

Empathy: an essential element of legal practice or ‘never the twain shall meet’?

WESTABY, Chalen <<http://orcid.org/0000-0002-6459-4675>> and JONES, Emma

Available from Sheffield Hallam University Research Archive (SHURA) at:

<http://shura.shu.ac.uk/16544/>

This document is the author deposited version. You are advised to consult the publisher's version if you wish to cite from it.

Published version

WESTABY, Chalen and JONES, Emma (2017). Empathy: an essential element of legal practice or ‘never the twain shall meet’? *International Journal of the Legal Profession*, 25 (1), 107-124.

Copyright and re-use policy

See <http://shura.shu.ac.uk/information.html>

Empathy: An essential element of legal practice or ‘never the twain shall meet’?

Abstract

In a climate where the work of the legal profession is changing and evolving rapidly, this paper considers the potential for empathy to be incorporated as an essential element of legal practice. This challenges the conceptions of legal practice held by many legal professionals and law students but draws on increasing scientific evidence demonstrating the interaction between cognition and affect and reflects the emotional realities of life in practice. This paper will consider the different definitions of empathy and argue that it is necessary for it to be conceptualised in a way which draws upon both cognitive and affective elements. When empathy is interpreted in this way it can provide both a more effective form of practice and a deeper appreciation of ethics and values. This paper will argue that to incorporate empathy in this way requires a richer, more nuanced consideration of the benefits and challenges involved in its use. However, embedding it throughout legal education, training and legal practice would more than reward such a careful evaluation of its role.

Key words: Empathy, affective domain, legal practice, legal professionals, legal training, legal education

Introduction

The concept of empathy and the role and scope of legal practice within society have both individually, over recent years, had increasing amounts of attention paid to

them.¹ However, the relationship between the two remains relatively unexplored, particularly in the context of the United Kingdom ('UK'). The first part of the paper will consider literature relating to empathy with the aim of determining its meaning and how it is operationalised. The next part of the paper will discuss whether empathy should form part of legal practice, focusing on both the benefits and the challenges and obstacles presented in the utilisation of empathy in this field. The final part of the paper will briefly consider how empathy might be introduced to law students as a key element of legal education and training. Overall, this paper will argue that empathy has the potential to provide a valuable method to marry together the affective and cognitive domains, and enable a more developed consideration of ethics and values, in a way which enhances legal practice. However, it is also acknowledged that empathy's use in this way requires a careful unpacking of its possible role and influence.

There is a significant academic literature in the United States of America ('USA') arguing for empathy's incorporation as a core lawyering skill that is required in order to put into practice all other lawyering skills (see, for example, Gallacher, 2012; Gerdy, 2008; Rosenberg, 2002; Henderson, 1987). In the UK, although overall there appears to have been less debate generated, the Legal Education and Training Review ('LETR') did refer to the word empathy (equating it with 'comforting' and 'caring' skills) and identified it as a core legal competency (LETR, 2013, para. 4.85 and table 4.3). This has, in turn, been reflected in the Bar Standards Board's

¹ Bloom (2016) refers to empathy as often being characterised in contemporary society as an "absolute good" (p.15) which "will save the world" (p.20). He notes that at the time he was writing there were over fifteen hundred books on amazon.com with "empathy" in their title (Bloom, 2016). The role and scope of legal practice has become fiercely debated as a result of regulatory, market and technological changes, leading Susskind to predict that "the legal world will change more radically over the next two decades than over the last two centuries" (2013, p.xiii).

‘Professional Statement for Barristers’ which requires practitioners to ‘know how and where to demonstrate empathy, and act accordingly’ (BSB, 2016, rule 3.4).

Despite the increasing usage of the term empathy, it is questionable whether the concept has truly become accepted, much less embedded, as a part of legal practice within the UK. This is arguably because, although empathy is not itself an emotion, it does involve, an emotional reaction and traditionally emotions and the affective domain overall have been denied a place in the practice of law (Grossi, 2015; Abrams and Keren, 2010; Maroney, 2006; Henderson, 1987, p.1575). Emotions have been seen as antithetical to law, with law aligning itself with cognition, and therefore reason and rationality. In contrast, emotions have been seen as being related to bodily functions and therefore unpredictable and often illogical in nature (Grossi, 2015; Maroney, 2006). As a result, the dominant view has been that emotion and emotional reactions should not feature within legal practice (Binder *et al*, 2004).

Nevertheless, there are those lawyers who maintain that the distinction between reason and emotion is not only impossible but also detrimental to the practice of law (Flower, 2014; Bandes, 2011-2012, Montgomery, 2008; Lange, 2002; Silver, 1999).

The increasing weight of scientific evidence and philosophical argument demonstrates that affect (including emotions) and cognition are intertwined and attempting to separate the two creates a false dichotomy which impoverishes and impairs reasoning and decision-making in all spheres of life (see, for example, Keltner *et al*, 2013; Scherer, 2011; Damasio, 2006 and Nussbaum, 2001). This is reflected in literature, particularly from the USA, which ranges from discussion of emotional intelligence and competencies through to wider movements, such as the

comprehensive law movement (now sometimes encompassed into the integrative law movement) (Wright, 2016; Daicoff, 2006; Silver, 1999).

In recent years, the role and scope of legal practice within society has been increasingly debated. Within the UK, the last thirty years have seen significant shifts leading to the legal landscape changing beyond recognition (Sommerlad, 2007). For example, Sommerlad *et al* discuss the 'radical changes' that have occurred within legal services and suggest that they 'raise the question of whether we still have an independent legal profession' (2015, p.20; see also Webb, 2008). The Legal Services Act 2007 has led to the creation of an 'alternative legal services market' whereby non-reserved legal services can be provided by a wide range of unregulated individuals and organisations (Solicitors Regulation Authority ('SRA'), n.d., p.6). This Act also enabled the formation of alternative business structures, designed to generate more innovative forms of practice, and allow legal service providers access to external investment, as well creating opportunities for collaboration with non-lawyers (SRA, n.d.). There has been an exponential growth of the corporate sector (Sommerlad, 2007). At the same time, legal aid has been drastically cut as a result of a move away from collective welfare provision (Melville and Laing, 2007; Sommerlad, 2007). Hence law firms are seeking to reinvent themselves to ensure their survival in a competitive, business-focused environment. Such substantial changes raise very real challenges for legal practice, but arguably also provide significant opportunities for re-examining traditional lawyering paradigms. Given this, the question this paper focuses on is whether empathy should now form an explicit part of legal practice and, if so, how?

What is empathy?

In psychological terms, empathy is notoriously difficult to define (Turner, 2012). Indeed Bandes maintains that 'on close scrutiny it resembles a moving target' (Bandes, 1996, p.373). Within the scientific literature, Batson (2011) has identified eight different uses of the concepts, which range from an understanding of another person's feelings to a sense of distress caused by another's suffering to effectively putting yourself in the other person's shoes. Nevertheless, there does appear to be a more general consensus that there are two levels of empathy. Firstly, what Goldman has termed a 'lower-level' (Goldman, 2006, p.140; see also Coplan and Goldie, 2011, pp.XXXIII/XXXIV), which has been described as akin to, or even a form of, emotional contagion. In other words, this level involves a form of emotional reaction, intuitively (and possibly unknowingly) picking up on and emulating the emotion of another, for example, from facial cues (Hatfield *et al*, 2011; Eisenberg *et al*, 1991, p.65). This form of empathy can also be described as 'emotional empathy', 'affective empathy' or 'mirroring', the latter due to its triggering of mirror neurons – the same regions in the brain will be activated in the person feeling empathy as in the individual who is the object of their attention (Shamay-Tsoory, 2011, p.18; Chrysikou and Thompson, 2016; Praszkie, 2014, Bråten, 2007).

The second level of empathy is termed by Goldman as 'higher level' (2006, p.140) but which has also been described as 'cognitive' (Shamay-Tsoory, 2011, p.18). It involves some form of role or perspective taking by an individual: An imaginative process which involves them thinking about the experience of the person they are empathising with from that person's perspective. At the same time, the individual who is empathising will maintain a clear distinction between their own self and that of the object of their empathy, known as 'self-other differentiation' (Coplan, 2011, p.15). Although there has been some debate in the scientific literature, the general

consensus appears to be that both levels of empathy can, to some extent at least, be taught and developed as a body of skills (Jeffrey and Downie, 2016; Stepian and Baernstein, 2006).

Probably the most cited definitions of empathy within legal circles are contained in Henderson's seminal work on empathy and legal regulation. Henderson encapsulates the plethora of literature on the phenomena captured by the word empathy into three separate categories:

(1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion). (Henderson, 1987, p.1579) ²

The first understanding of empathy presented by Henderson captures the lower level form of empathy previously discussed, which can be defined as 'an observer's emotional response to the affective state of others' (Rogers in Gerarda Brown, 2012, p.189).³ The literature dealing with empathy in relation to legal professionals rarely discusses empathy in this way, arguably because it is viewed, akin to other forms of emotional response, as dangerous and irrational and thus antithetical to the practice of law.⁴

² For a similar summary in the wider scientific literature see Elliott *et al* (2011). Bandes, however, maintains that even these definitions allow for the inclusion of a broad range of cognition and behaviour. (1996)

⁴ For arguably the seminal discussion on the law's treatment of emotion, see Kennedy (1982).

Certainly, it can be seen that incorporating solely this form of empathy into legal practice and notions of professionalism would result in both conceptual and practical problems. At a conceptual level, Henderson (1987) talks about how an emotional state in another person might be mislabelled as a result of emotional empathy mistaking one feeling for another, for example fear and anger, and how this can lead to inaccurate empathy or what Morton describes as 'pretend empathy' (2011, p.138). There is also the question of to what extent an individual can empathise with feelings they themselves have never experienced (Matravers, 2011). At a practical level, there are also expectations of the legal profession in terms of objectivity and impartiality. It is arguable that an overly emotional response to a client could cloud the judgement of a legal professional, leading them to act in an inappropriate or biased manner that hampers resolution of the legal issue and is unwanted by the client (see Duffy, 2010, in relation to mediation).

The second understanding of empathy presented by Henderson (1987) equates to the previous description of upper level empathy, in that it includes not only a form of emotional response, but also a cognitive element of understanding derived from imagining the situation from the perspective of the object of your empathy. In other words, it is "the process of understanding another person's perspective". (Rogers in Gerarda Brown, 2012, p.195). This is where interpretation of that emotional state and what it means for the person experiencing it is important. Often it is this second meaning of empathy that is employed (or, at least, advocated) in relation to legal practice (Gerarda Brown, 2012; Duffy, 2010; Rosenberg, 2002).

An issue with this type of empathy is that it has been characterised as entirely separate from lower level, emotional or affective empathy. Gerarda Brown suggests that within legal dispute resolution it is this form of cognitive empathy, which

dominates (2012).⁵ Margulies (1999), writing in relation to clinical legal education, echoes this and suggests there is a focus on empathy in client interviewing as a value-neutral, instrumental strategy. Consequently, both at a conceptual and operational level, empathy can be operationalised as a passive activity – the interviewer is perceived as responding from a separate vantage point which is outside, both their own and, the client's experience. This allows the lawyer to avoid involving their own judgement or values.

Margulies argues that this renders the 'empathy' in these situations too universal in nature, resulting in a lack of appreciation of the client's 'inner world' (1999, p.609). Effectively, it becomes a communication tool, rather than a way of fostering deeper understanding and insight. Gerarda Brown acknowledges that this form of cognitive empathy, or perspective-taking, can be beneficial in that it 'facilitates communication and improves the quality and creativity of problem-solving' (2012, p.200). However, she also argues that lower level empathy offers additional benefits that cognitive empathy alone cannot achieve in further strengthening the lawyer-client relationship by encouraging trust, as the client knows that their experience resonates with the lawyer. In conflict situations it can also provide an affirmation to the opponent that their experience and feelings have been acknowledged (Gerarda Brown, 2012).

What Gerarda Brown, Margulies and others are advocating is a form of empathy which utilises both emotional and cognitive processes. Thus reflecting the second type of empathy described by Henderson (1987).

This approach fits in well with the growing understanding that emotion and cognition are intertwined and avoids creating a new form of dualism between the two, in line

⁵ See also the definition of empathy given by Deigh (2011).

with other multidimensional and integrated approaches (Shamay-Tsoory, 2011). Lower level empathy alone may prove misguided and perhaps inappropriate in legal settings. A solely cognitive form of empathy is impoverished and lacks the full benefits of a broader definition. Drawing the two together provides the authentic element of feeling whilst also retaining the cognitive element which is likely to appeal to lawyers and enable them to accommodate empathy within the profession's culture, values and ethics. As such, it arguably provides a form of bridge which enables them to access the affective domain in a way which is both effective, but controlled.

The third meaning of empathy put forward by Henderson (1987) relates to sympathy, care and compassion. This draws on Hoffman's (2000, p.63) 'empathic distress' response, which is a form of emotional empathy where the person empathising with another feels discomfort resulting from the fact that the other person is in a distressing situation. Hoffman argues that this response may function as a helping or altruistic response, although he also emphasises that this is not always the case. Indeed, Nussbaum suggests that empathy is ethically neutral as 'a good sadist or torturer has to be highly empathetic, to understand what would cause his or her victim maximal pain' (2006, p.321).

Regardless of whether empathy as a concept is ethically or value neutral, it has been argued that its application within legal practice should be used in order to present a caring attitude towards the client (Gerdy, 2008; Menkel-Meadow, 1992). This leads to the question of how it can best be incorporated within legal practice.

Incorporating empathy into legal practice

Despite efforts to separate emotion from cognition, and regardless of whether or how it is acknowledged or responded to, empathy does play a role in everyday legal practice (Westaby, 2014; Westaby, 2010; Melville and Laing, 2007). Lawyers are humans and therefore inevitably have both emotional and cognitive responses to issues, even if they seek to suppress or disregard them (Duffy, 2010; Gerdy, 2008). Indeed, there is evidence that attempting to stifle any form of emotion within legal practice, resulting in surface acting, is both unsuccessful and potentially psychologically harmful, leading to burnout in some cases (Westaby, 2010; James, 2005; Harris, 2002). Similarly, clients will have an emotional involvement in their own case, regardless of the area of law involved (Barkai and Fine, 1983). For example, a business person may feel embarrassed at an oversight or worried about the potential consequences of a claim. Even if the case itself appears fairly emotionally neutral, the very nature of consulting with, or instructing, a lawyer is likely to engender an emotional reaction in the client – ‘Most people are probably less eager to see a lawyer than to see a doctor’ (Barkai and Fine, 1983, p.510).

As discussed above, Gerarda Brown (2012) views empathy as important in relation to lawyer-client relationships. There appears to be a general acceptance that empathy assists with the building of rapport and trust and confidence and therefore is particularly useful when interviewing clients. Indeed, mention is made of it in textbooks designed to assist law students in developing interviewing skills. For example in the Legal Practice Guide ‘Skills for Lawyers’ reference is made to the need to acknowledge a client's feelings by saying ‘I can quite see why you feel angry about this’. By responding in this way Elkington *et al* suggest that the lawyer is in fact involved in ‘expressing empathy with the client's feelings; not being judgemental about them’ (2015, s.11.5.1.5).

Binder *et al* maintain that the legal profession viewing themselves as rational fact gatherers focused on decision making rather than on client's feelings has led to ineffective lawyering. They argue that empathy is the 'real mortar of an attorney-client (indeed *any*) relationship' (Binder *et al*, 2004, p.49). Therefore, it is important for a lawyer to listen to, understand and accept a client's feelings as well as understand the link between the problems of clients and the emotions they feel (Binder *et al*, 2004).

Similarly, Genty (2000; see also Gerarda Brown, 2012), regards empathy as a central skill possessed by legal professionals which enables the gaining of a client's trust. Barkai and Fine argue that 'rapport, or a mutual trust, is...central to a good client-professional relationship, and the most basic of the conditions in creating this rapport is empathy' (1983, p.511; see also Gerdy, 2008). This rapport, in turn, allows the legal professional to develop an understanding of the solutions required by the client (Barkai and Fine, 1983). It is this connection provided by the employment of empathy which allows the lawyer to access all the other skills required to satisfactorily represent the client (Genty, 2000; Gerdy, 2008).

Using empathy within dispute resolution can be similarly advantageous as it enables a lawyer to better understand their client's ultimate goals. For example, by encouraging them to question whether they require their maximum entitlement, or if they would rather preserve some form of relationship or other value that is important to them by seeking a compromise (Barkai and Fine, 1983). It can assist with a client's understanding and acceptance of how and why a particular outcome was reached (Barkai and Fine, 1983; see also Gerdy, 2008) and aid the lawyer in dealing

with opponents by allowing them to demonstrate a genuine insight into the opposing stances that have been taken:

Even if individuals and the lawyers who represent them must ultimately reject or put aside the world view that animates opponents' positions in conflict, chances for resolution-for lasting peace-may increase if the opponents know that the other side has been willing to enter their world, see their perspective, and *feel* how important the issues are. (Gerarda Brown, 2012, p.196)

It can also be used more generally to communicate effectively and persuasively with jurors, judges and other lawyers, and other third parties such as witnesses by utilising the empathetic connection created as a tool to shape the approach used (Gallacher, 2012; Fletcher and Weinstein, 2002). Although, as above, it could be argued that this is simply utilising empathy as a form of communication strategy.

Despite these significant advantages with the use of empathy, there are also challenges and obstacles to it becoming an accepted part of legal practice. The legal profession have traditionally valued 'adherence to codes of conduct, duties to the court and respect for client confidentiality', notions which generally lack emotional content (Barton and Westwood, 2011, p.237). Focus remains on the rules and ethical codes of conduct rather than the 'development of attributes such as moral character' (Barton and Westwood, 2011, p.237). The reason for this has already been dealt with in some part in the introduction, and goes back to the historical dichotomy between rationality and cognitive decision making and the perceived irrationality of emotion and affect. Although, as discussed above, there are signs of its increasing acceptance, such as its explicit inclusion in the Bar's 'Professional Statement for Barristers' (2016), this is still arguably limited.

Even for those legal scholars who maintain that empathy is an important and/or unavoidable element of everyday legal practice, there are still perceived difficulties with the use of empathy. Henderson (1987) dispels myths surrounding empathy, which she deems to interfere with a comprehensive understanding of the concept. However, it remains useful to consider those myths and the impact they may have on the willingness of legal professionals to perceive empathy as part of everyday legal practice.

The first myth, which Henderson sees as the most prolific, is that women are 'naturally' more empathic than men (1987, p.1582). While this in itself may not directly influence the understanding that empathy is inappropriate in legal practice, it is clear that empathy being perceived as a feminine characteristic is relevant. Henderson cites the work of Gilligan (1993) who highlights an 'ethic of care' which is linked to feminine attributes and invites the connection between empathy and the 'female domain in American society' (1987, p.1583). This link between empathy and compassion and caring clashes with traditional, adversarial notions of legal practice. The legal professions have traditionally only incorporated masculine traits and therefore empathy is barred from having a place within legal practice, despite evidence suggesting that levels of empathy are predicated on previous experience and learning, not gender (Henderson, 1987).

Another myth Henderson refers to is that empathy 'entails a dissolution of ego boundaries, a loss of self' and results in the legal professional losing perspective and identifying too much with the client (1987, p.1584). This is described, for example,

by Gerdy who suggests that "'too complete identification with the client" might be harmful' (2008, p.2). Identification is also discussed by Fletcher and Weinstein, partly in the above terms. They maintain that it is required in order for a person to empathise with another, but are particularly mindful of certain identifications which occur generally where a person '*unconsciously* [takes] on the attitudes, behaviours and perspectives of others' (2002, p.142). They maintain that in professions which involve 'intense interpersonal interaction' such as law, the professional is more inclined to take on these identifications. This, they suggest, can have positive effects in terms of allowing the legal professional to empathise with a client and therefore enable a deeper understanding. However, they also note that it can have deleterious effects, and refer to the situation where objectivity is lost. The legal professional is in such a position that it is necessary for them to see the situation of a client in an objective manner 'in order to provide the critical eye and assessment that are part of [the lawyer's] obligation to him' (Fletcher and Weinstein, 2002, p.142). Therefore, when objectivity is lost it results in the clouding of professional judgement, meaning that a client cannot be represented effectively (Fletcher and Weinstein, 2002). It is evident that if empathy does lead to an over-close identification between the legal professional and their client, this will pose both practical and ethical issues. However, Henderson maintains that this form of over-identification is more commensurate with sympathy rather than empathy, which she describes as a 'flood of feeling, emotion, pain without a cognitive component' (1987, p.1584). Therefore, the problem is not too much empathy, but an over-reliance solely on emotional or affective empathy or empathy which becomes sympathy. Wispe encapsulates the difference between empathy and sympathy well when she explains that:

Sympathy refers to the heightened awareness of another's plight as something to be alleviated. Empathy refers to the attempt of one self-aware self to understand the subjective experiences of another self. Sympathy is a way of relating. Empathy is a way of knowing. (Wispe, 1986, p.314)

The question therefore becomes 'how to reconcile the maintenance of a professional boundary with empathic understanding' to avoid empathy becoming sympathy (Fletcher and Weinstein, 2002, p.142). The knee-jerk answer to this is arguably to focus on the type of cognitive form of empathy which largely suppresses or rejects the idea of any emotional content. However, there are equal dangers within this approach. Although the discussion above demonstrates that there are clear benefits to the use of empathy in legal practice, the potentially strategic, and even manipulative, nature of some of these is also evident (Barton and Westwood, 2011). If it misses out the emotional base upon which cognitive empathy should be built and simply becomes a form of marketing tool or a calculated strategy for client retention it may become more palatable to those engrained with traditional notions of 'thinking like a lawyer' but it will also be inauthentic, potentially unethical or immoral and far less effective – missing the deep and rich insights that a form of empathy based on emotion can bring to legal analysis and relations (Gerarda Brown, 2012; Gerdy, 2008, p.22; Sanger, 2001). Hence a balance is required between both lower and upper level empathy when dealing with such situations.

This issue is also arguably connected to the third myth discussed by Henderson - that empathy always results in 'altruistic, helping or caring responses' (1987, p.1583). This has been discussed in relation to different definitions of empathy, where it was noted empathy may lead to a compassionate response but will not

always do so (Nussbaum, 2006; Hoffman, 2000). This suggests great potential for both ethical and unethical uses of empathy. If a lawyer chooses to utilise a form of empathy to manipulate a client (or third party) for their own personal ends, this is clearly an abuse of their skill. Barkai and Fine (1983) argue that using empathy in client interaction is not manipulative because it will improve the lawyer-client relationship and therefore the client's case, but this assumes that the lawyer is using their empathic understanding in the client's best interests. For example, what if an unscrupulous lawyer sought to maximise profit by encouraging a client to prolong an issue, or encouraging them to reject cheaper alternatives to litigation? Perhaps more nuanced is the extent to which lawyers in a commercial and commercialised environment are walking the sometimes thin line between an empathetic approach which is appropriate and effective and one which becomes inauthentic and 'false'.⁶ It is arguable that the antidote to this is to acknowledge the role of empathy in legal practice further, allowing a full and nuanced discussion of these type of issues to be conducted. This could allow empathy to be aligned with wider legal ethics and values, rather than being either pigeonholed, disregarded as an unchecked impulse or manipulated (consciously or subconsciously) for inappropriate ends.

To summarise the key challenges that exist in incorporating empathy into legal practice, it is clear that both over-emphasising and relying on cognition have a number of pitfalls. Therefore, the key question is perhaps best framed as how can a lawyer preserve objectivity and impartiality in their dealings with clients without losing the empathic connection?⁷ In other words, how can they preserve the benefits of

⁶ For a wider discussion of inauthenticity in relation to law and emotion, see Sanger (2001).

⁷ Duffy (2010, p.53) draws a similar distinction between impartiality and neutrality; for discussion of the relationship between impartiality and detachment in a medical setting see J. Halpern (2001, p.16).

emotional empathy without losing their sense of self and their legal and ethical duties to the rule of law? Inter-related with this is the issue of how empathy relates to wider issues of ethics, values and morality within practice. These are difficult conundrums, which reflect the wider debate and tensions between an ethic of care and an ethic of justice within the legal profession (for further discussion on the ethic of care, see Sommerlad, 2014; Gilligan, 1993; Menkel-Meadow, 1992).

The very fact that empathy can open up and uncover such key issues and questions, alongside the bridge it offers between cognition and affect, do make it a potentially valuable construct within legal education and training and the profession. However, it is implausible to assume that simply incorporating empathy into these can provide any single, simple answer to the issues that it raises. As Dinerstein *et al* state '...no framework can be followed blindly. Because the real world is a world of vast variation and unpredictability' (2004, p.756). However, the final part of this paper will argue that the best approach to these questions is to introduce the concept of empathy within law during the formative legal education of potential lawyers. Doing this will enable them to explore such key themes and issues in a way which acknowledges the importance and relevance of empathy, whilst ensuring it does not become simply a shallow, or even meaningless, label.

Introducing empathy through legal education

The existing literature on incorporating empathy into legal education and training stems almost wholly from the USA. In this context, Gerdy argues that when students move into practice, empathy is as important as the intellectual, analytical skills often taught in the legal classroom. Thus it should be fostered throughout legal education through not only explanation and examples, but also through opportunities to

practice this as a skill themselves (Gerdy, 2008). She suggests that this could be achieved by using drama, self-reflection (for example, using small group discussions or personal narratives) and the use of role-models (for example, practising lawyers as guest speakers) (Gerdy, 2008; see also Beverly, 2014 and Watkins, 2011). Juergens (2005) echoes this last point, suggesting that the most powerful role models are, in fact, legal academics themselves who can both demonstrate their own emotions and also teach students how to develop these competencies, providing examples such as demonstrating their pleasure at a student making a positive contribution, or showing their sadness at a particularly harrowing case.

For Gerdy (2008), and also Gallacher (2012), the key appears to be to imbue an appreciation of the role and relevance of empathy throughout the law school curriculum as opposed to making it a discrete, assessable component of law school. Other commentators have instead focused on the development of empathy in a more discrete, explicit manner, through a specific class or course. For example, O'Carroll, drawing on her own experiences as a public defence lawyer, suggests that a class on wrongful convictions could assist in demonstrating to students the value of empathy as possibly 'the most essential qualification' for practice (2006, p.24). The most detailed account of this approach is given by Rosenberg (2002) who discusses his experience of developing and delivering an 'Interpersonal Dynamics for Lawyers' course.

His focus in this course is on empathy not only as a tool (such as discussed above, in relation to client interviewing) but also as a value which 'can shape a person's experiences, thoughts, and actions in a morally positive way' (2002, p.633; see also Hoffman, 2000). Rather than determining a particular moral code or choice, he

argues that factoring it into the thinking process can lead to better and more accurate decision-making (Rosenberg, 2002). He argues that this cannot be done within a lecture-style environment, but mirrors Gerdy (2008) and Juergens (2006) in essentially arguing for a more experiential type of learning based on modelling, practice and feedback, with a particular emphasis on students themselves facilitating the process in a safe and confidential setting (Rosenberg, 2002). In this type of scenario, it appears unlikely that empathy would be explicitly assessed, rather it could positively influence the wider judgements, reflections and decisions made by students in their work.

Within the UK, there does not appear to have been any reported, explicit inclusion of empathy within the law school curriculum. This is perhaps unsurprising when the subject of emotion in legal education has been 'relatively invisible' within the UK (Maharg and Maughan, 2011, p.1). A focus on the development of specific intellectual abilities (sometimes characterised as 'thinking like a lawyer') has meant anything relating to emotion and the affective domain has been largely disregarded or suppressed, a pattern which has continued within legal practice and decision-making (Jones, 2017; James, 2008). Although the emergence of the skills agenda in higher education, with its focus on educating for employability and the knowledge economy, has arguably opened the door for some acknowledgment of so-called 'soft skills', the implementation of this, at undergraduate level at least, has been somewhat patchy and uneven (Harris and Beinart, 2005).⁸

⁸ This situation may change with the recognition of the value of soft skills in the Teaching Excellence Framework (Department for Business, Innovation & Skills, 2016).

Indeed, the very split in the UK between the undergraduate law degree and the vocational stage of training can be seen as problematic in terms of the acknowledgment and incorporation of empathy. It is arguable that empathy fits most naturally into the type of client care skills currently taught on the post-graduate Legal Practice Course ('LPC') for aspiring solicitors.⁹ For example, the stage 1 LPC outcomes specifically state that students must demonstrate an ability to show 'sensitivity to issues of culture, diversity and disability in communication with clients, colleagues and others' (SRA, 2011). However, there also appears to be the danger of empathy treated in this way becoming the type of instrumental, broad-brush strategy that Margulies (1999) seems to envisage in the time-pressured environment of professional training. It also means that, for students who have a qualifying law degree, they may well have spent the preceding three years being socialised into a culture where empathy, particularly in its affective forms, is not valued, something unlikely to be significantly challenged by a session or two on active listening.¹⁰

At undergraduate level, there is a danger that the inclusion of empathy could become mired in the longstanding tensions between vocational and liberal approaches to legal education by being viewed as an overly vocational, non-cognitive soft skill or, conversely, treated as only one of a range of client care strategies with no reference to underlying intellectual questions relating to values or ethical questions.¹¹ Nevertheless, the current status of legal education does appear

⁹ At the time of writing, consultations are continuing over proposed changes to the vocational stage of training and the introduction of a centralised Solicitors Qualifying Examination, but it appears the two-stage model will be retained in some form (SRA, 2016).

¹⁰ The discussion of socialisation into a particular law school culture has largely taken place within the US and Australia. See, for example, Sturm and Guinier (2007); Brown (2000); Kennedy (1982); Some of these themes are discussed in a UK context in Stanley (1998) and Goodrich (1996).

¹¹ For a detailed argument in favour of liberal legal education, see Bradney (2003). For a more vocationally orientated viewpoint, see Savage and Watt (1996). A number of commentators also favour a form of compromise or synthesis between the two (see, for example, Twining (1995)).

to offer some exciting potential for empathy becoming embedded in at least parts of the UK law school undergraduate curriculum, particularly following the LETR's (2013) call for a greater focus on ethics and professionalism throughout legal education.

Conclusion

The title to this paper asks whether empathy is essential to, or antithetical to, legal practice. In fact, it is arguable that some degree of empathy is inescapable as it forms part of everyday legal practice. The question is whether empathy should be explicitly incorporated into the language and culture of legal professionals. A number of challenges have been highlighted, the most obvious perhaps being the argument, based on an emotional or affective conceptualisation of empathy, that the use of any form of emotive response results in blurred boundaries and over-identification with the client. In contrast, others have conceptualised empathy as a purely cognitive process, which may provide the potential to allow it to be used simply as a form of strategic, or even manipulative, tool.

However, acknowledging and incorporating a form of empathy which draws on both cognitive and emotional processes within legal practice has the potential to build a powerful bridge between the perceived separation of the affective and cognitive domains and provides significant benefits to the lawyer-client relationship. These include enhanced rapport leading to the building of a genuine and authentic relationship with the client as well as enabling the legal professional to understand and meet client needs.

It is also argued that incorporating this type of empathy into all stages of legal education and training, from the undergraduate law degree in the UK onwards, legal

professionals can develop a deeper appreciation of some key ethical and moral issues and an ability to analyse and reflect on them. Thus, where empathy and legal professionals meet, there is the opportunity for a deeper, richer form of practice.

References

- Abrams, K. and Keren, H. (2010) Who's Afraid of Law and the Emotions? *Minnesota Law Review*, 94(6), pp. 1997-2074.
- Bandes, S. A. (2011-2012) Moral Imagination in Judging, *Washburn Law Journal*, 51(1), pp.1-24.
- Bandes, S. A. (1996) Empathy, Narrative and Victim Impact Statements, *The University of Chicago Law Review*, 63(2), pp. 361-411.
- Barkai, J. L. and Fine, V. O. (1983) Empathy training for lawyers and law students, *Southwestern University Law Review*, 13(3), pp. 505-529.
- Bar Standards Board (2016) Professional Statement for Barristers https://www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf (accessed 24 November 2016).
- Barton, K. and Westwood, F. (2011) Developing professional Character - Trust, Values and Learning in: Maharg, P. and Maughan, C. (eds) (2011) *Affect and Legal Education* (Aldershot, Ashgate Publishing).
- Batson, D. (2011) These Things Called Empathy: Eight Related but Distinct Phenomena in: Decety, J. and Ickes, W. (eds) *The Social Neuroscience of Empathy* (Cambridge, Massachusetts and London, England, The MIT Press).
- Beverly, B. L. (2014) A Strategy for Teaching Objectivity to the Domestic Relations Student: Utilizing Psychodrama to Explore Attorney Empathy Toward Improving Family Law Outcomes, *Ohio Northern University Law Review*, 40(2), pp. 371-393.
- Binder, D. A., Bergman, P., Price, S. C. and Tremblay, P. R. (2004) *Lawyers as Counsellors. A Client-Centred Approach*, 2nd ed (St Paul, Thomson/West).
- Bloom, P. (2016) *Against Empathy. The Case for Rational Compassion* (London, The Bodley Head).
- Bradney, A. *Conversations Choices and Chances the Liberal Law School in the Twenty-First Century* (Oxford and Portland, Oregon, Hart Publishing).
- Bråten, S. (ed) (2007) *On Being Moved. From mirror neurons to empathy* (Amsterdam, The Netherlands and Philadelphia, USA, John Benjamins Publishing Company).
- Brown, H. (2000) The cult of individualism in law school: Moving from survival of the fittest to collaborative learning, *Alternative Law Journal*, 25(6), pp. 279-281.
- Coplan, A. and Goldie, P. (2011) Introduction in: Coplan, A. and Goldie, P. (eds) (2011) *Empathy. Philosophical and Psychological Perspectives* (Oxford, Oxford University Press).
- Coplan, A. (2011) Understanding empathy: Its features and effects in: Coplan, A. and Goldie, P. (eds) (2011) *Empathy. Philosophical and Psychological Perspectives* (Oxford, Oxford University Press).

- Chrysiou, E. G. and Thompson, J. W. (2016) Assessing Cognitive and Affective Empathy Through the Interpersonal Reactivity Index: An Argument against a Two-Factor Model, *Assessment*, 23(6), pp.769-777.
- Daicoff, S. (2006) Law as a Healing Profession: The "Comprehensive Law Movement", *Pepperdine Dispute Resolution Law Journal*, 6(1), pp. 1-63.
- Damasio, A. (2006) *Descartes' Error* (London, Vintage).
- Deigh, J. (2011) Empathy, justice and jurisprudence, *The Southern Journal of Philosophy*, 49, pp. 73-90.
- Department for Business, Innovation & Skills (2016) *Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523546/bis-16-265-success-as-a-knowledge-economy-web.pdf (accessed 28 June 2016).
- Dinerstein, R., Ellmann, S., Gunning, I. and Shalleck, A. (2004) Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary *Clinical Law Review*, 10(2), pp. 755-804.
- Duffy, J. (2010) Empathy, neutrality and emotional intelligence: A balancing act for the emotional Einstein, *Queensland University of Technology Law and Justice Journal*, 10(1), pp. 44-61.
- Eisenberg, N. (2000) Empathy and Sympathy in: Lewis, M. and Haviland, J. M. (eds) (2000) *Handbook of Emotions* (2nd edition) (New York and London, The Guildford Press).
- Eisenberg, N., Shea, C. L., Carlo, G. and Knight, G. P. (1991) Empathy-related Responding and Cognition: A "Chicken and the Egg" Dilemma in: Kurtines, W. M., Gewirtz, J. and Lamb, J. L. (eds) (1991) *The Handbook of Moral Behaviour and Development Volume 2: Research* (New York and London, Psychology Press).
- Elliott, R., Watson, J. C., Bohart, A. C. and Greenberg, L. S. (2011) Empathy, *Psychotherapy* 48(1), pp. 43-49.
- Elkington, A., Holtman, J., Shield, G. and Verlander, S. (2015) *Skills for Lawyers 2015/2016* (London, College of Law Publishing).
- Fletcher, L. E. and Weinstein, H. M. (2002) When Students Lose Perspective: Clinical Supervision and the Management of Empathy, *Clinical Law Review*, 9(1), pp.135-156.
- Flower, L. (2014) The (Un)Emotional Law Student, *The International Journal of Work Organisation and Emotion*, 6(3), pp. 295-309.
- Gallacher, I. (2012) Thinking Like Non-Lawyers "Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect its Importance", Syracuse University SURFACE, <http://surface.syr.edu/cgi/viewcontent.cgi?article=1005&context=lawpub> (accessed 4 January 2017).
- Genty, P. M. (2000) Clients don't take sabbaticals: The indispensable in-house clinic and the teaching of empathy, *Clinical Law Review*, 7(1), pp. 273-286.
- Gerarda Brown, J. (2012) New Directions in Negotiation and ADR: Deeply Contacting the inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays, *Washington University Journal of Law and Policy*, 39,189-230.

- Gerdy, K. B. (2008) Clients, Empathy and Compassion: Introducing First-Year Students to the “Heart” of Lawyering *Nebraska Law Review*, 87(1), pp.1-61.
- Gilligan, C. (1993) *In a Different Voice Psychological Theory and Women's Development* (Cambridge, Massachusetts: Harvard University Press).
- Goldman, A. I. (2006) *Simulating Minds: The Philosophy, Psychology and Neuroscience of Mindreading* (Oxford, Oxford University Press).
- Goodrich, P. (1996) Of Blackstone’s Tower: Metaphors of Distance and Histories of the English Law School in: Birks, P. (ed) (1996) *Pressing Problems in the Law Volume 2 What are Law Schools for?* (Oxford, Oxford University Press).
- Grossi, R. (2015) Understanding law and emotion, *Emotion Review*, 7(1), pp. 55-60.
- Halpern, J. (2001) *From Detached Concern to Empathy* (Oxford, Oxford University Press).
- Harris, L. C. (2002) The Emotional Labour of Barristers: An Exploration of Emotional Labour by Status Professionals, *Journal of Management Studies*, 39(4), pp. 553-584.
- Harris, P. and Beinart, S. (2005) A survey of law schools in the United Kingdom, 2005, *The Law Teacher*, 39(3), pp. 299-366.
- Hatfield, E., Rapson, R. L. and Le, Y.-C. L. (2011) Emotional Contagion and Empathy in: Decety, J. and Ickes, W. (eds) (2011) *The Social Neuroscience of Empathy* (Cambridge, Massachusetts and London, England, The MIT Press).
- Henderson, L. N. (1987) Legality and Empathy, *Michigan Law Review*, 85(7), pp. 1574-1653.
- Hoffman, M. (2000) *Empathy and Moral Development. Implications for Caring and Justice* (Cambridge, Cambridge University Press).
- James, C. (2008) Lawyers’ wellbeing and professional legal education, *The Law Teacher*, 42(1), pp. 85-97.
- James, C. (2005) Seeing Things as We Are. Emotional Intelligence and Clinical Legal Education, *Journal of Clinical Legal Education*, 8, pp. 123-149.
- Jeffrey, D. and Downie, R. (2016) ‘Empathy – can it be taught?’, *Journal of the Royal College of Physicians Edinburgh*, 46, pp. 107-112.
- Jones, E. (2017) ‘One size fits all? Multiple intelligences and legal education’ *The Law Teacher*, 51(1), pp. 56-68.
- Juergens, A. (2005) Practising what we teach: The importance of emotion and community connection in law work and law teaching *Clinical Law Review*, 11(2), pp. 413-424.
- Keltner, D., Oatley, K. and Jenkins, J. M. (2013) *Understanding Emotions*, 3rd ed (London, Blackwell Publishing).
- Kennedy (1982) Legal Education and the Reproduction of Hierarchy, *Journal of Legal Education*, 32(4), pp. 591-615.
- Lange, B. (2002) The Emotional Dimension in Legal Regulation, *Journal of Law and Society*, 29(1), pp. 197-225.
- Legal Education and Training Review, The Report (2013) <http://www.letr.org.uk/the-report/chapter-4/the-ingredients-of-legal-competence/index.html> (accessed 24 November 2016).
- Legal Services Act 2007 c 29.

- Maharg, P. and Maughan, C. (2011) Introduction in: Maharg, P. and Maughan, C. (eds) (2011) *Affect and Legal Education. Emotion in Learning and Teaching the Law* (Aldershot, Ashgate Publishing).
- Margulies, P. (1999) Reframing Empathy in Clinical Legal Education, *Clinical Law Review*, 5(2), pp. 605-637.
- Maroney, T. A. (2006) Law and Emotion: A Proposed Taxonomy of an Emerging Field, *Law and Human Behaviour*, 13(2), pp. 119-142.
- Matravers, D. (2011) Empathy as a route to knowledge in: Coplan, A. and Goldie, P. (eds) (2011) *Empathy. Philosophical and Psychological Perspectives* (Oxford, Oxford University Press).
- Melville, A. and Laing, K. (2007) "I just drifted into it": constraints faced by publicly funded family lawyers, *International Journal of the Legal Profession*, 14(3), pp. 281-300.
- Menkel-Meadow, C. (1992) Is Altruism Possible in Lawyering? *Georgia State University Law Review*, 8(2), pp.395-419.
- Montgomery, J. E. (2008) Incorporating Emotional Intelligence Concepts Into legal Education: Strengthening the Professionalism of Law Students, *University of Toledo law Review*, 39(2), pp. 323-352.
- Morton, A. (2011) Empathy for the Devil in: Coplan, A. and Goldie, P. (eds) (2011) *Empathy. Philosophical and Psychological Perspectives* (Oxford, Oxford University Press).
- Nussbaum, M. (2006) 'Reply to Amnon Reichmann' *Journal of Legal Education*, 56(2), pp. 320-329.
- Nussbaum, M. (2001) *Upheavals of thought: The intelligence of emotions* (Cambridge, Cambridge University Press).
- O'Carroll, S. (2006) Empathy, Courage and Diligence: Three Things I Wish I'd Learned in my Law School Ethics Course, *The Professional Lawyer*, 17(1), pp. 24-28.
- Praszker, R. (2014) Empathy, mirror neurons and SYNC, *Mind & Society*, 15(1), pp. 1-25.
- Rosenberg, J. D. (2002) Teaching Empathy in Law School, *University of San Francisco Law Review*, 36, pp.621-657.
- Sanger, C. (2001) The Role and Reality of Emotions in Law, *William & Mary Journal of Women and the Law*, 8(1), pp.107-113.
- Savage, N. and Watt, G. (1996) A House of Intellect for the Professions in: Birk, P. (ed) (1996) *Pressing Problems in Law: What are Law Schools for?* (Oxford, Oxford University Press).
- Scherer, K. R. (2011) On the rationality of emotions: or, When are emotions rational?, *Social Science Information*, 50(3-4), pp. 330-350.
- Shamay-Tsoory, S. G. (2011) The Neural Bases for Empathy, *Neuroscience Update*, 17(1), pp. 18-24.
- Silver, M. (1999) Emotional Intelligence and Legal Education, *Psychology, Public Policy, and Law*, 5(4), pp. 1173-1203.
- Solicitors Regulation Authority (n.d.) Research and analysis. The changing legal services market www.sra.org.uk/risk/resources/changing-legal-services-market.page (Accessed 26 May 2017).
- Sommerlad, H., Harris-Short, S., Vaughan, S. and Young, R. (2015) The Futures of Legal Education and the Legal Profession in: Sommerlad, H.,

- Harris-Short, S., Vaughan, S. and Young, R. (eds) *The Futures of Legal Education and the Legal Profession* (Oxford and Portland, Hart Publishing).
- Sommerlad, H. (2014) The Ethics of Relational Jurisprudence, *Legal Ethics*, 17(2), pp. 281-298.
 - Sommerlad, H. (2007) Researching and Theorizing the Processes of Professional Identity Formation, *Journal of Law and Society*, 34(2), pp. 190-217.
 - Solicitors Regulation Authority (2016) A new route to qualification: The solicitors qualifying examination <http://www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page#download> (accessed 17 January 2017).
 - Solicitors Regulation Authority (2011) Legal Practice Course Outcomes 2011, <http://www.sra.org.uk/students/lpc.page> (accessed 17 January 2017).
 - Stanley, C. (1998) Training for the Hierarchy? Reflections on the British Experience of Legal Education, *The Law Teacher*, 22(2), pp. 78-86.
 - Stepien, K. A. and Baernstein, A. (2006) 'Educating for empathy. A review', *Journal of*, 21, pp. 524-530.
 - Sturm, S. P. and Guinier, L. (2007) The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, *Vanderbilt Law Review*, 60(2), pp. 515-553.
 - Susskind, R. (2013) *Tomorrow's Lawyers: An Introduction to your Future* (Oxford, Oxford University Press).
 - Turner, S. (2012) The Strength of Weak Empathy, *Science in Context*, 25(3), pp. 383-399.
 - Twining, W. (1995) What are law schools for?, *Northern Ireland Legal Quarterly*, 46(3-4), pp. 291-303.
 - Watkins, D. (2011) The role of narratives in legal education, *Liverpool Law Review*, 32(2), pp. 113-133.
 - Webb, J. (2008) The Dynamics of Professionalism: The Moral Economy of English Legal Practice - and Some Lessons for New Zealand, *Waikato Law Review*, 16, pp. 21-45.
 - Westaby, C. (2014) A Qualitative Study of the Impact of Law Clinics on Students' Perceptions of Emotional labour Expectations, *The Law Teacher*, 48(3), pp. 248-280.
 - Westaby, C. (2010) "Feeling like a sponge": The emotional labour produced by solicitors in their interactions with clients seeking asylum, *International Journal of the Legal Profession*, 17(2), pp. 153-174.
 - Wispe, L. (1986) The Distinction Between Sympathy and Empathy: To Call Forth a Concept, A Word is Needed, *Journal of Personality and Social Psychology*, 50(2), pp.314-321.
 - Wright, J. K. (2016) *Lawyers as Changemakers, the Global Integrative Law Movement* (Chicago, ABA Book Publishing).

