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Scholarship in Law

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ALERT BUT NOT ALARMED: A RESPONSE TO PARKER'S CRITIQUE OF WELLBEING SCHOLARSHIP IN LAW

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I INTRODUCTION

Over the last century, dialogue about wellbeing has been plentiful, and in recent decades there has been a strong focus on evidence-based research. In North America, there have been consistent claims that wellbeing is impaired for both law students and lawyers.¹ The legal profession has been described as 'high paid misery',² with law students portrayed as 'the walking wounded'.³ Legal education has been comprehensively critiqued, for undermining the fundamental

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¹ See, eg, G Andrew H Benjamin et al, 'The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers' (1986) 11 *American Bar Foundation Research Journal* 225; Susan Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46 *American University Law Review* 1337; Susan Swaim Daicoff, *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* (American Psychological Association, 2004); Martin E P Seligman, Paul R Verkuil and Terry H Kang, 'Why Lawyers Are Unhappy' (2001) 23 *Cardozo Law Review* 33, 36; Lawrence S Krieger, 'Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence' (2002) 52 *Journal of Legal Education* 112, 114; Kennon M Sheldon and Lawrence S Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261; Elizabeth Mertz, *The Language of Law School: Learning to 'Think Like a Lawyer'* (Oxford University Press, 2007); Kennon M Sheldon and Lawrence S Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory' (2007) 33 *Personality and Social Psychology Bulletin* 883; Lawrence S Krieger, 'Human Nature as a New Guiding Philosophy for Legal Education and the Profession' (2008) 47 *Washburn Law Journal* 247, 266; Lawrence S Krieger and Kennon M Sheldon, 'What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success' (2015) 83 *George Washington Law Review* 554.

² Richard Delgado and Jean Stefancic, 'Can Lawyers Find Happiness?' (2008) 58 *Syracuse Law Review* 241, 247; Jerome M Organ, 'What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being' (2011) 8 *University of St Thomas Law Journal* 225.

³ Note, 'Making Docile Lawyers: An Essay on the Pacification of Law Students' (1998) 111 *Harvard Law Review* 2027, 2027.

psychological needs of students,⁴ and for conditioning students to adopt an amoral and counter-normative worldview.⁵ In Australia, the empirical research has consistently indicated that around one third of law students experience elevated levels of psychological distress, and that lawyers in the practising profession also experience elevated levels of psychological distress.⁶ Some Australian law schools have responded proactively to these findings, which have catalysed a diverse range of wellbeing interventions and initiatives,⁷ and wellbeing guidelines for law schools have been approved by the Council of Australian Law Deans.⁸

Wellbeing discourse has not been without its critics. In North America, criticism has been levelled at empirical research methodologies, at the mode of reporting and the interpretation of the

⁴ Lawrence S Krieger, 'What We're Not Telling Law Students – And Lawyers – That They Really Need to Know: Some Thoughts-In-Action Towards Revitalizing the Profession from Its Roots' (1998) 13 *Journal of Law and Health* 1, 5.

⁵ Mertz, above n 1, 6.

⁶ Beaton Consulting, 'Annual Professions Survey' (Research Summary, beyondblue, April 2007) <<https://www.liv.asn.au/PDF/LIJ/LIJ-June-2007/2007professionsurvey>> ('*Beaton Study*'); Norm Kelk et al, 'Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers' (Report, Brain and Mind Research Institute: University of Sydney, 2009) <<https://cald.asn.au/wp-content/uploads/2017/11/BMRI-Report-Courting-the-BluesLaw-Report-Website-version-4-May-091.pdf>> ('*BMRI Report*'); Massimiliano Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19 *Legal Education Review* 3; Catherine M Leahy et al, 'Distress Levels and Self-Reported Treatment Rates for Medicine, Law, Psychology and Mechanical Engineering Tertiary Students: Cross-Sectional Study' (2010) 44 *Australian and New Zealand Journal of Psychiatry* 608; Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 21; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (2011) 2(2) *International Journal of the First Year in Higher Education* 49; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149; Anthony Lester, Lloyd England and Natalia Antolak-Saper, 'Health and Wellbeing in the First Year: The Law School Experience' (2011) 36 *Alternative Law Journal* 47; Wendy Larcombe et al, 'Does an Improved Experience of Law School Protect Students Against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students' (2013) 35 *Sydney Law Review* 407; Wendy Larcombe and Katherine Fethers, 'Schooling the Blues? An Investigation of Factors Associated with Psychological Distress Among Law Students' (2013) 36 *University of New South Wales Law Journal* 390, 425; Adele J Bergin and Nerina L Jimmieson, 'Australian Lawyer Well-Being: Workplace Demands, Resources and the Impact of Time-Billing Targets' (2014) 21 *Psychology, Psychiatry and Law* 427.

⁷ See, eg, Enhancing Student Wellbeing, *Enhancing Student Wellbeing* (2016) <<http://unistudentwellbeing.edu.au>> and QUT's iBelong in the LLB program. Also see examples listed in Christine Parker, 'The "Moral Panic" Over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response?' (2014) 37 *University of New South Wales Law Journal* 1103, 1139–41.

⁸ Council of Australian Law Deans, *Promoting Law Student Well-Being: Good Practice Guidelines for Law Schools* (March 2013) <<https://cald.asn.au/wp-content/uploads/2017/11/Promoting-Law-Student-Well-Being-Good-Practice-Guidelines-for-Law-Schools.pdf>>.

evidence.⁹ In Australia, Parker (2014) has offered a similar critique, questioning research methodologies, reporting style and data analysis.¹⁰ However, Parker also offers an additional, theoretical critique. She contends that Australian wellbeing scholars are, unwittingly, facilitating a ‘moral panic’.¹¹ She describes a moral panic as the way in which a community responds to a time of ‘uncomfortable social, economic and political change’.¹² Typically, the discourse coalesces ‘around a particular diagnosis and action plan’.¹³ Parker’s concern is that in the legal context wellbeing is being individualised¹⁴ and medicalised¹⁵ to the extent that important social, political and economic problems which impact on the profession are being ignored. She cautions that wellbeing discourse may have been ‘co-opted by powerful interests that seek to confine change to the individual and not the collective ... levels’.¹⁶ She proposes that law student and lawyer wellbeing is driven by objective political factors, indicating the need for a collective response which aims to facilitate systemic cultural change.¹⁷

Parker’s critique has effectively polarised wellbeing dialogue. She offers a novel perspective grounded in sociology. However, in doing so she has effectively placed herself in contradiction to other wellbeing scholars. This article responds to Parker’s critique in detail with the aim of demonstrating that she has misunderstood the position of wellbeing scholars. It identifies the misunderstanding within contemporary wellbeing discourse and offers a corrective by identifying potential areas for collaboration. It claims that the views of wellbeing scholars, including Parker, are to a large extent aligned and that it would be most productive to view them as complementary. It suggests that theories regarding the cause of law student psychological distress are most potent when regarded as additive. Using a psychological framework, it recommends a fundamental narrative shift in wellbeing discourse and conceptualises a strategic, strength-based direction for future research. It concludes that legal academics should collaborate to promote a conception of a lawyer who is psychologically healthy and supported by a community directed towards a meaningful public purpose.

Part I sets context for the article by exploring the range of potential definitions for wellbeing. It then examines the evidence regarding wellbeing for law students in both North America and Australia. This article focuses in particular on the evidence regarding wellbeing for law students. It presumes that a life in the law is a continuum and that for the purposes of this discussion it is reasonable to concentrate on where that life begins. It proposes that Parker’s exploration of the empirical

⁹ Organ, above n 2.

¹⁰ Parker, above n 7.

¹¹ *Ibid* 1105.

¹² *Ibid*.

¹³ *Ibid*.

¹⁴ *Ibid* 1127.

¹⁵ *Ibid* 1107.

¹⁶ *Ibid* 1105.

¹⁷ *Ibid* 1129.

evidence is incomplete, and that her criticism of the research methodologies is unjustified. It contends that, in the legal education context, wellbeing scholars rely on a substantial evidence base to support their positionality, which reveals a broader range of research methodologies than the quantitative analyses examined by Parker. This includes a range of diverse methodologies including both qualitative and quantitative empirical research methods, as well as scholarly theory and anecdotal evidence.

Part II proposes that while Parker's critique constitutes an articulate, cautionary piece regarding the tone and direction of wellbeing discourse, wellbeing scholars operate according to a more complex conceptual framework than she suggests. In response to the 'moral panic' theory, it contends that some wellbeing scholars are uncomfortable with the concept of an 'individualising discourse'. Conversely, they support the commitment of Parker and other scholars to connect legal education with justice and share their determination to promote a rich conception of the lawyer imbued with a sense of public purpose.

Part III offers a conceptualisation for prospective wellbeing research in law schools. It proposes that legal professionals and academics with an interest in wellbeing collaborate in order to identify strategies which might effectively facilitate their shared aspiration for change. It suggests maintaining an equal focus on both structural and individual issues so that higher levels of wellbeing for law students and lawyers are achieved. It also proposes shifting the research focus from the experiences and needs of individuals to institutions, proposing empirical exploration of pedagogical strengths via a robust range of research methodologies.

II WHAT IS WELLBEING?

*A State of Being Comfortable, Healthy or Happy.*¹⁸

There are many potential definitions of wellbeing. The simple dictionary definition offered above is apt for general purposes. However, it is insufficient for academic purposes, since it provides little guidance for research. To measure and explore wellbeing, it is important to clarify whether it is defined as individual happiness, or whether it amounts to something more complex.

Michalos (2007) explores potential definitions of wellbeing. He begins by describing an 'internalized or psychologized' definition.¹⁹ According to this definition, the objectively measurable conditions of people's lives are not relevant in determining their wellbeing, and only their individual perceptions of their lives matter. By this definition, if a person lives cheerfully in an unsanitary or unsafe environment then it

¹⁸ English Oxford Living Dictionaries, *Definition of Well-Being in US English* (31 January 2017) <<https://en.oxforddictionaries.com/definition/us/wellbeing>>.

¹⁹ Alex C Michalos, 'Education, Happiness and Wellbeing' (2008) 87 *Social Indicators Research* 347, 351.

is acceptable, because only their perceptions are relevant. This might also be referred to as a subjective, one variable definition of wellbeing. Simsek (2009) explores subjective wellbeing (SWB) in more detail, defining it as a construct which focuses on ‘hedonic elements of life’,²⁰ like positive feeling, lack of negative feeling and overall satisfaction with life.²¹ SWB is proposed to consist of two components. The first is described as the ‘cognitive dimension’ and consists of the individual’s perception of their own life.²² The second is referred to as the ‘affective dimension’ or ‘emotional wellbeing’ and refers to the presence of positive and negative moods.²³ Subjective wellbeing ‘by definition, focuses on private and phenomenal characteristics of the human experience’.²⁴

Others propose that wellbeing is a more complex concept and define it as psychological wellbeing (PWB).²⁵ PWB is described as a ‘eudaimonic approach’ to subjective wellbeing.²⁶ Eudaimonist philosophers²⁷ believed that ‘eudaimonia’ was the highest form of good for human beings, and that it should constitute their universal, ultimate goal.²⁸ The word is roughly translated as ‘happiness’ or ‘welfare’, but is perhaps more accurately described as ‘human flourishing’, or a state of wellbeing.²⁹ To achieve eudaimonia a person must strive for important goals which extend beyond the hedonic pursuit of personal pleasure. PWB focuses on achieving meaning via the pursuit of activities that extend beyond the self. When defined as PWB, wellbeing does include subjective components, but it is also connected to more complex constructs such as personal autonomy, relationships with others, and feelings of mastery and purpose.³⁰

Michalos adopts a definition of wellbeing that extends beyond both SWB and PWB to include measures of objective wellbeing (OWB).³¹ He proposes that ‘in very broad strokes one may think of the quality of

²⁰ Omer Faruk Simsek, ‘Happiness Revisited: Ontological Well-Being as a Theory-Based Construct of Subjective Wellbeing’ (2009) 10 *Journal of Happiness Studies* 505, 506.

²¹ Ibid; Penelope Watson, ‘Using Peer Assisted Learning to Develop Resilient and Resourceful Learners’ in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 120, 121.

²² Simsek, above n 20, 506; Watson, above n 21, 121.

²³ Ibid.

²⁴ Simsek, above n 20, 506.

²⁵ Ibid.

²⁶ European Commission, *Eurostat Feasibility Study for Wellbeing Indicators – Task 4: Critical Review* <http://ec.europa.eu/eurostat/documents/118025/118135/Feasibility_study_Wellbeing_Indicators.pdf/2475816b-9e4f-44e4-9ebf-2cd05762df77>; Watson, above n 21, 121.

²⁷ Such as Socrates, Aristotle and Plato; Michalos, above n 19, 9.

²⁸ Patrick Ouma Nyabul and Joseph Wanyama Situma ‘The Meaning of Eudemonia in Aristotle’s Ethics’ (2014) 2(3) *International Journal of Philosophy and Theology* 65, 65.

²⁹ Ibid 66.

³⁰ Edward L Deci and Richard M Ryan, ‘Hedonia, Eudaimonia, and Well-Being: An Introduction’ (2008) 9 *Journal of Happiness Studies* 1, 4.

³¹ Michalos, above n 19, 4.

life or wellbeing of an individual or community as a function of the actual conditions of that life and what an individual or community makes of those conditions.’³² It appears that some individuals and governments in western society concur, accepting that a range of objective factors, such as health, shelter and education influence people’s wellbeing.³³

While dialogue about wellbeing has been plentiful, there has been no consensus regarding what might constitute the most significant driver of wellbeing, and the focus appears to shift through time and context. The Great Depression in the 1930s catalysed broad international dialogue about the nature of wellbeing, and in particular the economic wellbeing of countries.³⁴ Gross Domestic Product (GDP) was offered as a measure of the economic size and growth of countries, and it became a heavily utilised indicator for measuring national productivity.³⁵ However, while it is still generally regarded as a valuable means of measuring production, critics claim that GDP has been conflated with the concept of the objective wellbeing of a society.³⁶ In the 1970s, Richard Easterlin (1973) published research that provoked wide examination due to the contradictory nature of his findings.³⁷ He found that, for individuals, increased wealth was correlated with improved wellbeing.³⁸ He also found that wealthier countries did not necessarily experience improved wellbeing.³⁹ Put simply, at the individual level money appeared to ‘buy happiness’. However, at a national level, the evidence indicated that wealth does not improve wellbeing. He observed that ‘In the United States, the average level of happiness in 1970 was not much different from that in the late 1940’s, though the average income ... could buy over 60 per cent more’.⁴⁰ The research became referred to as the ‘Easterlin paradox’.⁴¹ Subsequent research suggested that it is not wealth per capita but income distribution which might account for the paradox.⁴² That is, where there is a large ‘income gap’ in countries, wellbeing

³² Ibid.

³³ Talina Drabsch, ‘Measuring Wellbeing’ (Briefing Paper No 4, NSW Parliamentary Research Service, Parliament of New South Wales, 2012) 4; Organisation for Economic Cooperation and Development, *How’s Life? Measuring Wellbeing* (OECD Publishing, 2011) <<http://dx.doi.org/10.1787/9789264121164-en>>; Australian Centre on Quality of Life, *Australian Unity Wellbeing Index (2001 to Present)* <<http://www.acqol.com.au/projects#reports>>; United Nations Development Programme, *Human Development Index (HDI)* <<http://hdr.undp.org/en/content/human-development-index-hdi>>; John Hawkins, ‘The Four Approaches to Measuring Wellbeing’ in Andrew Podger and Dennis Trewin (eds), *Measuring and Promoting Wellbeing: How Important is Economic Growth?* (Australian National University Press, 2014) 191, 195.

³⁴ Drabsch, above n 33, 1.

³⁵ Ibid.

³⁶ Ibid 10.

³⁷ Ibid 12; Richard A Easterlin, ‘Does Money Buy Happiness?’ (1973) 30 *The Public Interest* 3.

³⁸ Easterlin, above n 37, 5.

³⁹ Ibid 7.

⁴⁰ Ibid.

⁴¹ Drabsch, above n 33, 7.

⁴² Ibid 14.

declines, implying that more egalitarian societies are healthier and happier. However, this interpretation of the paradox is not universally accepted, with other research indicating that economic growth is in fact correlated with improved wellbeing.⁴³

While there has been a strong focus on discussing the role of economics, other objective drivers of wellbeing have been explored, including health, education, work/life balance, housing, civic participation, personal security and environmental quality.⁴⁴ Michalos examined the evidence for the impact of education on wellbeing, noting that much turns on the how the terms ‘education’, ‘wellbeing’ and ‘happiness’ are defined.⁴⁵ Where the terms are narrowly defined, little direct correlation between education and wellbeing is found. However, where the terms are defined broadly, there appears to be a strong, indirect correlation.⁴⁶ That is, where education is understood to mean learning, rather than simply formal education, and happiness is defined in a way that aligns with the broad contemporary concept of wellbeing (as something more than ‘good mood’ or pleasure) education arguably ‘has an enormous influence on happiness’.⁴⁷

The challenge of defining wellbeing and the controversy regarding the evidence confirms that it is a complex concept, and that the study of wellbeing is challenging. Over recent decades, there has been a wide variety of wellbeing research, both internationally, and in Australia at both federal and state levels.⁴⁸ It appears that the research generally accepts a two-variable definition, which includes measures of both SWB and OWB. In Australia it has been suggested that researchers use a ‘dashboard’ style of analysis.⁴⁹ This includes understanding wellbeing as a construct comprised of multiple drivers, without ranking their relative importance.⁵⁰

In the Australian legal context, there has not been an explicit, shared conversation about how wellbeing is defined. However, the research indicates that a two-variable definition of wellbeing is broadly

⁴³ Ibid 13.

⁴⁴ Organisation for Economic Cooperation and Development, above n 33.

⁴⁵ Michalos, above n 19, 2.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ United Nations Development Program, *Human Development Report 2016* (2016) <<http://hdr.undp.org/en/>>; Drabsch, above n 33, 24–7; Australian Psychological Society, *Stress and Wellbeing: How Australians are Coping with Life* (2015) <https://www.headsup.org.au/docs/default-source/default-document-library/stress-and-wellbeing-in-australia-report.pdf?sfvrsn=7f08274d_4>; Mike Salvaris, ‘Measuring the Kind of Australia We Want: The Australian National Development Index, the Gross Domestic Product and the Global Movement to Redefine Progress’ (2013) 46 *Australian Economic Review* 78; Australian Centre on Quality of Life, above n 33; Romina Boarini, Alexandre Kolev and Allister McGregor, ‘Measuring Well-Being and Progress in Countries at Different Stages of Development: Towards a More Universal Conceptual Framework’ (Working Paper No 325, OECD Development Centre, November 2014) <https://www.oecd-ilibrary.org/development/measuring-well-being-and-progress-in-countries-at-different-stages-of-development_5jxss4hv2d8n-en>.

⁴⁹ Drabsch, above n 33, 41; Hawkins, above n 33, 195.

⁵⁰ Drabsch, above n 33, 17.

accepted. While the empirical studies often focus on measuring SWB through the use of psychometric scales, they generally consider other potential drivers of wellbeing including disposition factors,⁵¹ the law school environment⁵² and lifestyle factors.⁵³ The following broad, two variable definition is proposed as a foundation for prospective dialogue regarding law students and lawyers: *Wellbeing is a state of being comfortable, healthy and happy which is demonstrated by access to fundamental physical and psychological needs.*

In the absence of a clear, shared definition of wellbeing there is potential for misunderstanding between scholars who demonstrate a commitment to the psychological health of law students and lawyers. For example, Parker challenges wellbeing scholars for reacting with ‘alarm’ in response to flawed evidence.⁵⁴ In doing so, she focuses on the limitations of two specific psychometric screening tools. There is some danger that this, combined with her theory regarding an ‘individualising discourse’,⁵⁵ might create the impression that wellbeing scholars propose a narrow definition of wellbeing, or that they have failed to appreciate its complexity as a social construct. The methodologies cited in Parker’s article are appropriate where wellbeing is defined as SWB. Although Parker concedes that ‘[s]cholars ... who write on the lawyer wellbeing crisis do of course recognise the need for individual psychological distress to be understood in the context of social conditions’,⁵⁶ her critique appears to be at least partly contingent on the fact that they do not. It is hoped that proposing an explicit definition of wellbeing might promote collaborative dialogue amongst the diverse community of scholars who demonstrate a shared commitment to change.

A Wellbeing for Law Students and Lawyers: The Evidence

While the focus to-date has been on evidence-based research, the concept that a life in the law might have a negative impact on wellbeing is not novel. In the 1970s anecdotal evidence, experiential knowledge and thought experiments catalysed scholarly theory, prompting academics to propose that legal education might be harmful to students.⁵⁷ Although there is no consensus regarding what might

⁵¹ Daicoff, ‘Lawyer: Know Thyself: A Review of Empirical Research’, above n 1.

⁵² Larcombe et al, above n 6, 410; Larcombe and Fethers, above n 6, 391; O’Brien, Tang and Hall, ‘Changing Our Thinking’, above n 6, 150.

⁵³ *BMRI Report*, above n 6.

⁵⁴ Parker, above n 7, 1123.

⁵⁵ *Ibid* 1127.

⁵⁶ *Ibid* 1130.

⁵⁷ Karl N Llewellyn, *The Bramble Bush: On Our Law and its Study* (Oceana Publications, 1960) 116; John D Ayer, ‘Isn’t There Enough Reality to Go Around? An Essay on the Unspoken Promises of our Law’ (1978) 53 *New York University Law Review* 475, 476; Jerold S Auerbach, ‘What Has the Teaching of Law to Do with Justice?’ (1978) 53 *New York University Law Review* 457; In Nickolas J James, ‘A Brief History of Critique in Australian Legal Education’ (2000) 24 *Melbourne University Law Review* 965, 969, James proposes that Australian law schools began to feel the influence of the critical tradition a little later than in the United States, ie during the 1960s and ’70s.

account for the psychological distress that law students appear to experience, there are theories which speculate as to possible causes. Austrian psychologist Heider (1958) developed a theory of human behaviour called Attribution Theory which proposes that human behaviour is influenced by both internal characteristics and external influences.⁵⁸ Heider's theory offers a useful framework for conceptualising wellbeing discourse. According to Attribution Theory, internal characteristics, or *dispositional factors*, include things like personality traits and genetics. External influences, or *situational factors*, include things like family climate and social context.⁵⁹ Some scholars argue that dispositional factors are the source of distress for lawyers and law students.⁶⁰ The theory is that 'a life in the law' attracts a certain personality type, one that is vulnerable and predisposed to psychological distress. The argument is that happiness is perhaps 'not in a successful lawyer's line'.⁶¹ Daicoff (1996) explored whether law student psychological distress might be influenced by dispositional factors.⁶² She concluded that there was sufficient evidence to indicate a definite 'lawyer personality' and that this personality appeared to be one that makes law students and lawyers vulnerable to psychological distress.⁶³ While she believes dispositional factors contribute to law student distress, Daicoff conceded that lawyers face multiple stressors and that situational factors might also have an impact.⁶⁴ Daicoff proposes that a 'diathesis stress model',⁶⁵ which is a psychological theory that explains human behaviours as deriving from both dispositional and situational factors, might be applied to law student psychological distress.

Others contend that *situational factors* contribute to lawyer and law student distress.⁶⁶ Wellbeing discourse, critical legal theory and legal education scholarship each propose that legal education constitutes a situational factor which impacts on law student wellbeing. For at least fifty years, legal education scholars have lamented legal education's apparent success in delivering a dehumanised curriculum that submerges justice.⁶⁷ The theory is that the dominant teaching

⁵⁸ Fritz Heider, *The Psychology of Interpersonal Relations* (Psychology Press, 1958).

⁵⁹ *Ibid.*

⁶⁰ Daicoff, 'Lawyer: Know Thyself: A Review of Empirical Research', above n 1.

⁶¹ Seligman, Verkuil and Kang, above n 1, 36.

⁶² Daicoff, 'Lawyer: Know Thyself: A Review of Empirical Research', above n 1, 1341.

⁶³ *Ibid* 1416.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Some examples include: Ayer, above n 57; Auerbach, above n 57; Seligman, Verkuil and Kang, above n 1; Krieger, 'Institutional Denial', above n 1; Sheldon and Krieger, 'Does Legal Education Have Undermining Effects on Law Students?', above n 1; Sheldon and Krieger, 'Understanding the Negative Effects of Legal Education on Law Students', above n 1; Krieger, 'Human Nature as a New Guiding Philosophy', above n 1; Larcombe et al, above n 6; Larcombe and Fethers, above n 6.

⁶⁷ Some examples include: Ayer, above n 57; Auerbach, above n 57; Julian Webb, 'Being a Lawyer/Being a Human Being' (2002) 5 *Legal Ethics* 130; Julian Webb, 'The "Ambitious Modesty" of Harry Arthur's Humane Professionalism' (2006) 44 *Osgoode Hall Law Journal* 119; Mertz, above n 1; Vanessa Merton, 'How Derrick

paradigms focus on analysis, argument and competition to such an extent that legal educators often forget that the whole point of the law is to achieve a collective ‘human enterprise’.⁶⁸ In the 1970s, Auerbach (1978) described the evolution of legal education, explaining the rise of rationalism and empiricism as powerful paradigms which have defined our dominant pedagogies in law schools.⁶⁹ He observed general malaise and demoralisation in his students, and wondered how to respond to those who clearly ‘yearned to reconcile craft and conscience’.⁷⁰ Ayer (1978) lamented that law had allowed itself to be ‘shunted into a backwater of thought’⁷¹ operating with ‘shop worn intellectual merchandise’,⁷² leaving no ‘conceptual framework for understanding the law as an essentially human enterprise’.⁷³ Llewellyn (1960) described the law school process for students in the following terms:

The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anaesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyse coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of law.⁷⁴

Kennedy (1982) in his radical polemic on legal education, critiqued law schools for perpetuating oppressive hierarchies.⁷⁵ In evaluating legal education, and in particular the institutional proclivity for summative assessment techniques, he concluded that ‘This is silly, looked at as pedagogy. But it is more than silly when looked at as ideology’.⁷⁶

Contemporary legal education scholars concur. Webb (2006) called for ‘humane professionalism’ in legal education, proposing a new generation of ‘smart’ law schools that emphasise the humanistic dimensions of the law.⁷⁷ In 2007, the Association of American Law

Bell Helped Me Decide to Become an Educator, Not Just a Faculty Member’ (2012) 2 *Columbia Journal of Race and Law Special Feature* 34; Paula Baron and Lillian Corbin, ‘Thinking Like a Lawyer/Acting Like a Professional: Communities of Practice as a Means of Challenging Orthodox Legal Education’ (2012) 46 *The Law Teacher* 100; Julian Webb, ‘A Tale of Two Cities: Reflecting on Lord Neuberger’s “Reforming Legal Education”’ in Chris Ashford, Nigel Duncan and Jessica Guth (eds), *Perspectives on Legal Education: Contemporary Responses to the Lord Upjohn Lectures* (Routledge, 2016) 24; Tony Foley and Stephen Tang, ‘On Being, Not Just Thinking Like, a Lawyer: Connections Between Uncertainty, Ignorance and Wellbeing’ in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 132.

⁶⁸ Ayer, above n 57, 479.

⁶⁹ Auerbach, above n 57, 460.

⁷⁰ *Ibid* 462.

⁷¹ Ayer, above n 57, 475.

⁷² *Ibid* 476.

⁷³ *Ibid*.

⁷⁴ Llewellyn, above n 57, 116, quoted in O’Brien, Hall and Tang, ‘No Time to Lose’, above n 6, 56.

⁷⁵ Duncan Kennedy, ‘Legal Education and the Reproduction of Hierarchy’ (1982) 32 *Journal of Legal Education* 591.

⁷⁶ *Ibid* 600.

⁷⁷ Webb, ‘The “Ambitious Modesty” of Harry Arthur’s Humane Professionalism’, above n 67, 152.

Schools chartered a Section on Balance in Legal Education, aiming to promote wellbeing for law students and lawyers by humanising the law.⁷⁸ In Australia, Kift (2008) observed impaired wellbeing in law students and proposed that ‘it is easy to speculate that many of the subtle messages about what counts for professional success, first inculcated in law school and then replicated in professional practice, might have something to answer for’.⁷⁹ Keyes and Johnstone (2004) described the law school experience as ‘individualised and isolating for both teachers and students’.⁸⁰ While observing significant improvements in legal education since the Pearce Report,⁸¹ they argued that the traditional model of legal education was still profoundly embedded in most Australian law schools.⁸² A related theory is that in encouraging students to ‘think like a lawyer’, law schools actively cause them psychological harm.⁸³ The underlying concept is that professional climate plays a fundamental and formative role in shaping personal identity. This has led scholars to propose that ‘for many persons at least they become their professional being’.⁸⁴ Applying this to legal education, scholars have proposed that in educating and preparing students for a life in the law, law schools are in fact ‘Courting the Blues’.⁸⁵ Critical legal theorists share these concerns and propose that the dominant model of legal education is in crisis. They argue that the legal classroom is a place of privilege and power that mirrors society and oppresses minorities.⁸⁶ While this perspective might be regarded as radical or confronting, the practical implications for legal education are simple and align with legal education theory and wellbeing discourse. Martinez (2015) argues that traditional legal education ignores best practice education principles⁸⁷ and proposes changes to legal education pedagogy that appear to align with recommended wellbeing interventions.

⁷⁸ The Association of American Law Schools includes a section entitled ‘Balance in Legal Education’: Association of American Law Schools, *Section on Balance in Legal Education*

<https://memberaccess.aals.org/eWeb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=9fb324e8-e515-4fd3-b6db-a1723feeb799>.

⁷⁹ Sally Kift, ‘21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law’ (2008) 18 *Legal Education Review* 1, 28.

⁸⁰ Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality and Prospects for the Future’ (2004) 26 *Sydney Law Review* 537, 542.

⁸¹ Ibid 554; Denis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Public Service, 1987).

⁸² Keyes and Johnstone, above n 80, 556.

⁸³ See, eg, Larcombe et al, above n 6, 408; Larcombe and Fethers, above n 6, 396; Foley and Tang, above n 67, 132.

⁸⁴ Richard Wasserstrom ‘Lawyers as Professionals: Some Moral Issues’ (1975) 5 *Human Rights* 1, 15.

⁸⁵ As the title of the *BMRI Report* suggests, above n 6.

⁸⁶ See, eg, Kennedy above n 75; Carrie Menkel-Meadow, ‘Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School”’ (1998) 38 *Journal of Legal Education* 61; James, above n 57, 969–72; Sheila I Velez Martinez ‘Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom’ (2015) 90 *Chicago-Kent Law Review* 585.

⁸⁷ Martinez, above n 86, 587.

Over the last few decades, wellbeing researchers have chosen to explore the theory that legal education might have a negative impact on students using evidence-based research. The research frequently employs Self Determination Theory (SDT) as a framework for measuring wellbeing.⁸⁸ SDT is a subfield of positive psychology theory.⁸⁹ It begins with some basic assumptions about human nature. First, it assumes that people can function at either their ‘best’ or their ‘worst’.⁹⁰ At their ‘best’, optimally functioning people are engaged, proactive, curious, self-motivated, ‘agentic and inspired’,⁹¹ strive to learn, master new skills and ‘apply their talents responsibly’.⁹² At their ‘worst’, individuals function sub-optimally and are characterised by propensities to ‘reject growth and responsibility’,⁹³ and tendencies to be passive, indolent, apathetic, irresponsible and alienated from others.⁹⁴ Secondly, SDT assumes that social contexts can influence psychological functioning and that environments can foster or undermine human development, behaviour and wellbeing.⁹⁵

Psychologists Ryan and Deci (2000) describe SDT as:

An approach to human motivation and personality that uses traditional empirical methods while employing an organismic metatheory that highlights the importance of humans’ evolved inner resources for personality development and behavioural self-regulation.⁹⁶

SDT is more simply described as a human theory of thriving. It identifies three universal, basic psychological needs: autonomy, relatedness and competence.⁹⁷ The theory is that where these needs are met, humans will flourish. Conversely, where they are not met, psychological functioning will be impaired. The needs are considered to be so fundamental that they can be likened to a plant’s need for sunlight and water.⁹⁸ All human beings require regular experiences of autonomy, competence and relatedness to thrive.⁹⁹

⁸⁸ See, eg, Sheldon and Krieger, ‘Does Legal Education Have Undermining Effects on Law Students?’, above n 1; Sheldon and Krieger, ‘Understanding the Negative Effects of Legal Education on Law Students’, above n 1; Larcombe et al, above n 6.

⁸⁹ James Duffy, ‘Balance and Context: Law Student Well-Being and Lessons from Positive Psychology’ in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 145, 145.

⁹⁰ Richard M Ryan and Edward L Deci, ‘Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being’ (2000) 55 *American Psychologist* 68, 68.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Sheldon and Krieger, ‘Understanding the Negative Effects of Legal Education on Law Students’, above n 1, 885.

⁹⁸ Richard M Ryan, ‘Psychological Needs and the Facilitation of Integrative Processes’ (1995) 63 *Journal of Personality* 397, 410.

⁹⁹ Sheldon and Krieger, ‘Understanding the Negative Effects of Legal Education on Law Students’, above n 1, 885.

The empirical research in North America provides important context for this discussion, since it appears to have functioned as a foundation and impetus for Australian research. The North American research has consistently demonstrated impaired wellbeing for both law students and lawyers.¹⁰⁰ In the context of legal education, the work of Sheldon and Krieger¹⁰¹ has been particularly influential in inspiring the work of Australian wellbeing scholars. Krieger (1998) proposed the theory that legal education is an objective driver of wellbeing.¹⁰² More specifically, he proposed that dominant beliefs and practices in legal education impact negatively on law student wellbeing and undermine students' psychological needs.¹⁰³ He also proposed that law schools were failing to effectively address the problem due to entrenched individual and institutional denial about the 'dark side of law school'.¹⁰⁴ Sheldon and Krieger set out to test his theory through a series of empirical studies, using SDT as a framework.

Sheldon and Krieger (2004) evaluated changes in subjective wellbeing for cohorts of law students at two different law schools, and reported increases in depression, decreases in life satisfaction and mood, shifts in values and motivations, general demoralisation and loss of purpose.¹⁰⁵ Each of these shifts was most dramatic during the first year of law school and was associated with decreased wellbeing.¹⁰⁶ Sheldon and Krieger (2007) confirmed their earlier findings.¹⁰⁷ In this study, they conducted a comparative cross-sectional study of two law schools.¹⁰⁸ The first school, LS1 was traditional; a conservative research-focused sandstone law faculty and was perceived by students to be more 'controlling' and less supportive of their autonomy. The second school, LS2, was described as a more progressive and less 'controlling' faculty.¹⁰⁹ It was found that all students experienced a decline in wellbeing over the three years at law school,¹¹⁰ and that student perceptions of the support they received from teachers and faculty were associated with wellbeing.¹¹¹ However, LS1 students experienced more significant declines in wellbeing.¹¹²

¹⁰⁰ Organ, above n 2. Organ summarised North American wellbeing research between 1984 and 2007 in his meta-analysis, which was published in 2011.

¹⁰¹ Sheldon and Krieger, 'Does Legal Education Have Undermining Effects on Law Students?', above n 1; Sheldon and Krieger, 'Understanding the Negative Effects of Legal Education on Law Students', above n 1.

¹⁰² Krieger, 'What We're Not Telling Law Students', above n 4.

¹⁰³ *Ibid* 27. Krieger was inspired by Maslow, an American psychologist best known for articulating a theory of psychological health which is based on a hierarchy of fundamental needs.

¹⁰⁴ Krieger, 'Institutional Denial', above n 1, 112.

¹⁰⁵ Sheldon and Krieger, 'Does Legal Education Have Undermining Effects on Law Students?', above n 1, 280–2.

¹⁰⁶ *Ibid*.

¹⁰⁷ Sheldon and Krieger, 'Understanding the Negative Effects of Legal Education on Law Students', above n 1, 883.

¹⁰⁸ *Ibid* 884.

¹⁰⁹ *Ibid* 893.

¹¹⁰ *Ibid* 889.

¹¹¹ *Ibid* 894.

¹¹² *Ibid* 883.

Mertz (2007) conducted an anthropological linguistic study of legal classrooms.¹¹³ Over the course of one semester, she conducted ethnographic case studies at eight American law schools, recording and analysing language in Contracts courses.¹¹⁴ She also conducted interviews with students and professors. Her findings were consistent across the schools and indicated that law schools train students to set aside moral and social context.¹¹⁵ She concluded that law students experience a 'profound moral shift'¹¹⁶ and become emotionally detached.¹¹⁷

Australian wellbeing research into law students and lawyers is found in the form of two major reports and a series of academic studies. In 2007, Beaton Consulting conducted an 'Annual Professions Survey'.¹¹⁸ The *Beaton Study* surveyed over 7500 Australian professionals using the Depression Anxiety and Stress Scale (DASS).¹¹⁹ The DASS is a self-administered questionnaire containing three subscales, designed to measure the magnitude of three emotional states: anxiety, depression and stress.¹²⁰ While the DASS is not a diagnostic tool, it has been developed to measure clinically significant emotional states, with the Psychology Foundation of Australia suggesting that it 'should thus meet the requirements of both researchers and scientist-professional clinicians'.¹²¹ The *Beaton Study* results indicated that professionals exhibited higher rates of depressive symptoms when compared to the general population.¹²² Lawyers were found to demonstrate the highest level of depressive symptoms, with almost 16 per cent of lawyers reporting moderate to severe depressive symptoms, compared to a range of approximately 6–10 per cent for other professionals and 6.34 per cent for the general population.¹²³

In Australia, it was the death of young lawyer Tristan Jepson which catalysed investigation into the wellbeing of law students and lawyers. Tristan was a young lawyer who suffered from clinical depression and took his own life. In 2006 Tristan's parents established the Tristan

¹¹³ Mertz, above n 1, 31.

¹¹⁴ Ibid 33.

¹¹⁵ Ibid 4.

¹¹⁶ Ibid 99.

¹¹⁷ Ibid 99. Referring to legal education, Mertz proposes that 'as students are drawn into this new discursive practice, they are drawn away from the norms and conventions that many members of our society, including future clients, use to solve conflicts and moral dilemmas. The seeds of citizen dissatisfaction with the law ... are sown already ... already we can begin to understand the schism that divides a distraught ... client, who is pouring out what she deems to be crucial emotional details, from her impatient attorney'.

¹¹⁸ *Beaton Study*, above n 6.

¹¹⁹ Ibid 2; S H Lovibond and P F Lovibond, *Manual for the Depression Anxiety Stress Scales* (Psychology Foundation, 2nd ed, 1995).

¹²⁰ Psychology Foundation of Australia, *Depression Anxiety Stress Scales* (26 July 2018) <<http://www2.psy.unsw.edu.au/dass/>>.

¹²¹ Psychology Foundation of Australia, *Overview of the DASS and its Uses* (10 November 2014) <<http://www2.psy.unsw.edu.au/dass/over.htm>>.

¹²² *Beaton Study*, above n 6, 1.

¹²³ Ibid 2.

Jepson Memorial Foundation.¹²⁴ The Foundation organises an annual series of lectures regarding psychological health and the legal profession. After the inaugural lecture, questions arose regarding the relevance of the North American wellbeing research and whether it was transportable to the Australian context.¹²⁵ The Foundation responded by instigating local research into the psychological health of law students and lawyers.¹²⁶

In 2009, the Brain and Mind Research Institute conducted a large nationwide study and produced the ‘Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers’ Report (*‘BMRI Report’*).¹²⁷ Altogether, 2421 law students (741) and lawyers (924 solicitors and 756 barristers) completed the International Depression Literacy Survey (IDLS).¹²⁸ The IDLS collects a range of data including: demographics; understanding of the symptoms of depression; personal experiences with depression; likelihood of seeking treatment; information seeking experiences; perceived needs for mental health support and attitudes to depression. The final section of the IDLS collects ‘general information’ or ‘lifestyle’ data’ which ‘pertain to the participants’ risk factors for depression’.¹²⁹ It includes the Kessler Psychological Distress Scale (K10),¹³⁰ which is a psychological screening tool used to ‘identify people in need of further assessment for anxiety and depression’.¹³¹ It consists of a ten-item questionnaire that is intended to measure current levels of distress and provide a global measure of distress based on symptoms experienced in the most recent four-week period.¹³² The Somatic and Psychological Health Report (SPHERE) is included to assess the ‘severity of psychological and/or somatic symptoms’.¹³³ The *BMRI Report* concluded that the wellbeing situation for law students and lawyers in Australia mirrors the American situation.¹³⁴ The report found that law students, solicitors and barristers demonstrate high to very high levels of psychological distress

¹²⁴ Tristan Jepson Memorial Foundation, recently renamed as ‘Minds Count Foundation’: Minds Count Foundation, *Who We Are* <<https://mindscount.org/about-us/who-we-are/>>.

¹²⁵ *BMRI Report*, above n 6, ii.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid* 5.

¹²⁹ *Ibid.*

¹³⁰ R Kessler and D Mroczek, ‘Final Versions of Our Non-Specific Psychological Distress Scale’ (Report, Survey Research Center of the Institute for Social Research, University of Michigan, 10 March 1994).

¹³¹ Drug and Alcohol Clinical Advisory Service, *The Kessler 10 – Information for Health Professionals* <<https://www.dacas.org.au/sites/default/files/inline-files/Kessler10-health-professionals.pdf>>.

¹³² Agency for Clinical Innovation, *Kessler Psychological Distress Scale (K10)* <https://www.aci.health.nsw.gov.au/__data/assets/pdf_file/0015/212901/Kessler_10_and_scoring.pdf>.

¹³³ Ian B Hickie et al, ‘The Assessment of Depression Awareness and Help-Seeking Behaviour: Experiences with the International Depression Literacy Survey’ (2007) 7 *BMC Psychiatry* 48, 50; Ian B Hickie et al, ‘Development of a Simple Screening Tool for Common Mental Disorders in General Practice’ (2001) 175 *Medical Journal of Australia* S10.

¹³⁴ *BMRI Report*, above n 6, 2.

symptoms¹³⁵ using the K10 scale. At the time of the *BMRI Report*, these levels were significantly higher than for the general population. The results also indicated high levels of self-reported depression.¹³⁶

At Melbourne Law School Larcombe et al (2008) conducted mixed methods research, surveying samples of LLB and JD students. The survey instrument included the DASS-21, Ryff's Psychological Wellbeing Scale (PWBS), and open-ended questions regarding student experience and awareness of support services.¹³⁷ Focus group discussions (FGDs) were organised to supplement the qualitative and quantitative survey results.¹³⁸ The DASS-21 results were found to align with both the ANU and BMRI Report results, with around 30 per cent of students experiencing symptoms of psychological distress.¹³⁹ The PWBS was included in the study as a complement to the DASS-21.¹⁴⁰ While the DASS measures negative psychological health symptoms, the PWBS measures elements of 'positive functioning that encompass wellness'¹⁴¹ including self-acceptance, personal growth, purpose in life, positive relationships with others, environmental mastery and autonomy.¹⁴² The results indicated that student wellbeing appeared to be compromised in terms of environmental mastery, sense of autonomy and self-acceptance.¹⁴³ These factors were negatively correlated with the DASS-21 results,¹⁴⁴ indicating that student wellbeing might be improved if interventions focussed on improvements in these areas.¹⁴⁵ The open-ended survey answers and FGDs indicated that students identified common concerns including assessment and feedback,¹⁴⁶ teacher approachability and support,¹⁴⁷ and law school culture.¹⁴⁸ The qualitative results were interpreted to provide strong support for SDT as a framework for wellbeing research, again confirming the relevance of Sheldon and Krieger's research in the Australian context.¹⁴⁹

At the Australian National University (ANU) O'Brien, Tang and Hall (2011) explored the relationship between wellbeing and the legal curriculum.¹⁵⁰ They conducted surveys with cohorts of student at the beginning and the end of first year law school.¹⁵¹ The surveys included several psychometric tools including the DASS-21, the Rational-

¹³⁵ Ibid 11. The *BMRI Report* found that 35.2 per cent of Australian law students, 31 per cent of solicitors and 16.7 per cent of barristers demonstrated high to very high levels of psychological distress symptoms using the K10 scale.

¹³⁶ Ibid 14.

¹³⁷ Larcombe et al, above n 6, 412.

¹³⁸ Ibid 413.

¹³⁹ Ibid 416.

¹⁴⁰ Ibid 412; Carol D Ryff and Corey Lee M Keyes, 'The Structure of Psychological Well-Being Revisited' (1995) 69 *Journal of Personality and Social Psychology* 719. Larcombe et al, above n 6, 412.

¹⁴² Ibid 412–13.

¹⁴³ Ibid 417.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid 418.

¹⁴⁶ Ibid 425.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid 426.

¹⁴⁹ Ibid 429.

¹⁵⁰ O'Brien, Tang and Hall, 'Changing Our Thinking', above n 6, 151.

¹⁵¹ O'Brien, Tang and Hall, 'Changing Our Thinking', above n 6, 154.

Experiential Inventory (REI)¹⁵² and the Satisfaction with Life Scale (SWLS).¹⁵³ The REI is a questionnaire that is based on a theory by Epstein, who proposes that there are two ways of processing information.¹⁵⁴ The first is the rational system which is analytic, intentional conscious and deliberative. The second is the experiential system which is holistic, immediate and is based on intuition and emotion.¹⁵⁵ Both of these systems are believed to operate simultaneously and are regarded as effective in their own ways.¹⁵⁶ The SWLS is a five-item questionnaire designed to indicate levels of subjective wellbeing by measuring global judgements about satisfaction with life.¹⁵⁷ It was included to complement 'the DASS-21 by focusing on the positive part of the emotional spectrum'.¹⁵⁸

The DASS-21 results indicated that between the beginning and end of first year law school symptoms of depression and anxiety increased.¹⁵⁹ The results for end of year students were generally consistent with the statistics indicated by the *BMRI Report*.¹⁶⁰ It was also found that the SWLS scores decreased during first year.¹⁶¹ The REI results indicated that, while a propensity for rational thinking increased, the propensity for experiential thinking decreased.¹⁶² Lower levels of experiential thinking were found to be associated with higher levels of depressive symptoms at the end of first year law school.¹⁶³ These quantitative results were cross referenced with qualitative data obtained from a faculty-student dialogue retreat.¹⁶⁴ The conclusion confirmed support for Krieger's theory in the Australian context, with the authors concluding that 'our data strongly suggest that we cannot rule out the hypothesis that law study has a negative impact on wellbeing that begins in the first year'.¹⁶⁵

At the University of Adelaide Leahy et al (2010) assessed tertiary student distress levels across different disciplines including law, medicine, engineering and psychology.¹⁶⁶ A total of 955 students completed the K10 scale.¹⁶⁷ The K10 scores indicated that tertiary students were four times more at risk than the general population for an

¹⁵² O'Brien, Tang and Hall, 'Changing Our Thinking', above n 6, 154; Rosemary Pacini and Seymour Epstein, 'The Relation of Rational and Experiential Information Processing Styles to Personality, Basic Beliefs, and the Ratio-Bias Phenomenon' (1999) 76 *Journal of Personality and Social Psychology* 972, 982-7.

¹⁵³ O'Brien, Tang and Hall, 'Changing Our Thinking', above n 6, 156; Ed Diener et al, 'The Satisfaction with Life Scale' (1985) 49 *Journal of Personality Assessment* 71.

¹⁵⁴ O'Brien, Tang and Hall, 'Changing Our Thinking', above n 6, 155.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* 156.

¹⁵⁸ *Ibid* 157.

¹⁵⁹ *Ibid* 161.

¹⁶⁰ *Ibid* 160.

¹⁶¹ *Ibid* 161.

¹⁶² *Ibid* 162.

¹⁶³ *Ibid* 163.

¹⁶⁴ *Ibid* 168.

¹⁶⁵ *Ibid.*

¹⁶⁶ Leahy et al, above n 6, 608.

¹⁶⁷ *Ibid* 609.

anxiety or depressive disorder, and that students enrolled in non-health disciplines such as law and engineering demonstrated a higher risk than those enrolled in health disciplines.¹⁶⁸

At Monash University Faculty of Law Lester, England and Antolak-Saper (2011) used the DASS-42 and other psychometric tests to examine the psychological journey of first year Bachelor of Law students.¹⁶⁹ At the start of their first year of study 354 students were surveyed, and 331 of that sample were surveyed again at the end of that year. These data indicated that there was a significant increase in depressive symptoms from the beginning to end of first year law school.¹⁷⁰

At Melbourne Law School Larcombe and Fethers (2012) surveyed 231 students to empirically investigate a broad range of factors which are potentially associated with psychological distress.¹⁷¹ Their literature review suggested that elevated levels of psychological distress for law students might be associated with dispositional factors,¹⁷² environmental factors in law schools¹⁷³ and general stressors affecting young people, including uncertain job prospects.¹⁷⁴ The survey included the DASS-21 and the PWBS, and collected demographic data.¹⁷⁵ It included questions about *participant related factors* including job prospects, current financial stress, self-expectations and sources of motivation.¹⁷⁶ Questions about *course related factors*¹⁷⁷ were also included, such as perceived autonomy support (PAS), course satisfaction and peer engagement.¹⁷⁸ Black and Deci's Learning Climate Questionnaire was modified to produce teacher and faculty autonomy support scales, which were then used to measure PAS.¹⁷⁹ The results confirmed that law students are more likely than the general population to demonstrate elevated symptoms of psychological distress.¹⁸⁰ Participant and course related factors were all found to be associated with increased psychological distress symptoms,¹⁸¹ with PAS indicated as a significant variable which was inversely associated with depression and anxiety symptoms.¹⁸² Larcombe and Fethers concluded that law student wellbeing is impacted by a range of

¹⁶⁸ Ibid 611.

¹⁶⁹ Lester, England and Antolak-Saper, above n 6, 48.

¹⁷⁰ Ibid.

¹⁷¹ Larcombe and Fethers, above n 6, 399.

¹⁷² Ibid 397.

¹⁷³ Ibid 392.

¹⁷⁴ Ibid 398.

¹⁷⁵ Ibid 401–2.

¹⁷⁶ Ibid 404

¹⁷⁷ Ibid.

¹⁷⁸ Ibid 403.

¹⁷⁹ Ibid. Larcombe and Fethers used a modified version of Black and Deci's Learning Climate Questionnaire as applied by Sheldon and Krieger in their research with US law students; Sheldon and Krieger, 'Understanding the Negative Effects of Legal Education on Law Students', above n 6, 888.

¹⁸⁰ Larcombe and Fethers, above n 6, 405.

¹⁸¹ Ibid 393.

¹⁸² Ibid 419.

variables.¹⁸³ They interpreted the results to confirm Krieger's theory in the Australian context,¹⁸⁴ and proposed SDT as the most powerful explanatory model for law student psychological distress.¹⁸⁵

At Melbourne Law School, Larcombe, Finch and Sore (2015) compared psychological distress levels across a diverse range of tertiary disciplines including law, engineering, veterinary medicine, science, arts and biomedicine.¹⁸⁶ 4711 students completed the DASS-21 scale. The results confirmed previous studies, indicating that law students report higher rates of psychological distress than age-matched samples from the general population.¹⁸⁷ However, the research also revealed that students in other disciplines experienced symptoms of psychological distress at similar, or in some cases, higher levels than law students.¹⁸⁸

Wellbeing scholars have concluded that scholarly theory and the aggregate anecdotal and empirical evidence provide sufficient impetus for further enquiry into law and wellbeing. Parker appears to reach a similar conclusion. While she queries the manner in which wellbeing scholars have interpreted and reported the statistics, she concedes that there is sufficient evidence regarding law student and lawyer psychological distress to warrant action. Parker is careful to state that her article is 'not intended to provide ammunition for "naysayers" who might deny the need to be concerned about lawyer and law student wellbeing at all'.¹⁸⁹ It appears that even the most determined analysis supports the conclusion that the evidence is sufficiently robust to demonstrate that law students are distressed, and that plausible interventions are indicated.

III PARKER ON 'PANIC'

Although Parker concedes that law students and lawyers are distressed, she is convinced that wellbeing scholars have reacted with 'alarm'¹⁹⁰ and diagnosed impaired wellbeing as an individual problem. She contends that this is leading them to ignore the potential impact of social, political and economic factors.¹⁹¹ Parker's article is divided into two Parts. The first Part focuses on challenging the Australian empirical wellbeing research, while the second Part explains her views based on moral panic theory. In the first Part, Parker reviews seven wellbeing studies, and she relies primarily on this sample to support her

¹⁸³ Ibid 393.

¹⁸⁴ Ibid 426.

¹⁸⁵ Ibid 394.

¹⁸⁶ Wendy Larcombe, Sue Finch and Rachel Sore, 'Who's Distressed? Not Only Law Students: Psychological Distress Levels in University Students Across Diverse Fields of Study' (2015) 37 *Sydney Law Review* 243.

¹⁸⁷ Ibid 258.

¹⁸⁸ Ibid 264.

¹⁸⁹ Parker, above n 7, 1107. Parker states that 'there certainly is evidence that there is widespread and significant psychological distress among law students and lawyers'.

¹⁹⁰ Ibid 1106.

¹⁹¹ Ibid 1107.

contentions throughout the article.¹⁹² Parker suggests that ‘the *Beaton Study* and *BMRI Report*, and some of the studies that have followed each have methodological limitations’.¹⁹³ This statement alone is uncontroversial, since each of the studies she refers to explicitly acknowledge their methodological limitations.¹⁹⁴ However, Parker moves from this general observation to an explicit criticism of the research methodology based on three specific grounds: use of psychological distress scales; sampling techniques; and proving a causal link between law and psychological distress.¹⁹⁵

A Using Psychological Distress Scales in Survey Research

First, Parker claims that wellbeing commentators and scholars are using psychometric tools, namely the DASS and K10 Scales, to imply ‘categorical clinical conclusions’.¹⁹⁶ Parker observes that both scales are intended as screening tools, not diagnostic tools.¹⁹⁷ She notes that while the DASS results can be reported numerically or categorically,

¹⁹² Ibid 1008–110.

¹⁹³ Ibid 1104

¹⁹⁴ Ibid 1115. Parker concedes that the following studies acknowledge the limitations of wellbeing research: *Beaton Study*, above n 6, 2: ‘To enable comparisons to be made in the Annual Professions Survey, the scores on the depression scale have been interpreted in the form of severity ratings ranging from normal to moderate or severe. It is important to note that high scores on the depression scale (i.e. moderate or severe) would not alone indicate a clinical diagnosis of depression, further assessment would be required.’; *BMRI Report*, above n 6, 4: ‘One factor that must be borne in mind concerns the extent to which the three samples are representative of their populations’; *BMRI Report*, above n 6, 6: ‘It is important to note here the nature of the measures of depression, distress and other mental illnesses used in this survey ... the K-10 and SPHERE surveys do not lead to a diagnosis of depression or any other mental illness. Instead, the K-10 and SPHERE give an estimate of the risk that a person with a particular score is suffering from a mental illness, including depression and anxiety. However, they do not confirm any particular diagnosis, nor do they clearly establish the existence of any mental illness’; Leahy et al, above n 6, 614: ‘All of the studies were cross sectional rather than longitudinal, thus the findings could be affected by cohort effects’; O’Brien, Tang and Hall, ‘Changing Our Thinking’, above n 6, 168: ‘of course we have to be cautious about our results, even on top of our caveats about causation and correlation’; O’Brien, Tang and Hall, ‘Changing Our Thinking’, above n 6, 167: ‘while we cannot conclude that the first year of law school caused these changes ... the changes raise important questions’; Lester, England and Antolak-Saper, above n 6, 49: ‘Caution needs to be taken in interpreting correlational data and more investigation is required to adequately interpret the relationships that have been found’; Bergin and Jimmieson, above n 6, 438: ‘The present study had a number of strengths ... Despite these strengths there are a number of limitations’. Bergin and Jimmieson discuss a range of potential limitations including self-selection bias, representative sampling and generalisability; Larcombe et al, above n 6, 413: ‘As there are a number of limits to the information collected through voluntary, self-report surveys, four focus group discussions (‘FGDs’) were organised to supplement the survey-based quantitative and qualitative data’; Larcombe et al, above n 6, 430: ‘notwithstanding the limits of a cross-sectional, voluntary survey methodology, the findings of our study point to the need for measures specifically designed to improve levels of psychological wellbeing among law students’.

¹⁹⁵ Parker, above n 7, 1113.

¹⁹⁶ Ibid 1114.

¹⁹⁷ Ibid.

the creators of the scale recommend using numerical scores for research purposes. Citing the DASS website, she argues that it is ‘generally not appropriate, in reporting survey-based research using either of these scales, to use categories or labels ... that might sound like a clinical diagnosis’.¹⁹⁸

The assumption underlying the DASS is that emotional syndromes are dimensional rather than categorical.¹⁹⁹ The creators believe that depression, anxiety and stress exist along a continuum of severity.²⁰⁰ They view the difference between a ‘normal’ individual and one who is clinically diagnosed with a psychological disorder as one of degree.²⁰¹ The DASS produces raw numerical scores for anxiety, depression and stress.²⁰² In the context of a research sample, these scores can be compared to scores for the general population (the normative sample) through the use of inferential statistics.²⁰³ The creators clearly prefer this mode of reporting, since they view the use of categories such as ‘mild’ ‘moderate’ and ‘severe’ as necessarily arbitrary in the context of dimensional syndromes.²⁰⁴ However, where a medical professional is dealing with a single client, they concede that conventional categories might be useful, since they provide some indication of where an individual is positioned with reference to the general population.²⁰⁵ Therefore, categories based on arbitrary cut-off scores are provided to assist with clinical assessment.²⁰⁶ Parker’s understandable concern is that using the categorical labels to report survey data is problematic since they may exaggerate the ‘diagnostic conclusiveness’²⁰⁷ of survey results.

Parker’s caution about reporting is important. For example, in the context of the *Beaton Study* it is clear that there has been ‘slippage in language’²⁰⁸ and ‘short form reporting’²⁰⁹ which might imply a clinical diagnosis. However, her critique does rely on a limited sample. To support her argument, she includes one quote from the *Beaton Study* and one from a paper presented at a Bar Association conference in Queensland.²¹⁰ A further reference is made in one footnote to the ANU research, where she suggests that, although the authors have been careful with their reporting, their results might ‘still be misread’.²¹¹ The danger in Parker’s critique is that wellbeing commentators and

¹⁹⁸ Ibid 1115.

¹⁹⁹ Psychology Foundation of Australia *Overview of the DASS and its Uses*, above n 121.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Psychology Foundation of Australia, *DASS FAQ (Frequently Asked Questions)* (10 November 2014) <<http://www2.psy.unsw.edu.au/dass/DASSFAQ.htm>>.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Parker, above n 7, 1114.

²⁰⁸ Ibid 1115.

²⁰⁹ Ibid 1116.

²¹⁰ Ibid.

²¹¹ Ibid.

wellbeing scholars are effectively ‘tarred with the same brush’. Although Parker concedes that ‘The academic studies that use the DASS are more careful — they all report the results in terms of categories but also report scores’,²¹² this is immediately qualified by the claim that ‘They show varying degrees of carefulness in reporting’,²¹³ rendering it faint praise in the general context of the article.

While it is true that the DASS categorical labels were originally developed to assist with diagnosis by clinical assessment,²¹⁴ it is difficult to understand why their use is problematic in the context of responsible reporting. Provided that researchers understand the nature of the DASS as a screening tool, and do not conflate labels with clinical categories, there is no reason that it is ‘inappropriate’ to include categorical results for descriptive purposes. The *Beaton Study* and *BMRI Report* clarify that the psychological scales used are screening, not diagnostic, tools.²¹⁵ Each of the academic studies referred to in Parker’s Table 1, and in this article, explicitly acknowledge their methodological limitations.²¹⁶ And, with the exception of the *Beaton Study*, each of the studies referenced also include additional methods for data collection. Wellbeing research is not limited to quantitative measurements of negative emotional symptoms using two psychometric scales.

B Sampling

Parker’s second argument regards the sampling techniques used in the *Beaton Study* and *BMRI Report*. She observes that these studies use voluntary, self-selected convenience samples.²¹⁷ She contends that because of this, the results ‘do not support generalisation to law students’,²¹⁸ or the general population. While she concedes that the academic studies ‘work with much better samples’,²¹⁹ she notes the studies are still based on voluntary samples, which of course may be vulnerable to self-selection bias.²²⁰

While Parker’s critique of the sampling techniques is reasonable, it is difficult to imagine how wellbeing researchers might obtain randomised probability samples. In law schools in particular, ethics approval will preclude anything beyond voluntary sampling. Wellbeing research will always present with methodological challenges. The limitations presented by voluntary sampling have been considered in

²¹² Ibid 1115.

²¹³ Ibid.

²¹⁴ Psychology Foundation of Australia, *DASS FAQ (Frequently Asked Questions)*, above n 203.

²¹⁵ *Beaton Study*, above n 6, 2; *BMRI Report*, above n 6, 4.

²¹⁶ Leahy et al, above n 6, 614; O’Brien, Tang and Hall, ‘Changing Our Thinking’, above n 6, 167–8; Lester, England and Antolak-Saper, above n 6, 49; Bergin and Jimmieson, above n 6, 438; Larcombe et al, above n 6, 413; Larcombe et al, above n 6, 430.

²¹⁷ Parker, above n 7, 1116.

²¹⁸ Ibid 1118.

²¹⁹ Ibid 1119.

²²⁰ Ibid.

the wellbeing literature. Methodological challenges should not deter academic enquiry, but rather they should inform creative and strategic research. Wellbeing scholars have explicitly acknowledged the limitations of their methods, have interpreted their results with caution, and have implemented appropriate validation procedures.

C *Legal Education as a Cause of Psychological Distress*

Parker's third argument is that the *Beaton Study* and *BMRI Report* have been cited to prove that the experience of law school and legal practice *cause* psychological distress.²²¹ She argues that the evidence is not sufficiently robust to establish a *causal connection*, and that the problem of psychological distress is not unique to law students and lawyers.²²² An exploration of Parker's causation critique reveals the point at which she and wellbeing scholars divide. Figure One (see over page) illustrates the relative positions of Parker and other wellbeing scholars.

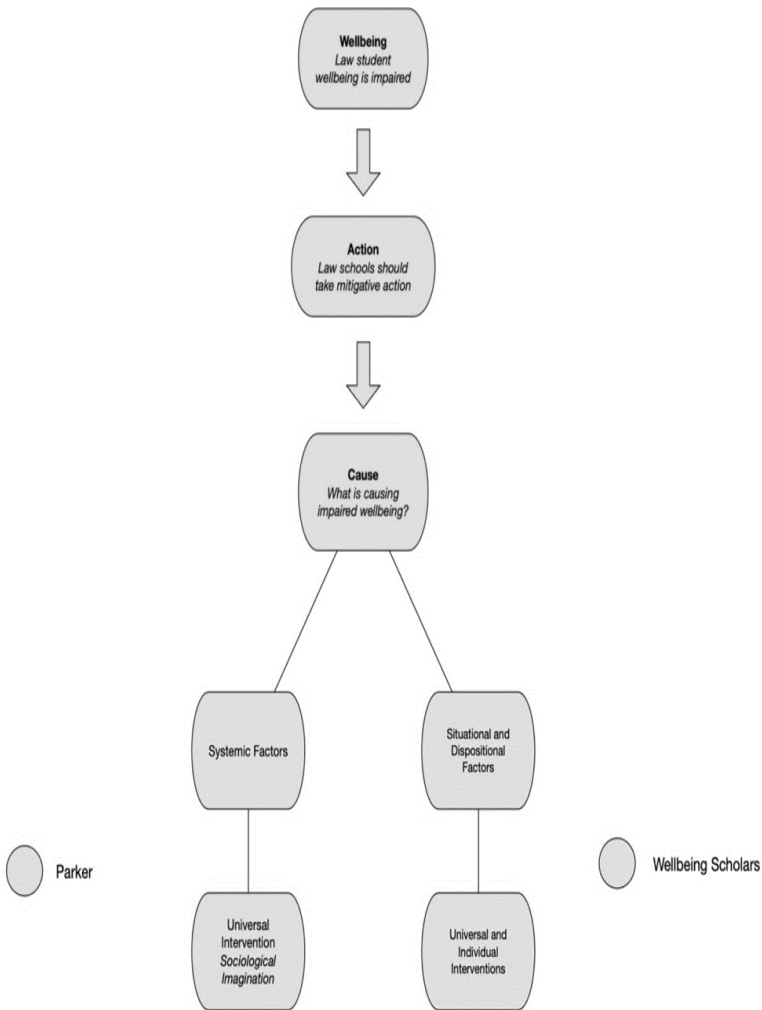
As Figure One demonstrates, the general consensus is that law student wellbeing is impaired, and that law schools ought to take action to address the problem. Clearly the aggregate evidence is sufficiently persuasive to indicate that a significant proportion of law students suffer from psychological distress. Parker and other wellbeing scholars are aligned to this point. In this sense there is no need for empirical samples to support inferences between law students/lawyers and the general population. Any level of psychological distress arguably constitutes sufficient evidence for action on the basis of professionalism, fiduciary duty or popular morality.²²³ It is clear that Parker and other wellbeing scholars are united in this perspective.

²²¹ Ibid 1120.

²²² Ibid.

²²³ Watson, above n 21, 122 discusses whether law teachers and law schools are obliged to take action in response to the evidence about the 'hazards legal education poses to wellbeing'; Rachael Field, 'Harnessing the Law Curriculum to Promote Law Student Well-Being, Particularly in the First Year of Legal Education' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 181, 186.

Figure One
Wellbeing and Law Students



The disagreement between Parker and wellbeing scholars pertains to what is causing psychological distress for law students and lawyers, and which interventions will most effectively address the problem at hand. While Parker agrees that law students are distressed,²²⁴ she is not persuaded that the evidence supports the conclusion that they are more distressed than other young, tertiary students.²²⁵ Therefore, she queries whether legal education, or a life in the law, are plausible causative

²²⁴ Parker, above n 7, 1107.

²²⁵ Ibid 1120.

agents.²²⁶ Even if they are, she worries that the discourse is focusing disproportionately on individual diagnoses of wellbeing and mitigative interventions, at the risk of excluding other important drivers of wellbeing.²²⁷ Her theory is that wellbeing is strongly driven by objective, political factors.²²⁸ Consequently, she offers traditional legal ethics discourse as a universal intervention.²²⁹ In doing so, Parker positions herself in contradiction to other wellbeing scholars.²³⁰ However, this only occurs because she misinterprets their position. As Figure One illustrates, wellbeing scholars do not propose that legal education constitutes the sole, or even a primary cause, of psychological distress. While some might argue that the empirical evidence indicates that law students are uniquely distressed, others are more cautious, relying on scholarly theory, anecdotal and empirical evidence to argue that legal education may be one causative agent.²³¹

Despite the focus on empirical studies in her article, the disagreement between Parker and wellbeing scholars appears to be theoretical rather than empirical. While Parker criticises the way wellbeing scholars have interpreted data, she offers no empirical evidence to support her own contention, relying instead on sociological theory. Notably, Larcombe, Finch and Sore suggest that causes for psychological distress in law students extend beyond legal education.²³² Although their research is predicated on methods which Parker would be likely to query, it does provide retrospective support for her earlier hypothesis that there are systemic causes of stress impacting on law students. However, it also complements the idea proposed by other wellbeing scholars, which is that there are multiple potential causes for that distress, including dispositional and environmental factors. Wellbeing scholars recognise that, while decades of theory and research have provided meaningful insights, psychological distress in law students remains essentially idiopathic.²³³ Consequently, they propose

²²⁶ Ibid 1107.

²²⁷ Ibid 1105.

²²⁸ Ibid 1128.

²²⁹ Ibid 1130.

²³⁰ Ibid 1135. See, eg, this statement in Parker's conclusion: 'At its best, the wellbeing literature reframes and situates traditional professional ethical concerns at the individual psychological level and thus connects individuals' feelings and experiences with broader ethical concerns facing the profession.'

²³¹ Ibid 1130 where Parker concedes that 'An excellent example is Molly Townes O'Brien, 'Connecting Law Student Wellbeing to Social Justice, Problem-Solving and Human Emotions' (2014) 14 *QUT Law Review* 52'; see also, Larcombe et al, above n 6, 410; Larcombe and Fethers, above n 6, 391: 'it is important for law schools to know whether it is legal education per se that triggers or exacerbates law student distress, or whether some interaction of "external" sources of distress and personal characteristics mediates students' responses'; Helen M Stallman and James Duffy, 'Beyond the Curriculum: The Wellbeing of Law Students Within Their Broader Environment' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 192, 193.

²³² Larcombe, Finch and Sore, above n 186.

²³³ *BMRI Report*, above n 6, 43: 'In a situation such as the present one, where the precise causes of depression amongst law students and lawyers are not known, it is still possible to formulate policies and procedures which will be effective in reducing the negative outcomes of mental illness in the legal community'; Stephen Tang, 'Valuing

that theories regarding the cause of law student psychological distress be regarded as additive, rather than mutually exclusive. Therefore, for wellbeing scholars, debates regarding the causes for impaired wellbeing in law students are no longer a priority.

Again, while Parker's critique constitutes an important caution, the risk is that her criticism focuses on data derived from two psychological screening tools which measure subjective wellbeing. This misrepresents the positions of wellbeing scholars. These data constitute only part of the aggregate evidence on which they rely. They advocate for a broad range of interventions, including individual supports and universal interventions.²³⁴ While there has been a focus on legal education as a potential trigger for law student psychological distress, this is attributable to the fact that wellbeing scholars are aware that this is the area where law schools are most qualified to effect change.²³⁵

D *Moral Panic: Alert or Alarmed?*

Parker borrows the term 'moral panic' from criminology and social science.²³⁶ She describes it as a situation where mass media have traditionally 'amplified deviance and created an opportunity for moral entrepreneurs ... to create hostility'²³⁷ to a person or a group of people. In a classic moral panic, the reaction is out of proportion to the perceived threat. In the context of law, Parker argues that the proliferation of wellbeing studies and programmes and a 'sense of alarm'²³⁸ about law student and lawyer psychological distress suggest 'something approaching a "moral panic"'.²³⁹ Parker contends that scholarly discourse may be 'coalescing around the diagnosis of a crisis of psychological wellbeing ... and a series of programmes aimed at improving lawyer wellbeing'.²⁴⁰ Her concern is that this creates an 'individualising discourse'²⁴¹ which focuses on psychological distress as a clinical issue and places responsibility for the problem with individuals, effectively indemnifying the profession from addressing

Persons and Communities in Doing Wellness for Law Well' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 8, 15: 'Every underlying theory is incomplete, and technically speaking, false'; Paula Baron, 'The Persistence of Distress' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 37, 39: Baron discusses 'The Elusive Nature of Cause' for psychological distress; Rachael Field, above n 223, 182; Wendy Larcombe, 'Towards an Integrated Whole-School Approach to Promoting Law Student Wellbeing' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 24, 27.

²³⁴ Stallman and Duffy, above n 231, 198.

²³⁵ Larcombe et al, above n 6, 410.

²³⁶ Parker, above n 7, 1124.

²³⁷ Ibid 1123.

²³⁸ Ibid 1124.

²³⁹ Ibid 1123.

²⁴⁰ Ibid 1124.

²⁴¹ Ibid 1127.

systemic problems.²⁴² She suggests that the psychological distress that law students and lawyers experience is in fact a manifestation of ‘growing commercialisation and resultant employment uncertainty’.²⁴³

Parker’s moral panic theory constitutes an explicit critique of wellbeing scholars and commentators. Her proposition that moral panic is ‘not necessarily a pejorative label’²⁴⁴ is not entirely persuasive. While it is beyond the scope of this article to explore these arguments in detail, it is worth noting briefly that wellbeing scholars query the application of moral panic theory to wellbeing research. It has been proposed that the concept of moral panic is ‘inherently judgmental, normative and biased’.²⁴⁵ It is also arguable that terms like ‘panic’ and ‘alarm’ might reify certain false dichotomies.²⁴⁶ An evaluation of the empirical evidence which is confined to quantitative empirical data, and which then proposes that wellbeing scholars are reacting with ‘panic’ and ‘alarm’, potentially invokes gendered dualisms, rational/irrational, thinking/feeling, intellectual/emotional.²⁴⁷ Not only is this counterproductive in terms of collaborative discourse, but as feminist theorists observe, ‘sometimes it is rational to be emotional, and ... “objective” claims are inevitably subjective’.²⁴⁸

Parker’s critique is contingent on two primary propositions. First, that wellbeing scholars are overreacting in response to ‘imperfect statistics’.²⁴⁹ Secondly, that in critiquing the adversarial nature of legal education and practice wellbeing scholars are potentially ‘demonising’ the important public function of lawyers.²⁵⁰ Parker’s critique is important, since the contemporary preference for empirical evidence may indeed have focused the discourse on elements of subjective wellbeing. However, there is little evidence to support her theory that wellbeing scholars are reacting with ‘panic’ and ‘alarm’. Parker’s theory challenges legal education theory, critical legal scholarship and an empirical evidence base which is more rigorous than her article suggests.

Parker’s second argument is more nuanced. She observes that wellbeing scholars have focussed on the connection between psychological distress and legal education or a life in the law.²⁵¹ Elaborating on her moral panic theory, she cautions that ‘there is a danger in the wellbeing literature that the public professional role of lawyers as adversarial advocates and guardians of justice is the thing that is demonised’.²⁵² It is true that wellbeing scholars have explored

²⁴² Ibid.

²⁴³ Ibid 1125.

²⁴⁴ Ibid 1105.

²⁴⁵ Stanley Cohen, ‘Whose Side are We On? The Undeclared Politics of Moral Panic Theory’ (2011) 7 *Crime Media Culture* 237, 237.

²⁴⁶ Menkel-Meadow, above n 86, 62.

²⁴⁷ Ibid 74.

²⁴⁸ Ibid.

²⁴⁹ Parker, above n 7, 1123.

²⁵⁰ Ibid 1130.

²⁵¹ Ibid 1104.

²⁵² Ibid 1130.

this connection. It has been proposed that law schools encourage, or even require, students to define people according to legal rights, and to solve problems by linear application of rules to those rights, using a competitive approach.²⁵³ Krieger refers to this phenomenon of ‘thinking “like a lawyer”’²⁵⁴ as a ‘failing paradigm’ in legal education. Larcombe et al refer to it as the ‘analytical-adversarial cognitive paradigm’.²⁵⁵ The theory is that legal education produces, or nurtures, individuals who are highly analytical and competitive. Psychologists agree, with Seligman, Verkuil and Kang describing the adversarial system as a traditional zero-sum game.²⁵⁶ They identify the adversarial process as one which is filled with negative emotions which are likely to demoralise participants.²⁵⁷

Parker’s concern is that in critiquing the analytical-adversarial cognitive paradigm wellbeing scholars are framing ‘public good (the adversary system) and personal satisfaction (lawyer wellbeing) as inherently themselves adversaries’.²⁵⁸ This is a concern which is shared by some wellbeing scholars. Seligman and Daicoff both contend that training students to ‘think like a lawyer’ is psychologically damaging, but they query whether it might constitute a necessary evil. They note that the notion of ‘adversarialism’ is entrenched in legal process and wonder if it might be an essential ingredient in the administration of the legal system.²⁵⁹ The theory is that perhaps students must be trained to ‘think like a lawyer’ in order to uphold our justice system. That is, that legal education needs to produce professionals who are objective and detached so that they can act as impartial agents for justice.

Any argument which relies on some notion of sacrificing psychological health in the pursuit of a public good requires rigorous examination. Leaving aside the question of what fiduciary and moral obligations law schools and legal educators might have to act when confronted with evidence of psychological distress,²⁶⁰ there is also the practical question of whether wellbeing scholars believe that this conception of the lawyer as a zealous, analytical advocate is necessary or optimal. While wellbeing scholars might critique the ‘thinking like a lawyer’ paradigm,²⁶¹ this does not necessarily constitute a criticism of the public role of the lawyer, as Parker suggests. The paradigm has been examined by scholars who argue that alternative conceptions of the lawyer are possible. Even back in the 1970s, Auerbach critiqued the concept of client-centred lawyering, arguing that it facilitates a profession where humanity can be hidden under a ‘cloak of value-free

²⁵³ Seligman, Verkuil and Kang, above n 1, 47; Krieger, ‘Institutional Denial’, above n 1, 117.

²⁵⁴ Krieger, ‘Institutional Denial’, above n 1, 117.

²⁵⁵ Larcombe et al, above n 6, 410.

²⁵⁶ Seligman, Verkuil and Kang, above n 1, 34.

²⁵⁷ *Ibid.*

²⁵⁸ Parker, above n 7, 1134.

²⁵⁹ Seligman, Verkuil and Kang, above n 1, 35; Daicoff, ‘Lawyer: Know Thyself: A Review of Empirical Research’, above n 1, 1411.

²⁶⁰ Watson, above n 21, 122; Field, above n 223, 186.

²⁶⁰ Parker, above n 7, 1120.

²⁶¹ Krieger, ‘Institutional Denial’, above n 1, 117.

neutrality'.²⁶² Contemporary scholars concur, proposing that alternative conceptions of the lawyer are needed and that legal education should reflect this possibility.²⁶³ Polikoff (1996) and White (1997) consider how we might accommodate lawyering for change through our traditional pedagogies.²⁶⁴ Krieger would no doubt view any argument that 'thinking like a lawyer' is necessary as a form of institutional denial about lawyer wellbeing:

It would be quite possible...to teach rigorous legal analysis in a manner that supplements rather than supplants a student's developed values, beliefs, and sense of self-a fact that often leads me to wonder whether we law teachers persist in exclusively valuing thinking 'like a lawyer' because of our own adeptness at it or comfort with it.²⁶⁵

Wellbeing scholars view the contemporary empirical evidence of psychological distress as providing potential for rich discourse regarding institutional responsibility,²⁶⁶ legal education pedagogy and change.²⁶⁷ They are eager to promote alternative visions of the lawyer, particularly teleological conceptions of lawyers which align with eudaimonic frameworks for psychological wellbeing.

IV CONCEPTUALISING WELLBEING DISCOURSE

Parker's proposed wellbeing intervention is to encourage law students and lawyers to engage their 'sociological imagination'²⁶⁸ through traditional legal ethics discourse. She argues that law students and lawyers can be encouraged to reconceptualise their personal issues as shared professional troubles which can be resolved through 'collective political, economic and social action'.²⁶⁹ She cites Martin Seligman as her case study for wellbeing discourse, contrasting three of

²⁶² Auerbach, above n 57, 457.

²⁶³ Paula O'Brien, 'Changing Public Interest Law: Overcoming the Law's Barriers to Social Change Lawyering' (2011) 36 *Alternative Law Journal* 82; Martinez, above n 86, 585; Prue Vines and Patricia Morgan, 'Contemplative Practice in the Law School: Breaking Barriers to Learning and Resilience' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 169, 177.

²⁶⁴ Nancy D Polikoff, 'Am I My Client? The Role Confusion of a Lawyer Activist' (1996) 31 *Harvard Civil Rights – Civil Liberties Law Review* 443; Lucie E White, 'The Transformative Potential of Clinical Legal Education' (1997) 35 *Osgoode Hall Law Journal* 603.

²⁶⁵ Krieger, 'Institutional Denial', above n 1, 125.

²⁶⁶ *Ibid.*

²⁶⁷ See, eg, Nick James, 'Dealing With Resistance to Change by Legal Academics' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 204, 204; Colin James, 'Resilient Lawyers: Maximizing Well-Being in Legal Education and Practice' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 108, 108; Molly Townes O'Brien, 'Connecting Law Students to Health and Wellbeing' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 158, 158.

²⁶⁸ Parker, above n 7, 1130.

²⁶⁹ *Ibid.*

his recommended interventions with alternative suggestions derived from legal ethics discourse.²⁷⁰ Seligman, Verkuil and Kang published an ‘essay’ entitled ‘Why Lawyers Are Unhappy’.²⁷¹ It offered psychological explanations for lawyer unhappiness, using positive psychology as a framework.²⁷² They proposed that lawyers are psychologically distressed for a range of reasons, including that lawyer disposition is inherently pessimistic, that they experience low decision latitude and are required to be adversarial.²⁷³ They recommended a variety of wellbeing interventions including ‘learned optimism’²⁷⁴ and promotion of ‘signature strengths’²⁷⁵ by employers. They also noted the highly competitive nature of law schools,²⁷⁶ explored the potential negative psychological impact of the Socratic method²⁷⁷ and recommended research into the impact of legal education pedagogy on students.²⁷⁸ Parker suggests that traditional legal ethics discourse can more aptly address wellbeing concerns. She proposes that inviting students to engage their sociological imagination encourages them to connect their personal troubles with broader public issues.²⁷⁹ With regard to Seligman’s claim about excessive adversarialism, she contends that this is a classic theme in legal ethics discourse, which has long invited discussion regarding the appropriate role of the lawyer, and the balance between individual needs and the public good.²⁸⁰ She argues that legal ethics discourse suggests ‘a much richer range of roles and associated ethics that lawyers can, do and should use beyond narrowly technical client service’.²⁸¹

Parker’s proposal that we encourage law students and lawyers to use sociological imagination offers promise as a universal wellbeing intervention. However, it is important to note that a focus on Seligman invites a cross-sectional view of wellbeing discourse. While Seligman might focus on individual interventions, contemporary scholars consider wellbeing in a broader context. As discussed above, wellbeing scholars are eager to encourage exploration of appropriate mechanisms for aligning legal education with justice, and legal practice with the public good. It is also regrettable that Parker’s proposed intervention is offered as a contrast or alternative to Seligman’s. Where the precise cause of impaired wellbeing remains unknown, arguably a

²⁷⁰ Ibid 1131.

²⁷¹ Seligman, Verkuil and Kang, above n 1, 33.

²⁷² Ibid 39.

²⁷³ Ibid 35.

²⁷⁴ Ibid 45.

²⁷⁵ Ibid 47.

²⁷⁶ Ibid 51.

²⁷⁷ Ibid; there has been dialogue regarding whether the Socratic method constitutes a signature pedagogy in the Australian context. For example, Morgan argues that it is used in Australia, although it is not identified under the Socratic ‘rubric’. She proposes that it used primarily as a reactive strategy to address non participation: Jenny Morgan, ‘The Socratic Method: Silencing Cooperation’ (1989) 1 *Legal Education Review* 151, 152.

²⁷⁸ Seligman, Verkuil and Kang, above n 1, 52.

²⁷⁹ Parker, above n 7, 1130.

²⁸⁰ Ibid 1133.

²⁸¹ Ibid 1135.

precautionary approach is appropriate, and a responsible strategy includes a range of individual and universal interventions.²⁸²

Looking to the future, it is important to make strategic research decisions that will contribute productively to wellbeing discourse. The history of legal education and wellbeing research provides a useful foundation which might inform future research priorities. Over the last fifty years, critiques of legal education have focused on potential deficiencies in dominant legal education pedagogies. Since the 1990s, wellbeing research has focused on measuring levels of psychological distress. Scholars and commentators have identified the need for more wellbeing research, including prospective, longitudinal studies into the ‘psychological careers’ of students.²⁸³ However, arguably limited insights will be derived from further resource intensive studies which use psychometric tests to evaluate distress levels in samples of law students and lawyers.²⁸⁴ As Parker confirms, there are clear methodological challenges associated with these studies. However, scholarly theory, empirical and anecdotal evidence all indicate that legal education potentially has a negative impact on student wellbeing. This suggests that further research into prevailing pedagogies is justified.

Duffy offers some insights which might inform strategic research priorities.²⁸⁵ He concedes that perhaps wellbeing scholars have gone too far with their critique of the dominant cognitive paradigms. He observes that ‘the phrase “thinking like a lawyer” has become a euphemistic “catch cry” for the almost schizoid detachment of feeling and affect from legal reasoning. It shouldn’t be.’²⁸⁶ Although Duffy believes that learning to ‘think like a lawyer’ can sometimes be beneficial, he believes that an alternative approach would be more productive.²⁸⁷ Duffy’s underlying point is that wellbeing discourse ought to begin to emphasise what law schools are doing well.²⁸⁸ He proposes a mechanism for promoting wellbeing through teaching dispute resolution.²⁸⁹ Duffy’s critique represents a narrative shift in wellbeing discourse. As he observes, if approximately 35 per cent of law students are distressed, approximately 65 per cent are not.²⁹⁰ His

²⁸² Stallman and Duffy, above n 231, 193.

²⁸³ *BMRI Report*, above n 6, 50–1; Larcombe and Fethers, above n 6, 425.

²⁸⁴ This research does not contend that data saturation has been achieved. There is certainly more scope for investigation as to the causes and manifestations of law student distress. However, having considered the themes and narratives literature, it seems reasonable to conclude other research priorities may contribute more productively to both wellbeing and legal education scholarship.

²⁸⁵ Duffy, above n 89, 145. Duffy suggests that we use positive psychology as a framework to focus on the things we do well as legal educators.

²⁸⁶ *Ibid.*

²⁸⁷ Foley and Tang, above n 67, 141 agree that the ‘thinking like a lawyer’ paradigm is not entirely without merit, and propose that it could be effectively modified. They propose that law schools ‘expand the idea of “thinking like a lawyer” to include pedagogies which will assist students to negotiate the inevitable uncertainty and ignorance which they will encounter in their professional lives.

²⁸⁸ Duffy, above n 89, 154.

²⁸⁹ *Ibid* 147.

²⁹⁰ *Ibid* 154.

theory is that law schools must be doing something well, and that they should attempt to discover what those things are and emphasise them in the curriculum. Notably, Duffy's theory is compatible with Parker's suggestion that students be encouraged to engage their 'sociological imagination'. Perhaps wellbeing discourse is best served by initiating an 'institutionalising discourse', which shifts the focus from individuals to institutions, from students to teachers. Self-determination theory might provide a useful conceptual framework for empirical research designed to identify existing law school pedagogies which facilitate student wellbeing.

V CONCLUSION

Parker's article reviewed the existing wellbeing literature with the aim of informing wellbeing interventions for law schools. Using a sociological framework, she proposed a unique, universal wellbeing intervention designed to address systemic causes of law student distress. Similarly, this article has reviewed wellbeing literature with the aim of identifying plausible interventions. However, it has also responded to Parker's article, using the discussion as an opportunity to clarify a fundamental dissonance in wellbeing discourse. Using a psychological framework, it proposes a definition of wellbeing for prospective research. It recommends the application of a diathesis stress model²⁹¹ in the Australian context, proposing that law student psychological distress is impacted by both dispositional and situational factors. Contingent on this proposition, it proposes that both individual and universal wellbeing interventions are required. It suggests that interventions be grounded in SDT and designed to meet the fundamental psychological needs of students. It proposes the empirical exploration of pedagogical strengths as a potential research focus.

Wellbeing is a complex concept, so it is hardly surprising that there is palpable academic dissonance regarding the empirical evidence, causation and the appropriate locus of responsibility. Fortunately, there is general consensus regarding the phenomenon of psychological distress and the need for plausible interventions. Parker is understandably concerned about the potential 'danger' of wellbeing discourse, including its potential to focus attention on subjective wellbeing and individual interventions, at the expense of important systemic drivers and universal interventions. However, her moral panic theory risks collateral damage. As Parker says, 'The ways that lawyers and academics talk and write about these issues are powerful'.²⁹² Arguably, as Cohen contends, 'it is near-impossible to use certain words in a neutral way'.²⁹³ The risk of using terms like 'panic' and 'alarm' is that they discredit wellbeing scholars through decontextualising their research. There is also a danger that her theory

²⁹¹ Daicoff, 'Lawyer: Know Thyself: A Review of Empirical Research', above n 1, 1416.

²⁹² Parker, above n 7, 1135.

²⁹³ Cohen, above n 245, 241.

deemphasises important interdisciplinary research and ‘demedicalises’²⁹⁴ psychological distress, potentially undermining mitigative interventions which are demonstrated to be effective.

Parker’s article does constitute an important reminder that that wellbeing is a complex social construct, which is no doubt partly driven by social and political factors. She also clearly aspires to support law students and lawyers, and advocates for an important cultural shift in the legal profession. It is therefore important that wellbeing scholars are explicit in articulating a broad definition of wellbeing which can accommodate the goodwill of all academics and facilitate collaborative dialogue. A definition of wellbeing as driven by subjective and objective variables offers this potential. Such research might facilitate a range of wellbeing interventions including, but not limited to, Parker’s proposal to exercise ‘sociological imagination’.

Parker’s suggestion that ‘we may feel powerless to change the social and economic system in which we live our lives’²⁹⁵ is well made. It is possible that this is why, in recent years, we have turned our attention to psychological wellbeing and individual responsibility. As Larcombe et al concede ‘While law schools need to be aware of and prepare students for these realities, it is not within the power of law schools to change them’.²⁹⁶ It is quite plausible that we might feel powerless, given that the legal academy has proven to be highly resistant to change.²⁹⁷ Unfortunately, traditional legal ethics discourse has, working alone, been unable to achieve Parker’s goal of ‘a more just polity and economy’.²⁹⁸ Auerbach’s words still resonate today ‘The idea of law as a public profession, with obligations that transcend client loyalty (which, after all, must be seen in *its* social context: loyalty to those who can pay the most), seems too strong to die but too weak to prevail’.²⁹⁹ Moving forward, perhaps both wellbeing scholars and legal ethics scholars might explicitly promote the conception of a lawyer who is both psychologically healthy and supported by a community directed towards a meaningful public purpose. More ambitiously, they might unite as complementary theories which function as powerful, contemporary catalysts for change.

²⁹⁴ Nikolas Rose, ‘Beyond Medicalisation’ (2007) 369 *Lancet* 700, 702. It is beyond the scope of this article to explore the concept of medicalisation in detail, but it is worth noting that the concept has been critiqued. Rose contends that medicalisation has ‘become a cliché of critical social analysis’ which ‘implies passivity on the part of the medicalised’. He argues that we ‘need more refined conceptual methods ... to assess the costs and benefits of our thoroughly medical form of life’; Watson, above n 21, 122 cautions that ‘Mental health is a very complex field in which law teachers are not experts, so we need to proceed with caution’.

²⁹⁵ Parker, above n 7, 1129.

²⁹⁶ Larcombe et al, above n 6, 410.

²⁹⁷ Krieger, ‘Institutional Denial’, above n 1, 112; Webb, ‘A Tale of Two Cities’, above n 67; Kift, above n 79, 2; Keyes and Johnstone, above n 80, 537; James, ‘Dealing With Resistance to Change by Legal Academics’, above n 267, 204.

²⁹⁸ Parker, above n 7, 1127.

²⁹⁹ Auerbach, above n 57, 473.