Analysis: Disentangling Knowledge and Skill*, *University of Detroit Mercy Law Review*, Vol. 101, Issue 3, Spring 2024, 287-332.

⁴⁰ Allen Newell was a computer scientist and researcher of cognitive psychology. Herbert A. Simon was an American political scientist, economist, sociologist and psychologist.

⁴¹ Blasi n39 supra at 333.

⁴² Ibid.

1. Is there a need to develop legal curricula and legal teaching beyond the traditional Socratic and dialectic methods? What are the criticisms of traditional legal pedagogy in South Africa and abroad and how do we teach law and practice in the 21st century? (This question is answered in Chapter 2 of this thesis.)
2. What are the core competencies of qualified graduates and how do we teach law students to think like lawyers? (This question is answered in Chapter 3 of this thesis.)
3. What roles do cognitive science (including learning theory) and psychology (including psychological phenomena such as pre-attentive processing, change blindness, intentional blindness, legacy cognitive blindness, heuristics, hindsight bias, positive illusions, perceptual capacity) play in legal education and lawyering skills? (Learning theory is canvassed in Chapter 2 and psychological phenomena are dealt with in Chapter 3 of this thesis.)
4. Would a course on legal psychology be an asset to the legal curriculum in the South African context and where would such a course be best placed within the undergraduate legal curriculum? Would this be a stand-alone course, could it be embedded in or form the foundation for other courses and in which year would it be offered? (This question is answered in Chapter 4 of this thesis.)
5. What would this course look like in the South African context and what lessons could we draw from experiential learning, legal education, psychology and similar courses on psychology and law from other jurisdictions to develop a pedagogically sound course? (This question is answered in Chapter 5 of this thesis.)

1.3.2 Theoretical framework

The theoretical framework for this thesis is premised on four pillars linked directly to the research questions and ultimate thesis chapters. First, in examining the current LLB curriculum, the research will draw on theories of learning which support a move away from the traditional dialectic and Socratic modes of teaching to constructivist modes (already discussed above) underpinned by andragogy, experiential learning and metacognition.

Knowles first posited the idea that there was a difference between *pedagogy* (Greek for child-leading) and *andragogy* (Greek for man-leading).⁴³ In other words, Knowles proposed that there was a difference between the way in which children and adults learned. Accordingly, educators who teach adults need to align their methods of instruction with a number of andragogical assumptions about the ways in which adults learn. In summary, Knowles proposed that adults needed to know the reason for learning something and that experience (including error) provided the basis for an adult's learning.⁴⁴ Knowles further proposed that in order to learn, adults needed to be responsible for their decisions and to be involved in the planning and evaluation of their instruction.⁴⁵ Further, Knowles proposed that adults were most interested in learning subjects, which had immediate relevance to them, their work and/or personal lives.⁴⁶ Finally, Knowles proposed that adult learning and therefore adult teaching needed to be problem-centered rather than content-oriented.⁴⁷ These andragogical assumptions are in line with a view that supports psychology as the corner stone for problem-centered learning and critical thinking, as psychology affects not only what the student is studying, but also the student himself. Experiential learning is about the implementation of learning activities through mutual enquiry rather than mere transmission of knowledge with the expectation that adult students will simply accept and conform.⁴⁸ This too, is in line with andragogy.

Metacognition refers to the “processes used to plan, monitor, and assess one’s understanding and performance”⁴⁹ with a view to alter one’s thoughts and behaviour to become more successful.⁵⁰ Whilst cognition refers to the way we think, approach, acquire and process information, metacognition refers to “the study of how we cognate.”⁵¹ Cognitive science will be used to explain how theory and experience is appropriated into the cognitive apparatus of

⁴³ Knowles M, *The Adult Learner: A Neglected Species*, Gulf Publishing Company (1973) at 4. [Hereinafter Knowles I] See also generally: Knowles M, *Self-Directed Learning*, Chicago Printing Press (1975). [Hereinafter Knowles II] The work of Knowles continues to be cited by legal scholars. For works that relied on one or both texts see: Boles E, *Promoting Technological Competency through Microlearning and Incentivization*, University of St. Thomas Law Journal, Vol. 20, Issue 1, Spring 2024, 251-275; Fortson C, *Now is Not the Time for Another Law School Lecture: An Andragogical Approach to Virtual Learning for Legal Education*, Saint Louis University Law Journal, Vol. 65, Issue 3, Spring 2021, 505-516.

⁴⁴ Knowles I n43 supra at 4.

⁴⁵ Ibid.

⁴⁶ Knowles I n43 supra at 4.

⁴⁷ Ibid.

⁴⁸ Hansen M, *Learn How They Learn* (2003) 89 A.B.A. Journal 26 at 28.

⁴⁹ Allen RN & Jackson AR, *Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum*, 95 U. DET. MERCY L. REV. 1, 15–16 (2017) at 14.

⁵⁰ Lee n20 supra at 237.

⁵¹ Ibid. See also Lustbader P, *Construction Sites, Building Types and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 Willamette L. Rev. 315, (1997) at 324.

practitioners,⁵² and how students who are aware that there are cognitive obstacles to fully rational decision making and problem-solving can self-adjust and regulate their approaches to learning and practice in order to counter such obstacles. Part of the hypothesis of this thesis is that students must be taught these obstacles *before* they enter the experiential learning arena so that they may self-adjust their responses during their clinical experience or future practice. Second, in evaluating the role of experiential learning and clinical legal education (which is defined later herein) in legal pedagogy and comparing the skills required of good practitioners, the research draws on existing discourse around the ways in which practical skills transfer can occur and at what point in the students' careers, skills training should commence. Clinical legal education (CLE) is defined as "lawyer-client work by law students under law school supervision for credit towards the law degree".⁵³ It is argued that CLE is distinct from the clinical method of teaching (or experiential learning) because at its educational core, the experiential learning simply utilises practical experience.⁵⁴ In contrast, CLE has come to be seen as a teaching method of its own, with experience in the context of the live-client only one of the models through which teaching can occur.⁵⁵ Giddings defines CLE as:⁵⁶

"...an intensive small group or solo learning experience in which each student takes responsibility for legal or law-related work for a client (whether real or simulated) in collaboration with a supervisor. Structures enable each student to learn from their experiences through reflecting on matters including their interactions with the client, their colleagues and their supervisor as well as the ethical dimensions of the issues raised and the impact of the law and legal processes."⁵⁷

According to Du Plessis, CLE is "mainly a practical course although it includes training in substantive law."⁵⁸ Accordingly, experiential learning is simply a method used in the course of CLE. Whilst some view the performance of legal skills only in the context of clinical legal

⁵² Blasi n39 supra at 317. See also Friedland S, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, (1996-1997) 20 Seattle U. L. Rev. 1 at 4.

⁵³ This is the definition of the Council on Legal Education for Professional Responsibility (CLEPR), a leading United States clinical organization. See also De Klerk W, *University Law Clinics in South Africa* (2005) 122 SALJ 929 at 929.

⁵⁴ De Klerk et al, *Clinical Law in SA* 2ed (2006) at 265.

⁵⁵ Mahomed S, *United in Our Challenges – Should the Model Used in Clinical Legal Education be Reviewed* (2008) Journal for Juridical Science (special edition) 53 – 60.

⁵⁶ Giddings J, *Promoting Justice Through Clinical Legal Education*, Victoria, Australia: Justice Press (2013) at 14.

⁵⁷ Ibid.

⁵⁸ Du Plessis MA, *Clinical Legal Education: Identifying Required Pedagogical Components*, 40(2) Journal for Juridical Science, 64-80 at 66.

practice, the metacognitive method (discussed in Chapter 2 of this work) supports the view that experiential learning is a metacognitive task that can be practiced in non-clinical courses. This is elaborated upon in Chapter 2 of this work but essentially, the hypothesis is that the experiential learning method supports and informs the metacognitive method and as such, should be introduced to students at an early stage of their academic careers.

To date, in the South African context, no doctrinal courses or clinical legal programmes concern themselves with the psychology involved in the lawyering enterprise and discourse on point is virtually non-existent in our jurisdiction – the purpose of this research is aimed at addressing this gap in discourse to show how a basic course in relevant legal psychology could bridge this gap. An argument will be made for such a course to be presented at an early stage within the students' academic careers so as to prime them for their subsequent clinical legal programme in their final year.

In evaluating the need for a course on legal psychology and determining what such a course would look like, existing research underpinning curriculum development and design in South Africa, Australia and the United States of America (USA) will be used. In addition, a comparative analysis of the content of similar courses from experts in the USA will be undertaken. This thesis will be the first to comment on point regionally, with the intention to stimulate interest and to spearhead scholarship on these issues within the African continent.

1.3.3 Introductory Literature Overview

The following literature overview is not extensive and is simply intended to give the reader a brief idea of the topics contained in this thesis. The purpose of this overview is to simply lay the foundation upon which the research contained in the forthcoming chapters is based.

1.3.3.1 On the criticisms of traditional legal teaching and more innovative ways to teach legal practice:

In 1971, Vukowich commented on how authors have criticised that graduates lack the practical knowledge,⁵⁹ skill, and ingenuity essential to effective performance in the role of a practicing

⁵⁹ Vukowich W, *Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change*, 23 Case W. Res. L. Rev. 140 (1971) at 140.

attorney since 1929.⁶⁰ The most common complaint highlighted in his article is how critics feel that law students should receive more exposure to the non-legal problems, which confront attorneys in their day-to-day practice.⁶¹ Vukowich supported the fact that Law Clinics could play an important role in this endeavour. One hypothesis upon which this thesis is based, is that students should be exposed to what lawyers face in their day-to-day practice before they ever enter a Law Clinic, and this could be achieved through innovative simulation overseen by an educator who has actually practiced law.

Katz writes that the solution to the criticisms levied against legal education lies in recommendations already present in the Carnegie Report.⁶² He notes that the authors of that report compared legal education to other forms of professional education, to the elements of the practice of law, and to adult learning theory, and reached the following conclusion: that American law schools did a relatively good job of teaching students about legal doctrine but had not done a very good job of teaching the skills required for the deployment of that doctrine in the service of real clients or the professional identity required to understand the role of a lawyer.⁶³ The Carnegie Report recommended a fairly straightforward solution to this: that law schools should offer more experiential learning opportunities that integrate the three key “apprenticeships” of doctrine, practical skills, and professional identity formation.⁶⁴ The research contained in this thesis explores these apprenticeships in the psychological context.

In the South African context, Van Marle writing with Modiri draws on the earlier work of Davis,⁶⁵ and opines that in addition to the need to produce critical thinkers and intellectuals, law faculties need to inculcate in students an acute awareness of law, not merely as a technical science and a set of rigid rules, but also as a system for resolution and reconciliation of conflicting social and economic interests for the fulfillment of needs, desires and aspirations of the people and communities that make up our society.⁶⁶ The authors warn that if we do not change our approach to the pedagogy of law, then institutions will ‘run the risk’ – as Jansen⁶⁷ puts it – of “producing technicians without ethics, products without politics, graduates without values, publications without commitments, materials without meaning, enterprise without

⁶⁰ Ibid.

⁶¹ Vukowich n59 supra at 141.

⁶² Katz M, *Facilitating Better Law Teaching –Now*, Emory Law Journal, Vol. 62 (2013) 823 at 825.

⁶³ Ibid.

⁶⁴ Katz n62 supra at 827.

⁶⁵ Davis D, *Legal Education in South Africa: A re-examination* (1978) 95 SALJ 424.

⁶⁶ Van Marle K & Modiri J, *What Does Changing the World Entail? Law, Critique and Legal Education in the Time of post-apartheid* (2012) 129 SALJ 210.

⁶⁷ Jansen J, *Why Tukkies Cannot Develop Intellectuals*, Innovation Lecture Series, University of Pretoria, 11 May 2001 at 5.

community, change without transformation”.⁶⁸

Still in the South African context, Gravett opines that it is only when theory is combined with doing – the ability to use the law and legal process – that change comes about.⁶⁹ In his opinion, theorising does not solve anything, he claims that because legal problems require solutions, effective legal practice consists of thought *and* action.⁷⁰ According to Gravett, law has significance only in relation to the underlying human problems that it is able to solve.⁷¹ He opines that legal education can only be truly relevant if it produces law students who are equipped with transferable intellectual skills that they can then use in socially constructive endeavours.⁷² Since legal problems are effectively human problems, a gap exists in South African literature on the impact that psychology and cognitive science could have on modern legal teaching and would contribute to the discourse on innovation in legal education.

Quinot and Greenbaum have also written on legal education in South Africa. Quinot argues that significantly increased attention to theory (or theories) of legal education is not only imperative in order to improve the quality of legal education in South Africa, but is a crucial ingredient of constitutional transformation grounded in law in this country.⁷³

In Chapter 2 of this thesis, USA and Australian perspectives on these issues will be considered.

1.3.3.2 On the skills required of good practitioners and the role of Clinical Legal Education in legal pedagogy:

In 1975, Kolb and Fry who are often referred to as the grandfathers of experiential learning published their paper “*Towards an Applied Theory of Experiential Learning*” in Cooper’s “*Theories of Group Process*”.⁷⁴ Here, they developed a model that is often used to describe experiential learning. The intriguing aspect of the model is that the teaching process can begin at any stage and is continuous.⁷⁵ Essentially, there is no limit to the number of times that the cycle might run its courses in a student’s personal learning experience. The four stages are: the

⁶⁸ Ibid.

⁶⁹ Gravett W, *Pericles Should Learn to Fix a Leaky Pipe - Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 1)* PER 2018 21(1) 1-30 at 9.

⁷⁰ Ibid at 10.

⁷¹ Gravett n69 supra at 10.

⁷² Ibid.

⁷³ Quinot G, *Transformative Legal Education*, SALJ Volume 129 Issue 3 (2012) 411-433 at 412.

⁷⁴ Kolb DA & Fry R, *Towards an Applied Theory of Experiential Learning* in Cooper C, *Theories of Group Process*, (1975).

⁷⁵ Ibid at 34.

formation of abstract concepts and generalizations, the testing of the implications of those concepts in new situations, concrete experience and observations and reflections.⁷⁶ In Chapter 2, the model will be compared to the 12-step metacognitive method described by Lee intended to aid students to become metacognitive thinkers.⁷⁷

Hoffman states that no doctrine or theory underlies lawyering skills and whilst anecdotal suggestions about how to accomplish particular tasks are helpful, they cannot be accorded the status of doctrine or theory.⁷⁸ With that in mind, the MacCrate Report and the Carnegie Reports have gone some ways in defining the most fundamental skills required of lawyers – these reports envisage that greater attention should be placed on practice experience within legal education, the development of reflective judgment, and an exploration of the moral experience of lawyering.⁷⁹ In the South African context, the more recent CHE Review⁸⁰ echoes these sentiments. In Chapter 3 of this work, five crucial skills will be extracted from the relevant reports, and it will be demonstrated how students can use knowledge of basic psychology to help develop these skills in innovative ways for long-term retention.

Du Plessis, the first academic on the African continent upon whom a PhD in CLE was conferred, has written extensively on the required outcomes, skills and values of clinical legal programmes and how CLE is the ideal setting in which the short-comings of traditional legal education could be addressed.⁸¹ Her work on aligning skills to pedagogical outcomes and assessment will be drawn upon in the course design parts of this work.

Quinot has also written on the perceived challenges in the LLB curriculum. Writing with Van Tonder, he opines that capstone courses and learning experiences (collectively referred to as capstones) could be used as modes of instruction with which to address some of the perceived problems in legal education.⁸² Quinot defines capstones as a learning experience in the final year of undergraduate study in which the learning of the entire programme is integrated with an emphasis on the application of the knowledge acquired in authentic learning designs.⁸³ According to Quinot however, capstones may take many forms – an entire course

⁷⁶ Kolb & Fry n74 supra at 34.

⁷⁷ Lee n20 supra.

⁷⁸ Hoffman P, *Clinical Scholarship and Skills Training*, (1994-1995) 1 *Clinical Law Review* 93 at 105.

⁷⁹ Beckman S & Tremblay P, *Foreword: The Way to Carnegie* (2012) 32 *Boston College Journal of Law and Social Science* 215 at 216.

⁸⁰ CHE Review n34 supra.

⁸¹ Du Plessis MA, *Clinical Legal Education: Determining the Vision and Focus of a University Law Clinic and Required Outcomes, Skills and Values* 2015 *De Jure* 312-327.

⁸² Quinot G & Van Tonder SP, *The Potential of Capstone Learning Experiences in Addressing Perceived Shortcoming in LLB Training in South Africa* Potchefstroom Electronic Law Journal 17(4): 1350 at 1351.

⁸³ Ibid at 1352.

could be designed to be a capstone experience, alternatively, a capstone experience may form only part of a course, capstone experiences may also exist outside of a formal course such as a free-standing capstone assessment or a capstone research project.⁸⁴ It is my hypothesis that a stand-alone course which exposes students to cognitive science and legal psychology in the early part of the legal curriculum would qualify as a capstone experience which could form a strong foundation for subsequent capstone opportunities in the students' final year of study. This is elaborated upon in Chapter 4 of this work.

1.3.3.3 On the role of psychology and cognitive science in effective lawyering and the psychological tenets which underpin legal education and the skills-set of a good practitioner:

In the USA, Sternlight & Robbennolt have written extensively on the role of psychology and the lessons which practicing attorneys could learn from psychologists in varying contexts including legal counseling.⁸⁵ In their book *“Psychology for Lawyers: Understanding the Human factors in Negotiation, Litigation and Decision-Making”*⁸⁶ the authors use research from psychologists to contribute to a broader understanding of lawyering that includes problem-solving, decision-making, group dynamics and dispute systems design – the book engages with how insights from psychology can be incorporated into teaching law students to practice law. In a 2015 article, the authors wrote on the importance of providing students with a grounding in the science of human behaviour that will prepare them for the interpersonal aspects of practice and help inform and shape what they learn from their experiences.⁸⁷ In the same article, the authors promote harnessing the science of psychology to attune lawyers to insights that are usually difficult to discover organically, but can help to avoid drawing mistaken insights from lawyers' experiences in practice.⁸⁸

Sternlight is a Saltman Professor of Law, and the Director of the Saltman Center for Conflict Resolution at the University of Nevada, Las Vegas and Robbennolt is a Professor of Law and Psychology at the University of Illinois, College of Law. Both professors taught

⁸⁴ Quinot & van Tonder n82 supra at 1352.

⁸⁵ Sternlight J & Robbennolt K, *Good Lawyers Should Be Good Psychologists: Insight for Interviewing and Counseling Clients*, Ohio State Journal on Dispute Resolution, Volume 23: 3 (2008) 437-538. [Hereinafter Sternlight & Robbennolt II]

⁸⁶ Sternlight J & Robbennolt K, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision-Making*, American Bar Association, 2ed, 2022.

⁸⁷ Sternlight & Robbennolt I n4 supra at 365.

⁸⁸ Ibid.

substantive seminar courses which exposed students to the science of psychology and which were explicitly focused on how psychology could help students become better lawyers.⁸⁹ The courses required students to study a range of findings from psychology that were relevant to lawyering, apply the psychology to specific lawyering tasks and then present papers applying the psychological concepts to lawyering.⁹⁰ The authors' findings were that students benefited from actively learning about psychology and that allowing students to experience psychological phenomena for themselves allowed them to gain a better understanding of how psychology impacts lawyering especially given *bias blind spots* – the difficulty that people have in recognising influences on their own perceptions, judgments and decisions.⁹¹ Sternlight and Robbennolt suggest that psychology could be infused into virtually any practice endeavour. For instance, the psychology of ethics could help students understand how well-intentioned lawyers end up crossing ethical lines, psychology relating to perception and persuasion could assist in trial advocacy generally and psychology pertaining to pre-existing biases could assist in constitutional and criminal defense arguments specifically.⁹² The work of Sternlight and Robbennolt will be relied upon extensively in the role that psychology plays in legal practice (Chapter 3 of this work) and in the content design chapter of this work (Chapter 5).

Burgess has written on lessons from cognitive science and psychology, which optimise law school learning with a focus on the learning enterprise itself.⁹³ Her research provides a theoretical and scientific understanding of the ways in which law students learn as a useful method for law professors to design their lessons and curricula.⁹⁴ Burgess explains that the cognitive domain is divided into what the student should learn (the knowledge dimension) and what the student should do with that knowledge (the cognitive dimension).⁹⁵ Burgess states that usually, these learning objectives translate into a verb describing the cognitive dimension and a noun describing the knowledge dimension.⁹⁶ For example, Burgess states that professors will often say that they want their students to be able to apply (cognitive dimension verb) the rule against perpetuities (knowledge dimension noun).⁹⁷ In this way, the knowledge and cognitive dimensions combine to form an objective of what the student should do with

⁸⁹ Sternlight & Robbennolt I n4 supra at 375-376.

⁹⁰ Ibid.

⁹¹ Sternlight & Robbennolt I n4 supra at 377.

⁹² Ibid at 381-383.

⁹³ Burgess H, *Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning* 29 Quinnipiac Law Review Vol. 29 (2011) 1.

⁹⁴ Ibid at 4.

⁹⁵ Burgess n93 supra at 7-8.

⁹⁶ Ibid.

⁹⁷ Burgess n93 supra at 7-8.

identified knowledge.⁹⁸ Burgess however stresses that there is a third dimension and that is the overarching goal of the objective: that the student be able to transfer knowledge to new situations.⁹⁹ The ability to transfer knowledge is linked directly to metacognition (the ability to assess one's own strengths and weaknesses against learning objectives) and it is this element of practical learning, which is lacking in most modern law students.¹⁰⁰ This and other research on point will form the substantive basis of Chapter 2 of this work and will feature again in the content design aspects in Chapter 5.

Gantt writes about what *thinking like a lawyer* actually means and posits that legal scholarship would benefit from an extended discussion of the cognitive components of this skill considering that this phrase is most commonly used as the fundamental goal of law school education.¹⁰¹ Gantt notes that an increasing body of scholarship has begun to analyze the process of legal reasoning focusing on the cognitive elements of perceiving, organising and transforming new information into meaningful concepts.¹⁰² Gantt surveys empirical research on legal thinking by examining recent research on personality and learning styles to identify what *thinking like a lawyer* actually means and how students can be taught to think like lawyers.¹⁰³ Gantt's work will be used predominantly in Chapter 3 of this work.

Spellman is a former lawyer turned psychology professor. In her article, "*Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist – and (in particular) Studying Analogical and Causal Reasoning – Changed My Views About the Field of Psychology and Law*",¹⁰⁴ Spellman shares her concerns about how most research on psychology and law focuses on well-researched phenomena from cognitive psychology such as the primacy effect or hindsight bias or the predictions of support theory and tests only whether these phenomena occur in judicial settings or that it affects the people involved in judicial proceedings such as judges, lawyers or jurors – her critique is that psychology research should be applied to the practice of law and not just be recognised or identified in existing legal procedures.¹⁰⁵ Spellman points out that psychologists often do not have a clue how relevant

⁹⁸ Burgess n93 supra at 7-8.

⁹⁹ Ibid.

¹⁰⁰ Burgess n93 supra at 9.

¹⁰¹ Gantt L, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 Campbell L. Rev. 413 (2007).

¹⁰² Ibid at 417.

¹⁰³ Gantt n101 supra at 417 – 419.

¹⁰⁴ Spellman B, *Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist – and (in particular) Studying Analogical and Causal Reasoning – Changed My Views About the Field of Psychology and Law*, 79 Chi-Kent L. Rev. 1187 (2004).

¹⁰⁵ Ibid at 1189.

their everyday research is to the legal system – because they do not know enough about what the legal issues are, whilst lawyers do not know enough about current relevant psychological research to constructively apply it to legal practice.¹⁰⁶ The work contained in this thesis seeks to bridge this gap and show how an interdisciplinary approach can benefit legal education in general and the acquisition of lawyering skills in particular.

In addition to the above, a wealth of research exists on psychological phenomena such as visual metacognition in the context of change blindness,¹⁰⁷ inattention blindness,¹⁰⁸ cognitive load theory in the context of multimedia learning,¹⁰⁹ cognitive learning theory in general,¹¹⁰ cognitive bias¹¹¹ as well as transference and countertransference.¹¹² All these phenomena have profound effects on the clinical practice of law. Chapter 3 of this work elaborates on these phenomena and matches applicable psychological phenomena to relevant practical legal skills in order to develop a course on psychology *within* the law, which focuses on how these skills can be better learnt and retained.

1.3.3.4 On the need for a course in legal psychology within the LLB curriculum, course development and course content.

¹⁰⁶ Spellman n104 supra at 1189.

¹⁰⁷ Change blindness is a perceptual phenomenon that occurs when a change in visual stimuli is introduced but the observer does not notice it. See also Jaeger C & Levin D, *Justice is (Change) Blind: Applying Research on Visual Metacognition in Legal Settings* (2017). See also Sammon N & Bogue J, *The Impact of Attention on Eyewitness Identification and Change Blindness* (2015) *Journal of European Psychology Students* 6(2) 95-103. Fitzgerald R, Oriet, C, & Price H, *Change blindness and eyewitness identification: Effects on accuracy and confidence* *Legal and Criminological Psychology*, 21, (2016) 189-201.

¹⁰⁸ Inattention blindness is a psychological lack of attention that is not associated with vision deficits and usually occurs when unexpected stimuli is introduced. See Simons D & Chabris C, *Gorillas in our Midst: Sustained Inattention Blindness for Dynamic Events* *Perception*, Vol. 28 (1999) 1059-1074.

¹⁰⁹ Lee G, *Draw Me a Picture: Instructional Visual Displays in the Academic Law Library*, Thesis in partial fulfillment of the Culminating Experience Project for MLIS, University of Washington Information School, Seattle (May, 2015).

¹¹⁰ George S, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School* *Maine Law Review*, Vol. 66, No. 1, Winter 2013 *Suffolk University Law School Research Paper No.* 13-10. See also Niedwiecki A, *Lawyers and Learning: A Metacognitive Approach to Legal Education* 13 *Widener L. Rev.* 33.

¹¹¹ Peer E & Gamliel E, *Heuristics and Biases in Judicial Decisions*, 49 *Ct. Rev.* 114 (2013). See also Weinstein I, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 8 *Clinical L. Rev.* 783 (2002). Okpaluba C & Juma L, *The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa* *Potchefstroom Electronic Law Journal* 2011, Volume 14, Number 7, 14-36.

¹¹² Kahn M, *Jurisprudential Countertransference*, *Touro Law Review*: Vol. 18: No. 3, Article 5 *Touro Law Review*: Vol. 18: No. 3, Article 5. See also Van Breda A & Feller T, *Social work Students' Experience and Management of Countertransference* *Social Work* 2014:50(4) 469-483.

As early as 1968, Watson, a psychiatrist and psychoanalyst wrote on legal education using experiential learning from the vantage point of his membership in a law faculty.¹¹³ He drew conclusions from the theories of human behaviour regarding traditional course modification and proposed several multidisciplinary teaching techniques, which will be drawn upon in Chapter 3 of this work. Watson proffered the idea that the classroom itself is a laboratory for exploring the power of emotions and psychic life.¹¹⁴ Watson proposed exposing students to professional anecdotes on legal problems and then giving them an opportunity to observe what goes on at all levels of consciousness with the anecdotal players.¹¹⁵ Watson's work emphasises the interpretative and reflective value of this type of teaching.

An undergraduate course on psychology *within* the law would give students a sense of understanding themselves before they try to make sense of the actions and motivations of their clients, judges and opponents when they enter the clinical legal environment. It is contended that legal education fails to adequately bridge the gap between law and practice because students are never taught to factor in the feelings, fears, concerns and motivations of themselves or others. A course, which exposes students to their own psychological motivations as well as those of the other players in the litigation arena would give students much needed context on how to approach the acquisition of skills and the exercise of competencies to be exercised in practice. This is elaborated upon in Chapter 3 of this work.

Relying on the work of Watson, Silver advocates that legal curricula should prepare students for the emotional dimensions of lawyering.¹¹⁶ She argues that we fail our students if we fail to prepare them for the impact of their emotional lives, as well as those of their clients, on the practice of law.¹¹⁷ Silver criticises traditional courses and assessments, which measure academic accomplishments without incorporating the psychological skills necessary to produce successful lawyers.¹¹⁸ Silver specifically criticises the predominant view in law schools that thinking and feeling are mutually exclusive and that emotions are disruptive and maladaptive and provides support for a pedagogy, which perceives emotions as motivating factors for purposeful activity. Silver relies on the work of Demasio who provides scientific

¹¹³ Watson A, *The Quest for Professional Competence: Psychological Aspects of Legal Education* 37 U. Cin. L. Rev. 91 (1968).

¹¹⁴ Ibid at 147.

¹¹⁵ Watson n113 supra at 147.

¹¹⁶ Silver M, *Emotional Intelligence and Legal Education* Psychology, Public Policy and Law, American Psychological Association Inc. Vol. 5(4) Dec 1999, 1173 at 1174. [Hereinafter Silver I] See also generally, Silver M, *Love, Hate and other Emotional Interference in the Lawyer/Client Relationship*, 6 Clin. L. Rev. 259 (1999). [Hereinafter Silver II].

¹¹⁷ Ibid Silver I n116 supra at 1174.

¹¹⁸ Silver I n116 supra at 1180.

evidence that not only are thinking and feeling not mutually exclusive, but that rational decision making is dependent on emotional input.¹¹⁹ Silver argues for at least certain aspects of legal education to facilitate the healthy integration of the rational and emotive processes¹²⁰ – this thesis advocates for an undergraduate course in which students are taught to relate to the interplay between thinking and feeling which can later be exercised and re-evaluated in their clinical legal experience.

Drawing on the work of educational psychologists, Bloom writes on cutting-edge strategies for teaching students how to regulate their motivational beliefs, their resource management practices and their approaches to mastering the material taught for success both as law students and as future lawyers.¹²¹ Bloom provides a number of checklists to help law professors build a culture of self-regulated learning in their courses. Bloom also writes on what she calls “backwards course design”¹²² which is based on first determining desired learning outcomes, then choosing formative and summative assessment methods to measure those outcomes and finally, incorporating specific teaching strategies to help students achieve those outcomes.¹²³ Bloom describes the learning outcome of her research as providing law professors with tools to design and deploy tangible strategies that advance learning.¹²⁴ I draw on these lessons to design a course on psychology within the law. Bloom’s work features in the course development chapters of this work (Chapters 4 and 5).

Huang and Felder draw on research to show that law schools foster emotional detachment by translating human conflict into legal language thereby losing the cultural, emotional, moral and social details and contexts that provide the bases for ethical problem-solving and judgments.¹²⁵ The authors note that research places the blame for this on an overemphasis in legal education on analytical and cognitive skills as compared to interpersonal and social skills.¹²⁶ By applying the metaphor of mindless zombies wandering without aim to students, Huang and Felder offer a number of solutions to cure what they call “the zombie apocalypse”. They argue that one way to reverse zombification is to practice mindfulness.¹²⁷

¹¹⁹ Demasio A, *Descartes Error: Emotion, Reason and the Human Brain*, Harper Perennial, 1994.

¹²⁰ Silver n116 supra at 1194.

¹²¹ Bloom E, *Teaching Law Students to Teach Themselves: Using Lessons from Psychology to Shape Self-Regulated Learners* 59 Wayne L. Rev. 311 (2013). [Hereinafter Bloom I]

¹²² Bloom E, *Creating Desirable Difficulties: Strategies for Reshaping Teaching and Learning in the Law School Classroom* University of Detroit Mercy L. Rev. Vol. 95, Issue No. 2, 115-151 (2018). [Hereinafter Bloom II]

¹²³ Ibid at 115.

¹²⁴ Bloom n122 supra at 115.

¹²⁵ Huang P & Felder C, *The Zombie Lawyer Apocalypse*, 42 Pepp. L. Rev. 727 (2015).

¹²⁶ Ibid at 743.

¹²⁷ Huang & Felder n125 supra at 750.

Mindfulness entails being able to regulate one's attention, being aware of one's bodily sensations, regulating one's emotions, and changing one's self-perspective.¹²⁸ They rely on multiple definitions of mindfulness, one of which explains mindfulness as an awareness of awareness itself.¹²⁹ This is similar to what is stated about metacognition in Chapter 2 of this work.

The idea behind a stand-alone course on psychology *within* the law is to provide students with the opportunity to practice mindfulness (or metacognition) in various contexts of the legal enterprise, through the improvement of learning techniques, through simulation, observation and evaluation in the hopes that they will later use these skills in their clinical experiences. Substantively, the intended course will teach students that law and psychology are very similar and differ mainly in methodology. Drawing on the work of Clifford, it can be said that both disciplines ask “what is the reality?” – law answers in terms of probabilities (beyond a reasonable doubt or on a balance of probability) while psychology also answers in probabilities but as enshrined within statistical tables that calculate the probability of the event (reality) being due to chance.¹³⁰ Clifford explains that both psychology and law deal with uncertainty and both end up with a decision or judgment despite this uncertainty.¹³¹ Since law is based upon theories and expectations of human behaviour, the two methodologies could enrich each other.

From a curriculum design perspective, the research will incorporate the work already done by Du Plessis on clinical legal pedagogy and outcomes,¹³² recommended assessment regimes,¹³³ and curriculum development.¹³⁴

Inextricably linked to the issue of a successful and well-integrated course design is understanding and facilitating for differing learning styles – that is the cognitive, affective and psychological behaviours that indicate how learners interact with and respond to the learning environment and how they perceive, process, store and recall what they are attempting to learn.¹³⁵ Alaka explores the controversy surrounding learning styles and questions whether a

¹²⁸ Ibid.

¹²⁹ Huang & Felder n125 supra at 751.

¹³⁰ Clifford B, *Methodology: Law's Adopting and Adopting to Psychology's Methods and Findings*, Handbook of Psychology in Legal Contexts, Second Edition, John Wiley & Sons, Ltd. 2003, Chapter 5.1 at 606-624.

¹³¹ Ibid at 608.

¹³² Du Plessis MA, *Clinical Legal Education: Planning a Curriculum That Can Be Assessed*, 2011 Journal for Juridical Science 36(2):25-57. [Hereinafter Du Plessis I]

¹³³ Du Plessis MA, *Clinical Legal Education Models: Recommended Assessment Regimes*, PER/PELJ 2015(18)7 2778-2802. [Hereinafter Du Plessis II]

¹³⁴ Du Plessis MA, *Clinical Legal Education: Identifying Required Pedagogical Components*, 2015 Journal for Juridical Science 40(2):64-80. [Hereinafter Du Plessis III]

¹³⁵ Jacobson M, *A Primer on Learning Styles: Reaching Every Student*, 25 Seattle U. L. Rev. 139, 142 (2001).

positive correlation exists between individual learning styles and learning outcomes.¹³⁶ Alaka proposes that learning styles or their assessments should be used to measure preferences or habits rather than to identify immutable styles – this understanding facilitates the recognition in students of strengths and weaknesses which they can self-modulate.¹³⁷

Finally, I will consider the neurobiology of learning. Fruehwald writes that one can become an expert teacher by understanding the neurobiology of learning.¹³⁸ Fruehwald's research outlines how the brain is the result of both nature and nurture, whilst the macro-architecture of the brain is genetic, the micro-architecture is environmental; in the learning context, experience affects the brain on a micro-level by neural firing.¹³⁹ He states that genetics provide the framework but experience provides the details – learning is part of the details.¹⁴⁰ Fruehwald notes that according to cognitive psychologists, learning is a relatively permanent change in a neuron and because neurons are changed by activity, learning occurs when the firing ability of a neuron is changed.¹⁴¹ Fruehwald's research shows teaching and instruction work when they create conditions that trigger neural mechanisms in students.¹⁴² A course that has metacognition as its foundational imperative can help manipulate and motivate these changes in students and the module design and content will at least in part be motivated by research on the neurobiology of learning itself.

1.4 PART C: RESEARCH METHODOLOGY & OVERVIEW OF CHAPTERS

1.4.1 Research methodology

The research contained in this work is non-empirical in nature. Two primary research methodologies will be relied upon. First, a theoretical methodology is utilised to construct an analysis of existing research on the subject matter which is related to the research questions posed. This methodology is based predominantly on a literature review of existing sources as proposed by Mouton.¹⁴³ It will use inductive reasoning, a process by which known premises

¹³⁶ Alaka A, *Learning Styles: What Difference Do the Differences Make?* 5 Charleston L. Rev. 133 2010-2011 at 134.

¹³⁷ Ibid at 169-172.

¹³⁸ Fruehwald S, *How to Become an Expert Law Teacher by Understanding the Neurobiology of Learning*, LegEdDig 43; (2013) 21(3) Legal Education Digest, 1-57.

¹³⁹ Ibid at 4.

¹⁴⁰ Fruehwald n138 supra at 4.

¹⁴¹ Ibid.

¹⁴² Fruehwald n138 at 5 – 7.

¹⁴³ Mouton J, *How to Succeed in Your Master's and Doctoral Studies* (2001) 179.

are used to generate untested conclusions to develop novel outcomes.¹⁴⁴ The purpose of an inductive theoretical approach is to build and generate theory and the information collected is then used to identify and explore patterns in order to create conceptual frameworks with a view to innovate.¹⁴⁵ This method relies on the review of academic articles and textbooks with the aim of understanding existing scholarship in the research area in order to build a novel or adapted hypothesis on the existing foundation. The research will be qualitative in nature meaning that it will be concerned primarily with enquiries pertaining to why and how as opposed to how often – this being a feature of the quantitative method.¹⁴⁶

Second, a comparative methodology will be used. Eisenhardt¹⁴⁷ explains the comparative method as the continuous comparison of data involving the emergence of theoretical categories from pre-existing evidence and an incremental approach to further research selection and data gathering.¹⁴⁸ This method will be used to explore and analyze existing sources to establish what could work in our jurisdiction based on what has been successfully accomplished in other jurisdictions. Scholarship from the USA, Australia and South Africa will be considered.

1.4.2 Overview of the chapters.

CHAPTER 1:

INTRODUCTION

The introductory chapter introduced the basic premise behind the intended research and oriented the research focus. Part A of the introduction dealt with the contextual background and significance of the research as well as the motivation and purpose of the research. Part B revealed the objectives and corresponding research questions and provided the theoretical framework for the research in the introductory literature overview. This was intended to introduce some of the concepts dealt with in the successive chapters of this thesis. Part C of the introductory chapter briefly explained the research methodology employed and provides an overview of the chapters.

¹⁴⁴ Saunders, M, Lewis, P & Thornhill, A. (2012) “Research Methods for Business Students” 6ed Pearson Education Limited at 56.

¹⁴⁵ Ibid.

¹⁴⁶ Berg, Bruce Lawrence; Lune, Howard (2012). *Qualitative Research Methods for the Social Sciences* (8th ed.). Boston at 3. ISBN 9780205809387.

¹⁴⁷ Eisenhardt K, *Building Theories from Case Study Research* Academy of Management Review, 1989 Vol. 14, No. 4, 532-550.

¹⁴⁸ Ibid at 534.

CHAPTER 2:

CRITICISMS OF TRADITIONAL LEGAL EDUCATION AND LEGAL EDUCATION AND THE NEED FOR AN APPROACH BASED IN COGNITIVE SCIENCE

This chapter explores both the theoretical and practical criticisms of traditional legal education locally and internationally. Discourse from the USA, Australia and South Africa is considered. This chapter explores the need for the development of the South African LLB degree in the context of recommendations made by the Council for Higher Education. The chapter proposes the use of cognitive learning theory to maximise law school learning by drawing on research related to metacognition and the influence of individual learning styles. Research question 1 and its related sub questions are answered in this chapter, namely: What are the criticisms of traditional legal pedagogy, is there a need to develop legal curricula and teaching beyond the traditional Socratic and dialectic methods and how do we teach law and practice in the 21st century?

CHAPTER 3:

THE ROLE OF PSYCHOLOGY IN LEGAL PRACTICE

This chapter introduces the importance of psychology *within* the law and explains the choice of phraseology. This chapter orients the role of psychology in legal practice in the context of undergraduate study. The chapter proceeds to isolate five indispensable legal skills required of law graduates to practice law and gives insight on how psychology impacts on the acquisition and use of those skills for effective legal practice. In this respect, the chapter answers research question 2, namely: What are the core competencies of qualified law graduates and how do we teach law students to think like lawyers? This chapter advocates for the need for a stand-alone course on the study of basic psychology (including metacognitive learning) to improve lawyering skills in graduates. This chapter will thus also answer research question 3, namely: What roles do cognitive science and psychology including psychological phenomena (such as pre-attentive processing, change blindness, intentional blindness, legacy cognitive blindness, heuristics and biases, hindsight bias, positive illusions, perceptual capacity, and prior knowledge activation) play in legal education and lawyering skills?

CHAPTER 4:

PSYCHOLOGY *WITHIN* THE LAW: COURSE DESIGN PART I (VALUES, GOALS, OUTCOMES AND PLACEMENT IN THE LEGAL CURRICULUM)

This chapter focuses on the first part of course design, values, goals and outcomes of the proposed course on psychology *within* the law. This chapter engages with the values which underpin the course design process, the need to focus on law as grounded in the humanities as opposed to science and the ultimate exorcism of the theory-practice divide. A proposal is made for the use of the unified learning model (ULM) in the development of the proposed course and lessons from experiential learning are used to set goals and outcomes for the curriculum. Lastly, the chapter focuses on the proposed placement of the intended course (based on its goals and outcomes) within the broader LLB curriculum. This chapter will answer research question 4, namely: Would a course on legal psychology be an asset to the legal curriculum in the South African context and where would such a course be best placed within the undergraduate legal curriculum? Would this be a stand-alone course, could it be embedded in other courses and in which year would it be offered?

CHAPTER 5:

PSYCHOLOGY *WITHIN* THE LAW: COURSE DESIGN PART II (METHODOLOGY, CONTENT & ASSESSMENT)

This chapter focuses on the actual course methodology, course content and assessment of the proposed course. The chapter describes numerous teaching methodologies and their implications on the choice of course design model. Lessons on proposed content from similar courses offered in the USA are used to construct a proposed syllabus, course outline and assessment plan for the course. Essentially, this chapter constructs a hypothetical pilot module for adaptation within the undergraduate LLB curriculum based on the goals, outcomes and placement referred to in the previous chapter. This chapter answers research question 5, namely: What would a course on Psychology *within* the law look like in the South African context?

CHAPTER 6:

CONCLUSION

Concluding remarks, reflective findings related to the research questions as well as proposals for further research are made in this concluding chapter.

CHAPTER 2

THE CRITICISMS OF TRADITIONAL LEGAL EDUCATION AND THE NEED FOR AN APPROACH BASED IN COGNITIVE SCIENCE

2.1 Introduction

In the late seventeenth century, in his treatise on legal education,¹ European jurist Huber (1636-1694) described the law students of his time as “ill-prepared, ignorant of classical literature, concerned only to get the qualification which would admit them to the rewarding world of government or business, and meanwhile they amused themselves with wine, women and song”.² Lamenting how Huber could easily have been describing the law students of today, it has been suggested that after completing their studies, law graduates lack the ability to apply legal principles and to solve problems.³ For many years, it was thought that one could only learn law by undertaking doctrinal study and engaging in the traditional Socratic or Langdellian case-method.⁴ The Socratic method can help to teach students how to think through and unravel fact patterns, to exercise reflection before accepting the opinion of another, to group facts and to establish the legal problem in issue with a view to solve problems.⁵ More modern approaches (which will be discussed hereunder) highlight the flaws in this method as authors continue to argue that *learning by doing*⁶ and *learning how to learn*⁷ are the preferred approaches to

¹ *De ratione juris docendi & discendi diatribe per modum. Dialogi*, published during Huber’s lifetime in two editions, namely those of 1684 and 1688 [hereinafter *The Dialogus*]

² *The Dialogus* n1 *supra* at 75.

³ Domanski A, *Ulric Huber’s Programme for Legal Education – What Lessons for Today?* 2011, 17, *Fundamina* 46 at 55.

⁴ Christopher Langdell, previous Dean of Harvard Law School is thought to be the creator of the case method (also known as the dialogue or Socratic method which purports to teach law by way of analysis and reflection upon past court cases.) See Franklin N, *The Clinical Movement in American Legal Education* (1990) *Natal University Law and Society Review* 2, 55-58. See also, Jackson JD, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?* 43 *Cal. W. L. Rev.* 267, 2007.

⁵ Hawkins-Leon CG, *The Socratic Method-Problem Method Dichotomy: The Debate over Teaching method Continues*, 1998 *BYU Educ. & L.J.* 1, 14 (1998) at 14.

⁶ Richard Grimes coined the phrase “learning by doing” in his article: Grimes R, *Learning Law by Doing Law in the UK*, (2000) 1 *International Journal for Clinical Education* 54.

⁷ For articles on the importance of learning how to learn, see Jacobson S, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, *Journal of the Association of Legal Writing Directors*, Vol. 2, 2004, 27-72 [hereinafter Jacobson I] and George S, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School* *Maine Law Review*, Vol. 66, No. 1, Winter 2013, *Suffolk University Law School Research Paper No. 13-10*; Burgess H, *Deepening the Discourse Using the Legal Mind’s Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning* 29 *Quinnipiac Law Review* Vol. 29 (2011). Palmer J, *The Millennials are Coming: Improving Self-Efficacy in Law Students through Universal Design in Learning*, *Cleveland State Law Review*, Vol. 63, Issue 3, 2015, 675-706. All three authors use the work of Jacobson on learning theory and both Burgess and George are used substantively throughout the thesis.

learning in a number of disciplines. In his orations, Huber insisted that the practice of rhetoric and disputation were indispensable during the undergraduate study of law.⁸ Huber stated that:

“Merely listening to lectures in no way suffices...to achieve a ready and sound knowledge of the law ... [P]ractice in disputing should be diligently commenced and continued during the whole time that is spent on law, for nothing is more efficacious than this in preparing the mind, the mode of expression, and the manner of speaking appropriate to public litigation where, at some stage, jurists to stand up and discharge their duty successfully.”⁹

Disputing or arguing a case as described by Huber generally requires some form of legal analysis or evaluation. Evaluation includes critique, ability to review synthesised material for accuracy, deciding likely outcomes and analysing the effects of policy on the likely outcomes – this includes a student’s own assessment of whether their knowledge meets their learning objectives.¹⁰ This type of evaluation requires higher order thinking skills, more advanced than the mere recall and understanding of prescribed material. Whilst most law schools focus on the teaching of doctrine and theory, they seldom devote much, if any, attention to teaching the metacognitive skills which are required to perform these functions.¹¹ This is the over-arching basis of this chapter. Developmental discourse regarding legal curricula founded in the MacCrate¹² and Carnegie¹³ reports entrench the notion that law schools teach students how to *think* like lawyers but not how to *be* lawyers.¹⁴ The proposed response to this criticism is that metacognition – the awareness and understanding of one’s own thought processes – and the development of higher order thinking skills is key to legal training but is presently absent in

⁸ Domanski n3 supra at 52.

⁹ Huber n1 supra and Domanski n3 supra at 52.

¹⁰ Burgess H, *Deepening the Discourse Using the Legal Mind’s Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning* 29 Quinnipiac Law Review Vol. 29 (2011), 1 at 19.

¹¹ George S, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School* Maine Law Review, Vol. 66, No. 1, Winter 2013 Suffolk University Law School Research Paper No. 13-10. See also Niedwiecki A, *Lawyers and Learning: A Metacognitive Approach to Legal Education* 13 Widener L. Rev. 33. Further confirmed in Bloom E, *A Law School Game Changer: (Trans)formative Feedback*, Oh. N. University L. Review, Vol. 41, Issue 2 (2015), 227-260. See also Graham LP, *Generation Z Goes to Law School: Teaching and Reaching Students in the post-Millennial Generation*, University of Arkansas at Little Rock Review, Vol 41, Issue 1, 2018, 29-69.

¹² MacCrate R, American Bar Association, Section of Legal Education and Admissions to the Bar (July 1992) Report of The Task Force on Law Schools and the Profession: Narrowing the Gap [hereinafter the *MacCrate Report*]. So called in recognition of Robert MacCrate, Chair of the task force that produced the report.

¹³ Sullivan W et al, *Educating Lawyers: Preparation for the Profession of Law*, Carnegie Foundation for the Advancement of Teaching (2007) – Summary [The Carnegie Report].

¹⁴ Franzese P, *Law Teaching for the Conceptual Age*, Seton Hall L. Rev. Vol. 44 (2013) 967 at 968. See also generally Gantt L, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 Campbell L. Rev. 413 (2007).

the South African legal curriculum. The American Clinical Legal Education's *Best Practices in Legal Education*¹⁵ (hereinafter the American Best Practices) expressly calls for legal educators to base their teaching on "research about effective teaching, or at least hypotheses grounded in research".¹⁶ In this chapter it is proposed that legal educators ought to draw on the gains made by cognitive psychologists in understanding what happens when people learn and what neuroscience has to say about how people think.¹⁷ Accordingly, it is proposed that teaching students about metacognition and effective studying techniques in a course designed to focus on adopting cognitive learning theories will help to produce better graduates.¹⁸ In addition, it is posited that knowledge about the process of learning is important to lawyering because the foundation for all competent lawyering is the ability to acquire and impart knowledge.¹⁹

2.2 The need for development in Law School Curricula.

Traditionally, law schools taught by what is referred to as the Case Method.²⁰ This entailed law professors lecturing on the subject matter of previously decided cases and the students writing down and memorising the lectures.²¹ The Socratic method is named after Socrates, the Greek philosopher who taught students by asking many follow-up questions intended to show the contradictions in students' thinking and thought processes with a view to guiding them towards solid and tenable conclusions.²² The follow-up questions serve primarily, to challenge the

¹⁵ Stuckey R et al, *Best Practices for Legal Education: A Vision and a Road Map* (2007). [hereinafter American Best Practices].

¹⁶ Ibid at 132.

¹⁷ Fruehwald S, *How to Become an Expert Law Teacher by Understanding the Neurobiology of Learning*, LegEdDig 43; (2013) 21(3) Legal Education Digest 1-57. See also generally, Stropus RK, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 Loy. U. Chi. L.J. 449, 1996 and George n 11 supra.

¹⁸ George n11 supra at 1. See also generally, Lawson CA et al, *Recipe for Success: Teaching Students Metacognitive and Self-regulatory Learning Strategies*, Learning Assistance Review (TLAR), Vol. 26, Issue 2, 2021, 149-178.

¹⁹ Jacobson I n7 supra at 28.

²⁰ Jackson n4 supra at 270. See also generally, Stropus RK, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 Loy. U. Chi. L.J. 449 (1996) at 455. See also Franzese n14 at 968. Also see Wolksi B, *How, and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum*, Journal of L. Education, Volume 52, 2002, 287-302 at 290. See also Hess GF, *Heads and Hearts: The Teaching and Learning Environment in Law School*, J of Legal Education, Volume 52, 2002, 75-111 at 92-102. See also LA Jewel, *Old School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric*, Legal Communications and Rhetoric: JALWD, Vol. 13, 2016 at 59. See also, Winson KE, *What's Your Problem*, Stetson L. Rev. (2014-12015) 777 where the author criticizes the case method in favour of the problem-solving method.

²¹ Kerr OS, *The Decline of the Socratic Method at Harvard*, 78 Neb. L. Rev. 113 (1999) at 114.

²² Grant O, *Teaching Law Effectively with the Socratic Method: The Case for a Psychodynamic Metacognition*, S. Texas. L. Rev, Vol 58, 399 (2017) at 401. See also Marshall DG, *Lecture, Socratic Method and the Irreducible Core of Legal Education*, 90 Minn. L. Rev. 1, 10 (2005).

assumptions upon which the student based their answer.²³ The follow-up questions can take a number of different forms with distinct purposes.²⁴ For example, one might use follow-up questions to help move the student towards being more specific in their understanding of the theory or application of a certain principle.²⁵ One might also use the follow-up questions to show how the scenario being dealt with actually requires an exception to the general rule.²⁶ Finally, one might use follow-up questions to encourage and develop a specific stream of thought in the students.²⁷ The contemporary approach to this method is to ask the questions in a manner which helps students to discover the answers for themselves.²⁸ Langdell, Dean of Harvard Law School during the 1870s adopted the Socratic method to help foster analytical skills, to encourage independent thinking and to help students to practice the skill of rhetoric.²⁹ The modern approach to the Socratic method is that it requires more of students than the simple memorisation of facts and principles from a case, it requires students to focus on the application of the legal rules to perceptible fact patterns.³⁰ The contemporary approach requires students to reduce law to its basic elements and to be able to analyse those elements independently in relation to others.³¹ Lastly, through an act of amalgamation of the facts and law, the students must arrive at a proposition which can be used as a guide for the resolution of future disputes.³² Critics of this traditional approach, even in its contemporary form, argue that these methods have never been proven to be effective.³³ Further, that these methods are usually taught poorly,³⁴ or incorrectly, in that they fail to teach students about the actual role of lawyers or the methods in critical analysis, planning and decision making and thus do not truly prepare

²³ Ibid Grant at 402.

²⁴ Grant n22 supra at 402.

²⁵ Grant n22 supra at 402.

²⁶ Ibid at 403.

²⁷ Grant n22 supra at 403. For a discussion on the role of teachers in adaptive teaching styles, including the Socratic Method, see Lustbader P, *Construction Sites, Building Types and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 Willamette L. Rev. 315, (1997) at 324.

²⁸ Ibid Grant at 403. See also Jackson n4 supra at 272.

²⁹ Grant n22 supra at 401. See also Jackson n4 supra at 270. See further, Kerr n21 supra.

³⁰ Ibid Grant at 403. See also, Hess GF et al, *Techniques for Teaching Law*, 2ed, (2011) at 31 (where Hess discusses numerous law school teaching methods including the Socratic method.)

³¹ Marshall n22 supra at 6.

³² Ibid.

³³ Curcio AA, Jones GT & Washington TM, *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, Vol 35, Fla. St. U.L. Rev. (2008) 271 at 272-274. (Here the authors discuss the unavailability of empirical research behind traditional legal pedagogy.) See also, Velez Martinez SI, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 Chi. Kent L. Rev. 585 at 595 (where the author argues that the effectiveness of the case-dialogue method has never been demonstrated).

³⁴ Velez Martinez n33 supra at 593. See also Salinas OJ, *Secondary Courses Taught by Secondary faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum ahead of the NextGen Bar Exam*, Minnesota Law Rev., Vol. 107, Issue 6, 2034, 2663-2700 at 2667.

students for legal practice.³⁵ Schwartz critiques the traditional approach to law school teaching as expecting students to teach themselves or to learn vicariously through others.³⁶ According to Schwartz, the classroom interaction between a professor and law student assumes some kind of rebound learning effect on other students in which the interaction between professor and student will somehow rub off on all the other students in class.³⁷ The problem with the approach, is that the non-participating students are simply presumed to know how to play along and how to learn to think like lawyers by experiencing what the participating student or the professor is experiencing vicariously.³⁸ Schwartz makes the point that this is tantamount to trying to learn how to swim without any explicit instruction on how to actually move or breathe in the water but by simply jumping into the pool.³⁹ What is required, according to Schwartz, is practice, feedback and an opportunity to improve one's skills.⁴⁰ Relying on the work of Schwartz, Lee opines that Schwartz's swimming analogy demonstrates exactly why the most frequently recommended reforms in legal education include "clearer instruction, more opportunities for evaluation and feedback, and more engaged learning methodologies, through which students do not seek to learn passively but instead, actively participate in generating their own knowledge."⁴¹ According to Lee, all of these reforms actually form part and parcel of the metacognitive approach⁴² (discussed further below).

³⁵ Salinas n34 supra 2667-2669. See also Barry MM, Dubin JC & Joy PA, *Clinical Legal Education for the Millennium: The Third Wave*, 7 Clinical L. Rev. 1, (2000) 27 at 34. See also Du Plessis MA & Welgemoed M, *Training for Legal Practice – Towards Effective Teaching Methodologies for Procedural Law Modules*, Obiter, Vol 43, Issue No. 2, 2022, 205-233 at 210-212.

³⁶ Schwartz M, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347, 349 (2001) at 350. See also, Madison BV III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, University of Detroit Mercy Law Rev., Vol. 85, Issue 3, 2008, 293—346. See also, Kowalski T, *True North: Navigating for the Transfer of Learning in Legal Education*, Seattle University Law Review, Vol. 34, Issue 1, 2010, 51-132 at 83-85 where the author criticises most law schools for failing to discuss common themes across the law school experience and across subjects or to explicitly teach that knowledge from one course could be generalised to apply to other courses regardless of whether the focus is skill or doctrine.

³⁷ Schwartz n36 supra at 351.

³⁸ Ibid.

³⁹ Schwartz n36 supra at 351.

⁴⁰ Ibid at 356.

⁴¹ Lee JA, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 Drexel L. Rev. (2020) 227 at 233. Lee's work on metacognition has been referenced by: Ryder R, *With Great Power Comes Great Responsibility: Improving Your Feedback and Hallmarks of Effective Feedback*, Saint Louis University Law Journal, Vol. 68, Issue 3, Spring 2024, 537-556; Gundlach J, *Understanding the Metacognitive "Space" and its implications for Law Students; Learning*, Hofstra Law review, Vol. 50, Issue 4, Summer 2022, 769-828.

⁴² Ibid.

The MacCrate Report,⁴³ the American Best Practices,⁴⁴ and the Carnegie Report,⁴⁵ together with initiatives by the American Bar Association (ABA)⁴⁶ have led to discussions on how best to teach law students, however, some argue that not enough has changed to produce graduates who can successfully engage with in-depth thinking and sophisticated legal work.⁴⁷ The MacCrate Report,⁴⁸ identified ten fundamental *skills*⁴⁹ and four fundamental *values*⁵⁰ that are essential to competent lawyering. All ten of the lawyering skills (which can be summarised as problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, client counselling, negotiation, litigation and other dispute resolution procedures, organization and management of legal work, or ethical dilemmas) require both teaching and learning in order to be effective.⁵¹ Likewise, teaching and learning is fundamental to the pursuit of the four values whether they be competent representation, the promotion of justice, fairness and morality, the improvement of the profession or the improvement of one's own lawyering skills.⁵² The American Best Practices⁵³ has recommended that lecturers help students to improve their self-directed learning skills,⁵⁴ thus suggesting that changes in teaching methodology are necessary for meaningful change in the law students that are produced in law schools. The Carnegie Report⁵⁵ has advised professional students that they have a responsibility to “become ‘metacognitive’ about their own learning”⁵⁶ and authors have interpreted this to mean that teaching metacognitive strategies is crucial to make students better

⁴³ MacCrate Report n12 supra.

⁴⁴ American Best Practices n15 supra.

⁴⁵ Carnegie Report n13 supra.

⁴⁶ See Duncan S, *The New Accreditation Standards are Coming to a Law School Near You - What You Need to Know About Learning Outcomes and Assessment*, 16 Legal Writing: J. Legal Writing Inst. 605 (2010) at 608.

⁴⁷ George n11 supra at 16.

⁴⁸ MacCrate Report supra n12.

⁴⁹ The skills include the ability to develop and evaluate strategies for solving a problem or accomplishing an objective, analyse and apply legal rules and principles, identify legal issues and research them thoroughly and efficiently, plan, direct, and (where applicable) participate in factual investigation, communicate effectively, whether orally or in writing, counsel clients about decisions or courses of action, negotiate in either a dispute-resolution or transactional context, employ — or to advise a client about — the options of litigation and alternative dispute resolution, practice effectively and represent a client consistently with applicable ethical standards. The MacCrate Report supra n11 at 138-140.

⁵⁰ The values include attaining a level of competence in one's own field of practice, maintaining a level of competence in one's own field of practice, representing clients in a competent manner”, “the values of promoting justice, fairness, and morality in one's own daily practice, the values of participating in activities designed to improve the profession, assisting in the training and preparation of new lawyers and the values of seeking out and taking advantage of opportunities to increase his or her knowledge and improve his or her skills. The MacCrate Report supra n11 at 140-141.

⁵¹ Jacobson I n7 supra at 29.

⁵² Ibid.

⁵³ American Best Practices n15 supra.

⁵⁴ American Best Practices n15 supra at 127.

⁵⁵ Carnegie Report n12 supra.

⁵⁶ Ibid at 173.

lifelong learners.⁵⁷ The most recently published 2018-2019 ABA Standards⁵⁸ specifically require law schools to incorporate fundamental components of the metacognitive approach (discussed hereunder) by requiring formative assessments with meaningful feedback throughout the curriculum,⁵⁹ by insisting on the completion of a course that includes substantial instruction in the rules of professional conduct and the values and responsibilities of the legal profession and its members,⁶⁰ as well as the completion of at least one experiential course which must be a simulation course, Law Clinic or field placement as defined elsewhere in the accreditation document.⁶¹ This will be addressed further in the course design chapters that follow at Chapters 4 and 5.

The above sentiments are echoed by Australian academics in *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (hereinafter “Australian Best Practices”),⁶² where the authors advocate for the use of both summative (what they refer to as developmental) and formative (which they refer to as concluding) assessments,⁶³ including self-assessment,⁶⁴ and advocate for the utilisation of clinical methods including simulation by substantive compulsory law courses.⁶⁵ Simulation and assessment will be dealt with in more detail in the course development chapters of this work (Chapters 4 and 5 respectively). The Australian authors also specifically mention the role of metacognition as espoused in the American Best Practices⁶⁶ and Carnegie Report⁶⁷ as critically important to revitalising legal education.⁶⁸

In the South African context, In November 2018, the Council on Higher Education (CHE) released a 98-page report on the national review of the Bachelor of Laws (LLB)

⁵⁷ Niedwiecki A, *Lawyers and Learning: A Metacognitive Approach to Legal Education* 13 Widener L. Rev. 33 at 155.

⁵⁸ American Bar Association Standards and Rules of Procedure for Approval of Law Schools 2018-2019. https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf Accessed on 22.08.2023.

⁵⁹ ABA Standards n57 supra at standard 314.

⁶⁰ ABA Standards n57 supra at standard 303(a)(1).

⁶¹ ABA Standards n57 supra at standard 303(a)(3).

⁶² Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School*, Australian National University Press, 2017 [Hereafter Australian Best Practices].

⁶³ Australian Best Practices n62 supra at 184-185, 192-197.

⁶⁴ Ibid at 194.

⁶⁵ Australian Best Practices n62 supra at 211.

⁶⁶ American Best Practices n15 supra.

⁶⁷ Carnegie Report n13 supra.

⁶⁸ Australian Best Practices n62 supra at 197-199

programme in South Africa (the CHE Review).⁶⁹ The report was compiled due to repeated complaints by professional lawyers that law graduates were of a poor quality. The report highlighted a range of shortcomings in the Bachelor of Laws (LLB) qualification offered by South African universities. The report made reference to the “Qualification Standard for the Bachelor of Laws” (the LLB Qualification Standard) which was developed between 2013 and 2015 by a group of law academics and which devised a minimum standard for the award of the qualification based on competencies expected of a law graduate.⁷⁰ According to the report, the group was convened and advised by the CHE and received recommendations from various stakeholders.⁷¹ All universities endorsed the LLB Qualification Standard in 2015.⁷² The CHE review concluded that there was a serious lacuna in the legal education system with regard to the inculcation in students of critical thinking skills.⁷³ The report suggested that critical thinking skills were the most important of the skills mentioned in the LLB Qualification Standard, as they encapsulated all other applied competencies such as ethics and integrity, communication, numeracy, information technology, problem solving, self-management and collaboration, ability to transfer knowledge as well as agency and accountability.⁷⁴ Critical thinking skills as envisaged in the report require metacognitive abilities which are not self-evident in students and need to be taught. Cognitive skills are specifically mentioned in the Report in that criterion 11 specifically requires academic development which includes strategies for “cognitive skills which enhance the use of disciplinary discourse and skills by students.”⁷⁵

In addition to the above calls for reform, the very nature of the average law student is changing and this change is condition precedent for the impetus to foster more competent graduates. Modern law students (comprised of Millennials and Generation Z’s) can be described as “digital natives”⁷⁶ who are constantly plugged-in, accessing information at a

⁶⁹ The document titled “The State of the Provision of the Bachelor of Laws (LLB) Qualification in South Africa” [Hereinafter CHE Review] is available at: https://www.derebus.org.za/wp-content/uploads/2019/06/CHE_LLQ-National-Report_2018.pdf Accessed on 02.09.2023.

⁷⁰ CHE Review n69 supra at 3.

⁷¹ Ibid.

⁷² CHE Review n69 supra at 4.

⁷³ CHE Review n69 supra at 57.

⁷⁴ Ibid at 22.

⁷⁵ CHE Review n69 supra at 78. (Criterion 11)

⁷⁶ George n11 supra at 1. See also Moppet S, *Control-Alt-Incomplete? Using Technology to Assess “Digital Natives”* 12 CHI.-KENT J. INTELL. PROP. 2013 77 at 78, Tapscott D, *Growing Up Digital: The Rise of the Next Generation* 1998 New York: McGraw Hill. xii +338. ISSN 0-07-063361-4. *Education and Information Technologies* 4, 203–205 (1999). See also

moment's notice (to a lecturer's chagrin, often during class itself).⁷⁷ These students focus on achievement rather than personal development and as such, they may not value the benefit of lifelong learning, they require instant feedback.⁷⁸ The modern student is used to scrutinising everything and being given instant access to information, the positive is that they are not constrained by traditional ideas of studying but the negative is that this causes them to expect and desire quick feedback from their lecturers.⁷⁹ This student can be characterised as having “unrealistically high expectations of success” but “astonishingly low levels of effort on their part”.⁸⁰ This type of student does not read “front to back” but rather, hunts for pieces of information.⁸¹ They are used to jumping from text to text, clicking on hyperlinks and moving through different parts of information without ever reading the original document at all, or all the way through.⁸² The biggest concern in the context of the academic enterprise is that most often, this generation of students is quick to hand off the job of remembering things to technology.⁸³ Research at Columbia University on the cognitive effects of having information at our fingertips showed that when subjects expected to be able to find the information later on, they did not remember it as well as when they were told that the information presented would no longer be available.⁸⁴

The inference to be made from the research is that the prospect of information being available or accessible in the future (or indefinitely) affects how well students remember information. The problem with this is that solving complex legal problems requires critical thinking and analysis which must be developed in the context of facts and rules which need to be contained in our long-term memories and cannot simply be “googled” as we go.⁸⁵

The further problem with the modern law student is their propensity to multitask. Children today grow up “media multitasking”, that is, they will listen to music (or watch a movie), do homework and text message their friends, all at the same time.⁸⁶ This translates to

⁷⁷ Ibid George at 1.

⁷⁸ George n11 supra at 4.

⁷⁹ Ibid at 5.

⁸⁰ Gravett W, *The Generational Traits of Millennial Law Students*, THRHR (Journal for Contemporary Roman-Dutch Law), Vol. 83, Issue 1 (2020), 67-82 at 68.

⁸¹ George n11 supra at 6. See also Carr N, *The Shallows* Atlantic Books (2010) at 6-7. New edition published in 2020

⁸² Carr n81 supra at 8 and George n11 supra at 6.

⁸³ George n11 at 6.

⁸⁴ Sparrow et al, *Google Effects on Memory: Cognitive Consequences of Having Information at our Fingertips*, 333 SCL (2011) 776 at 776-778.

⁸⁵ George n11 supra at 7 relying on Paul A, *Your Head is in the Cloud*, TIME, Mar. 12 (2012) at 65.

⁸⁶ Ibid.

the adult student who, at one time, would have simply day-dreamed in a law lecture but now, is distracted by a whole new arena of distractions online. The student might sit in lectures texting, emailing, checking social media and scheduling their weekend activities. Educators across the USA, Australia and South Africa are concerned that all this multitasking has detrimental effects on the way that students learn and process information.⁸⁷ Whilst most multitaskers believe that they are able to attend to many things at once, research indicates that simultaneously processing different information results in the brain toggling among tasks and leaking mental efficiency with every switch which is not ideal.⁸⁸

2.3 The use of cognitive learning theory to maximise law school learning.

2.3.1 What is cognitive learning theory and metacognition

Cognitive learning theory uses cognitive science to explain how people learn.⁸⁹ More specifically, cognitive learning theory is interested in how the brain processes information and translates that information into knowledge.⁹⁰ The goal of learning theory is to help store information long-term in an “organised, meaningful and useable manner”⁹¹ with a view to develop deeper thinking skills such as reasoning and the solving of complex problems.⁹² There is growing support for the proposition that since law school is supposed to be a deep-thinking experience, it would be prudent to apply cognitive learning theory to its teaching.⁹³

⁸⁷ George n11 supra at 8. See also Glenn D, *Divided Attention*, Chron. Higher Educ., Chron Rev., Feb. 28, 2010. Available at: <http://chronicle.com/article/Scholars-Turn-Their-Attention/63746> Accessed on 02.09.2023. See also, generally, George S, *The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness*, Duquesne Law Review, Vol. 53, Issue 1 (2015), 215-224. Also see, O’Leary DL, *Flipped Out, Plugged in, and Wired Up: Fostering Success for Students with ADHD in the New Digital Law School*, Cap. U, L. Rev. Vol. 45 (2017) 289. See also Gravett n80 supra for a South African perspective. See also Donnison, *Unpacking the Millennials: A Cautionary Tale for Teacher Education*, Australian Journal of Teacher Education, Vol. 32, Issue 3, 2007, 1-13 at 9 for an Australian perspective (The author cautions educators against making assumptions about millennial students but rather, encourages educators to come up with strategies to suit this brand of student: “These strategies must be informed by sustained educational research that seeks to understand the millennial generation from their perspective rather than be based on the dubious claims of others. It is only when the Millennials engage in the active co-construction of their own discourses that real empowerment will be possible.”)

⁸⁸ George n11 supra at 8 relying on Wallis C, *genM: The Multitasking Generation*, TIME, Mar. 27, 2006.

⁸⁹ George n11 supra at 8 relying on Miller M, *What College Teachers Should Know About Memory: A Perspective from Cognitive Psychology*. See also, Schwartz n36 supra at 371-379.

⁹⁰ George n11 supra at 9.

⁹¹ Schwartz n36 supra at 371-72.

⁹² Ibid at 372.

⁹³ George n11 supra at 9 and Schwartz n36 supra at 372. See also, Lee n41 supra.

The brain is made up cells called neurons.⁹⁴ Psychologists define learning as “a permanent change in a neuron”.⁹⁵ Neurons operate by sending and receiving signals from one another.⁹⁶ When a neuron is active, it will release neurotransmitters which flow across multiple neurons and attach themselves to other neurons, thus, either triggering or suppressing the neighbouring neuron.⁹⁷ The connection or movement between neurons is called a synapse.⁹⁸ Most complex processes in our brains including our thoughts, memories and emotions come from these electrochemical interactions.⁹⁹ Regardless of what role any individual neuron plays, all neurons follow the same learning mechanism.¹⁰⁰ If the neuron is constantly fired, its ability to fire again is increased, however, if it is not fired, its ability to continue firing is decreased.¹⁰¹ As the brain develops from youth to adulthood, the pattern of neurons and how they are connected is determined by what neurons and neuronal connections fire and which do not.¹⁰² As a whole, all learning experiences are based on which neurons grow or die and which neuronal connections are created or eliminated based on which are consistently being activated.¹⁰³ These connections are capable of being programmed and reprogrammed throughout one’s life since the brain is characterised by its physical and chemical plasticity.¹⁰⁴ In response to the “nature vs. nurture” argument on whether the brain (or behaviour) is primarily due to genetics or due to experience (learning), cognitive psychologists respond that it is both.¹⁰⁵ They explain that while the brain does come pre-wired to receive input from the world in certain ways, for example, the human arm and leg can only move in certain ways but not in others in response to neural signals, the actual things that we see (what we come to recognize or deem meaningful) or movements we can do (such as whether we can dance, play an instrument, or catch a ball) are the result of experiences which have produced certain patterns of neural firing – this is the concept of learning.¹⁰⁶

⁹⁴ Shell D et al, *The Unified Learning Model: How Motivational, Cognitive and Neurobiological Sciences Inform Best Teaching Practices*, Springer (2010) at 7-8.

⁹⁵ Ibid at 7.

⁹⁶ Shell et al n94 supra at 8.

⁹⁷ Ibid at 8-9.

⁹⁸ Shell et al n94 supra at 8-9.

⁹⁹ George n11 supra at 10.

¹⁰⁰ Shell et al n94 supra at 9.

¹⁰¹ Ibid.

¹⁰² Shell et al n94 supra at 9.

¹⁰³ Ibid.

¹⁰⁴ Shell et al n94 supra at 9.

¹⁰⁵ Ibid at 10. See also Fruehwald S, *How to Become an Expert Law Teacher by Understanding the Neurobiology of Learning*, LegEdDig 43; (2013) 21(3) Legal Education Digest 1-57 at 4.

¹⁰⁶ Shell et al n94 supra at 9.

Cognition is the way in which we understand, approach, acquire and process information.¹⁰⁷ Metacognition is the study of how we actually do this (cognate).¹⁰⁸ It refers to the mental processes used to plan, monitor and to assess the understanding of one's performance and thereafter, to regulate one's thinking and actions to better succeed at the task at hand.¹⁰⁹ Lee¹¹⁰ undertakes a review of literature focused on how a metacognitive thinker might actually acquire such self-awareness and compiles a 12-step process which she terms "the metacognitive approach".¹¹¹ The approach is based on what clinicians in experiential courses call the "plan, do, reflect and integrate" approach.¹¹² Simply put, it requires the student to orient themselves within a three-phase cycle of "forethought, performance and reflection".¹¹³ This is similar to Kolb and Fry's four stage approach of (1) abstract concept formation and generalization (2) testing of implications in new situations (3) concrete experience and observations and (4) reflection.¹¹⁴ (Discussed again in Chapter 4 of this work.) Drawing on the work of Niedwiecki,¹¹⁵ Lee hypothesises that metacognition is not innate, rather, it can be explicitly taught and practiced by the constant manipulation of the student's cognitive processes.¹¹⁶ By carefully following the 12-step approach, students can develop their metacognitive skills over time.¹¹⁷ What follows is a summary of Lee's 12-step plan for the metacognitive thinker,¹¹⁸ together with my own proposals (in italics) on how the 12-step plan could be utilised by a student in practice to meet the recursive cycle espoused by Lee.

1. Identify the goals or outcomes of the activity to be engaged in.

¹⁰⁷ Lee n41 supra at 237. See also, Lustbader n27 supra at 324.

¹⁰⁸ Ibid.

¹⁰⁹ Lee n41 supra at 237. See also Allen RN & Jackson AR, *Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum*, 95 U. DET. MERCY L. REV. 1, 15–16 (2017).

¹¹⁰ Lee n41 supra.

¹¹¹ Ibid at 237.

¹¹² O'Leary K, *Evaluating Clinical Law Teaching-Suggestions for Law Professors Who Have Never Used the Clinical Teaching method*, 29 N.KY. L. Rev., 491 (2002) at 510. See also, Du Plessis MA, *Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills & Values*, De Jure Law Journal, Vol. 48, Issue No. 2, 2015, 213-327 at 319-325. See also, Du Plessis MA, *Designing an Appropriate and Assessable Curriculum for Clinical Legal Education*, De Jure Law Journal, Vol. 49, Issue 1, 2016, 1-22 at 7, 14-16. See also, Australian Best Practices n62 supra at 156-173.

¹¹³ This is sometimes called the recursive cycle. See Lee n41 supra at 241.

¹¹⁴ Kolb DA & Fry R, *Towards an Applied Theory of Experiential Learning* in C Cooper Theories of Group Process, (1975) at 34. See also, Wolksi B, *Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum*, Journal of Legal Education, Vol. 52, Issue No. ½ (2002), 287-302 at 292.

¹¹⁵ Niedwiecki n11 supra and Lee n41 supra at 240.

¹¹⁶ Ibid.

¹¹⁷ Lee n41 supra at 240.

¹¹⁸ Ibid at 238-239.

When asked to sit for an assessment, the goal for the student might be as simple as achieving an A in assessment.

2. Identify what resources you already have to achieve the desired outcome.

This would require the student to collect and collate lecture notes and class exercises and to engage with prescribed materials already in their possession.

3. Identify the additional resources required to achieve the outcome but that you do not yet possess. This includes identifying how to find the resources and also, when and how to use them.

Here the student might need to establish how to actually find case law in the library or via an appropriate online platform in instances where their notes might be lacking or where their case law is limited. The students might combine class notes and other reading materials into study materials.

4. Identify the obstacles which may hinder your acquisition of the required outcome.

Here the student would think about the time that they have to study versus their academic, work and family commitments. The student might create a study timetable ensuring that all the prescribed topics are engaged with in the time that remains. The student might make a list of questions on topics or issues that they do not understand.

5. Identify the strategies which may assist in overcoming the obstacles in order to achieve the desired outcome.

Here the student would need to actively prioritise the learning endeavour in favour of other responsibilities. The student might reach out to the lecturer to clarify certain concepts or lapses in understanding. The student might re-attempt class exercises by timing themselves in order to practice information retrieval. The student might make mind-maps or further fine tune their study materials for easier retrieval.

6. Select the most effective strategies.

Here the student would reflect on the possibilities in 5 above and choose the most suitable ones based on the remaining time available.

7. Perform the task.

The student sits for the assessment.

8. Collect information which indicates whether the performance was successful (this may include feedback or grading).

Individual feedback received on the student's script, general feedback given to the class, the break-down of the mark allocation and/or a memorandum (if available) would assist students to establish how successful they were and where they went wrong. For instance, common feedback to students could be that they are merely providing unsubstantiated conclusions or that they have used facts from a case to get to their answer instead of extracting the relevant legal principles from the case to apply to their given set of facts. Other feedback might include that there is an overreliance on legal recital but no practical application or conversely, that the student engaged well with the facts presented but has not actually set out all relevant law on the matter.

9. Identify the characteristics of the performance which helped you to achieve the desired outcome and those which failed to help achieve it.

The information acquired in 8 above must now be digested by the student. The information would be used to evaluate where the student was successful and where they failed the task at hand.

10. Evaluate whether your performance met or failed to meet the desired outcome.

The student would need to internalise what the feedback and relevant mark allocations actually mean to their performance and how that translates into the mark that they achieved. The student would need to make a list of issues or problems to internalise and to actively work on.

11. Identify what contributed to the successful and unsuccessful part of your performance.

Here, the student would need to contemplate the cause for their shortfalls. Is the issue that they did not study hard enough (because the comments reflect poor recital of legal principles), or is it that they are sound on legal exposition but did not apply effectively, in that case, is the

cause a lack of understanding, a misinterpretation of the facts or simply a problem of time-management during the assessment.

12. Establish how you might adjust or adapt your thinking and behaviour to improve your performance in the future.¹¹⁹

Once the causes are identified, the student must ponder how these can be avoided in future. For instance, is it that the student needed to allocate more time to studying, is it that they need to attend tutorials or class exercises and engage in them more actively, is it that they actually left out a big portion of the work due to “spotting” while studying or is it that they actually did not understand the question but failed to consult or to engage in class discussions on that point.

Ultimately, metacognition occurs throughout the 12 steps but it is when the student proceeds through the cycle a second or third time, that they begin to actively apply what they have learned from prior experience and in so doing, the theory is that the student will constantly modify their thinking and actions to improve their performance.¹²⁰ Lee notes that the more often the cycle is repeated (across courses or activities), the more opportunities exist for the student to refine their approach to achieve greater success.¹²¹ In summation, the metacognitive approach encourages the student to plan, evaluate and then modify their thinking processes and behaviours in order to improve future outcomes.¹²² The unique thing about the approach is that in addition to focusing on the task at hand, it requires a student to “question their own instinctual thinking patterns and behaviours, and to affirmatively replace their default patterns with different ones.”¹²³

2.3.2 The role of attention and memory in learning

At the heart of learning is attention, people learn by paying attention, processing the information attended to and then using it.¹²⁴ Information is generally absorbed by the brain through a process known as “selective attention”.¹²⁵ Selective attention is a necessary

¹¹⁹ Lee n41 supra at 238-239.

¹²⁰ Ibid at 239.

¹²¹ Lee n41 supra at 239.

¹²² Ibid.

¹²³ Lee n41 supra at 240.

¹²⁴ George n11 supra at 10 relying on Burgess n10 supra at 23. See also Schunk DH, *Learning Theories: An Educational Perspective* 144 (2ed 1996). [Generally, information processing theories focus on how people attend to environmental events, encode information in memory, store new knowledge in memory, and retrieve it later as needed.]

¹²⁵ Schwartz n36 supra at 372.

consequence of the brain continuously being bombarded with stimuli and as such, some of it must be ignored.¹²⁶

Even at the basic level, a student who might be studying in the library must consciously (or subconsciously) ignore nearby conversations, people or traffic. In the technological era, the student must choose to pay attention to the task at hand (studying) over a barrage of possible external stimuli which includes notifications, emails, pings, reminders and updates on their electronic devices.

The information that is selectively attended to must pass into short-term memory (otherwise known as working memory).¹²⁷ What is stored in working memory is then either transferred to long-term memory for later recollection or lost entirely.¹²⁸ The process by which information is moved between short-term and long term memory is known as “encoding” and it involves the linking of pieces of information together for easy retrieval.¹²⁹ Encoding happens through rehearsal (or practice) or memorisation.¹³⁰ Once rehearsed, or memorised, information can be retrieved from long-term memory by a process called “automaticity”.¹³¹

An example of rehearsal in the law students’ context would be a moot court exercise where the student rehearses the art of arguing a matter. An example of memorisation would be when the student studies a legal principle off by heart for later retrieval.

Other information in the brain is encoded by the use of “schemata” or “chunking” which are the processes by which new information is attached to prior knowledge through a connection to something that is already known.¹³² Learning is a process of interactive schemata.¹³³ Schemata are models; they embody prototypical expectations about objects, situations and actions, which are called default schemata.¹³⁴ Schemata are essentially screen captures of what one would expect to see in any given scenario. For instance, people who may

¹²⁶ Jacobson S, *Paying Attention or Fatally Distracted? Concentration, Memory and Multi-Tasking in a Multi-Media World*, 16 Legal Writing, 419 (2010) at 421. [Hereinafter Jacobson II]

¹²⁷ George n11 supra at 11. See also Burgess n10 supra at 23-26.

¹²⁸ Ibid George at 11.

¹²⁹ Miller n89 supra at 119.

¹³⁰ Jacobson II n126 supra at 421-423.

¹³¹ Schwartz n36 supra at 373.

¹³² Ibid. See also Burgess n10 supra at 28.

¹³³ Reiman P & Chi M, *Human Expertise in Human and Machine Problem Solving* (1989) K. J. Gilhooly 161 at 172. For more on schemata see Friedland S, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, (1996-1997) 20 Seattle University Law Review 1, 5.

¹³⁴ Ibid Reiman at 172.

be shown a picture of an office may later recall that the shelf in the picture contained books even though there were no books in the picture.¹³⁵ Chunking on the other hand, involves associating similar pieces of information so that collectively, the information becomes one slot within the working memory instead of many.¹³⁶ “Chunking” allows us to group complex information into categories or schemata. For example, in an experiment where participants were asked to remember the letters “fbicbsibmirs”, most were unable to recall the twelve letters correctly and sequentially until they “chunked” them into “fbi”, “cbs”, “ibm” and “irs”.¹³⁷ The four verbal stimuli which correspond with known acronyms (which can be called schemata) are easier to recall than twelve individual letters.¹³⁸

The proposition about learning in relation to chunking is that the more easily information can be connected to a pre-existing framework of knowledge, the more easily new information can be learned and retained.¹³⁹ While short-term memory is limited, long-term memory has a far greater capacity – the limiting factor with long-term memory is not how much you can store but rather, the ability to find what you need later.¹⁴⁰ The problem with memory is that there can be no memory without attention and as such, the ability by a student to pay attention and the concomitant ability of the lecturer to hold the attention of the student is imperative to the learning endeavour.¹⁴¹

The concepts of schemata and chunking are not generally known to the students we teach. Students would benefit from instruction on these processes in order to assist them in the metacognitive method described above. Most students do not appreciate that the lapses in their practical understanding of law are often due to misinformed or maligned schemata or expectations about what legal principles mean or what lawyers do.

For example, consider an assessment where students in a criminal law class are asked to evaluate A’s liability for murder or culpable homicide (manslaughter) in a situation where a tenant (B) has forgotten to switch off a gas heater provided by the landlord (A) resulting in fatal gas inhalation by a child. The question asks students to evaluate whether by providing the

¹³⁵ Blasi G, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, (1995) 45 *Journal of Legal Education* 313 at 337.

¹³⁶ Jacobson II n126 supra at 424. For more on chunking, see Jewel n20 supra at 63-64.

¹³⁷ Ibid.

¹³⁸ Jacobson II n126 supra at 424.

¹³⁹ George n11 supra at 12 and Burgess n10 supra at 30.

¹⁴⁰ Ibid George supra.

¹⁴¹ Ibid. See also Burgess n10 supra at 24-25 and Miller n89 supra at 121-122.

gas heaters (which were the less expensive option), A (the landlord) could be considered the legal cause of death. The further facts provided to students are that A is a known "slumlord" who provided the heaters because he felt guilty about the poor insulation in the tenants' rooms causing it to be especially cold in winter. This additional set of facts can be provided as a red herring as the landlord's "guilt" in the context of the cold rooms has nothing to do with whether the landlord is the cause of death. Despite the unlawful conduct (failure to switch off the gas) having been performed by B, it is possible that many students will find the landlord (A) liable simply because he was a "known slumlord". If this were to occur, the student's preconceived notion of what a slumlord is, will have clouded their ability to rationally attend to the elements of criminal liability as most of their application will have been clouded by what was ostensibly an irrelevant fact.

Students would benefit from exercises which help them to expose the propensity to default to pre-existing and sometimes incorrect schemata. As far as chunking is concerned, most students are never expressly taught how to study or how to commit basic information to memory. Students tend to rely on reading and re-reading their material and they conflate the familiarity of the material with acquired knowledge. This is made apparent when students actually sit for an assessment but are unable to accurately recite even the most basic legal principles. Thus, it is becoming increasingly apparent that the students of today actually need instruction on *how* to learn.

2.3.3 Cognitive science and categories (how we really think and learn)

According to Aristotle, a syllogism is what produces new causal knowledge.¹⁴² An example of a syllogism is the following: "All men are mortal, Socrates is a man, Socrates is mortal."¹⁴³ The concept of bivalence or exclusivity tells us that it is not possible for the same thing to both belong and not belong in the same category.¹⁴⁴ For example, it is not possible for Socrates to be both mortal and immortal.¹⁴⁵ The concept of transitivity tells us that if two things are identical to another, then any addition to the category must also be identical.¹⁴⁶ For instance, if

¹⁴² Aristotle, 1 *Posterior Analytics*, Chapter 2 (G.R.G. Mure trans.) Available at: <http://www.logoslibrary.org/aristotle/posterior/102.html> Accessed on 07.09.2023. For a more detailed discussion, also see Jewel n20 supra at 43-47.

¹⁴³ Jewel n20 supra at 43.

¹⁴⁴ Ibid. Also see Lakoff & Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought*, New York: Basic Books, 1999 at 17.

¹⁴⁵ Jewel n20 supra at 43.

¹⁴⁶ Ibid.

all men are the same, then all men are mortal.¹⁴⁷ Syllogistic reasoning can be viewed as a default schemata but cognitive science tells us that instead of neat boxes, categories actually take on blurry, circular shapes.¹⁴⁸ We do not actually formulate categories in neat self-contained boxes, rather, we categorise in a manner that is unconscious, subjective and also dependent on cultural and social context.¹⁴⁹ Thus, the way in which we actually categorise takes more of a radial shape than clearly identifiable symmetrical boxes.¹⁵⁰ By way of illustration, in the category of birds, a robin would be situated in the middle of the category structure but a penguin (which is also technically a bird) would be located closer to the category's radial periphery.¹⁵¹ Essentially, what this tells us is that the principles of bivalence and transitivity are not as clear-cut as Aristotle believed. The traditional idea that we make categorical decisions consciously and rationally is not in line with cognitive science since our category forming is usually based on subjective choice which is a product of culture and individual experience.¹⁵² The main point to all of this is that traditional legal education encourages syllogistic reasoning. Students are generally taught a common stock of ideas which is useful but can also be constraining when students are required to find creative solutions to legal problems.¹⁵³ It has been posited that a “fluid and critical approach to categorisation can reshape the law and move it in positive directions.”¹⁵⁴ However, when categories are applied rigidly, they may result in creating injustices in the law.¹⁵⁵ Legal formalism embraces the traditional binary and mutually exclusive approach to categorisation – you either have a case or you do not, the element is either met or it is lacking, judgment is either in favour of the plaintiff or the defendant.¹⁵⁶ Even the universal IPAC (or IRAC) analytic template heavily relies on this type of formalism.¹⁵⁷ The IPAC structure follows the same structure as a syllogism, P – Principle is the major premise, the A- Application is the minor premise and C is the Conclusion. It has been suggested that this approach guides students away from robust

¹⁴⁷ Jewel n20 supra at 44.

¹⁴⁸ Ibid.

¹⁴⁹ Jewel n20 supra at 44.

¹⁵⁰ Ibid. See also, Rosch E, *Cognitive Reference Points*, 7 Cognitive Psychol., (1957), 532 at 544-546. Rosch's research is also discussed in Lakoff & Johnson, n144 supra at 45 and 83-84.

¹⁵¹ This example is given in Lakoff & Johnson n144 supra at 41 and 45 and also repeated in Jewel n20 supra at 45.

¹⁵² Jewel n20 supra at 45. For a further discussion on how culture may influence category formation, see Jewel n20 supra at 46.

¹⁵³ Ibid at 51.

¹⁵⁴ Jewel n20 supra at 51.

¹⁵⁵ Ibid. For a discussion on how rigid syllogistic reasoning was used to perpetuate racial inequality in the USA, see Jewel n20 supra at 51-54.

¹⁵⁶ These examples are summarised from Jewel n20 supra at 56.

¹⁵⁷ Jewel n20 supra at 59. IPAC stands for Issue, Principle, Application, Conclusion and IRAC formulation simply replaces the word “Principle” with the word “Rule”.

and holistic legal thinking and avoids consideration of social context which inevitably permeates legal problems.¹⁵⁸ Notwithstanding the above, legal formalism prevails due to the human tendency to default to what is the most simple, logical and helpful when processing and perceiving information.¹⁵⁹ This was evidenced in the example of students who might default to assigning criminal blame on the basis of moral ambiguity on the part of the landlord despite the available legal principles not sustaining a conclusion of criminal liability.

2.3.4 Cognitive capacity overload and the perils of multitasking

In recent years, neuroscientists have used brain scanning technology to shed light on the process of learning.¹⁶⁰ Functional magnetic resonance imaging (fMRI) tests conclusively revealed that different forms of memory are processed by different parts of the brain.¹⁶¹ For instance, declarative memory (the type used to remember things like names, dates or what you did yesterday) uses the brain's hippocampus (which plays a role in processing, storing and recall of information).¹⁶² Procedural memory (the type used to remember things like how to ride a bike or play a sport) uses the brain's striatum (which is activated when learning new tasks).¹⁶³ Brain scans of people who were multitasking or distracted, showed activity in the striatum (responsible for learning new skills) whilst brain scans of people who were focused showed activity in the hippocampus (dedicated to storing and recall).¹⁶⁴ When a person is deeply focused on a task, they use the brain's pre-frontal cortex (located behind the forehead), this is known as the "top-down" approach to attention but when they are distracted, they use the parietal cortex (further back in the brain) and follow the "bottom-up" or instinct-driven approach to attention.¹⁶⁵ This is the same part of the brain that would have responded to and scanned for danger in prehistoric man.¹⁶⁶ This research shows us that by multi-tasking, a student is actually inhibiting their ability to store and recall information – each time that a student responds to distraction, they use their limited cognitive capacity and lose some of the focus that was engaged when they were paying attention.¹⁶⁷ Thus, unless the multi-tasking is

¹⁵⁸ Jewel n20 supra at 59.

¹⁵⁹ Ibid at 62.

¹⁶⁰ Anderson S, *In Defense of Distraction*, N. Y. MAG., May 17, 2009. Available at: <http://nymag.com/news/features/56793> Accessed on 26.09.2023.

¹⁶¹ Ibid.

¹⁶² George n11 supra at 13 relying on Anderson n142 supra.

¹⁶³ Ibid.

¹⁶⁴ Rosen C, *The Myth of Multitasking*, 20 New Atlantis, 105, (2008) at 107.

¹⁶⁵ Jacobson II n126 supra at 429-430.

¹⁶⁶ Ibid.

¹⁶⁷ George n11 supra at 14 relying on Jacobson n126 supra at 430. See also generally, Cole J, *The Fallacy of Multitasking*, Miss. Law., Vol. 69, Issue 2 (2023), 38-39. Davidson J, *The False Promise of Multitasking*, Prac.

completely automatic and requires no cognitive effort or attention, what is actually happening in the brain is known as “task switching” which requires the brain to divide attention between tasks and to switch between them.¹⁶⁸ This can be likened to the opening and closing of new tabs on one’s computer. Time and efficiency are lost each time that the brain is required to shift tasks.¹⁶⁹ Ultimately, multitasking requires constant task switching which energises regions of the brain that specialise in physical coordination and visual processing and which will inevitably short-change the areas related to memory and learning.¹⁷⁰ Research confirms that walking while talking on the phone or texting while driving is dangerous, it is thus reasonable to assume that students who multitask might make more errors than those who do not.¹⁷¹ In 2005, research found that workers who were constantly distracted by emails and phone-calls suffered a fall in IQ more than twice that found in habitual marijuana smokers.¹⁷² As the time that students devote to quiet reflection and contemplation diminishes, so the circuits that support these “old” intellectual functions and pursuits weaken.¹⁷³

Since lawyers (and law students) are required to engage in in-depth thinking and since multi-tasking disengages us from the part of the brain devoted to deep focus, students are essentially training themselves to be less attentive when they multi-task. Ultimately, every time that students attend to something other than their lecturer or the material that they are studying, they lose mental efficiency. This results in more errors, thus, decreasing the likelihood of remembering the material and learning with the area of the brain that is the most conducive to long-term memory.¹⁷⁴ Since the default belief of most people is that multi-tasking makes them more efficient, instruction and research on how the brain *actually* works is likely to be beneficial to students.

Law., Vol. 59, Issue 3 (2013), 15-18. Jarmon A, *Multitasking – Helpful or Harmful*, Student Law., Vol. 36, Issue 8 (2008) 31-35.

¹⁶⁸ Jacobson II n126 supra at 437.

¹⁶⁹ See Jacobson II n126 supra at 438 and Rosen n164 supra at 106.

¹⁷⁰ George n11 supra at 15 relying on Kim W, *The Autumn of the Multitaskers*, ATLANTIC, Nov.1, (2007). Available at: <http://www.theatlantic.com/magazine/archive/2007/11/the-autumn-of-the-multitaskers/306342> Accessed by George in 2013.

¹⁷¹ Jacobson II n126 supra at 436.

¹⁷² Rosen n164 supra at 106.

¹⁷³ Carr n81 supra at 120.

¹⁷⁴ George n11 supra at 20.

2.3.5 Successful teaching and learning methods based on cognitive learning theory.

Educational psychologists have studied the process of learning for a number of years and in the process, have accepted a theoretical framework capturing the types and levels of learning.¹⁷⁵ The most cited framework is Bloom's Taxonomy of Educational Objectives¹⁷⁶ as revised¹⁷⁷ which divides learning into six cognitive processes as follows: at the bottom level, we have remembering, understanding, applying and analysing and at the top level, we have evaluating and creating.¹⁷⁸ In traditional law school instruction, lecturers focus on the bottom four levels of the taxonomy (remembering, understanding, applying and analysing) despite good performance in assessments generally requiring the use of the top two levels (evaluating and creating).¹⁷⁹

Another method to improve student learning is to provide students with information about effective study techniques and their impact on memory.¹⁸⁰ Studies have found that the most commonly used study techniques (like highlighting text, re-reading text, drawing pictures to represent content, keyword mnemonics and summarisation) were actually not found to improve the effectiveness of learning.¹⁸¹ The five techniques that do show evidence of correlation to learning are: 1. Distributing practice – which is the practice of spreading out learning time over blocks instead of back-to-back sessions (cramming);¹⁸² 2. Retrieval practice (or testing) – which is the practice of testing one's own memory recall;¹⁸³ 3. Interleaved practice – which is the study of one topic, interleaved or broken up by the study of another topic, for example, studying law of contract and law of delict intermittently in one day for a few hours at a time;¹⁸⁴ 4. Elaborative interrogation – this is where students question the

¹⁷⁵ George n11 supra at 18.

¹⁷⁶ A Committee of College and University Examiners, *Taxonomy of Educational Objectives: The Classification of Educational Goals: Handbook I, Cognitive Domain* (Benjamin S. Bloom ed., Longman 1956). [hereinafter Bloom's Taxonomy].

¹⁷⁷ A Taxonomy for Learning, Teaching, and Assessing: A Revision of Bloom's Taxonomy of Educational Objectives § 3.2D, (Lorin W. Anderson & David R Krathwohl eds., Complete ed. 2001) [hereinafter Revised Taxonomy].

¹⁷⁸ Ibid at 28.

¹⁷⁹ Burgess n10 supra at 9.

¹⁸⁰ George n11 supra at 20.

¹⁸¹ Dunlosky J et al, *Improving Students' Learning with Effective Learning Techniques: Promising Directions from Cognitive and Educational Psychology*, 14 PSYCHOL. SCI. IN PUB. INTEREST 4 (2013) at 18-29.

¹⁸² Ibid.

¹⁸³ Dunlosky et al n181 supra at 29-35.

¹⁸⁴ Ibid at 40-44.

information that they are studying while studying it,¹⁸⁵ for instance by, posing differing scenarios to themselves; and 5. Self-explanation – where students explain or recite procedures or information learned to themselves or others.¹⁸⁶ Ultimately, students can only apply learning theory to their studies if they are made aware of it and encouraged to practice its many permutations in the course of their studies.

Introducing new law students to this taxonomy of learning will help them understand the type of learning that is required to be successful in law school and to appreciate that what is expected of them is at a higher level than what they have become accustomed to at school. Actually understanding the taxonomy will allow students to internalise what they must aspire to during their studies, namely, the top two levels or tiers of learning (evaluating and creating). Creating was called “synthesis” in the original form of the taxonomy and refers to “mentally reorganising some elements or parts into a pattern or structure not clearly present before”.¹⁸⁷ Thus, it is contended that law schools have a duty to teach students to be better learners by teaching them metacognitive strategies to develop their learning abilities and to make them better life-long learners.¹⁸⁸ Likewise, educating students about cognitive capacity and overload (discussed above) may help students to plan and manage their own learning experiences more effectively as they may have never otherwise considered the ways in which their brain stores information.¹⁸⁹ Further, educating students about the limits of their attention and the perils of multi-tasking may enable them to take more from their law school experience.

2.4 The use of learning styles to maximise law school learning.

Self-awareness is important in the context of both teaching (from the perspective of the lecturer) and learning (from the perspective of the learner).¹⁹⁰ A self-aware learner will master

¹⁸⁵ Dunlosky et al n181 supra at 8-11.

¹⁸⁶ Ibid at 11-14.

¹⁸⁷ George n11 supra at 19. See also the Revised Taxonomy n177 at 84.

¹⁸⁸ This contention is supported by Niedwiecki supra n10 at 34 and 155.

¹⁸⁹ George n11 supra at 19.

¹⁹⁰ Jacobson I n7 supra at 29. The need for lawyers to be self-aware is broad. For a discussion on how cognitive psychology can be used to develop cultural self-awareness which is important to multicultural competence, see Weng C, *Multicultural Lawyering: Teaching psychology to Develop Cultural Self-Awareness*, Clinical L. Rev., Vol. 11, Issue 2 (2005) 369-404. For a discussion on how self-critique can develop performance in the clinical (experiential learning) context, see Blaustone B, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self-Awareness in Performance*, Clinical L. Rev. Vol. 13, Issue 1 (2006), 143-164. Further, in the experiential learning context and the relevance of self-awareness, see Barette J, *Self-awareness: The Missing Piece of the Experiential Learning Puzzle*, T.M. Cooley J. Prac. & Clinical L., Vol. 5, Issue 1, (2002) 1-20. Also, for a broader discussion on how self-awareness and critical reflection aids in learning itself, see Anzalone FM, *It All Begins with You: Improving Law School Learning through Professional Self-Awareness and Critical Reflection*, Hamline L. Rev., Vol. 24, Issue 3, (2001), 325-371.

material more successfully if they absorb, process and retain information in the manner that is most efficient and effective for them.¹⁹¹ A self-aware teacher will be more successful if they acknowledge and address the different learning styles of their students.¹⁹²

In order to discover how a student learns best, they would need to engage in the metacognitive method described above.¹⁹³ This would involve inventorying one's own learning preferences (based on results achieved through different learning processes) and then monitoring and self-regulating one's cognitive activities with the appropriate adjustments.¹⁹⁴ Alaka proposes that learning styles or their assessments should be used to measure preferences or habits rather than to identify immutable styles – this understanding facilitates the recognition in students of strengths and weaknesses which they can self-modulate.¹⁹⁵ The metacognitive process specifically engaged here can be translated into three learning components, namely: knowledge about learning, knowledge about learning style, and skills to improve proficiency.¹⁹⁶ The first component, “knowledge about learning” has already been addressed in the preceding paragraphs and is important to “learning style” because the type of learning required to achieve each level of learning in Bloom's taxonomy¹⁹⁷ (discussed above) differs. If we refer back to the six levels of learning in the taxonomy, we can see that memorisation (remembering) – which includes the observation and recall of information – is the simplest level of knowledge acquisition.¹⁹⁸ Comprehension and sorting (understanding and applying) – which includes translating knowledge into context, ordering or grouping information is a little bit harder.¹⁹⁹ However, the most complex level of knowledge is analysing (this comprises of analysis, evaluation and creativity) – practically speaking, this includes applying information to solve problems and synthesising information from multiple sources, comparing ideas, and making choices based on reasoned argument.²⁰⁰ The importance of learning styles is based on

¹⁹¹ Jacobson I n7 supra at 29.

¹⁹² Ibid. See also Anzalone n190 supra at 327.

¹⁹³ Jacobson I n7 supra at 29. See also Lee n41 supra.

¹⁹⁴ Ibid Jacobson I supra. See also Paul T. Wangerin, *Learning Strategies for Law Students*, 52 Alb. L. Rev. 471, 474-477 (1988) and Catherine A. Stouch, *What Instructors Need to Know About Learning How to Learn*, in *Applying Cognitive Learning Theory to Adult Learning* at 59-60.

¹⁹⁵ Alaka A, *Learning Styles: What Difference Do the Differences Make?* 5 Charleston L. Rev. 133 2010 at 169-172.

¹⁹⁶ Flannery D, *Applying Cognitive Learning Theory 59: New Directions for Adult and Continuing Education*, 1ed, Jossey-Bass, 1993 at 23.

¹⁹⁷ Bloom's Taxonomy n176 supra.

¹⁹⁸ Jacobson I n7 supra at 30. See also Bloom's Taxonomy n176 supra at 62-88.

¹⁹⁹ Ibid Jacobson I at 30. See also Bloom's Taxonomy n176 supra at 89-119.

²⁰⁰ Jacobson I n7 supra at 30. See also Bloom's Taxonomy n176 supra at 119-197.

the contention that the *type* of learning (and concomitantly, teaching) required to achieve different levels of learning is different.²⁰¹

For instance, if a lecturer simply requires students to remember the elements for private defence in criminal law, then, effective memorisation may be adequate, but, if the student is required to determine whether one of those elements can be established on a balance of probabilities in the context of specific facts and in the face of conflicting evidence, then memorisation alone will not suffice and the student will need to employ tools that will engage the student in analysis. The student will need to amalgamate a number of legal principles from the case law and establish which principles are relevant (these are simple and intermediary levels of knowledge) but in addition, the student will need to be able to manipulate the principles in a manner which persuades the Court of their application despite evidence or facts to the contrary (this requires the higher order thinking skills which include creativity, synthesis and evaluation). A student must understand their own learning style in order to effectively perform higher order thinking (and learning).

2.4.1 What contributes to learning styles

Personal characteristics, including intelligence, personality, and information processing mechanisms amongst others, all contribute towards an individual's learning style.²⁰²

2.4.1.1 Intelligence

Eight categories of intelligence have been identified, namely: “linguistic intelligence (words); logical-mathematical intelligence (chains of reasoning); musical intelligence (melody, rhythm, timbre); spatial intelligence (seeing from different angles, imagining movement, multi-dimensional thinking); bodily-kinesthetic intelligence (bodily motions, handling objects); interpersonal intelligence (knowing the feelings and intentions of others); intrapersonal intelligence (knowing yourself); and naturalist intelligence (distinguishing among, classifying, and using features of the environment).”²⁰³ A student's preference/s for how they absorb

²⁰¹ Ibid Jacobson I supra.

²⁰² Ibid at 31. See also generally, Claxton C & Murrell P, *Learning Styles: Implications for Improving Educational Processes*, Jossey-Bass 1(1987) citing Curry L, in *An Organization of Learning Styles Theory and Constructs* 3-4 (Annual Meeting, Am. Educ. Research Assn., Apr. 11-15, 1983) See also, Anzalone n190 supra at 361-363 where she discusses the proliferation of learning style models and preferences in the past 30 years.

²⁰³ Jacobson I n7 supra at 31. See also relying on Gardner H, *Intelligence Reframed: Multiple Intelligences for the 21st Century* 19, Basic Books, 1999 [hereinafter Gardner, *Intelligence Reframed*]. See also Gardner H, *Frames of Mind: The Theory of Multiple Intelligences*, Basic Books, 1983 [hereinafter Gardner, *Frames of Mind*].

information would be reflected in the strengths and weaknesses which they display with regards to the above forms of intelligence.²⁰⁴ Accordingly, knowledge about these intelligences would help a student to identify their strengths and self-direct their learning by employing the appropriate preferences to learning and working to actively improve those styles which do not come naturally to them.

By way of illustration, let us focus on metaphor. Lecturers often use metaphors as a mode of instruction. Metaphors assist students to connect new information with that which they already know²⁰⁵ (this was described as schemata in the preceding paragraphs). A metaphor that likens a money-laundering scheme to a multiple storey building, where each player's role forms a component block of the greater whole, will not be helpful to a student who is not *spatially* intelligent, but, will be of great benefit to someone who has a pre-existing knowledge of structure or architecture.²⁰⁶ Likewise, a metaphor about victim rage to establish a defence for a woman accused of assaulting her boyfriend (for having involved her in said money laundering scheme) would not resonate with someone who has low interpersonal intelligence as they would not be able to relate or to empathise.²⁰⁷

In the South African context, a student who has previously been homeless will struggle to understand how eviction legislation permits an eviction if it is just and equitable in the circumstances as they will struggle to understand how homelessness is ever just. Likewise, a student whose family has been exploited by an unpaying tenant will struggle to understand the protection and consideration of the rights of the non-paying tenant who might be rendered homeless. In a multicultural society, interpersonal intelligence and its impact on how legal rules are applied and interpreted is of paramount importance. Understanding that people have different configurations of intelligence is useful to legal educators who might amend their lecturing style to cater for multiple factor intelligence within their class but is equally important to the students, first because it will allow them to understand what learning modes work for them and second, because they will one day be relying on metaphors to argue their own court cases. Further psychological insights related to how psychology can inform emotional

²⁰⁴ Ibid Jacobson I at 31.

²⁰⁵ Jacobson I n7 supra at 32.

²⁰⁶ This example is given by Jacobson I n7 supra at 32.

²⁰⁷ Ibid.

intelligence as a skill and how emotional intelligence could be cultivated in a classroom setting will be discussed in the next chapter (The Role of Psychology in Legal Practice) at 3.4.2.

2.4.1.2 Personality

Basic knowledge of personality theory is useful to students and lecturers alike because personality may affect a person's manner of processing information.²⁰⁸ Personality is comprised of attitude-types and function types.²⁰⁹ Attitude-types describe whether a person is directed towards external objects or events (extraversion) or directed away from them (introversion).²¹⁰ The function-types refer to the manner in which a person adapts and orients themselves in their inner and outer worlds.²¹¹ The function-types include sensing (gathering information through the senses), thinking (evaluating information), intuiting (integrating information) and feeling (evaluating through emotional response).²¹² Everyone has the ability to perform all these functions but not all functions are as well or as equally developed in all individuals.²¹³ For example, a lawyer cannot assume that a conclusion is obvious simply from the information he gives a client, colleague or judge – likewise, a lecturer cannot assume that *correct* conclusions will be drawn or made self-evident to all students in a class because every person's intuiting function is different.²¹⁴

For example, in an average classroom, some students will respond to information rooted in logic whilst others will respond to information rooted in feelings. Some students will draw on past experience whilst others will draw on their own sense of morality. Some students will draw conclusions from their own internal monologues whilst others will require conversations to play out in the classroom in order to lead them to their conclusions. For this reason, students, lawyers and lecturers alike would do well to think beyond the function strengths of their *own* personalities only because to impart information or to make persuasive legal arguments, they may need to incorporate the functions and strengths which resonate with others as well.²¹⁵ A discussion on how personality types and styles of learning can be used to maximise law school learning is discussed at 2.4.2 below. A further discussion on personality types and how these

²⁰⁸ Jacobson I n7 supra at 33.

²⁰⁹ Ibid. Jacobson relying on Jung C, *Psychological Types*, Princeton University Press, 1971 (originally published in 1923).

²¹⁰ Jacobson I n7 supra at 32 relying on Jung n133 supra at 330, 452-53 and 556.

²¹¹ Ibid.

²¹² Jacobson I n7 supra at 33.

²¹³ Ibid.

²¹⁴ Jacobson I n7 supra at 33.

²¹⁵ This view is supported by Jacobson I n7 supra at 33.

could be used to better inform interviewing and counselling skills will be discussed in the next chapter (The Role of Psychology in Legal Practice) and will focus more on the role that psychology plays in the acquisition of specific lawyering skills under item 3.4.1.

2.4.1.3 Information processing and absorption.

The next and perhaps most important personal characteristic capable of affecting learning style is how the student absorbs and processes information. Both elements are essential to effective learning because if a student is not absorbing all the relevant information, even the best processing techniques will prove ineffective in producing a satisfactory learning experience.²¹⁶ In the same vein, even if information of the highest calibre is successfully absorbed, the student may fall short in his learning if he lacks the ability to process it correctly.²¹⁷

a. Information Absorption

Senses such as sight, hearing and touch generally help a person to absorb information thus, a student may absorb information in a combination of ways including visual, oral, aural, tactile or kinaesthetic modes.²¹⁸

Based on the above, some students may need to see *and* hear in order to remain engaged and to learn. PowerPoint slide presentations which accompany discussions could assist such students and where the discussion in class is practical, images or a video of the problem that the students are called upon to evaluate could be presented to assist those students. It is proposed that even a crude drawing or representation of the factual matrix of a problem would be useful to students who are simply unable to imagine the scenario from verbal queues alone. Whilst it is not possible for every educator to draw pretty pictures for students during class, a student's appreciation that they learn better from visual cues may encourage them to create their own visual mind maps or visual representations as they read cases in preparation for lectures or as they study after their lectures.

²¹⁶ Jacobson I n7 supra at 33.

²¹⁷ Ibid.

²¹⁸ Jacobson I n7 supra at 33.

Strong *verbal* learners who best absorb information through written text (either through reading or writing) flourish in traditional law school teaching models because information in the traditional law school is primarily conveyed through written materials.²¹⁹

Lawyering is well suited to this mode of learning because most of the work of a lawyer is conveyed through the written word. Accordingly, the most important aspect of a student's exposure to learning styles is to learn to identify the styles with which they are not comfortable. Once that is established, students could then use the metacognitive method (described in the 12 steps above) to consciously train themselves to improve on those styles rather than to focus solely on the learning styles which come to them naturally, but which might not be producing the required results.

A strong *visual* learner is one who best absorbs information through modes other than text, for instance diagrams and pictures.²²⁰ Such learners have a mental picture of the information they absorb which they recall in blocks.²²¹ Such learners might struggle in traditional law school instruction as the mental images they remember do not always help them to synthesise integrated materials resulting in an inability to critically evaluate and reason.²²²

As proposed above, in order to assist visual learners, lecturers could enhance lectures by the addition of diagrams or pictures with headings, charts, shading or colours²²³ – likewise, students could insert such recall mechanisms into their own study notes to help in their later recollection. In addition, case studies could be made visual even in the course of a purely verbal lecture. Visual learners often envisage a case or legal problem as a play or television series and the characters help them to understand ideas while the plots help them to interlink ideas.²²⁴ One teaching technique could be to use popular culture to create metaphors for problems in a case study – again, the onus need not fall squarely on the lecturer as an informed student could be guided to create their own metaphors for recall during their active study sessions. More specific examples including simulation and the use of film will be explored in the course development chapter of this work at 5.2.3.1.

²¹⁹ Jacobson I n7 supra at 34.

²²⁰ Ibid.

²²¹ Jacobson I n7 supra at 34.

²²² Ibid.

²²³ Jacobson I n7 supra at 34.

²²⁴ Ibid at 35.

The next mode of information absorption is the *oral* or speaking mode. Strong oral absorbers absorb information best by talking out their ideas and thrive on opportunities to talk.²²⁵ With such learners, instruction which allows for question and answer sessions is important because these learners develop ideas as they speak or prepare to speak. When these learners talk out their ideas (with a lecturer or their peers), ideas which were originally half-baked become structured and focused.²²⁶

This form of information absorption favours the traditional Socratic and Langdellion method discussed at the beginning of this chapter. Even where a lecture does not allow time for a protracted question and answer session, students who learn best through this mode could be tasked with presenting possible solutions to problems to each other in small groups including by the use of peer assessment techniques. This will be elaborated upon in Chapter 5 of this work where I discuss the collaborative teaching method at 5.2.4.

On the other hand, strong *aural* learners learn best by listening to lectures, discussions or recordings.²²⁷ These are usually passive learners who prefer to be the receptacle for knowledge without investing too much of their own mental energy at the point of information absorption.²²⁸ Sometimes, these are students who are insecure, lazy or just shy, but other times, they are simply learners who learn better by listening to others first and then verifying their own understanding.²²⁹ Some have said that this is the most difficult form of information absorption and that generally, without something else to hold their attention, most people would struggle with recall which was based on aural absorption alone.²³⁰ For this reason, most experienced speakers (and educators) tell stories, ask questions or show visuals during a presentation as this allows the audience to absorb the information by using more than one mode of absorption.²³¹

The *tactile* or touching mode tells us that some people prefer material that they can touch and manipulate in order to learn.²³² Such learners will print out documents because it

²²⁵ Jacobson I n7 supra at 34.

²²⁶ Ibid at 35.

²²⁷ Jacobson I n7 supra at 35.

²²⁸ Ibid.

²²⁹ Jacobson I n7 supra at 36.

²³⁰ Ibid.

²³¹ Jacobson I n7 supra at 36.

²³² Jacobson I n7 supra at 36. See also Robert F. Wislock, *What Are Perceptual Modalities and How Do They Contribute to Learning in Applying Cognitive Learning Theory to Adult Learning* 5-6 (Danielle D. Flannery ed., Jossey-Bass 1993).

helps them to understand the content of the document better if they can touch it and write on it.²³³

Such learners might highlight, re-write, annotate or mark their documents to assist with recall. With such learners, it is important that they have opportunities actually handle learning materials as they benefit from physically manipulating animate objects. In the online space, it would be easy for learners to receive word documents which they can edit and manipulate (either electronically) or by printing the materials out and adding their own annotations, drawings or schematics.

Lastly, the *kinesthetic* (or moving) mode tells us that some learners learn best by doing – this gives them an opportunity to move and actually do things.²³⁴ Such learners do well with simulations, role-play and other experiential activities as they learn better in situations where they can physically move or act (this may be as simple as being allowed to gesticulate, pace or by physically using a computer).²³⁵

Allowing students an opportunity to present in class, to act out scenarios, to physically arrange themselves into groups or even to provide answers to polls through clickers would be beneficial to such learners.

The crux of the matter is that everyone learns better if they can absorb information through their preferred mode of learning or if they can gain experience in utilising a mode that was previously unfamiliar to them. Whilst a student's preferred learning mode will not always be apparent to a lecturer and whilst the lecturer may have large classes with students who respond to varying modes of information absorption, it is proposed that everyone can become a better learner if they engage with information multiple times in more than one learning modality. As such, students should be encouraged to engage with their course materials in multiple ways. For instance, step one would be for the student to attend the lecture (it does not matter whether the lecture is live online, in person or even pre-recorded). Even if the student is a passive listener, mere presence and attention in the lecture would satisfy the aural modality. If the student engages or asks questions, they would engage the oral modality. Step two, would be for the student to take down notes (if the lecture was in person) or if the lecture was recorded,

²³³ Ibid.

²³⁴ Jacobson I n7 supra at 37.

²³⁵ Ibid.

to re-watch the lecture and to jot down important points and to summarise the material presented (this engages the tactile or visual mode). This step would encapsulate making visual diagrams or inserting annotations and/or printing out the material. Step three would require the student to use their own notes to create a presentation on the acquired information to be presented to others and to rehearse or talk through that presentation (thus observing the oral and kinaesthetic modes of learning). Even if the student simply presents this to themselves as a form of revision or learning for an assessment, the student experiences the oral and kinaesthetic mode. By following these three steps, the student is using metacognition and his learning experience is encompassing all the available modes of learning to ensure the most effective learning experience possible (even if the natural inclination is to one mode only).

(b) Information Processing

How a person processes information is based on whether they are using right-brain or left-brain functions.²³⁶ For most people, 80% of one hemisphere of the brain is more dominant than the other so whilst all people use both hemispheres, they will habitually rely on their dominant sphere for the processing of information.²³⁷ Which side of the brain a person uses does not affect their abilities, it only affects how they will accomplish the task because the style of processing is different.²³⁸ Left-brain hemisphere processes can be characterised as *linear* (moving from part to whole in a clear direction), *logical* (working towards a result with one piece of information following another), *sequential* (splitting and ranking information by cause and effect), *temporal* (relating to time and order of things) and *verbal* (using words to remember things).²³⁹ In contrast, right-brain hemisphere processes are *holistic* (moving from whole to part and seeing patterns or conclusions first), *intuitive* (thinking outside the constraints of the pieces), *simultaneous* (lumping information which is connected and seeing the whole), *non-temporal* (little sense of time due to diversions), *spatial* (seeing where things are in relation to each-other, using images to remember).²⁴⁰ In summary, the main function of the left

²³⁶ Jacobson I n7 supra at 38.

²³⁷ Ibid at 39 relying on Ornstein R, *The Right Mind: Making Sense of the Hemispheres*, 81 Harcourt, 1997 at 68.

²³⁸ Ibid.

²³⁹ Jacobson I n7 supra at 40 relying on Ornstein R, *The Right Mind: Making Sense of the Hemispheres*, 81 Harcourt, 1997 at 68.

²⁴⁰ Jacobson I n7 supra at 40.

hemisphere is “to work with the parts that lead to a whole, while the central function of the right hemisphere of the brain is to work with a whole and make conclusions from that.”²⁴¹

This is relevant to lawyering because clients, Judges and opponents need to be convinced by a legal argument regardless of whether they see and analyse information in the same way as the person making the argument.²⁴² Likewise, this is relevant to law school learning because effective teaching and learning will require challenging left-brain dominant thinkers to see possibilities beyond precedent, policy or legal principle and to challenge right-brain dominant thinkers to establish the relevance of the connections and synergies that they develop outside of precedent, policy or legal principle.²⁴³ What this means is that to convince someone who does not naturally process information in the same way that you do, you need to understand something about how people process information in general and how those who process information in a manner that is different to you can ultimately be persuaded. For example, in the context of interviewing clients, one might use nonverbal cues to understand a client’s reasoning or motivations.²⁴⁴ One would however be cautious with how one interprets those nonverbal cues, for instance, in some cultures, eye contact would be a sign of honesty and attentiveness whilst in another, it might signal disrespect and lack of deference.²⁴⁵ One method of ensuring that you are processing nonverbal cues correctly would be to mirror or to reflect back the facts and the emotional context related to the client’s legal problem.²⁴⁶ The same can be said for a second year law student simply studying for their mid-term assessment – putting themselves in the shoes of the lecturer and asking themselves what the lecturer might require of them in the assessment and to what degree of specificity they would require the knowledge, based on past lectures and class exercises. The student will be practising the very same metacognitive task that they will later rely upon in practice. As such, understanding how people process information is broader than just providing students with a means to finetune their learning habits, it can be utilised in the actual practice of lawyering. A broader discussion on how psychology plays a role in interviewing and counselling will be set out in chapter 3 of this work under 3.4.1.

²⁴¹ Ibid at 48.

²⁴² Jacobson I n7 supra at 39.

²⁴³ Ibid.

²⁴⁴ Salinas OJ, *A Short & Happy Guide to Effective Client Interviewing and Counseling*, 2016, West Academic Publishing at 175.

²⁴⁵ Ibid.

²⁴⁶ Salinas n244 supra at 180-181.

2.4.2 Modes or styles of learning and how to maximise law school learning through learning styles

The predisposition towards left versus right side brain hemisphere processing produces a number of learning styles as follows:

2.4.2.1 Field-dependent or field-independent thinkers.

People who are field-independent are easily able to see the whole, for instance, in experiments, field-independent individuals were immediately able to locate a geometric figure embedded into a more complex figure while field-dependent individuals were more distracted by the surroundings and had difficulty finding the embedded figure.²⁴⁷

In the lawyering context, cues would need to be provided to the field-dependent thinker to help them to attend to and prioritise the most relevant information. In the teaching and learning context, this could be done in the form of supplementation of written documents with headings, commentary, summaries, and/or reflections which might help the learner to make the appropriate connections which they are unable to make themselves.

2.4.2.2 Holistic vs serialist thinkers.

A holistic learner is one who sees the whole immediately and whose thinking process may involve redundancies until the thinking process is complete – they rely on illustration and analogy and connect information to people.²⁴⁸ A serialist learner on the other hand, is a linear processor whose thinking is logical, step-by-step and who sees the whole much later in the process, they usually work independently.²⁴⁹

²⁴⁷ Witkin H et al., *Field-Dependent and Field-Independent Cognitive Styles and Their Educational Implications*, 47 Rev. of Educ. Research 1, at 2-6 (1977) (describing methodologies). [Hereinafter Witkin I]; Witkin H, *Individual Differences in Ease of Perception of Embedded Figures*, 19 J. of Personality 1, 1- 15 (1950) at 7-17. [Hereinafter Witkin II]

²⁴⁸ Ibid Witkin I at 5. See also Pask G, *Styles and Strategies of Learning*, 46 Br. J. of Educ. Psychol. 128, 128-148 (1976) at 130.

²⁴⁹ Jacobson I n7 supra at 41.

In the lawyering context, because trials run in a non-linear fashion, organisational cues will be required for serialist receivers (in practice, this may be the Judge adjudicating the matter or the opposing attorney).²⁵⁰

In the teaching and learning context, it is proposed that information presented to serialist receiver learners should be constructed (where pieces of information are built upon part-by-part in a piece-meal fashion) but deconstructed for holistic receivers (where the larger point is disassembled into smaller chronological parts). This can be achieved by presenting the information in one mode (constructing the narrative) but asking questions which require the student to answer in the opposite mode (deconstructing the narrative). For instance, to test the proposition that an accused *is* guilty of murder would require the lecturer to present a set of facts which resulted in a murder conviction. The student would then be required to deconstruct the elements of criminal liability and to extract the factual evidence that would have entitled the State to prosecute the accused. Conversely, presenting an open ended statement of facts upon which a potential crime *could* be founded might require students to test each element of criminal liability sequentially (thus, to construct the elements of the crime) in order to establish whether prosecution could result.

2.4.2.3 Sequencing style.

In this model, it is hypothesised that learners process information either from the “top-down” or from the “bottom-up”.²⁵¹ Top-down sequencers will process information better if they are given general concepts first as an anchor for the facts or details which come later.²⁵² These types of learners will be frustrated with details or facts unless they know and understand how these facts fit into the bigger picture.²⁵³ Bottom-up sequencers process information better if they first have the facts or the details from which the broader and more general concepts follow.²⁵⁴ These types of learners will be frustrated if an overview or recital of general concepts does not follow the facts to reorient the broader concept.

²⁵⁰ Jacobson I n7 supra at 42 (noting that in the American context, jurors may struggle to connect the verbal evidence produced with the legal elements that are required to be established).

²⁵¹ Ibid at 41. See also George n11 supra and Burgess n11 supra. Also see Palmer J, *The Millennials are Coming: Improving Self-Efficacy in Law Students through Universal Design in Learning*, Cleveland State Law Review, Vol. 63, Issue 3, 2015, 675-706. All three authors use the work of Jacobson on learning theory and both Burgess and George are used substantively throughout the thesis.

²⁵² Jacobson I n7 supra at 42.

²⁵³ Ibid.

²⁵⁴ Jacobson I n7 supra at 42.

A good approach to accommodating both top-down and bottom-up sequencers is to present lectures in a manner where an overview (or overview and review) is provided before and after an important point is made. For instance, in a lecture on provocation as a defence to murder, a lecturer might begin and end with the proposition that provocation has (in appropriate circumstances) the potential to negate the fault element of the crime but not the voluntariness element of the crime. The substantive part of the lecture would be on how this is possible and in what circumstances such a defence had been permitted, but the over-all proposition is both the founding and end point of the discussion. It is submitted that encouraging students to study material in a manner which begins and ends with the overall hypothesis not only serves to structure their arguments, but also encourages reflection. Reflection will be discussed as a key component of successful course design in Chapters 4 and 5 of this work.

2.4.2.4 Impulsive vs reflective actors.

Some learners will reflect over alternative solutions before responding with a conclusion whilst others are prone to impulsive selection.²⁵⁵ The impulsive processor will get to answers more quickly but with more errors while the reflective processor will be more cautious and thus slower, but may also be more accurate.²⁵⁶

In the lawyering context, this reveals the importance of pacing and giving relevant parties an opportunity to process what you are saying, including the time to respond meaningfully. In the teaching and learning context, this disparity could be addressed in ensuring that assessments are varied, for instance, an assessment could be set in a manner which tests impulse only (for example, a timed multiple choice assessment) or, an assessment might require careful consideration and reflection (in the form of a 24-hour research assessment). Assessment will be discussed in more detail in Chapter 5 of this work.

Law is inherently a left-hemisphere activity due to its reliance on logic and reasoning.²⁵⁷ However, effective lawyering actually requires both hemispheres of thinking – lawyers need to be cognitively flexible enough to master the logic of law and its organisation whilst still being able to see the bigger picture including the possibilities available outside of

²⁵⁵ Jacobson I n7 supra at 42. See also George n11 supra and Burgess n11 supra. Also see Palmer J, *The Millennials are Coming: Improving Self-Efficacy in Law Students through Universal Design in Learning*, Cleveland State Law Review, Vol. 63, Issue 3, 2015, 675-706. All three authors use the work of Jacobson on learning theory and both Burgess and George are used substantively throughout the thesis.

²⁵⁶ Ibid.

²⁵⁷ Jacobson I n7 supra at 48.

the legal structure.²⁵⁸ Essentially, left-hemisphere thinkers cannot rely solely on step-by-step thinking to be successful at lawyering and right-hemisphere thinkers cannot rely on creativity alone.²⁵⁹ It is proposed that left-hemisphere thinkers should practice some right-hemisphere thinking to expand their views to include multiple possibilities while strong right-hemisphere thinkers should practice left-hemisphere skills in order to overcome problems with organisation.²⁶⁰

2.5 Conclusion

Although most law lecturers can be said to have salutary educational goals²⁶¹ and while some individual law lecturers intuit and develop insightful experimental instruction, “law school instruction as a whole, remains locked in an instructional methodology of dubious merit”.²⁶² It has been posited that what is still missing from current law schools is an educationally sound body of andragogy scholarship which applies current developments in the fields of learning to the design of law school curricula.²⁶³ It would appear that there is a global shift in the goals of higher education in that Universities used to be predominantly institutions of instruction but are now starting to be seen as institutions of learning.²⁶⁴ The focus on learning is novel in that it envisions the University itself as a learner, which over time, learns to produce more learning but this paradigm is yet to find complete expression in the structures and processes of most Universities.²⁶⁵ What we have presently is a wide gap between “espoused theory” and “theory-in-use”.²⁶⁶ *Espoused theory* is a set of principles offered by people to explain their behaviour whilst *theory-in-use* is the principles we can infer from how people or their organisations *actually* behave.²⁶⁷ It can be said that presently, the instruction paradigm is still the “theory-in-use” in most Universities while the theories, visions and intentions espoused by most educators

²⁵⁸ Ibid.

²⁵⁹ Ibid Jacobson I n7 supra at 48.

²⁶⁰ Jacobson I n7 supra at 48. See also Jacobson I n7 supra at 51-57 where he gives examples of different organising methods, namely, the traditional Roman-style method, the digest method, the diagram or flow-chart method, the picture or mind-map method and the brainstorming method. Such methods of organisation would be useful tools given to students at the commencement of their legal studies.

²⁶¹ Schwartz n36 supra at 349.

²⁶² Ibid.

²⁶³ Schwartz n36 supra at 350.

²⁶⁴ Barr R & Tagg J, *From Teaching to Learning: A New Paradigm for Undergraduate Education*, Change, Vol.27, No.6 (1995) at 1.

²⁶⁵ Barr & Tagg n264 supra at 2.

²⁶⁶ Barr & Tagg n264 supra quoting the work of Argris C & Schon D, *Theory in Practice*, 1974; *Organizational Learning*, 1978; *Organizational Learning II*, 1996.

²⁶⁷ Ibid Barr & Tagg at 2.

more closely resemble the learning paradigm.²⁶⁸ This is relevant to learning theory in that the instruction paradigm views learning atomistically – knowledge consists of information dispensed or delivered by the instructor in chunks intended for later recall in tests, until a degree is awarded when a student has received the specified amount of instruction.²⁶⁹ The chief agent is the lecturer while the student is viewed as a passive vessel ingesting knowledge.²⁷⁰ This traditional approach to learning suited left-hemisphere thinkers who use logic and incremental chunking to create “wholes” linearly. In contrast, the learning paradigm frames learning holistically, recognising the student as the chief agent in the process and thus, the constructor of his or her own knowledge.²⁷¹ Under the learning paradigm, knowledge is understood as an existing framework of “wholes” constructed by the learner.²⁷² Knowledge is not seen as cumulative and linear, but rather, as an interaction of frameworks.²⁷³ Learning is done when those frameworks are utilised to understand and to act upon the understanding.²⁷⁴ Seeing the whole of something (the forest rather than the trees) gives meaning to its component parts, and that whole becomes more than a sum of component parts.²⁷⁵ This view of learning is more intuitive to right-hemisphere thinkers.

It is proposed that the more we discover about how the mind works and how students learn, and the more we incorporate research in this field into our teaching, the more likely we are to diminish the gap between the traditional instruction paradigm and the paradigm of learning. Thus, the more likely we are to produce metacognitive thinkers. The research contained in this chapter is an attempt to further the discourse in this area. It is proposed that the sporadic ingenuity of *some* lecturers in *some* law courses applied on an ad hoc basis is not adequate to produce the type of graduate contemplated in the discourse at the beginning of this chapter. It is further submitted that what is required in the South African context, is a stand-alone course (which is the subject matter of this thesis and which will be expounded upon in the subsequent chapters of this work) which incorporates research on cognition and learning styles with the role of psychology in the acquisition of lawyering skills to create more efficient learners and more effective practitioners.

²⁶⁸ Barr & Tagg n264 supra at 3.

²⁶⁹ Ibid at 11.

²⁷⁰ Barr & Tagg n264 supra at 11.

²⁷¹ Ibid.

²⁷² Barr & Tagg n264 supra at 11.

²⁷³ Ibid.

²⁷⁴ Barr & Tagg n264 supra at 11.

²⁷⁵ Ibid.

CHAPTER 3

THE ROLE OF PSYCHOLOGY IN LEGAL PRACTICE

3.1 Introduction

Laws are human creations that are constantly evolving from the human need for order and consistency.¹ The law affects everything from our birth to our death.² Laws regulate our private lives as well as our public actions, this includes how fast we are permitted to drive, when (and to whom) we can marry, whether we are allowed to play music in our homes at full volume, to what extent we can infringe on the rights of our neighbour and in what circumstances we may defend ourselves against the acts of others.³ Laws and legal systems are studied by several disciplines.⁴ Anthropologists compare laws and mechanisms in different societies and relate them to other characteristics of these societies.⁵ For example, an anthropologist might study how frequently women are raped in different societies and determine the effect of factors (such as the extent of separation of the sexes during childhood or the degree to which males dominate females in that society) on rape.⁶ Sociologists might study a specific society to examine its institutions and their effect on the family, the church, or the subculture in order to determine that society's role in developing adherence to laws.⁷ Psychology examines the thoughts and actions of individuals.⁸ Lawyers must have a good understanding of how people think and make decisions and must possess good people skills in order to counsel and persuade.⁹ This chapter is concerned with the convergence of law and psychology and the ways in which psychological insights might contribute to the effectiveness of the lawyering enterprise.¹⁰

¹ Greene E & Heilbrun K, *Wrightman's Psychology and the Legal System*, 9ed, Cengage, 2019 at 2.

² Ibid.

³ Greene & Heilbrun n1 supra at 2.

⁴ Ibid at 4.

⁵ Greene & Heilbrun n1 supra at 4.

⁶ Ibid.

⁷ Greene & Heilbrun n1 supra at 4.

⁸ Ibid.

⁹ Sternlight J & Robbennolt K, *Good Lawyers Should Be Good Psychologists: Insight for Interviewing and Counseling Clients*, Ohio State Journal on Dispute Resolution, Volume 23: 3 (2008) 437 – 538.

¹⁰ In research cited as Shultz M & Zedeck S, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, Law & Social Enquiry, Journal of the American Bar Foundation, Vol.36, Issue 3, 620, (2011) at 661, the authors list twenty-six factors which contribute to the effectiveness of lawyers as follows: analysis and reasoning, creativity innovation, practical judgment, researching the law, passion and engagement, questioning and interviewing, influencing and advocating, writing, speaking, integrity/honesty, ability to see the world through the eyes of others, self-development, organising and managing others, negotiation skills, networking and business development, building client relationships including advice and counsel, organising and managing one's own work, developing relationships, evaluation/development/mentoring, problem solving, stress

3.2 Psychology in context

As stated above, psychology is the science of behaviour.¹¹ This is not a perfect definition, but it is the one commonly subscribed to by modern psychologists.¹² Psychology usually contributes to the legal system in what can be termed a tripartite relationship between psychology and law comprising of psychology *in* the law, psychology *and* the law, and psychology *of* the law.¹³ Although there is some overlap, psychologists engaged in the first relationship (psychology *in* the law) are primarily clinical, psychologists engaged in the second (psychology *and* the law) are primarily research-based, and psychologists engaged in the third relationship (psychology *of* the law) are primarily philosophical in their approaches.¹⁴ These relationships are not mutually exclusive and a psychologist might operate in all these realms.¹⁵ The most common relationship is termed psychology *in* the law – here, psychology is used to provide services to the legal community, for instance, psychologists might be called upon to conduct psychological evaluations of accused persons or, in the American context, to aid in jury selection based on what they know about people.¹⁶ In the South African context, psychologists might be called on to evaluate the extent to which severe emotional stress impacted on an accused's capacity to truly act in accordance with his appreciation between what is right and wrong. In the psychology *in* the law relationship, psychology tries to answer questions like: How does law affect society? How successful is criminal punishment in controlling and altering human behaviour? Why are some laws embraced whilst others are resisted?¹⁷ Psychology *and* the law refers to a relationship between psychology and law where psychologists conduct research in areas that are pertinent to the law, for instance, psychologists might research and give opinions on the intricacies of eye-witness testimony or child development.¹⁸ Further, in this category of relationship, psychology tries to answer questions such as whether judges are ever truly able to disregard inadmissible evidence in making their decisions, whether some people are better at detecting lies than others and whether witnesses can give accurate information considering that human memory does not work as well under stressful and traumatic circumstances. Other examples include whether persons with mental

management, fact finding, diligence, listening, community involvement and service, and strategic planning. Some of these factors will be focused on in this chapter.

¹¹ Bartol, C & Bartol, A, *Psychology and Law*, SAGE Publications, Kindle Edition at 21.

¹² *Ibid.*

¹³ Bartol C & Bartol A n11 *supra* at 21.

¹⁴ *Ibid.*

¹⁵ Bartol C & Bartol A n11 *supra* at 21.

¹⁶ *Ibid* at 7.

¹⁷ Bartol C & Bartol A n11 *supra* at 8.

¹⁸ *Ibid.*

disorders have the ability to make decisions in their own best interest and whether children under the age of 14 can be held accountable for serious crimes?¹⁹ Finally, psychology *of* the law is the category wherein the law itself becomes the object of psychological study, for instance, psychologists might research why people obey the law or how the decision-making of Judges is influenced by the behaviour of litigating parties.²⁰ Spellman is a former lawyer turned psychology professor. In her article, “*Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist – and (in particular) Studying Analogical and Causal Reasoning – Changed My Views About the Field of Psychology and Law*”,²¹ she argues that psychology research should be applied to the practice of law and not just be recognised or identified for study in existing legal procedures.²² Spellman points out that psychologists often do not have a clue how relevant their everyday research is to the legal system – because they do not know enough about what the legal issues are whilst lawyers do not know enough about current relevant psychological research to constructively apply it to legal practice.²³ The pre-existing three relationships described focus on the relevance of legal studies to psychologists but there is very little discourse on the relevance of psychology to lawyers and the actual practice of law. In this chapter, a fourth relationship which I term psychology *within* the law is proposed – the focus of this relationship would be on how the study of basic psychology (including cognitive science) could improve lawyering skills. The term psychology *within* the law is used throughout the thesis to distinguish it from the broader relationship of psychology *in* the law. As stated above, psychology *in* the law usually focuses more on the relevance of psychology to legal principles or concepts as opposed to the relevance of psychology to the practice of being a lawyer. As such, psychology *within* the law is used to denote a much narrower relationship related to how psychology affects and impacts on the skills of lawyering as opposed to the boarder framework of psychology *in* the law which focuses on how psychology affects and impacts on legal principles.

¹⁹ Bartol C & Bartol A n11 supra at 8.

²⁰ Ibid at 7.

²¹ Spellman B, *Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist – and (in particular) Studying Analogical and Causal Reasoning – Changed My Views About the Field of Psychology and Law*, 79 Chi-Kent L. rev. 1187 (2004).

²² Ibid at 1189.

²³ Spellman n21 supra at 1189.

3.3 The value of interdisciplinary collaboration: Why teach psychology to law students (the value of interdisciplinary collaboration and what *thinking like a lawyer* means in context)?

Traditionally, the legal academy has not been considered as the collaborative type.²⁴ Between 1970 and 1999, the rate of intradisciplinary collaboration between legal professionals and other fields in the USA was only fifteen percent.²⁵ Whilst interdisciplinary discourse is improving due to a rise in co-authorship by younger scholars, generally, seasoned academics prefer to research alone and in their niche fields.²⁶ In the South African context, academics are, as a general rule, not concerned with the dynamics governing the practical application of what they teach.²⁷ Even though academic methodology is deconstructed in clinical methodology and even though the goal of both is to produce well-rounded and competent graduates, clinicians often feel like institutional misfits or “fringe actors”.²⁸ Clinicians are well placed to provide context for the role that psychology might play in lawyering because clinical clients “tend to present to the clinic lawyer a rather large package of problems, half of which have nothing to do with the law and the other half so intertwined with poverty that their actual legal problems are often very hard to extract”.²⁹ Having practiced as a clinician for 12 years, I am well placed to expand on discourse in this area. Psychology is crucial to the practice of law because clients are complex creatures, influenced and constrained by the contexts of their lives and communities – they have conflicting goals, concerns, needs, and desires – and are usually seeking to litigate against other persons or entities who have contrary or inconsistent goals.³⁰ The legal problems expressed by clients to their lawyers are inextricably intertwined with other complex issues which are invariably human problems.³¹ Thus, knowing the law and being able to analyse legal theory, whilst necessary to assist clients to solve legal problems, are not sufficient on their own.³² It is submitted that representing a client may require presenting choices which help to foster and maintain values, thus, the preservation of social values or religious beliefs lies at the

²⁴ Lerner A & Talati E, *Teaching Law and Educating Lawyers: Closing the Gap Through Multidisciplinary Experiential Learning*, Journal of Clinical Education, December 2006 at 103.

²⁵ Ibid. See also George T & Guthrie C, *Joining Forces: The Role of Collaboration in the Development of Legal Thought*, 52, J. Legal Educ. 559, 2002 at 562.

²⁶ Lerner & Talati n24 supra at 103-105.

²⁷ De Klerk W, *Unity in Adversity: Reflections on the Clinical Movement in South Africa*, International Journal of Clinical Legal Education, (2007), 95-104 at 99.

²⁸ De Klerk n27 supra at 96-97.

²⁹ Ibid at 97.

³⁰ Lerner & Talati n24 supra at 101.

³¹ Ibid.

³² Lerner & Talati n24 supra at 101.

heart of any legal dispute. This suggests that attempting to abstract or detach legal analysis from values (or feelings) is not only undesirable but perhaps impossible.³³ According to Salinas, feelings of empathy are paramount to the lawyering enterprise.³⁴ Empathising does not mean feeling sorry for clients, it requires attempting to understand what it must feel like to be experiencing our client's problem.³⁵ What we are really trying to do is to *receive* and to *process* our client's unique perspective.³⁶ This is a the kind of metacognitive task that was discussed in the preceding chapter at 2.3.1. Lawyering encapsulates answering questions, remedying problems and finding solutions but the most successful lawyers will reach beyond the legal question posed to more fully understand the nature and context of the human problem – doing so is essential to finding the most effective means to achieve the client's goals.³⁷

The above considerations require us to re-examine and to significantly change how we prepare law students to be effective, responsible lawyers and how to become important contributors to the legal system as a whole.³⁸ It has been proposed that psychologically apt lawyers can perform their roles more effectively because they understand how people (themselves and those around them) think, feel, behave and make decisions.³⁹ From a practice-oriented perspective, clinical experiences often show students how important it really is to rely on and to work with other people. Lerner cites a student reflecting on his clinical experience as stating that, "All of our clients had problems that one lawyer, no matter how gifted, could never solve alone. It took working with professionals in other fields and with each other in order to become helpful."⁴⁰

Unfortunately, in most South African University programmes, clinical experiences in law are only offered to final-year law students.⁴¹ It is proposed that learning the value of the human experience (and its psychological underpinnings) at this stage is often too late to

³³ Ibid. See also Salinas OJ, *A Short & Happy Guide to Effective Client Interviewing and Counseling*, 2016, West Academic Publishing at 80-95 and 187 where the author discusses the psychological importance of empathy on the relationship between lawyer and client.

³⁴ Salinas n33 supra at 91.

³⁵ Ibid at 91-92.

³⁶ Salinas n33 supra at 91.

³⁷ Lerner & Talati n24 supra at 104 and Salinas n33 at 80-81.

³⁸ Lerner & Talati n24 supra at 101.

³⁹ Sternlight & Robbennolt n9 supra at 448.

⁴⁰ Lerner & Talati n24 supra at 106.

⁴¹ Du Plessis MA, *Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills and Values*, De Jure, Vol. 48, Issue 2, 312-327 at 316-317 [Hereinafter Du Plessis I] and Du Plessis MA, *Forty-five Years of Clinical Legal Education in South Africa*, Fundamina, Vol. 25, Issue 2, (2019), 12-34 at 24-25 [Hereinafter Du Plessis II].

produce truly effective graduates. Students should comprehend the value of psychology to themselves, to their work and to the acquisition of their legal skills at a stage of their education where there is room for that knowledge to produce meaningful connections and opportunities for reflection within them. More on why a course in psychology *within* the law is necessary as well as its placement within the broader legal curriculum (as opposed to a separate qualification in the humanities) will be discussed in the succeeding chapter. The main point of this chapter is to establish the contextual relevance of other disciplines (like psychology) to the practice of law. My hypothesis is that this multidisciplinary approach will lead to better professional development and a more acute acquisition of legal skills. According to Lerner, lawyers trained in interdisciplinary environments will learn to seek and to implement non-traditional solutions to legal problems because they will invariably see them as human and not merely legal problems.⁴²

In his article, “*Deconstructing Thinking Like a Lawyer*”,⁴³ Gantt explores the conception of what it means to *think like a lawyer*. His hypothesis is that whilst many non-cognitive practical skills are central to the task of lawyering, *legal thinking* remains the philosophical backbone of legal education.⁴⁴ Therefore, the cognitive components of legal thinking are intricately linked to legal education which is supposed to convey the idea of how to *think like lawyers*.⁴⁵ Gantt prepares a schematic representation which presents legal analysis in the framework of problem-solving.⁴⁶ Through the schematic, he shows how skills such as paying attention to detail, being coherent, construction of an argument, attention to detail and the ability to assess relevance, ambiguity and the perspectives of others are all informed by cognitive methods, and as such, thinking like a lawyer, is ultimately cognating.⁴⁷ This is a psychological process.

To isolate where psychology most informs lawyering skills, the ten fundamental lawyering skills contained in the MacCrate Report⁴⁸ (discussed in the preceding chapter) have

⁴² Du Plessis II n41 *supra* at 24-25.

⁴³ Gantt L, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 Campbell L. Rev. 413 (2007).

⁴⁴ *Ibid* at 478. For more on thinking like a lawyer, see Schultz N, *How Do Lawyers Really Think?*, 42 J. Legal Educ. 57 (1992); Seale C, *Thinking like a Lawyer: A Framework for Teaching Critical Thinking to All Students*, Pruffrock Press, 2020. Cantoni GF & Cantoni L, *Think Like a Lawyer*, Xlibris, 2004; Redfield S, *Thinking Like a Lawyer: An Educator's Guide to Legal Analysis and Research*, 2ed, Carolina Academic Press, 2011.

⁴⁵ Gantt n43 *supra* at 478.

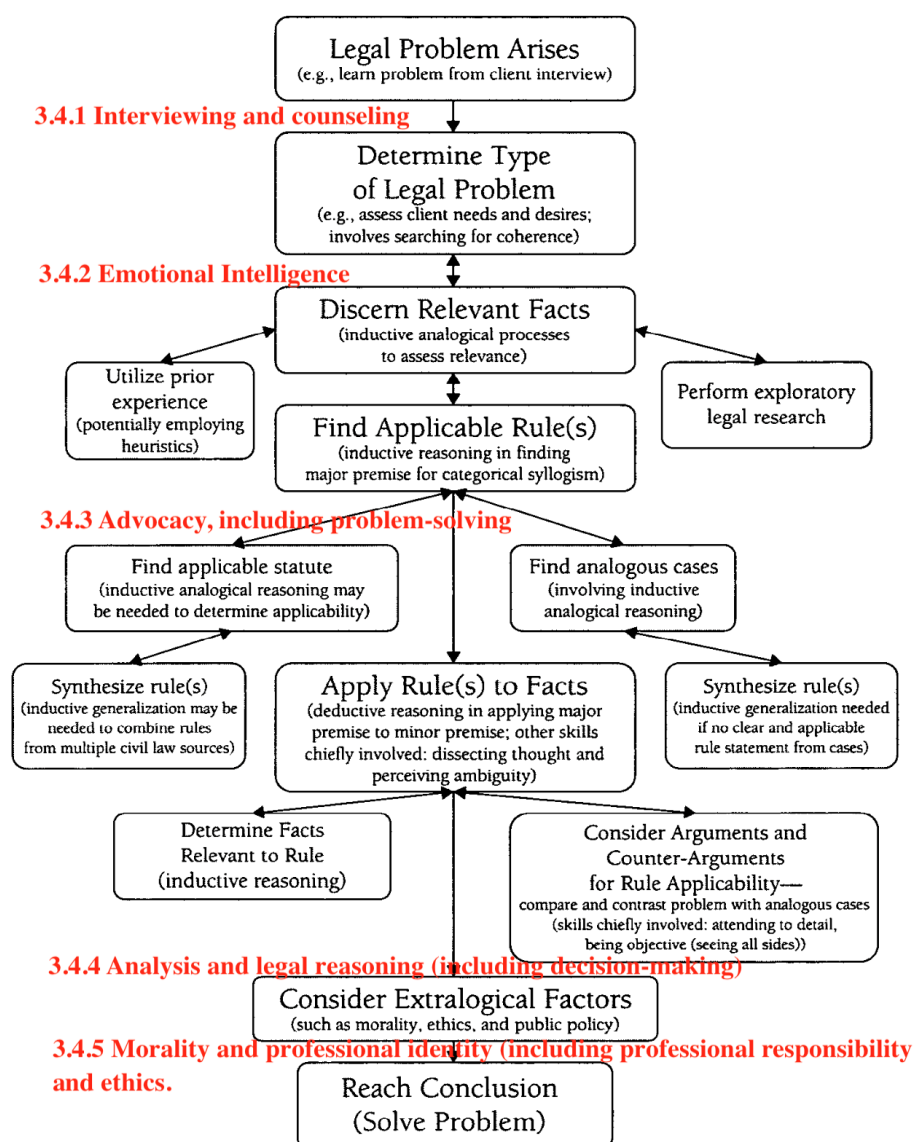
⁴⁶ *Ibid* at 481.

⁴⁷ Gantt n43 *supra* at 479.

⁴⁸ MacCrate R, American Bar Association, Section of Legal Education and Admissions to the Bar (July 1992) Report of The Task Force on Law Schools and the Profession: Narrowing the Gap [hereinafter the *MacCrate*

been grouped into five categories as follows: (1) interviewing and counseling, (2) emotional intelligence, (3) advocacy, including problem solving, (4) analysis, including legal reasoning and (5) morality, including professional identity. Gantt's schematic on what thinking like a lawyer in the cognitive context looks like is reproduced below together with my annotations depicting where in Gantt's schematic, the five categories of skills that are discussed at item 3.4 are activated. What follows is an explanation of where my five categories of skills are activated within Gantt's schematic. What follows thereafter is an exposition of how psychology is relevant to those five categories.

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Report]. So called in recognition of Robert MacCrate, Chair of the task force that produced the report. The ten skills listed were problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, client counselling, negotiation, litigation and other dispute resolution procedures, organization and management of legal work, or ethical dilemmas.

- (1) Interviewing and counseling: This is activated when the legal problem arises and the students are required to learn from the client interview.
- (2) Emotional Intelligence: This skill is required to determine the type of legal problem by assessing client's needs and desires.
- (3) Advocacy including problem-solving: These skills are required to discern the relevant facts, perform exploratory research, to use prior experience and to settle on the applicable rules.
- (4) Analysis and legal reasoning (including decision-making): These skills are pertinent to the application of the relevant legal rules which includes the ability to determine the facts relevant to the rules, to synthesise the rules and to consider arguments and counter-arguments.
- (5) Morality and professional identity (including professional responsibility and ethics): These skills are activated when extralogical factors are considered such as morality, ethics and public policy.

3.4 Psychological insights on practical skills

3.4.1 Psychological insights relevant to interviewing and counseling

Considering how much time lawyers spend interviewing and dispensing legal advice to clients, lawyers as “counselors” is not an entirely new concept, but traditional legal education does very little to teach students how to be good with people.⁴⁹ Interviewing and subsequent legal counseling is one of the most fundamental skills required in legal practice. According to Du Plessis,⁵⁰ most of the intellectual energy expended by attorneys is not in court, but rather, in the development of the relationship with their client.⁵¹ In the introductory chapter of this work, the Hippocratic oath was used as an analogy to reflect that just as doctors must know how the body works, so too, skilled attorneys should know how the mind works. If the goal of a good doctor is to diagnose symptoms with a view to treat or cure illness, then the goal of a good lawyer should be to diagnose and solve legal problems with a view to providing effective counsel. It is submitted that effective legal representation is dependent on the accurate diagnosis of what a client *actually* wants (in the medical context, it would be a cure) versus

⁴⁹ Sternlight & Robbennolt n9 supra at 438.

⁵⁰ Du Plessis MA, *Effective Legal Interviewing and Counselling*, Juta, 2019. [Hereinafter Du Plessis III]

⁵¹ Ibid at 1.

what a client can legally get (usually, in the medical context, this would be the prognosis).⁵² For instance, where the prognosis in an elderly cancer patient is poor, the patient might choose a less aggressive course of treatment which prioritises a better quality of life over an ultimate cure. A legal opinion is not unlike a medical prognosis, often, the legal prognosis determines the ultimate course of action that the client will take. Students must understand the role that prognosis plays in the counseling exercise. Based on the above, the initial client consultation or interview is the foundation upon which the entire legal relationship between the lawyer and client will develop and psychology has a lot to teach us in this regard. The question then arises, how do we teach students to become better legal diagnosticians and ultimately, more effective legal counselors? The premise of what follows is that students who are aware that there are cognitive implications and obstacles to fully rational decision-making can self-adjust and regulate their approaches to counseling to counter such obstacles.⁵³

3.4.1.1 Approaches to interviewing from a clinical perspective

According to Rosenthal, there are two accepted models to interviewing, the traditional (autonomy) and the participatory model.⁵⁴ The traditional (autonomy) model is where the lawyer is considered to be competent, objective and masterful.⁵⁵ This model is premised on the idea that there are certain things which a lay person simply will not understand and as such, the lawyer determines how much legal information about his legal problem the client should receive.⁵⁶ According to this model, the client is more passive, asks few questions and entrusts the lawyer with the direction in which the matter moves.⁵⁷ This model is most closely related to the paternalistic approach discussed below. The participatory model on the other hand, is premised on the idea that the client is entitled to receive extensive and explicit information about his legal matter.⁵⁸ In this model, the client plays a central role in decision-making.⁵⁹ This model is more closely related to the client-centered approach discussed below. According to Du Plessis, the distinction in the models is important in deciding which practice skills are

⁵² Du Plessis, MA, *Clinical Legal Education: Interviewing Skills*, De Jure, 2018, (1):140-162. [Hereinafter Du Plessis IV]. See also Du Plessis III n50 supra.

⁵³ DiPippa J, *How Prospect Theory Can Improve Legal Counseling*, 24 U. Ark. Little Rock L. Rev. 81 (2001) at 83.

⁵⁴ Rosenthal DE, *Lawyer and Client: Who's in Charge?*, New York, Russell Sage, 1974. See also, Lauchland KA & Le Braun MJ, *Legal Interviewing: Theory, Tactics and Techniques*, Butterworths, 1996 at 26-28. See further, Du Plessis III n50 supra at 3-4.

⁵⁵ Lauchland & Le Braun n54 supra at 27.

⁵⁶ Ibid. See also Rosenthal n54 supra at 93 and Du Plessis III n50 supra at 4.

⁵⁷ Lauchland & Le Braun n54 supra at 27.

⁵⁸ Ibid.

⁵⁹ Lauchland & Le Braun n54 supra at 27.

applicable.⁶⁰ According to Lauchland and Le Braun, the participatory model is primed to give clients psychological reassurance and to continuously offer a vantage point from which the client can review and evaluate the work performed by the lawyer.⁶¹ The participatory model is the model preferred by writers in the field across the Americas, Australia and South Africa.⁶² Relying on the work of Binder, Bergman and Price,⁶³ Lauchland and Le Braun advocate that effective legal interviewing requires understanding and action.⁶⁴ Elaborating on action, the authors propose that this includes the ability to review, reflect, evaluate and learn from our experience.⁶⁵ It is submitted that these are the very same components of the metacognitive method described in the preceding chapter of this work and thus, the ability to cognate is essential to the task of interviewing and counseling. Elaborating on understanding, the authors suggest that the lawyer needs to be receptive, responsive, sensitive and capable of acknowledging the client's feelings, attitudes and ideas.⁶⁶ This aligns with the skill of emotional intelligence which will be discussed further below.

3.4.1.2 Rational Choice and Prospect Theory

Rational choice theory is a theory that presumes three things: first, that clients are rational, second, that a client will act rationally by choosing the path that leads to maximum utility and third, that lawyers can act professionally by basing their behaviour on the preceding assumptions.⁶⁷ When it comes to the course of action that a client is willing to pursue when being counseled, we presume that the client will use rational choice.⁶⁸ However, research seems to cast doubt on this theory because people do not always make rational decisions – real people use “perceptual shortcuts and cognitive end-runs” to suit their own needs.⁶⁹ The presumption of rational choice thus fails to account for the possibility that when clients are

⁶⁰ Du Plessis III n50 supra at 4.

⁶¹ Lauchland & Le Braun n54 supra at 28.

⁶² For the American perspective, see Salinas n33 supra at 21-23. For the Australian perspective, see Lauchland & Le Braun n54 supra at 29-34. For the South African perspective, see Du Plessis III n50 supra.

⁶³ Binder D & Price S, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977).

⁶⁴ Lauchland & Le Braun n54 supra at 33.

⁶⁵ Ibid.

⁶⁶ Lauchland & Le Braun n54 supra at 34.

⁶⁷ DiPippa n53 supra at 81. See also, Posner R, *Rational Choice, Behavioral Economics and the Law*, 50 Stan. L. Rev. 1551 (1998).

⁶⁸ Ibid.

⁶⁹ DiPippa n53 supra at 82. See also generally, Korobkin RB, *Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics*, 88 Calif. L. Rev. 1051 (2000). See also, Langevoort DC, *Behavioural Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499 (1998).

faced with uncertainty, they may become overly emotional or scared and thus, may not conform with rational behaviour.⁷⁰

For instance, a client might be motivated by revenge or by “the principle of the matter” and less so by the utility of the litigation. This is especially true of clients who are not required to pay for legal services such as in the clinical context or in those seeking free legal aid.⁷¹

Prospect theory tells us that peoples’ willingness to take risks are directly affected by whether they believe they are facing a potential loss or gain.⁷² Prospect theory also tells us that the decisions that a client will make are greatly influenced by the way in which their options are framed.⁷³ More specifically, clients will make decisions based on how lawyers frame the prospects of success in a matter, how the lawyer evaluates possible outcomes as well as the probabilities based on past experiences.⁷⁴ However, prospect theory cannot explain the actions of certain clients. For instance, many accused persons in criminal matters prefer to take plea bargains despite being innocent of the crime.⁷⁵ In most jurisdictions, accused persons are more likely to escape criminal liability than to be convicted due to the high onus of proof which rests on the State to prove guilt beyond a reasonable doubt.⁷⁶ However, when given the opportunity to take a plea bargain, accused persons tend to weigh up possible adverse consequences (a criminal record and punishment) versus the possibility of a greater adverse consequence (conviction at trial on the more serious charges).⁷⁷ Despite the very real possibility that the State would be unable to secure a conviction on the more serious charges, accused persons generally accept plea deals on lesser charges even if they know that they are not guilty of the offence. It is possible that the choice to accept such a plea deal lies in the way that criminal defence attorneys frame the accused’s options to them.⁷⁸

Based on the psychological implications of rational choice and prospect theory, it is proposed that legal counseling should be less ideological and more pragmatic since the options from which a client will ultimately choose their course of action are based on how they are

⁷⁰ DiPippa n53 supra at 82. See also, Rachlinski JJ, *The Uncertain Psychological Case for Paternalism*, 97 Nw. U. L. Rev. 1165 (2002-2003) at 1165.

⁷¹ For more on the nature of the client in the Clinical legal context, see De Klerk n27 supra at 97-99.

⁷² Sternlight & Robbennolt n9 supra at 527. See also, Sternlight & Robbennolt, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making*, American Bar Association, 2022 at 110-118. [Hereinafter Sternlight & Robbennolt *Psychology for Lawyers*]

⁷³ Ibid. See also Sternlight & Robbennolt n9 supra at 527-531. See also, Tversky A & Kahneman D, *Rational Choice and the Framing of Decisions*, 59, J. Bus. S251 (1986) at S274.

⁷⁴ Tversky & Kahneman n73 supra at S254.

⁷⁵ DiPippa n53 supra at 111. See also, Birke R, *Reconciling Loss Aversion and Guilty Pleas*, Utah L. Rev., 1999, 205 at 219. See also Rachlinski n70 supra at 1192.

⁷⁶ Snyman CR, *Criminal Law*, 7ed, LexisNexis, 2020 at 4-5.

⁷⁷ DiPippa n53 supra at 111.

⁷⁸ Ibid.

ultimately framed and presented. If a lawyer gives too little information about the merit of the matter and the value of the trial (or by framing the plea bargain in a manner which causes the accused to perceive more value in it than actually exists), the accused person may make adverse decisions.⁷⁹ Since a lawyer (especially a public defender) may be incentivised to encourage plea bargains due to the constraints that too many criminal trials may place on court processes (or on their own time), the way that lawyers frame their client's options may manifest themselves as information that distorts the accused's views of available alternatives.⁸⁰ As such, lawyers must always be careful that they are not manipulating a client by giving too much or too little information when framing their client's options.⁸¹ Lawyers who are aware of the psychological dynamics of choice and decision-making can minimise the negative effects of framing.⁸² It is proposed that students be taught and given the opportunity to practice what is termed "the cognitive error approach to counseling".⁸³ In this approach, the lawyer is required to assess whether the difference between his and the client's analysis of options is due to the client's cognitive error or whether it is a mere manifestation of a difference in utility functions between them.⁸⁴ If the difference is due to cognitive error, the lawyer has the duty to change or to reframe the client's outlook, but, if the difference is due to a clear preference based on a true understanding of both options, then the lawyer should avoid interference.⁸⁵ This is not to say that the lawyer should be taught to serve the function of a psychologist, but rather, "to steer a middle course between indiscriminately attempting to influence settlement decisions and indiscriminately avoiding such a role".⁸⁶

In the legal education context, the student should understand at the very beginning of their degree that in addition to diagnosing legal problems, their work will likely entail having to diagnose and improve their client's decision-making efforts as well.⁸⁷ A further discussion on framing in this context will follow later under the psychological implications on decision-making.

⁷⁹ DiPippa n53 supra at 111.

⁸⁰ Birke n75 supra at 247-248.

⁸¹ Ibid. See also Tversky & Kahneman n73 supra at S252-S253.

⁸² DiPippa n53 supra at 1113.

⁸³ Korobkin R & Guthrie C, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 Tex. L. Rev. 77 (1997) at 130 [hereinafter Korobkin II]. See also, Korobkin n69 supra at 1054.

⁸⁴ Korobkin II n83 supra at 130.

⁸⁵ Ibid.

⁸⁶ Korobkin II n83 supra at 136.

⁸⁷ DiPippa n53 supra at 115. Relying on the work of Janis I, *Short Term Counseling* (1983).

3.4.1.3 Paternalism vs Client-Centered Counseling

As alluded to above, prevailing schools of thought regarding legal counseling favour the client-centered or autonomous approach over the more traditional paternalism approach to legal counseling.⁸⁸ By way of reminder, the client-centered approach to counseling requires a client to make self-directed decisions based on an impartial explanation of applicable law by the lawyer.⁸⁹ The approach highlights the importance of listening to the client and treating them like a person as opposed to a mere legal problem, it requires one to reflect on social justice and the related values of dignity and equality and emphasises awareness of the effects of race, class and gender.⁹⁰ The imperatives associated with the client-centered approach are in line with metacognitive thinking as elaborated upon in the previous chapter. In contrast, the paternalistic approach favours the client delegating significant decision-making power over to the lawyer.⁹¹ Having discussed the implication of framing in prospect theory (above), it is important to elaborate on how framing might impact the approach that a student takes to counseling.

Very few students enter clinical experiences or leave undergraduate study even having contemplated that there might be varying approaches on how to counsel clients – most students in final year clinical programmes focus on what the client wants even if what the client wants is not rationally connected to what a client could legally get.⁹² The difference between the two approaches is relevant to the way in which a lawyer orders the material that they present to their client and the manner in which they present viable options (as discussed under prospect theory above). Spiegel agrees that psychological research suggests that lawyers greatly influence the decisions which their clients make by the way that their options are presented.⁹³ Some commentators go as far as to say that legal counseling is akin to a benevolent form of manipulation in that it seeks to “guide another’s thoughts or actions in a direction desired by the person guiding”.⁹⁴ It would appear that the only difference between manipulation in the

⁸⁸ O’Leary K, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. Cooley J. Prac. & Clinical L. (2001) 103 at 107-108. See also, Salinas n33 supra at 21-23. Lauchland & Le Braun n54 supra at 29-34 and Du Plessis III n50 supra. Also see, Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School*, Australian National University Press, 2017 at 110. [Hereafter Australian Best Practices].

⁸⁹ Ibid.

⁹⁰ Australian Best Practices n88 supra at 110.

⁹¹ Ibid at 308.

⁹² Similar sentiments are shared by Du Plessis IV n53 supra and De Klerk n27 supra.

⁹³ Spiegel M, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, Brigham Young University Law review (1997), 307-338 at 308. See also Korobkin II n83 supra at 130-136 and DiPippa n53 supra at 111-115.

⁹⁴ Ellman S, *Manipulation by Client and Context: A Response to Professor Morris Reply*, UCLA L. Rev., Vol 23, (1987) 1003 at 1004. For a broader discussion on what a client wants and expects from the client-lawyer relationship see Relis T, *Civil Litigation from Litigants’ Perspectives: What We Know and What We Don’t Know about the Litigation Experience of Individual Litigants*, 25 Stud. L. Pol. & Soc’y 151 (2002). From the Criminal

colloquial sense of the word and the legal counseling context, is a difference in motive – an ethical lawyer is motivated to do no harm and frames options accordingly.⁹⁵

In general, students seldom understand the power that they wield over a client's decision-making processes, nor do they realise that they create and therefore must manage the expectations of clients throughout the litigation process.⁹⁶ I propose that whilst client-centered approaches to counseling are laudible and can effectively be employed by experienced lawyers and litigators, students in the early stages of their careers should be encouraged to first develop a paternalistic approach to legal counseling. As stated above, paternalism can be defined as the substitution of one person's judgment for another's for the benefit of that latter person.⁹⁷ To do so, a student must be truly attuned to what is in the best interests of the client, even when the client might not be.⁹⁸ If psychological research reflects that people are generally incapable of making good choices (due at least in part to the problems with rational choice and prospect theory discussed above), then it would appear that cognitive psychology supports constraint on individual choice.⁹⁹ What is called for from psychologically astute lawyers is what can be termed paternalistic intervention.¹⁰⁰

The average student is reluctant to substitute their own judgment for that of their client due to the student's relative inexperience and self-doubt pertaining to their own knowledge.¹⁰¹ As such, the student does not comprehend the importance of the responsibility placed on their shoulders and often, such a student creates false hope in clients by using the more client centred approach to legal counselling by simply going along with what the client thinks is best.¹⁰² It is proposed that the student should be primed towards "refined paternalism" early on in their career (in a second- or third-year course on psychology *within* the law). The goal with refined paternalism is to "work for the choice that seems most consistent with the paternalist's understanding of who the client is".¹⁰³ Students can role-play as lawyers; each being given an opportunity to interview and to intuit what the student playing the client wants versus what is

law perspective, see Zacharias F, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice*, 44 Vand. L. Rev. 45 (1991).

⁹⁵ Singer J & Rakoff T, *Problem Solving for First-Year Law Students*, Elton L. Rev., Vol. 7, (2015) 413 at 414-415.

⁹⁶ Sternlight & Robbennolt n9 supra at 527-531. See also, Tversky n73 at S274.

⁹⁷ Spiegel n93 supra at 315.

⁹⁸ Ibid at 316.

⁹⁹ Rachlinski n70 supra at 1166.

¹⁰⁰ Ibid at 1168.

¹⁰¹ Du Plessis n50 supra at 149-151.

¹⁰² Ibid.

¹⁰³ Spiegel n93 supra at 319. See also Simon WH, *Lawyer Advice and Client Autonomy: Mrs. Jones' Case*, 50 MD. L. Rev., (1980), 307.

actually in their best interests. Since the refined paternalism approach can be criticised for basing client's needs on a lawyer's misplaced intuition of what the client wants,¹⁰⁴ students could be primed to gather relevant information during the initial interview which seeks to identify the broader concerns, motivations and desires of their client instead of assumptions based on facts which go solely to the technical legal issues at play. Once broader concerns are identified, students could interview each other again and present options that the reasonable client would want to hear and then adjust those options as they learn more about the client.¹⁰⁵ With experience, the student will be less afraid to manipulate responses if full disclosure of information would prevent the client from making a sound and rational decision.¹⁰⁶ Based on the above refined understanding of paternalism and how it influences effective counseling, a student can begin to form their own conception of responsibility, duty and accountability for the advice that they will dispense and the options that they will frame for future clients. The main hypothesis here is that the two approaches to counselling are not mutually exclusive. Arguably, this refined paternalism approach can develop into a more client-centered approach by the time that the student enters their clinical programme. The hypothesis is that to be effective at client-centered counseling, the student should first be a good paternalist thinker. It is only then that they can effectively guide their client away from some of the perceptual pitfalls discussed later in this chapter. The student might even vary or alternate their approach based on the kind of client that they are faced with. Perhaps most important of all, it is important that the student is explicitly taught that no matter the counseling model they employ (paternalist or client-centered), the starting point or default position that they frame to their client matters significantly.¹⁰⁷ The starting point is crucial not only because one's psychology or orientation influences behaviour but also because starting points or base-lines determine behaviour when we are not sure what to do.¹⁰⁸ Students could benefit greatly from reflection and deliberation on whether lawyers *should* influence clients, under what conditions they should do so and in what situations we should become concerned with such influence.¹⁰⁹ Ideally, this type of contemplation should come before the students embark on roles as counselors during their final year clinical experiences.

¹⁰⁴ Spiegel n93 supra at 318-319.

¹⁰⁵ Ibid at 327.

¹⁰⁶ Spiegel n93 supra at 329.

¹⁰⁷ Spiegel n93 supra at 332.

¹⁰⁸ Ibid.

¹⁰⁹ Spiegel n93 supra at 336.

3.4.1.4 Personality Type

The discussion of the effect of personality type on interviewing in this chapter is prefaced by the assumption that there are two main objectives of legal interviewing, (1) building and maintaining good rapport and (2) soliciting complete and accurate information.¹¹⁰ Students often fail to realise that during the interviewing process, they themselves will have to make decisions about the kinds of questions to use, which information to pursue or discard and how to organize their line of enquiry to maximise the utility of the exchange between themselves and their client.¹¹¹ For the sake of context on how personality type is relevant to interviewing, we will further assume that there are three basic stages in the interviewing process.¹¹² First, there is the preliminary problem identification – this is the narrative response on the general nature of the problem and how the client would like to see it resolved;¹¹³ second is the chronological overview – this is a step-by-step description of the relevant facts;¹¹⁴ third, we have theory development and verification – this is a mental review of the problem and systematically testing the viability of certain legal theories to the problem.¹¹⁵

3.4.1.4.1 The Myers-Briggs Type Personality Indicator

As stated in the previous chapter, Jung came up with the general theories of psychological type which describe the ways in which people differ in their approaches to information acquisition.¹¹⁶ The work of Briggs and Myers used Jung's original research on type theory to construct what is now known as the Myers-Briggs type indicator (MBTI).¹¹⁷ The MBTI can be used to the benefit of students in the legal education setting in two ways: (1) to improve individual interviewing and negotiation skills and, (2) to develop collaborative working skills.¹¹⁸ Psychological type theory proposes that everyone develops preferences regarding the

¹¹⁰ Peters D & Peters M, *Maybe That's Why I Do That: Psychological Type Theory, The Myers-Briggs Type Indicator and Learning Legal Interviewing*, 35 N. Y. L. Sch. L. Rev. (1990) 169 at 171.

¹¹¹ Ibid.

¹¹² Binder & Price n63 supra at 38-52. Du Plessis III n50 supra follows a similar approach in Chapters 6, 8 and 9. See also, Lauchland & Le Braun n54 supra at Chapter 4, 6-9. See also Salinas n33 supra at Chapters 14-16.

¹¹³ Ibid Binder at 53, 59-72.

¹¹⁴ Binder & Price n63 supra at 53-54, 72-85.

¹¹⁵ Binder & Price n63 supra at 54, 85-92.

¹¹⁶ Jung C, *Psychological Types*, Princeton university Press, 1971 (originally published in 1923).

¹¹⁷ Peters D & Peters M n110 supra at 173-174. For more on the role of the Myers-Briggs Type Indicator (MBTI) on law school teaching see Boyle, R, *Teaching Law Students through Individual Learning Styles*, 62 Alb. Law. Rev. 213 (1998-1999). Lustbader P, *Teach in Context: Responding to Diverse Voices Helps All Students Learn*, 48 J. Legal Educ. 402 (1998).

¹¹⁸ Ibid Peters at 174. For a discussion on how the MBTI can influence the skill of negotiation, see Peters D, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 Drake L. Rev. 1 (1993).

way they use their own perception and judgment.¹¹⁹ The MBTI contains four separate bi-polar indexes to reflect one of four basic preferences which will affect the use of perception, judgment and decision-making.¹²⁰

Between the four basic indexes, a person could fall into one of sixteen possible personality types. Awareness of these preferences is a useful tool for students to self-regulate their responses to each other and their future clients. Lecturers or clinicians could also use these preferences to group students into firms or pairs chosen to maximize the utility of pre-existing psychological preferences during simulations or live-client consultations. The four basic indexes can be summarised as follows:

(1) Sensing versus Intuiting (S – N)

If a person has a preference for sensing (S), this will signal a primary reliance on specific concrete details.¹²¹ A sensor would be practical and fact-orientated when collecting data.¹²² In contrast, an intuitive preference (N) would focus on patterns, meanings, and possibilities when gathering information.¹²³ Persons oriented this way would enjoy abstract, symbolic and theoretical uses of data.¹²⁴

In the context of interviewing, a student with an intuitive personality type (N) might rely less on the specific facts relevant to the client and more on whether a similar course of action worked successfully in a similar matter. A student attuned more to the sensing (S) personality type would determine merit more on the specific facts relevant to the client's case. Understanding these indexes (or personality types) is relevant to the interviewing process because a student with the (S) orientation would be likely to ask more questions in an interview. They would ask directed as opposed to open-ended questions and they would be less prone to assign meaning to the facts elicited from the client. The (N) oriented student would probably ask fewer directed questions and more open-ended questions,¹²⁵ they would assign meaning to the patterns arising from the facts given or from facts of other similar cases.

(2) Judging versus Perceiving (J – P)

¹¹⁹ Peters D & Peters M n110 supra at 175. Also see Fines BG, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 Washburn L.J. 313 (2007-2008).

¹²⁰ Ibid. Also see Boyle and Lustbader n112 supra.

¹²¹ Peters D & Peters M n110 supra at 176.

¹²² Ibid.

¹²³ Peters D & Peters M n110 supra at 176.

¹²⁴ Ibid.

¹²⁵ For a discussion on the value of open-ended questions, see Salinas n33 supra at 169-172. Du Plessis III n50 supra at 50-52 and Lauchland & Le Braun n54 supra at 95-96.

This index deals with attitudes to decision making.¹²⁶ A judging attitude (J) would indicate a preference towards planning, goal setting and seeking closure.¹²⁷ A perceiving attitude (P) would enjoy a more unstructured and flexible approach, they would be more prone to receiving new information and postponing or restructuring decisions based on newly available data.¹²⁸ Such a person prefers a fluid and spontaneous approach to decision making.¹²⁹

In the context of interviewing, students attuned to the perceptive attitude (P) are well paired¹³⁰ with those who employ the judging attitude (J) during consultations as the former will be structured by the latter's concern for orienting, structuring and planning.

(3) Thinking versus Feeling (T – F)

Thinkers decide impersonally based on logical consequences, analysing and weighing of facts sequentially.¹³¹ Those oriented towards feeling, base their judgment primarily on personal or social values, they prefer attending to what matters to others as opposed to the technicality of the problem.¹³²

According to Salinas, successful interviewing results in reflecting back the client's factual content and the emotional context of their problem.¹³³ As such, it is imperative that a student who is only attuned to thinking (T) be paired with a student who operates under the feeling (F) index so that the two students might learn from and complement each other's approaches to interviewing. Salinas proposes that when students are more attuned to thinking versus feeling, what is helpful is to share a list of abstract feelings with them which they might practice to use when mirroring back their client's perspective.¹³⁴ These feelings might include confusion, outrage, intimidation, betrayal, frustration, embarrassment as well as optimism, confidence, relief, acceptance determination (the list is not exhaustive).¹³⁵ Exercises in getting

¹²⁶ Peters D & Peters M n110 supra at 177.

¹²⁷ Ibid.

¹²⁸ Peters D & Peters M n110 supra at 177.

¹²⁹ Peters D & Peters M n110 supra at 177.

¹³⁰ For a discussion on the benefits of pairing specifically and student collaboration in Clinical Legal Education more broadly, see Chavkin DF, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 Clinical L. Rev. 199 (1994). See also Zimmerman CS, *Thinking Beyond My Own Interpretation: Reflections on Collaborative Learning Theory in the Law School Curriculum*, 31 Ariz. St. L.J. 957 (1999). For a discussion on how working in pairs could explicitly build student knowledge, see Bryant S, *Rounds: A Signature Pedagogy for Clinical Education*, 14 Clinical L. rev. 195 (2007-2008).

¹³¹ Peters D & Peters M n110 supra at 176.

¹³² Ibid.

¹³³ Salinas n33 supra at 179.

¹³⁴ Ibid at 181.

¹³⁵ Salinas n33 supra at 181-182.

students to identify these emotions in others may go some way in building emotional intelligence (elaborated on further below).

(4) Extroversion versus Introversion (E – I)

Extroverts prefer active involvement with people, tend to be action oriented and leap into tasks with little planning.¹³⁶ Introverts are persons who look inwards, they require careful planning and introspection before making decisions.¹³⁷

Whilst students attuned to extroversion (E) are the obvious choices to take an active role in the interviewing process, students attuned more to introversion (I) are more likely to empathise with clients. The importance of empathy to the lawyering enterprise was introduced at the beginning of this chapter¹³⁸ and will be elaborated on further in the context of emotional intelligence below.

The MBTI has been criticised as having limited application in that it does too much stereotyping with too little validity or scientific backing.¹³⁹ The MBTI perpetuates stereotypes due to “(1) the the polarity of its scales, (2) the common terminology used to define its scales, (3) the multiplicity of characteristics for each personality type, and (4) the oversimplified designation of personality type.¹⁴⁰ The bipolarity of the scales (or indexes) contributes to stereotyping as it suggests that, for each word describing a preference, a negative opposite term exists.¹⁴¹ On the issue of terminology, since we generally give words their ordinary meanings, the MBTI’s wording contributes to stereotyping when it results in misinterpretations of what the preferences actually represent.¹⁴² The characteristics for each preference further contribute to stereotyping when a person’s preference results in attributing characteristics to the person that he or she may not actually possess.¹⁴³ Lastly, the MBTI’s oversimplification of personality type contributes to stereotyping systemically as well as individually.¹⁴⁴ Regarding validity, whilst Jung’s research supports the personality characteristics, no research seems to support

¹³⁶ Ibid at 177.

¹³⁷ Peters D & Peters M n110 supra at 177.

¹³⁸ Salinas n33 supra at 91.

¹³⁹ Jacobson S, *Using the Meyers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype*, Willamette Law Review, vol. 33, no. 2, Spring 1997, 261-314 at 270.

¹⁴⁰ Ibid at 271-278.

¹⁴¹ Jacobson n139 supra at 279.

¹⁴² Ibid.

¹⁴³ Jacobson n139 supra at 279.

¹⁴⁴ Ibid.

the existence of the sixteen personality types.¹⁴⁵ On the point of reliability, to be reliable, one would expect the results of an MBTI personality test to be consistent from one test to another. However, test-retest data seems to show varied results even when the retest interval is very short.

Whilst the criticisms of the MBTI are noted, the over-arching purpose of making students aware of the MBTI (and perhaps even by making them take an online personality test) would be to encourage them to identify their own preferences or inclinations and thus, to better understand their habitual choices and actions. The purpose would be self-evaluation and the influence that individual preferences might have on learning and practicing law.¹⁴⁶

Each person uses both aspects of each of the above bi-polar indexes, but personality type theory posits that an individual responds first or most often with the preferred attitude.¹⁴⁷ This is true only if an individual *chooses* to follow or respond with that preference.¹⁴⁸ The ability to manipulate or to match one's own responses to a particular client, opponent or judge is crucial in successful lawyering. In the interviewing context, knowledge of one's own personality type may help students to identify their behavioural tendencies and to modify them when the need arises based on the client's problem and context. It may also be a good idea for students to rely on different preferences depending on the phase of the interview. For instance, at the initial stage, an intuitive approach may be appropriate to build rapport and to empathise with the client but at the chronological overview stage, that tendency may well impede the consultation. Where students, working in pairs are required to interview clients, it may be a good idea to pair a student with introverted tendencies with one who has extroverted tendencies to ensure that a client can relate to at least one of the interviewers. This does not mean that the introverted student's skills would be ignored. Type theory suggests that due to the introvert's natural orientation towards introspection and planning, introverts will be better organisers.¹⁴⁹ The extroverted personality type who has the tendency to act first and think later will be well paired with an organiser because left to their own devices, the extrovert may ask too many unnecessary or irrelevant questions.¹⁵⁰ As such, there is the potential for students to build on

¹⁴⁵ Jacobson n139 supra at 280-290.

¹⁴⁶ For more on the relevance of the MBTI to legal pedagogy see, Peters D & Peters M, *Using Psychological Type Theory to Help Law Students Develop Professional Identity*, Regent University Law Review, vol. 27, no.2, 2014-2015, 255-302 and Gilchrist BJ, *The Myers-Briggs Type Indicator as a Tool for Clinical Legal Education*, St. Louis University Public Law Review, vol. 10, no. 2, 1991, 601-614.

¹⁴⁷ Salinas n33 supra at 178.

¹⁴⁸ Peters D & Peters M n110 supra at 177.

¹⁴⁹ Ibid at 185.

¹⁵⁰ Peters D & Peters M n110 supra at 185.

one another's knowledge.¹⁵¹ Even where a student interviews a client alone, applying type theory to interviewing can increase awareness of and appreciation for the complexity of accurate information transfer, especially since there is likely to be type difference between the student interviewer and the client.¹⁵² Type theory could serve as a fun tool to teach students the differences in how humans acquire, perceive and use information. Students may find this knowledge a valuable vehicle for self-awareness, it may identify proclivities in students which they may actively self-direct during their future clinical experiences. Counseling clients invariably involves acting as a teacher.¹⁵³ As such, the vast majority of the literature on learning canvassed in Chapter 2 of this work is also relevant to counseling. Because people learn in different ways, effective teachers generally use multiple methods to convey their messages.¹⁵⁴ Thus, whilst most lawyers may rely predominantly on oral communication skills within the interviewing and counseling exercise, the psychologically attuned lawyer will know to use and factor in the implications of prospect theory, rational choice, approaches to counseling and personality theory as discussed above to regulate their counseling behaviour in the most meaningful manner.

3.4.2 Psychological insights relevant to emotional intelligence

3.4.2.1 Transference

It is important for students to recognise that emotional intelligence which includes strong emotional reactions (both positive and negative) affect the lawyering process.¹⁵⁵ Law students like to think of themselves as completely rational and unfeeling but misplaced emotions of transference and countertransference have a greater impact on lawyering than most students realise.¹⁵⁶ Transference was first introduced by Sigmund Freud in the context of psychoanalysis but he observed that the phenomenon was not limited to psychoanalysis and in fact, manifested in all human relationships.¹⁵⁷ Freud explained transference as the direction of emotions by the patient (often affection mingled with hostility) on the therapist which emotions

¹⁵¹ Bryant n125 supra at 196-197.

¹⁵² Peters D & Peters M n110 supra at 197.

¹⁵³ Sternlight & Robbennolt n9 supra at 548.

¹⁵⁴ Ibid.

¹⁵⁵ Silver M, *Love, Hate and other Emotional Interference in the Lawyer/Client Relationship*, 6 Clin. L. Rev. 259 (1999) at 260. See also Salinas n33 supra at 179.

¹⁵⁶ Ibid Silver at 261.

¹⁵⁷ Freud S, *Five Lectures on Psycho-Analysis, Leonardo da Vinci, and Other Works, Fifth Lecture*, in XI The Standard Edition of the Complete Psychological Works of Sigmund Freud, 51, (James Stachey ed., 1957) (1910) at 51-52.

were not based on any tangible relation between the patient and the therapist.¹⁵⁸ Countertransference is a phenomena where the therapist directs such emotions onto the patient – essentially, it is a therapist’s response to transference.¹⁵⁹ Freud urged therapists to identify and resist the urge to act on transference.¹⁶⁰ In the legal interviewing context (or in lawyering in general), transference would include all the reactions stimulated by the lawyer’s involvement as well as some unreal and distorted impressions derived from the lawyer’s experiences (both legal and emotional).¹⁶¹ Essentially transference and counter transference both relate to how human beings use unconscious purposes to relate to one another.¹⁶²

Most students enter clinical programmes or leave law school without any structured protocol for addressing transference or countertransference.¹⁶³ This phenomenon is especially important to cross-cultural learning which, according to Bryant, takes place in the cognitive, behavioural and emotional spheres.¹⁶⁴ Bryant proposes that on the cognitive plane, we need to help students establish knowledge and awareness of cultural differences including the dynamics of prejudice and oppression.¹⁶⁵ On the behavioural plane, we need to encourage students to evaluate the skills they have or still need to acquire in order to be competent in cross-cultural lawyering.¹⁶⁶ On the emotional plane, we need to encourage students to assess their motivations to learn and identify any possible resistance to change in order to fully prepare students for to cross-cultural learning.¹⁶⁷ Bryant also proposes that to develop the emotional intelligence and competence required for cross-cultural lawyering, that students practice five habits as follows:¹⁶⁸

(1) Habit One: Degrees of Separation and Connection

Students should be trained to analyse the significance of the similarities and differences between themselves and their clients in order to better inform the process of gathering of information from their client.¹⁶⁹

¹⁵⁸ Ibid.

¹⁵⁹ Silver n155 supra at 263.

¹⁶⁰ Ibid. See also Freud n103 supra.

¹⁶¹ Watson A, *The Lawyer in the Interviewing and Counseling Process*, (1976) at 23-24.

¹⁶² Silver n155 supra at 265, her note 28. See also Stein H, *The Psychodynamics of Medical Practice: Unconscious Factors in Patient Care*, 3ed., (1985).

¹⁶³ Silver n155 supra at 272.

¹⁶⁴ Bryant S, *The Five Habits: Building Cross Cultural Competence in Lawyers*, 8 Clinical L. Rev (2001) 33-107 at 48.

¹⁶⁵ Ibid.

¹⁶⁶ Bryant n164 supra at 48.

¹⁶⁷ Ibid.

¹⁶⁸ Bryant n164 supra at 64-78.

¹⁶⁹ Ibid at 64.

(2) Habit Two: The Three Rings

Here, students are encouraged to identify and analyse the possible effects that the similarities and differences between the student, their client and the decision-maker (the three rings) may have.¹⁷⁰ Here, the student is contextualising what effect the differences or similarities might have on the ultimate outcome of the case.¹⁷¹

(3) Habit Three: Parallel Universes

The third habit teaches students to explore alternative explanations for their client's motivations and behaviours within the client's and the student's own cultural framework.¹⁷²

(4) Habit Four: Pitfalls, Red Flags and Remedies

Whereas the first three habits focus on incorporating cross-cultural knowledge, habit four focuses on cross-cultural communication.¹⁷³ In this habit, students must focus on any red flags during the interview that might show the conveyance of inaccurate or disingenuous information transfer.¹⁷⁴ This habit is also intended to teach students to manage the expectations of their clients.¹⁷⁵

(5) Habit Five: The Camel's Back

This habit requires students to explore themselves as a cultural being.¹⁷⁶ This habit is intended to have students realise that they themselves are prone to cultural blinders, biases and stereotypes.¹⁷⁷ The point of this habit is to recognise this in oneself and to prevent it from affecting the client-lawyer relationship in a manner that reaches the proverbial last straw that broke the camel's back (or breaking point).¹⁷⁸

Students who do not have undergraduate degrees in psychology would likely never have come across the concepts of transference or bias (discussed below) and thus, would not be able to recognise it in themselves or others.¹⁷⁹ It is proposed that students must be given the tools to develop some awareness of the unconscious behavioural impulses which might affect their

¹⁷⁰ Bryant n164 supra at 68.

¹⁷¹ Ibid.

¹⁷² Bryant n164 supra at 70.

¹⁷³ Bryant n164 supra at 72.

¹⁷⁴ Ibid.

¹⁷⁵ Bryant n164 supra at 77.

¹⁷⁶ Ibid.

¹⁷⁷ Bryant n164 supra at 77.

¹⁷⁸ Ibid at 78.

¹⁷⁹ For more on how bias affects students in the clinical context and the ways in which bias can be avoided, see Bryant n164 supra at 57-63 and 77-78.

interaction with clients during their undergraduate legal studies,¹⁸⁰ that is, before they begin dealing with clients in their clinical experiences. This is especially important in a cross-cultural society. Emotional responses are triggered in virtually all human encounters – the goal for the educator should be to encourage students to recognise them and to analyse how, if at all, these emotional responses may affect the client-lawyer relationship.¹⁸¹

In her article “*Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship*.”¹⁸² Silver gives an example of how love and hate transference affects an attorney’s ability to properly diagnose and treat client problems.¹⁸³ In her example, Adam, a 50-year-old lawyer whose marriage is on the rocks and whose 14-year-old son has effeminate tendencies (much to Adam’s disappointment) consults with two clients. Both clients are charged with felony drug charges. Client A is guilty and client B is not. Client A is a young woman who treats Adam with awe. Adam finds himself attracted to client A and enjoys her company. She vehemently denies her guilt to Adam. When a plea bargain is offered, Adam puts it to A but advises her that her case is strong enough to go to trial. Placing her trust in Adam, A goes to trial and is convicted and sentenced. Client B is the same age and has been charged with the same offence as A. Adam finds Client B annoying and obsequious due to his effeminate affect. Client B claims he was framed but Adam’s prejudice makes him believe that this is unlikely. When a plea deal is offered to B, Adam pushes the deal strongly on B and does not delve too deeply into the possibility that B was framed. He informs B that his odds are not good. Afraid of the consequences, B agrees to the plea bargain which involves minor jail time despite his innocence.

This example evidences that we cannot remain intolerant to the role of psychology and the role of phenomena like transference and countertransference in how students will practice their craft. Unfortunately, the disposition with which most law students enter law school and the training they receive throughout law school reinforces the disinclination to be aware of the power and influence that their and their client’s emotions may have on the litigation process.¹⁸⁴

If Adam was trained to recognise and acknowledge countertransference reactions within himself, he may have been better equipped to counsel his clients. The awareness of

¹⁸⁰ Silver n155 supra at 275.

¹⁸¹ Ibid at 276. For the value of emotional psychology in legal education generally, see Silver MA, *Emotional Intelligence and Legal Education*, 5 Psychol. Pub. Pol’y & L. 1173 (1999) [Hereinafter Silver II]. For the role that emotions play in judges and adjudicators, see Maroney TA, *Emotional Regulation and Judicial Behaviour*, 99 Calif. L. Rev. 1485 (2011).

¹⁸² Silver n155 supra at 272.

¹⁸³ Silver n155 supra at 277. Bryant gives similar examples. See Bryant n164 supra at 64-78.

¹⁸⁴ Ibid at 281.

psychological forces, personality makeup and human motivation makes it more likely that one can accurately perceive (or diagnose) the nature and extent of a client's problem and thus formulate a more responsive strategy.¹⁸⁵ That knowledge is the same thing that allows a student to recognise what is going on in their own mind and how their feelings or bias could affect their own handling of a case.¹⁸⁶ Ultimately, self-awareness which can be said to be a component part of emotional intelligence is as essential to effective lawyering as the knowledge of the law. Wolberg, a psychotherapist, designed several questions that a student could ask themselves to elicit evidence of countertransference.¹⁸⁷ The questions cited to elicit evidence of countertransference are:

- “1. How do I feel about the client?
2. Do I anticipate the client?
3. Do I ever over identify with, or feel sorry for, the client?
4. Do I feel any resentment or jealousy toward the client?
5. Do I get extreme pleasure out of seeing the client?
6. Do I feel bored with the client?
7. Am I fearful of the client?
8. Do I want to protect, reject, or punish the client?
9. Am I impressed by the client?”¹⁸⁸

The goal of such an exercise would be to make the unconscious conscious in order to recognise that a potential problem exists and how it could be counteracted. If any of these questions elicits an affirmative response, we might ask “Why?”¹⁸⁹ Even if a specific reason is not self-evident, it is proposed that the recognition that a problem exists in our emotional response may be enough to take control of the problem.¹⁹⁰ For instance, a student who identifies that he is experiencing “love countertransference” could pretend to be the client's adversary to test the veracity of the version given by the client so as to avoid the pitfalls inherent in the countertransference phenomena. One might argue that the skill of self-awareness inherent in emotional intelligence should have commenced early in one's psychological development, perhaps even as a child.¹⁹¹ It is proposed however, that it is never too late to begin to recognise

¹⁸⁵ Silver n155 supra at 288. See also Bastress R & Harbaugh J, *Interviewing, Counseling and Negotiating*. (1990) at 26.

¹⁸⁶ Ibid.

¹⁸⁷ Bastress & Harbaugh n171 supra at 297. See also Bastress & Harbaugh citing Wolberg L, *The Technique of Psychotherapy*, (1954) at 309.

¹⁸⁸ Ibid.

¹⁸⁹ Silver n155 supra at 297.

¹⁹⁰ Ibid at 298.

¹⁹¹ Silver n155 supra at 305.

and resolving psychological sore spots.¹⁹² In particular, in the context of cross-cultural lawyering skills, it is imperative that students be trained to make judgments on the facts rather than stereotypes and bias.¹⁹³ This is important because the meaning we attribute to a client's words and behaviour cannot be based on ethnocentric interpretations caused by differing world views between the lawyer and the client.¹⁹⁴ The goal with cross-cultural lawyering is to make isomorphic attributions which refers to the ability to attribute the meaning that a person actually intended to convey.¹⁹⁵ To be able to attribute meaning correctly, Bryant argues that students need to be able "to imagine multiple possible meanings for behaviours and to be flexible and adaptable" [*sic*].¹⁹⁶ I propose that in order to do this, students must be explicitly trained in phenomena such as transference which may build on their emotional intelligence. Materials on transference¹⁹⁷ and simulations on this type of phenomena can easily be used in a course on psychology *within* the law to expose students to it, in order to elicit more mature emotional responses in their future clinical experiences. Tully puts it aptly when she states that culturally responsive lawyering is grounded in deliberative processes which extend further than the mere performance of skills, it acknowledges that culture and law exist in a mutually constitutive relationship and employs skills such as transformative legal analysis and intercultural sensitivity to meet the requirement of competent lawyering.¹⁹⁸

3.4.2.2 Framing

It has been proposed elsewhere in this chapter¹⁹⁹ that the decisions clients make are greatly influenced by the way their options are framed.²⁰⁰ I am of the view that the ability to accurately and meaningfully frame options for clients is largely dependent on the lawyers' acute awareness of their own emotions and feelings and how emotions influence them and their

¹⁹² Ibid.

¹⁹³ Bryant n164 supra at 56.

¹⁹⁴ Ibid.

¹⁹⁵ Bryant n164 supra at 56.

¹⁹⁶ Ibid.

¹⁹⁷ Andrew S Watson published numerous articles and two books for a legal audience spanning a twenty-year period commencing in 1958. His work explored psychotherapeutic insights to legal education and the practice of law. He repeatedly urged legal educators to incorporate basic psychiatric tenets (including countertransference) into mainstream legal education. For his work, see Watson A, *The Lawyer in the Interviewing and Counseling Process*, (1976) and Watson A, *Psychiatry for Lawyers*, 4ed, (1978). Also see Bryant n164 supra at 42-45 for the perils of transference or over-identification with clients.

¹⁹⁸ Tully DL, *The Cultural (Re)Turn : The Case for Teaching Culturally Responsive Lawyering*, 16 Stan. J. C. R. & C. L. 201 (2020) at 201.

¹⁹⁹ See the discussion on prospect theory and paternalism in the context of counseling and interviewing supra at 3.4.1.2 on pg73-78 of this thesis.

²⁰⁰ DiPippa n53 supra at 82. See also, Posner R, *Rational Choice, Behavioral Economics and the Law*, 50 Stan. L. Rev. 1551 (1998). See also Sternlight & Robbennolt n9 supra at 527-531. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 110-119.

clients (emotional intelligence). It is suggested that we fail our students if we do not adequately prepare them for the impact of their emotional lives, and those of their clients on the practice of lawyering.²⁰¹ The literature based on the Myers-Briggs assessments (discussed earlier in this chapter) suggest a sort of personality dichotomy in that lawyers tend to think of themselves as thinkers rather than feelers.²⁰² The separation between thinking and feeling is largely influenced by the misconception that the two are mutually exclusive: that the former relies on objective logic while the latter relies on that which is subjective and personal.²⁰³ However, thinking and feeling are not mutually exclusive, to the contrary, rational decision-making is actually dependent on emotional input.²⁰⁴

It is my contention that emotions are directly linked to prospect theory (discussed above). As stated above, prospect theory tells us that peoples' willingness to take risks are directly affected by how their options are framed and whether they believe they are facing a potential loss or gain.²⁰⁵ I contend that emotions have a lot to do with whether one perceives themselves to be losing or gaining. Because emotions are highly manipulable, so are people's views of losses and gains. The first implication of this is "endowment effect", a phenomenon in which people may demand more to give up something that they already possess or feel strongly about.²⁰⁶ This phenomenon can be seen in people selling homes in which they have grown up and to which they attach emotional and personal value – such a seller is likely to overestimate a reasonable selling price. Secondly, the phenomenon known as "status *quo* bias" results in people valuing the status *quo* over other options because the downsides of change looms larger on a person's emotional well-being as opposed to any potential (but yet unknown) gains.²⁰⁷ For instance, the administrative burden and accompanying stress of changing insurance providers might result in a person choosing to remain with a provider who charges higher premiums. A third implication is "option devaluation", a phenomenon which occurs when people find a particular option less attractive when it is presented amongst other options versus that same option when it is presented on its own.²⁰⁸ For example, a ten-year-old vehicle

²⁰¹ Silver II n181 supra at 1174.

²⁰² Ibid at 1180.

²⁰³ Silver II n181 supra at 1180-1181.

²⁰⁴ Silver II n181 supra at 1181. See also Demasio A, *Descartes Error: Emotion, Reason and the Human Brain*, Harper Perennial, 1994 (cited by Silver).

²⁰⁵ Sternlight & Robbennolt n9 supra at 527. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 110-119.

²⁰⁶ Ibid at 528.

²⁰⁷ Sternlight & Robbennolt n9 supra at 529. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at Chapter 3.

²⁰⁸ Ibid.

may not seem like a good buy until or unless it is shown in comparison to newer vehicles but which have accumulated far greater mileage. In a civil suit, a settlement of R50 000 when one has lost R100 000 does not seem like a good idea but in the context of precedent indicating that the client is likely to lose the case altogether if they do not settle, the option of settlement becomes more attractive.

The emotional significance of all three phenomena is that people are predisposed to emotional bias and a lawyer who is aware of his own and the bias of others is better primed to navigate through such bias and prevent its negative effects.

3.4.2.3 Inculcating emotional intelligence in the classroom

Since lawyers spend far more time interacting with people than they do reading and arguing cases, it is proposed that training lawyers to understand their own emotional needs as well as those of their clients is imperative.²⁰⁹ A case has already been made out for how important emotional intelligence is to cross-cultural lawyering and to counseling in general in the preceding paragraphs. Most of us would want to be assisted by a medical professional who can understand our pain and alleviate our anxiety and our clients want no less of us.²¹⁰ The crucial question is, how can we teach self-awareness or emotional intelligence to law students?

Although ideally, law students should enter law school already equipped with a grounding in psychology (either through prior study or basic life experience), the reality is that most modern law students have no such preparation.²¹¹ Since many law students in the South African context enter law school without having undergone any undergraduate study at all, law schools will inevitably have to compensate. I submit that the solution to this problem is the subject matter of this work. An undergraduate course on psychology *within* the law in which we can ensure exposure for our students, to the psychology affecting basic legal practice and the acquisition of lawyering skills. The course content, design and placement within our already overburdened curriculum will be discussed in Chapters 4 and 5 but the over-arching premise is that emotional intelligence can be cultivated if its instruction is pervasive.²¹² A student should know very early in their law school experience that understanding basic

²⁰⁹ Silver n155 supra at 284. See also Griswold E, *Law Schools and Human Relations*, 37 Chi. B. Record 199, 201, (1956) at 202-204. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 110-119.

²¹⁰ Silver n155 supra at 306. See also Salinas n33 supra at 91-92 on the importance of distinguishing empathy from sympathy when dealing with clients.

²¹¹ Silver n155 supra at 308.

²¹² Ibid at 310. See also Salisbury J, *Emotional Intelligence in Law Practice*, Advocate Idaho State Bar, Vol.53, Issue 1 (2010), 38-41. See further: James CL, *Exploring Changes in the Emotional Intelligence of Law Students*, Legal Educ. Rev., Vol. 28, Issue 1, (2018), 1-18.

psychological principles is as crucial to the practice of law as is understanding the legal processes and principles that underpin it.²¹³ In Chapter 5 (on various aspects of course design and content), I will show how simulations, the use of recordings and subsequent critiques of recorded performances (as well as other methods of problem-based learning) could inculcate the necessary psychological skills which aim to improve emotional intelligence, amongst other competencies. For example, simulated clients could be used to reveal manifestations of countertransference,²¹⁴ or, scenes from movies evidencing the phenomenon could be used to establish strategies for its successful resolution. The MacCrate Report²¹⁵ states that a good lawyer “is respectful of human dignity, and is committed to social justice, fairness, equality and other values of the professional community.”²¹⁶ Further, that the good lawyer should possess “professional qualities that include integrity, honesty, trustworthiness, compassion and faithfulness... Although dedicated to truth, the good lawyer is tolerant of ambiguity and diverse points of view, and has a capacity for empathy and imagination that allows for the complexity of social relations and a wide range of human activities, behaviours, motivations and interests.”²¹⁷ This is echoed by Australians in their Best Practices²¹⁸ where Evans et al state the importance of reflecting on social justice values such as dignity and the right to equality.²¹⁹ By identifying the characteristics or attributes that we hope our graduates will possess upon leaving law school, we can see that emotional intelligence (especially compassion and empathy) are implicit.²²⁰

In the South African context, it has been said that, in addition to the need to produce critical thinkers and intellectuals, law faculties need to inculcate in students an acute awareness of law, not merely as a technical science and a set of rigid rules, but also as a system for resolution and reconciliation of conflicting social and economic interests for the fulfillment of needs, desires and aspirations of the people and communities that make up our society.²²¹ We

²¹³ Silver n155 supra at 310.

²¹⁴ Ibid at 311.

²¹⁵ MacCrate R, American Bar Association, Section of Legal Education and Admissions to the Bar (July 1992) Report of The Task Force on Law Schools and the Profession: Narrowing the Gap [hereinafter the *MacCrate Report*]. So called in recognition of Robert MacCrate, Chair of the task force that produced the report.

²¹⁶ MacCrate Report n215 supra at 7.

²¹⁷ Ibid at 7-8.

²¹⁸ Australian Best Practices n88 supra at 109.

²¹⁹ Ibid.

²²⁰ Silver II n181 supra at 1198. See also MacCrate Report n215 at 7 and Australian Best Practices n88 supra at 109.

²²¹ Van Marle K & Modiri J, *What Does Changing the World Entail? Law, Critique and Legal Education in the Time of post-apartheid* (2012) 129 SALJ 210. The authors draw on the earlier work of Dennis Davis in Davis D, *Legal education in South Africa: A re-examination* (1978) 95 SALJ 424.

have been warned that if we do not change our approach to the pedagogy of law, then institutions will run the risk of “producing technicians without ethics, products without politics, graduates without values, publications without commitments, materials without meaning, enterprise without community, change without transformation”.²²² To take a more practical approach, law is only significant in relation to the underlying human problems that it is able to solve.²²³ It is proposed that legal education can only be truly relevant if it produces law students who are equipped with transferable intellectual skills that they can then use in socially constructive endeavours.²²⁴ Such endeavours continue to have emotional intelligence at their core and the significance of this trait or skill cannot be overstated.

3.4.3 Psychological insights relevant to advocacy (including problem-solving)

When a rule of law tells us that someone has a particular legal right and a concomitant legal remedy, the remedy is generally achieved through litigation (although this is not the only way in which lawyers solve problems).²²⁵ Students often assume that the existence of a legal remedy automatically results in the solving of a client’s legal problem.²²⁶ The reality is that law (and its remedies) should be seen as tools for problem-solving rather than the mechanism which will secure the required result.²²⁷ Many obstacles exist in the course of advocacy and the problem-solving endeavour that is inherent in it – much of these obstacles are psychological. What follows is an explanation of some identifiable obstacles to effective advocacy and problem-solving as well as some proposals on how a psychologically astute student might overcome these obstacles.

3.4.3.1 Change Blindness and Inattentional Blindness

Inattentional blindness is a psychological lack of attention that is not associated with vision deficits and usually occurs when unexpected stimuli is introduced to the observer.²²⁸ Change blindness on the other hand, is a perceptual phenomenon that occurs when a change in visual

²²² Jansen J, *Why Tukkies Cannot Develop Intellectuals*, Innovation Lecture Series, University of Pretoria, 11 May 2001 at 5.

²²³ Gravett W, *Pericles Should Learn to Fix a Leaky Pipe - Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 1)* PER 2018 (1) 23 at 23.

²²⁴ Gravett n223 supra at 24.

²²⁵ Singer & Rakoff n95 supra at 416.

²²⁶ Ibid at 417.

²²⁷ Singer & Rakoff n95 supra at 417.

²²⁸ Simons D & Chabris C, *Gorillas in our Midst: Sustained Inattentional Blindness for Dynamic Events* Perception, Vol. 28 (1999) 1059-1074.

stimuli is introduced but the observer does not notice it.²²⁹ When a person's attention is otherwise engaged (like in the ways discussed in the preceding chapter), people may fail to notice even substantial and relevant changes in their environment. In the most famous study on the topic,²³⁰ participants were asked to watch two teams of players passing a ball to one another and to keep count of the players' passes.²³¹ When the participants' attention was focused in this manner, nearly half of them failed to notice when a person in a gorilla costume or a person with an open umbrella walked through the game.²³² In another study,²³³ people engaged in conversation (asking for directions) which was interrupted as two people carrying a door passed between them.²³⁴ Many participants in the study failed to notice that they were talking to a different person when the conversation resumed.²³⁵ Understanding these limits on human attention can help students to understand why there might be gaps in witness testimony or their own client's knowledge of relevant facts or why they themselves display significant lapses in attention during their studies.²³⁶

In the context of advocacy, the errors in metacognition described above have serious implications as they may cause decision makers to mis-weigh evidence and misallocate responsibility.²³⁷ The practical implication of this is that in criminal or delictual matters where negligence is required to establish liability, an accused or defendant may be found negligent for failing to detect stimuli that the ordinary, reasonable person would not have foreseen.²³⁸ Negligence requires an enquiry into whether a reasonable person would have foreseen harm (or an unlawful consequence), whether the reasonable person would have taken steps to guard against it and to what extent the defendant or accused failed to act as a reasonable man would have.²³⁹ People generally overestimate their ability to accurately detect visual stimuli in a variety of contexts.²⁴⁰ As such, judges, witnesses or even the accused or defendant themselves

²²⁹ Jaeger C & Levin D, *Justice is (Change) Blind: Applying Research on Visual Metacognition in Legal Settings* (2017). See also Sammon N & Bogue J, *The Impact of Attention on Eyewitness Identification and Change Blindness* (2015) *Journal of European Psychology Students* 6(2) 95-103. Fitzgerald R, Oriet, C, & Price H, (2016) *Change blindness and eyewitness identification: Effects on accuracy and confidence* *Legal and Criminological Psychology*, 21, 189-201. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 2-4.

²³⁰ Simons and Chabris n228 supra.

²³¹ Simon & Chabris n228 supra at 1060.

²³² Ibid at 1068.

²³³ Simons D & Levin D, *Failure to Detect Changes to People in a Real-World Interaction*, 5 *Psychonomic Bull. & Rev.* 644 (1998) at 644.

²³⁴ Simons & Levin n233 supra at 644.

²³⁵ Ibid.

²³⁶ Sternlight & Robbennolt n9 supra at 451.

²³⁷ Jaeger & Levin n229 supra at 1.

²³⁸ Ibid at 3.

²³⁹ Snyman n76 supra at 183.

²⁴⁰ Jaeger & Levin n229 supra at 1.

might conclude that the accused (or defendant) “should have foreseen” a stimulus that a reasonable person would not actually have perceived. The problem is compounded by two factors, first, that judges will typically have information about the stimulus which is putative (thus increasing the possibility of cognitive error) and second, without knowledge in the contrast between *beliefs* about perception and *actual* perception, judges may fail to appreciate the utility of expert testimony in such cases.²⁴¹

“Tractor-trailer underide” cases provide a good practical example of the legal implications of visual metacognitive errors.²⁴² In such cases, a truck slides out of control on the highway and comes to rest with the trailer part of it blocking one or more lanes of oncoming traffic.²⁴³ Drivers who subsequently approach the scene often hit the truck head-on resulting in a fatal accident. In many cases, the defendant’s car produces no skid marks, which indicates that the driver did not notice the trailer before hitting it.²⁴⁴ Litigation of such cases generally revolves around whether the driver who hit the trailer must have been impaired, asleep, or not inattentive enough (negligent) to have missed such a large object in front of it.²⁴⁵ A conclusion of negligence on the part of the driver in such instances usually rests on the Judges, or in the US context, on the juror’s psychology – they tend to consider the visual signals provided to the driver (such as the size of the trailer, the reflectors on it, and in some cases, the headlights shining back up the highway) as indicators of negligence.²⁴⁶ If decision-makers believe that ordinary visual attention allows more complete perception and awareness than it actually does, they will misallocate responsibility to the driver when, in fact, the driver may have fallen victim to the phenomena explained that most reasonable people are actually prone to.²⁴⁷ An understanding of inattentional and change blindness might allow future decision-makers to accept that even when a person visually sees a given stimulus, they do not always readily detect it.²⁴⁸ Exposure to this phenomena is crucial to advocacy in both criminal and delictual (tort) cases.

²⁴¹ Ibid at 13.

²⁴² Jaeger & Levin n229 supra at 13-14. See also Rachlinski J, *Misunderstanding Ability, Misallocating Responsibility*. Brooklyn Law Review, 68, (2003), 1055-1091.

²⁴³ Ibid.

²⁴⁴ Jaeger & Levin n229 supra at 14.

²⁴⁵ Ibid. For a specific case example, see the American case of *Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450 (Miss. 2010).

²⁴⁶ Jaeger & Levin n229 supra at 14.

²⁴⁷ Ibid.

²⁴⁸ Jaeger & Levin n229 supra at 14.

3.4.3.2 Preconception and Confirmatory Bias

In Chapter 2 of this work, the reader was introduced to schemata (basic knowledge structures) that define expectations about how the world operates. We use these schemes of pre-existing knowledge to fill in gaps or to make inferences and judgments.²⁴⁹ For example, if we are told that a person who went to a restaurant got up when they realised that they had forgotten their glasses in the car, we infer that the person had difficulty reading the menu even if this detail was not specifically recounted.²⁵⁰ In this instance, the schema created a preconception. Because schemas do not always accurately reflect the facts (for instance, the person in the example could have decided to fetch the glasses due to fear of theft and not because they could not read the menu), they may lead us to incorrect assumptions or preconceptions.²⁵¹ Preconceptions can influence how information is labeled, interpreted and the extent to which it is scrutinised.²⁵² Perceptions might affect a number of situations related to advocacy, for instance, a lawyer might assume that the client's main goal is litigation and maximum compensation but the client may actually have been willing to settle on less compensation subject to an apology. A witness might describe an accused as "intelligent" which might lead the defence attorney to argue that the accused was sensible and logical while the witness may have intended to convey that the accused was being cunning or dishonest in the way that they went about their business.²⁵³ In the context of contract law, a contracting party might overestimate the likelihood that the other contracting party will perform the terms of their contract due to reliance on the assumption that people generally tend to abide by contracts – thus, they might underestimate the risk of non-performance when drafting their cancellation clause.²⁵⁴ Conversely, one's own incorrect assumptions about their own ability to perform a contract may result in agreement on clauses which expand their liability for non-performance.²⁵⁵

²⁴⁹ Sternlight & Robbennolt n9 supra at 452. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 6-11. See also Reiman P & Chi M, *Human Expertise in Human and Machine Problem Solving* (1989) K. J. Gilhooly 161 at 172. For more on schemata see Friedland S, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, (1996-1997) 20 Seattle University Law Review 1, 5. Burgess H, *Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning* 29 Quinnipiac Law Review Vol. 29 (2011)

²⁵⁰ Sternlight & Robbennolt n9 supra at 38.

²⁵¹ Ibid at 452.

²⁵² Sternlight & Robbennolt n9 supra at 452. See also Australian Best Practices n88 supra at 110. See also Bryant n164 at 226. See also Rachlinski n70 supra at 1169-1172.

²⁵³ Sternlight & Robbennolt n9 supra at 453.

²⁵⁴ Rachlinski n70 supra at 1178-1179.

²⁵⁵ Ibid at 1179.

Psychology also tells us that people tend to exhibit confirmatory bias in the way that they seek out and evaluate information.²⁵⁶ This happens when people unconsciously seek out information that confirms their pre-existing views and tend to disregard conflicting information.²⁵⁷ When assessing information, there is also a tendency to accept information consistent with the attitudes or expectations of the receiver – a phenomenon known as biased assimilation.²⁵⁸ For example, in one study, participants were asked to scrutinise and review a police docket and to make decisions about further investigation.²⁵⁹ When participants were asked to name a suspect from the available evidence, participants demonstrated confirmatory bias by including additional investigatory information which was not available in the docket yet.²⁶⁰ Those asked to name a suspect were more able to remember evidence consistent with the named suspect's guilt or to reject evidence inconsistent with that suspect's guilt than those who were not asked to name a suspect.²⁶¹

This bears on advocacy in that both witnesses and interrogators might become the object of confirmatory bias. Whilst lawyers have expertise in quickly integrating large amounts of information about the facts of their client's case and the law relevant to it, this same expertise may lead lawyers to a course of action which seeks to confirm assumptions rather than to disconfirm them.²⁶² The main problem that confronts the professional is that they might "fill in the gaps" with related information from other similar cases or experiences or leap ahead to anticipate information that may not actually be involved in the case at hand.²⁶³ An understanding of how schemata create preconceptions, misconceptions, cognitive errors²⁶⁴ or confirmatory bias, might train future lawyers to ask better questions and to elicit better evidence during the advocacy process. One strategy already discussed in the context of

²⁵⁶ Sternlight & Robbennolt n9 supra at 453. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 9-11.

²⁵⁷ Sternlight & Robbennolt n9 supra at 454. See also Nickerson R, *Confirmatory Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol., (1998), 175.

²⁵⁸ Sternlight & Robbennolt n9 supra at 454. See also Lord C et al, *Biased Assimilation and Attitude Polarisation: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol., (1979) 2098.

²⁵⁹ Sternlight & Robbennolt n9 supra at 454 relying on an unpublished study of O'Brien B & Ellsworth P, *Confirmation Bias in Criminal Investigations*, September 2006.

²⁶⁰ Ibid.

²⁶¹ Sternlight & Robbennolt n9 supra at 454 relying on an unpublished study of O'Brien B & Ellsworth P, *Confirmation Bias in Criminal Investigations*, September 2006.

²⁶² Ibid at 455.

²⁶³ Sternlight & Robbennolt n9 supra at 455 relying on an unpublished study of O'Brien B & Ellsworth P, *Confirmation Bias in Criminal Investigations*, September 2006. See also Cochran et al, *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling*, (1999) at 39 and Heller M et al, *An Introduction to Legal Interviewing and Counseling*, (1960) at 11.

²⁶⁴ For a fuller discussion on how cognitive errors are performed in the market in relation to contract, financial decision making, health and safety, excess litigation and property rights, see Rachlinksy n70 supra at 1178-1195.

interviewing above, is to “consider the opposite”.²⁶⁵ That is, to consciously reflect on alternative possibilities, to assume that one’s preconceptions are erroneous and to seek out disconfirming evidence.²⁶⁶

3.4.3.3 Causal attribution error

In psychology, attribution theory is the study of the ways in which people make attributions of causation or responsibility.²⁶⁷ People have a tendency to designate blame when they perceive the cause to be internal and capable of control by the actor.²⁶⁸ This is known as attribution error or correspondence bias.²⁶⁹ For instance, people might attribute the views contained in a speech to its speaker – if a female speaker presents on gay rights, members of the audience might attribute homosexuality to her, even though the speaker is heterosexual.²⁷⁰ People might also attribute legal or political views to others even when they know that the person was specifically assigned to give a talk on a position with which they actually disagree.²⁷¹

In the lawyering context, a judge is more likely to assume guilt or recalcitrancy on the part of an accused who is rude, aggressive or defensive as opposed to an accused who is mild-mannered and polite.

Psychology also shows that people tend to view the causality of their own acts differently to those of others – a phenomenon known as “actor-observer effect”.²⁷² When people evaluate other people’s acts, they tend to attribute behaviour to dispositional factors (such as inherent aggression or recalcitrance described above) but when evaluating their own acts, people tend to attribute the cause of their behaviour to situational factors (such as running late or having been disappointed by another).²⁷³ Knowledge related to how people think of and attribute causation can help students in advocacy in that it can teach them to look at facts

²⁶⁵ Lord C et al, *Considering the Opposite: A Cognitive Strategy for Social Judgment*, 47, J. Personality & Soc. Psychol., (1984) 1231.

²⁶⁶ Sternlight & Robbennolt n9 supra at 457. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 12-15.

²⁶⁷ Sternlight & Robbennolt n9 supra at 461. See also Jones E, *Interpersonal Perception*, (1990) at 138-166; Kelley H, *The Process of Causal Attribution*, 28 AM. Psychologist, (1973) at 107.

²⁶⁸ Ibid Sternlight & Robbennolt at 461. See also Weiner B, *Judgments of Responsibility: A Foundation for a Theory of Social Conduct*, 5 (1995) at 6-12.

²⁶⁹ Sternlight & Robbennolt n9 supra at 462.

²⁷⁰ Ibid.

²⁷¹ Sternlight & Robbennolt n9 supra at 462.

²⁷² Ibid.

²⁷³ Sternlight & Robbennolt n9 supra at 462. See also Jones E & Nisbett R, *The Actor and the Observer: Divergent Perceptions of the Causes of Behaviour*, in *Attribution: Perceiving the Causes of Behaviour* (1972) at 123.

differently and thus allow them to assess the strengths and weaknesses of their future cases more accurately.²⁷⁴

3.4.3.1 Naïve realism

Above, we have seen how people construct realities based on what they have paid attention to and as a “function of how they construe data via their schemas and expectations”.²⁷⁵ Due to these expectations, people often fail to make adequate inferential allowance for the fact that others may construe the same situation very differently.²⁷⁶ This phenomenon is called “naïve realism” and results in the feeling that one’s own take on the world is the most authentic and that other people will share that view of the world.²⁷⁷ Those affected by the phenomenon assume that those who see the world differently to them are not reasonable or they lack adequate information or are biased in some other way.²⁷⁸

The implications of this on advocacy are two-fold, first, people tend to overestimate the degree to which others share their views or perspectives (this is called the false consensus effect),²⁷⁹ and second, when conveying information, people overestimate that the receiver will interpret or recall the information correctly.²⁸⁰ For instance, senders of emails notoriously overestimate the degree to which they are able to convey tone, humour or emotions to its recipients.²⁸¹ Likewise, lawyers often misconstrue their own ability to accurately persuade neutral third-parties of the merits of their client’s position.²⁸² In the litigation context, a plaintiff in a personal injury matter will tend to overestimate the causative role of the manufacturer of a product which caused them injury.²⁸³ Doctrinal study will however tell us that liability in such cases is usually based on whether the manufacturer was actually obligated to prevent the

²⁷⁴ Ibid Sternlight & Robbennolt at 463.

²⁷⁵ Sternlight & Robbennolt n9 supra at 463.

²⁷⁶ Ross L & Nisbett R, *The Person and the Situation: Perspectives of Social Psychology*, 76, (1991) at 12.

²⁷⁷ Sternlight & Robbennolt n9 supra at 463-464. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 16-18. See also Pronin E et al, *Understanding Misunderstanding: Social Psychological Perspectives, in Heuristics and Biases: The Psychology of Intuitive Judgment*, (Gilovich T et al. eds., 2002) at 646 and Ross L & Ward A, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *Values and Knowledge*, 103, (Reed E et al eds., 1996) at 110-111.

²⁷⁸ Ibid at 464. See also Ross & Ward n262 supra at 88.

²⁷⁹ Sternlight & Robbennolt n9 supra at 464. See also Pronin et al n262 supra at 642 and Ross L et al, *The False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. Personality & Soc. Psychol., (1977), 279.

²⁸⁰ Ibid Sternlight & Robbennolt at 463.

²⁸¹ Kruger J et al, *Egocentrism Over Email: Can We Communicate as Well as We Think?* 89 J. Personality & Soc. Psychol. 925, (2005) at 926.

²⁸² Sternlight & Robbennolt n9 supra at 465.

²⁸³ Ibid.

product from causing harm or whether the product caused harm because it was manufactured incorrectly.²⁸⁴ Naïve realism also prevents a client from realising that their own negligent use of the product may have played a greater causal role in their resulting harm. Thus, creating cognitive assurances against naïve realism in oneself and others is crucial to addressing the potential negative effects of this phenomena on advocacy and practice.

3.4.4 Psychological insights relevant to analysis and legal reasoning (including decision-making)

3.4.4.1 Heuristics

People take cognitive shortcuts to make decisions, these mental shortcuts are known as heuristics.²⁸⁵ For example, when crossing the street, we might estimate a car's speed and distance from us in order to decide whether to cross the road at that moment, we would express discomfort and register surprise if the car came closer than expected or sooner than expected.²⁸⁶ Heuristics (or these cognitive shortcuts) are not always conscious but they help us to make decisions every day.²⁸⁷ People generally assume that they make important decisions rationally by thinking everything through and taking no shortcuts but research indicates to the contrary.²⁸⁸ Empirical work suggests that we can improve our ability to make decisions and judgments if we are conscious of our cognitive biases and practice correcting them.²⁸⁹ What follows are four examples of heuristics which impede legal reasoning and ultimate decision-making but which can be avoided if recognised during the reasoning process:

(1) Availability

²⁸⁴ Sternlight & Robbennolt n9 supra at 465.

²⁸⁵ Sternlight & Robbennolt n9 supra at 465. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 83-86. See also Weinstein I, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 8 Clinical L. Rev., 783 (2002) and Okpaluba C & Juma L, *The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa* Potchefstroom Electronic Law Journal 2011, Volume 14, Number 7, 14-36.

²⁸⁶ Weinstein n271 supra at 790.

²⁸⁷ Ibid at 791.

²⁸⁸ Weinstein n271 supra at 792. See also Korobkin II n83 supra at 77.

²⁸⁹ Ibid Weinstein at 792. See also a 1982 study summarising the results of 40 studies showing that there are techniques which may overcome or lessen the impact of bias. Fischhoff B, *Debiasing* in Kahneman et al., *Judgment Under Uncertainty: Heuristics and Biases* (1982) at 422.

The availability phenomenon is premised on the idea that people often judge the likelihood of an event occurring by the ease with which they can remember similar events having occurred previously.²⁹⁰ Availability also affects judgments of causality (discussed above) because the more common an event, the more likely it will be thought to have a causal influence.²⁹¹ For example, people tend to believe that motor vehicle accidents cause more deaths annually than stomach cancer even though the opposite is true.²⁹² Lawyers who double check facts, statistical information and circumstantial evidence against concrete evidence are more likely to make well-reasoned arguments than those who are merely guided by gut feeling and instincts based on the availability phenomenon.²⁹³

(2) Anchoring

Anchoring is the phenomenon by which available or existing inputs provide a starting point (or anchor) for a future decision or judgment.²⁹⁴ Whilst adjustments can be made away from the anchor, often, the anchor is over-valued in the decision-making process.²⁹⁵ For example, in negotiation, the first offer has been shown to usually influence the negotiated outcomes.²⁹⁶ When asked to make numeric estimates, anchoring will result in individual's relying on known reference points and then adjusting from there.²⁹⁷ For example, students asked to estimate the price of a textbook provided much higher estimates when they were asked whether it cost more or less than \$7000.²⁹⁸ Despite rationalising that the book must cost much less than \$7000 (based on their experience of buying textbooks), those students who were given the benchmark estimated the book to cost far more than the students who were not given any benchmark.²⁹⁹

Furthermore, factors like the media, public perception or even one's own ego might create unwarranted anchoring trends which result in poor reasoning and decision-making. Lawyers

²⁹⁰ Sternlight & Robbennolt n9 supra at 466. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 88-89. See also Tversky & Kahneman, *Availability Heuristic for Judging Frequency and Probability* in Kahneman et al., *Judgment Under Uncertainty: Heuristics and Biases* (1982) at 163. See further, Rachlinksy n70 at 1170.

²⁹¹ Sternlight & Robbennolt n9 supra at 466. See also Ross et al n264 supra at 8.

²⁹² Ibid at 466.

²⁹³ Sternlight & Robbennolt n9 supra at 467.

²⁹⁴ Ibid. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 87-88. See also Tversky & Kahneman n290 supra at 14-18.

²⁹⁵ Sternlight & Robbennolt n9 supra at 467.

²⁹⁶ Ibid at 468. See also Korobkin R & Guthrie C, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 Ohio St. J. On Discip. Resol., 1, (1994).

²⁹⁷ Rachlinksy n70 supra at 1171.

²⁹⁸ Ibid.

²⁹⁹ Rachlinksy n70 supra at 1171. For a discussion on the specific study, see Plous S, *The Psychology of Judgment and Decision Making*, McGraw-Hill, 1ed, 1993 at 146.

who are aware of the perils of anchoring can employ better reasoning themselves and also, can avoid anchoring their clients to unreasonable expectations which might lead to poor decision-making. For instance, if a lawyer anchors his client to an unrealistic view of the merits of their case, the client is more likely to choose litigation even if the subsequent pitfalls of litigation were explained. This is because the anchor related to winning (good merits) will operate stronger than the possibility of losing.³⁰⁰

(3) Positive Illusions (Egocentric bias)

People tend to perceive the world as it relates to them in more positive terms than they might if they were being completely objective bystanders.³⁰¹ This phenomenon is also known as the self-serving bias and is characterised by overconfidence, overoptimism or egocentricity.³⁰² People tend to be overconfident in the forecasts that they make, thus failing to allow for uncertainty or lapses in their judgment.³⁰³ Even professional experts are prone to demonstrate overconfidence, for example, financial analysts are known to overestimate earnings.³⁰⁴ People also tend to have unrealistically positive views of themselves which makes them perceive themselves to be “better than average” in many things.³⁰⁵ For instance, research shows that most people estimate themselves to be above average drivers even though statistically that cannot be true.³⁰⁶ This is a result overoptimism.³⁰⁷ Research also suggests that probability estimates by most people are poorly calibrated – this is a result of overconfidence.³⁰⁸ People also tend to overestimate their contributions to any given conversation – this, a result of egocentrism.³⁰⁹

As lawyers, we often see people make judgments about events in ways that are consistent with their own interests, for example, in marital disputes, one spouse might overestimate their

³⁰⁰ Sternlight & Robbennolt n9 supra at 468.

³⁰¹ Sternlight & Robbennolt n9 supra at 468. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 83-86. See also Taylor S, *Positive Illusions: Creative Self-Deception and the Healthy Mind*, 1989 and Taylor S & and Brown J, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 Psychol. Bull. 193, (1988).

³⁰² Rachlinksy n70 supra at 1172.

³⁰³ Sternlight & Robbennolt n9 supra at 469.

³⁰⁴ Ibid at 470.

³⁰⁵ Sternlight & Robbennolt n9 supra at 470. See also Rachlinksy n70 supra at 1172.

³⁰⁶ Sternlight & Robbennolt n9 supra at 470. See also Svenson O, *Are We Less Risky and More Skillful Than Our Fellow Drivers?* 47 Acta Psychologica, (1981), 143.

³⁰⁷ Rachlinksy n70 supra at 1172.

³⁰⁸ Ibid. See also Koehler DJ, *Hypothesis Generation and Confidence in Judgment*, 20 J. Experimental Psychol.: Learning, Memory and Cognition, 461 (1994) who reviews overconfidence in judgment.

³⁰⁹ Rachlinksy n70 supra at 1172. See also Ross et al n264 supra at 324 (discussing egocentric bias in joint activities.)

contributions to the joint estate.³¹⁰ This phenomenon can also be seen in sports games, where fans from opposing teams make self-serving judgments and evaluations about the fairness and conduct of the opposing team.³¹¹ Self-serving bias affects reasoning and decision-making in significant ways. For instance, judges are prone to estimate that their colleagues have higher judgment reversal rates on appeal than they do, clients and their representatives make biased estimates of fair settlement values in civil cases as well as unreasonable predictions about what a neutral decision-maker might award in the circumstances.³¹² Understanding that such bias exists in the first place is the first step to recognising and adjusting it in oneself and others.

(4) Affect Heuristic

Judgment and reasoning may also be hindered by a phenomenon known as “affect heuristic”.³¹³ People tend to make judgments based on the overall impressions that they make using their feelings and emotions.³¹⁴ For instance, a person may rely on their general feelings towards issues such as nuclear power or 5G technology to make judgments about the risks and benefits of the objects which utilise them.³¹⁵ A person’s general feelings towards religion or political affiliation might affect their views on divorce or abortion. Lawyers, their clients or opponents might use their general feelings to influence their courses of action – for instance, a person with the propensity to “do something” about a perceived wrong is more likely to choose litigation as a course of action as compared to someone who has the tendency to sit back.³¹⁶ A person who feels strong negative emotions in situations of conflict due to a volatile home environment might choose settlement of a matter over someone who views backing down as a weakness. If a lawyer can attune his own feelings and emotions and/or positively direct those of the people he deals with, he may help them and himself to employ better reasoning and decision-making skills.

³¹⁰ Sternlight & Robbennolt n9 supra at 470.

³¹¹ Ibid at 471.

³¹² Sternlight & Robbennolt n9 supra at 471.

³¹³ Sternlight & Robbennolt n9 supra at 472. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 92-93. See also Finucane M, *The Affect Heuristic in Judgments of Risks and Benefits*, 13, J. Behav. Decision Making, (2000), 1.

³¹⁴ Sternlight & Robbennolt n9 supra at 473.

³¹⁵ Ibid.

³¹⁶ Sternlight & Robbennolt n9 supra at 473.

3.4.5 Psychological insights relevant to morality and professional identity (including professional responsibility and ethics)

Lawyering as a profession is regulated. In the South Africa context, the Legal Practice Council (LPC),³¹⁷ regulates the affairs of and exercises jurisdiction over all legal practitioners.³¹⁸ Learning a code of conduct which pertains to ethical practice does not necessarily lead to ethical practice.³¹⁹ Robert Coles put it aptly when he said that:

“Moral life is not to be confused with tests meant to measure certain kinds of abstract (moral) thinking, or with tests that give people a chance to offer hypothetical responses to made-up scenarios. We never quite know what will happen in this life; nor do we know how an event will connect with ourselves.”³²⁰

Inevitably, professional identity begins with what we study (or practice) in law school.³²¹ At the University of the Witwatersrand, students in their third year of study are expected to complete a compulsory course called “Ethics and Law: Theory and Practice.”³²² The syllabus description presents the course as a self-standing subject of the study of ethics as it shapes the law.³²³ The course claims to engage a number of schools of thought including the African construct of Ubuntu, utilitarianism, deontology, African humanism, black consciousness, feminist ethics, neo-Aristotelianism, relational ethics, development theory and the capabilities approach.³²⁴ Based on the above description, the course seems to overemphasise the theoretical underpinnings of ethics in favour of its implications on practice. Whilst most authors agree that law school courses cannot possibly have much impact on the ethical and professional responsibility attributes of students who developed their character, professional responsibility and ethical convictions outside of the law school during their formative years, ethical practice

³¹⁷ The Legal Practice Council (LPC) is a national body established in terms of section 4 of the Legal Practice Act 28 of 2014. The LPC and its provincial councils regulates the affairs of and exercises jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners.

³¹⁸ Preamble of Act 28 of 2014.

³¹⁹ Lerner A, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, Quinnipiac L. Rev., Vol 23, 643 (2004) at 650.

³²⁰ Coles R, *Moral Life of Children*, 29, Boston Atlantic Monthly Press, (1986).

³²¹ Lerner n319 supra at 654.

³²² The 2023 Syllabuses for the Faculty of Commerce, Law and Management at 314-315. The document can be accessed at:

<https://www.wits.ac.za/media/wits-university/students/academic-matters/2023%20Commerce%20Law%20Management%20Rules%20and%20Syllabuses-Final.pdf>

Accessed on 10.09.2023.

³²³ Ibid.

³²⁴ The 2023 Syllabuses for the Faculty of Commerce, Law and Management n322 supra at 314.

can indeed be taught by the experiential method.³²⁵ It is my hypothesis (and this will be elaborated upon in the course design chapters of this work) that the experiential method does need to be limited to the students' experiences in a clinical programme. The pertinent question in this section is whether social psychology and cognitive science could assist us to begin to inculcate professional responsibility and ethics in students in the early parts of their degree (before they enter an experiential or clinical programme). My hypothesis is that a course on psychology *within* the law (in the second or third year of study) would be well suited to prime students for a more meaningful experience in the third year ethics course and the subsequent fourth year clinical experience.

How do we prime students to be ethical? In law school, students are primed to learn principles, statutes and regulations and to memorise court opinions in order to build arguments which support their client's case.³²⁶ The neural networks form patterns of explicit and implicit memory that are repeatedly reinforced when students follow precedent or analyse why it does not apply.³²⁷ Thus, traditional doctrinal study primes students to look at predetermined sources such as precedents and Socratic dialogue during class discussions as well as exam preparation continuously reinforce these types of memories.³²⁸ The perils of methodology based solely on Socratic and Langdellian methods were discussed in detail in Chapter 2 of this work. When a legal problem is instrumentalist (how to accomplish a client's goal), the explicit and implicit knowledge garnered in doctrinal study stands out to students and drawing on these memories will generally produce adequate results.³²⁹ However, when the legal problem posed is not *how* to do something but rather *whether* to do it – when problems involve values or relationships among people, including ethical considerations, neither the explicit nor the implicit knowledge learned in doctrinal courses is of much help.³³⁰ On the assumption that students enter law school without ever having fully considered issues of ethics and professional responsibility as

³²⁵ Lerner n319 supra at 657. See also Frenkel D, *On Trying to Teach Judgment*, 12 LEGAL EDUC. REV. 19 (2001) (sharing his experience of teaching professional responsibility to students through the use of real world dilemmas that evoke student responses on both an intellectual and emotional levels); Myers E, *Teaching Good and Teaching Well: Integrating Values with Theory and Practice*, 47 J. LEGAL ED. 401 (1997); Hartwell S, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 522-528, 532-535 (1995) (discussing his experience of teaching a professional responsibility course centered on student group interaction and collaboration and how that rather than teacher led discussions improved the students' moral reasoning); Luban D & Millemann M, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995) (discussing how incorporating a legal ethics course within a clinic where students met weekly to discuss specific ethical issues arising in their clinical work was helpful).

³²⁶ Lerner n319 supra at 681.

³²⁷ Ibid.

³²⁸ Lerner n319 supra at 681.

³²⁹ Ibid.

³³⁰ Lerner n319 supra at 682. See also Sternlight & Robbennolt *Psychology for Lawyers* n72 supra at 448-455.

a core duty of legal practice, the educator's goal should be to help them acquire the ability to act in an ethically responsible manner as early as possible.³³¹ Motivation has been identified as the key attitude change that can drive this process.³³² People are generally motivated by the need to affirm themselves as a good person.³³³ Self-affirmation can be achieved by changing one's attitude about one's own behaviour, either changing the behaviour so that it aligns with prior values, or, if these are absent, to change (or develop) one's values so that they relate to one's established behaviour.³³⁴ As long as Law Schools teach students to value effective legal arguments without regard to the moral and ethical considerations related to them, students will not be motivated to value embedding ethical and moral considerations in their professional behaviours as practitioners.³³⁵

A course on psychology *within* the law could concern itself with exercises which help students to isolate considerations of ethics, morality and social responsibility. For instance, students might be asked to question whether equality before the law really exists considering that discretion including criminal profiling (based on race or gender) often informs sentencing.³³⁶ Students might be asked to evaluate whether individual or private rights should be considered more or less important than the common good – for instance, is it fair that smokers are relegated to certain areas or denied entry to others; is it right to prevent transgender persons from enlisting in the army?³³⁷ Students might also be tasked with addressing the question of whether conflict resolution or truth lies at the heart of litigation.³³⁸ Whilst these issues may not directly address professional ethics, they help students to articulate legal problems more broadly than in the instrumentalist sense discussed above. All these issues require considerations of morality and social responsibility which are key to professional identity. The motivation to be competent commentators on problems that require broader thinking than merely the “how to” of the matter is the same motivation which might produce more ethical and professional practitioners. Another technique to foster astute professional responsibility could be by showing examples from history where the problems operated or were

³³¹ Ibid at 686.

³³² Lerner n319 supra at 686.

³³³ Ibid.

³³⁴ Lerner n319 supra at 686. See also Kunda Z, *Social Cognition, Making Sense of People*, 211, Mass. Inst. Of Tech., (1999) at 218-223 on research which supports that the motivation to believe that one is a good person drives changes in behaviour and attitude about one's behaviour.

³³⁵ Lerner n319 supra at 686.

³³⁶ Greene & Heilbrun n1 supra at 8-13.

³³⁷ Ibid at 5-8.

³³⁸ Greene & Heilbrun n1 supra at 13-15.

exposed.³³⁹ By using both good and bad examples (of ethical and unethical behaviour alike), we could teach students to recognise the emotional pressures created by professional situations. For instance, discourse pertaining to professional indemnity insurance cases could be used to make students aware of unethical behaviour and the psychological causes of it (for instance, stress, financial or reputational worry, cognitive overload etc.). This might allow students to recognise and reject unethical and unprofessional behaviour and to insist on pursuing the “right”, ethical or professionally responsible choices in their own future clinical experiences and practice.³⁴⁰

3.5 Conclusion

Most of the lawyering skills identified in this chapter have “problem-solving” at their core. The concept of problem-solving in cognitive science can be described as “a search through the web of possible paths from the current situation to the desired outcome through a problem space.”³⁴¹ Simon and Newell,³⁴² who are thought to be the fathers of the cognitive science theory, hypothesised that problem-solving consists of four stages; an ‘initial state’ (describing the starting state of affairs), a ‘goal state’ (describing the desired state of affairs), a set of ‘operators’ (describing the possible steps that can be taken to change the current state of affairs) and then a set of ‘path constraints’ (which may impose additional problems or conditions).³⁴³ All these components are thought to make up a ‘problem space’ through which any problem solver navigates and a solution is a sequence that leads from the initial state through a number of operators to the goal state in any given scenario.³⁴⁴ This chapter has identified the absence of instruction in basic cognitive science and legal psychology as a problem space that can be navigated by the introduction of a course on psychology *within* the law into the undergraduate legal curriculum. In contrast to courses in psychology already available in the humanities, such a course would speak specifically to the psychological phenomena and gains made by cognitive science to the skills required in effective lawyering which are ubiquitously absent in the modern law student. The purpose of this chapter was to link certain psychological phenomena to the

³³⁹ Lerner n319 supra at 691.

³⁴⁰ Lerner n319 supra at 691.

³⁴¹ Blasi G, *What Lawyers Know: Lawyering Wise, Cognitive Science and the Functions of Theory*, (1995) 45 *Journal of Legal Education* 313 at 331.

³⁴² Allen Newell was a computer scientist and researcher of cognitive psychology. Herbert A. Simon was an American political scientist, economist, sociologist and psychologist.

³⁴³ Blasi n341 supra at 333.

³⁴⁴ *Ibid.*

five categories of skills that are required of a good practitioner. The succeeding chapters will focus on course development to establish how students could be exposed to these phenomena in a manner that is pedagogically sound with a view to improving their lawyering competencies for future practice.

CHAPTER 4

PSYCHOLOGY *WITHIN* THE LAW: COURSE DESIGN PART I (VALUES, GOALS, OUTCOMES AND PLACEMENT IN THE LEGAL CURRICULUM)

4.1 Introduction.

Students entering law school tend to embark on their legal journeys conditioned that in the practice of law, reason reigns supreme and that emotions interfere with reason and thus detract from truth.¹ Life tends to condition us to the primacy of reason by favouring logic and reason in anecdotes such as “look before you leap”, “think before you speak” and to allow yourself to “sleep on it” whenever we make important decisions.² It is generally believed that reason solves problems and provides order to society while emotion overwhelms and causes us to act impulsively, thus causing disorder.³ The value of emotional intelligence and its influence on interviewing and counselling, cross-cultural lawyering and decision-making was already discussed in the preceding chapter. In this chapter, it is proposed that emotions and reason are not mutually exclusive, and both are relevant to consideration of course design and development.

The history of our distrust of emotions dates back to the days of Plato⁴ and Aristotle,⁵ but contemporary theories in cognitive psychology and behavioural neuroscience suggest that there is actually an inextricable link between reason and emotion.⁶ Drawing on the work of Damasio, Tiscione writes that reason and emotion work together, particularly in decision-

¹ Damasio AN, *Descartes Error: Emotion, Reason and the Human Brain* (1994) at xi. (In his book on how reason and emotions come together in the mind, Damasio recounts how he was conditioned, early in life, to believe that sound decisions came from a cool head and that emotions and reason mixed like oil and water. He subsequently became convinced that traditional views of rationality could not be correct). See also Lloyd HA, *Cognitive Emotion and the Law*, 41 Law & Psychol. Rev. 53, (2016) at 55 (noting the commonly held belief that “emotion or other affective experience” should not play a role in legal or other “pure reasoning”). See also Todd E. Pettys, *The Emotional Juror*, 76 Fordham L. Rev. 1609, (2007) at 609 (Todd also notes the widely shared belief within the American legal community that “emotions undercut rational decision making”).

² Tiscione KK, *Feelthinking like a Lawyer: The Role of Emotion in Legal Reasoning and Decision-Making* (2019) 54 Wake Forest L. Rev. 1159 at 1160.

³ Ibid.

⁴ Plato, *The Republic* IX, 580-583 (Benjamin Jowett, trans., Random House 1941) (c. 380 BCE) [explaining that of the three classes of men, the lover of wisdom, honor, and gain, the lover of wisdom (the philosopher) lives the most noble and pleasant life as a seeker of true knowledge.]

⁵ See Maroney TA, *Judicial Emotion as Vice or Virtue: Perspectives Both Ancient and New*, in Aristotle on Emotions in Law and Politics, Huppel-Cluysenaer L & Nuno M.M.S. Coelho eds., 2018 at 13.

⁶ See Damasio n1 supra and Tiscione n2 supra. For a discussion on how emotion influences moral reasoning, see: Wilson JQ, *Emotions, Reason and Character*, 13. Crim. Just. Ethics 83 (1994). For a discussion on how emotions influence the reasoning and decision-making of Judges, see: Maroney TA, *Judges and their Emotions*, Northern Ireland Legal Quarterly, Vol. 64, Issue 1, (2013) 11-24.

making because we cannot make decisions without thinking and we do not think without feeling.⁷ Tiscione writes that “emotion is a necessary and desirable part of thinking like a lawyer”⁸ and this is the broad foundational premise upon which I propose to design the intended course on psychology *within* the law. Damasio writes that emotions and feelings do not need to be seen as “intruders in the bastion of reason”, but rather, as being “enmeshed in its networks”.⁹ Scientifically, human biological regulation is expressed in emotions and even though reasoning strategies are established in the formative years, the continued development of reason depends entirely on the ability to experience and to regulate emotions/feelings.¹⁰ Whilst Damasio agrees that emotion can, in certain instances, interfere with reason, he believes that certain aspects of emotion and feeling are indispensable to rationality and therefore, to reason.¹¹ According to Damasio, feelings “take us to the appropriate place in a decision-making space, where we may put the instruments of logic to good use.”¹² Posner agrees with Damasio when he says that “people can cultivate their emotions”.¹³ In his view, people are generally self-conscious and knowledgeable about their emotional states and as such, they can recognise when emotional dispositions lead them astray and take steps to modify them.¹⁴

With the foregoing in mind, whilst this chapter is fundamentally about course design and the placement of the intended course on psychology *within* the law within the broader South African legal curriculum, it is also about the values which should (in my opinion) underly the design of such a course. It is my hypothesis that a course on psychology *within* the law should challenge (or at least re-frame) traditional notions of instruction and hence, I start this chapter by challenging the dichotomy between reason and emotion and explain how emotion informs reason. Next, in designing a course on psychology *within* the law, I make a case for the exorcism of the theory-practice divide by showing that like reason and feeling, theory and practice are inextricable. In the next part of this chapter, I explain the Unified Learning Model (ULM) and show how the principles underpinning this model are well-suited to the design of

⁷ Tiscione n2 supra at 1161. These sentiments are supported by Maroney n6 supra at 14-15. Further, see Lloyd HA, *Law and the Cognitive Nature of Emotion: A Brief Introduction*, 54 Wake Forest L. Rev. 909 (2019) [Hereinafter Lloyd I] who also writes on the interdependence of emotion and reason.

⁸ Ibid at 1162. Thinking like a lawyer was discussed in chapter 3 of this work at 3.3.

⁹ Damasio n1 supra at xii.

¹⁰ Ibid at xii. Maroney n6 supra at 12-15 agrees with this proposition. Also, for a discussion on how the role of emotions tends to be neglected in legal theory, see Posner EA, *Law and the Emotions*, 89 Geo. L.J. 1977 (2000-2001) at 1977.

¹¹ Damasio n1 supra at xiii.

¹² Ibid.

¹³ Posner n10 supra at 1985.

¹⁴ Ibid.

the contemplated course. In the final part, I deal with actual curriculum design and make a case for course design oriented in the same goals and outcomes as that of experiential learning. I refrain from discussing course design in the context of method, content or assessment, which will be covered in chapter 5. In the final part of this chapter, I investigate where in the legal curriculum a course on psychology *within* the law is best placed within the broader curriculum and in what year of study it should be taught to law students undertaking a four-year undergraduate law degree. I base my opinion on an empirical study on the development of reasoning skills in law students conducted in the USA as well as on the propensity for the course to serve as a capstone and foundation for future capstone experiences.

4.2 Values underlying the intended course design.

4.2.1 Instruction which accepts emotion as a determinant of reason.

Plato understood the attainment of knowledge as the ultimate truth and that a reasoned exchange between philosophers is what leads to that truth.¹⁵ Plato further understood the intrusion of emotion as a regrettable function of being human.¹⁶ According to Plato, rhetoric (which includes legal argument)¹⁷ is something that appeals primarily to emotion and thus produces belief but not truth.¹⁸ Plato was particularly critical of orators who prioritised appealing to the *feelings* of their audience as seen in his dialogue entitled “Gorgias”.¹⁹ In this dialogue, Socrates (Plato’s teacher) challenges Gorgias (an orator and teacher of rhetoric) by questioning the exact meaning and purpose of rhetoric.²⁰ Gorgias explains rhetoric as “the ability to convince and to persuade with words.”²¹ Socrates criticises rhetoric because through rhetoric, one may persuade but not necessarily tell the truth, and as such, according to Socrates,

¹⁵ Plato n4 supra at 580-583. See also Kraut R, *Introduction to the Study of Plato*, in *The Cambridge Companion to Plato*, Richard Kraut ed., 1999 at 1-3. (Here, the author explains Plato's philosophy as an intellectual method of engaging in adversarial conversation to reveal an organised system of truths).

¹⁶ Ibid. See also Tiscione n2 supra at 1163.

¹⁷ For more on rhetoric incorporating legal argument, see Frost M, *Introduction to Classical Legal Rhetoric: A Lost Heritage* 3ed, Routledge 2016. (The study of rhetoric began in Greece in about 450 BCE. The full course of study took ten to twelve years and progressed from learning the alphabet to interactive classroom exercises to effective public speaking and persuasion.)

¹⁸ Plato, *Gorgias*, in *The Collected Dialogues*, Edith Hamilton & Huntington Cairns eds., 1961 at 454e.

¹⁹ Ibid.

²⁰ Plato n18 supra at 447c.

²¹ Ibid at 452e.

rhetoric produces belief but not necessarily knowledge about what constitutes justice in a given situation.²² Gorgias accepts Socrates' reasoning but views this as a virtue of rhetoric because a good rhetor is able to persuade even in the absence of knowledge.²³ In these dialogues, Socrates criticises rhetoric as by appealing solely to emotion and desire, rhetoric will only lead to an *appearance* of justice but not true justice.²⁴ Socrates goes on to argue that rhetoric is to justice what cookery is to medicine.²⁵ According to Socrates, cooking is the false art of medicine because it "pretends to know the best foods for the body".²⁶ With that analogy, Socrates is essentially saying that rhetoric "feeds" people what they want to hear (implying decision-making based on desire and emotion) instead of what is real or true (decision-making based on reason).²⁷ From this dialogue, it is clear that the primacy of reason has deep philosophical roots and is perhaps the reason why traditional law school curricula avoid the role of emotions in doctrinal teaching.²⁸

Aristotle (who was a student of Plato) also valued the pursuit of knowledge,²⁹ but unlike his teacher, he recognised that rhetoric could produce valuable (albeit only probable) truth which in his mind, was akin to justice.³⁰ Aristotle defined rhetoric as "having the ability to see the available means of persuasion in each case"³¹ depending on the nature of the audience (deliberative if the audience was political, judicial if the audience was legal and demonstrative if the audience was ceremonial).³² He believed that the actual goal of rhetoric was justice and that the art of rhetoric lay in the invention, arrangement, style and delivery of the rhetor's appeal to his audience's *logos* (reason), *pathos* (emotion) and *ethos* (credibility).³³ According to Aristotle, where reason alone was insufficient to move an audience, the audience should be led to feel emotion (*pathos*) by the speech as a form of persuasion.³⁴ It is clear that unlike his teacher, Aristotle believed that it was impossible to disregard emotion as a fact of life.³⁵

²² Plato n16 supra at 454e.

²³ Ibid at 455e-56c.

²⁴ Plato n16 supra at 455e-56c.

²⁵ Ibid at 464d.

²⁶ Plato n16 supra at 464d.

²⁷ Tiscione n2 supra at 1165.

²⁸ Ibid at 1161.

²⁹ See Aristotle, *Nicomachean Ethics*, VI.2 in Ackrill JL ed, A New Aristotle Reader (1988) Princeton University Press at 1139a-b (Here, Aristotle described truth as the product of the part of the soul that possesses reason, distinguishing it from practical knowledge, which relies on desire/emotion as well).

³⁰ Aristotle, *On Rhetoric: A Theory of Civic Discourse* I.1, Kennedy GA, trans., 2ed 2006 at 1355a11. (Here Aristotle explains that truth is a result of dialectic and that what "resembles truth" is a product of rhetoric.)

³¹ Ibid at I.1, 1355b14. See also Tiscione n2 supra at 1169.

³² Aristotle n30 supra at I.3, 1358b3.

³³ Aristotle n30 supra at I.2, 1355b-56a. See also Tiscione n2 supra at 1169.

³⁴ Ibid Aristotle at I.2, 1356a5.

³⁵ Aristotle n30 supra at III.3, 1113a11-13. See also Tiscione n2 supra at 1170.

According to Aristotle, reason and emotion influence one another.³⁶ Based on advancements in modern neuroscience, we are able to tell that Aristotle was not far off in his understanding of the interaction between emotion and reason.³⁷ As Damasio aptly puts it:

“...feelings are the sensors for the match or lack thereof between nature and circumstance. And by nature I mean both the nature we inherited as a pack of genetically engineered adaptations, and the nature we have acquired in individual development, through interactions with our social environment, mindfully and willfully as well as not. Feelings, along with the emotions they come from, are not a luxury. They serve as internal guides, and they help us communicate to others signals that can also guide them. And feelings are neither intangible nor elusive. Contrary to traditional scientific opinion, feelings are just as cognitive as other percepts. They are the result of a most curious physiological arrangement that has turned the brain into the body's captive audience.”³⁸

The brain and body are integrated by the nervous system and the bloodstream.³⁹ In maintaining regular life processes, the brain receives signals from the body through the peripheral nervous system and sends signals back to the body.⁴⁰ In conjunction, the brain manufactures chemicals (such as hormones) which are sent via the bloodstream. The brain-and-body partnership thus interacts with the external environment as an ensemble, the interaction being of neither the body nor the brain alone.⁴¹ Based on the foregoing, there is scientific evidence to suggest that reason and emotion cannot be entirely extricated. In fact, Damasio's work can be used to show how the brain and body work together to make decisions.⁴²

Damasio explains that there are two types of emotions, primary emotions and secondary emotions.⁴³ Primary emotions are a direct reaction to external stimuli, they include fear, anger, sadness, happiness and surprise – they develop early in life and are universal. Secondary emotions on the other hand result from the pairing of “objects in a situation” on the one hand with “primary emotions” on the other.⁴⁴ Tiscione gives the example from Othello where Iago's scheming leads Othello to believe that his wife has betrayed him. Othello is angry (primary

³⁶ Aristotle n30 supra at I.13, 1102b31-32. See also Tiscione n2 supra at 1171.

³⁷ Tiscione n2 supra at 1171.

³⁸ Damasio n1 supra at xv.

³⁹ Damasio n1 supra at 86-89. See also Tiscione n2 supra at 1172.

⁴⁰ Ibid Damasio at 86-89.

⁴¹ Damasio n1 supra at 86-89. See also Tiscione n2 supra at 1172.

⁴² Tiscione n2 supra at 1173. See also Damasio n1 supra at 88.

⁴³ Damasio n1 supra at 131-136.

⁴⁴ Ibid.

emotion) but he is also jealous (secondary emotion) - the jealousy is caused by Othello mentally evaluating the situation that caused his anger.⁴⁵ Accordingly, we experience emotion in one of two ways, through an actual change in body state and a resulting feeling – this is called “the body loop” – or through a mental simulation of a change in body state – this is called the “as if body loop”.⁴⁶ The “as if” feelings can occur consciously or subconsciously.⁴⁷ How this relates to decision-making is termed the “somatic marker hypothesis”.⁴⁸ Somatic markers are the feelings that influence decisions, including what we commonly refer to as “gut feelings”.⁴⁹ Somatic markers are created and influenced by social conventions, ethics and past experiences.⁵⁰ According to this hypothesis, we constantly experience emotions which identify the outcomes of decisions as good or bad or in-between and we make decisions based on these feelings.⁵¹ According to Damasio, somatic markers help us to make quick, efficient and accurate decisions or in the least, put us in a better position to engage in deliberate reasoning in order to choose from the available alternatives.⁵² Intuition is a type of somatic marker which operates subconsciously.⁵³

Intuition is relevant to legal pedagogy because most lawyers considered to be *experts* are efficient due to their ability to generate solutions quickly by subconsciously matching situations to similar, prior experiences within their stored memory.⁵⁴ This evidences an above average ability to intuit (or to use somatic markers effectively). Emotion contributes to both intuition and deliberation and as such, cognition and emotion actually work together and support one another.⁵⁵ It is submitted that the main lessons to impart to students (who are not yet experts) is to get them accustomed to the process of continuously running mental simulations to establish viable options.⁵⁶ My hypothesis is that to be in touch with intuition, necessitates being in touch with one’s emotions and as such, any course which seeks to enmesh

⁴⁵ Tiscione n2 supra at 1173. See also, Damasio n1 supra at 130.

⁴⁶ Damasio n1 supra at 154-158. See also Tiscione n2 supra at 1174.

⁴⁷ Ibid Damasio at 154-158.

⁴⁸ Damasio n1 supra at Ch8, 165-200. See also Damasio A, *The Somatic Marker Hypothesis and the Possible Functions of the Prefrontal Cortex*, Phil. Transactions: Biological Sci. Vol 1, (1996) at 1415 [hereinafter “The Somatic Marker Hypothesis”]. See also Tiscione n2 supra at 1174.

⁴⁹ Ibid Damasio at 165.

⁵⁰ Damasio n1 supra at 179.

⁵¹ Ibid at 186. See also Damasio n42 [The Somatic Marker Hypothesis] at 1414-1415.

⁵² Damasio n1 supra at 173. See also Tiscione n2 supra at 1175.

⁵³ Ibid Damasio at 187.

⁵⁴ Kahneman D & Klein G, *Conditions for Intuitive Expertise: A Failure to Disagree*, 64 Am. Psychologist, 2009 at 515-16.

⁵⁵ Tiscione n2 supra at 1184. See also Woodward J & Allman J, *Moral Intuition: Its Neural Substrates and Normative Significance*, 101 J. Physiology (Paris), 2007 at 189. See also Lloyd I n7 supra at 910.

⁵⁶ Ibid Tiscione at 1184.

psychology and law must be devised in a way which accepts that reason and emotion are inextricable. Tiscione writes that emotion impacts on a number of advocacy skills including legal research, the framing of a client's story, selecting and organising arguments and the use of metaphor.⁵⁷ When lawyers are presented with a legal problem or case, they begin by collecting research for the case, they skim, sift and sort through precedent, they use gut feelings about what is relevant and what is not.⁵⁸ At that stage, the lawyer does not read the chosen cases slowly and deliberately, rather, he makes quick intuitive decisions to minimize the relevant case load.⁵⁹ When we frame our client's story during opening or closing legal argument at trial, we use emotions to put our audience in the correct frame of mind, this helps the audience to empathise with our client's version of events.⁶⁰ Stories help us to make decisions but the source of their power is not logic or reason, it is emotion - stories help us to organize our internal worlds by the way we *feel* about certain things.⁶¹ When determining which arguments to pursue or when to make them, we use recursive loops of intuition and deliberation which calls on an equal balance of emotion and experience.⁶² In the context of rhetoric, lawyers and legal educators often use stories or metaphors to get certain points across. In that context, metaphors can be described as "repositories of universal wisdom and emotional power".⁶³ Metaphors have the ability to structure our audience's thinking and to condition their sympathies and emotional reactions.⁶⁴ Most importantly, metaphors (propelled by the emotions which they invoke), help people to determine what evidence they consider most salient and what outcomes they are willing to pursue.⁶⁵ Conceptual metaphors work in two ways, first by "highlighting certain properties" and second, by "downplaying...[or] hiding" others.⁶⁶ Lakoff and Johnson give the example of a client in divorce proceedings who claims that he caught his wife "whispering with another man the previous night".⁶⁷ Such a metaphor evokes the impression of infidelity and thus highlights the possibility of such a conclusion. Had he simply

⁵⁷ Tiscione n2 supra at 1186-1192. See also Lloyd HA, *Law as Trope: Framing and Evaluating Conceptual Metaphors*, 37 Pace L. Rev. 89 (2016-2017) 89-114.

⁵⁸ Tiscione n2 supra at 1187.

⁵⁹ Ibid.

⁶⁰ Tiscione n2 supra at 1188.

⁶¹ Klein GA, *Sources of Power: How People Make Decisions* (1999) at 3.

⁶² Tiscione n2 supra at 1191.

⁶³ Ibid at 1192. See also Frost M, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 3ed, (Routledge 2016), (2005) at 100.

⁶⁴ Tiscione n2 supra at 1192.

⁶⁵ Klein n61 supra at 199. Lloyd n57 supra at 89-90 where Lloyd agrees that metaphors play a much deeper role in thought than mere style, they play a necessary role in how we structure categories of thought and according to Lloyd, they are a necessary part of thought itself, including legal thought.

⁶⁶ Lloyd n57 supra at 93. See also, Lakoff G & Johnson M, *Metaphors We Live By*, University of Chicago Press, 1ed, 2003 at 35-40.

⁶⁷ Ibid Lloyd at 93.

said that he overheard his wife quietly talking on the phone to a man for lengthy period, he would have been downplaying the possibility as it leaves room open that she was simply discussing the impending divorce with her father or brother. Lakoff and Johnson state that by highlighting and downplaying, people show their inherent biases.⁶⁸ As such, it is proposed that goods lawyers do not accept versions uncritically, they factor in the downplaying or highlighting effects to test and to properly understand versions of events.⁶⁹ In developing a course on psychology *within* the law, we should be mindful to raise awareness of the interplay between emotion, reason and the extent to which metaphors are used to highlight or downplay facts. This is likely to help train students to understand the influence that their own emotions have on their own decision-making as well as that of others since emotions invariably influence metaphors. A more detailed account of how metaphor could be used as an important tool to achieve this will be elaborated upon below but the first underlying premise of course design relevant to this chapter is that emotion and reason work together in the acquisition of legal skills.

4.2.2 The exorcism of Langdell's ghost and the theory-practice divide in favour of instruction grounded in the humanities.

Lloyd calls for the exorcism of what he calls the two “phantoms” pervasively haunting American Law Schools – the so-called theory-practice divide and its fraternal twin, Langdell's ghost.⁷⁰ Just like in their American counterparts, these two phantoms are ever present in South African law schools, frightening doctrinal lecturers from fully admitting that theory and practice are inseparable whilst also disillusioning students with the application of “...cases stripped of...the craft and humanities that truly make up the law”.⁷¹ A course focused on psychology *within* the law will need to inform students of the existence of these two phantoms and ensure that students are counseled against their adverse effects.

⁶⁸ Lakoff & Johnson n66 supra at 93.

⁶⁹ Ibid.

⁷⁰ Lloyd HA, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 Wake Forest L. Rev. (2014) at 1213 [Hereinafter Lloyd II]. For articles agreeing with the inseparability of theory and practice including what may have been responsible for the divide in the first place see: Tiscione KK, *How the Disappearance of Classical Rhetoric and the Decision to Teach Law as a Science Severed Theory from Practice in Legal Education*, 51 Wake Forest L. Rev. 385 (2016).

⁷¹ Ibid Lloyd II at 1213.

4.2.2.1 The theory-practice divide.

According to Lloyd, any divide between theory and practice is a phantom one and cannot possibly exist either factually or semantically.⁷² *Theory* is a set of general propositions used as an explanation, it is usually abstract so that it may apply to more than one particular situation”.⁷³ *Practice* on the other hand, usually denotes “the doing of something”.⁷⁴ We associate practice with repetition and the gaining of skills because we generally gain skills through repetition and practice.⁷⁵ Relying on the work of Rhee,⁷⁶ Lloyd claims that there are three main facts that belie any distinction between theory and practice: first, we know that legal practitioners are capable of authoring innovative legal scholarship, second, legal academics have the ability to become renowned legal practitioners or judges and third, some doctrinal concepts which are taken for granted in practice are known to have first been popularised in legal scholarship.⁷⁷ The danger in suggesting that the theory-practice divide is real is that students in law schools disengage themselves from reality and become incapable of applying law to real-life situations.⁷⁸ Gerken elaborates on this proposition when she says that the qualities that make a great lawyer, are the same qualities that make a great academic.⁷⁹ Gerken cites skepticism, peripheral vision, the ability to think conceptually, the ability to meet an opponent’s strongest argument rather than dismissing his weakest and the ability to question one’s own principles as the qualities shared by academics and lawyers alike.⁸⁰ According to Gerken, “A true scholar follows her idea wherever it leads. So, too, the day you really become a lawyer is the day you realise that the law doesn’t – and shouldn’t – match everything you believe.”⁸¹ As such, one cannot have pure legal theory that is divorced from practice.⁸² In

⁷² Lloyd II n70 supra at 1214. See also, Friedman LA, *A History of American Law* 613, 2d ed. (1985) at 615 (where Friedman discusses the tension between vocational and academic training in legal education.) See also Sullivan W et al, *Educating Lawyers: Preparation for the Profession of Law*, Carnegie Foundation for the Advancement of Teaching (2007) – Summary [The Carnegie Report] (where Sullivan discusses the inadequacy of the theory-practice divide). For a more recent article agreeing with this proposition, see Gerken HK, *Resisting the Theory/Practice Divide: Why the Theory School is Ambitious about Practice*, 132 Harv. L. Rev. F. 134 (2018-2019).

⁷³ Spiegel M, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577 (1987) at 578.

⁷⁴ Ibid.

⁷⁵ Spiegel n73 supra at 578.

⁷⁶ Rhee W, *Law and Practice*, 9 Legal Comm. & Rhetoric: JALWD 273 (2012) at 280–81.

⁷⁷ Ibid. See also Lloyd II n70 supra at 1215.

⁷⁸ Lloyd II n70 supra at 1215. See also Gerken n72 supra at 135 where the author agrees that any argument for experiential work should resist the theory-practice.

⁷⁹ Gerken n72 supra at 144.

⁸⁰ Ibid.

⁸¹ Gerken n72 supra at 144.

⁸² Lloyd II n70 supra at 1216.

addition to this, Lloyd claims that by definition, theory seeks to explain practice and as such, to remove theory from practice would leave theory with nothing to explain.⁸³

It is proposed therefore that a course in psychology *within* the law must place emphasis on “meaning” which encapsulates an equal measure of theory and practice. According to Lloyd, any workable conception of meaning must involve both *sense* (which is the cognitive or mental component of meaning – in this context, it is “theory”) and *reference* (reference determines fact from fiction – in this context, it is “practice” or “experience”).⁸⁴ A practical example of how we construct meaning using both theory and practice is the following:

“If one asks a good lawyer what a certain statute means, for example, the lawyer would flesh it out and would describe how it would play out in practice. If one asks a good law professor what a fictional contract means, he would do the same.”⁸⁵

Based on the above, it is submitted that a course on psychology *within* the law must be designed in a manner which both articulates the meaning of theory and practice as distinct concepts but also engages in exercises which evidence how one cannot operate without the other. Cognitive research supports the proposition by showing us that when we hear or read words (theory), we tend to engage our vision and motor systems to recreate the visions and actions that are described (we can only do this with practice or experience).⁸⁶ Designing a course where such projections (or simulations) are encouraged and practiced would assist students in their future legal careers, whether they see their futures as academics or practitioners. Even where simulations might involve abstract concepts for which students are yet to develop appropriate projections, educators may assist by providing metaphors (discussed above) which serve to bring the abstract concepts into more concrete terms.⁸⁷ For instance, even a student who has never formally entered into a contract has contracted if he provided services such as mowing the lawn in exchange for payment.⁸⁸ A student who has been blamed for something they did not do, will have a conception around being “accused”. A student who has struggled to find or retain accommodation will have certain feelings around eviction legislation. Even students with

⁸³ Lloyd II n70 *supra* at 1216.

⁸⁴ *Ibid* at 1216-1217. See also Noth W, *Handbook of Semiotics* 92–99 (1995) (In this work, Noth discusses meaning, sense, and reference).

⁸⁵ Lloyd n70 *supra* at 1217.

⁸⁶ Bergen BK, *Louder Than Words: The new Science of how the Mind Makes Meaning* (2012) at 223.

⁸⁷ Lloyd II n70 *supra* at 1219. See also Lakoff G & Johnson M, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (1999) at 45.

⁸⁸ Lloyd II n70 *supra* at 1219 [Lloyd gives the example that “consideration becomes concrete when defined as something of value (such as forty dollars) given in exchange for the promise to do something (such as mowing one’s yard.”]

limited life experience have at least watched movies or series in which the expression of legal (and psychological) processes has resonated with them. According to Lloyd, we can even use simulations (or mental recreations)⁸⁹ to bring abstract concepts into practical reality. Relying on research done by Bergen, Lloyd makes the point that baseball players are known to perform better when they are actually visualising proper bowling techniques.⁹⁰ By analogy, students who are encouraged to simulate or to pretend to “be there” in the role of lawyers start gaining some experience. For example, students who are required to simulate an interview with a client, a moot court argument or to draft and present heads of argument start to develop a mental memory of the kinds of skills required for these practical tasks. Requiring students to identify gaps in the arguments of others would also be a good exercise, even if the arguments were not strictly law related – the skill of extracting important information in the midst of another party downplaying or highlighting information (discussed above) could be invaluable practice. It is my contention that the final year of study (during a clinical legal course) is too late to start building the proverbial muscle memory lawyering skills which should be embedded (at least to varying degrees of success) by the time the students are exposed to real clients. A course on psychology *within* the law at an early enough stage of the students’ degree would prime students to start building their capacity for the acquisition of the relevant skills. According to Lloyd, even time spent engaging in a classroom presents a perfect opportunity for students to blend theory with the simulation of lawyering which can ultimately translate into better future performance.⁹¹ Building on this, and from my experience teaching doctrinal law courses, it is my contention that the curriculum in substantive law courses does not always allow enough time for expanded classroom discussions, arguments or simulations. Lloyd posits that students cannot have a good conception of law in the broader sense if they do not have any practical reference point for it.⁹² To my mind, this does not mean that practical reference points can only be created in clinical courses or by exposure to actual practice. Lloyd suggests that a student would not have a good sense of what the law of sale actually means unless the student had actually reviewed documents and hypothetical situations to which the law of sale applied.⁹³ The natural response to this would be to have a lecturer in a law of sale and lease class to expose students to numerous contracts or transactions but the reality is that not every

⁸⁹ Lloyd II n70 *supra* at 1219. See also Bergen n86 *supra* at 70 (where Bergen discusses an experiment where participants were asked to simulate what it would be like to “be there” in a scene described by researchers.)

⁹⁰ *Ibid* Lloyd II. See also Bergen n86 *supra* at 25.

⁹¹ Lloyd II n70 *supra* at 1219.

⁹² *Ibid* at 1223.

⁹³ Lloyd II n70 *supra* at 1223.

substantive law course has the time or space to incorporate practical skills acquisition components. Accordingly, a course designed to teach psychology *within* the law could rely heavily on simulation exercises intended to trigger experiential learning and better performance in later practice. This will be elaborated upon in the next chapter on course method, content and assessment. Such a course would not need to be limited to one area of substantive law and could draw on practical simulated problems from multiple subjects from contract, to delict to criminal law.

4.2.2.2 Langdell's ghost.

In chapter two the criticisms of traditional legal education based on the Socratic or Langdellian method was discussed.⁹⁴ Lloyd writes that whilst there have been many developments in legal education, Langdell's ghost still tends to permeate law school culture.⁹⁵ Instead of learning and analysing law through an in-depth reading of multiple sources and an examination of the humanities, students tend to rely solely on reading case summaries and outlines of cases.⁹⁶

The danger with this approach is that students learn abstract principles but are never equipped to properly apply them because they have no notion of the real-life psychological and human problems which inspired the principles in the first place. Whilst it is true that law students must by and large be able to read, interpret, analyse and apply cases, they must also be able to read, interpret, analyse and apply other sources of law such as the Constitution, statutes, regulations, executive orders, legislative history and academic articles.⁹⁷ My contention is that in addition to this, law students must also be able to read, interpret and analyse *people* and to apply their experience of people to the legal work that they do. Beckman notes that the case method misses a large part of the actual *practice* of law by neglecting the role of clients, the role of fact development and ambiguity as well as the role of reflection and ethics – all of which form part and parcel of real cases.⁹⁸ As such, the case method and its insistence on treating law as a science fails to take account of the social, political and economic forces

⁹⁴ Christopher Langdell, previous Dean of Harvard Law School is thought to be the creator of the case method (also known as the dialogue or Socratic method which purports to teach law by way of analysis and reflection upon past court cases.) Franklin N, *The Clinical Movement in American Legal Education* (1990) Natal University Law and Society Review 2, 55-58. See also Friedman n63 supra at 613 (where Friedman discusses the Socratic method).

⁹⁵ Lloyd II n70 supra at 1224.

⁹⁶ Ibid.

⁹⁷ Lloyd II n70 supra at 1227.

⁹⁸ Beckman S & Tremblay PR, Foreword: The Way to Carnegie, 32 B.C. J. L. & Soc. Just. 215 (2012) at 216.

influencing the choices of others.⁹⁹ It is my contention that such forces are inextricably intertwined with human psychology as explained in chapter 3 of this work and accordingly, any course educating on psychology *within* the law must give instruction on the pit-falls of purely Socratic and Langdellian methods and make students more aware of different styles of learning (already discussed in chapter 2 hereof). Being exposed to a course in which there is space to examine these differences is likely to change students' perspectives of how to approach other doctrinal courses. Friedman puts it well when he comments on Langdell's method as follows:

“If law is at all the product of society, then Langdell's science of law was a geology without rocks, an astronomy without stars. Lawyers and judges raised on the method, if they took their training at all seriously, came to speak of law mainly in terms of a dry, arid logic, divorced from society and life.”¹⁰⁰

Since law is not divorced from society and life,¹⁰¹ it, likewise, cannot be divorced from psychology, which permeates society (and life). If the humanities and persuasion (such as rhetoric discussed above) play a critical role in the practice of law,¹⁰² then psychology must be the instrument used to perfect and hone the practice of law.

4.2.2.3 Instruction grounded in the humanities.

The question then becomes, what does a course free of the theory-practice divide and Langdell's ghost actually look like? Lloyd states that if we go back to the pre-Langdellian era, we see that the road to becoming a member of the legal fraternity was through some sort of clerkship or apprenticeship.¹⁰³ In the South African context, admission as a legal practitioner is still dependent on the applicant having undergone practical vocational training (including community service) in line with certain requirements prescribed by Statute and the relevant Council.¹⁰⁴ This vocational training takes place after the candidate has successfully completed

⁹⁹ Beckman & Tremblay n98 supra at 216.

¹⁰⁰ Friedman n72 supra at 617. See also Lloyd II n70 supra at 1228.

¹⁰¹ Ibid.

¹⁰² Friedman n72 supra at 617.

¹⁰³ Lloyd II n70 supra at 1231.

¹⁰⁴ Section 26(1)(c) of the Legal Practice Act No 28 of 2014. Guidelines are contained in sections 27-29 of the same Act. The Legal Practice Council (LPC) is a national body established in terms of section 4 of the Legal Practice Act 28 of 2014. The LPC and its provincial councils regulates the affairs of and exercises jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners.

their Bachelor of Law (LLB) qualification.¹⁰⁵ Generally, the value of such clerkships depend largely on the quality of the lawyer doing the training.¹⁰⁶

My concern is, how do we ensure some level of apprenticeship by the student during their undergraduate qualification but *before* their vocational training or clinical legal training commences and how do we incorporate this into curriculum design? In my view, the answer lies in simulation. Just as the theory-practice divide might be exorcised through meaningful simulation, so the ever-present influence of Langdell's ghost can be dissipated with meaningful simulation also. The value of simulation as a mode of instruction will be discussed more fully in the next chapter but for the purposes of course design, it must be stated that simulation cannot exist for its own sake. Just like the effectiveness of apprenticeships is dependent on the quality of lawyer doing the training, so the effectiveness of simulation is dependent on what the simulation is purporting to achieve. Accordingly, it is my contention that a course on psychology *within* the law which seeks to rely on simulation as a mode of instruction should embrace the humanities and expose students not only to legal problems but the human problems which underly them. How do we do this?

At the beginning of this chapter, I introduced the concept of metaphor and story-telling and the role that emotion plays in its utility. To elaborate, it can be said that our ordinary system of conceptualization is largely based on metaphor.¹⁰⁷ According to Lloyd, even the concept of a "cup" is based on a set of experiences that we have metaphorically categorised as a cup.¹⁰⁸ Lloyd states that one person might categorise the very same things which make up a cup as a beaker or a mug or even a glass.¹⁰⁹ Essentially, what Lloyd is saying is that very few human experiences are literal in nature, rather, people construct meaning through their experiences.

In teaching the limitations of witness recall to my second-year, criminal law students, I often ask students to draw and then to raise their hands and describe a cup. Just as Lloyd posits, students tend to draw or describe an array of containers ranging from glasses to mugs to beakers. I generally follow up the question by asking whether a glass is also a cup and whether a cup can be made of glass and the class usually erupts in fervent conjecture. I also ask each participating student to share the drawing of their cup with the person sitting next to

¹⁰⁵ Section 26(1)(a) of the Legal Practice Act No 28 of 2014.

¹⁰⁶ Friedman n72 *supra* at 97-98.

¹⁰⁷ Lakoff & Johnson n66 *supra* at 3.

¹⁰⁸ Lloyd II n70 *supra* at 1232-1234.

¹⁰⁹ *Ibid.*

them and for both to identify whether their cups look the same or different. This is a very basic exercise (or simulation) conducted in our introductory lecture and has very little to do with law in the literal sense, but it does serve as a valuable metaphor for the approach that we will take to evaluating evidence in establishing criminal liability during the course of the year. The exercise shows students that we cannot know what people mean unless we know people and people are invariably made up of their own unique experiences and categorisations informed by metaphors. Unfortunately, we generally do not have time in the course of the year to make explicit how the cup metaphor plays out in practice or in the cases that we study. An exercise of this nature could be elaborated upon in the course proposed in this research and specific case examples could be used to illustrate where objective factors and subjective inferences simply failed to add up. For example, it is possible for an accused to give evidence that he did not “intend” to kill his victim even though objective evidence allows us to infer the contrary. Lloyd argues that “since metaphors have long been a central subject for poets and English majors in humanities, the importance of the humanities to the law is therefore obvious”.¹¹⁰ Lloyd is adamant that a good legal education requires some knowledge of the liberal arts and humanities.¹¹¹ It is submitted that if anything, at least some grounding in the humanities will provide students with the context necessary to understand certain human problems related to why people differ and what brings about legal conflicts in the first place.

In designing a course on psychology *within* the law, my focus is on undergraduate LLB students who have no grounding in psychology or other courses based in the humanities. It is submitted that a psychology *within* the law course which forms part of the LLB degree would offer students something that they are not presently exposed to. The study of rhetoric for instance, usually forms part of a course in philosophy. A good grasp of rhetoric (discussed above) would provide students with an opportunity to become better at legal argumentation. By way of example, in the discussion above, I mentioned how metaphor can be used to highlight certain properties or to downplay them.¹¹² To further elaborate on how this can be used to teach legal skills we might pose the following question to students, “Is welfare a ‘hand out’ or a ‘safety-net’?”¹¹³ One would argue that welfare is a hand out if one wished to eradicate the provision of welfare but one would view welfare as a safety-net if one ever relied on it or

¹¹⁰ Lloyd II n70 *supra* at 1233.

¹¹¹ *Ibid* at 1234.

¹¹² Lakoff & Johnson n87 *supra* at 152. See also Lloyd II n70 at 1234.

¹¹³ Lloyd II n70 *supra* at 1234.

generally perceived it as an indispensable obligation by the State to its citizens.¹¹⁴ It is thus evident that the categories (or metaphors) that we rely upon do not derive from the shape of the world around us but the metaphors we use actually create or shape our world views.¹¹⁵ Lloyd argues that to the extent that we create legal categories in law, a larger stock of philosophical, literary, historical and other knowledge will provide a richer source of potential metaphors for use by students.¹¹⁶ It is my view therefore that some grounding in the humanities (whether it be through film, philosophy, history, anthropology, art or literature) should be incorporated in the course design of a course on psychology *within* the law. With that in mind, the remaining parts of this chapter and the next, will focus on the actual design of such a course for offer within the existing LLB curriculum.

4.3 A course based on the Unified Learning Model (ULM)

The Unified Learning Model (ULM) is a model of how people learn and includes a model for teaching and instruction.¹¹⁷ The model was developed by a number of academics from the University of Nebraska-Lincoln College of Education & Human Sciences and was published by Springer in 2010 under the name *The Unified Learning Model: How Motivational, Cognitive, and Neurobiological Sciences Inform Best Teaching Practices*.¹¹⁸ Some of the insights from this text were relied upon in chapter 2 of this work on learning theory and the need for development in Law School curricula in general. What follows is an overview of how the ULM may be utilised for the purposes of course design.

The ULM (as suggested by its name) is intended to be a synthesis of existing theories, research and findings related to teaching and learning.¹¹⁹ The book suggests that the

¹¹⁴ Ibid. See also Amsterdam AG & Bruner J, *Minding the Law* (2002) at 51.

¹¹⁵ Amsterdam & Bruner n114 supra at 27-28.

¹¹⁶ Lloyd II n70 supra at 1233.

¹¹⁷ Shell D et al, *The Unified Learning Model: How Motivational, Cognitive and Neurobiological Sciences Inform Best Teaching Practices*, Springer (2010) at 1. James B. Levy uses the model to write on how cognitive science could be used to improve online legal writing and research. See Levy JB, *Bend it like Beckham? Using Cognitive Science to Inform Online Legal Research and Writing Pedagogy during the Pandemic*, 45 Nova L. Rev. 385 (2020-2021). Also relying on the model, Freuhwald writes on how legal education reform could be incorporated into the first year of study. See Freuhwald SE, *Bringing Legal Education Reform into the First Year: A New Type of Torts Text*, 50 J. Marshall L. Rev. 713 (2016-2017). Freuhwald also writes on how the model can be used to develop the professional identities of students. See Freuhwald SE, *Developing Law Students' Professional Identities*, 37 U. La Verne L. Rev. 1 (2015-2016).

¹¹⁸ Ibid Shell et al at 1.

¹¹⁹ Shell et al n117 supra at 1. James B. Levy elaborates on this research by incorporating the working of Shell et al to argue that whilst there is a lot of research on how the brain works and how this relates to learning, there is

components of the ULM underlie all learning phenomena and that all current models of learning, teaching and instruction can be subsumed within the ULM.¹²⁰ In its introductory chapter, the authors state that the goal of the ULM is to “replace the current diverse and confusing array of learning concepts and terminology with a scientifically grounded and concise set of core learning principles”.¹²¹ Once these core learning principles are understood, an educator will be better equipped to facilitate learning through their teaching and instruction.¹²² The book offers a set of guides for decision making around teaching methods at any age or educational level from pre-school to graduate school.¹²³ It is my opinion that a solid foundation for course design should be based on these core principles. According to the ULM, the core principles are related to (1) working memory, (2) knowledge and (3) motivation.¹²⁴ Working memory and knowledge were discussed at length in chapter of 2 of this work on cognitive learning theory and what follows is a short reminder of these concepts. Working memory is central to all models of cognition including thinking, attention, decision making, brain functioning and most importantly, learning.¹²⁵ From a cognitivist perspective, knowledge refers to everything we know and it is stored in long-term memory.¹²⁶ The role of knowledge in the ULM is two-fold, first, the purpose of learning is to increase knowledge (and as such, knowledge is the product of working memory) and second, knowledge influences how working memory functions.¹²⁷ This means that working memory can be affected by existing knowledge in that the more you know about something, the easier it is to learn something new about it – this is known as the “prior knowledge effect”.¹²⁸ This was discussed in the context of schemata in chapter 2. Motivation is what directs working memory to the task of learning.¹²⁹ Psychologically speaking, motivation is what compels us and sustains us to put forth effort.¹³⁰ From the ULM perspective, the relevant question is what motivates someone to learn and how

no empirical support that the brain or how we think and learn has undergone any significant changes due to the pervasive use of technology in the past 30 years. Levy cites two meta-studies which are the largest to date and attempt to assess the overall effectiveness of digital teaching technologies. See Levy JB, *Teaching the Digital Caveman: Rethinking the Use of Classroom Technology in Law School*, 19 Chap. L. Rev. 241 (2016) at 303-305.

¹²⁰ Shell et al n117 supra at 1.

¹²¹ Ibid.

¹²² Shell et al n117 supra at 1.

¹²³ Ibid at 115.

¹²⁴ Shell et al n117 supra at 1.

¹²⁵ Ibid at 2. For more on working memory, see Chapter 3 of Shell et al n117 supra at 19-30.

¹²⁶ Shell et al n117 supra at 2. For more on knowledge, see Chapter 4 of Shell et al n117 supra at 33-62.

¹²⁷ Shell et al n117 supra at 3.

¹²⁸ Ibid.

¹²⁹ Shell et al n117 supra at 3. For more on motivation, see Chapter 5 of Shell et al n117 supra at 65-83. Also, see generally, Grigorescu D, *Extrinsic Motivation vs Intrinsic Motivation or Education as Infinite Game*, Jus et Civitas: A Journal of Social and Legal Studies, Vol. 7, Issue 1, (2020) 47-54 where the author discusses intrinsic and extrinsic motivation, and which is better suited to serve legal education.

¹³⁰ Shell et al n117 supra at 65.

do we tap into that at course design level?¹³¹ Based on the foregoing, the ULM is founded on the following principles:¹³²

1. Learning is a product of working memory allocation.
2. Working memory's capacity for allocation is affected by prior knowledge.
3. Working memory allocation is directed by motivation.¹³³

According to the authors, teaching that follows these principles will be most effective.¹³⁴ What follows is an evaluation of how these principles can be applied to course design for the intended course on psychology *within* the law.¹³⁵

According to the authors of the ULM, when embarking on course design, the question should not be whether doctrinal or experiential learning is a better learning strategy but rather, should determine “how well either approach focuses working memory allocation, engages prior knowledge, and provides motivation”.¹³⁶ According to the authors, either hands-on activity or lecturing can do a good or bad job of these.¹³⁷ The guidance offered in order for instruction to enact the three founding principles is as follows:¹³⁸

1. Direct student attention to the desired knowledge to be learned. Help students focus attention on relevant materials and avoid distractions through the learning environment, instructional materials, and connection to students' prior knowledge.
2. Provide necessary repetition. Provide multiple exposures to the knowledge to be learned and opportunities for recall and practice.
3. Facilitate connections. Provide ways for students to connect what they are learning to what they have previously learned in the class, what they have learned in other classes, and their other prior knowledge. Help them to construct meaningful connections between what they know and what they are learning.
4. Provide a learning environment that facilitates motivation. Recognize that learning can be difficult and provide support for maintaining students' effort.

¹³¹ Ibid.

¹³² Shell et al n117 supra at 3.

¹³³ Ibid.

¹³⁴ Shell et al n117 supra at 3.

¹³⁵ The practical application of the ULM in a broad sense is discussed in Part II, Chapters 7-14 of Shell et al n117 supra. Only those aspects of the practical application that apply to course design and the intended course will be discussed.

¹³⁶ Shell et al n117 supra at 116.

¹³⁷ Ibid.

¹³⁸ Shell et al n117 at 116.

5. Remember that learning is learning. Directing attention, providing repetition, facilitating connections, and providing motivation are the parts of good instruction.¹³⁹

In amplification of the above guidelines, the intended course should be designed with the following in mind:

4.3.1 Efficient instruction through the CORE lesson model

CORE is an acronym that stands for Connect, Organise, Reflect and Extend.¹⁴⁰ The first task of an educator is to *connect* students to their prior knowledge or experiences.¹⁴¹ This can be done by making references to previous lessons or commonly held experiences.¹⁴² The educator then guides students to *organise* their thinking in a way that builds connections with the current lesson.¹⁴³ This can be done through discussion or graphic organisers such as charts or diagrams. Throughout the lesson, the educator makes room for repetition and connection by asking questions which encourage *reflection* on the lesson being taught.¹⁴⁴ The educator then plans ways to *extend* the students' use of the new lesson to other contexts which allows students to practice their newly acquired knowledge.¹⁴⁵ The educator would close off the lesson by recapping what was learnt and explicitly requiring the students to answer how they could use their newly acquired knowledge in future.¹⁴⁶

¹³⁹ Shell et al n117 supra at 116. Whilst the ULM is cited by multiple sources in the context of education and learning, very few citations appear in the of the ULM appear in legal literature. For articles which relied on the ULM, see: Fernandez Alonso R & Muniz J, *International Handbook of Comparative Large-Scale Studies in Education*, Springer International Handbooks of Education, 2022, 1209; Chiriacescu et al, *Understanding Human Learning Using Multi-agent Simulation of the Unified Learning Model*, Int. J. Cognitive Informatics and Intelligence, 2013, Volume 7, Issue 4, 1. Nelson KG et al, *Motivational and Self-regulated Learning Profiles of Students Taking a Foundational Engineering Course*, Journal of Engineering Education, 2015, Vol. 104, Issue No. 1, 74; Gupta T et al, *Impact of Guided-Inquiry-Based Instruction with a Writing and Reflection Emphasis on Chemistry Students' Critical Thinking Abilities*, Journal of Chemical Education, 2015, Vol. 92, Issue 1, 32.

¹⁴⁰ Shell n117 supra at 116.

¹⁴¹ Shell et al n117 supra at 135.

¹⁴² Ibid.

¹⁴³ Shell et al n117 supra at 135.

¹⁴⁴ Ibid.

¹⁴⁵ Shell et al n117 supra at 135.

¹⁴⁶ Shell n117 supra at 136. This process is very similar to that employed by clinical legal educators. For more see Du Plessis MA, *Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and its Required Outcomes, Skills and Values*, De Jure, Vol. 48, Issue No. 2, 2015, 312-327; Du Plessis MA, *Clinical Legal Education: Identifying Required Pedagogical Components*, J. for Juridical Science Vol. 40, Issue No. 1 & 2, (2015) 64-80.

For instance, in teaching private defence to a criminal law student, the educator might begin by making reference to the element of unlawfulness as a crucial element of criminal liability. The educator would *connect* the students' prior knowledge on unlawfulness (usually covered at the beginning of the semester in the context of conduct in the form of omission) and remind the students how in that context, an omission was deemed unlawful if the legal convictions of the community required a legal duty on the accused to have acted in the circumstances.¹⁴⁷ To *organise* the students' thinking in a manner that builds connection, the educator would explain how all grounds of justification (including private defence) are based on the legal convictions of the community and how their purpose is to justify (or excuse) otherwise unlawful conduct.¹⁴⁸ The educator can encourage *reflection* by asking what the legal convictions of the community are based on and by trying to elicit what this means for the over-arching test for private defence – is it objective or subjective?¹⁴⁹ The educator can then proceed to *extend* the concept to each element of private defence and how it can be proven. For example, if the imminence of an attack only exists in the mind of the accused and cannot be established objectively speaking, then the accused cannot rely on private defence.¹⁵⁰ The educator might also explicitly require students to deliberate on what this means for future topics such as consent in the context of rape¹⁵¹ or taking (appropriation) in the context of theft.¹⁵² The CORE model can easily be applied to teaching the psychological phenomena which affects lawyering (discussed in chapter 3 hereof). For instance, to *connect*, the educator might elicit a time in a student's life when they were affected by framing, transference, change blindness, naïve realism or confirmatory bias (all discussed in chapter 3 of this work). To *organise*, the educator would explain the psychological phenomena including how and why it happens. To *reflect*, the educator would elicit responses on how one could go about negating any negative effects of the phenomena in practice based on what the students now know about the phenomena. Lastly, to *extend*, the educator might insist that the students write an essay on how the phenomena might affect others (colleagues, opponents, judges or juries) and how students can use knowledge thereof to their advantage in future practice. It is proposed that students can even

¹⁴⁷ For more on how an omission qualifies as unlawful conduct, see Snyman CR, *Criminal Law*, 7ed, LexisNexis, 2020 at 81.

¹⁴⁸ For a discussion on the legal convictions of the community as the over-arching test for grounds of justification such as private defence, see Snyman n147 supra at 82.

¹⁴⁹ For a discussion on the nature of the test for private defence (objective or subjective) see Snyman, n147 supra at 82-83.

¹⁵⁰ For a discussion on the requirement of imminence of the attack in the context of private defence, see Snyman, n147 supra at 82-83.

¹⁵¹ For a discussion of the crime of rape, see Snyman n147 supra at 313.

¹⁵² For a discussion of the crime of theft, see Snyman, n147 supra at 424-426.

self-direct themselves towards using CORE to improve their own study techniques or to practice asking better questions of their educators.

4.3.2 Facilitating Implicit Searching/Building Searchable Connections

As stated above and in chapter 2 of this work, learning is about making connections.¹⁵³ Explicit mental searching is when we make relatively straightforward connections that requires setting one's mind to a target and then locating that target in long-term memory.¹⁵⁴ Implicit mental searching is different in that you are not too sure what you are looking for.¹⁵⁵ For instance, you know where you live, you might envisage the street name that you have seen countless times when you turn into your street and the corresponding number of your dwelling when you turn into your driveway – this is explicit mental searching.¹⁵⁶

To further elaborate, I have constructed the following example which could be used in my proposed course. Say we pose the following question to students, “Where does Arnold Schwarzenegger live?” The student will need to use implicit searching to get to the answer. First, they would need to rely on his foreign surname to surmise that he was born in Austria and that as such, he could live there. If the student already knew that he was a famous film star in America, the student might infer that as a film star, he would live in Hollywood which is situated in Los Angeles. If the student had some geographical knowledge of the United States, they would know that Los Angeles is situated in the state of California. If the student knew something about politics, they would recall that Arnold was once Governor of California and thus, based on all the aforementioned, this is likely where he resides today. Essentially, implicit searching takes you through several routes before you settle on an ultimate answer. According to the authors of the ULM, most real-world problem-solving involves implicit rather than explicit searching.¹⁵⁷ From an instructional viewpoint, learning is about building searchable connections and as such, course design should be based on fostering and cultivating the

¹⁵³ Shell et al n117 supra at 136.

¹⁵⁴ Ibid.

¹⁵⁵ Shell et al n117 supra at 136.

¹⁵⁶ Ibid.

¹⁵⁷ Shell et al n117 supra at 136.

processes of implicit searching.¹⁵⁸ This is why a grounding in humanities (discussed above) is useful because it builds pathways or routes through which implicit searching can be achieved.

The authors of the CLM posit that since a curriculum designer/instructor knows more about the knowledge required for a course and how it should be organised and connected, they are in a prime position to use direct instruction to build a student's knowledge base for efficient explicit retrieval cues.¹⁵⁹ This is not the case with implicit retrieval because an instructor cannot cover all the possible ways in which the material could apply or be interconnected, nor can the instructor anticipate all the possible situations in which knowledge can be retrieved through implicit searching for novel problems.¹⁶⁰ What an instructor can however do, is to provide opportunities for students to engage in activities (including simulations) which require implicit searching to help students build a "richer knowledge base with more potential pattern matches".¹⁶¹ Whilst tacit learning is more difficult to direct, an instructor can at least structure the environment of the class in ways which promote the desired experiences or outcomes.¹⁶²

For example, research suggests that most of a radiologist's learning is done tacitly.¹⁶³ Those in training are shown an x-ray and then have an expert interpret that x-ray as part of the learning.¹⁶⁴ In fact, it could be said that most, if not all mentoring and apprenticeship programmes rely on implicit learning.¹⁶⁵ A student hears what their mentor says and then sees the choices that they make (even if the reasons for the choices are never explained or only become apparent later).¹⁶⁶

From my understanding of the above, it seems that what the student processes includes the circumstances and context of what is said and connects it with the decision made as well as the outcome of the choices made. It would appear therefore that the role of the mentor is to provide opportunities for these connections to be made (for the better or for the worst).

¹⁵⁸ Ibid.

¹⁵⁹ Shell et al n117 supra at 136.

¹⁶⁰ Ibid.

¹⁶¹ Shell et al n117 supra at 136.

¹⁶² Ibid at 137.

¹⁶³ Shell et al n117 supra at 136. See also Lesgold A, Robinson H, Glaser R, Klopfer D, Feltovich P, & Wang Y, *Expertise in a Complex Skill: Diagnosing x-ray Pictures* (1988). In M. T. H. Chi, M. J. Farr, & R. Glaser (Eds.), *The Nature of Expertise*, Mahwah, NJ: Lawrence Erlbaum Associates at 436.

¹⁶⁴ Shell et al n117 supra at 136.

¹⁶⁵ Ibid at 137.

¹⁶⁶ Shell et al n117 supra. For more on mentoring in legal education generally (outside of the clinical legal education context) see Brown-Nagin T, *The Mentoring Gap*, 129 Harv. L. Rev. F. 303 (2015-2016). Here the author argues for better relationships with students outside of the classroom to facilitate better experiences inside the classroom.

Considering my proposition that students need experiential training before they arrive at their clinical experience, there is no reason why such opportunities cannot be created in an undergraduate course which does not provide mentoring in the traditional sense. The mentoring and opportunities for implicit learning can occur from simulations (to be discussed in the next chapter), videos, podcasts, films, literature, the experiences of experts in the field or even pop culture. The lecturer of the proposed course becomes the mentor, not by showing how the work is done (which would be the case in the clinical experience) but rather, by explaining and exposing students to the skills and psychological implications that are required *to get the work done*. What must be remembered is that educators are the managers, trainers and coaches of working memory¹⁶⁷ and as such, the educator in a course such as the one proposed can serve the role of mentor and the course should be designed with this in mind. As intimated above, lecturers of regular substantive law courses generally do not have the time to devote to cognitive training and as such, they often default to content and subject-matter coverage as the primary objective in the classroom. I suspect that due to the above, many lecturers would welcome a course intended to increase the clarity and rigor with which students think.¹⁶⁸

4.3.3 Motivation through goal setting

As stated above, motivation directs working memory allocation and as such, the goal of motivation is to “focus working memory on the learning task”.¹⁶⁹ The authors of the ULM set out multiple ways in which teachers can facilitate motivation.¹⁷⁰ For the purposes of this work, I will only focus on goal setting as an aspect of motivation which I perceive to be indispensable to effective course design and development.

From a cognitive perspective, goals are central to all intentional (or purposeful) and controlled processing.¹⁷¹ Since learning is purposeful, education, including legal education is

¹⁶⁷ Shell et al n117 supra at 138.

¹⁶⁸ Pettys TE, *The Analytic Classroom*, 60 Buff. L. Rev. 1255 (2012). In this article, the author laments how subject-matter coverage permeates most classrooms and makes the point that the purpose of classrooms should be to train students to “think in lawyerly ways” even if that is at the cost of the breadth and depth of the content to be covered.

¹⁶⁹ Shell et al n117 supra at 131.

¹⁷⁰ For a full discussion on how motivation can be supported in the classroom, see Shell et al n117 supra at Chapter 5 and 8. For the purposes of this work, only those aspects which are to be considered in course design will be discussed.

¹⁷¹ Shell et al n117 supra at 118.

generally goal directed.¹⁷² It is trite that students should be pursuing educational goals that are concordant with certain predetermined outcomes.¹⁷³ Once there is a goal, students generally exert cognitive effort to attain that goal.¹⁷⁴ Educational goals can be classed broadly as learning goals or performance goals.¹⁷⁵ Learning goals are directed at the acquisition of new knowledge or the mastering of a new task or problem while performance goals are directed at demonstrating the ability to do something (especially in relation to others).¹⁷⁶ The authors of the ULM posit that the most useful goal to set in an educational setting is a learning goal.¹⁷⁷ According to the authors, this was made clear to them in practice when they conducted an experiment in one of their programs.¹⁷⁸ A company had hired the authors of the ULM to offer one of their courses to its employees and the company offered a monetary bonus to the employees who took and completed the course.¹⁷⁹ When asked why participants were taking the course, three answers emerged: (1) To receive the bonus (2) To gain knowledge which would help the participant do their job better and (3) To learn as much as the participant could about the industry.¹⁸⁰ The authors found that for the final exam, those who completed the course merely for the sake of compensation, did not pass, those who undertook the course to assist with their job passed in the 70% criterion but those who took the course because they wanted to learn as much as possible, passed with scores above 90%.¹⁸¹ From this experiment, it can be inferred that those who had a learning goal ended up learning more.¹⁸² The authors of the ULM suggest that learning goals are valuable because they are not the same as intrinsic motivation or interest – whilst intrinsic motivation might help, a learning goal does not require that you be interested in or enjoy the contents of what you are learning.¹⁸³ Learning goals are valuable because they are connected to other desired things, for instance, one of the authors of the ULM is a statistician who never liked maths.¹⁸⁴ He had no desire to study statistics for

¹⁷² Ibid. See also Du Plessis n 147 supra *Determining the Mission and Focus of a University Law Clinic and its Required Outcomes, Skills and Values*.

¹⁷³ Shell et al n107 supra at 118. Further on the point of appropriate outcomes see Du Plessis MA, *Designing an Appropriate and Assessable Curriculum for Clinical Legal Education*, De Jure, Vol. 1, (2016) 1. See also, Du Plessis MA, *Clinical Legal Education Identifying Required Pedagogical Components*, Journal for Juridical Science, Vol. 40, (2015) 64.

¹⁷⁴ Shell et al n107 supra at 118.

¹⁷⁵ Ibid.

¹⁷⁶ Shell et al n107 supra at 118.

¹⁷⁷ Ibid.

¹⁷⁸ Shell et al n107 supra at 119.

¹⁷⁹ Ibid.

¹⁸⁰ Shell et al n107 supra at 119.

¹⁸¹ Ibid.

¹⁸² Shell et al n107 supra at 119.

¹⁸³ Ibid. For a contrary view where the hypothesis is made that a learning goal can only be achieved if it is aligned with one's own intrinsic motivations, see Grigorescu n129 supra.

¹⁸⁴ Shell et al n117 supra at 119.

statistics sake but did so because he liked doing research and could use statistics to properly analyse his research data.¹⁸⁵

In the legal context, a student might not like learning about the Prevention of Illegal Evictions and Unlawful Occupation of Land Act (PIE)¹⁸⁶ due to an assumption that its provisions favour the rights of illegal occupiers over the rights of private landowners. However, this disinclination can be turned around if the student appreciated that a sound knowledge of this legislation could be used or interpreted in ways which assist the private landowner.

The authors of the ULM suggest that the core of successfully motivating students is to get them to set a learning goal.¹⁸⁷ Accordingly, course design should build in and bring learning goals to the forefront. The authors suggest using the KWLQ chart method to set learning goals for specific topics.¹⁸⁸ The KWLQ acronym can be explained in the context of the above example as follows: First, the educator would ask, “What do you *Know* about the Act?” Next, the educator would ask “What do you *Want* to learn about the Act?” Having read or engaged with the prescribed material, the educator would then ask, “What new information did you *Learn* about the Act? Finally, the educator asks, “What unanswered or new *Questions* do you have about the Act? In this manner, the educator is facilitating the generation of learning goals for the lesson and beyond.¹⁸⁹

Course design pertaining to the relevant psychological phenomena could likewise be structured in this manner. The course outline could require students to apply the first three parts of the KWLQ chart method on their own in advance of each topic (what do you *know*, what do you *want* to know and what did you *learn*) and the lecture or class exercises can then focus on the final part (what unanswered or new *questions* do you have).

4.3.4 Expectancy driven methods

The next method which could underlie course design is to build in a way for students to anticipate an outcome and then to have the student match that expectation against feedback

¹⁸⁵ Ibid.

¹⁸⁶ Act 19 of 1998.

¹⁸⁷ Shell et al n117 supra at 119.

¹⁸⁸ Ibid.

¹⁸⁹ Shell et al n117 supra at 1120. This is supported by Lee’s metacognitive approach discussed in chapter 2 of this work. See Lee JA, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 Drexel L. Rev. (2020) 227 at 238-239.

given and the outcome.¹⁹⁰ This is known as the anticipatory or expectancy-driven method which was first proposed by Renkl in his study of probability.¹⁹¹ In this method, the educator simulates a situation, for instance, that the educator will do xyz and asks the students to predict the outcome.¹⁹² The educator then does xyz and the students are required to compare their predictions with the actual outcome.¹⁹³ The simulated situations are carefully selected to ensure that the predictions are generally proved wrong.¹⁹⁴ The authors of the ULM give the example of a science teacher asking what will happen to a weight tied to a rubber band if the rubber band is heated.¹⁹⁵ Most students would predict that the rubber band will soften and stretch thereby moving the weight lower.¹⁹⁶ Scientifically, what actually happens is that the rubber band contracts and the weight rises.¹⁹⁷

In the criminal law context, an educator might posit a situation where A, B and C participate in the killing of X to various degrees of participation (for instance by beating him to death) but there is only enough evidence to establish that the blow dealt by A caused death. The question posed would be whether B or C (who played a lesser role in the killing, say by dealing weaker blows) could be convicted of murder together with A. It is arguable that most students who have just completed the first semester of their undergraduate criminal law curriculum would answer no, because all the elements of the crime (particularly, causation cannot be established against B and C). The answer is of course incorrect due to the existence of the doctrine of common purpose which allows the prosecution to impute the acts (including the element of causation) of the principal perpetrator to all others who actively associated with the killing (subject to a number of requirements).¹⁹⁸

According to the authors of the ULM, expectancy-driven methods provide opportunities for new chunk building (chunking was discussed in chapter 2 of this work under 2.3.2) and the formation of new connections.¹⁹⁹ The key advantage of this method is that “discrepant events tend to attract attention, so they can focus the students’ attention on the

¹⁹⁰ Shell et al n107 supra at 153

¹⁹¹ Ibid. See also Renkl A, *Learning from Worked-Out Examples: A Study on Individual Differences*, Cognitive Science, 21(1), (1997) at 1–29.

¹⁹² Ibid.

¹⁹³ Shell et al n117 supra at 153 and Renkl n191 supra at 1-29.

¹⁹⁴ Ibid.

¹⁹⁵ Shell et al n117 supra at 153.

¹⁹⁶ Ibid.

¹⁹⁷ Shell et al n117 supra at 153.

¹⁹⁸ For a discussion of common purpose by active association, including the requirements see Snyman, n147 supra at 227-230.

¹⁹⁹ Shell et al n117 supra at 153.

material”.²⁰⁰ The hypothesis is that, as students encounter the discrepancy between prediction and outcome, they will have the opportunity to transform the connections in their existing knowledge base.²⁰¹ The discrepancy serves as a tool to weaken the knowledge which is inconsistent with the new information and to strengthen the new connection being made.²⁰² I am thus of the opinion that the intended course be designed in a manner which makes room for expectancy driven learning.

4.3.5 Practicing deliberately

According to the authors of the ULM, experts become experts because they practice – they develop routines.²⁰³ A number of consistent observations have been made about experts, the most crucial of which is that they practice deliberately.²⁰⁴ With ordinary practice, a person tries to automate some existing process or processes, with deliberate practice, the person is using working memory with the specific intention of either developing or changing a process.²⁰⁵ With deliberative practice, a person is actually thinking about some details of what they are doing or how they are doing it, with the intent of changing (usually improving) it.²⁰⁶ To modify what would normally be an automated process, we must somehow consciously bring the process into working memory in order to deal with it.²⁰⁷ The authors of the ULM give the example of an expert surgeon who performs his work without having to consciously think about how to hold the knife – this is automated practice.²⁰⁸

In the lawyering context, many processes and responses are automated, for instance, an expert lawyer automatically embarks on a process of issue identification when he hears a set

²⁰⁰ Ibid.

²⁰¹ Shell et al n117 supra at 153.

²⁰² Ibid.

²⁰³ Shell et al n117 supra at 156. See also Kiewra K, & Creswell J, *Conversations with Three Highly Productive Educational Psychologists: Richard Anderson, Richard Mayer, and Michael Pressley*, Educational Psychology Review, Vol. 12(1) (2000) at 135–161.

²⁰⁴ Shell et al n107 supra at 156. See also, Gardner H, *Extraordinary Minds*, New York Basic Books, (1998); Gladwell, M, *Outliers: The Story of Success*, New York Little, Brown, and Company, (2008); Bloom B, & Sosniak L, *Developing Talent in Young People*, New York: Ballantine Books, 1985; Ericsson KA, Krampe RT, & Tesch-Römer C, *The Role of Deliberate Practice in the Acquisition of Expert Performance*, Psychological Review, Vol. 100(3), (1993) at 363–406; Ericsson KA, *The Influence of Experience and Deliberate Practice on the Development of Superior Expert Performance*. In K. A. Ericsson, N. Charness, P. J. Feltovich & R. R. Hoffman (Eds.), *The Cambridge Handbook of Expertise and Expert Performance*, New York: Cambridge University Press (2006) at 683–703.

²⁰⁵ Shell et al n117 supra at 156.

²⁰⁶ Ibid.

²⁰⁷ Shell et al n117 supra at 156.

²⁰⁸ Shell et al n117 supra at 156.

of facts. An expert lawyer automatically embarks on the process of admission, denial or avoidance when reading a pleading which he is required to respond to. At trial, an expert lawyer automatically objects to evidence which is inadmissible. However, there was a time when the expert was still learning and when they *did* have to think about how and when their responses were appropriate. According to the authors of the ULM, that is when the expert was still a novice and they were engaging in deliberate practice.²⁰⁹ It is proposed by the authors of the ULM that the knowledge gained from experts (understanding the automatic procedures relied upon by experts and how they were acquired) can be turned into a blueprint for the practice of non-experts.²¹⁰ It is my contention that with this in mind, course design should incorporate opportunities for deliberate practice, whether that is done through simulation or through the study of deliberative practice in others. As such, since the focus of the intended course is the role of psychology and cognitive science on the *skills* of lawyering, it is imperative that a course like the one intended be taught by an actual expert in practice (or at least a practicing attorney who is also an academic).

4.4 Curriculum/syllabus design lessons from experiential learning (the setting of goals and outcomes).

4.4.1 Link to experiential learning

In 1975, Kolb and Fry who are often referred to as the grandfathers of experiential learning published their paper “*Towards an Applied Theory of Experiential Learning*” in Cooper’s “*Theories of Group Process*”.²¹¹ Here, they developed a model that is often used to describe experiential learning. Lee (whose work was relied upon in chapter 2 of this work) calls this the recursive cycle.²¹² The intriguing aspect of the model is that the teaching process can begin at any stage and is continuous.²¹³ Essentially, there is no limit to the number of times that the cycle might run its courses in a student’s personal learning experience. The four stages are (1) the formation of abstract concepts and generalizations, (2) the testing of the implications of

²⁰⁹ Ibid.

²¹⁰ Shell et al n117 supra at 156.

²¹¹ Kolb DA & Fry R, *Towards an Applied Theory of Experiential Learning* in Cooper C, *Theories of Group Process*, (1975).

²¹² Lee n189 supra at 238-239.

²¹³ Ibid at 234.

those concepts in new situations, (3) concrete experience and observations and (4) reflection.²¹⁴ Lee adapts this cycle into the more contemporary 12-step metacognitive method (which was discussed in chapter 2 of this work).²¹⁵ Much like the experiential learning theory of Kolb & Fry, Lee proposes that metacognitive theory holds that human performance improves when people are able to plan and reflect on their own experiences in order to improve performance.²¹⁶ According to Lee, the metacognitive thinker performs more effectively because he deliberately maps out his intellectual pursuits, evaluates his own strengths and weaknesses and purposefully adjusts thoughts and actions in ways which will improve outcomes.²¹⁷ As such, metacognition (based on experiential learning) can enhance legal expertise by providing a means by which students can go from novice to expert.²¹⁸

Finkelstein writes about ways of creating more “practice aware” law graduates.²¹⁹ According to Finkelstein, educators should expand the use of pedagogy that replicates the practice of law and enhances the learning experience through collaborative exercises (this is an experiential learning technique).²²⁰ This technique and other methods to teach the outcomes discussed in this chapter will be dealt with in more detail in chapter 5 but it is important at this stage, to mention that whilst experiential learning is a method or pedagogy in and of itself, it underlies many other techniques which serve to produce the requisite outcomes of the proposed course on psychology *within* the law and is thus relevant to this chapter. As far as experiential techniques go, Finkelstein emphasises teamwork, collaboration, and creative problem solving.²²¹ According to Finkelstein, the underlying pedagogy influencing course design should (1) involve students working in teams (learning from each other) to address practical problems, (2) utilise divided class formats with interaction intended to replicate the process of working with opposing counsel, and (3) create opportunities where students participate in

²¹⁴ Kolb & Fry n211 supra at 34.

²¹⁵ Lee n189 supra at 238-239.

²¹⁶ Ibid at 229.

²¹⁷ Lee n189 supra at 230.

²¹⁸ Ibid.

²¹⁹ Finkelstein J, *Practice in the Academy: Creating “Practice Aware” Law Graduates* Journal of Legal Education Vol. 64(4), (May 2015) at 622. For articles citing the work of Finkelstein on collaboration in the context of the development of legal education see: Millemann M et al, *Teaching Professional Responsibility through Theatre*, 17 Hastings Race Poverty & L.J. 399 (2020); Kupenda A, *Collaborative Learning in the Constitutional Law Classroom: Adapting the Concept of Inevitable Disagreement in Seven Steps*, 68 J. Legal Educ. 284 (2018-2019); Oko O, *Legal Education Reform in Africa: Time to Revisit the Two-Tier Legal Education System*, 29 U. Miami Int’l & Comp. L. Rev. 130 (2021-2022). Schultz N, *What Do Lawyers Really Do?*, 50 Cap. U. L. Rev. 1 (2022).

²²⁰ Finkelstein n219 supra at 622. For more on collaboration in clinical legal education see Du Plessis MA, *Clinical Legal Education: The Challenge of Large Student Numbers*, J for Juridical Science Vol. 38, Issue No. 2, (2013) 17-37; Du Plessis MA, *Clinical Legal Education: The Assessment of Student Collaboration and Group Work*, J for Juridical Science Vol. 39, Issue No. 2, (2014) 67-91.

²²¹ Finkelstein n219 supra at 622.

simulations on opposing sides of a problem, and as in actual practice, interact and work with others to address legal issues.²²²

This pedagogical approach would suit a course on psychology *within* the law by incorporating experiential learning techniques before the student actually embarks on their clinical experience in final year. According to Stuckey, any subject can be taught using experiential learning methodology.²²³ The remaining question is then how do we go about actually designing the syllabus for a course on psychology *within* the law with experiential learning as its underlying methodology?

4.4.2 Course Design

According to Hess, course design decisions include five components:

“(1) Goals—articulating the knowledge, skills, and values students should learn in the course; (2) Materials—finding appropriate texts and electronic resources; (3) Assignments—identifying readings and projects to be completed in and out of class; (4) Methods—choosing teaching and learning approaches; and (5) Evaluation—determining the grading scheme, including exams, quizzes, papers, and participation [sic].”²²⁴

It is proposed that a successful syllabus sets out more than just reading assignments and due dates, it sets out course goals, objectives, outcomes, teaching methodology and assessment methods.²²⁵ This chapter concerns itself primarily with the goals (or aims) and outcomes of the intended course whilst the next chapter deals with the other pedagogical components, namely, methodology, content (including materials) and assessment. The purpose of a syllabus is four-fold: (1) it serves as a set of instructions to execute teaching and learning, (2) it can be considered an enforceable and reciprocal agreement between educator and student with rights and obligations on both sides, (3) it serves as evidence in cases of challenge, review promotion and accreditation and (4) it contains certain institutionally mandated requirements.²²⁶ From a

²²² Ibid. See also Bryant S & Milstein ES, *Rounds: A Signature Pedagogy for Clinical Education*, 14 Clinical L. Rev. 195 (2007) where the authors propose “rounds”, a form of facilitated peer conversation intended to help students reflect on their experiences collaboratively.

²²³ Stuckey R et al, *Best Practices for Legal Education: A Vision and a Road Map* (2007) Clinical Legal Education Association at 168.

²²⁴ Hess G, *Collaborative Course Design: Not My Course, Not Their Course, but Our Course* (2008) 47 Washburn LJ 367 at 373.

²²⁵ Soonpaa NJ, *The Ins and Outcomes of Writing an Effective Syllabus*, Journal of Legal Education, Spring 2018, Vol. 67, No 3, pp833-852 at 834.

²²⁶ Soonpaa n225 supra at 834. See also Hess n204 supra at 374.

pedagogical perspective, it should be clear how the course will be taught and include how and what students will learn from a mere reading of the syllabus.²²⁷

With this in mind, where do we commence with course design? According to the authors of *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (hereinafter “Australian Best Practices”),²²⁸ course design does not commence with teaching method (and hence that has been left for the next substantive chapter of this work), but rather, the first question to be asked is, “what are the aims (or “goals”) of the course?”²²⁹ Goals are the base for learning objectives and need to be established before it can be determined what methods will best meet those aims.²³⁰ Goals (or aims) are different from intended learning outcomes in that outcomes are more specific than goals (or aims).²³¹ A syllabus also requires course outcomes, outcomes describe what the student will know or will be able to do as a result of their learning in the course.²³² As such, course goals (aims) should be decided first, then learning outcomes and lastly, the teaching methods.²³³ All three, once established will form part of the syllabus.

4.4.2.1 Course Goals/Aims

In establishing course goals or aims, one would ask, what type of educational goals (aims) are best taught by experiential teaching methods?²³⁴ According to Stuckey, the five most important educational objectives from an experiential learning perspective are: (1) developing problem solving skills (2) becoming more reflective about legal culture and lawyering roles (3) learning how to both behave and think like a lawyer (4) understanding the meaning of justice and lawyers’ responsibility to strive to do justice and (5) discovering the human effects of the law.²³⁵ In chapter 2 of this work, the role and impact of cognitive psychology on learning was canvassed and the role and impact of psychological phenomena on the same skills referenced by Stuckey was canvassed in chapter 3. Accordingly, the primary course goals (or aims) of a

²²⁷ Ibid.

²²⁸ Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School*, Australian National University Press, 2017, Ch4 (Course Design for Clinical Teaching) at 68. [Hereafter Australian Best Practices]

²²⁹ Ibid.

²³⁰ Evans et al, *Australian Best Practices* n228 supra at 68.

²³¹ Ibid at 70.

²³² Evans et al, *Australian Best Practices* n228 supra at 70.

²³³ Evans et al, *Australian Best Practices* n228 supra at 70.

²³⁴ Ibid.

²³⁵ Evans et al, *Australian Best Practices* n228 supra at 70. See also Stuckey n203 supra at 50-51.

course on psychology *within* the law would be (1) to learn how cognitive learning theory maximises learning and (2) to learn the impact and effect of certain psychological phenomena on the skills required to practice law. In summation, goals (aims) can be understood as the reasons *why* a course is being offered.²³⁶

4.4.2.2 Course/Learning Outcomes

Learning outcomes require that a student will be able to show what they have learned from a course.²³⁷ In other words, learning outcomes are the skills and knowledge which is intended to be demonstrated by students by the time that the course is completed.²³⁸ Learning outcomes are crucial to course design because they affect course content, practical experience sought and mode of assessment.²³⁹ Accordingly, materials, class time, casework, practical and theoretical content as well as assessments all need to accord with the learning outcomes.²⁴⁰ The most important thing about setting course outcomes is to ensure to “use verbs that create measurable levels of proficiency to facilitate assessment”.²⁴¹ For example, rather than phrasing a learning outcome as, “Students must *understand*...”, use verbs such as “identify, describe, analyse and determine.”²⁴² The latter verbs will result in more effective learning outcomes as they are easier to quantify than something like understanding which may be subjective or open to interpretation.²⁴³ The authors of the Australian Best Practices suggest that useful verbs word be to:

“analyse, apply, appreciate, classify, collaborate, compare, compute, conduct, contrast, define, direct, derive, designate, demonstrate, discuss, display, evaluate, explain, identify, infer, integrate, interpret, justify, list, name, organise, outline, report, respond, solicit, state, synthesise.”²⁴⁴

²³⁶ Ibid at 78.

²³⁷ Evans et al, *Australian Best Practices* n228 supra at 78.

²³⁸ Ibid. See also The Learning Institute, *Good Practice Guide on Writing Aims and Learning Outcomes* (2011) Queen Mary, University of London, 4.

²³⁹ Evans et al, *Australian Best Practices* n228 supra at 79.

²⁴⁰ Ibid.

²⁴¹ Soonpaa n225 supra at 838.

²⁴² Ibid.

²⁴³ Soonpaa n225 supra at 834.

²⁴⁴ Evans et al, *Australian Best Practices* n208 supra at 80.

In addition thereto, the Australian Threshold Learning Outcomes (TLOs) for Law specify that in relation to thinking skills, students should be able to:

“identify...articulate...apply...generate...engage in...and think creatively...”²⁴⁵

Soonpaa offers a very useful sequence that can be applied to develop course specific learning outcomes as follows:

- “1. Ask yourself, what do I want my students to know at the end of this course? (Hint: “All about criminal law” is too broad—that is more likely a goal.)
2. Next, are there identifiable subparts to that content? And what do I intend to cover in the course? (Now you are getting to learning objectives—the content that you, the teacher, plan to cover.)
3. Does each subpart identify specific content knowledge, skill(s), or values?
4. What level of proficiency do I expect students to reach? Can I describe each outcome using a clear, specific verb setting out an expectation that can be assessed? (With 3 and 4, now you are developing learning outcomes.)
5. Given the constraints of my course and students, have I set out an appropriate amount of content and appropriate goal proficiency levels?
6. Having answered the first five questions, ask the following: Can I design assessments to determine whether my students have arrived at the identified learning destination(s) and with the identified level of proficiency?”²⁴⁶

In addition to the above, the authors of the Australian Best Practices propose the following specific outcomes for clinical legal education (which incorporates experiential learning):

“critical analyses of legal concepts through reflective practice
an ability to work collaboratively
an ability to practise ‘lawyering’ skills
developed interpersonal skills, emotional intelligence and self-awareness of their own
cognitive abilities and values

²⁴⁵ Kift S, Israel M and Field R, Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement December 2010 (11 February 2011) Australian Learning and Teaching Council, at perma.cc/RP3A-PWRQ.

²⁴⁶ Soonpaa n205 supra at 839.

a developing ability to ‘learn from experience’

an understanding of continuing professional development and a desire for life-long self-learning

an understanding, and appropriate use, of the dispute resolution continuum (negotiation, mediation, collaboration, arbitration and litigation)

an awareness of lawyering as a professional role in the context of wider society (including the imperatives of corporate social responsibility, social justice and the provision of legal services to those unable to afford them) and of the importance of professional relationships

a developing personal sense of responsibility, resilience, confidence, self-esteem and, particularly, judgment

a consciousness of multi-disciplinary approaches to clients’ dilemmas – including recognition of the non-legal aspects of clients’ problems

a developing preference for an ethical approach and an understanding of the impact of that preference in exercising professional judgment

a consolidated body of substantive legal knowledge, and knowledge of professional conduct rules and ethical practice, and

an awareness of the social issues of justice, power and disadvantage and an ability to critically analyse entrenched issues of justice in the legal system. [sic]”²⁴⁷

From the above list, we can summarise several outcomes which link directly to the psychological insights related to learning (dealt with in chapter 2) and practical skills (dealt with in chapter 3 of this work). Much of what was discussed in those chapters would constitute the broad curriculum for the intended course. It is submitted that most of the above outcomes can be introduced in a course on psychology *within* the law on an introductory and developing basis, in this way, they can serve as an accompanying capstone experience or will serve to facilitate a future capstone experience during the students’ actual clinical legal course (a more detailed discussion on capstones follows below). Accordingly, it is proposed that the below outcomes (drawn, summarised and grouped from the list above) be introduced as the ultimate outcomes required of a graduate. It is further proposed that they be introduced these as *developing outcomes* at an early enough stage in the students’ broader curriculum that they can be embedded (at least in part) by the time that the student reaches final year (which is usually

²⁴⁷ Evans et al, *Australian Best Practices* n228 supra at 80.

when clinical courses are generally offered). My hypothesis is that if students are exposed to, learn and understand the ultimate outcomes early enough, they may begin cultivating a conceptualisation of how psychology influences the acquisition of these outcomes for better uptake during their subsequent courses and actual clinical legal experience. What follows is a table summarising and grouping the outcomes proposed by the Australian Best Practices and linking them to the psychological insights discussed in chapter 2 of this work.

TABLE: Learning Outcomes for Psychology *within* the Law

Item	Learning Skills Outcome	Psychological Insights from Chapter 2 and 3 including chapter references	Specific psychological phenomena related to the acquisition of the skill
1.	Developing reflective practice and ways to promote substantive and procedural legal knowledge.	Chapter 2, Item 2.2, 2.3 and 2.4 • The need for development in Law School Curricula. • The use of cognitive learning theory to maximise Law School Learning. • The use of learning styles to maximise Law School Learning.	Attention, memory, cognition, absorption and processing, sequencing, chunking.
2.	Development of cognitive abilities and values including emotional intelligence and interpersonal skills.	Chapter 2, Item 2.3 • The use of cognitive learning theory to maximise Law School learning. Chapter 3, Item 3.4.1 and 3.4.2 • Psychological insights relevant to interviewing and counseling. • Psychological insights relevant to emotional intelligence.	Attention, memory, cognition, absorption and processing, sequencing, chunking transference, framing.
3.	Developing mechanisms for self-directed learning including professional development.	Chapter 2, Item 2.3.2 and 2.3.3 • The role of attention and memory in learning. • Cognitive capacity overload and the perils of multitasking.	Intelligence, personality, learning styles, sequencing.

4.	Developing collaboration and multi-disciplinary approaches to novel problems.	Chapter 3, Item 3.3, 3.4.1 and 3.4.2 • The value of interdisciplinary collaboration. • Psychological insights relevant to interviewing and counseling. • Psychological insights relevant to emotional intelligence.	Personality type, rational choice, prospect theory, transference, framing etc.
5.	Developing legal reasoning and decision-making skills.	Chapter 3, Item 3.4.4 • Psychological insights relevant to analysis and legal reasoning (including decision-making).	Availability, anchoring, egocentric bias, affect heuristics.
6.	Developing Lawyering Skills through practice (including the interviewing, negotiating, mediating, arbitrating and litigating (all components of advocacy).	Chapter 3, Item 3.4.3 • Psychological insights relevant to advocacy (including problem solving).	Change blindness, inattentional blindness, preconception, confirmatory bias, causal attribution error, naïve realism.
7.	Developing Professional responsibility and ethics including to society at large (social justice and critique of legal theories).	Chapter 3, Item 3.4.5 • Psychological insights relevant to morality and professional identity (including professional responsibility and ethics).	Self-affirmation, questioning, empathy, conception of truth.
8.	Developing the ability to learn experientially.	Chapter 5, Item 5.3 • Methodology.	

The intended course methodology or pedagogy, content and assessment of the proposed course will be dealt with in the next chapter (chapter 5) and the table will be reproduced to include the teaching methods and assessments.

4.5 Placement of the proposed course within the LLB curriculum.

4.5.1 Placement informed by an empirical study of the development of reasoning skills in law students.

In September 2006, Krieger conducted a study seeking to examine the development of legal reasoning skills in law students throughout their undergraduate legal curriculum.²⁴⁸ Krieger's study is based on the work of scholars who developed the research in order to examine the way in which medical students progressed through their studies from novices to expert practitioners.²⁴⁹ The medical researchers were able to develop theories grounded in empirical findings about the reasoning process of expert physicians and the most successful methods to train them and Krieger's work is an attempt to extend this research to the field of law.²⁵⁰ Much

²⁴⁸ Krieger SH, *The Development of Legal Reasoning Skills in Law Students: An Empirical Study*, Journal of Legal Education, September 2006, Volume 56, No 3 (September 2006) at 332-355. The work of Krieger was relied upon heavily by Gantt (cited in Chapter 3 of this work at item 3.3). More specifically, see Gantt L, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 Campbell L. Rev. 413 (2007). Krieger's work was also used by the following authors: Liebmann T, *The Elephant in the Room in Clinical Scholarship: Ethical Guardrails and Case Histories*, Clinical Law Review, Vol. 29, Issue 1, Fall 2022, 135-ii; Cooper J & Gurung R, *Smarter Law Study Habits: An Empirical Analysis of Law Learning Strategies and Relationship with Law GPA*, Saint Louis University Journal, Vol. 62, Issue 2, Winter 2018, 361-396; Martinez S, *Why Are We Doing This: Cognitive Science and Nondirective Supervision in Clinical Teaching*, Kansas Journal of Law & Policy, Vol. 26, Issue 1, Fall 2016, 24-47.

²⁴⁹ Ibid Krieger at 332. See also Patel V et al., *Differences Between Medical Students and Doctors in Memory for Clinical Cases*, 20 Med. Educ. 3 (1986). The other work relied upon by Krieger is as follows: Kaufman D and Patel V, *The Nature of Expertise in the Clinical Interview: Interactive Medical Problem Solving*, in Proceedings of the Tenth Annual Conference of the Cognitive Science Society 461 (Hillsdale, N.J., 1988); Vimla L. Patel, David R. Kaufman, and José F. Arocha, *Conceptual Change in the Biomedical and Health Sciences Domain*, in Advances in Instructional Psychology (Robert Glasser ed., Mahwah, N.J., 2000) [hereinafter Patel et al., Conceptual Change]; Vimla L. Patel, José F. Arocha, and David R. Kaufman, *Expertise and Tacit Knowledge in Medicine*, in Tacit Knowledge in Professional Practice 75 (Robert H. Sternberg and Joseph A. Horvath eds., Mahwah, N.J., 1999) [hereinafter Patel et al., Expertise and Tacit Knowledge]; Vimla L. Patel and David R. Kaufman, *Clinical Reasoning and Biomedical Knowledge: Implications for Teaching*, in *Clinical Reasoning in the Health Professions* 117 (Joy Higgs and Mark Jones eds., Oxford, 1995); Vimla L. Patel and Guy J. Groen, *The General and Specific Nature of Medical Expertise: A Critical Look*, in *Toward A General Theory of Expertise* 93 (K. Anders Ericsson and Jacqui Smith eds., Cambridge, 1991); José F. Arocha and Vimla L. Patel, *Novice Diagnostic Reasoning in Medicine: Accounting for Evidence*, 4 J. Learning Science 355 at 995; Henry P. A. Boshuizen and Henk G. Schmidt, *On the Role of Biomedical Knowledge in Clinical Reasoning by Experts, Intermediates and Novices*, 16 Cognitive Sci. 153 (1992); Vimla L. Patel, Guy J. Groen, and Geoffrey R. Norman, *Reasoning and Instruction in Medical Curricula*, 10 Cognition Sc Instruction 335 (1993); Vimla L. Patel and Guy J. Groen, *Developmental Accounts of the Transition from Medical Student to Doctor: Some Problems and Suggestions*, 25 Med. Educ. 527 (1991); Vimla L. Patel, Guy J. Groen, and Geoffrey R. Norman, *Effects of Conventional and Problem-Based Medical Curricula on Problem Solving*, 66 Acad. Med. 380 (1991) [hereinafter Patel et al., Effects of Conventional and Problem-Based Curricula]; Vimla L. Patel, Guy J. Groen, and José E Arocha, *Medical Expertise as a Function of Task Difficulty*, 18 Memory and Cognition 394 (1990). See generally Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 Clinical L. Rev. 149, 153-54, 178-85 (2004).

²⁵⁰ Krieger n248 supra at 333.

of Krieger's findings relevant to law students will be used in this work to ascertain the most optimal time within students' legal degrees for the introduction of the course on psychology *within* the law as contemplated.

Krieger's study presented law students at different stages of their degree with a legal problem.²⁵¹ The research focused on three groups of students (1) incoming law students (first years), (2) students completing the first semester of their second year (second years) and (3) students nearing graduation (final years).²⁵² The responses were transcribed, coded and analysed by Krieger and his team to identify the patterns of reasoning for students at every stage of their degree.²⁵³ Krieger was interested in answering the following questions pertaining to the students answering the problem:

“Do they initially rely on common sense and lay experience to solve legal problems? Do they then begin to apply legal rules in solving problems but in an inconsistent and incoherent manner relying on both relevant and irrelevant facts? Do they eventually start to filter out irrelevant facts and focus on facts relevant to an effective legal theory? When, if ever, do they use backward-directed reasoning? Do they ever start to use the forward-directed reasoning of an expert practitioner?”²⁵⁴

The stimulus material for the legal problem was a real-life consumer fraud case dealing with the sale of a used vehicle.²⁵⁵ In short, the salesman had told the consumer that the vehicle had been “executive driven” and was a “great used car”.²⁵⁶ On formal documentation given to the buyer, it had been stated that former owner of the vehicle had been a rental car company.²⁵⁷ The consumer did not experience any serious malfunctioning of the vehicle.²⁵⁸ The problem raised four legal issues: “(1) whether “executive driven” was a representation of a fact or mere puffing; (2) whether the representation was material; (3) whether the buyer reasonably relied on the misrepresentation; and (4) whether the customer incurred any damages”.²⁵⁹

²⁵¹ Krieger n248 supra at 336.

²⁵² Ibid.

²⁵³ Krieger n248 supra at 336.

²⁵⁴ Ibid.

²⁵⁵ Krieger n248 supra at 337. The case used was *Miller v Williams Chevrolet* 326 Ill. App. 3d 642, 762 N.E.2d 1 (2001) and a copy of the problem is annexed to Krieger's article n228 supra.

²⁵⁶ Ibid.

²⁵⁷ Krieger n248 supra at 337. Also, see the case citation at n255 supra.

²⁵⁸ Ibid.

²⁵⁹ Krieger n248 supra at 337. Also, see the case citation at n255 supra.

In addition to the actual facts from the case, several red herrings were included in the facts to add to its complexity as follows: “(1) the buyer was described as a thirty-seven year old electrician with an eighth grade education; (2) English was identified as his second language; (3) while the client's name is "Samos," the name on the title was written as "Stamos"; and (4) the sticker stated that the car was sold "as is.””²⁶⁰ The first two facts were added to create sympathy for the buyer but they were not legally relevant – the client was literate (he had an eighth grade education) and he read the sticker at the dealership and signed all the paperwork.²⁶¹ The client did not indicate that he failed to understand anything.²⁶² In the circumstances, the client's limited intellectual and language capacities probably were not relevant to misrepresentation.²⁶³ Likewise, the misspelling of the name was not relevant but was included to assess whether any students (particularly first years), would focus on those issues.²⁶⁴ The reference to the “as is” sticker was included to establish whether students had an understanding of the relationship between a damages claim based on misrepresentation versus waiver of obligations in the context of what we call “*voetstoets*” in South Africa.²⁶⁵

The data acquired by Krieger was analysed based on the following categories: (1) level of recall (recital) of facts, (2) the drawing of inferences, (3) identification of rules and (4) the identification of the procedural aspects of the case.²⁶⁶ What follows is a summary of some of Krieger’s findings and how they are relevant to the placement of the proposed course on psychology *within* the law within the broader LLB curriculum.

On the issue of “recall of all the factual propositions from the case”, Krieger found that the second years recalled 24.7% of all the facts (both relevant and irrelevant), a higher average percentage as compared to the first years with 20.4% of all facts recalled.²⁶⁷ Final years however, only recalled 20.2% of all the facts.²⁶⁸ As to the *relevant* facts, the second years recalled 56% of the *most relevant* facts and 23.6% of the relevant facts.²⁶⁹ The first years recalled only 38% of the *most relevant* facts and 19.1% of the relevant facts.²⁷⁰ The final years

²⁶⁰ Krieger n248 supra at 338.

²⁶¹ Ibid.

²⁶² Krieger n248 supra at 337.

²⁶³ Ibid at 338.

²⁶⁴ Krieger n248 supra at 338.

²⁶⁵ Ibid.

²⁶⁶ Krieger n248 supra at 342-353.

²⁶⁷ Krieger n248 supra at 343.

²⁶⁸ Ibid.

²⁶⁹ Krieger n248 supra at 343.

²⁷⁰ Ibid.

showed no improvement over the second years as they recalled only 42% of the *most relevant* facts and 20% of the relevant facts - this shows a decrease in over-all fact recall as compared to the second years.²⁷¹

On the relationship between *relevant facts* recalled in relation to the number of *over-all facts* recalled, the second years recalled a higher average percentage of relevant facts as compared to the first years (34.7% versus 30.8%) and final years only recalled 33.6% of the relevant facts.²⁷² Where the final years did out-perform their first and second year counterparts (albeit marginally in comparison to the second years) was in their ability to *fully and accurately* recall the *most relevant* facts.²⁷³ The final years fully recited 66.7% of the *most relevant* facts compared with 36.8% by the first years and 66.3% by the second years.²⁷⁴ The final years were however only able to fully recite 77.5% of *relevant facts* as compared to 88.6% by the second years.²⁷⁵ What Krieger draws from this is that, apparently, final years recall a smaller average percentage of over-all facts than the first and second years but what they do recall, is recalled more fully and accurately.²⁷⁶ These findings raise questions about the third and final year of Law School and why students tend to lose the ability to focus on the all the relevant facts of a legal problem by the time they reach final year.²⁷⁷

It would appear, if Krieger's findings are correct, and if the results would be replicated in our South African students, then a course on psychology *within* the law could serve to counteract these results if it was offered in the second semester of their second year or in the first semester of their third year of study. It would seem from Krieger's results that intervention is most required at a point just after second year but before final year.

On the issue of "the drawing of inferences", an inference was defined as "the drawing of a conclusion from known facts based on premises known or assumed to be true".²⁷⁸ In some instances, students drew inferences from the legal principles that they knew but in most instances, inferences were drawn from the students' lay experiences.²⁷⁹ The purpose of the analysis was to investigate whether there was any effect by the Law School curriculum on the

²⁷¹ Krieger n248 supra at 343.

²⁷² Ibid at 344.

²⁷³ Krieger n248 supra at 344.

²⁷⁴ Ibid.

²⁷⁵ Krieger n248 supra at 344.

²⁷⁶ Ibid.

²⁷⁷ Krieger n248 supra at 345.

²⁷⁸ Ibid. See also See Binder D & Bergman P, *Fact Investigation: From Hypothesis to Proof* 82 (St. Paul, Minn., 1984).

²⁷⁹ Ibid.

tendency of students to rely on common knowledge in the drawing of inferences.²⁸⁰ The results showed that on average, second years identified roughly the same number of inferences from common experience as first years (2.4 versus 2.7 inferences).²⁸¹ However, final years only drew 1.3 inferences from the given facts.²⁸² According to Krieger, the results could be interpreted to mean one of two things, (1) that the substantial decline in inference-drawing by the final year students is because they are better able to pay attention to detail and avoid making irrelevant inferences or (2) that final year law students feel inhibited from using common experience in solving legal problems.²⁸³ Krieger submits that it might be the questioning regimen and the final years' experience with exams which ingrains in them the notion that they should just stick to the facts rather than to rely on common sense or their own experiences.²⁸⁴

Once again, Krieger's findings show that, on the assumption that our students would have performed similarly in this study, there is a gap during the end of second year through the third year (but before final year) where students need to be reminded that legal doctrine and common-sense work together and do not subsume one another. This gap can be closed by a course on psychology *within* the law which allows students the opportunity to investigate this apparent decline in the use of common sense by graduates.

Going back to Krieger's experiment, on the issue of "identification of rules", a rule can be defined as "any factor that the subject took into account in determining if Samos had a claim for damages."²⁸⁵ The purpose of this analysis was to assess the effect of increased exposure to legal doctrine throughout the students' degree on their ability to identify rules applicable to the legal problem.²⁸⁶ The average number of rules identified by the students increased from group to group – the first years identified 2.7 rules, the second years identified 3.1 and the final years identified 4.5 rules.²⁸⁷ As far as *relevant rules* go, the first years identified only 1.1 rules relevant to fraudulent misrepresentation, the second years 1.3 and the final years 1.9 rules.²⁸⁸ The study is concerning in relation to the number of rules cited which are *irrelevant* to a claim of fraudulent misrepresentation – the first years cited 1.8, the second years 2 and the final years

²⁸⁰ Krieger n248 supra at 345.

²⁸¹ Ibid at 346.

²⁸² Krieger n248 supra at 346.

²⁸³ Ibid.

²⁸⁴ Krieger n248 supra at 346.

²⁸⁵ Ibid at 347.

²⁸⁶ Krieger n248 supra at 347.

²⁸⁷ Ibid.

²⁸⁸ Krieger n248 supra at 347.

2.6.²⁸⁹ These statistics show that from the total number of rules identified, around 60% of the rules identified by all three groups were actually irrelevant.²⁹⁰ Krieger's findings suggest that, as law students progress through their law degree, they are able to identify more rules in relation to legal problems but that their ability to identify and apply *the most relevant rules* increases only slightly.²⁹¹ The medical researchers called this phenomenon "the intermediate effect" where people who are not yet experts often engage in too wide a scope in information gathering without being able to screen out irrelevant information – they simply process too much.²⁹²

Intervention for this phenomenon would be well placed in a course on psychology *within* the law considering that the course would be using cognitive learning theory to teach students about cognitive overload, the perils of multi-tasking and the role of attention in memory (all discussed in chapter 2 of this work). Again, Krieger's findings seem to suggest that the intervention is required sometime after the students commence law school but before they reach final year. It is proposed that the second semester of the second year or the first semester of the third year would be appropriate considering that in South Africa, we have a four-year undergraduate degree.

On the issue of "identification of procedural aspects of the case", Krieger tried to establish whether time in the law school had any effect on students' tendency to identify procedural problems such as the need for further information through fact investigation, the need for legal research and analogous cases, the need to determine whether and what Statutes apply and what evidentiary burden was held by the claimant.²⁹³ Due to the overall absence of identification of many of the above categories by all three groups, Krieger views his findings on this category as tentative.²⁹⁴ Having said this, Krieger was particularly surprised that most final year students who would have completed a course in evidence, failed to consider issues pertaining to the evidentiary burden.²⁹⁵ Krieger found that from the data collected, the need for additional factual investigation increased between the first years on the one hand and the second and final years on the other but the opposite was true pertaining to legal research.²⁹⁶

²⁸⁹ Ibid.

²⁹⁰ Krieger n248 supra at 347.

²⁹¹ Ibid at 349.

²⁹² Krieger n248 supra at 349. See also Patel V and Groen G, *The General and Specific Nature of Medical Expertise: A Critical Look*, in *Toward A General Theory of Expertise* 93 (K. Anders Ericsson and Jacqui Smith eds., Cambridge, 1991) at 532.

²⁹³ Krieger n248 supra at 349.

²⁹⁴ Krieger n248 supra at 350.

²⁹⁵ Ibid.

²⁹⁶ Krieger n228 supra at 350.

Only one first year identified the need for further factual investigation while three students from the second and final year groups identified this issue.²⁹⁷ With regards to legal research, four out of ten first years identified this issue but no second years raised it and only one final year did.²⁹⁸ Krieger posits that this might be explained either, (1) by the students presuming that they were already expected to have the legal knowledge or, (2) by the students considering the problem like a law school exam in which they would be reluctant to answer by indicating that further research was required.²⁹⁹

This part of the study is relevant because it could be argued that students become overly reliant on memorising legal principles from precedents without critically reading and evaluating. To elaborate on this point, a known basis upon which an omission (failure to act) could be deemed unlawful in criminal law is if the accused gave the impression (by specific undertaking) that he would act (perform a certain task) but then failed to do (with the requisite fault). In such situations, failure to act which results in (or causes) death or injury, would be considered unlawful.³⁰⁰ The classic example is found in the case of *S v Russell*³⁰¹ where a menial worker was requested (and undertook the task) to inform the crane operator working on power lines that electricity had been turned on after the crane operator and his crew returned from a break. Forgetting to do so resulted in one of the crew being electrocuted and Russell being convicted of culpable homicide on the basis of his unlawful omission. To test the principle, one might ask students to establish the unlawfulness of an omission on facts that are very similar to the case of Russell in the sense that a menial worker is asked to switch off power supply to a building in which a co-worker (electrician) intends to work on the power lines. However, to test the students' understanding of the principle, one could change the facts to state that the electrician made the request to the menial worker by way of a note left on the door of the building which the menial worker read. The new facts are that on the assumption that the menial worker had acceded to the request (but without asking), the electrician commenced work at a time when the power was still on and was electrocuted. If students were not paying attention, they might base liability of the menial worker, for his omission on the rule that the menial worker created the impression, by his undertaking that he would switch off

²⁹⁷ Ibid.

²⁹⁸ Krieger n248 supra at 350.

²⁹⁹ Ibid at 351.

³⁰⁰ For more on how an omission qualifies as unlawful conduct, see Snyman n147 supra at 81.

³⁰¹ *S v Russell* 1967 (3) SA 739 (N) at 743.

the power and failure to do so was unlawful. This would be incorrect because in the new scenario posed, there is no express (or implied) undertaking that the menial worker would or did accede to the request. It is proposed that students are likely to avoid or gloss over nuances in facts or evidence in applying legal principles and this is due to preconceptions and confirmatory bias. Preconception and confirmatory bias were covered in chapter 3 of this work and are psychological phenomena which could be used to caution students against these pitfalls. It is my view that students should be taught the pitfalls of preconception and confirmatory bias before students fully embed these bad habits and as such, I would again propose that the course on psychology *within* the law would work well if it were offered in the second semester of second year or the first semester of the third year of study.

In summation, in most respects, the final years in Krieger's study showed only a slight improvement in reasoning strategy compared to the second year students.³⁰² They were better at fully and accurately reciting the relevant facts, but unlike the first and second years, they relied less on their own experiences in reasoning.³⁰³ On average, the final years identified more rules than first and second years but a large number of those rules were irrelevant to the claim.³⁰⁴ This shows that the final years were still employing backward-directed reasoning instead of the forward-directed reasoning required of and displayed by experts.³⁰⁵ Krieger offers some hypothesis for these findings, and it is submitted that these could be as relevant to students in the South African context as they are to their American counterparts: (1) It is possible that the doctrine learned in the first two or three years of Law School has not been adequately reinforced in the subsequent year/s so students remain uncertain about the applicability of particular rules to a legal problem.³⁰⁶ (2) Students may not have had an adequate opportunity to practice experiential learning techniques at a point that is the most meaningful for them.³⁰⁷ Krieger contrasts this with medical students who have the opportunity to continuously apply the medical knowledge learned in earlier years to practicals through each year of study and thus are able to develop forward reasoning strategies during the process.³⁰⁸ In the South African context, law students are generally taught abstract doctrine until their final year of study which is when they would have exposure to a Law Clinic – whilst some courses

³⁰² Krieger n248 supra at 351-353.

³⁰³ Ibid.

³⁰⁴ Krieger n248 supra at 351-353.

³⁰⁵ Ibid at 353.

³⁰⁶ Krieger n248 supra at 353.

³⁰⁷ Ibid.

³⁰⁸ Krieger n248 supra at 353.

attempt to incorporate skills training, not all of them have the time for simulations or other experiential learning exercises which provide students with an opportunity to actively practice their skills. (3) It is possible that by its very nature, legal problem solving requires more backward-directed reasoning than medical practice,³⁰⁹ but this seems to be in opposition to the psychological literature on expertise which suggests that forward-directed reasoning is the attribute of expert problem solving across disciplines.³¹⁰ A course on psychology *within* the law that is offered in the second part of the second year (or the first part of the third year) of a four year curriculum would be able to provide students with the opportunity to practice some forward-directed thinking and reasoning techniques before they are actually required to use them during their clinical experiences.

4.5.2 Placement informed by capstones

A capstone experience can be understood as a learning experience or experiences in which accumulated knowledge is integrated into an experience where the acquired knowledge can be investigated or applied.³¹¹ A capstone experience may take a number of forms, including a part of a course, or an entire course designed to function as a capstone experience, a free-standing capstone assessment or a capstone research project.³¹² In South Africa, the use of capstone experiences as a tool to address the perceived problems in the South African legal curriculum was alluded to as early as 2013 during the LLB Summit of May 2013 attended by members of the South African Law Deans Association, the Legal Practice Council³¹³ and the General

³⁰⁹ For instance, it has been found that experts need to resort to backward-directed reasoning when they face difficult and factually unfamiliar problems. Faced with such problems, forward-directed reasoning is not helpful because the situation is unlike previous cases and experts must engage in developing and testing different hypotheses. See Patel et al., *Conceptual Change*, n229 *supra*, at 329 and 387.

³¹⁰ Krieger n228 *supra* at 353. See also Binder n258 *supra* in his work titled *Fact Investigation: From Hypothesis to Proof* and see O'Donnell E, *Use of Forward Versus Backward Reasoning During Audit Procedures: Evidence from a Computerized-Process-Tracing Field Study*, 44 *Acct. 76* (2004) which includes the difference between forward and backward reasoning but in the business context.

³¹¹ Quinot G & Van Tonder SP, *The Potential of Capstone Learning Experiences in Addressing Perceived Shortcoming in LLB Training in South Africa*, Potchefstroom Electronic Law Journal 2014 17(4): 1350-1390 at 1352. See also Brown AH, & Benson B (2005) *Making Sense of the Capstone Process: Reflections from the Front Line*. *Education* 125(4): 674–692 and Adkins JK & Tu C (2019) *Applying an Agile Approach in an Information Systems Capstone Course*. *Information Systems Education Journal* 17(3): 41–49 and Blanford J, Kennelly P, King B, et al. (2020) *Merits of Capstone Projects in an Online Program for Working Professionals*. *Journal of Geography in Higher Education* 44(1): 45–69.

³¹² Quinot & Van Tonder n311 *supra* at 1351-1352.

³¹³ Then called the Law Society of the South Africa (LSSA).

Council of the Bar.³¹⁴ Quinot and Van Tonder have written on the extent to which this is true in the South African context.³¹⁵ Their work is relied upon to substantiate the case for a course on psychology *within* the law serving as a foundation for the future capstone experience that a clinical legal programme would provide to students.

According to Quinot and Van Tonder, there are two key characteristics of capstones, (1) an overall *looking back* over the academic project in order to make sense of it and (2) a *looking forward* towards professional futures built on that foundation of learning.³¹⁶ The proposed course on psychology *within* the law is not a capstone course in the truest sense, because it is not backward looking, students will only have accomplished about half of their doctrinal learning by the time that it is intended for the course to be offered. The course is however intended to serve as a stepping-stone or an accompaniment towards the ultimate capstone experience during the students' final year of study through the CLE methodology in the Law Clinic. The proposed course requires that students learn about the skills and outcomes that will ultimately be required of them before they graduate, as well as during their clinical experience. The course intends to facilitate and to commence the students' development of these skills from a psychological and cognitive science perspective. The over-arching goal would be that the students' subsequent undergraduate courses, including their clinical experience will benefit from the perspective on the acquisition of skills that students will attain in this course. The proposal therefore, is that the course on psychology *within* the law would serve as a bridging course to the students' ultimate capstone experience in the Law Clinic. To put it more simply, the course will prime students to understand what is expected of practice with a view to hone some of the required practical skills through experiential learning methods before they actually get to practice them on real clients. For example, the student might learn about inattentional blindness and ways to counteract the phenomenon (discussed in chapter 3 of this work) in a course on psychology *within* the law and might even experience its operation during a simulated exercise in that course, but the capstone experience will occur when the student actually recognises it in practice (during their clinical course) and self-regulates to counteract it. As such, my hypothesis is that the course on psychology *within* the law might lead to more effective and meaningful future capstone experiences.

³¹⁴ Quinot & Van Tonder n311 at 1351.

³¹⁵ Ibid.

³¹⁶ Quinot & Van Tonder n311 *supra* at 1355.

With the above explanation in mind, it is contemplated that the proposed course on psychology *within* the law would share the same or similar advantages as a capstone course even though it is more correctly classified as a course which will *provide for* or *facilitate* capstone experiences. Based on the work of Quinot and van Tonder, the advantages of capstone experiences can be summarised as follows:

1. Capstones support student development in that they aim to consolidate undergraduate knowledge and training in a manner which supports identity forming and socialisation within the profession.³¹⁷

The proposed course on psychology *within* the law is designed in a way which practically exposes students to this as an end goal and gives students the tools to ensure its achievement. It is important that a course exists which is intended to prime students towards their ultimate capstone experience in the Law Clinic before it actually occurs and it is this gap that is sought to be filled by the intended course being offered at roughly the middle stage of the undergraduate law degree (second semester of year two or first semester of year three).

2. Capstones provide *conscious* and *reflective* consolidation of acquired knowledge (backward-looking) which includes reflection on the integration of the various fields and sub-fields which may have been encountered as separate law school courses.³¹⁸ This may even include reflection on the relationship between law and other disciplines and with society as a whole.³¹⁹

The main purpose of the intended course on psychology *within* the law is to prime students to the understanding that law is influenced and informed by another discipline – psychology – and that the psychological phenomena we encounter affect the practice of law and the functioning of society.

3. In addition to the backward-looking reflective benefits, capstone experiences are forward-looking in that they recognise that students are in *transition* and thus require some navigation assistance for the progression from their undergraduate student life to their professional life.³²⁰ As such, capstone experiences provide bridges between the known and the unknown or as Quinot and Van Tonder put it, “capstones do not simply

³¹⁷ Quinot & Van Tonder n311 supra at 1355.

³¹⁸ Ibid.

³¹⁹ Quinot & Van Tonder n311 supra at 1355.

³²⁰ Quinot & van Tonder n311 supra at 1358.

serve to deliver students from the undergraduate experience into the world beyond... they also create the link between the two worlds.”³²¹

One of the motivating factors which gave birth to the idea that there is a need for a course on psychology *within* the law is the fact that there is an ever-present gap (or limitation) in traditional law school teaching and learning (discussed in chapter 2). If the critiques of legal education discussed in chapter 2 of this work are valid, then the gap leaves graduates without a way to cross the proverbial gap-space between doctrinal study and their clinical capstone experience. A bridge is needed, and it is proposed that students need to start building that bridge brick by brick well before their capstone experience in final year. It is further proposed that students be given the tools to and should start laying the foundation for this bridge, brick by brick, from the knowledge acquired in the psychology *within* the law course together with the knowledge and experiences still to be acquired before they enter the Law Clinic. The hope is that with this bridging course, students will have acquired the means with which they can better direct their capstone experiences in the Law Clinic.

In summation, as discussed in 4.2.1 above, the intended course on psychology *within* the law has two broad over-arching goals (1) to teach the impact and effect of psychology (and cognitive science) on learning and (2) to teach the impact and effect of psychological phenomena on the skills required to practice law. In order for the course to be useful and meaningful to students, it must be offered at a time where there is still some learning left to be done (to facilitate course goal 1) and at a time which leaves room for students to self-articulate, identify and to use the psychological phenomena learnt in their future law school experiences, particularly in the Law Clinic (this facilitates course goal 2). If the course is offered (as intended) in the second semester of the second year or the first semester of the third year, students would be left with some time to use the tools learned and to continue developing the skills introduced in this course thus facilitating their own future learning including in future capstone experiences.

³²¹ Ibid at 1359.

4.6 Conclusion

In summary, in this chapter, it was proposed that the intended course on psychology *within* the law be underpinned by values which (1) accept emotion as a determinant of reason, (2) challenge the theory-practice divide and break away from the Socratic and Langdellian method and (3) accept that some grounding in the humanities is beneficial for well-rounded law graduates. Next, it was proposed that the course be designed in accordance with the Unified Learning Model (ULM) and I explained the practical implication of this model for the course which included (1) facilitating instruction through the CORE lesson model, (2) facilitating the building of searchable connections (building and explicit and implicit knowledge base), (3) support of motivation through self-goal setting, (4) ensuring that students use methods based on expectancy and (5) ensuring that students use methods based on deliberate practice. Next, I commenced with the actual course design by setting course goals/aims as well as course/learning outcomes rooted in and informed by lessons drawn from experiential learning. Lastly, I used an empirical study on the development of reasoning skills in law students in America to establish a hypothesis on the point at which the intended course should be offered to law students such that it would be most beneficial to them. I found support for my hypothesis that the programme will be best run in the second semester of the second year or the first semester of the third (penultimate) year of study by showing how the intended course would prime students for meaningful capstone experiences. In the chapter that follows, I will turn to look at the intended methods for the course (how the students will achieve the goals and outcomes espoused in the present chapter) and compare courses with similar outcomes to establish what a workable course similar to the intended course actually looks like so as to inform my own course content and assessment. In the final parts of the next chapter, I will present a concept curriculum for my course (relying on the research gathered in this and the subsequent chapter).

CHAPTER 5

PSYCHOLOGY *WITHIN* THE LAW: COURSE DESIGN PART II (METHODOLOGY, CONTENT & ASSESSMENT)

5.1 Introduction.

In the preceding chapters, a case was made for the need of a course on psychology *within* the law within the broader undergraduate legal curriculum to address the perceived shortcomings of traditional legal education. In chapter 4 of this work, the underlying values, goals and outcomes of the contemplated course were investigated as part one of a broader investigation into the proposed course design relevant to the intended course. What follows in this chapter is part two of that investigation. In this chapter, I continue to investigate course design with a specific focus on methodology, the proposed content to be taught and the assessment methods which will be appropriate to evaluate the outcomes articulated in the previous chapter. In part one of this chapter, teaching methods are investigated in order to ascertain what teaching and learning methodologies would be best suited for the intended course. Cognitivism, behaviourism, constructivism (including simulation) as well as collaborative learning and the extent to which these methods are being used in existing courses will be investigated. It is further investigated whether any American Universities (from where the bulk of discourse on psychology and law emanates) currently offer a course on law and psychology within their legal undergraduate degrees. To the extent that some universities offer a course similar to the one contemplated, in the second part of this chapter, the available information is compared and contrasted to determine what these courses look like, how they are taught and how they are assessed. In the third part of the chapter, a brief overview of assessment is given. Using the information acquired from existing courses teaching law and psychology, assessment methods which will be best suited to the outcomes that are intended in the proposed course are assessed. In the final part of this chapter, the research from this and the preceding chapters is consolidated to draft a proposed course plan or course outline for the intended course on psychology *within* the law.

5.2 Applicable teaching methodologies and their implications on course design

5.2.1 Cognitivism

In Chapter 2 of this work, a case was made for an approach to learning that is rooted in cognitive science. Cognitivism concerns itself with information processing theories which explain how the brain processes and retains knowledge.¹ Cognitivism equates learning with a student's ability to actively store and retrieve information from long-term memory in an organised and meaningful manner.² The metaphor which best explains cognitivism is the brain as a computer – hundreds of pieces of information enter and register in the brain, only information which is attended to and processed reaches short-term memory (wherein it is retained as working memory) and which can ultimately be stored in long-term memory through successful encoding.³ In the context of teaching method, the cognitive approach emphasises the teaching of intellectual skills, how to reason and how to combine acquired knowledge in new ways to solve complex problems.⁴ From the instructional perspective, cognitivism concerns itself with how best to facilitate the students' ability to encode what they have learned.⁵ In this regard, five principles can be extracted from the cognitivists which are relevant to the design of law school instruction: (1) Create learning experiences which allow students to make connections between acquired knowledge and new material (discussed in chapter 4, item 4.3.2 of this work).⁶ (2) Emphasise the continuous structure, organisation and sequencing of information to facilitate optimal processing by students – this can be done through diagrams and flow charts.⁷ (3) Integrate opportunities for students to become active participants in their own learning,⁸ this includes the techniques already discussed in chapter 2, item 2.4 of this work.⁹ (4) Have

¹ Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347 at 349 (2001). See also Chapter 2 of this work.

² Ibid at 371. See also Schunk DH, *Learning Theories: An Educational Perspective* 144 (2ed 1996). (Generally, information processing theories focus on how people attend to environmental events, encode information in memory, store new knowledge in memory, and retrieve it later as needed.)

³ Schwartz n1 supra at 372. See also Driscoll MP, *Psychology of Learning for Instruction*, 332 (1994). See also Ch2 of this work at item 2.3.1-2.3.3.

⁴ Ibid at 372.

⁵ Schwartz n1 supra at 375. See also Ertmer PA & Newby TJ, *Behaviorism, Cognitivism, Constructivism: Comparing Critical Features from an Instructional Design Perspective*, 6 Performance Improvement Q., 1993 50-70 at 60.

⁶ Schwartz n1 supra at 375. See also Ertmer & Newby, n5 supra at 61.

⁷ Ibid.

⁸ Schwartz n1 supra at 376. See also Driscoll n3 supra at 103.

⁹ See Chapter 2, Item 2.4 and particularly, item 2.4.1. Some other learning and memory techniques are cited in the work of Smith PL & Ragan TJ, *Instructional Design* 8, (2ed 1999) at 168-169 where the authors cite the following techniques: (1) The "single use coding" method, in which the student uses the first letter in a set of words to remember a list. (IPAC is an example, I is for Issue, P is for Principle, A is for Application and C is for Conclusion). (2) The "peg word" method, in which the student uses rhyme to arbitrarily associate items in a list with a sequence of numbers. The example given by the authors is that of a promissory estoppel in contract law whereby "one" is for "run" because the promisor must expect the promisee to run out and do something, "two" is for "do", because the promisee must actually do something and "three" is for "be" because enforcement of the promise must be necessary to avoid unjust enrichment. (3) The "method of loci" in which the student imagines a familiar room with a number of decorations or furniture items, the student then creates an association between the decoration/furniture and each item on their list. (4) The "keyword technique" in which the student attempting to

students perform task analysis which involves students having to identify the objective external behaviours that are sought to be learned or emulated but also the internal, mental processing that is necessary to perform the observable tasks.¹⁰ It is proposed that much of “thinking like a lawyer” (discussed at length in chapter 3) is premised on this principle. (5) Ensure to present or facilitate multiple representations of the material to be learned, this is to ensure adequate repetition of principles in differing scenarios.¹¹

5.2.2 Behaviourism

The core relevant belief underlying behaviourism is that students learn best when they exhibit the correct response to a specific stimulus.¹² The goal of instruction which arises from this premise is to develop and to strengthen the connections between the response and the stimulus.¹³ This is done by providing reinforcement for correct responses and punishment (or criticism) for improper (or incorrect) responses.¹⁴ Behaviourist principles still form the bedrock of most instructional design today – educators generally assess according to this behavioural model when they require students to produce an observable response (the answer) to an external stimulus (the exam question or legal problem).¹⁵ What we can take from the behaviourists on the point of methodology is as follows: (1) According to behaviourists, students should be assessed first to determine at which point instruction should begin.¹⁶ (2) Instruction should be sequenced to ensure that students can master easier problems earlier on in the instruction.¹⁷ (3) Lessons can be taught and learning can be enhanced by developing certain nonhuman and non-classroom (albeit mediated) modes of instruction (such as online podcasts, quizzes and web interfaces).¹⁸ (4) Lessons must be practiced and student practice should be rewarded with

learn a series of matched items, associate keywords from each matched set with strange images. For example, the authors state that students could remember waiver (an intentional relinquishment of a known right) by associating waiver with an ocean wave and the relinquishment with rollerblading and then by creating the mental image of rollerblading over an ocean wave.

¹⁰ Schwartz n1 supra at 378. See also Smith & Ragan n9 supra at 22.

¹¹ Ibid Schwartz at 379. See also Driscoll n3 supra at 100 and 103.

¹² Schwartz n1 supra at 367. See also Smith & Ragan n9 supra at 19 and Ertmer & Newby, n5 supra at 55.

¹³ Ibid Schwartz at 367.

¹⁴ Schwartz n1 supra at 367. See also Smith & Ragan n9 supra at 19 and Ertmer & Newby, n5 supra at 55.

¹⁵ Ibid Schwartz at 368. See also Ertmer & Newby, n5 supra at 56 and Driscoll n3 supra at 63.

¹⁶ Schwartz n1 supra at 368. See also Ertmer & Newby, n5 supra at 56.

¹⁷ Ibid Schwartz at 368.

¹⁸ Schwartz n1 supra at 369-370. For more on non-classroom modes of instruction, see Geist M, *Where Can You Go Today?: The Computerisation of Legal Education from Workbooks to the Web*, 11 Harv. J.L. & Tech. 141 (1997).

structured feedback, appropriate cues¹⁹ and directed shaping.²⁰ (5) Instructional materials should be constantly evaluated and revised by empirically testing the effect of the materials on the students' performance.²¹

5.2.3 Constructivism

Constructivists view learning as being constructed by each individual from his own experience.²² According to this theory, an individual continually constructs and reconstructs his own images of the world from his experiences and his interpretation of those experiences.²³ The constructivist theory can be likened to the hypothesis taken from cognitive science, that learning is a process of interactive schemata.²⁴ Schemata are models, they embody prototypical expectations about objects, situations and actions, which are called "default schemata".²⁵ It has been stated in chapter 2 that schemata are essentially screen captures of what one would expect to see in any given scenario. By way of reminder, people who may be shown a picture of an office may later recall that the shelf in the picture contained books even though there weren't any in the picture.²⁶ Most significantly, constructivists believe that students should be situated in real-world settings so they may encounter the complex, multi-layered and ill-structured problems which arise in real-life scenarios.²⁷ Accordingly, three things are crucial in relation to methodology for constructivists: (1) that students get to practice in real-life settings (experience/simulation), (2) that students have the opportunity to develop their own personal interpretations of their experiences (individual construction of meaning) and (3) that students get the opportunity to validate and to make sense of the meaning of what they have learned (collaboration).²⁸ The implications of this methodology for course design is that it supports

¹⁹ Cues are prompts from the educator and can be in the form of instructional materials directing the students' practice efforts. For instance, once you have done x, do y. (See Driscoll n3 supra at 44.)

²⁰ Shaping is where the educator provides encouragement for the correct aspects of a student's performance to gradually assist them to alter their performance to the desired form. Shaping can also be done by discouraging undesired performance. (See Driscoll n3 supra at 40.)

²¹ Schwartz n1 supra at 371. See also Smith & Ragan n9 supra at 19.

²² Schwartz n1 supra at 380. See also Smith & Ragan n9 supra at 14-15 and Ertmer & Newby, n5 supra at 62.

²³ Ibid Schwartz at 380.

²⁴ Reiman P & Chi M, *Human Expertise in Human and Machine Problem Solving*, (1989) K. J. Gilhooly 161 at 172. For more on schemata see Friedland S, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, (1996-1997) 20 Seattle University Law Review 1, 5.

²⁵ Ibid.

²⁶ Blasi G, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, (1995) 45 *Journal of Legal Education* 313 at 337.

²⁷ Schwartz n1 supra at 380. See also Ertmer & Newby, n5 supra at 64-65.

²⁸ Ibid Schwartz at 380.

experiential learning including the use of Law Clinics, externships, apprenticeships, simulations and role-plays.²⁹

5.2.3.1 Simulation as a constructivist mode of experiential learning to teach a course on psychology *within* the law.

Considering that the intended course on psychology *within* the law is proposed to be offered to students in the middle of their degree, before they have reached their actual clinical legal experience (see chapter 4 of this work), it is proposed that simulation would be the most ideal method to ensure to experiential learning.³⁰ The Oxford Dictionary defines simulation as “a situation in which a particular set of conditions is created artificially in order to study or experience something that could exist in reality.”³¹ Simulation can be understood as an “imitation of the conditions of a real life target situation by means of a model”.³² To be of value, the simulation must embody some (or most) of the key characteristics of the target in order to be properly representative of the real world.³³ Simulations can be posed within a continuum ranging from macro simulation to micro simulation.³⁴ At the macro level, the role player’s vantage point is god-like – the role player looks down upon the world from high up, seeing the full picture at a glance but observing very little of the finer details.³⁵ Such a role player’s thinking and interaction is *strategic* from this vantage point.³⁶ At the micro level, the role player is so close to the world of the simulation that the role player is a direct participant in the action at ground level.³⁷ Such a role player’s thinking and interactions will function at the *tactical* level.³⁸ In the legal context, a macro level simulation could be induced by having the students watch a filmed trial proceeding (or movie) and to articulate, for instance, which arguments were the most probative or which legal arguments could have been made but were not.

²⁹ Schwartz n1 supra at 381-382.

³⁰ For more on the intended course as a developmental course intended to illicit capstone experiences in the students’ final year where they will be exposed to a Clinic, see chapter 4 of this work (at item 4.5).

³¹ Oxford Learner’s Dictionary (Online)

Accessible at: <https://www.oxfordlearnersdictionaries.com/definition/english/simulation>

Accessed on 14.09.2023.

³² Widdison R, Aikenhead M & Tom Allen, *Computer Simulation in Legal Education* (1997) 5 Int’l JL & Info Tech 279 at 281.

³³ Ibid.

³⁴ Widdison et al n 32 supra at 285.

³⁵ Ibid.

³⁶ Widdison et al n 32 supra at 285.

³⁷ Ibid.

³⁸ Widdison et al n 32 supra at 285.

An example of a micro level simulation would involve the student being a participant in a mock trial. During a mock trial, role attribution becomes important to simulation.³⁹ The question of what role the student is going to be assigned and what purpose this will serve becomes relevant. The two crucial questions are what *identity* and what *function* is the student going to be assigned in any given simulation?⁴⁰ On the issue of *identity*, the student may simply be invited to play himself and to cope with the various demands of the simulation as he would have done had the situation arisen in the real world.⁴¹ Alternatively, the student may take on a different role and play someone else, perhaps with a completely different personality, age, race or gender.⁴² It is also possible that students be given the opportunity to change identities numerous times in order to evaluate and reflect on the psychological differences which might be experienced by the altered role perception. As to *function*, the possibilities are endless, the student could be asked to play the legislator, the administrator, the judge, the attorney, the litigant, the eyewitness or the expert psychologist.⁴³ The importance of function would be to ensure that skills are practiced to serve multiple functions. For instance, simulations should not be limited to just one orientation but rather, opposing orientations (prosecutor versus defence attorney, eyewitness versus accused, plaintiff versus defendant, Judge versus practitioner or even student versus lecturer).

The advantages of simulation as an educational method can be summarised as follows: (1) Simulations have the capacity to bridge the gap between theory and practice because they force role players to experience something real such as commitment, attachment or the pressure associated with their participation.⁴⁴ (2) Simulations do not disturb the real world which means that role players can gain experience without the risk of causing loss or harm to clients, opponents, judges or to themselves.⁴⁵ (3) Simulations allow for “controlled” experimentation, thus allowing for the acquisition of knowledge through trial and error.⁴⁶ (4) Simulations allow students to practice or deal with situations which may not usually occur in their real environment.⁴⁷ (5) Simulations can give students the opportunity to see legal matters which

³⁹ Widdison et al n32 supra at 286.

⁴⁰ Ibid.

⁴¹ Widdison et al n32 supra at 286. See also Fripp J, *Learning Through Simulations: A Guide to the Design and Use of Simulations in Business and Education* (London: McGraw-Hill, 1993) at 20.

⁴² Ibid Widdison at 286.

⁴³ Widdison et al n 32 supra at 286

⁴⁴ Ibid Widdison at 288. See also Graybeal W & Pooch U, *Simulation: Principles and Methods* (Boston: Little Brown, 1980) at 10.

⁴⁵ Widdison et al n32 supra at 288.

⁴⁶ Ibid.

⁴⁷ Widdison et al n32 supra at 288.

would otherwise take years or months to bring to fruition.⁴⁸ (6) Simulations ensure that everyone takes responsibility because everyone is assigned a specific role or function.⁴⁹

For example, in relation to (5) above, it is unlikely that a private law firm would allow a candidate legal practitioner or junior attorney to run a trial on their own due to the associated risks and possibility of adverse cost orders. Even in the context of a Law Clinic, a student's experience is generally limited by the client intake and the proliferation of certain issues over others – for example, a Law Clinic student is more likely to get exposure in opposing an application for execution against immovable property than instituting one. In relation to (6) above, the key benefit here is that simulations can provide a mechanism whereby key aspects of the role playing can be captured and replayed (or even sped up) to fit into the available time. Since the proposed course is intended as a developmental course which identifies and sets in motion the learning, development and practice of lawyering skills (as informed by cognitive science and the psychological influences which underpin them), the course is a perfect place for well thought-out and structured simulations.⁵⁰ Du Plessis notes that proper assessment of simulations requires “each student to be evaluated in both roles for a reasonable length of time [but] student numbers and time constraints render this impossible.”⁵¹ This will be elaborated upon below and a possible solution furnished.

Classic examples of simulations to teach lawyering skills to students include mock trials, negotiation exercises and drafting exercises including the drafting of court documents and/or legislation.⁵² It is also possible to use computers and the online arena to facilitate simulation.⁵³ For instance, in Hardy's *Constitutional Theory Experiment*,⁵⁴ a group of law students were set the on-going task of collaborating on and drafting a Constitution for a made-

⁴⁸ Ibid.

⁴⁹ Widdison et al n 32 supra at 289. For a discussion on trial advocacy (the primary simulation exercise) undertaken at the Wits Law Clinic, see Stilwell P, *Trial Advocacy* in De Klerk W et al, *Clinical Law in South Africa* 2ed, (2006), LexisNexis, 233-252.

⁵⁰ Presently, simulation is not a necessary component of the LLB degree in South Africa. At the University of the Witwatersrand, the Wits Law Clinic engages students on a 7-week trial advocacy component which has simulation of a real civil trial matter at its core but not all South African Universities have trial advocacy as a component part of their LLB. Gravett WH makes a case for the incorporation of trial advocacy into the broader LLB curriculum. See Gravett W, *Pericles Should Learn to Fix a Leaky Pipe - Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 1)* PER 2018(21) and Gravett W, *Pericles Should Learn to Fix a Leaky Pipe - Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 2)* PER 2018(21). See also Du Plessis MA, *Designing an Appropriate and Assessable Curriculum for Clinical Legal Education*, De Jure, Vol. 1, (2016) 1 for a comparative analysis of what is offered in the Law Clinics of different South African Universities.

⁵¹ Du Plessis n50 supra at 107.

⁵² Widdison et al n32 supra at 294-298.

⁵³ Ibid.

⁵⁴ Hardy T, *An Experiment with Electronic Mail and Constitutional Theory* (1994) 44 Journal of Legal Education.

up country called “Dalmatia”.⁵⁵ All the students’ discussions, decisions and drafting were done exclusively via electronic mail (email).⁵⁶ Considering the extent to which email is now widely used as a mode of communication between students and educators, lessons on proper email etiquette could be included in such simulations and the educator could easily be copied in on aspects of the work that are to be assessed.

In the American context, Fulero from the Sinclair Community College and five other colleagues from American Universities who are predominantly psychologists,⁵⁷ undertook to research the extent to which “psychology and law” courses formed part of the undergraduate psychology curriculum in American institutions of higher learning.⁵⁸ In their work, the authors illustrate ways in which legal psychology could be introduced into the undergraduate psychology curriculum and offer suggestions about curricular materials and teaching aids for educators wishing to develop courses on legal psychology.⁵⁹

Whilst much of their insights pertain to undergraduate “psychology and law” course offerings suited to a psychology department, to be distinguished from the proposed “psychology *within* the law” course proposed in this work,⁶⁰ the overlap between the fields allows me to use some of their insights on course methods and materials for a psychology *within* the law course in a legal department.

Fulero and his team give three benefits for why psychology and the law make for good marriage and in the context of course design, the benefits are the following: (1) The blend of

⁵⁵ Hardy supra n54 at 446.

⁵⁶ Ibid.

⁵⁷ In addition to Solomon Fulero, the colleagues are Edith Green from the University of Colorado, Palm Springs, Valerie Hans from the University of Delaware, Michael T Nietzel from the University of Kentucky, Mark A Small from the University of South Carolina Medical School and Lawrence S Wrightsman from the University of Kansas (listed alphabetically).

⁵⁸ Fulero et al., *Undergraduate education in Legal Psychology*, in Law and Human Behavior, Feb., 1999, Vol. 23, No. 1, The First 20 Years of Law and Human Behavior (Feb., 1999), 137-153.

⁵⁹ Ibid at 138.

⁶⁰ For a full discussion on the categories of psychology and the law fields, See item 3.2 in chapter 3 of this work. The most common relationship is termed *psychology in the law* – here, psychology is used to provide services to the legal community, for instance, psychologists might be called upon to conduct psychological evaluations of accused persons or aid in jury selection based on what they know about people. *Psychology and the law* refers to a relationship between psychology and law where psychologists conduct research in areas that are pertinent to the law, for instance, psychologists might research and give opinions on the intricacies of eye-witness testimony or child development or profiling. *Psychology of the law* is the category wherein the law itself becomes the object of psychological study, for instance, psychologists might research why people obey the law or how the decision-making of judges is influenced by the behaviour of litigants. The three relationships described focus mostly on the relevance of legal studies to psychologists but there is very little discourse on the relevance of psychology to lawyers and the actual practice of law. In this work, I proposed a fourth relationship called *psychology within the law* – the focus of this relationship would be on how the study of basic psychology (including cognitive science) might improve learning and lawyering skills.

psychology and law provides an opportunity to stimulate and develop critical thinking processes⁶¹ (a goal of experiential learning), (2) the blend of psychology and law will continue to be relevant to students as they progress through their lives, continuously processing information about the contemporary world⁶² (and thus, honing their decision-making skills) and (3) the blend of psychology and law lends itself to research across disciplines⁶³ (thus providing new and novel opportunities for academic research).

On the issue of method, Fulero and his colleagues propose that the most effective teaching methods are those which promote active participation in the learning process.⁶⁴ This echoes the cognitivist and constructivist methods outlined above. On a practical note, methods such as demonstrations, class discussions and role-plays or simulation exercises are thus proposed as the most viable options for course instruction.⁶⁵ Some examples mentioned by Fulero and his colleagues include the following:

1. A demonstration of the accuracy of eyewitness testimony (or lack thereof) can be simulated by staging (or recording) a mock assault, purse snatching or assassination.⁶⁶
2. Students could be tasked with the dramatisation of a famous trial, for instance, of a serial-killer who was found to have the capacity to stand trial to teach the concept of the insanity plea.⁶⁷ This was previously done involving a cast of six students re-enacting the roles of the judge, lawyers and expert psychiatric witnesses in a moot courtroom session.⁶⁸ After the trial, there would be discussion about the requirements or criteria for an insanity (mental illness) defence and reflection by the students on the verdict.⁶⁹

For example, Jeffrey Dahmer was a known serial killer who killed, dismembered, and ate some of his victims (behaviour which might be perceived as insane) but he was found to have legal capacity to stand trial. Students could critically evaluate this.

⁶¹ Fulero et al, n57 supra at 137.

⁶² Ibid.

⁶³ Fulero et al, n57 supra at 137.

⁶⁴ Ibid at 142. See also Benjamin n61 supra at 68-74.

⁶⁵ Fulero et al, n57 supra at 142-143.

⁶⁶ Ibid at 143. See also Dragon W, *To be or not to be: Uses for a Videotaped Shooting in the Classroom*. (1992) Paper presented at the meeting of the Midwestern Psychological Association, Chicago, Illinois.

⁶⁷ Fulero et al, n57 supra at 143. See also Gray J, *Dramatization of a Retrial of John Hinckley Jr. to Teach the Concept of the Insanity Plea in abnormal psychology*. (1995). Paper presented at the American Psychological Society Third Institute on Teaching, New York.

⁶⁸ Ibid.

⁶⁹ Fulero et al, n57 supra at 143. See also Gray n66 supra.

3. Students could be asked to role-play a real case based on a real case and appeal judgments, particularly those containing *amicus curiae* testimony.⁷⁰

For example, in the South African context, the legal position on euthanasia and assisted suicide could be critically evaluated through the High Court and Supreme Court of Appeal (SCA) appeal decisions in *Stransham-Ford v Minister of Justice & Correctional Services & Another*.⁷¹

4. Films featuring some aspect of law and psychology could be utilised for in-depth class discussions.⁷² For instance, students could be asked to identify and research the legal principles relevant to the film's content and critique the film's portrayal of the legal material.⁷³ In addition thereto, the students could be asked to identify and research any psychological issues presented or operating on the characters in the film and to critique the film's representation of those issues.⁷⁴ It is suggested that films provide good opportunities to help students increase comprehension, refine critical thinking and to allow students to examine new perspectives.⁷⁵

Whilst Fulero and his co-authors cite three older films (at footnote 72 below), more modern examples of films which could be used are: *The Exorcism of Emily Rose* (2005),⁷⁶ *Double Jeopardy* (1999),⁷⁷ and *A Reasonable Man* (1999).⁷⁸

⁷⁰ Fulero et al, n55 supra at 143. See also Tomkins A, *The Role of Applied Psychology Courses in the Undergraduate Psychology Curriculum: "Psychology and Law" courses as a case in point*. (1992) Unpublished manuscript, University of Nebraska.

⁷¹ *Stransham-Ford v Minister of Justice & Correctional Services and Others* 2015 (4) SA 50 (GP); *Minister of Justice & Others v Estate Stransham-Ford & Others* 2017 (3) SA 152 (SCA).

⁷² Fulero et al, n55 supra at 144. See also Anderson DD, *Using Feature Films as Tools for Analysis in a Psychology and Law course*. *Teaching of Psychology*, (1992)19, 155-158.

⁷³ Ibid Anderson supra. Anderson used the films *Nuts* (1987), *The Onion Field* (1979) and *Taxi Driver* (1976) which are still options albeit somewhat dated and as such, newer options are provided at note 19, 20 and 21 below.

⁷⁴ Fulero et al, n55 supra at 144. See also Anderson n69 supra.

⁷⁵ Ibid Fulero et al supra at 143-144. See also Anderson n69 supra. Anderson used the films *Nuts* (1987), *The Onion Field* (1979) and *Taxi Driver* (1976) in his classes but they may be slightly dated for a largely Gen Z audience.

⁷⁶ In this movie, a lawyer represents a priest who performed an exorcism on a young girl.

Available at: https://www.imdb.com/title/tt0404032/?ref=nm_sr_srg_0 Accessed on 13.09.2023.

⁷⁷ In this movie, a woman framed for her husband's murder suspects that he is still alive. Because she has already been tried and convicted, she cannot be tried again if she actually finds and kills him.

Available at: https://www.imdb.com/title/tt0150377/?ref=nm_sr_srg_0 Accessed on 13.09.2023.

⁷⁸ In this South African production, the concept of negligence is brought into question when a young cow-herder is accused of murder after having killed a baby, believing it to be an evil spirit (tokoloshe).

Available at: https://www.imdb.com/title/tt0178860/?ref=fn_al_tt_0 Accessed on 13.09.2023.

5.2.4 The collaborative teaching/learning method (CL)

The collaborative teaching method (CL) is a method of teaching and learning which involves groups of students working together to solve a problem, complete a task, or to create a product.⁷⁹ The idea underpinning this method is that “students are challenged both socially and emotionally as they listen to different perspectives, and are required to articulate and defend their ideas.”⁸⁰ The purpose of this method is to create a space where students can create their own conceptual frameworks and not rely solely on what was taught through doctrinal study.⁸¹ The hallmark of CL is thus active engagement which is in line with the experiential learning (constructivist) method. With the CL method, in addition to being transmitters of knowledge, educators are seen as “designers” or “directors” of the experiences they intend for their students to have and to reflect on.⁸² CL is not to be confused as a mere synonym for group work because a learning experience only qualifies as CL if it contains the following elements: (1) Positive interdependence – team members are required to rely on one another and understand that they need to achieve something as a group.⁸³ (2) Considerable interaction – team members must gather and share knowledge by challenging one another’s conclusions and reasoning by giving feedback.⁸⁴ (3) Individual accountability and personal responsibility – all team members need to be held accountable for the mastery of the material to be learned or the task to be completed.⁸⁵ (4) Social Skills – students must help each other to develop and practice skills such as trust-building, leadership, decision-making, communication and conflict management.⁸⁶ (5) Group self-evaluation – students must set group goals, continuously assess what they are doing as a team and periodically identify the changes that are required.⁸⁷

⁷⁹ Laal M & Laal M, *Collaborative Learning: What is It?* Procedia – Social and Behavioral Sciences 31 (2012) 491-495 at 491. See also Bruffee KA, *Collaborative Learning and the “Conversation of Mankind”* College English, Vol. 46, No. 7 (1984) 635-652 at 63; Bruffee KA, *Collaborative Learning: Higher Education, Interdependence, and the Authority of Knowledge* 2ed, John Hopkins University Press, 1999; MacGregor JT, *Collaborative Learning: Shared Inquiry as a Process of Reform*, In Svinicki MD, *The Changing Face of College Teaching*, New Directions for Teaching and Learning No. 42, San Francisco, USA, Jossey-Bass Publishing.

⁸⁰ Ibid Laal & Laal at 491.

⁸¹ Laal & Laal n79 supra at 491.

⁸² Ibid at 492. For a discussion on the challenges encountered in assessing collaborative work specifically and in the clinical environment more broadly, see Du Plessis MA, *Assessment Challenges in the Clinical Environment*, 2016, J for Juridical Science 34(2) 91–117.

⁸³ Laal & Laal n79 supra at 493. See also Johnson DW, Johnson RT & Smith KA (1991) *Active Learning: Cooperation in the College Classroom*, Edina, Minnesota; USA at 1-6.

⁸⁴ Laal & Laal n79 supra at 493. See also Johnson et al n83 supra.

⁸⁵ Ibid.

⁸⁶ Laal & Laal n79 supra at 493. See also Johnson et al n83 supra.

⁸⁷ Ibid.

Accordingly, CL can be understood as the umbrella term for educational approaches which involve joint intellectual effort aligning with the underlying outcomes in order to achieve a broader goal (and this may include group work).⁸⁸

One example of CL in practice is “peer evaluation” (also called peer criticism) – here, students are asked to give a report describing the structure of a peer’s written essay, paraphrase it and then comment on what seemed well done and where the peer believes the author could improve.⁸⁹ The educator then evaluates both the essay and the critical review before the author is asked to reflect on his own work.⁹⁰ Another example of CL is the traditional “group work” where a small group of students is asked to work towards a consensus in responding to a question set by the educator.⁹¹ Accordingly, whilst collaborative learning does not necessarily change what is taught, it does harness the “powerful force of peer influence”⁹² which is of critical importance in both fields of psychology and law and is itself an example of psychology in practice.

Du Plessis notes that setting proper parameters for the assessment of practical skills, especially when students work collaboratively is not clear-cut.⁹³ Large student numbers present a problem for individual assessment and collaborative learning poses the problem that the lecturer may not know who did the work or whether the workload was shared equally.⁹⁴ Two elements which may curb these pitfalls is first, to offer the intended course as an elective course (thus reducing high student numbers) and second, to insist that any collaborative assessment is subject to or may be influenced by positive peer assessment by both students in the pair or all the students in the group. For example, in the context of moot court simulations (or trial advocacy) which is conducted in pairs, teams or groups, a peer review could reflect what each member of the team did, the extent to which it contributed to the success of the over-all goals and outcomes and whether the other team members viewed the contribution as valuable, merely useful or negligible. The lecturer is then able to use the peer review to inform individual assessment based on the inferences to be drawn from the completed peer assessments. A more detailed discussion on how the intended course will be assessed follows below at 5.4.

⁸⁸ Laal & Laal n79 supra at 495.

⁸⁹ Bruffee KA, *Collaborative Learning and the “Conversation of Mankind”* n79 supra at 638.

⁹⁰ Ibid.

⁹¹ Bruffee KA, *Collaborative Learning and the “Conversation of Mankind”* n79 supra at 638.

⁹² Ibid.

⁹³ Du Plessis MA n82 supra at 92.

⁹⁴ Ibid at 97.

5.3 Lessons on method and content from existing courses (similar to the one intended).

5.3.1 Sternlight and Robbennolt's Psychology and Law Course

Sternlight, a Saltman Professor of Law and the Director of the Saltman Center for Conflict Resolution at the University of Nevada, Las Vegas and Robbennolt, a Professor of Law and Psychology at the University of Illinois College of Law have shed some very meaningful insights for educators wishing to use psychology to teach effective lawyering.⁹⁵ Sternlight and Robbennolt's course and accompanying textbook seem to be the closest in style and content to the one proposed in this work and by and large, the proposed course on psychology *within* the law will be modelled on the one that they have developed in the American context. Sternlight & Robbennolt posit that since it is unrealistic to expect all future lawyers to engage in a course of psychological study, students should be given the opportunity to learn the aspects of psychology that will actually help them to function better in practice.⁹⁶ Exposing students to psychology through a course which specifically focuses on the role of psychology in lawyering gives students the opportunity to think about how psychology can help them to become better lawyers.⁹⁷ The need for such a course was elaborated upon in chapter 2 (using cognitive science to inform learning) and chapter 3 (using psychology to inform learning) of this work. Sternlight and Robbennolt have taught such a course to both upper-level and first year students at their respective Universities in the form of a semester-long elective course.⁹⁸ Their course includes aspects of regular seminar teaching and includes skills training.⁹⁹ The authors prescribe their book, *Psychology for Lawyers*¹⁰⁰ and the course follows the organisation of the chapters in that text.¹⁰¹ Effectively, students are first introduced to a range of findings from psychology that are relevant to lawyering and then students are asked to apply that psychology to specific

⁹⁵ Sternlight J & Robbennolt J, *Psychology and Effective Lawyering: Insights for Legal Educators*, Journal of Legal Education, February 2015, Vol. 64, No. 3 (February 2015) 365-384. [Hereinafter Sternlight & Robbennolt I]. See also Sternlight J & Robbennolt J, *Good Lawyers Should Be Good Psychologists: Insight for Interviewing and Counseling Clients*, Ohio State Journal on Dispute Resolution, Volume 23: 3 (2008) 437-538 which was relied upon in chapter 2 of this work. [Hereinafter Sternlight & Robbennolt II]

⁹⁶ Ibid Sternlight & Robbennolt I at 375.

⁹⁷ Sternlight & Robbennolt I n95 supra at 375.

⁹⁸ Ibid.

⁹⁹ Sternlight & Robbennolt I n95 supra at 375.

¹⁰⁰ Sternlight J & Robbennolt J, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making*, American Bar Association, 2ed, 2022. First published in 2013, the new edition is available to buy at: <https://www.americanbar.org/products/inv/book/408370452/>

¹⁰¹ Sternlight & Robbennolt I n95 supra at 375.

lawyering tasks.¹⁰² The course culminates in the students having to present papers applying psychological concepts to lawyering tasks and skills.¹⁰³ Students are presented with a choice to write one of three papers: (1) A research paper requiring the student to familiarise himself with an aspect of psychology literature and to apply it to a specific lawyering issue.¹⁰⁴ Topics include how to effectively interview child witnesses, how to use emotion to gain a strategic edge in negotiation, how courtroom interpreters might influence decision-making, how psychology could be used to evaluate the reliability of witness statements in criminal proceedings and how psychology sheds light on the differences between the inquisitorial and adversarial systems of law (amongst others).¹⁰⁵ (2) A practical application paper requiring students to interview at least two legal practitioners and to determine whether and to what extent psychological principles that were covered in the course are useful in the lawyer's practice.¹⁰⁶ In the practical application paper, students address topics such as how public defenders could use psychology to develop better rapport with accused persons, how psychology could be used to allow litigators to act more ethically, and how research on judgment shortcuts could help lawyers to deal with *pro bono* clients better.¹⁰⁷ (3) A mock grant proposal which requires students to think about new or additional psychological research to assist lawyers in practice.¹⁰⁸ Here, students are required to review existing psychological research and to situate it in the context of legal practice, then, to design a study to explore a specific research question and to make persuasive arguments about how this would benefit lawyers in practice.¹⁰⁹

In addition to the papers, Sternlight and Robbennolt's students were assessed on class participation, periodic in-class quizzes and a reflection journal which required students to analyse and reflect on certain topics or class discussions.¹¹⁰ As indicated earlier, assessment for the proposed course including the use of reflection journals will be dealt with at item 5.4 below.

¹⁰² Ibid Sternlight & Robbennolt I n95 supra at 375.

¹⁰³ Sternlight & Robbennolt I n95 supra at 375.

¹⁰⁴ Ibid at 376.

¹⁰⁵ For a full list of topics, see Sternlight & Robbennolt I n95 supra at their footnote 86.

¹⁰⁶ Sternlight & Robbennolt I n95 supra at 376.

¹⁰⁷ Ibid. See also Sternlight & Robbennolt I n95 supra at their footnote 87.

¹⁰⁸ Sternlight & Robbennolt I n95 supra at 376.

¹⁰⁹ Ibid. See also Sternlight & Robbennolt I n95 supra at their footnote 88.

¹¹⁰ Sternlight & Robbennolt n95 supra at 376. For more on reflective journals as a mode of assessment, see Du Plessis n50 supra at 109-110.

¹¹¹ Ibid.

On the issue of method, Sternlight and Robbennolt use lessons from psychology pertaining to learning (this was dealt with in chapter 2 of this work) to inform their instructional design methods.¹¹¹ They emphasise the use of multiple modalities and channels to maximise student learning, especially through the use of online videos.¹¹² The authors suggest a series of videos on memory and perception produced by National Geographic called “Brain Games” which can be accessed via YouTube.¹¹³ In their proposals on methodology, the authors echo much of what was stated above in the context of behaviourism, cognitivism, constructivism and collaborative learning methods by suggesting: (1) active learning which engages students in the provision of information,¹¹⁴ (2) small group activities which activate prior learning,¹¹⁵ (3) participation in simulation similar to those that students are likely to encounter in practice,¹¹⁶ (4) techniques which allow for the stimulation of students’ inherent interests,¹¹⁷ (5) collaborative activities which boost self-efficacy and retention¹¹⁸ and (6) metacognitive work which requires students to think, write and reflect on what they are learning for themselves.¹¹⁹

In her first class, Professor Robbennolt asks students to respond to a series of hypothetical situations each intended to explore a specific psychological phenomenon, for example, students are asked questions that are likely to demonstrate the effects of psychological phenomena such as availability, anchoring or hindsight bias (all discussed in chapter 2 of this work).¹²⁰ The class continuously revisits the questions together with their responses as they go through the relevant topics throughout the semester.¹²¹ Students come to learn that people are

¹¹¹ Sternlight & Robbennolt I n95 supra at 376.

¹¹¹ Ibid.

¹¹² Sternlight & Robbennolt I n95 supra at 377 at footnote 90. Brain Games can be accessed at

¹¹² Ibid.

¹¹³ Sternlight & Robbennolt I n95 supra at 377. In addition, YouTube contains recorded talks on several topics of relevance from psychologists, lawyers and philosophers including by Nobel Laureate Daniel Kahneman which are also very informative.

¹¹⁴ Sternlight & Robbennolt I n95 supra at 377. See also Prince M, *Does Active Learning Work? A Review of the Research*, 93 J. Engr. Educ. 223 (2004).

¹¹⁵ Ibid Sternlight & Robbennolt I at 377. See also Onyon C, *Problem-Based Learning: A Review of the Education and Psychology Literature*, 9 The Clinical Teacher 22 (2012); Schmidt HG et al, *Explanatory Models in the Processing of Science Text: The Role of Prior Knowledge Activation Through Small Group Discussion*, 81 J. Educ. Psych. (1989) 610-690.

¹¹⁶ Sternlight & Robbennolt I n95 supra at 377. See also Lave J & Wenger E, *Situated Learning: Legitimate Peripheral Participation* (1991).

¹¹⁷ Ibid Sternlight & Robbennolt I at 377. See also Biggs J, *Teaching for Quality Learning at University*, 2ed, 2003.

¹¹⁸ Sternlight & Robbennolt I n95 supra at 377. See also Qin Z et al., *Cooperative versus Competitive Efforts and Problem Solving*, 65 Rev. Educ. Res. 129 (1995).

¹¹⁹ Ibid Sternlight & Robbennolt I at 377. See also McCabe J, *Metacognitive Awareness of Learning Strategies in Undergraduates*, 39 Memory & Cognition 462 (2011); Pintrich PR, *The Role of Metacognitive Knowledge in Learning, Teaching and Assessing*, Theory Into Practice, 219-25 (2002).

¹²⁰ Sternlight & Robbennolt I n95 supra at 378-379.

¹²¹ Ibid.

constantly affected by the psychological phenomena studied in ways that are surprising to them and they are able to use their own experience as participants in this phenomena to better understand their own strengths and limitations.¹²² In her first class, Professor Sternlight uses an in-class encounter with her secretary to help students become aware that their perception and memories are not as good as they might think they are.¹²³ In the staged encounter, the secretary wears some distinctive clothing and enters the classroom to deliver an unusual object to Sternlight.¹²⁴ At the end of the class, students are asked to fill out a survey describing the incident and what the secretary wore.¹²⁵ The responses generally demonstrate the common variability in witness accounts of events and the influence of stereotypes on perception.¹²⁶ Both Sternlight and Robbennolt's courses use role plays and actively involve students in commenting on videos of attorneys engaged in their work.¹²⁷ Students conduct role plays on subjects including interviewing, counseling and negotiation and then analyse those activities using the psychology they have learned.¹²⁸ Similarly, students watch attorneys conduct interviews, examinations in chief and cross examinations and then discuss how knowledge of psychology could assist attorneys to improve their effectiveness in those tasks.¹²⁹ The authors suggest that their courses emphasise the importance of self-direct learning, cooperative activities and self-reflection.¹³⁰ The authors further reflect that their courses have been successful and that their students have gained something unique from their participation in these courses.¹³¹ Having said this, the authors acknowledge that they themselves are still learning how best to present all the psychological material in a manner which best facilitates the application of the material in a lawyering context.¹³²

Whilst the authors do not state this expressly, it would appear that Sternlight and Robbennolt support a course on psychology in a legal context to facilitate a later capstone experience (discussed in chapter 4 at 4.5.2). According to the authors, Law Clinics provide an

¹²² Sternlight & Robbennolt I n95 supra at 378.

¹²³ Ibid at 379.

¹²⁴ Sternlight & Robbennolt I n95 supra at 379.

¹²⁵ Ibid.

¹²⁶ Sternlight & Robbennolt I n95 supra at 379.

¹²⁷ Sternlight & Robbennolt I n95 supra at 379.

¹²⁸ Ibid.

¹²⁹ Sternlight & Robbennolt I n95 supra at 379.

¹³⁰ Ibid.

¹³¹ Sternlight & Robbennolt I n95 supra at 379.

¹³² Ibid.

opportunity for students to see how the psychology they were exposed to in the psychology and law course actually plays out in practice.¹³³

5.3.2 Tigran Eldred's Behavioural Legal Ethics Course

Eldred, a Professor at New England Law School, Boston provides psychological insights on teaching a course in legal ethics as a core element of professional responsibility.¹³⁴ Eldred's course is concerned with behavioural research which serves as a "primer" for those not familiar with the science in that area.¹³⁵ His main concern in the course is how to integrate behavioural science into legal ethics education.¹³⁶ As such, Eldred's course is narrower than the one offered by Sternlight and Robbennolt (discussed above) in that it focuses specifically on how psychological factors influence ethical judgment and the behaviour of lawyers.¹³⁷ Nevertheless, his insights are valuable for the type of course that is intended for our local context.

Eldred's course is run in two parts. In the first, Eldred integrates the core tenets of behavioural science into classroom discussions and in the second, he utilizes a more in-depth examination of the subject matter through an extra credit bearing assignment in which students are required to read, comment on and help to produce a blog developed for the course.¹³⁸ As far as content is concerned, Eldred's course deals with topics such as (1) factors that can blind lawyers from seeing ethical missteps in themselves and others, including the mental tricks and distortions that cause everyone to make predictable errors in ethical judgment,¹³⁹ (2) the dynamics between the social forces and pressures at play in legal practice and why the adversarial system that can cause lawyers to act against their own ethics,¹⁴⁰ (3) the psychological reasons why it is so easy to rationalise misbehaviour after it happens,¹⁴¹ and (4) what social science tells us about ways to overcome these psychological roadblocks.¹⁴² The

¹³³ Sternlight & Robbennolt I n95 supra at 380.

¹³⁴ Eldred TW, *Insights from Psychology: Teaching Behavioural Legal Ethics as a Core Element of Professional Responsibility* (2016) Mich. St. L. Rev. 757.

¹³⁵ Ibid at 761.

¹³⁶ Eldred n134 supra at 761.

¹³⁷ Ibid.

¹³⁸ Eldred n134 supra at 761.

¹³⁹ Ibid at 762. See also Robbennolt J & Sternlight J, *Behavioural Legal Ethics*, 45 Ariz. St. L.J. 1107, (2012) at 1112-1113.

¹⁴⁰ Eldred n134 supra at 762. See also Robbennolt & Sternlight n139 supra at 1124-1153.

¹⁴¹ Eldred n134 supra at 763. See also Robbennolt & Sternlight n139 supra at 1153-1156.

¹⁴² Ibid Eldred at 763. See also Robbennolt & Sternlight n139 supra at 1156-1181.

connective tissue between all these tenets is that they work in subtle and unconscious ways to “permit people to live under the illusion of their own ethicality, making it difficult to perceive ethical lapses when they do occur.”¹⁴³ Eldred prescribes a number of texts on psychological phenomena which influence behavioural ethics, including the book by Sternlight and Robbennolt mentioned above.¹⁴⁴ For those students who require deeper psychological explanations focused on legal ethics in specific domains, he cites sources which focus on ways in which heuristics influence the ethical judgments of lawyers in specific settings such as corporations, criminology, private or solo practice and large firms.¹⁴⁵

On the issue of method, Eldred’s approach works on two tracks: the first integrates the central concepts from behavioural science into classroom discussions using participatory exercises which allow students to experience some of the phenomena documented in the behavioural research.¹⁴⁶ Role plays and simulations are used to immerse students in the contextual and emotional dynamics that might influence ethical behaviour.¹⁴⁷ Eldred also uses multimedia (especially video) to explore the core concepts of interest to legal ethics.¹⁴⁸ The second track takes place outside of the classroom, in this track, students are required to partake in a companion blog created for the course.¹⁴⁹ Each week of the semester, Eldred adds a few posts to the blog, intended to dovetail with the material discussed in class.¹⁵⁰ These posts provide links to additional readings and multimedia material.¹⁵¹ Eldred makes participation in

¹⁴³ Eldred n134 supra at 763.

¹⁴⁴ Other texts mentioned by Eldred include: Bazerman MH & Tenbrunsel AE, *Blind Spots: Why We Fail to do What’s Right and What to do About It*, 2012; Tavis C & Aronson E, *Mistakes Were Made (But Not By Me): Why We Justify Foolish Beliefs, Bad Decisions and Hurtful Acts*, 2008; Kahneman D & Tversky A, *On the Psychology of Prediction*, 80 Psychol. Rev. 237, 1973; Gilovich T & Griffin D, *Introduction – Heuristics and Biases: Then and Now*, in *Heuristics and Biases: the Psychology of Intuitive Judgment* 1-3 (Thomas Gilovich et al., eds., 2002); Kahneman D, *Thinking Fast and Slow*, 2011.

¹⁴⁵ Eldred n134 supra at 766. Eldred’s cited texts include: Langevoort DC, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 Wis. L. Rev. 495, (2012); Kim SH, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 Fla. L. Rev. 129, (2011); Burke A, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & Mary L. Rev. 1587 (2006); Eldred T, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 Rutgers L. Rev. 333, (2013); Eldred T, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. Kan. L. Rev. 43, (2009); Levin L, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 House. L. Rev. 309 (2004); Rapoport NB, *“Nudging” Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 St. Mary’s J. On Legal Malpractice & Ethics 42 (2014).

¹⁴⁶ Eldred n134 supra at 767.

¹⁴⁷ Ibid.

¹⁴⁸ Eldred n134 supra at 767.

¹⁴⁹ Eldred n134 supra at 768. Eldred suggests creating the blog using Wordpress.com or Blogger.com which are free websites that makes it simple for anyone who is interested to create their own blog.

¹⁵⁰ Ibid.

¹⁵¹ Eldred n134 supra at 768.

the blog voluntary and available for extra credit.¹⁵² If students decide to participate, they are required to read and engage with the blog regularly (much like they would on a social media platform) and are required to post at least three substantive comments, or their own blog post on a relevant topic during the semester.¹⁵³

What follows is some examples of lessons that Eldred uses in his course to evidence some of the psychological phenomena that lawyers are likely to experience in practice. Since this phenomena and its impact on lawyering skills was discussed at length in chapter 3 of this work, only a short summary of the phenomena and an idea of how the lesson was taught by Eldred is set out. It is proposed that these lessons serve as good examples for how some of the psychological phenomena referred to in this work could be introduced to students in a course on psychology *within* the law.

5.3.2.1 A lesson on naïve realism, fast thinking and blind spots

The phenomenon of naïve realism was discussed in chapter 3 of this work under psychological insights relevant to advocacy (including problem-solving) at item 3.4.3. In brief, the phenomenon occurs because people erroneously assume that their conscious experience of the world is the fullest and most accurate account of the world “as it really is” without realising the limitations of their own cognitive processes.¹⁵⁴ Eldred teaches this phenomenon by encouraging students to confront their own misperceptions caused by implicit and systematic biases.¹⁵⁵ Eldred shows students a video of the “checker shadow illusion” to illustrate.¹⁵⁶ The illusion requires students to compare the colour of the checks designated as A and B (the static image of the checker box illusion is reproduced below).¹⁵⁷

¹⁵² Eldred n134 supra at 768.

¹⁵³ Ibid.

¹⁵⁴ Eldred n134 supra at 769. See also Pronin E et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 Psychol. Rev. 781, (2004) at 783; Pronin E et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in *Heuristics and Biases* n138 supra at 636 and 640.

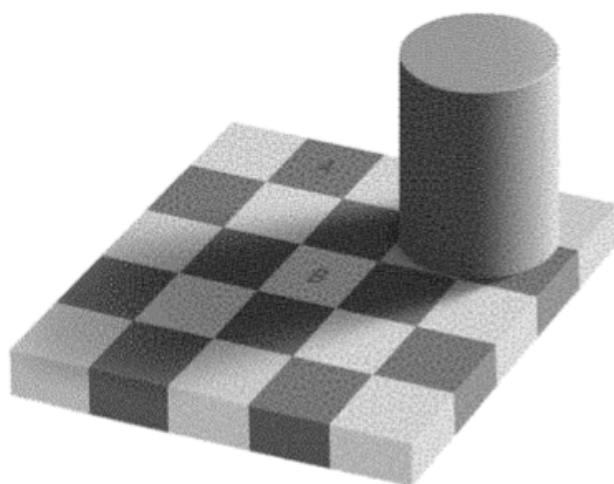
¹⁵⁵ Eldred n134 supra at 769.

¹⁵⁶ The video can be accessed at:

https://www.youtube.com/results?search_query=checker+shadow+illusion+adelson

Accessed on 13.09.2023.

¹⁵⁷ Eldred n134 supra at 769.



At first blush, it appears that the checks marked A and B are not the same shade, but when the surrounding objects, the shadow and other checks are removed, the checks are revealed to be the exact same colour.¹⁵⁸ Eldred's goal with this lesson is to illustrate how perceptions can be misleading and that students should question their own (and others') experiences of the world.¹⁵⁹ The lesson is supplemented with a blog post in which Eldred provides additional visual illusions including a video on inattention blindness (discussed in chapter 2 of this work at item 3.4.3).¹⁶⁰ In the video, observers are instructed to count how many times six people passed a basketball between themselves, during this time, a person in a gorilla suit walks through the scene, turns to the camera and thumps his chest, then exits.¹⁶¹ Remarkably, almost half the people studied in this experiment failed to actually see the gorilla.¹⁶² The video evidences two important lessons, first, that people generally overlook what they do not expect to see (even when it is right in front of them) and second, people are generally unaware of (or blind to) the limits of their own attention.¹⁶³

¹⁵⁸ Eldred n134 supra at 770. Eldred explains that the scientific basis for the checkerboard illusion involves how the visual system detects shades and color. Because measuring light from the surface (known as luminosity) is insufficient to account for effects of shadows, the mind uses tricks to measure and compensate for shadows.

¹⁵⁹ Ibid.

¹⁶⁰ Eldred n134 supra at 771. A video explaining the phenomenon can be accessed at:

<https://www.youtube.com/watch?v=UtKt8YF7dgQ>

Accessed on 22 September 2022.

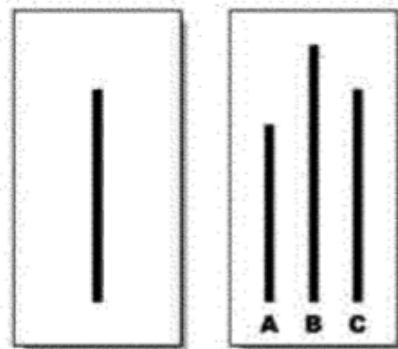
¹⁶¹ Ibid.

¹⁶² Eldred n134 supra at 771. See also Simons D & Chabris C, *Gorillas in our Midst: Sustained Inattentional Blindness for Dynamic Events* Perception, Vol. 28 (1999) 1059-1074. (Discussed in chapter 3 of this work at 3.4.2)

¹⁶³ Ibid Eldred at 772. See also Simons & Chabris n162 supra.

5.3.2.2 A lesson on situationism and peer influence

Situationism explores the power that situational variables have on how people think and behave.¹⁶⁴ The theory is linked to attribution error which describes peoples' tendency to overestimate the predictive value of others' disposition and personality whilst undervaluing situational forces when accounting for behaviour.¹⁶⁵ For example, when people tend to presume that past behaviour is predictive of future behaviour, the presumption fails to account for situational (or surrounding) variables.¹⁶⁶ The legal implications of this phenomena is related to the influence of conformity and obedience on decision-making.¹⁶⁷ Eldred teaches the lesson by sharing research on conformity and consensus intended to show the extent to which a subject would go to conform with the majority even where the majority is clearly wrong.¹⁶⁸ The research was originally conducted by having a row of people sit together in a line with only one person being the subject of the experiment whilst (unbeknownst to the subject) the others facilitated the study.¹⁶⁹ The participants were shown two cards (reproduced below) with lines drawn on them.¹⁷⁰ The participants were then asked to declare whether the line on the card on the left matched the height of any of the lines on the card on the right.¹⁷¹



¹⁶⁴ Eldred n134 supra at 773. See also Doris J, *Lack of Character: Personality & Moral Behavior*, 1-2, 23-26 (2002).

¹⁶⁵ Ibid Eldred at 774. See also Wendel WB, *Stephen Glass, Situational Forces, and the Fundamental Attribution Error*, 4 J. L. 99, (2014).

¹⁶⁶ Ibid.

¹⁶⁷ Eldred n134 supra at 774.

¹⁶⁸ Ibid at 775. See also Asch SE, *Opinions and Social Pressure*, 193 Sci. Am. 31, 32 (1995).

¹⁶⁹ Eldred n134 supra at 775.

¹⁷⁰ Ibid.

¹⁷¹ Eldred n134 supra at 776.

Even though the answer is clear, most subjects in the study changed their answer when the majority of the people in the row surreptitiously provided the incorrect one.¹⁷² The purpose of the study was to determine whether subjects would succumb to or defy the pressure associated with group consensus.¹⁷³ Eldred teaches the lesson by showing the cards and asking the students whether their answers would change if they knew that more than half of the class gave a different answer.¹⁷⁴ Eldred notes that most students tend to disbelieve that the actions of others would influence them.¹⁷⁵ However, Eldred then shows students an example of conformity in action by playing a *Candid Camera* video.¹⁷⁶ In the video, subjects in a public elevator tend to conform with how “others” in the elevator (who are actors) tend to stand and in which direction they tend to look while waiting for the elevator doors to open even though their actions are patently absurd.¹⁷⁷

5.3.2.3 A lesson on biased reasoning

One of the ways in which people tend to be unconsciously influenced in their decision-making is through a phenomenon known as confirmation bias and motivated reasoning (discussed in chapter 3 of this work at item 3.4.3).¹⁷⁸ Confirmation bias causes people to unconsciously seek out, interpret and remember information which conforms with their previously held beliefs or outlook on life.¹⁷⁹ Motivated reasoning is a phenomenon which refers to the power of motivation to influence the filtering process, that is, people not only seek to confirm pre-existing beliefs, but they also seek to reaffirm their pre-existing beliefs, views or outlooks.¹⁸⁰ To teach the material, Eldred uses another demonstration. In this demonstration, he shows students four cards (as represented in the image below) and he poses the following hypothesis: “If there is a letter “A” on one side of the card, then there is a number “3” on the other side of

¹⁷² Eldred n134 supra at 776.

¹⁷³ Ibid.

¹⁷⁴ Eldred n134 supra at 776.

¹⁷⁵ Ibid.

¹⁷⁶ The video can be accessed at: <https://www.youtube.com/watch?v=ztFv6OSFeUA>
Accessed on 13.09.2023.

¹⁷⁷ Eldred n134 supra at 776.

¹⁷⁸ Eldred n134 supra at 782.

¹⁷⁹ Ibid. See also Nickerson R, *Confirmatory Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol., (1998), 175.

¹⁸⁰ Eldred n134 supra at 782. See also Kunda Z, *The case for Motivated Reasoning*, 108 Psychol. Bull. 480 (1990).

that card.¹⁸¹ Eldred then asks the students which two cards they would turn over to test the truth of the hypothesis.¹⁸²

A	D	3	7
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The most common (but incorrect) answer is that students would turn over the “A” and the “3” – this demonstrates that most people seek to confirm a hypothesis by looking for examples where it is confirmed to be true (confirmation bias).¹⁸³ The better approach when determining the accuracy of any hypothesis is to investigate whether there are any instances in which it is false, rather than seeking out examples where it is true.¹⁸⁴ The correct answer to prove the hypothesis is thus to turn over the card with the letter “A” and the card with the number “7”. Once instructed, most students generally realise that if they turned over the card with the letter “A” and found a number that is not “3”, then the hypothesis is false. Likewise, if they turned over the card with the number “7” and found an “A”, then again, the hypothesis has to be false.¹⁸⁵ In contrast, turning over the card with the number “3” is inconsequential because even if it reveals an “A” on the other side, it will only be revealing one instance in which the hypothesis was true, but not that it is always true.¹⁸⁶ Eldred offers the students an even more practical experience of confirmation bias in action by showing them a video of a group of people protesting.¹⁸⁷ Students are told that the people protesting are protesting the now defunct “don’t ask don’t tell” policy in front of a military office.¹⁸⁸ Students are then asked whether the conduct of the protesters constitutes protected free speech.¹⁸⁹ Eldred then tells students that he will show them another video of a protest, this time, in front of an abortion clinic by anti-

¹⁸¹ Eldred n134 supra at 783. The demonstration which is also called “the selection task” is based on Peter Wason’s research. See Wason P, *Reasoning About a Rule*, 20 Q.J. Experiential Psychol. 273 (1968).

¹⁸² Ibid Eldred at 783.

¹⁸³ Eldred n134 supra at 783.

¹⁸⁴ Ibid.

¹⁸⁵ Eldred n134 supra at 783 at his footnote 103.

¹⁸⁶ Ibid.

¹⁸⁷ Eldred n134 supra at 785. This lesson is based on the work of Dan Kahan. See Kahan DM et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 Stan. L. Rev. 851 (2012).

¹⁸⁸ Eldred n134 supra at 785.

¹⁸⁹ Ibid. See also Kahan n187 supra.

abortion protestors.¹⁹⁰ Again, the students will be asked to determine whether the actions of the protestors is protected free speech.¹⁹¹ Eldred then shows them the exact same video as before.¹⁹² Students are then tasked to reflect on whether their response pertaining to free speech differed based on the type of activity that was being protested even though the actual activity observed was exactly the same.¹⁹³ The lesson shows how the perception of legally relevant facts (in this case, the conduct of the protestors) is influenced by the observer's pre-existing cultural, religious or political values or beliefs.¹⁹⁴ In both lessons, the point is the same: people tend to seek out and interpret information based on their own preconceived views and notions.¹⁹⁵ For example, people will tend to scrutinise information that is inconsistent with their preferences more carefully than they would information that is completely compatible with their views.¹⁹⁶

5.3.3 Perry, Huss, Galas & McAuliff's Psychology and Law Course Based on Active Learning

Perry, McAuliffe and Galas from Creighton University together with Huss from the University of Nebraska-Lincoln, have devised an undergraduate course on psychology and law based predominantly on an "active learning" approach, specifically designed to improve students' critical thinking skills.¹⁹⁷ Active learning transcends basic comprehension and memorisation and instead, focuses on the examination, analysis, evaluation and application of course related concepts.¹⁹⁸ The active learning process is intended to help students become "critical, informed and autonomous builders and judges of different sophisticated worldviews."¹⁹⁹ The strategies that promote this involve students "doing things and thinking about the things they are doing."²⁰⁰ Thus, active learning provides opportunities for students to enjoy "hands-on and

¹⁹⁰ Eldred n134 supra at 785.

¹⁹¹ Ibid.

¹⁹² Eldred n134 supra at 785.

¹⁹³ Ibid.

¹⁹⁴ Eldred n134 supra at 786.

¹⁹⁵ Ibid.

¹⁹⁶ Eldred n134 supra at 786.

¹⁹⁷ Perry NW, Huss MT, McAuliff BD, & Galas JM, *An Active-Learning Approach to Teaching the Undergraduate Psychology and Law Course*, Teaching of Psychology, (1996) 23(2), 76–81.

¹⁹⁸ Ibid at 76. See also Bonwell C & Eison J, *Active Learning: Creating Excitement in the Classroom*, (ASHE-ERIC Higher Education Rep. No. 1), Washington DC: The George Washington University, School of Education and Human Development.

¹⁹⁹ Mathie VA (with Beins B, Benjamin LT, Ewing MM, Hall CC, Henderson B, McAdam DW & Smith RA, *Promoting Active Learning in Psychology Courses* (1993) in McGovern T ed, *Handbook for Enriching Undergraduate Education in Psychology*, Washington DC: American Psychological Association, 183-214.

²⁰⁰ Perry et al n197 supra at 76. See also Bonwell & Eison n198 supra at 2.

minds-on experiences”²⁰¹ such as debating, discussing, researching, teaching each other, conducting interviews and participating in observations.²⁰² Critical thinking as a concept can be described as “a set of skills that enable individuals to think logically, to present well-reasoned arguments and to examine and evaluate logically the arguments of others.”²⁰³ Techniques that can be utilised to improve critical thinking skills in students involves having students identify controversial issues, research and evaluate opposing sides of a viewpoint and then to debate both sides of the argument.²⁰⁴ According to Perry and her colleagues, practice using these skills allows students to clarify and improve their own understanding of concepts and ideas.²⁰⁵

Perry and her colleagues have offered their course 7 times over 6 years.²⁰⁶ Theirs is a semester course which ranges from between 11 to 29 participants.²⁰⁷ It is submitted that in order to achieve the goals and outcomes in a manner which serves reasonable assessment (discussed below), the registration capacity of the course would need to be limited, or the course would need to be duplicated over two semesters to cater for smaller groups in each semester. This may also mean that the course would have to be run as an elective and not a compulsory module or that students be given an opportunity to register for the course either their second or their third year of study, thus diminishing the number of students in the course each year. (The placement of the course in year two or the first semester of year 3 was discussed in Chapter 4 at page 142-154.)

Perry and her colleagues’ course was designed to meet six objectives as follows: (1) to help students learn the discipline of psychology and law, (2) to involve students actively in the learning process, (3) to assist students to identify psychological issues in daily life, (4) to encourage students to apply psychological theory and research to the resolution of psychological dilemmas in the real world, (5) to helps students develop both written and oral skills in the area of critical thinking and (6) to provide opportunities for students to overcome anxiety associated with active class participation.²⁰⁸ The prescribed text for the course is

²⁰¹ Ibid.

²⁰² Perry et al n197 supra at 76.

²⁰³ Ibid at 77.

²⁰⁴ Perry et al n197 supra at 77. See also Facione PA, *Testing College Level Critical Thinking*, Liberal Education, (1986) 72, 221-231.

²⁰⁵ Ibid at 77.

²⁰⁶ Perry et al n197 supra at 77.

²⁰⁷ Ibid.

²⁰⁸ Perry et al n197 supra at 77.

Wrightsmans Psychology and the Legal System,²⁰⁹ because according to Perry and her colleagues, it focuses specifically on the kinds of psychological dilemmas which encourage critical thinking about theories, empirical data and case law.²¹⁰ The course begins with a discussion of four psychological dilemmas as follows: (1) In general, should the rights of individuals or of the common good prevail? (2) Should judicial decision-making and legal processes be guided by equality or discretion? (3) Is the primary goal of a trial the discovery of truth or the resolution of the conflict? and (4) Should case law or scientific findings guide legal decision-making?²¹¹ Additional course topics included content covered in *Wrightsmans textbook*,²¹² such as, an overview of the criminal and civil legal systems; the role of law in human society; the role and impact of the attitudes, behaviours, background and socialisation of attorneys, psychologists, police officers, criminals and victims on the legal system; confessions; capacity issues; witness behaviour and sentencing (this is not an exhaustive list).²¹³ The assessments in the course included short quizzes on each chapter, as well as two essay style examinations.²¹⁴ In addition to the formal assessments, each student was required to engage in several active learning projects designed to promote critical thinking and to overcome the anxiety associated with public speaking.²¹⁵ The active learning projects were designed to increase in complexity as the semester progressed: the first was an action project, then, a current events analysis, a basic oral argument or debate and finally, a mock trial.²¹⁶

The *action project* was designed to give students hands-on experience in the first three weeks of the semester.²¹⁷ There were two options: the first option was to attend a real trial involving either a criminal or civil case.²¹⁸ Students were required to observe as much of the trial as they could, including opening statements, witness testimony (including examination in chief and cross examination), closing arguments and the judge's instructions.²¹⁹ Students were also required to attend the handing down of the judgment.²²⁰ The second option was to conduct interviews with people working in the legal system using a pre-prepared set of questions which

²⁰⁹ Greene E & Heilbrun K, *Wrightsmans Psychology and the Legal System*, 9ed, Cengage, 2019.

²¹⁰ Perry et al n197 supra at 77.

²¹¹ Perry et al n197 supra at 77-78.

²¹² *Wrightsmans textbook* n209 supra. Also available for purchase in South Africa from Loot.co.za.

²¹³ Perry et al n197 supra at 78.

²¹⁴ Ibid.

²¹⁵ Perry et al n197 supra at 78.

²¹⁶ Ibid.

²¹⁷ Perry et al n197 supra at 78-79.

²¹⁸ Ibid.

²¹⁹ Perry et al n197 supra at 78-79.

²²⁰ Perry et al n197 supra at 78-78.

addressed a psychological issue covered in class.²²¹ Perry and her colleagues provided suggestions for possible topics but encouraged students to devise their own.²²² The students were required to submit a 10-page paper organised as follows: a brief description of the interview/s, a detailed discussion on the relevant psychological issue/s at play, an analysis of how each psychological issue related back to the prescribed course texts or class discussions and how it applied in the legal context.²²³ Perry and her team provided feedback for each paper and offered students the opportunity to resubmit their papers after having incorporated the feedback.²²⁴ The papers were graded as follows: 15% for trial (or interview) description, 50% for the discussion and analysis of the psychological issues at play and 35% for writing style.²²⁵

The *current events analysis* required each student to individually present a news article that related to some aspect of psychology and law.²²⁶ The student was required to write a 1-page summary of the news item and include a description of the relevant psychological issues at play.²²⁷ The student was then required to use their written summary to present orally to the class.²²⁸ The students were required to hand in their summary along with a copy of the dated and referenced news article.²²⁹ The exercise was designed to increase self-confidence.²³⁰

The *oral argument* required that students engage in a more challenging, critical thinking exercise.²³¹ In this exercise, student pairs were required to debate each other in an adversarial format regarding some topic in the field of psychology and law.²³² For example, students debated the following issues: (1) Whether plea bargaining is a good or bad idea for accused persons, (2) Should spouse abusers be treated or prosecuted? (3) Should therapists be required to warn others if their client is dangerous? (4) Which is better, determinate or indeterminate sentencing?²³³ On the day of the debate, each pair was required to provide the class with a 2-page summary of their most salient points as well as any relevant documentation (such as

²²¹ Ibid.

²²² Perry et al n197 supra at 78-78.

²²³ Ibid.

²²⁴ Perry et al n197 supra at 78-78.

²²⁵ Ibid.

²²⁶ Perry et al n197 supra at 78-78.

²²⁷ Ibid at 77-78.

²²⁸ Perry et al n197 supra at 77-78.

²²⁹ Ibid.

²³⁰ Perry et al n197 supra at 77-78.

²³¹ Ibid.

²³² Perry et al n197 supra at 77-78.

²³³ Perry et al n197 supra at 77-78.

psychological studies, statistics or case law).²³⁴ Each pair member had exactly 5 minutes to present his or her case (10 minutes per pair or team) and then the issue was opened to the class for debate and questions.²³⁵ The participating students were required to decide which team or pair had the winning case and which individual gave the most persuasive argument.²³⁶ Students scored each other by giving a numerical rating corresponding with the quality of each presenter's case and the data was used to reflect on why certain presentations were perceived as being more or less persuasive.²³⁷

Midway through the semester, the class engaged in a *mock trial* on a topic which they had selected.²³⁸ The students were required to use an actual case so that the basic facts could be stipulated conclusively.²³⁹ The instructor presented the case facts to the class in written form and students were asked to rank their preferences for potential roles in the trial (for instance, judge, attorney, expert witness or other witness).²⁴⁰ At the mock trial, students were allowed about 5 minutes per role – opening statements, direct and cross examination, closing statements etc. to present.²⁴¹ The entire trial was recorded and parts of the recording were played back in the following class to illustrate important psychological and legal points and most importantly, to provide feedback.²⁴² The grades for the mock trial were allocated as follows: 20% for the effectiveness of the student in their role, 30% for the use of psychological theories, empirical studies or case law and statutes relevant to their role or testimony, 10% for aspects of the roles that would have influenced the jury, 25% for writing style in respect of written submissions, 10% for team participation and 5% for the actual courtroom performance.

It is proposed that a combination of teaching methods used by Sternlight & Robbennolt, Eldred and Perry would be suitable for a course on psychology within the law in the South African context. For instance, seminar style lectures would be appropriate for the section of the course dealing with cognitive learning theory (chapter 2 of this work). Whether students actually acquired the ability to use different learning styles to improve their study methods could be assessed by evaluating the students' substantive knowledge of certain psychological

²³⁴ Ibid.

²³⁵ Perry et al n197 supra at 77-78.

²³⁶ Ibid.

²³⁷ Perry et al n197 supra at 77-78.

²³⁸ Ibid at 79.

²³⁹ Perry et al n197 supra at 79.

²⁴⁰ Ibid.

²⁴¹ Perry et al n197 supra at 79.

²⁴² Ibid.

phenomena (chapter 3 of this work). Eldred's style of explaining psychological phenomena through videos, brain-games and self-exploratory experiments would be ideal for the section of the course dealing with psychology in context and the psychological phenomena which influences practical legal skills, and in particular, for introducing students to each psychological phenomenon before students are required to engage with it more substantively in the legal context. Perry and her colleagues' approach of introducing active-learning techniques which gradually increase in difficulty (current events analysis, debate and mock trial) would be useful to incorporate how psychology affects the acquisition and development of practical legal skills after it has been studied in a more abstract sense through Eldred's methods. A blog which mimics a social media platform could ensure that students remain engaged, informed and actively participate in the course outside of class time, alternatively, the option of a reflection journal could serve as out of class participation. It is proposed that a combination of these methods be used depending on applicability based on the topic to be taught.

5.4 Assessing a course on psychology *within* the law

Instructional designers generally assess students for two reasons: (1) to assess the extent of an individual student's learning and/or performance in the course and (2) to establish what kind of revisions might be needed in the instructional materials or methods to achieve better learning and/or performance.²⁴³ Accordingly, in theory, it can be said that the goal of assessment is primarily, to evaluate instruction since both goals of assessment are rooted in the value and quality of the instruction given.²⁴⁴

Since not every student does well in a well-designed and well-instructed course, the goals of assessment should be fine-tuned beyond a mere focus on instruction. If the goal is to assess student competency, then course designers would need to create a criterion-based assessment instrument.²⁴⁵ This can be done by matching learning outcomes with assessment items.²⁴⁶ Criterion-based assessments measure a student's competence or skill in a particular field.²⁴⁷ Norm-based assessments, on the other hand, purport to measure general abilities such

²⁴³ Schwartz n1 supra at 404. See also Dick W & Carey L, *The Systematic Design of Instruction* 5 (4ed 1996).

²⁴⁴ Ibid Schwartz at 404.

²⁴⁵ Schwartz n1 supra at 405.

²⁴⁶ Ibid.

²⁴⁷ Sergienko G, *New Modes of Assessment*, 38 San Diego Law Review, (20001) 463 at 467.

as the aptitude to learn in comparison to others.²⁴⁸ If a course attempts to develop skills that would be substantially the same in other courses or different subject matters within a course (such as how to read a question, how to investigate facts, how to understand and make general policy arguments etc.), then norm-based assessments are probably the most appropriate (although not all scholars are in agreement with this).²⁴⁹

Since the intended course is developmental in nature, and the learning outcomes have been couched in that language, the main objective for assessment in this course should be to establish that the student has evidenced *some competency* in the acquisition of the intended outcomes. Accordingly, norm-based assessment is probably better suited in the assessment of the intended course outcomes. Having said this, I am of the view that norms are difficult to establish without known criteria and therefore, it is suggested that perhaps a combination of criterion-based and norm-based assessments need to be employed in order for the students to contextualise their performance in relation to others.²⁵⁰ One option is to have at least one assessment assessed on a criterion basis and then give students an opportunity to reflect and resubmit – the resubmission can then be assessed on a normative basis. The final mark could then represent the average between the two marks. This approach would serve the function of reflection.

There are three general criteria which underpin an effective assessment (whether it is norm or criterion based), they are: validity, reliability and practicality.²⁵¹ Validity is the ability of the assessment to correspond to the outcomes that it is meant to address.²⁵² Reliability exists if the assessment delivers consistent results (in theory, this means that if the same assessment was administered immediately a second time, it would produce the same results and if remedial intervention was taken, then the results would improve).²⁵³ Lack of reliability could result from a lack of objectivity during grading, a student guessing on the assessment or unclear directions or instructions being given regarding the assessment.²⁵⁴ Practicality exists if an assessment is

²⁴⁸ Ibid.

²⁴⁹ Sergienko n247 supra at 467. Roy Stuckey and Riette du Plessis propose that criterion-based assessments are preferable over norm-based assessments in the clinical legal context. See Stuckey R et al, *Best Practices for Legal Education: A Vision and a Road Map* (2007) Clinical Legal Education Association at 243-245; Du Plessis MA, *Clinical Legal Education Models: Recommended Assessment Regimes*, Potchefstroom Electronic Law Journal, 2015, Vol. 18, No. 7 2778-2802 at 2790.

²⁵⁰ This reasoning would comply with the principles set out below.

²⁵¹ Schwartz n1 supra at 405. See also Sergienko n247 supra at 465. See also Smith & Ragan n9 supra at 93.

²⁵² Sergienko n247 supra at 466.

²⁵³ Ibid.

²⁵⁴ Sergienko n247 supra at 466.

easy to administer – impracticality can arise if the form of assessment requires an unreasonable amount of time to grade or if the ideal format would involve unacceptable risks (such as a student litigating a real case).²⁵⁵ To some extent, there are tradeoffs amongst reliability, validity and practicality because a higher degree of reliability and validity may be required on summative assessments whilst less reliability and more practicality is likely to be required for formative assessments.²⁵⁶

A formative assessment is an assessment which constitutes a learning experience in its own right.²⁵⁷ Examples include, writing an essay, undertaking a class presentation, debating or participating in a mock trial. Summative assessments usually occur at the end of a learning period in order to generate a grade which will reflect over-all performance.²⁵⁸ An example of a summative assessment is a typical closed-book examination at the end of a course.²⁵⁹ The main difference between the two forms of assessment is that the summative assessments generally measure a student's learning at the end or summation of the course while formative assessments give students the opportunity to learn from their experience and to perform better in the next one.²⁶⁰ As such, it has been suggested that it is of paramount importance that formative assessments be coupled with meaningful feedback to facilitate the student's learning.²⁶¹ Considering that the purpose of this course is to create metacognitive thinkers (discussed in chapter 2 of this work), continuous feedback and opportunities for reflection and improvement will need to form a component part of the course. According to Lee, the idea behind formative assessments with meaningful feedback seems to echo the recursive cycle (mentioned in chapter 2 and 4 of this work and used to construct Lee's 12-steps for metacognitive thinking). As such, according to Lee, it is important to reinforce metacognition and self-regulation at the assessment stage.²⁶² The role of the student does not end at the point when they receive their grade or comments – the student must continue in the steps of the cycle

²⁵⁵ Ibid.

²⁵⁶ Sergienko n247 supra at 466.

²⁵⁷ Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School*, Australian National University Press, 2017, Ch8 (Clinical Assessment of Students' Work) [Hereafter Australian Best Practices] at 192.

²⁵⁸ Ibid at 193.

²⁵⁹ Evans et al, Australian Best Practices n257 supra at 193.

²⁶⁰ Lee JA, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 Drexel L. Rev. (2020) 227 at 253.

²⁶¹ Ibid.

²⁶² Lee n260 supra at 254.

by evaluating their own process, reflect on their results and plan accordingly for future assessments.²⁶³ The full 12-step plan is contained in chapter 2 at 2.3.1.

It is proposed that due to the developmental nature of the intended course, the bulk of the assessment methods should be formative in nature and perhaps only one summative assessment at the end of the semester should be held. The types of assessments which are appropriate for the intended course have been discussed in the paragraphs preceding this one starting at 5.4 above and the most appropriate assessments will be reproduced in the course plan set out below.

It is suggested that regardless of the format that an assessment in the course takes, if the assessment goal is to evaluate experiential learning then the following principles from the experiential learning method should be considered: (1) the goals of the assessment should be clear, (2) the assessment should assess whether the student has learned what they were taught (validity), (3) criterion-based assessments are preferred over norm-based, (4) assessments should be used to inform students about their level of development (reliability), (5) assessments must be feasible (practicality), (6) multiple assessment methods should be used, (7) formative and summative assessments should be distinguished, (8) formative assessments should be conducted throughout the semester, (9) at least one summative assessment should be conducted, (10) ensure that summative assessments are also formative in nature (if possible), (11) require students to complete educational portfolios.²⁶⁴

Based on the foregoing, together with the types of assessments used in the courses offered in the USA, I suggest that an appropriate assessment regime for a South African course on psychology within the law would be the following: (1) A short *quiz* on cognitive learning theory (summative assessment) - counting 10% of the course grade; (2) A *current events analysis* requiring students to individually present a news article (or case) which relates to some aspect of psychology and law (formative assessment) - counting 10% of the course grade.²⁶⁵ (3) A paired or group *debate* (oral argument) where students debate each other in an adversarial format regarding some topic in the field of psychology and law (formative assessment) - counting 20% of the course grade.²⁶⁶ (4) A mock trial intended to evaluate how students are

²⁶³ Lee n260 supra at 254.

²⁶⁴ Stuckey R, *Best Practices* n249 supra at 175-196. Du Plessis n249 supra at 2790.

²⁶⁵ Perry et al n197 supra at 77-78.

²⁶⁶ Ibid.

applying the psychological phenomena in practice including an opportunity for reflection (formative and summative assessment) – counting 30% of the course grade, (5) A research paper in one of the three styles proposed by Sternlight and Robbennolt above²⁶⁷ (summative assessment) – counting 20% of the course grade and (6) Participation in an online blog requiring sporadic entries and comments throughout the semester *or* the preparation of a reflection journal,²⁶⁸ incorporating ways in which the student has experienced psychological phenomena during their studies and/or in the course (formative assessment) counting 10% of the course grade. The intended assessment regime has been reproduced in the course plan set out below.

5.5 Proposed course plan: Psychology *within* the Law

The below course plan reflects the broad proposed outline of what a course on psychology *within* the law could look like in the South African undergraduate LLB curriculum, more specifically, at the University of the Witwatersrand. The value of the course plan to other instructors wishing to design a similar course is in the structure of the contents and assessments and its alignment to experiential learning and the lawyering skills elaborated upon in chapters 3 and 4 of this work. Below, sections of the course outline are reproduced with explanatory notes below each section. At the end, the entire outline is reproduced chronologically as an addendum to give a holistic overview of the course for reproduction in the actual course that is proposed.

5.5.1 Course Plan and Goals

²⁶⁷ Sternlight & Robbennolt I n95 supra at 376. The options are: (1) A research paper requiring the student to familiarise themselves with an aspect of psychology literature and to apply it to a specific lawyering issue. Topics will be provided but students are encouraged to come up with their own topics. (2) A practical application paper requiring students to interview at least two legal practitioners and to determine whether and to what extent psychological principles that were covered in the course are useful in the attorneys' practice (3) A mock grant proposal which required students to think about new or additional psychological research which could assist lawyers in practice. Here, students are required to review existing psychological research and to situate it in the context of legal practice, then, to design a study to explore a specific research question and to make persuasive arguments about how this would benefit lawyers in practice.

²⁶⁸ Reflection journals are used in a number of University Law Clinics. For a discussion on the extent to which Australian Law Clinics utilise reflection journals, see Du Plessis n82 supra at 109-110. More specifically, at the University of Monash in Melbourne, students have the choice to submit a reflection journal in place of an assignment counting for 20% of the course mark.

PSYCHOLOGY WITHIN THE LAW COURSE PLAN

COURSE DESCRIPTION

This course focuses on the role of psychology in legal education and is specifically concerned with how the study of basic psychology (including cognitive learning theory) improves lawyering skills. The course begins with a study of cognitive learning theory and how learning styles can be used to maximise law school learning. The course then introduces several psychological phenomena which affect and impact on the practice of law in various skills contexts including interviewing and counselling, emotional intelligence, advocacy (including problem-solving), legal reasoning (including decision-making) and professional identity and responsibility.

COURSE GOALS

1. To learn how cognitive learning theory can maximise law school learning.
2. To learn the role, impact and effect of certain psychological phenomena on the skills required to practice law.

The course description is taken from the over-arching hypothesis of this thesis, namely, that in order to address the criticisms of traditional legal education (dealt with in chapter 2) and in order to provide a bridge between the astute student and the metacognitive practitioner (discussed in the context of capstones in chapter 4), students need to be exposed to cognitive science (chapter 2 of this work) and psychology relevant to lawyering (chapter 3 of this work). The practical skills mentioned in the course description are taken from the ten fundamental lawyering skills contained in the MacCrate Report²⁶⁹ (discussed in chapter 2) and were grouped into five broader categories (discussed in chapter 3) with a view to isolate where psychology most notably informs lawyering skills. The five categories are interviewing and counselling, emotional intelligence, advocacy (including problem-solving), legal reasoning (including decision-making) and professional identity and responsibility. The skills are in line with those

²⁶⁹ MacCrate R, American Bar Association, Section of Legal Education and Admissions to the Bar (July 1992) Report of The Task Force on Law Schools and the Profession: Narrowing the Gap [hereinafter the *MacCrate Report*]. So called in recognition of Robert MacCrate, Chair of the task force that produced the report. The ten skills listed were problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, client counselling, negotiation, litigation and other dispute resolution procedures, organization and management of legal work, or ethical dilemmas.

currently taught at the University of the Witwatersrand Law Clinic and the goals reflected form a supplement to the goals intended in that course.²⁷⁰

5.5.2 Course Aims and Outcomes

COURSE AIMS/OUTCOMES	
1.	The development of reflective practice and ways to promote the acquisition of substantive and procedural legal knowledge.
2.	The development of cognitive abilities and values including emotional intelligence and interpersonal skills.
3.	The development of mechanisms for self-directed learning including professional development.
4.	To commence the development of collaborative and multi-disciplinary approaches to novel problems.
5.	The development of legal reasoning and decision-making skills.
6.	The development of lawyering skills through active learning and practice (including the interviewing, negotiating, mediating, arbitrating and litigating).
7.	The development of professional responsibility and ethics including to society at large (social justice and critique of legal theories)
8.	The development of the ability to learn experientially.

The course aims and outcomes are aligned to the five categories of skills mentioned above but in addition thereto, they are aligned to the metacognitive method (discussed in chapter 2), the collaborative learning method (discussed in chapter 5) and the experiential method (discussed in chapter 4).

5.5.3 Course Assessment (Weeks 6, 10, 12-13 and 14)

COURSE ASSESSMENT				
	Description	Type	Weighting	Due Date
1.	Online Quiz	Summative	10%	Week 6
2.	Current Events Analysis (Presentation)	Formative	10%	Week 6
3.	Debate including peer review	Formative	20%	Week 10
4.	Mock trial including reflection	Formative + Summative	30%	Week 12&13
5.	Research Paper	Summative	20%	Week 14

²⁷⁰ See Steenhuisen E, *Goals of Clinical Legal Education* in De Klerk W et al, *Clinical Law in South Africa* 2ed, (2006), LexisNexis, 263-280.

6.	Blog Participation <i>or</i> submission of a reflection journal	Formative	10%	Continuous/assessed at the end of the semester
<i>A full description of the assessments including content covered in the assessment as well as due dates will be provided on a separate assessment plan.</i>				

The types of course assessments used are inspired by lessons from the American legal educators who have developed and successfully implemented courses similar to this one (discussed at 5.3 above). For a semester course, six assessments may seem like a lot but the decision to assess in this manner is based on the research done by Lee (discussed at 5.4 above) to the effect that metacognitive thinking can be encouraged by continuous assessment, feedback and reflection opportunities. The main purpose of all the assessments save one being formative in nature is based on the facilitation of the recursive cycle (mentioned in chapter 2 and 4 of this work and used to construct Lee's 12-steps for metacognitive thinking). The point of this many formative assessments is to emphasize that the role of the student does not end at the point when they receive a grade or lecturer feedback but that they must continue on in the steps of the recursive cycle in a self-directed manner. By evaluating their own process, reflecting on their results and planning accordingly for future assessments, they are continuously exposed to the recursive cycle and required to be active participants in the cycle. The assessments have been carefully chosen to align with specific skills and to promote the recursive cycle (metacognitive approach), for instance, the online quiz is intended to test the ability by students to use the lessons on cognitive learning to acquire and retain information on the role that psychology plays on lawyering.

WEEK 6

ASSESSMENT WEEK: QUIZ & CURRENT AFFAIRS ANALYSIS

SKILLS OUTCOME/S:

1. Developing better learning styles.
2. Developing the ability to learn experientially.

ASSESSMENT 1: QUIZ

Students will be required to participate in a short quiz on cognitive learning theory, this is intended as a summative assessment. The quiz will be presented online.

ASSESSMENT 2: CURRENT AFFAIRS ANALYSIS (PRESENTATION)

Students will be required to present a news article (or recent case) to the class which relates to some aspect of psychology and law. Students will hand in a 3-page summary of their presentation and include a description of the relevant psychological issues at play and analyse them in relation to the legal skill concerned.

The single lecture that week will be used to conduct the online quiz while the double lecture will be used for the student's current affairs presentations. Depending on class numbers, additional time may need to be allocated to complete the exercise but it has already been proposed that numbers for the course registration will likely need to be capped. It is envisaged that this first oral presentation be individual (where the student works and performs on their own). It is conceivable that some of the single lectures during the seminar lecture weeks between weeks 6 and week 10 (which is when the debates begin) could be used to continue the current affairs analysis presentations, for example, a number of students could be allocated to present each week. The current events presentation (assessed by the lecturer) is intended to give students an introduction to public speaking and to note any criticisms by the lecturer in their approach which they can reflect on and improve for subsequent assessments.

WEEK 10

ASSESSMENT WEEK: ORAL DEBATE & PEER ASSESSMENT

RELEASE OF RESEARCH PAPER INSTRUCTIONS

*Students are required to work in pairs or teams to debate opposing teams in an adversarial format regarding some topic in the field of psychology and law. Student performance will be scored and reflected upon by other participants. *A communique containing instructions and parameters will be distributed ahead of time.*

****The communique pertaining to the research essay due at the end of week 14 will be distributed this week.***

SKILLS OUTCOME/S:

1. Developing the ability to learn experientially.
2. Developing reflective practice.

The debate and accompanying peer review gives the students an ability to reflect on the feedback received on their individual presentations and to improve their public speaking. In this instance, the added skills of collaboration (with a partner or in a group) and persuasive argument will be brought into the mix. The students will be able to reflect on whether they have improved from the time that they gave the current events presentation and this time, since peer assessment is a component of the exercise, they will have the perspective of their peers on the extent to which they were able to address prior weaknesses.

WEEK 12 & 13:**ASSESSMENT WEEK: MOCK TRIAL (MOOT COURT)**

*Students will be required to participate in a mock criminal trial intended to evaluate how students use psychological phenomena that they learned about in the course in practice. Students will be assigned roles such as Judge, accused, expert witness, witness, defence attorney, prosecutor etc. The trial will be recorded and opportunities for reflection will be provided the following week. *A **communiqué** containing instructions and parameters will be distributed ahead of time.*

SKILLS OUTCOME/S:

1. Developing the ability to learn experientially.
2. Developing reflective practice.

The mock trial is both summative and formative in nature because it will give the students an opportunity to put what they have learned about psychology (summative) into practice (formative). They will receive feedback on which to reflect. This time, the feedback serves to address the cumulative impact of the prior assessments which were staggered in terms of levels of difficulty (oral presentation, debate and then mock trial). The purpose of the reflection at this stage is to map the extent to which each exercise served to improve the student's subsequent performance. It is specifically intended that the students participate in a mock criminal trial since a mock civil trial already forms part of the trial advocacy exercise provided by the Wits Law Clinic in the students' final year as part of the compulsory Practical Legal Studies course. Further, final year students have the opportunity to register for an elective course called Moot which gives them exposure to a mock High Court application proceeding rooted in Constitutionalism and Human Rights. The mock criminal trial component will fill the gap provided by those courses. It is envisaged that the mock trial will run over two weeks or that it will run twice by simply dividing the students in the course so that everyone has an equal opportunity to participate and play a role in the trial process.

WEEK 14:**ASSESSMENT WEEK: RESEARCH PAPER, REFLECTIVE JOURNAL (OR BLOG PARTICIPATION IS DUE)****SKILLS OUTCOME/S:**

1. Developing the ability to perform well in summative assessments.
2. Developing the ability to learn experientially.

ASSESSMENT 1: RESEARCH PAPER

Students are required to submit a research paper in one of the following forms:

- (1) A research paper where the student familiarises themselves with an aspect of psychology literature and applies it to a specific lawyering issue. Topics will be provided but students are encouraged to come up with their own topics. The student is required to reflect on how this aspect of psychology impacted their experience in the course or how it will affect their future approach to lawyering.
- (2) A practical application paper wherein the student interviews at least two legal practitioners to determine to what extent psychological phenomena that were covered in the course are useful in the attorneys' practice. A practical evaluation of the effect of the psychological phenomena on the lawyering practice must be furnished. The student must also reflect on what this course has taught them about that practical phenomena and the extent to which that knowledge would have improved their practice if they were the practitioner experiencing it.
- (3) A mock grant proposal requiring the student to think about new or additional psychological research which could assist lawyers in practice. Here, the student is required to review existing psychological research not covered in this course or to expand on topics covered and to situate them in the context of legal practice. The student must then design a study to explore the effect of that research on lawyering practice. Reflection on how this would benefit the student's future practice of law is required.

**A communique containing instructions and parameters will be distributed ahead of time.*

ASSESSMENT 2: REFLECTIVE JOURNAL OR BLOG PARTICIPATION

During the course of the semester, each student must choose to either participate in the course blog (including at least 4 substantive blog posts on relevant issues discussed on the blog) or, the students must keep a reflection journal (including at least 4 substantive entries) on instances where they experienced psychological phenomena in the course of their studies in this course, another course, or in their personal lives and how they addressed them.

The research paper is the final summative assessment in the course. It is intended to be a research paper and not a test or an exam because in addition to its summative component (using what the students have learned in the course), it is intended to test the student's own ability to reflect on their experiences. In the prior assessments, reflection is aided and collaborative, it is guided by the lecturer and to some degree, by the student's peers. With the final assessment, the student will be required to reflect independently and individually. This is difficult under exam conditions and with time constraints. As will be noted from the relevant extract of the course outline dealing with the final assessment due in week 14 (reproduced below), each research paper option is set in a manner which requires individual reflection to be a component part of the essay. As such, this is the final opportunity to reflect that the students will experience in the course and the student is able to self-direct the reflection perspective they wish to write on (whether it is retrospective or prospective) by choosing their own topic. The choice of topic and concomitant reflection is likely to be affected by the student's individual experience in the course. The ongoing assessment which the students will have to consider from the inception of

the course is the choice between continuous participation in the course blog or the making of continuous entries in a reflective journal. The purpose of this is to ensure that reflection is not just seen as some kind of abstract notion that only needs to be considered or attended to at the points of assessment but rather, that it must permeate the entire experience in the course in order to meet metacognitive imperatives. To put it simply, I will require students to actually practice reflection throughout the course and not just write about it in their final essay – they will do this either by making blog entries (which require reflection on the topics covered including how the topics covered played out in legal matters in the public domain – for example in televised trials, television shows or films and/or news articles) or by keeping a reflection journal (which requires reflection on how the topics covered affected the student personally in this course, other courses or their day-to-day lives).

There will be no lectures in the final week of the course (week 14). The purpose of this assessment week is to give students the final week of the course to complete and to finalise the last two assessments, namely, the research paper and reflective journal. If the students opted to participate in the blog, there will be an opportunity for a final blog post during this week. Students will be told the due date for these final assessments at the beginning of the course. The research paper instructions will be released during week 10 (after all the substantive teaching has taken place but before the students embark on their mock trials in order to put the substantive elements into practice). This will ensure that students have about 4 weeks to prepare the final research essay once they have picked a topic and that they are able to direct themselves towards the reflection component of the research paper including the use of their experience in the mock trial. The challenges related to high student numbers and how to effectively assess collaborative learning were dealt with elsewhere in this chapter but for the most part, students in this course would be assessed individually with peer assessment influencing only about 10% of the overall mark (as it is incorporated in the debate and mock trial exercises).

5.5.4 Prescribed Readings and recommended texts

PREScribed & RECOMMENDED TEXTS
Prescribed: 1. Sternlight J & Robbennolt J, <i>Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making</i> 2ed, American Bar Association, 2022.

Considering the extent to which the work of Sternlight and Robbennolt was relied upon in this thesis (both in the role of psychology to effective lawyering and in the context of course content and structure), the intended prescribed text for the course is Sternlight & Robbennolt's book, *Psychology for Lawyers*.²⁷¹ The text is available as an online, kindle edition and thus, would be accessible to South African students. It is noted that extracts from this and other prescribed and recommended texts may need to be reproduced for students and that the requisite permissions would need to be obtained from the relevant authors. Furthermore, it is noted that the amount of proposed prescribed and recommended readings is voluminous but it would be up to the instructor to add or remove requisite readings or to merely prescribe extracts from the readings as may be appropriate for the relevant year-level. It is envisaged that the readings would be reduced once the course is piloted and it would be up to the instructor to decide where they wished to place focus. The intention was to give a fairly broad scope for an instructor to work with and to tailor or fine-tune the proposed course outline to be fit for purpose.

5.5.5 Course Content: Week 1

COURSE CONTENT
WEEK 1: INTRODUCTION TO THE COURSE <i>Students will be introduced to the course scope, contents, teaching methods and course assessments. Students will conduct an online personality test and will be grouped into teams or pairs based on the results of the test. Students will play a number of brain-games to introduce some of the topics that will be covered in this course and experience some relevant psychological phenomena for themselves.</i>

The weekly course content is structured around the average semester course offered at the University of the Witwatersrand which comprises of a single and double lecture each week, usually on a different day of the week. A single lecture is 45 minutes, and the double lecture is 105 minutes. The double lecture is usually followed by the single lecture at a later point in the week. For example, in Criminal law, the double lecture is on Mondays at 08:00-09:45 and the single lecture is on Wednesdays at 12:30-13:15. It is proposed that the first week be utilised to introduce students to the course, the course outline and assessments as well as the lawyering

²⁷¹ Sternlight & Robbennolt n100 supra.

skills and psychological phenomena that they will be exposed to. This will be done in the form of showing videos and having students play simple brain games which introduce them to some of the phenomena that will be discussed. In the first double lecture, the students will be introduced to the Myers-Briggs Personality Test and how it will be used in the course. It will be explained that they will be grouped or paired to conduct future exercises based on the results of this test. The subsequent single lecture that week will be used to have the students conduct the personality test online and the lecturer will process the results and pair the students into pairs and groups. A list of pairs and groupings will be posted for the students at the start of the subsequent week or closer towards the time that students are expected to commence working together in their pairs or groupings.

5.5.6 Course Content: Weeks 2 – 5, 7 – 9 and 11

Weeks 2-5, 7-9 and 11 represent the substantive aspects of this course. They are reproduced in the course outline attached as an addendum at the end of this chapter. Each week (and sometimes more than one week) is devoted to the engagement of the students in the study of the five categories of skills that they will be learning and the cognitive and psychological tenets which underpin them. Due to the length of the material, the sections of the course outline on these weeks has not been reproduced here but should be read in conjunction with or after this explanatory note. The substantive lectures will be grounded in recommendations made by Wolski in her article *Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate law Curriculum*.²⁷² Like Lee (referred to in Chapter 2 and 4 of this work), Wolski sees skills teaching methodology as being grounded in experiential learning theory.²⁷³ She proposes the following plan which I have summarised to suit my proposed course and which plan is in line with the recursive cycle and metacognitive method of Lee discussed in the preceding chapters):

1. Prepare the students for experience with instructions and demonstrations.²⁷⁴

²⁷² Wolski B, *Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate law Curriculum*, J. Legal Educ., Vol. 52, Issue No. 1/2 (March/June 2002) 287 at 302.

²⁷³ Wolski n279 supra at 302.

²⁷⁴ Ibid at 292.

This includes instruction on the theory related to the skill being taught and a conceptualisation of the framework for the skill's effectiveness and purpose.²⁷⁵

Demonstrations should be used to model the effective performance of the skill or skills to give students an understanding of what the skill requires behaviourally.²⁷⁶

2. Use simulations to provide experiences.²⁷⁷

This involves allowing the students to practice the skills through simulations.²⁷⁸

3. Revive the student's experiences through assessment, feedback and reflection.²⁷⁹

This includes using numerous formative assessments, giving individual feedback and including opportunities for reflection so that the students may plan what to do differently the next time.²⁸⁰

4. Provide opportunities for further practice in subsequent assessment activities.²⁸¹

This includes giving students the opportunity to transfer what they have learned to new situations.²⁸²

The explanatory note on assessments (including weeks 6, 10, 12-13 and 14 of the course) above, reflects items 2-5 of Wolski's proposals for a lecture plan. Item 1 (preparing the students for experience with instructions and demonstrations) is intended to be reflected in the substantive teaching weeks (Weeks 2-5, 7-9 and 11). The reader will note that each of these weeks focus on psychological phenomena or lessons from cognitive science which impact on or play a role in the acquisition of one or more lawyering skills grouped into the five categories as aforementioned. Each of these weeks will include a seminar style lecture during the double lecture period (with demonstrations to evidence contextual relevance) and an accompanying practical lecture (during the single lecture of the week) to allow students an opportunity to ask questions, engage in class exercises or to engage in rhetoric-styled questioning on the subject matter taught that week. (The importance of rhetoric was discussed on pages 109-113 and 121 of this thesis.)

The intended course has been presented as being offered to students in the second semester of their second year of study or the first semester of the third year of study (chapter 4

²⁷⁵ Wolski n279 supra at 292.

²⁷⁶ Ibid.

²⁷⁷ Wolski n279 supra at 293.

²⁷⁸ Ibid.

²⁷⁹ Wolski n279 supra at 293.

²⁸⁰ Ibid.

²⁸¹ Wolski n279 supra at 293.

²⁸² Ibid.

of this work). At the University of the Witwatersrand, second year level courses on the 4-year LLB stream are pitched at NQF levels 6 or 7 whilst third year level courses are pitched at NQF level 7 only.²⁸³ NQF credits are used to denote how much time a student would spend learning in a course and are defined as “credits recognised by the Higher Education Qualifications Sub-Framework (HEQSF) as a measure of the volume of learning required for a qualification, qualified as the number of notional study hours required for achieving the learning outcomes specified for a qualification”.²⁸⁴ The credit rating system at most South African Universities rates 10 notional credit hours as equivalent to one credit. The credits for a second semester, second-year course pitched at NQF level 7 (like Jurisprudence for instance) are 18 NQF credits. This means that in a 15-week semester, a student would need to spend about 12 hours per week on the relevant subject. To account for public holidays and varying University almanacs, the course has been structured on the basis of 14 teaching weeks. Based on the above, the reader will note that the prescribed and recommended reading list per week of substantive lectures is extensive. It must be noted that the recommended readings are intended as supplements for the lecturers teaching this course but relevant extracts from these readings could be provided to students. Students would be informed that the recommended readings are not required to do well in the course but that they may be useful to the student in the compilation of their summative research essays and that they should be attended to, to the extent that they are featured in class. Even the prescribed readings should be tailored and finetuned based on the NQF level at which this course is ultimately pitched and whether the course would be run as a semester or year-long course. It is intended that the prescribed readings be monitored and finetuned after the first pilot run of this course. It is intended that lecturing materials be created using the research contained in the prescribed and recommended readings and this may further limit the amount of prescribed reading required of students.

5.6 Conclusion

Whilst the study of psychology as a discipline has much to offer to the legal fraternity, very few courses exist globally which merge the two disciplines in a manner proposed in this thesis.

²⁸³ The 2023 Syllabuses for the Faculty of Commerce, Law and Management at 48. The document can be accessed at:

<https://www.wits.ac.za/media/wits-university/students/academic-matters/2023%20Commerce%20Law%20Management%20Rules%20and%20Syllabuses-Final.pdf>

Accessed on 10.09.2023.

²⁸⁴ Ibid at 11.

In chapter 3, the difference between the concepts of “psychology and the law” which is an existing and emerging field versus “psychology *within* the law” – a category not yet articulated in legal or psychological discourse was canvassed. To the extent that courses on law and psychology exist (with the exception of the courses mentioned herein) they are predominantly courses offered by psychology departments to train forensic psychologists wishing to specialise in criminal justice or to offer other assistance to lawyers such as expert witness testimony (also discussed in chapter 3). Considering that psychology will continue to be applicable to students’ professional lives and decisions, and that they will constantly encounter psychological phenomena in both study and practice, it is time to incorporate legally relevant psychology into the undergraduate legal curriculum. This has particularly crucial ramifications for legal education in South Africa because ours is predominantly an undergraduate law degree with no grounding in any of the sciences or humanities unless students choose to first complete an undergraduate degree in those fields. Considering that an undergraduate degree is not a prerequisite to study law, many students do not have this grounding at all. The proposed course is intended to take steps towards addressing the criticisms continuously levied against traditional legal education (discussed in chapter 2 hereof) and to provide students a new and exciting way to begin building practical skills competencies and conceiving future capstone experiences.

**For the full course outline for the proposed course (extracts from which were used in the above discussion), see the addendum at the end of this chapter.*

ADDENDUM: COURSE OUTLINE

PSYCHOLOGY *WITHIN* THE LAW COURSE PLAN

COURSE DESCRIPTION

This course focuses on the role of psychology in legal education and is specifically concerned with how the study of basic psychology (including cognitive learning theory) improves lawyering skills. The course begins with a study of cognitive learning theory and how learning styles can be used to maximise law school learning. The course then introduces a number of psychological phenomena which affect and impact on the practice of law in various skills contexts including interviewing and counselling, emotional intelligence, advocacy (including problem-solving), legal reasoning (including decision-making) and professional identity and responsibility.

COURSE GOALS

1. To learn how cognitive learning theory can maximise law school learning.
2. To learn the role, impact and effect of certain psychological phenomena on the skills required to practice law.

COURSE AIMS/OUTCOMES

1. The development of reflective practice and ways to promote the acquisition of substantive and procedural legal knowledge.
2. The development of cognitive abilities and values including emotional intelligence and interpersonal skills.
3. The development of mechanisms for self-directed learning including professional development.
4. To commence the development of collaborative and multi-disciplinary approaches to novel problems.
5. The development of legal reasoning and decision-making skills.
6. The development of lawyering skills through active learning and practice (including the interviewing, negotiating, mediating, arbitrating and litigating).
7. The development of professional responsibility and ethics including to society at large (social justice and critique of legal theories)
8. The development of the ability to learn experientially.

COURSE ASSESSMENT

	Description	Type	Weighting	Due Date
1.	Online Quiz	Summative	10%	Week 6
2.	Current Events Analysis (Presentation)	Formative	10%	Week 6

3.	Debate including peer review	Formative	20%	Week 10
4.	Mock trial including reflection	Formative + Summative	30%	Week 12&13
5.	Research Paper	Summative	20%	Week 14
6.	Blog Participation <i>or</i> submission of a reflection journal	Formative	10%	Continuous/assessed at the end of the semester

A full description of the assessments including content covered in the assessment will be provided on a separate assessment plan.

PRESCRIBED & RECOMMENDED TEXTS

Prescribed:

1. Sternlight J & Robbennolt J, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making* 2ed, 2021 ABA Publishing (hereinafter *Psychology for Lawyers*); or
2. Greene E & Heilbrun K, *Wrightsmen's Psychology and the Legal System*, 9ed, 2019, Cengage.

Recommended:

3. Tredoux C, Foster D, Allan A, Cohen A, Wassenaar D, *Psychology and Law*, 2005, Juta.
4. Bartol, C & Bartol, A, *Psychology and Law*, 2ed, 2019, Sage Publications.

COURSE CONTENT

WEEK 1:

INTRODUCTION TO THE COURSE

Students will be introduced to the course scope, contents, teaching methods and course assessments. Students will conduct an online personality test and will be grouped into teams or pairs based on the results of the test. Students will play a number of brain-games to introduce some of the topics that will be covered in this course and experience some relevant psychological phenomena for themselves.

WEEK 2

TOPIC 1: COGNITIVE LEARNING THEORY

Students will explore cognitive learning theory and will be introduced to a number of learning styles to maximise their law school learning in this course and beyond. Topics will include the role of attention and memory in learning, cognitive capacity overload and the perils of multitasking.

SKILLS OUTCOME/S:

1. Developing reflective practice and ways to promote substantive and procedural legal knowledge.
2. Developing mechanisms for self-directed learning including professional development.

PRESCRIBED READINGS: *relevant extracts will be provided

- *Psychology for Lawyers*, Chapters 1 and 2.
- Lee JA, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 Drexel L. Rev. (2020).

- Jacobson S, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, Journal of the Association of Legal Writing Directors, Vol. 2, 27.
- Burgess H, *Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning* 29 Quinnipiac Law Review Vol. 29 (2011).
- George S, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School* Maine Law Review, Vol. 66, No. 1, Winter 2013 Suffolk University Law School Research Paper No. 13-10.
- Niedwiecki A, *Lawyers and Learning: A Metacognitive Approach to Legal Education* 13 Widener L. Rev. 33 at 155.

RECOMMENDED READINGS:

- Shell D et al, *The Unified Learning Model: How Motivational, Cognitive and Neurobiological Sciences Inform Best Teaching Practices*, Springer (2010).
- Rosen C, *The Myth of Multitasking*, 20 NEW ATLANTIS 105, (2008).
- Dunlosky J et al, *Improving Students' Learning with Effective Learning Techniques: Promising Directions from Cognitive and Educational Psychology*, 14 PSYCHOL. SCI. IN PUB. INTEREST 4 (2013).
- Blasi G, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, (1995) 45 *Journal of Legal Education* 313.

WEEK 3 & 4

TOPIC 2: PSYCHOLOGICAL INSIGHTS RELEVANT TO INTERVIEWING AND COUNSELING

Students will explore psychological insights relevant to the skills of interviewing and counselling. Topics will include the value of interdisciplinary collaboration, personality type, rational choice and prospect theory.

SKILLS OUTCOME/S:

1. Development of cognitive abilities and values including interpersonal skills.
2. Developing collaboration and multi-disciplinary approaches to novel problems.

PRESCRIBED READINGS:

- *Psychology for Lawyers*, Chapters 7, 9, and 10.
- Sternlight J & Robbenolt K, *Good Lawyers Should Be Good Psychologists: Insight for Interviewing and Counseling Clients*, Ohio State Journal on Dispute Resolution, Volume 23: 3 (2008) 437 – 538.
- Du Plessis MA, *Clinical Legal Education: Interviewing Skills*, 51(1) [2018] Dejure 10.
- Peters D & Peters M, *Maybe That's Why I Do That: Psychological Type Theory, The Myers-Briggs Type Indicator and Learning Legal Interviewing*, 35 N. Y. L. Sch. L. Rev. (1990) 169.
- DiPippa J, *How Prospect Theory Can Improve Legal Counselling*, 24 U. Ark. Little Rock L. Rev. 81 (2001).
- Spiegel M, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counselling*, Brigham Young University Law review (1997), 307-338.

RECOMMENDED READINGS:

- Binder D & Price S, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977).
- O'Leary K, When Context Matters: How to Choose an Appropriate Client Counselling Model, 4 T.M. Cooley J. Prac. & Clinical L. (2001) 103.

WEEK 5**TOPIC 3: PSYCHOLOGICAL INSIGHTS RELEVANT TO EMOTIONAL INTELLIGENCE**

Students will explore the psychological insights relevant to emotional intelligence which has a bearing on how they understand themselves and others. Phenomena such as transference, framing, preconception and their effects on lawyering will be explored.

SKILLS OUTCOME/S:

1. Development of cognitive abilities and values including emotional intelligence.

PRESCRIBED READINGS: *relevant extracts will be provided

- *Psychology for Lawyers*, Chapter 3
- Sternlight J & Robbennolt K, *Good Lawyers Should Be Good Psychologists: Insight for Interviewing and Counseling Clients*, Ohio State Journal on Dispute Resolution, Volume 23: 3 (2008) 437 – 538.
- Silver M, *Love, Hate and other Emotional Interference in the Lawyer/Client Relationship*, 6 Clin. L. Rev. 259 (1999).

WEEK 6**ASSESSMENT WEEK: QUIZ & CURRENT AFFAIRS ANALYSIS****SKILLS OUTCOME/S:**

1. Developing better learning styles.
2. Developing the ability to learn experientially.

ASSESSMENT 1: QUIZ

Students will be required to participate in a short quiz on cognitive learning theory, this is intended as a summative assessment. The quiz will be presented online.

ASSESSMENT 2: CURRENT AFFAIRS ANALYSIS (PRESENTATION)

Students will be required to present a news article (or recent case) to the class which relates to some aspect of psychology and law, students will hand in a 3-page summary of their presentation and include a description of the relevant psychological issues at play and analyse them in relation to the legal skill concerned.

WEEK 7 & 8**TOPIC 4: PSYCHOLOGICAL INSIGHTS RELEVANT TO ADVOCACY (INCLUDING PROBLEM SOLVING)**

Students will explore the psychological insights relevant to advocacy in general (with a focus on problem-solving). Phenomena such as change blindness, inattention blindness, confirmatory bias, causal attribution error and naïve realism and their effects on lawyering will be explored.

SKILLS OUTCOME/S:

1. Developing lawyering skills through practice (including the interviewing, negotiating, mediating, arbitrating and litigating (all components of advocacy).

PRESCRIBED READINGS: *relevant extracts will be provided

- *Psychology for Lawyers*, Chapters 6 and 11.
- Sternlight J & Robbenolt K, *Good Lawyers Should Be Good Psychologists: Insight for Interviewing and Counseling Clients*, Ohio State Journal on Dispute Resolution, Volume 23: 3 (2008) 437 – 538.
- Simons D & Chabris C, *Gorillas in our Midst: Sustained Inattention Blindness for Dynamic Events* Perception, Vol. 28 (1999) 1059-1074.
- Jaeger C & Levin D, *Justice is (Change) Blind: Applying Research on Visual Metacognition in Legal Settings* (2017).
- Simons D & Levin D, *Failure to Detect Changes to People in a Real-World Interaction*, 5 Psychonomic Bull. & Rev. 644 (1998).

RECOMMENDED READINGS:

- Rachlinski J, *Misunderstanding Ability, Misallocating Responsibility*. Brooklyn Law Review, 68, (2003), 1055-1091.
- Nickerson R, *Confirmatory Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol., (1998), 175.
- Ross L & Nisbett R, *The Person and the Situation: Perspectives of Social Psychology*, 76, (1991).

WEEK 9

TOPIC 5: PSYCHOLOGICAL INSIGHTS RELEVANT TO ANALYSIS AND LEGAL REASONING (INCLUDING DECISION-MAKING)

Students will explore the psychological insights relevant to analysis and legal reasoning (with a focus on decision-making), Phenomena such as availability, anchoring, egocentric bias and affect heuristics as well as their effects on lawyering will be explored.

SKILLS OUTCOME/S:

1. Developing legal reasoning and decision-making skills.

PRESCRIBED READINGS: *relevant extracts will be provided

- *Psychology for Lawyers*, Chapters 4 and 5.
- Sternlight J & Robbenolt K, *Good Lawyers Should Be Good Psychologists: Insight for Interviewing and Counseling Clients*, Ohio State Journal on Dispute Resolution, Volume 23: 3 (2008) 437 – 538.
- Weinstein I, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 8 Clinical L. Rev., 783 (2002).

RECOMMENDED READINGS:

- Nickerson R, *Confirmatory Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol., (1998), 175.
- Taylor S, *Positive Illusions: Creative Self-Deception and the Healthy Mind*, 1989: Taylor S & Brown J, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 Psychol. Bull. 193, (1988).

WEEK 10**ASSESSMENT WEEK: ORAL DEBATE & PEER ASSESSMENT****RELEASE OF RESEARCH PAPER INSTRUCTIONS**

*Students are required to work in pairs or teams to debate opposing teams in an adversarial format regarding some topic in the field of psychology and law. Student performance will be scored and reflected upon by other participants. *A communique containing instructions and parameters will be distributed ahead of time.*

**The communique pertaining to the research essay due at the end of week 14 will be distributed this week.*

SKILLS OUTCOME/S:

1. Developing the ability to learn experientially.
2. Developing reflective practice.

WEEK 11:**TOPIC 6: PSYCHOLOGICAL INSIGHTS RELEVANT TO PROFESSIONAL IDENTITY (INCLUDING PROFESSIONAL RESPONSIBILITY)**

Students will explore the psychological insights relevant to morality and professional identity (with a specific focus on professional responsibility and ethics). Phenomena such as self-affirmation, self-questioning, empathy, conception of truth, situationism/peer pressure and their effects on lawyering will be explored.

SKILLS OUTCOME/S:

1. Developing professional responsibility and ethics including to society at large (social justice and critique of legal theories).

PRESCRIBED READINGS:

- *Psychology for Lawyers*, Chapters 14 and 15.
- Eldred TW, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility* (2016) Mich. St. L. Rev. 757.
- Lerner A, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, Quinnipiac L. Rev., Vol 23, 643 (2004) at 650.

RECOMMENDED READINGS:

- Frenkel D, *On Trying to Teach Judgment*, 12 Legal Educ. Rev. 19 (2001)

- Hartwell S, *Promoting Moral Development Through Experiential Teaching*, 1 Clinical L. Rev. 505, 522-528, 532-535 (1995).
- Luban D & Millemann M, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31 (1995).

WEEK 12 & 13:

ASSESSMENT WEEK: MOCK TRIAL (MOOT COURT)

Students will be required to participate in a mock criminal trial intended to evaluate how students use psychological phenomena that they learned about in the course in practice. Students will be assigned roles such as Judge, accused, expert witness, witness, defence attorney, prosecutor etc. The trial will be recorded and opportunities for reflection will be provided the following week.

SKILLS OUTCOME/S:

1. Developing the ability to learn experientially.
2. Developing reflective practice.

WEEK 14:

ASSESSMENT WEEK: RESEARCH PAPER, REFLECTIVE JOURNAL (OR BLOG PARTICIPATION IS DUE)

SKILLS OUTCOME/S:

1. Developing the ability to perform well in summative assessments.
2. Developing the ability to learn experientially.

ASSESSMENT 1: RESEARCH PAPER

Students are required to submit a research paper in one of the following forms:

(1) A research paper where the student familiarises themselves with an aspect of psychology literature and applies it to a specific lawyering issue. Topics will be provided but students are encouraged to come up with their own topics. The student is required to reflect on how this aspect of psychology impacted their experience in the course or how it will affect their future approach to lawyering.

(2) A practical application paper wherein the student interviews at least two legal practitioners to determine to what extent psychological phenomena that were covered in the course are useful in the attorneys' practice. A practical evaluation of the effect of the psychological phenomena on the lawyering practice must be furnished. The student must also reflect on what this course has taught them about that practical phenomena and the extent to which that knowledge would have improved their practice if they were the practitioner experiencing it.

(3) A mock grant proposal requiring the student to think about new or additional psychological research which could assist lawyers in practice. Here, the student is required to review existing psychological research not covered in this course or to expand on topics covered and to situate them in the context of legal practice. The student must then design a study to explore the effect of that research on lawyering practice. Reflection on how this would benefit the practice of law is required.

****A communique containing instructions and parameters will be distributed ahead of time.***

ASSESSMENT 2: REFLECTIVE JOURNAL OR BLOG PARTICIPATION

During the course of the semester, each student must choose to either participate in the course blog (including at least 4 substantive blog posts on relevant issues discussed on the blog) or, the students must keep a reflection journal (including at least 4 substantive entries) on instances where they experienced psychological phenomena in the course of their studies in this course, another course, or in their personal lives and how they addressed them.

CHAPTER 6

CONCLUSION

6.1 Concluding Remarks

The foundational concern underpinning this research is the role of and the extent to which psychology and cognitive science influences the acquisition of legal skills with a focus on how psychology and cognitive science can be used to improve practical skills teaching and learning.

My research has shown that experiential learning is necessary for the proper acquisition of skills (Chapter 4) and that it can be improved by the metacognitive method and cognitive science (Chapter 2). My research reflects that whilst laudable attempts are made by legal educators to incorporate skills teaching into undergraduate classrooms, syllabus and time constraints simply do not allow for the recursive nature of the metacognitive approach and experiential learning is only truly practiced when students embark on their clinical programme, the practical legal studies course in the Law Clinic (Chapter 4). Whilst most law students are exposed to some kind of clinical experience before graduation, in the South African context, this is usually in the final year of study where there is little time left to successfully or to meaningfully integrate theory and practice in a manner which supports life-long learning. As such, the proposal in this thesis was for a course specifically focusing on the role which psychology and cognitive science play within the practice of lawyering with a view to improve skills acquisition and to acquire and help to improve basic competency in those skills. It was proposed that this course be offered at about the mid-point of the students' undergraduate studies to introduce them to the skills that they will require in future practice. The idea is to have students begin creating a foundation for the acquisition of those skills by articulating what those skills actually are, how psychology and cognitive science can help to acquire and improve those skills and to have students engage in some experiential learning exercises (as informed by the metacognitive method) *before* they ever begin to deal with live clients during their clinical programme.

The difficulty with any course focused on skills training was articulated by McFarlane in as early as 1992, when she wrote that “knowing what to do, and how to do it well is a far more complex synthesis of action and reaction than a simple aggregation of what you know.”¹

¹ McFarlane J, *Look Before You Leap: Knowledge and Learning in Legal Skills Education*, Journal of Law and Society, 1992, Vol. 19, Issue No. 2, 293-319 at 294.

By and large, this is what is expected of students when they enter their clinical programme in their final year. According to McFarlane, there must be informed terms of reference for the design and development of skills programmes which includes criteria for what should be taught, how it should be taught as well as how it ought to be assessed.² More specifically, McFarlane advocated for theory to inform our understanding of how skills education should be applied so that new courses are not mere imitations of others and that they do not serve to confuse students.³

In the preceding chapters, I have attempted to base my propositions relating to course design on sound theoretical frameworks pertaining to experiential learning, the metacognitive method and the relevant gains made by experts already teaching this nuanced topic of psychology's impact on the law. As such, the proposed course has been constructed with relevant theoretical underpinnings in mind and has been designed in a manner which compliments other courses within the School of Law at the University of the Witwatersrand. For instance, see Chapter 4 on how the proposed course supplements existing courses such as Legal Ethics, Moot and Practical Legal Studies (Wits University's clinical programme).

Another problem, according to McFarlane, is the propensity for some academics to view skills courses as the "soft" option to legal teaching.⁴ On the one end of the spectrum, there is the criticism that an overemphasis on skills teaching will "fail to challenge the legitimacy of the status quo of legal professionalism, that is, it will be even less successful than the academic model in 'radicalising' student thinking and transforming behaviours"⁵ and on the other end, some argue that skills training belongs in trade-schools and "blurs the proper role of the University law school."⁶

It is my contention that there is no real substantive basis for either concern surrounding the proposed course on psychology *within* the law. The latter concern is alleviated by taking at least some of the burden off from doctrinal courses to have to incorporate skills teaching into their curriculum since the proposed stand-alone course focuses predominantly on skills acquisition. The former concern is addressed in the substance of the course and the prescribed syllabus – many of the psychological tenets and related insights discussed in Chapter 3 of this work were chosen *because* they enable the radicalising of thinking and the transformation of behaviours (for instance, knowledge of rational choice and prospect theory influences how a

² McFarlane n1 supra at 294.

³ Ibid.

⁴ McFarlane n1 supra at 296.

⁵ Ibid.

⁶ McFarlane n1 supra at 296.

student might frame options to his clients or how a student might approach legal argument, knowledge and recognition of transference and counter-transference allows a student to recognise and counteract its effects at trial or during client consultations, emotional intelligence invariably facilitates cross-cultural lawyering etc.)

Another critique which might be levied at a course of this nature is that the time spent on learning skills has the propensity to reduce the amount of time spent on the learning of substantive law.⁷ The logical answer to this criticism is that the relationship between skills and knowledge of the law is symbiotic.⁸ According to McFarlane, it is a mistake to view knowledge as content, rather than process related.⁹ Knowledge of the law is ultimately implicit in any skillful application of the law and the best test of legal knowledge is its application in practice.¹⁰ Practical context is thus fundamental to the acquisition of knowledge but is often lacking in doctrinal courses.¹¹ Both Bloom and Dunlosky have stated that it is misguided for educators to focus on content delivery while failing to teach students to develop effective techniques to guide their learning.¹²

Since the proposed course is intended to be supplemental in nature, it will not derogate from any substantive learning done in any of the doctrinal courses which are a part of the curriculum. To the contrary, the course would (or could) incorporate certain components of substantive law which students would have encountered in their first and second years of study such as family law, delict (torts) and criminal law, or will still encounter in subsequent years such as the law of contract, property law, the law of evidence and legal ethics. Having lectured the bulk of the mentioned courses, having headed up a litigation unit at the Wits Law Clinic and being a practicing attorney, I am well-prepared to provide the kind of context that time does not permit in the substantive law classroom due to the constant need to put content coverage above skills training. It is thus hoped that the proposed course will serve as a vehicle for the reinforcement of basic legal principles which are essential to legal practice.

Another important consideration is that legal education carries with it, a dual responsibility: in the broad sense, it must concern itself with the imparting of knowledge but

⁷ McFarlane n1 supra at 298.

⁸ McFarlane n1 supra at 298.

⁹ Ibid.

¹⁰ McFarlane n1 supra at 298.

¹¹ Ibid at 300.

¹² Bloom E, *Creating Desirable Difficulties: Strategies for Reshaping Teaching and Learning the Law School Classroom*, 99 U. Det. Mercy L. Rev. 115 (2017-2018) at 118; See also, Dunlosky J et al, *Improving Students' Learning with Effective Learning Techniques: Promising Directions from Cognitive and Educational Psychology*, 14 Psychol. Sci. Pub. Int. 4, 46 (2013).

in the narrower sense, it must concern itself with the development of professional competence.¹³

Professional competence requires a solid foundation upon which to build in order to be truly cemented and reflected in practice. It has been stated elsewhere in this work (Chapter 4) that professional competence cannot be left for construction only when the student first enters his or her clinical programme, which in the South African context, is only in the final year of study. Instead, students must be primed to identify and to understand the skills which they are required to develop by the time they graduate (including how psychology and cognitive science impacts the acquisition of those skills) at the mid-point of their academic careers, thus allowing room for growth and meaningful reflection. Thus, the idea behind the proposed course is to lay that very foundation at a stage which is early enough to allow for the acquisition of relevant knowledge, some experiential practice and reflection on one's own acquired competency. The hope is that a student enters their future clinical programme with a basic level of skills competence acquired through their participation in this course, and is then better able to self-direct their clinical experience with the live client into more meaningful professional competence.

In as early as 1989, an academic writer from Hong Kong aptly stated that:

“Mere acquisition of legal knowledge in law school is of little value to a practitioner because that knowledge (a) can only be a tiny part of the whole (b) can be understood only superficially (c) is easily forgotten or only partially or inaccurately remembered (d) is rarely needed in practice in the form in which it is learned (e) is likely to be quickly outmoded and thus dangerous to rely on and if is of little use where new problems arise to be solved.”¹⁴

It is thus hoped that the proposed course will serve not only as a bridge between the theory in the doctrinal courses and the practice undertaken by the students during their clinical programme but also serve as a vehicle for the reinforcement of basic legal principles which are essential to legal practice.

¹³ McFarlane n1 supra at 310.

¹⁴ Wesley-Smith P, *Neither a Trade nor a Solemn Jugglery: Law as Liberal Education*, in Wacks R, *The Future of Legal Education and the Legal Profession in Hong Kong*, ed. (1989). Quoted by McFarlane n1 supra at 299.

6.2 Reflective Findings Related to the Research Questions

There were five primary research questions underpinning this research with related sub-questions thereto. The research questions are reproduced below together with a short summary of the chapter in which those questions were addressed, a summary of the findings related to those questions as well as short reflection thereon is provided.

Research Question 1

Is there a need to develop legal curricula and legal teaching beyond the traditional Socratic and dialectic methods? What are the criticisms of traditional legal pedagogy in South Africa and abroad and how do we teach law and practice in the 21st century? (This question was answered in Chapter 2 of this thesis.)

Chapter 2 started off with the criticisms of traditional legal education all of which, imply, in some way or another, that students graduate law school unable to actually *do* what is expected of competent lawyers. This chapter advocated for a move away from the traditional Langdellian and Socratic approaches to legal education in favour of legal education grounded in the metacognitive approach. A number of instruments such as the MacCrate Report, Carnegie Report, the American and Australian Best Practices, directives by the American Bar Association as well as the South African Council of Higher Education were used to support the notion that metacognition is crucial to revitalising and developing legal education.

The nature of the modern law student being a millennial or GenZer formed the backdrop of discussions related to the modern students' propensity to simply "google" knowledge as they go and their inability to store information long-term due to their constant need to multitask. The perils of multi-tasking and cognitive overload were considered in that context.

The proposed solution was the use of cognitive learning theory to maximise law school learning. The chapter expounded on the concepts of cognition and metacognition and introduced Lee's 12-step metacognitive method based on the recursive cycle founded by the grandfathers of andragogy, Kolb and Fry. The 12-step method was designed to work with both doctrinal and experiential learning courses and as such, is helpful to substantive law courses and skills courses alike. The chapter went on to propose that the role of attention in memory and the process of learning itself needs to be incorporated into the undergraduate legal syllabus in order to maximise law school learning. The over-arching premise of the chapter was that

how students *think* they learn and how people *actually* learn are very different and few opportunities exist in a traditional law school for students to come to this realisation. A number of teaching methods were proposed together with the use of varying learning styles to improve law school learning. The chapter explained how intelligence, personality as well as information processing and absorption contributes to law school learning and how associated learning styles could be used by students to improve their law school learning. Whilst learning styles can be used as a tool for legal educators, they were discussed more in the context of their relevance to students in order to become more independent, self-sufficient and self-directed thinkers. As Bloom puts it, whilst most people have differing learning styles with distinct preferences, attempting to accommodate the learning styles of all students could actually hurt them.¹⁵ How we should be using learning styles, is to require that students build all types of learning skills,¹⁶ based on and in response to their innate preferences. There are a number of proposals in this regard linked to the cognitive method.

The main finding related to the research questions that this chapter sought to address is that there is indeed a fundamental need to develop legal education but it does not necessarily stem from tired University professors clinging to the past, it is driven primarily by the fact that students unconsciously experience a conflict between “the type of learning they *believe* is best for them and the type of learning that actually *is* best for them.”¹⁷ As Bloom aptly puts it, students continue to choose ineffective study techniques and often mistake short-term excellence with long-term competence.¹⁸ Students confuse performance (what they think they understand when they study) with actual learning (the permanent change in understanding).¹⁹ Accordingly, the main research finding in this chapter is that students require a space where they can be directed to build the cognitive skills which will enable successful learning and result in proper retention and transfer of knowledge. The intended course proposes to provide that space by giving instruction on basic learning theory in an effort to maximise law school learning.

¹⁵ Bloom n12 supra at 127.

¹⁶ Ibid.

¹⁷ Bloom n12 supra at 121.

¹⁸ Ibid.

¹⁹ Bloom n12 supra at 121. See also generally, Brown PC et al., *Make it Stick: The Science of Successful Learning*, Belknap Press, (2014).

Research Question 2

What are the core competencies of qualified graduates and how do we teach law students to think like lawyers? (This question is answered in Chapter 3 of this thesis.)

Chapter 3 commenced with a contextualization of the aspects of psychology which impact or influence lawyering skills generally. Rather than the traditional concepts of psychology *in* the law, psychology *and* the law or psychology *of* the law, a fourth category titled psychology *within* the law was proposed which concerns itself specifically how the study of basic psychology (including cognitive science) could improve lawyering skills. The chapter established some basic presumptions about what *thinking like a lawyer* actually means and how this process is inextricable from certain psychological functions and influenced by psychological phenomena. The main finding in relation to this research question was that the type of lawyering skills generally expected of professionals could be grouped into five categories. Accordingly, the ten fundamental skills mentioned in the MacCrate Report were grouped into 5 categories as follows: (1) interviewing and counseling, (2) emotional intelligence, (3) advocacy, including problem solving, (4) analysis, including legal reasoning and (5) morality, including professional identity. These categories of skills were then transposed over Gantt's schematic of what thinking like a lawyer looks like in the cognitive context.²⁰ The categories were found to be an exact chronological match for the cognitive process undertaken when one is thinking like a lawyer. This finding showed that there was merit to the five groupings that I had constructed. For instance, Gantt's schematic shows that the first step in the cognitive process when one is thinking like a lawyer is that the legal problem arises,²¹ this is linked to the first category of skills required of a good lawyer, namely, interviewing and counselling. The second stage would be to determine the type of legal problem that one is dealing with, including assessing the client's needs and desires and this involves searching for coherence.²² I transposed my second category, emotional intelligence at this stage since this is the primary skill needed to truly understand what a client's needs and motivations are. Gantt's third and fourth steps require the discerning of relevant facts and the finding of applicable rules.²³ These steps involve utilising prior experience, performing legal

²⁰ Gantt L, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 Campbell L. Rev. 413 (2007) at 481.

²¹ Page 70 of this thesis. Gantt n20 supra at 481.

²² Ibid.

²³ Page 70 of this thesis. Gantt n20 supra at 481.

research and the use of inductive reasoning to find relevant principles to use for syllogistic reasoning.²⁴ I transposed the skills of advocacy and problem-solving to these steps because the drafting of pleadings and the preparation of heads of argument including preparation for trial generally involve these processes. Gantt's fifth step involves the application of the legal rules to the facts including inductive generalization and deductive reasoning which are used to combine multiple sources of law, perceiving any ambiguities and establishing arguments for and against applicability.²⁵ I transposed the skills of legal reasoning (including decision-making) over this process as those skills are fundamental to that cognitive process. Lastly, Gantt's schematic shows the process of consideration of extralogical factors including morality, ethics and public policy which goes into the final solving of the problem.²⁶ I transposed my final category of requisite skills, that being morality and professional identity (including professional responsibility and ethics) at this stage of the cognitive process. Having aligned the skills required of a competent lawyer in the Carnegie Report with Gantt's cognitive processes undertaken by the competent lawyer, I was able to isolate the exact core competencies that we should require of our law school graduates. My next task was to determine the role that psychology plays in the acquisition of these competencies.

Research Question 3

What roles do cognitive science (including learning theory) and psychology (including psychological phenomena such as pre-attentive processing, change blindness, intentional blindness, legacy cognitive blindness, heuristics, hindsight bias, positive illusions, perceptual capacity) play in legal education and lawyering skills? (This question was answered in Chapters 2 and 3 of this thesis.)

The role of learning theory was canvassed in Chapter 2 of this thesis in the context of why there is a need to develop legal education beyond the traditional methods and the related findings were discussed above. As to the role of psychology (including the numerous psychological phenomena at play) in the practice of lawyering, I relied on research which spoke specifically to phenomena which would be activated, or which would affect or impact on the five core skills competencies categorised at the beginning of Chapter 3. As such, each section

²⁴ Page 70 of this thesis. Gantt n20 supra at 481.

²⁵ Ibid.

²⁶ Page 70 of this thesis. Gantt n20 supra at 481.

is headed “psychological insights relevant to....” followed by the relevant skill-set category. I found that each skill-set was affected by at least one type (usually more) of psychological phenomena which had the potential to hinder the performance of the relevant skill but which could also be regulated, integrated or manipulated for the optimal learning and performance of that skill. Each psychological phenomenon was first explained in the context of its relevance to the identified skill-set category and then it was illustrated how the acquisition of knowledge pertaining to that phenomena could be used to better perform that skill. The psychological tenets and phenomena canvassed were: rational choice and prospect theory, personality type, transference, framing, emotional intelligence, change blindness and inattention blindness, preconception, confirmatory bias, causal attribution error, naïve realism and heuristics including availability, anchoring, egocentric bias and affect heuristic.

Research Question 4

Would a course on legal psychology be an asset to the legal curriculum in the South African context and where would such a course be best placed within the undergraduate legal curriculum? Would this be a stand-alone course, could it be embedded in or form the foundation for other courses and in which year would it be offered? (This question was answered in Chapter 4 of this thesis.)

Chapter 4 engaged the first part of course design and development including the goals, values, outcomes and possible placement of the proposed course on psychology *within* the law in the existing South African law curriculum. The chapter started off with the two values underpinning the design of the intended course, the first being, that emotions (and related psychology of emotions) are an integral and determining aspect of reasoning including legal reasoning and the second, that instruction for a course of this nature should be grounded in the humanities and move away from the idea of law as a science. Encapsulating this second value was the proposition to exorcise two phantoms still pervading many modern law schools, namely, Langdell’s ghost and the theory-practice divide. Next, the chapter proposed that the intended course be based on the Unified Learning Model (ULM) which is a synthesis of existing theories, research and findings related to teaching and learning and some of its central principles were laid out including the CORE lesson model, implicit searching, motivation, expectancy driven methods and deliberative practice. Next, I focused on the actual curriculum or syllabus design focusing on goals/aims and learning outcomes for the intended course. Research from experiential learning experts was used to devise acceptable learning goals and

outcomes for the intended course. Lastly, the placement of the intended course within the South African curriculum was informed by empirical research on the development of reasoning skills in law students together with the possibility of the course serving as a bridge to a future capstone experience. The main finding in this chapter was that what is required is a type of bridging course for students where they are exposed to skills training, experiential learning and the metacognitive method at a stage which is early enough in their legal development to leave room for meaningful retention of the relevant skills (and how psychology influences them), directed reflection and ultimate application when the students embark on their clinical programme in final year. Accordingly, it was proposed that the intended course be offered in the second semester of the second year of study or the first semester of the third year of study, thus allowing the students to enter the intended course with some prior knowledge of law so that the experiential learning that occurs in the intended course is actually grounded in some legal substance. This also leaves students enough room (two years left of their law degree) to implement the skills learned in order to improve their performance. The first sub finding in this chapter was that the intended course could serve as the proverbial bridge between theory and practice since at its core, it has the elements of experiential learning and adult learning (andragogy) that are usually derogated to clinical programmes in the final year of study. Further, it could serve as a bridge between the acquisition of basic skills (first acquired, experienced and reflected upon in the intended course) and then later practiced in the real live-client environment as a capstone experience in the Law Clinic. The second sub finding in this chapter was that whilst the intended course is predominantly a skills course, the course could also serve as an important space to reinforce certain basic substantive legal principles from the practical perspective and thus, could serve as a supplement to certain substantive law courses whilst providing the relevant practical context that is often missing in doctrinal courses (this was discussed in the concluding remarks *supra*). As such, it was proposed that the intended course be a stand-alone course rather than an embedded part of the curriculum.

Research Question 5

What would this course look like in the South African context and what lessons could we draw from experiential learning, legal education, psychology and similar courses on psychology and law from other jurisdictions to develop a pedagogically sound course? (This question was answered in Chapter 5 of this thesis.)

Chapter 5 engaged the second part of course design, namely, the methodology, course content (or syllabus) and the assessment of the intended course on psychology *within* the law. The chapter commenced with a basic introduction of the most popular teaching methodologies upon which instruction in the intended course would be based. Cognitivism, behaviourism and constructivism and the collaborative learning method were chosen as they best align with the precepts of andragogy and experiential learning upon which the intended course is founded. Each method was briefly explained and in each instance, elaboration was made on the method's implications for the intended course. Simulation as a crucial component of experiential learning outside of the clinical environment was engaged with at length and a number of examples of simulated activities were proposed. The related finding was that simulation is indispensable to skills teaching in general and the recognition of psychological phenomena in particular and as such, in the absence of a live-client, simulation could be used to effectively get students accustomed to some of the core competencies associated with lawyering. From the psychological perspective, films, literature and current events could be used as important tools of engagement with the relevant psychological phenomena. The second half of the chapter referenced three similar courses conceived and successfully implemented by experts in the USA. Specific ideas related to course content, lesson plans, methods and assessments were then used to construct a course outline for the intended course on psychology *within* the law in the South African context. The course outline was structured first to engage students on the aspects of cognitive science relevant to learning and thereafter, the chronology aligns with the skill-set categories identified in Chapter 3 as superimposed on Gantt's cognitive conception of what thinking like a lawyer looks like. The assessments were chosen in a manner which allows for the recursive nature of Lee's metacognitive method (discussed in Chapter 2) and which supports retention, reflection and transfer. Considering that psychology would continue to be applicable to students' professional lives and decisions, and that they would constantly encounter psychological phenomena in both study and practice, the main finding in this chapter, was that it is time to incorporate legally relevant psychology into the undergraduate legal curriculum in South Africa. This has particularly crucial ramifications for legal education in South Africa because ours is predominantly an undergraduate law degree with no grounding in any of the sciences or humanities unless students choose to complete an additional degree in those fields. The proposed course is intended to provide students with a new and exciting way to build practical skills competencies while conceiving and self-directing their future capstone experiences.

6.3 Proposals for Further Research

In the South African context, discourse on the extent to which psychology and cognitive science influences legal pedagogy and practice is virtually non-existent in our jurisdiction. The purpose of this research was aimed not only at addressing the gap in academic discourse on the matter but also to attempt to provide a solution for the criticism that law students leave law school ill-prepared to actually practice law. The proposed course on psychology *within* the law as a bridge between basic skills competency and the refined acquisition of skills in the students' clinical programme has been proposed as the potential solution to this problem. The research conducted is extendable in that a number of related questions now flow from the findings contained in this thesis or will flow once the intended course is piloted.

The first proposal for further research pertains to the issue of knowledge retention and transfer. Retention of knowledge refers to the ability to demonstrate the skill that was learned.²⁷ Transfer of knowledge is the ability to apply one's knowledge or to execute the skill learned across various related situations.²⁸ An interesting point of further research would be to empirically test the extent to which a study of learning theory and the implementation of various learning methods associated with learning style would serve to improve a student's subsequent performance in other (unassociated) doctrinal courses. The study could compare the performance of students who have had some instruction on learning theory with those who were never exposed to it. This could be done by comparing over-all performance in a course (like criminal law) before the intended course was offered with the performance in the course by students who were simultaneously receiving instruction on learning theory.

The second proposal pertains to a study establishing the extent to which exposure to the relevant psychological phenomena will actually improve lawyering skills and overall lawyering competency. Future research on the experiences of clinical supervisors or legal practitioners engaging with and supervising students who participated in this course during their compulsory vocational training versus those who did not, would allow an empirical basis for the success or failure of intended goals.

A third point of interest would be to establish the extent to which the current LLB curriculum offered at the University of the Witwatersrand would need to be reconfigured to make space for this type of course and whether it would be offered as an elective or compulsory

²⁷ Bloom n12 supra at 121.

²⁸ Ibid at 122.

component of the qualification and whether it should be run as a semester or a full-year course. This is worthy of research as the decisions made would have implications on the student numbers in the course. The success or the failure of many of the associated imperatives of the course design are dependent on the student-to-lecturer ratio.

The fourth proposal for associated research is related to the extent to which a course such as the one proposed could be facilitated entirely online (thus supporting distance education). Research on whether some component of face-to-face interaction is desirable in order to meet some of the objectives would be relevant and the extent to which a blended learning approach could serve as a via-media solution to this problem could be evaluated in this research.

The final proposal for further research is related to the extent to which the intended course could collaborate with other courses within the law school to align the skill-set categories with existing substantive law subjects. For instance, how psychology impacts on interviewing and counseling could easily be facilitated by topics from family law and the law of contract. How psychology impacts on and conditions emotional intelligence could be facilitated by topics in criminal law, property law and jurisprudence. How psychology impacts on advocacy, including problem solving and how psychology impacts on analysis, including legal reasoning could be facilitated by topics in evidence, civil and criminal procedure as well as the clinical programme (Practical Legal Studies). Lastly, how psychology impacts on morality, including professional identity, could be facilitated by topics from the existing course on legal ethics and the professional responsibility component of the clinical programme.

Accordingly, the research is extendable in at least five different areas.

Word Count: 93 883 words.

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