

## The promise and perils of positive psychology in legal education

This paper introduces positive psychology in general and Positive Psychology in particular, and argues that legal education may benefit from utilisation of positive psychology. Positive Psychology is a self-declared movement will be referred to as Positive Psychology below: positive psychology will be taken to include Positive Psychology. However, it argues that legal educators need to be cautious in how and why they adopt the findings of positive psychology into the curriculum and practice of legal education. Specifically, Positive Psychology is problematic, due in large part to its limited and unreflective epistemology, an epistemology it has used to exclude factors important for delivering legal education from consideration. However, positive psychology including Positive Psychology is far too valuable a potential source of understanding to forgo. Therefore, the nature and impact of the epistemological problems are discussed, illustrated, and placed within a jurisprudential frame of reference which will be more familiar to lawyers.

### What is positive psychology?

Psychology has sometimes focussed upon dysfunction or sickness, serving as a theoretical science in support of the clinical practice of psychiatry. This branch of psychology is sometimes called clinical psychology. Psychology has sometimes focussed on the prediction and manipulation of animal behaviour, including but not limited to human behaviour. This branch of psychology is known as behaviourism.

Positive psychology as a self-identified approach to psychology defined itself against these concerns with behaviour and dysfunction. Behaviourism ignores the quality of the animal's experience, and clinical psychology has a very clear concern with responding to psychological problems. Positive psychology aspired to explore subjective states of thinking and feeling, and excellence in psychological performance. The nature of the difference is captured by Fuller's contrast between the morality of duty and the morality of aspiration.<sup>1</sup> Positive psychology seeks to investigate human aspiration towards excellence, rather than helping people meet the duties that permit them to function in society. Being able to function is really important (necessary) but insufficient as the goal for a fulfilling life.

The contrast between positive and negative sometimes seems intended to cast non-positive psychology as negative, although Gable and Haidt expressly disavow this implication:<sup>2</sup>

“However, positive psychology does not imply that the rest of psychology is negative, although it is understandable that the name may imply that to some people. In fact, the large majority of the gross academic product of psychology is neutral, focusing on neither wellbeing nor distress. Positive psychology grew largely from the recognition of an imbalance in clinical psychology, in which most research does indeed focus on mental illness.”

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<sup>1</sup> Lon L Fuller, *Morality of Law* (Yale University Press 1964), 9-13

<sup>2</sup> Shelly L. Gable and Jonathan Haidt, 'What (and Why) Is Positive Psychology?' (2005) 9 *Review of General Psychology* 103, 104

Seligman and Csikszentmihalyi used the term when launching Positive Psychology in a manner that was intended to exclude the long tradition of humanistic psychology.<sup>3</sup> It also obscured the research tradition of social psychology,<sup>4</sup> and their account did not highlight the late twentieth century developments in cognitive psychology.<sup>5</sup> Although cognitive psychology does not necessarily concern itself with subjective states of feeling much of it does so.<sup>6</sup> Although the powerful analogy in cognitive psychology with the computer focussed attention on non-affective processes important currents of inquiry investigated the links between subjective feeling and cognition.<sup>7</sup>

Finally, developmental psychology has always had to wrestle with the teleological impulse implicit in the idea of development. Much work in developmental psychology seeks to facilitate the development of high capability people, not merely functional.<sup>8</sup> In short it would be dangerous and create distortion to rely upon such characterisations of the rest of psychology implied by the distinction made of Positive Psychology as a movement:<sup>9</sup>

“Psychology has, since World War II, become a science largely about healing. It concentrates on repairing damage within a disease model of human functioning. This almost exclusive attention to pathology neglects the fulfilled individual and the thriving community.”

This characterisation of work before the founding of Positive Psychology seems to be inaccurate. Of course it is not made to illuminate other psychology it is made to allow the delimitation of Positive Psychology:<sup>10</sup>

“The aim of positive psychology is to begin to catalyze a change in the focus of psychology from preoccupation only with repairing the worst things in life to also building positive qualities.”

In a similar vein:<sup>11</sup>

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<sup>3</sup> Martin E. P. Seligman and Mihaly Csikszentmihalyi, ‘Positive Psychology: An Introduction’ (2000) 55 *American Psychologist* 5. Humanistic psychologists include: William James, Abraham Maslow, Carl Rogers, Viktor E Frankl, and Emory L. Cowen

<sup>4</sup> A vast field, famous practitioners include: Solomon Asch, Kurt Lewin, Stanley Milgram, and Philip Zimbardo

<sup>5</sup> Howard Gardner, *The Mind’s New Science: A History Of The Cognitive Revolution* (Basic Books 1987)

<sup>6</sup> Self-determination theory serves as a good example, it originated from an attempt to understand motivation that was internal (not external or reinforcement based), and developed a theory based on the cognitive (understanding or interpretation) of the motivated person: see Graham Ferris and Rebecca Huxley-Binns, ‘What Students Care About and Why We Should Care’ in Paul Maharg and Caroline Maughan (eds) *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate 2011) 195; Edward I Deci and Richard M Ryan, *Handbook of Self-Determination Research* (University of Rochester Press 2002). The complex nature of cognition poses huge challenges to interpreters of the results of psychologically informed experiments, see: Melvin J Lerner, *Justice and Self-Interest: Two Fundamental Motives* (CUP 2013).

<sup>7</sup> Aaron T Beck, and the development of cognitive therapy, is the most obvious clinical example

<sup>8</sup> Dante Cicchetti, Julian Rappaport, Irwin Sandler, and Roger P Weissberg, *The Promotion of Wellness in Children and Adolescents* (CWLA Press 2000); Michael Rutter, Resilience concepts and findings: implications for family therapy (1999) 21 *Journal of Family Therapy* 119

<sup>9</sup> Martin E. P. Seligman and Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction* (2000) 55 *American Psychologist* 5, 5

<sup>10</sup> Martin E. P. Seligman and Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction* (2000) 55 *American Psychologist* 5, 5

<sup>11</sup> Shelly L. Gable and Jonathan Haidt, What (and Why) Is Positive Psychology? (2005) 9 *Review of General Psychology* 103, 103

“In the second half of the 20<sup>th</sup> century, psychology learned much about depression, racism, violence, self-esteem management, irrationality, and growing up under adversity but had much less to say about character strengths, virtues, and the conditions that lead to high levels of happiness or civic engagement.”

These characterisations of non-positive psychology are drawn with a clear intention to emphasise the differentiation of Positive Psychology, the academic movement, from other earlier psychological endeavours.

The reason this is important for those of us outside of the psychological discipline is that the rhetoric obscures much work done prior to the launch of Positive Psychology that retains value, and reduces the span and range of materials available for our critical evaluation. The self-esteem movement was not part of the Positive Psychology movement, but shared similar objectives, and there are lessons to be learned about its failures that a self-defined content for positive psychology would deny us.

Therefore, we shall be concerned with psychology that is relevant to the subject matter of Positive Psychology whether it would be recognised as falling within the movement or not. That subject matter has been variously defined but the following two quotations should give a good idea of the intended subject matter. First from Seligman and Csikszentmihalyi:<sup>12</sup>

“The field of positive psychology at the subjective level is about valued subjective experiences: well-being, contentment, and satisfaction (in the past); hope and optimism (for the future); and flow and happiness (in the present). At the individual level, it is about positive individual traits: the capacity for love and vocation, courage, interpersonal skill, aesthetic sensibility, perseverance, forgiveness, originality, future mindedness, spirituality, high talent, and wisdom. At the group level, it is about the civic virtues and the institutions that move individuals toward better citizenship: responsibility, nurturance, altruism, civility, moderation, tolerance, and work ethic.”

Second from Gable and Haidt:<sup>13</sup>

“Positive psychology is the study of the conditions and processes that contribute to the flourishing or optimal functioning of people, groups, and institutions.”

Reflection on these definitions suggest that Positive Psychology aims to be the science of the good life.

### **A Short But Important Jurisprudential Diversion**

The pursuit of human goods, the good life, is of course the foundation of contemporary natural law theory. Whereas some theories exclude questions of what a good life may be, preferring a focus upon right,<sup>14</sup> natural law has always sought to facilitate the living of lives that seek and realise human goods:<sup>15</sup>

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<sup>12</sup> Martin E. P. Seligman and Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction* (2000) 55 *American Psychologist* 5, 5

<sup>13</sup> Shelly L. Gable and Jonathan Haidt, *What (and Why) Is Positive Psychology?* (2005) 9 *Review of General Psychology* 103, 104

<sup>14</sup> John Rawls, *A Theory of Justice*, is an obvious example.

<sup>15</sup> John Finnis, ‘Natural Law: The Classical Tradition’, in Coleman, J & Shapiro, S, (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002), 22

“So, since positivism prides itself on dealing only in facts, it deprives itself of the only conceivable source of reasons for action (oughts), namely true and intrinsic values (basic human goods, and the propositional first principles of practical reason that direct us to those goods as to-be pursued, and point to what damages them as to-be-shunned).”

The idea of human flourishing is, of course, associated with the philosophy of Aristotle. The attraction for Positive Psychology of an Aristotelian understanding of what makes for a good human life has been recognised expressly and noted in commentary.<sup>16</sup>

However, the emphasis on subjective feelings in Positive Psychology resonates with the idea of hedonistic utilitarianism. It is not obvious that what Seligman and Csikszentmihalyi called the “subjective level” in the quotation above can be clearly distinguished from the classic utilitarianism of Bentham. In this respect it is worth noting the development of an analogous sub-discipline to Positive Psychology in economics. Although the two sub-disciplines should not be equated each make use of self-report questionnaires relating to subjective wellbeing. Economists concerned with wellbeing or satisfaction have produced measures of self-reported wellbeing or happiness or satisfaction and generated a literature discussing the findings of these instruments.<sup>17</sup> Certainly Layard is clear that his approach is founded on a Benthamite utilitarianism.<sup>18</sup>

“I believe that Bentham's idea was right and that we should fearlessly adopt it and apply it to our lives. You can of course agree with much that is in this book without agreeing with Bentham. But a clear idea adds great power to a set of good intentions.”

Thus, working within the field of wellbeing, and using similar methodologies of measurement, two sets of contrasting philosophical approaches have been formulated. Certainly it is not obvious how the idea of flow or optimal activity as developed by Csikszentmihalyi can be clearly differentiated from utilitarian types of analysis, as the emphasis is on the subjective experience.<sup>19</sup> Flow is not consumption based, but the common assumption that utility is consumption based owes more to economics than Bentham.

Finally, there is a tension between the scientific and factual ideals of Positive Psychology and its prescriptive impulses. We are told the activities that lead to a good life are largely given, universal aspects of the human condition, derived presumably from our shared evolutionary history. Psychology as a discipline aspires to be recognised as a “science”, a social science, or a behavioural science, or an experimental science. The seminal introduction to the special issue of *American Psychologist* by Seligman and Csikszentmihalyi uses the word “science” four times on its first page.<sup>20</sup> There is a tension between the posture of value neutrality associated with science and the obvious value content of the prescriptive parts of the endeavour.

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<sup>16</sup> Christopher Peterson & Martin E P Seligman, *Character Strengths and Virtues: A Handbook and Classification* (OUP 2004), 89: “social science equivalent of virtue ethics”; Kristján Kristjánsson, *Virtues and Vices in Positive Psychology* (CUP 2013)

<sup>17</sup> Richard Layard, *Happiness: lessons from a new science* (Penguin Books 2011); *Happiness Around the World: the paradox of happy peasants and miserable millionaires* (OUP 2009); Angus Deaton, *The Great Escape: Health, Wealth, and the origins of inequality* (Princeton University Press 2013); all of which are poorly cross-referenced to the psychological literature, Bruno Frey, *Happiness: A Revolution in Economics* (Massachusetts Institute of Technology Press 2010) gives a more integrated account.

<sup>18</sup> Richard Layard, *Happiness: lessons from a new science* (Penguin Books 2011), 112

<sup>19</sup> Mihaly Csikszentmihalyi, *Flow*

<sup>20</sup> Martin E. P. Seligman and Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction* (2000) 55 *American Psychologist* 5, 5

This tension, of course, resembles the tension between those who tried to separate the descriptive part of jurisprudence from the evaluative part – questions of law from questions of justice. Bentham, Austin, and Hart serve as an example of the proponents of the separation of questions of what is law from what is good law and from what is moral law. Fuller, Dworkin and Finnis can provide examples of thinkers who rejected the coherence of attempting such a separation.

Thus, we can find in the short history of wellbeing research generally, and Positive Psychology specifically, echoes of major disputes that have informed jurisprudential thought. Specifically, first, whether human goods are essentially discernible upon a universal unitary bi-polar scale (pleasure and pain); or, whether human goods are embedded in dissimilar universal but incommensurable goods (not contradictory but irreducible one to another). It is worth noting that the possibility of culturally specific human goods is excluded under either analysis. Second, whether the descriptive part of an analysis (analytical jurisprudence, the science of psychology) can be neatly portioned off from the evaluative part of an analysis (censorious jurisprudence, the prescriptive part of psychology).

### **The Epistemic Posture of Positive Psychology**

One promise of Positive Psychology is that it rests expressly on the scientific method, that it can offer an objectivity that sets to rest our concerns over value choice noted above, concerns that could inhibit our adoption of its lessons:<sup>21</sup>

“... positive psychology does not rely on wishful thinking, faith, self-deception, fads, or hand waving; it tries to adapt what is best in the scientific method to the unique problems that human behaviour presents to those who wish to understand it in all its complexity.”

Obviously, “scientific method” is not a description of how to go about science in this context. The “methods” of experimental genetics are not very similar to the methods of theoretical physics for example. One purpose of this passage is to distinguish “positive thinking”. Positive thinking is fairly obviously magical thinking for a secular age.<sup>22</sup> However, the reference to fads and hand-waving may also be meant to distinguish Positive Psychology from the self-esteem movement in the USA. This distinction is more problematic.

The self-esteem movement has been subjected to a lot of critical comment,<sup>23</sup> and it did suffer from both theoretical and empirical weaknesses. Theoretically the main problem was a tendency to apply the idea of enhancing self-esteem mechanically, and without reference to what the self was being esteemed for. Self-esteem was reified as a state quality of an individual – one had or did not have high self-esteem - in the same way one had or did not have an IQ of 102 (another example of reification of a test score as a state quality). Therefore, one needed to increase the self-esteem of the individual, and one did this through authority figures bestowing praises (“good job”) and encouraging self-praise (let us give ourselves a round of applause). However, few sentient beings feel valuable if they are praised indiscriminately. One deserves praise through achievement. One achieves within domains of action. This rather restricted theoretical foundation created problems in

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<sup>21</sup> Martin E. P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology An Introduction* (2000) 55 *American Psychologist* 5, 7

<sup>22</sup> Barbara Ehrenreich, *Smile or Die* traces the origins of positive thinking in the USA back to nineteenth century religious origins that gave rise to Christian Science and ...

<sup>23</sup> Martin E P Seligman, *The Optimistic Child: A proven program to safeguard children against depression and build lifelong resilience* (Houghton Mifflin 2007) 1<sup>st</sup> ed. 1995, Chapter 4; Alfie Kohn, *The Truth About Self-Esteem* (1994) Phi Delta Kappan available at <http://www.alfiekohn.org/article/truth-self-esteem/> last accessed 22/08/2016

the practice of those self-esteem practitioners (such as school administrators and teachers) who adopted such an inadequate theoretical understanding of self-esteem.

The empirical problem was a reliance upon correlations of self-esteem with other qualities that were seen as desirable or undesirable. Self-esteem was positively correlated with academic achievement for example, and negatively correlated with criminal activity. Obviously, such correlations could very plausibly be reinterpreted, not as evidence of the power of self-esteem but as evidence of the damage done to self-esteem by academic failure and criminal justice processes. Correlation is not causation, and indeed it is not even evidence of direct relationship. For example, in India both poor academic performance and low self-esteem among Dalit people could be interpreted as the result of social stigma resulting from caste prejudice.<sup>24</sup> This is often a problem with social science based upon surveys and statistical analysis. However, Positive Psychology uses survey and statistical analysis. Although laboratory experiments and evaluation of applications of Positive Psychology are also utilised, there is no obvious qualitative distinction apparent between the empirical scientific methodology deployed in the self-esteem movement and Positive Psychology.

Self-esteem played a role in sophisticated attempts to respond to educational problems. However, it was not a mechanistic self-esteem lacking in context or content.<sup>25</sup> Educationalists' concern with self-esteem has been in response to concerns about the affective domain in educational practice. They have tended to take a less individualistic approach than most psychologists, and placed more emphasis upon situational causes. Writing in the 1980s Beane and Lipka set out their frame of analysis.<sup>26</sup>

“In sum, then, both the individual self and the environment play a role in forming self-perceptions. However, the environment, particularly those persons who are perceived as “most significant”, evidently has a more powerful role. Those concerned with enhancing self-perceptions must be sensitive to the environment they construct and the degree of significance they have in the lives of others.”

What is most striking is that Beane and Lipka place the responsibility for facilitating good outcomes upon those who have most power over the environment. Positive psychology and especially Positive Psychology tend to emphasise the necessity for individuals to adjust, learn new techniques, and become more “positive”.

The problem of simply excluding self-esteem from “science” is more is lost than the meretricious and banal examples given most prominence in critical accounts. Both good scholarship and epistemically well founded research and analysis is lost.

Another, even more worrying distinction may have been intended. It is a distinction made explicitly by Peterson and Seligman:<sup>27</sup>

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<sup>24</sup> Karla Hoff and Priyanka Pandey, ‘Belief Systems and Durable Inequalities: An experimental Investigation of Indian Caste’ (2004) World Bank, Policy Research Working Paper 3351

<sup>25</sup> James A Beane, *Sorting Out the Self-Esteem Controversy* (1991) Educational Leadership 25

<sup>26</sup> James A Beane and Richard P Lipka, *Self-Concept, Self-Esteem and the Curriculum* (Teachers College 1984), 15; Both Beane and the Penn Resiliency Program focussed on school classrooms rather than College or University education see: <https://www.authentic happiness.sas.upenn.edu/learn/educatorresilience> last accessed 26/8/2016

<sup>27</sup> Christopher Peterson & Martin E P Seligman, *Character Strengths and Virtues: A Handbook and Classification* (OUP 2004), 4

“... distinguishes positive psychology from the humanistic psychology of the 1960s and 1970s and from positive thinking movement is its reliance on empirical research to understand people and the lives they lead.”

This distinction, between humanistic psychology and Positive Psychology appears to be unjustified.<sup>28</sup> It also ignores developments from the humanistic psychology tradition since the 1970s. On the face of the quotation it seems to render the life work of such psychologists as Emory L Cowen redundant. Cowen (some decade before Positive Psychology was launched as a movement) developed the concept of wellness. His trajectory was not dissimilar from Seligman’s, from preventative interventions towards interventions aimed at increasing wellness. Indeed, in some ways Cowen’s approach to wellness remains more sophisticated, and open to disparate methodologies of investigation, than Positive Psychology:<sup>29</sup>

“At the same time, additional generative information about the ontogenesis of wellness is needed in several areas, including: (a) the *in vivo* study of conditions and processes that nourish the early, spontaneous development of wellness; (b) clarifying understandings of the self-views, skills and competencies and familial contexts and pathways that operate to advance and maintain wellness; (c) identifying settings, community structures, and policies that further support the development of wellness.”

The focus of Positive Psychology seems to be on (b), reflecting its heavy reliance on experimental and survey based investigation of individual behaviour and difference. Case studies and investigation of institutions and social structures that support wellbeing have not been a prominent feature of Positive Psychology. As we noted above, in relation to Beane and Lipka’s work, the exclusion on epistemic terms narrows the factors taken into account in the analysis.

Positive Psychology seems to assume that experiment and statistical analysis are the hallmarks of scientific methodology. This methodology is tied to an empirical epistemology, associated with logical positivism. There has been a fairly wide-spread recognition that the logical positivist exclusive three sets classification of statements as analytical statements, or facts, or emotional expression (which included values), was a failure.<sup>30</sup> This leaves precisely what is meant by “scientific” indeterminate in Seligman’s writings, and given his emphasis on the importance of the distinctively scientific nature of his contributions this is unsatisfactory. The hard questions, around the role of the researcher’s values in research practice, cannot be answered by appeals to scientism.<sup>31</sup> Seligman claims:<sup>32</sup>

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<sup>28</sup> Eugene Taylor, ‘Positive Psychology and Humanistic Psychology: A reply to Seligman’ (2001) *Journal of Humanistic Psychology* 13

<sup>29</sup> Emory L Cowan, ‘The Enhancement of Psychological Wellness: Challenges and Opportunities’ (1994) 22 *American Journal of Community Psychology* 149, 173

<sup>30</sup> Willard Van Orman Quine, ‘Two dogmas of empiricism’ in Willard Van Orman Quine, *From A Logical Point of View: Nine logico-philosophical essays* (Harvard university Press 1980) chapter 2; Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and other essays* (Harvard University Press 2002); Kwame Anthony Appiah, *Cosmopolitanism: ethics in a world of strangers* (Penguin 2006) Chapter 2; Andrew Sayer, *Why Things Matter to People: Social Science, Values and Ethical Life* (CUP 2011)

<sup>31</sup> See: Christopher Peterson & Martin E P Seligman, *Character Strengths and Virtues: A Handbook and Classification* (OUP 2004), chapter 2. Kristjan Kristjánsson, *Virtues and Vices in Positive Psychology: A philosophical critique* (CUP 2013) argues Positive Psychology should surrender the remnants of its scientific positivism and accept its central concern with human values, upon which, he believes Positive Psychology would be largely a modern form of Aristotelianism.

<sup>32</sup> Seligman, *Flourish* 2011, loc 147

“The appeal of what I write comes from the fact that it is grounded in careful science ... my writings are believable because of the underlying science.”

However, exactly what this entails, and how precisely it can distinguish his enterprises from those of humanistic psychology, or psychologists who have not fully endorsed Positive Psychology is unclear.

In short the epistemological appeal to science and scientific method of Positive Psychology seems to be a rhetorical posture made to appeal to general readers, and policy makers, and funders. There is no clear demarcation between Positive Psychology and other congruent research endeavours directed at enhancing wellbeing.

Thus, we have demonstrated that in Positive Psychology the content of the concepts of “science” and “scientific method” have been left obscure, and the terms have been used to exclude what seem to be otherwise pertinent scholarship. An implicit reliance upon empiricism fails to acknowledge the shift in understanding of the relationship between “factual statements” and other types of statement in philosophy. It is not possible to draw qualitative distinctions between all empirical or factual statements, and all evaluative or value statements. It is not possible to have a purely factual account of human meaning, happiness, virtues, and the good life. So “science” cannot mean “factual account stripped of values”, and yet Seligman and his co-writers proffer no alternative meaning. What is excluded can be discerned, but the actual content of his epistemology seems at best obscure.

### **Positive psychology and Education,**

Positive psychology has taken an interest in education. It offers a perspective on educative practices that promises great potential benefits. Education is always about character formation and value inculcation. To fail to address values explicitly in legal education is itself a value laden position to take. Legal positivism, like scientific positivism, rests upon shaky philosophical foundations. Whilst cognitive aspects of education are obviously important they are not the exclusive matters of concern. Student wellbeing, student personal development, and student reflection on values and personal identity are also essential aspects of legal education.<sup>33</sup>

Positive psychology has been informed by an applied mission as well as a pure research mission. The researchers have often been motivated by a desire to improve educational and other social practices. Certainly Positive Psychology has been associated with applications of research. In the words of Seligman:<sup>34</sup>

“I want a revolution in world education. All young people need to learn workplace skills, which has been the subject matter of the education system in place for two hundred years. In addition, we can now teach the skills of well-being – of how to have more positive emotion, more meaning, better relationships, and more positive achievements.”

This desire to see research applied in improving life is common across positive psychology. Dweck describes her research in abstract or non-applied terms:<sup>35</sup>

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<sup>33</sup> Graham Ferris, ‘Values ethics and legal ethics: the QLD and LETR Recommendations 6, 7, 10, and 11’ (2014) 48 *Law Teacher* 20; Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015)

<sup>34</sup> Seligman, *Flourish* 2011 loc 1103

<sup>35</sup> Carol S Dweck, *Self-Theories: their role in motivation, personality, and development* (Psychology Press 2000) loc 130



“I address the question of why sometimes people function well and sometimes they function not so well, behaving in ways that are self-defeating or destructive. In the course of examining this issue, we will come to understand better why some people exceed expectations, while others fail to fulfil their potential.”

However, she has carried out most of her research in educational settings. In her popular book *Mindset* she addresses application of her research findings directly:<sup>36</sup>

“One day, my students sat me down and ordered me to write this book. They wanted people to be able to use our work to make their lives better ... At the end of each chapter and throughout the last chapter, I show you ways to apply the lessons ... My work has been about growth, and it has helped foster my own growth. It is my wish that it will do the same for you.”

She identifies key audiences in Chapter 7 which is titled “Parents, teachers, and coaches: where do mindsets come from?”.<sup>37</sup> Dweck is clearly concerned with the formation of a specific self-view that can facilitate resilience, persistence and successful development or growth.

Cowen argued that application, rather than theory, was central to his reputation:<sup>38</sup>

“With prevention as the goal and young children as prime targets, two settings (home and school) held theoretical appeal as loci for prevention efforts ... schools offered a practical edge for systematic implementation of prevention programs for young children. By the mid-1950s, this thinking had forged a 3- pronged credo, i.e., "prevention, young children and schools," ... Our first attempt to vivify this way of thinking was to create the vestigial precursor of what has proven to be a robust, enduring entity, i.e., a school program for early detection and prevention of young (K-3rd grade) children's school adjustment problems, called the Primary Mental Health Project (PMHP) ... The PMHP model is now being implemented by 700+ school districts around the world. These programs bring effective preventive services to tens of thousands of young children at-risk for school Maladjustment each year ... I'd still venture the guess, however timorously, that PMHP has been the single "thing" that has most contributed to any awards/honors into which I have bungled over the years.”

His theoretical construct of wellness was constructed for the potential applications it might support.

If the research and applications are applicable to legal education then surely we should be incorporating the lessons from positive psychology into our educational practice to improve performance, wellbeing, and achievement. Thus, in broad terms the substantive promise of positive psychology is that it can provide the foundations for a better and more enriching educational experience.

The possible applications of positive psychology in the practice of legal education are legion. The discussion below is restricted to several important examples: improving motivation (engagement); creativity in legal education; and wellbeing.

### **Positive psychology and motivation.**

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<sup>36</sup> Carol S Dweck, *Mindset: How you can fulfil your potential* (Robinson 2006), Introduction

<sup>37</sup> Seligman also identifies coaches as a key audience in his book *Flourish*.

<sup>38</sup> Emory L Cowen, ‘Forty years of community psychology: Time goes by fast when you’re having fun’ (1995) *The Community Psychologist* 28(5) 10, 11

I have written about this subject elsewhere in connection with self-determination theory.<sup>39</sup> Very briefly, self-determination theory identifies two major types of motivation, intrinsic and extrinsic. However, it is not a binary classification, and there is a spectrum that runs from pure extrinsic to pure intrinsic (if either of the two ideal poles exist). To encourage intrinsic motivation in students, which is a very good thing to do, we need to be sensitive to three human needs: the need to feel competent; the need for to feel one is autonomous; and the need to feel part of a community, or relatedness. By taking care to support these three human needs we can support more intrinsic motivation, and thereby improve both the educational experience or learning, and the effectiveness of the curriculum in academic terms.

Carole Dweck supplies another potentially invaluable route towards better student motivation. Dweck has been researching the role of the self-theories held by students in educational performance, overwhelmingly her research has been concerned with children in schools. She has found two types of self-theories exist. One is essentialist (clever people do well and stupid people do badly), and one is developmental (working hard makes one cleverer and improve). The essentialist self-theory comes with an anxiety about seeming inadequate, and being judged adversely. The developmental model is associated with less anxiety over being judged, and can lead the holder of the theory to perceive difficulty or failure as an opportunity to develop. If one holds to an essentialist model this can lead to discouragement when work is difficult, and a shift of student attention from the learning task to how to satisfy and placate the teacher.<sup>40</sup> A developmental model can lead a student to treat failure as a learning opportunity, an invitation to renew effort and master the novel area. These models or self-theories can be influenced by how educational authorities describe educational tasks.

Dweck advocates explicitly teaching that intelligence is plastic, that the brain changes in response to activities such as learning, rather than intelligence is a predetermined quality. Essentialist thinking is thereby shown to be founded in a mistake about potential and ability. Obviously, this touches upon the debates about intelligence: what it is (if anything – the ontological debate; theories of multiple intelligence *per* Howard Gardner<sup>41</sup>), what determines it (genetic or environmental factors on absolute and relative IQ scores), and how important it is in judging a person (educational meritocracy, *Bell Curve*<sup>42</sup>). However, Dweck sidesteps them:<sup>43</sup>

“The goal of this book is not really to resolve what intelligence is, but rather to ask: What is the most useful way of thinking about intelligence and what are the consequences of

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<sup>39</sup> Graham Ferris & Rebecca Huxley-Binns, ‘What Students Care About and Why We Should Care in Affect: The Impact of Emotion on Learning and Teaching the Law’, in *Affect and Legal Education: Emotion in Learning and Teaching the Law*, P. Maharg and C. Maugham (eds) (2011) Ashgate 195; Rebecca Huxley-Binns & Graham Ferris, ‘Putting Theory into Practice: Designing a Curriculum According to Self-Determination Theory’ (2013) 19 (3) *The International Journal of Pedagogy and Curriculum*; Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015) Chapter 4

<sup>40</sup> Carol Dweck, *Mindset: How you can fulfil your potential* (Ballantine Books 2008), 6. This student led reformulation of the classroom activity towards teacher placation was observed by John Holt, *How Children Fail* (Perseus Books 1982), it is well-known in practice, as being instrumental in the approach to learning

<sup>41</sup> Howard Gardner, *Frames of Mind: theory of multiple intelligences* (Fontana Press 1993)

<sup>42</sup> Richard J Herrnstein & Charles Murray, *Bell Curve: Intelligence and Class Structure in American Life* (Free Press Paperback 1996) which seems to argue that IQ is the most important attribute of a person for life chances and for social evaluation

<sup>43</sup> Carol S Dweck, *Self-Theories: their role in motivation, personality, and development* (Psychology Press 2000) loc 63

adopting one view over another? I think our research findings speak very clearly to this issue.”

Fairly obviously, an essentialist self-theory (fixed) undermines motivation because it suggests further effort will merely confirm the negative judgment. A developmental self-theory (changeable) can feed motivation to keep trying, as effort can lead to growth and new skills and abilities.

Dweck does not really engage with the problem that a lot of educational practice is pretty obviously based upon an essentialist ideology. The obsession with assessment and sorting of students (he is a 2:2 student) reflects a social pressure towards essentialist thinking. Dweck herself observes that her personal belief in an essentialist model of IQ was inculcated through her experience as a pupil in a classroom.<sup>44</sup> However, she does discuss techniques for encouraging a developmental self-theory without interfering with the role of assessment in modern educational practice. Certainly it behoves us to try and minimise the damage an essentialist theory of intelligence can do to our students’ learning.

### **Legal education and creativity**

Creativity is both one of the “strengths” identified by Positive Psychology, and something associated with optimistic affect. Sometimes the strengths are called virtues – but creativity is an odd virtue.

Creativity seems not necessarily ethically valuable. Creativity can be deployed to bad ends. For example, the creativity of businesses established to take advantage of consumer weakness or gullibility, whether fraudulently or through sharp practice.<sup>45</sup>

If virtue is thought of as excellence in performance or action, then creativity seems to be a feature of domains of action. Creativity is very different in law and the visual arts. It seems rather to be a feature of excellence, when appropriately deployed. Pure creativity would be formless, chaotic, without some end to which the creativity is directed. Sometimes the creative solution is the excellent solution, but sometimes it is not. Whether creativity gives rise to excellence depends upon the domain and the end aimed at. The Fosbury flop was both creative and excellent, because it enabled high jumpers to jump higher than earlier techniques. The Ferris flop was unique, but not excellent – as it was indeed a flop.

Finally, Confucius would have been appalled at the idea of engaging in the traditional rituals in a creative manner. In some activities creativity is failure to understand important aspects of the activity.

If we discount the character strength understanding of creativity, as something intrinsically valuable, then we need to ask whether creativity is a legal virtue. Precedent gives priority to consistency with past results rather than novelty in decision making. Certainty requires predictability, and predictability is not enhanced through creativity. One of the most important virtues of law is the protection of expectations, and expectations are based upon what has been promised or earlier conduct, creativity threatens expectations. These important factors do not entail the conclusion that law does not value creativity, although it does mean that creativity is not an unalloyed good in a

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<sup>44</sup> Carol Dweck, *Mindset: How you can fulfil your potential* (Ballantine Books 2008), 6

<sup>45</sup> George A Akerlof and Robert J Shiller, *Phishing for Phools: The economics of manipulation and deception* (Princeton University Press 2015); Natasha Dow Schull, *Addiction by Design: machine gambling in Las Vegas* (Princeton University Press 2012)

legal context, it has to earn its place. Integration and consistency and clarity and justice are more basic legal virtues.

However, it remains the case that we, as legal educators, value domain appropriate creativity in our students, and in our own research activity. The creativity we value includes novel insight into connections between different areas of law: as exemplified by the work of scholars and judges interested in unjust enrichment theory, who re-interpreted and transformed in a principled manner areas of law previously collected as disparate anomalous cases and called quasi-contract.<sup>46</sup> In such cases creativity can serve integration, and consistency, and justice, through novel interpretations of existing but poorly justified law. Also, we value novel uses of existing legal doctrine by practitioners to generate novel combinations for the benefit of clients. Examples are the use of the discontinuous lease to facilitate and legally structure time-share arrangements;<sup>47</sup> or the use of novel discretionary powers in trusts utilised as vehicles for pensions funds.<sup>48</sup> In these cases expectations can be given legal security through creative adaptations of property law. We value the creative use of litigation and legislation to address injustices in law and society.<sup>49</sup> An examples is the Vermont litigation on gay marriage, and the subsequent legislative response of civil partnership.<sup>50</sup> Here creativity served justice concerns and consistency in legal treatment of citizens.

In academic practice we value application of insights from outside the legal discipline, whether termed multi-disciplinary or cross-disciplinary.<sup>51</sup> We value the application of philosophical or philosophically informed theory to law and legal problems (jurisprudence). We value attempts to compare law and legal processes across jurisdictions (comparative law). We value re-framing of law or legal process in ways that bring valuable insight.<sup>52</sup> All of these research approaches involve some degree of creativity.

However, law is singular as a discipline in two ways. It gives some texts (primary sources) a unique authority. It strives for convergence of interpretation of these texts as a central virtue. Creativity has a role to play provided it is subordinated to these two imperatives. All of these factors mean that encouragement of creativity is not necessarily a good thing, the educational needs of law are not simple in this regard. Creative solutions that diverge from authoritative texts are wrong, unless they are situated within an area of permitted creativity – an exercise in law reform (although even here some reforms would be wrong if they diverged from principles upheld within the legal system without adequate cause).

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<sup>46</sup> Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985)

<sup>47</sup> *Cottage Holiday Associates v Customs and Excise Commissioners* [1983] QB 735

<sup>48</sup> *McPhail v Doulton* [1971] AC 424, although the actual law used (following the precedent in *Re Gulbenkian's Settlements* [1970] AC 508) to creatively serve the function has proved unfit for purpose

<sup>49</sup> Graham Ferris & Nick Johnson, 'Practical Nous as the Aim of Legal education?' (2013) 19 *International Journal of Legal Education* 271

<sup>50</sup> Beth Robinson, 'The Road to Inclusion for Same Sex Couples: The Lessons from Vermont' (2001) 11 *Seton Hall Constitutional Law Journal* 237

<sup>51</sup> For examples: Richard Nobles and David Schiff, *Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Ashgate 2014)

<sup>52</sup> For example: the concept of "fragmentation of ownership" as explicated in F H Lawson and Bernard Rudden, *The Law of Property*, 2<sup>nd</sup> ed (OUP 1982), and F H Lawson and Bernard Rudden, *The Law of Property*, 3<sup>rd</sup> ed (OUP 2002), the two editions provide different conceptual frames, although clearly developed from a single root; the concept of "regulatory space" as developed in Leigh Hancher and Michael Moran, *Capitalism, Culture, and Economic Regulation* (OUP 1989); David Howarth, *Law as Engineering* (Edwin Elgar 2013) is a recent attempt at such a re-framing

Unfortunately, the case becomes even more obscure, as some conditions that favour creativity also disfavour close analytical work.<sup>53</sup> As a general rule law as a discipline requires creativity to be based upon close analytical work. Therefore, especially for neophytes, who lack extensive experience handling legal materials, encouragement of a happy and optimistic affective state might enhance inappropriate creativity at the expense of much needed development of close analytic skills. It is far too simplistic to identify creativity as a strength and then seek to encourage it within legal education.

## Wellbeing

There are reasons to think law study and legal practice might undermine wellbeing.<sup>54</sup> One of the roots of Positive Psychology is Seligman's work on learned optimism: the inculcation of an optimistic approach to life and circumstances, to counteract helplessness and feelings of inefficacy and hopelessness.<sup>55</sup> In this it attempts through cognitive interventions to alter affective states, and originally to specifically counter the effects of "learned helplessness". The breadth of Seligman's work has expanded from this preventative role, to the encouragement of wellbeing, which is the aim of Positive Psychology.<sup>56</sup>

Therefore, one source for institutional response to wellbeing problems, and thereby student engagement and resilience in students and professionals, is through positive psychology. Specifically Positive Psychology has been the theoretical inspiration for educational interventions in schools and in the US Army.<sup>57</sup> It has inspired work on value based interventions in professional education, such as the Jubilee Centre for Character and Virtues based at the University of Birmingham.<sup>58</sup> Resources are available freely online from the Authentic Happiness website hosted by the University of Pennsylvania.<sup>59</sup> As noted above Positive Psychology promotes itself as the "scientific study of what makes life worth living".<sup>60</sup> As noted above this emphasis on "science" excluded work by scholars such as Cowen, or Beane and Lipka.

In Positive Psychology situational forces (the ecological approach per Cowen, or the environment per Beane and Lipka) are taken as given. The Positive Psychologist is the scientific expert who can teach the individual children, or soldiers, how to be happy in their circumstances. Combat trauma does not have to be harmful if the soldier learns how to correctly understand the experience. It can be part of

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<sup>53</sup> Victoria A Visser, Daan van Knippenberg, Gerben A van Kleef, Barbara Wisse, 'How Leader displays of happiness and sadness influence follower performance: Emotional contagion and creative versus analytical performance' (2013) 24 *The Leadership Quarterly* 172; S Kaplan, J Cortina, H Mulin, X Hu, V Nicolaidis, E Weiss, V Gilcrane & R Vega (2013) 'Investigation of leader emotion management processes', Technical Report, Fort Leavenworth Reserch institute, Fort Belvior, VA: US Army Research Institute for the Behavioral and Social Sciences, cited in Todd B Kashdan & Robert Biswas-Diener, *The Power of Negative emotion: How anger, guilt and self-doubt are essential to success and fulfilment* (Oneworld 2015)

<sup>54</sup> Deborah L Rhode, *The Trouble with Lawyers* (OUP 2015), Chapter 2 for a review of US research; Kelk et al, *Courting the Blues* (Brain and Mind Institute 2009) for Australia

<sup>55</sup> Martin E P Seligman, *Learned Optimism: How to Change Your Mind and Your Life* (Vintage 2011)

<sup>56</sup> As evidenced by comparison of *Learned Optimism* with Martin E P Seligman, *Flourish: A New Understanding of Happiness and Well-Being - and how to Achieve Them* (Nicholas Brealey Publishing 2011)

<sup>57</sup> Martin E P Seligman, *Flourish: A New Understanding of Happiness and Well-Being - and how to Achieve Them* (Nicholas Brealey Publishing 2011)

<sup>58</sup> <http://www.jubileecentre.ac.uk/> last accessed 26/8/2016

<sup>59</sup> <https://www.authentichappiness.sas.upenn.edu/> last accessed 26/8/2016

<sup>60</sup> Christopher Peterson, pod cast: "What makes life worth living", University of Michigan, available at: <https://www.authentichappiness.sas.upenn.edu/> last accessed 26/8/2016

a process of personal growth. There is no question of whether repeated combat deployments are necessary, nor whether reserve soldiers should be posted overseas.<sup>61</sup> However, we should beware of the risks of generous compensation for Post-Traumatic Stress Disorder, as it might encourage malingering:<sup>62</sup>

“Here I must assume a curmudgeonly voice ... even though the literature suggest that the survivors were not malingering ... we will never know what effect the financial incentive had ... A parallel system is at work in military PTSD, unfortunately. A diagnosis of full blown PTSD will earn a veteran a disability payment of around \$3,000 a month for the rest of his life ... Once veterans get the diagnosis and the disability payments begin, 82 percent do not return for therapy. We do not know what effect this substantial incentive is having on the diagnosis of PTSD from our wars, but the 20 percent often reported from Iraq and Afghanistan is way above rates in previous wars ... I do not believe that PTSD is malingering. My doubts are about overdiagnosis.”

Seligman did not find it necessary to speculate on the role of multiple combat deployments upon soldiers, nor on the rising use of reserve troops overseas. The political and military decisions that generated the environmental stressors seem to fall outside of the scientific realm of analysis.

In any case Seligman wants to encourage post traumatic growth, and that can be greater with recurrent traumatic experiences:<sup>63</sup>

“To our surprise, individuals who’d experienced one awful event had more intense strengths (and therefore higher well-being) than individuals who had none. Individuals who’d been through two awful events were stronger than individuals who had one, and individuals who had three – raped, tortured, and held captive for example – were stronger than those who had two.”

This result came from self-selecting respondents whose responses were not objectively verified. One must wonder, scientifically, about those who went through traumatic experiences and did not fill out the online survey. Whilst human resilience is a wonderful thing, and it deserves study, one has to wonder how ethically sensitive it is to ignore the decisions that create the stressors, speculate on the possibility of malingering by those who are damaged by the stressors, and portray the repeated creation of situations that impose stressors as experiences that offer a growth possibility.

This brings us to a problem with Positive Psychology in particular. It is fairly obviously engaged in a project that is informed by values: it has in reality abandoned the positivist account of science that it deploys rhetorically. We have noted above, that it aspires to a universalism that is congruent with

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<sup>61</sup> The PTSD and mental health problems post-Iraq 2003 were concentrated among reservists – who were deployed overseas far more than in earlier US wars: See: Charles S Milliken, Jennifer L Auchterlonie, and Charles W Hoge, ‘Longitudinal Assessment of mental health Problems Among Active and Reserve Component Soldiers Returning From the Iraq War’ (2007) 298 *Journal of the American medical Association* 2141, 2141: “Based on the combined screening, clinicians identified 20.3% of active and 42.4% of reserve component soldiers as requiring mental health treatment. Concerns about interpersonal conflict increased 4-fold.” David R. Segal and Mady Wechsler Segal, ‘U.S. Military’s Reliance on the Reserves’ (2005) Population Reference Bureau available at: <http://www.prb.org/Publications/Articles/2005/USMilitarysRelianceontheReserves.aspx> last accessed 26/8/2016

<sup>62</sup> Martin E P Seligman, *Flourish: A New Understanding of Happiness and Well-Being - and how to Achieve Them* (Nicholas Brealey Publishing 2011), loc 2654-2660.

<sup>63</sup> Martin E P Seligman, *Flourish: A New Understanding of Happiness and Well-Being - and how to Achieve Them* (Nicholas Brealey Publishing 2011), Loc 2676

natural law theories, and yet tries to establish this on a foundation that uses subjective wellbeing as a measure of wellbeing, which is fairly obviously far more congruent with utilitarianism. It ignores relevant literature which it excludes through the deployment of an undefined and epistemically naïve category of science. It seems to be another example of scientism being used to address the problems of value diversity in modern society in general and in America in particular.

### **Is the Science of Positive Psychology Value Neutral? Another Jurisprudential Diversion**

John Rawls self-consciously wrestled with the problem of value diversity in modern society in general, and in the USA in particular:<sup>64</sup>

“How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”

Rawls argued these problems – (1) the establishment of a fair and just system (2) amongst people who disagree about what is important and good and right – pose the central challenges to democratic liberal society:<sup>65</sup>

“We should find it remarkable that, so deeply opposed in these ways, just cooperation among free and equal citizens is possible at all.”

As is well known Rawls tried to find a solution to the problems by distinguishing conceptions of right from conceptions of good, and setting out a method for compelling by force of reason concurrence on the nature of right, or political justice.<sup>66</sup>

In formal terms the problem is finding a convergent frame (everyone can agree) which will support a divergent value diversity (everyone can disagree). Rawls recognised that free institutions are likely to generate value diversity, even if such diversity is not present at the start of the collective endeavour. Hence the necessity for liberal democracy, being a system committed to liberty and equality, to reconcile the clashes generated by value diversity in social cooperation.

Richards argues that American psychology as a discipline has always been and remains committed to a similar, although not so self-conscious, moral mission. Science is convergent, over time the best theory will win out through objective testing. Psychology, as science, can offer a non-religion based account of the good life. In the words of Richards:<sup>67</sup>

“It was of course a central tenet of the 1788 constitution that plurality of religious, and indeed non-religious, belief was a ‘Right of Man’ - where then was moral authority to be located? Given the lack of an official institutionalized state religion or social class system in which ‘elders and betters’ were customarily deferred to, the only universally accepted statements of moral principle were the Bill of Rights and the Constitution itself. Rebellious students then, like US dissidents ever since, could readily cite these in their favour. It was clear to university and college authorities that they had to find an internal solution to the threats of atheism, deism and materialism.”

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<sup>64</sup> John Rawls, *Political Liberalism* (Columbia University Press 2005), 4

<sup>65</sup> John Rawls, *Political Liberalism* (Columbia University Press 2005), 4

<sup>66</sup> John Rawls, *A Theory of Justice* (OUP 1999)

<sup>67</sup> Graham Richards, “‘To Know our fellow men to do them good’: American Psychology’s enduring moral project’ (1995) 8 *History of the Human Sciences* 1, 2-3

Richards argues that psychology in America originated in this search for a secular foundation for shared beliefs, and that contemporary psychology is still motivated by this impulse.<sup>68</sup>

“Their [G. T. Ladd and J. M. Baldwin] underlying moral project can be clearly shown to have been carried over in secularized and extended terms by most of the New Psychologists, and demonstrably persists in a variety of forms to the present day.”

This moral mission is present in Positive Psychology. Indeed, Seligman notices, but does not develop the insight, a link between modern society (as opposed to traditional society) and the need for Positive Psychology.<sup>69</sup>

“... the Old Order of the Amish of Lancaster County, who live thirty miles down the road from me, have only one-tenth of Philadelphia’s rate of depression ... It has everything to do with modernity and perhaps with what we mistakenly call ‘prosperity’.”

Seligman offers no analysis of modernity, as his analytical focus is not upon causes of low wellbeing or distress but upon how individuals can improve their life. Social structures, as noted above, tend to fall outside of the remit of Seligman’s “science” of psychology; and scholars like Cowen, who called for a multi-disciplinary response to wellness, fall outside the scientific tent.<sup>70</sup>

Positive Psychology is expressly committed to a universal account of the good life. Character Strength or Virtues, it is argued, are universally recognised across time and culture:<sup>71</sup>

“The primary lesson we learn from the historical exercise described in this chapter is that there is a strong convergence across time, place, and intellectual tradition about certain core virtues.”

Therefore, it follows, that Berlin was wrong about there being plural moralities that are valued by different civilisations.<sup>72</sup>

Rawls tried to mediate between diversity and cooperation by separating the right from the good and seeking agreement about the right. Positive Psychology seems to have attempted to solve the same problem by separating out the good from the right, and focussing on the good. Rawls tried to force agreement through the reasonableness of his thought experiment. Positive Psychology seeks to force agreement through its scientific credentials, as it is irrational to disagree with scientific results. Positive Psychology can live with an amalgam of utilitarianism and natural law approaches – as each is based upon universalistic claims. However, pluralism it rejects, as it undermines the status of science, and the moral mission of psychology.

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<sup>68</sup> Graham Richards, “‘To Know our fellow men to do them good’: American Psychology’s enduring moral project’ (1995) 8 *History of the Human Sciences* 1, 17-18

<sup>69</sup> Martin E P Seligman, *Flourish: A New Understanding of Happiness and Well-Being - and how to Achieve Them* (Nicholas Brealey Publishing 2011), Loc 1383. The suggestion that people might be better off if they were less materially well provided for has poor research support, see: Angus Deaton, *The Great Escape: Health, Wealth, and the Origins of Inequality* (Princeton University Press 2013). What has been found is that mere increases in Gross Domestic Product are not good predictors of wellbeing

<sup>70</sup> Emory L Cowen, ‘The Enhancement of Psychological Wellness: Challenges and Opportunities’ (1994) 22 *American Journal of Community Psychology* 149, 172 lists: “social policy makers, urban planners, political scientists, child development specialists, and educators”

<sup>71</sup> Christopher Peterson and Martin EP Seligman, *Character Strengths and Virtues: A handbook and classification* ((OUP 2004), 50

<sup>72</sup> Isaiah Berlin, ‘The Pursuit of the Ideal’, in Henry Hardy and Roger Hausheer eds, *The Proper Study of Mankind: An anthology of essays* (Pimlico 1998)



## Why Do the Jurisprudential Diversions Matter?

It is not argued that science in general, or social science in particular, should be value free. Indeed, this is probably impossible, as noted above. How could one have a science not committed to truth, or a commitment to tolerance for critical accounts of the leading theories? However, it is argued that one virtue of science is a commitment to a reflective practice, that science that is self-conscious about its value orientations and commitments is better than science that is not:<sup>73</sup>

“The crux of the matter appears to be whether the scientist’s model of reality is a better substitute for reality than one’s own personal experience. According to the humanistic viewpoint, one can only acquiesce to the equal power of both objective analysis and subjective experience when one’s theory becomes self-reflective in a re-examination of what constitutes objectivity ... Seligman’s theories about positive psychology contain no such reflexive elements as yet, so the theory must be judged as still being in its infant stages.”

Essentially the objection is that Positive Psychology is not self-aware. If it has a moral purpose to unite people in a liberal democracy around an account of the good life - Peterson: “scientific study of what makes life worth living”; Seligman:<sup>74</sup> “This book will help you flourish” – then it is not self-aware that this moral purpose informs its “science” and its “scientific method”.

This is not merely about being fair to scholars whose efforts preceded one’s own (an ethical commitment of most scholarship, upheld by prohibition of plagiarism); it goes to the mutual understanding, or misunderstanding, of scholars within and outside the discipline. Lawyers are not used to methodological disputes, but the important point is that valuable insights are lost, and distortions of understanding are introduced by the practices of the Positive Psychologists:<sup>75</sup>

“From taking part in seminars and workshops on values and social research I have often encountered the strange idea that values are not only subjective but synonymous with ‘bias’ and distortion. It’s further assumed that they are personal biases that one ideally should confess to, so that others will at least be able to ‘take them into account’, that is, discount them. This is self-deprecating insofar as it invites the reader to discount what may be reasonable evaluative judgements. Tactically, it’s disastrous since it invites readers with different values to ignore them. It implies that values are no more than subjective afflictions having nothing to do with what is being valued. In addition, values are often seen as private and inviolable – ‘my personal values’ – and not to be assessed by others. Because they assume that values are beyond the scope of reason, some social scientists try to avoid value-judgements in their accounts of social life, believing that this is necessary to ensure objectivity ... Others argue the reverse, that values are inevitable in social science, so we cannot expect to be objective. Although these two positions are diametrically opposed, they are completely agreed on one thing: that objectivity and values are incompatible. I disagree with both positions. Each is trapped within the framework of problematic distinctions that prevent us from understanding normativity.

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<sup>73</sup> Eugene Taylor, ‘Positive Psychology and Humanistic Psychology: A reply to Seligman’ (2001) 41 *Journal of Humanistic Psychology* 13, 23-24

<sup>74</sup> Martin E P Seligman, *Flourish: A New Understanding of Happiness and Well-Being - and how to Achieve Them* (Nicholas Brealey Publishing 2011), Loc 147 (opening words of the preface)

<sup>75</sup> Andrew Sayer, *Why Things Matter to People Social Science, Values and Ethical Life* (Cambridge University Press 2011), 10-11

If values are within the scope of reason, they need not be regarded as a contaminant in social science itself.”

If Sayer is right, then values are not antagonistic to good science, of course if one cannot recognise one’s values then they may become distorting. Positive Psychology discounts earlier work that does not share its rather limited understanding of “scientific method”, and it cannot properly address structural issues; of power, injustice, or collective action for example; because they fall outside its methodological range. Finally, pluralism is discounted because scientific thought is convergent, therefore, a priori there must be one answer to a scientific question. When one makes the nature of the good life into a scientific question this excludes, without consideration, the possibility of valid pluralism (the divergent reasonable religious, philosophical, and moral doctrines of Rawls).

I have argued at length elsewhere that legal education needs to be pluralistic in its assumptions about value conflict.<sup>76</sup> Where we endorse a specific value, such as values that contribute to the rule of law, the reason for doing so should be capable of being made explicit. Positive Psychology seems to be an attempt to smuggle in value positions without attempting to articulate them or defend them in value terms. Thus, the emphasis on optimism as a response to situational stressors is both limited in its ambition and potentially oppressive in its operation.

It is limited as it seems to start with an assumption that the stressors cannot be changed through challenge. The message is not to optimistically challenge the source of the stress: this practice of grade curve marking is a silly exercise that is divisive and educationally unjustifiable and should be stopped; I will not serve a third tour of combat duty; I will not sell this customer product protection insurance as he does not want to buy it, because it is very bad value. Individual or collective challenge to the sources of stress – which are usually socially situated – is not within the range of “optimism”. One should change one’s own perceptions of the meaning of the practice. A grade point average D is a reason to try harder and beat my colleagues; trauma can lead to growth opportunities if I just stop lashing out at my spouse and children and use my new skills; if the bosses think high pressure exploitative selling is good business then I guess they are right, and I should focus on obtaining my bonus, after all the customer can always say no.

From the point of view of ethical legal education this is potentially very problematic. We seek to encourage sensitivity to ethical issues, and to facilitate efficacy in challenging unethical practices. Misuse of optimism as an individually adaptive response can foster and facilitate denial. Denial is the paradoxical way that people can deliberately not know what would disturb their equilibrium.<sup>77</sup> Denial is an obstacle in the road to justice, and permits violations of the rule of law. Denial violates values that I argue should be embedded in legal education. Positive Psychology with its optimistic individual adaption approach risks disabling inquiring minds, because what they might find would make them unhappy, pessimistic about their organisation or society, and distressed.<sup>78</sup>

“Many institutions – armies, police forces, government departments, cabinets, the arms-industry, care institutions where children are abused, work-places where women are harassed – are full of people who do not have inquiring minds. These people and their states of mind appear in every Truth Commission and war crimes trial. They are also present in investigations of illegal arms dealing, political corruption, discrimination and

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<sup>76</sup> Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015)

<sup>77</sup> Stanley Cohen, *States of Denial: Knowing about atrocities and suffering* (Polity Press 2001)

<sup>78</sup> Stanley Cohen, *States of Denial: Knowing about atrocities and suffering* (Polity Press 2001), 128

abuse of authority. This is not a flat denial of any knowledge at the time, but a claim either not to have grasped the significance of the event or not to have known the big picture”

Law is about an attempt to control abuse through formal rules and processes. It may be true that assuming those in power mean well, and will not take advantage of their position, is conducive to an optimistic and contented life; but few outstanding lawyers or legal reformers could have been effective in such a state of mind. The “scientific” view that one should accept life stresses and adapt by an optimistic interpretation of them is incompatible with legal virtue of speaking truth to power.

The desire that those who are suffering should be optimistic threatens to become oppressive. Ehrenreich found the “scientific”, but actually thin and unproven data base, for positive thinking as an element in treatment of cancer objectionable. Breast cancer is not an opportunity but a disease that is not suffered by the negative thinkers but by unlucky women. Positive thinking is no guarantor of positive outcome, and the pressure to be positive can be a burden on the patient, but may alleviate the distress of family and carers. In Ehrenreich’s words:<sup>79</sup>

“Sugar coating of cancer can exact a dreadful cost. First, it requires the denial of understandable feelings of anger and fear, all of which must be buried under a cosmetic layer of cheer. This is a great convenience for health workers and even friends of the afflicted, who might prefer fake cheer to complaining, but it is not so easy on the afflicted.”

One cannot assume in practice that the ethically sensitive and sincerely meant intention to benefit others through the use of techniques promulgated by Positive Psychology will exist. In arenas of values the values advanced require justification and evaluation in the light of other value perspectives, and not an assertion of scientific validity for some and dismissal of others as:<sup>80</sup>

“wishful thinking, faith, self-deception, fads, or hand waving”

The values advanced need to be subjected to criticism and to be justified as values. It is not acceptable to sidestep this stage through a poorly articulated epistemological position.

## Conclusion

Positive psychology and Positive Psychology are valuable resources for legal educators. However, we must be cautious in our appropriation of the work and its adaptation to our practice.

First, and obviously, we must trust our professional judgment based on our professional practice. We need to test out our reactions to possible innovations carefully. As the analysis of creativity and analytical work above demonstrated domain specificity must be respected.

Second, we need to be aware of the methodological debates in social science if we are to use social science. We can seek some support from existing discourse in jurisprudence. However, ultimately we must be sensitive to the historically located nature of social science. As lawyers we are experienced in dealing with the interaction of power and reason in practice; social science is not always as self-consciously aware of such dynamics, but when it tries to articulate them reflectively it generates methodological discourse. We do not need to join this discourse, but we do need to treat it respectfully.

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<sup>79</sup> Barbara Ehrenreich, *Smile or Die: How Positive Thinking Fooled America and the World* (Granta 2010), 41

<sup>80</sup> Martin E P Seligman & Mihaly Csikszentmihalyi, ‘Positive Psychology An Introduction’ (2000) 55 *American Psychologist* 5, 7

Third, we need to be aware of both implicit and explicit value discourses in psychology, and indeed in law. Once again not everyone needs to be immersed in the collapse of positivism and the undermining of the fact value dichotomy (not the fact value distinction – that unsurprisingly remains a useful distinction to make). The call for greater ethical content in legal education, or the need to attend to the third apprenticeship, are internal expressions of this necessary reorientation.

Fourth, some of the value commitments of Positive Psychology are inimical to legal education. The rejection of pluralism and risk of encouraging denial being two that have been explained above.

Finally, we can point to examples of productive use being made of positive psychology in legal education. There are valuable resources that we can utilise if we approach them with care and a willingness to engage with them not naively merely as neutral technologies, but realistically as parts of a value informed and continuing discourse. Within Positive Psychology people are engaged in a discourse, it is not a static field governed by the writing of a few authoritative leaders,<sup>81</sup> and the very articulation of Positive Psychology as a field has encouraged a reaction from psychologists who never committed to the endeavour.<sup>82</sup> As legal educators we need to be aware of the discourse, although we do not need to become psychologists to do so.

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<sup>81</sup> See e.g. : Todd Kashdan and Robert Biswas-Diener, *The Power of Negative Emotion: How Anger, Guilt, and Self Doubt are Essential to Success and Fulfillment* (Oneworld Publications 2015)

<sup>82</sup> See e.g. Julie K Norem, *The Positive Power of Negative Thinking: Using Defensive Pessimism to Harness Anxiety and Perform at Your Peak* (Basic Books 2002)