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A change in outfit? Conceptualising Legal Skills in the Contemporary Law School

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Abstract

This chapter will draw on Stuart Toddington's paper within Birks focusing on the question 'what is an authentic legal skill?'. It will use the paper as a starting point to discuss how legal skills are currently characterised and used within legal education, considering the way in which the wider shift away from transmissional knowledge and towards skills and employability within higher education has manifested itself within law schools. In doing so, it will support Toddington's argument that the notion of an authentic legal skill should not be defined by either the legal profession, or the employability agenda more widely. Instead, it explores how Toddington's conception of the normative ideal of the legal enterprise is compatible with forms of liberal legal education which eschew such focuses. The chapter will then move on to consider how an authentic legal skill should be defined to achieve such a normative ideal....., suggesting that there is a need to broaden Toddington's original conception and include more general academic skills, as applied within the discipline of law. In addition, it will argue that both digital skills and skills involving emotions require incorporating into contemporary definitions of authentic legal skills to achieve the normative legal ideal that Toddington proposed.

Introduction

This chapter focuses on legal skills. In doing so, it draws inspiration from Stuart Toddington's chapter in *Pressing Problems* titled 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education'.¹ The title makes an allusion to the Hans Christian Andersen folktale 'The Emperor's New Clothes', a story in which a vain Emperor is persuaded that only intelligent people, competent in their role, can see the (non-existent) clothes made by two supposed tailors. His courtiers, keen to be perceived as clever and able, all pretend to see the garments and it is only during a public procession when a child points out the Emperor is, in fact, not wearing any clothes, although the Emperor feels compelled to continue the parade despite this realisation. There are many interpretations of this folktale² but, for the purposes of this chapter, it is construed as a metaphor demonstrating the need to distinguish between, on the one hand, illusion and façade and, on the other hand, that which is authentic and real. The notion of 'authenticity' is complex, multi-faceted and contested even within the setting of education.³ However, for the purpose of this chapter it will be construed as meaning a set of skills which are either necessary or valuable in the pursuit of the normative ideal of legal education. Toddington's conception of the legal enterprise, and the skills it requires, will be explored further below.

¹ Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 69

² See, for example, Hollis Robbins, 'The Emperor's New Critique' (Autumn 2003) 34(4) *New Literary History* 670

³ Joseph Petraglia, *Reality By Design: The Rhetoric and Technology of Authenticity in Education* (Routledge, 1998) 2

Much of Toddington's chapter is focused upon identifying what constitutes an authentic 'legal' skill, as opposed to more generic academic, professional or entrepreneurial skills.⁴ He is particularly critical of the conflation of the term 'legal' with 'what Legal Professionals *do*' [original author's italics], arguing that this leads to a focus on 'managerial and organisational skills' which are not specifically legal in nature.⁵ Instead, Toddington argues that there is a need to identify 'a rational concept of law' in which to ground a theory, and critical assessment, of legal skills.⁶ For him, this is the notion that the normative ideal of law is to 'attempt to regulate and co-ordinate social life in a principled and rational fashion'.⁷ In particular, he refers to the importance of legal skills 'where institutions must be designed to identify, inhibit and resolve disputes, co-ordinate policy, foster participation and inhibit conflict'.⁸

In essence, the 'Legal Profession'⁹ seem to be the tailors of the folktale, weaving a notion of what comprises legal skills. This appears to provide legal education with an enticing outfit, consisting of the trappings required for a legal career. However, such an outfit is illusory because it equates the law with legal practice and fails to recognise the wider conception of the legal enterprise which should form the basis for identifying and developing (what Toddington terms as) authentic legal skills. Instead, the focus becomes upon skills 'required by any and every commercial enterprise' which do not capture 'the complexity and distinctiveness of legal phenomena'.¹⁰

This chapter will revisit Toddington's conceptualisation of legal skills to consider to what extent it can, and should, be applied within contemporary legal education. It will explore what constitutes a legal skill and to what extent legal skills form an integral part of the curriculum of law schools. In doing so, it will argue that legal education remains largely committed to a concept of legal skills created by the Legal Profession, in much the same way as Toddington identified in Birks. The chapter will then move on to consider Toddington's normative ideal of law, which appears to be commensurate with the notion of legal education developing students' sense of citizenship, commonly identified as a key tenet of liberal legal education. Using this notion as a framework, I will argue that to meet such a normative ideal it is necessary to expand Toddington's definition of legal skills, to recognise more generic academic skills, when applied specifically within the legal context, as a necessary component. The chapter will also suggest two further important ways of broadening out Toddington's categorisation of legal skills. The first is by incorporating digital skills and

⁴ Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 87

⁵ *Ibid.*, 76

⁶ *Ibid.*, 88

⁷ *Ibid.*, 77

⁸ *Ibid.*, 85

⁹ Toddington capitalises the phrase Legal Profession when referring to the '*actual body of personnel and practices*' involved, to distinguish it from the normative ideal of a legal profession. The same practice has therefore been adopted within this chapter. Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 69, fn 3

¹⁰ Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 76; see also Stuart Toddington, 'Skills, Quality and the Ideologies of Managerialism' (1994) 28 *Law Teacher* 243

forms of digital lawyering,¹¹ the second is to incorporate skills involving emotions. These are both vital parts of the law school experience. They are particularly relevant in the rapidly changing legal environment created by the COVID-19 global pandemic but also have long-term significance for both education and citizenship.¹²

Defining legal skills

The term ‘skill’ itself is often used in a loose and broad way, encompassing a wide range of attributes, abilities and competencies (terms which are themselves often used interchangeably with ‘skills’).¹³ Recently writing in the context of English legal education Guth captures this breadth well when she defines skills as ‘how to do things rather than learning about things’.¹⁴ She also notes that legal skills are difficult to define, choosing the wide definition of legal skills as ‘...those related to how to do things within the discipline of law broadly defined’.¹⁵ Other recent literature suggests that the notion of a specifically legal skill is similarly vague in its use within legal education, with recent suggestions ranging from mindfulness¹⁶ to cultural competence¹⁷. Despite Twining, as early as 1988, arguing both for the importance of legal skills and for the need for them to be more clearly theorised and practically developed, it appears that over thirty years later difficulties still remain with conceptualising legal skills in a clear and defined manner.¹⁸

Toddington’s discussion of legal skills makes it clear that they should be distinguished from generic academic, professional and entrepreneurial skills.¹⁹ In terms of academic skills, he argues that these are skills such as ‘logical reasoning, sifting information into the relevant and irrelevant, evaluating arguments’ are generic academic skills.²⁰ In terms of professional skills, he divides these into ‘Formal (generic) Professional Skills’ and ‘Substantive Professional Skills’.²¹ The former are those general skills, for example, relating to management and administration, which a professional must master before going on to apply

¹¹ Ronald W. Staudt and Marc Lauritsen ‘Justice, Lawyering and Legal Education in the Digital Age: Introduction’ (2013) 88 *Chicago-Kent Law Review*, 687 <

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335470> accessed 15 August 2021

¹² See, for example, Jonathan Goldsmith, ‘The Pandemic’s Impact on Legal Education’ (*The Law Society Gazette*, 15 December 2020) <<https://www.lawgazette.co.uk/commentary-and-opinion/the-pandemics-impact-on-legal-education/5106805.article>> accessed 3 March 2021

¹³ Neville Bennett, Elisabeth Dunne, and Clive Carre, ‘Patterns of Core and Generic Skill Provision in Higher Education’ (1999) 37(1) *Higher Education* 71, 74; Cecilia K. Y. Chan, Emily T. Y. Fong, Lillian Y.Y. Luk and Robbie Ho, ‘A Review of Literature on Challenges in the Development and Implementation of Generic Competencies in Higher Education Curriculum’ (2017) 57 *International Journal of Educational Development* 1, 4

¹⁴ Jessica Guth, ‘The pasts and futures of legal skills in English law schools’ in Emma Jones and Fiona Cownie (eds) *Key Directions in Legal Education: National and International Perspectives* (Routledge, 2020) 161

¹⁵ Jonathan Goldsmith, ‘The Pandemic’s Impact on Legal Education’ (*The Law Society Gazette*, 15 December 2020) <<https://www.lawgazette.co.uk/commentary-and-opinion/the-pandemics-impact-on-legal-education/5106805.article>> accessed 3 March 2021, 162

¹⁶ Katerina P Lewinbuk and Christy Gilbert, ‘Law Student Heal Thy Self: Teaching Mindfulness as a Legal Skill’ (2016) 41 *Journal of Legal Professionals*, 37

¹⁷ Ederlina Co, ‘Teaching Cultural Competence as a Fundamental Lawyering Skill’ (2019) 23 *Legal Writing: Journal of the Legal Writing Institute* 4

¹⁸ William Twining, ‘Legal Skills and Legal Education’ (1988) 22 *The Law Teacher* 4, 5

¹⁹ Stuart Toddington ‘The Emperor’s New Skills: The Academy, The Profession and the Idea of Legal Education’ in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 87

²⁰ *Ibid*, 84

²¹ *Ibid*, 86

their specialist (substantive) skills. The latter is perhaps the most difficult to distinguish from legal skills as it covers ‘Skills which must be developed in response to the nature of a substantive field of endeavour and its specific problems and tasks requiring full time attention’.²² It can be surmised that, by differentiating it as a separate category from legal skills, Toddington was seeking to reinforce the idea that legal education, at undergraduate level in England and Wales, is not a vocational course focused on the production of professional attributes.

Interestingly, Toddington does not give any form of detailed definition of what actually constitutes a ‘legal skill’. He simply states that they are ‘skills required by, and specific to, the pursuit of the substantive goals of the legal enterprise rationally conceived’.²³ As discussed in the Introduction, for Toddington these goals appear to be around the construction of civic society and the role that legal education can play in equipping its graduates to contribute to the development of institutions to regulate society in a ‘principled and rational’ manner.²⁴ Therefore, his notion of an authentic legal skill is one which will equip graduates in this fashion. However, the exact nature of these legal skills remains unclear as, overall, he focuses on what legal skills are not, rather than what they are.

The integration of skills within legal education

To explore whether Toddington’s criticism of legal skills as largely determined by the Legal Profession remains relevant today, it is necessary to consider to what extent legal skills are now integrated into the curricula of law schools and which so-called legal skills are usually focused upon. In doing so, there is a need to take a somewhat broader view of what constitutes ‘legal skills’ than Toddington, drawing on existing discourse within the legal academy on the topic.

Toddington’s chapter within Birks begins by referring to the ‘much current enthusiasm for skills provision’ present throughout education generally and legal education in particular.²⁵ This implies that, at the time he was writing, there was already a strong interest in, and commitment to, the incorporation of skills within the undergraduate law degree. However, it should not be assumed that the inclusion of skills within the legal curriculum is, or ever was, wholly uncontroversial. For Toddington to state that his focus is on ‘the question of what role the academy... should play in this regard’ is to imply that at the time of *Pressing Problems* the inclusion of skills was unsettled and in dispute. Indeed, several years earlier, Twining had referred to a ‘considerable resistance to direct teaching of skills by many law teachers.’²⁶ In doing so he noted that key objections included the notions that the teaching of skills was either ‘illiberal, amoral, narrow, reactionary, anti-intellectual, impractical, or unnecessary’.²⁷

In part, such opposition may well have stemmed from a reluctance to embrace change. Webb argues that, traditionally, undergraduate legal education within law schools had consisted of ‘3 years of doctrinal law-teaching, supported by research’... and, perhaps, a dose of legal method to highlight the technicalities of legal problem-solving’.²⁸ This traditional focus on

²² Ibid, 87

²³ Ibid, 87

²⁴ Ibid, 77

²⁵ Ibid, 69

²⁶ William Twining, ‘Legal Skills and Legal Education’ (1988) 22 *The Law Teacher* 4, 8

²⁷ Ibid 8

²⁸ Julian Webb, ‘Where the Action Is: Developing Artistry in Legal Education’ (1995) 2 *International Journal of the Legal Profession* 187, 188

the transmission of legal knowledge, in the form of doctrinal rules and principles, prizes content in a way which renders skills at best as secondary and, at worst, as irrelevant. Wider conceptions of the role of legal education may well also have formed a part in such opposition. The original development of the doctrinal approach to legal education was intended to separate law as an academic discipline and carve out a niche which would ensure that 'From the tangles of the common law, the scholar could find the inner logic and principles required to guide practitioners, indoctrinate students in the tradition and move law forward'.²⁹ Once again, this implies a focus on content which seems to have been deeply embedded within the teaching of law.

However, Toddington was writing on the cusp of a more fundamental shift towards the inclusion of skills in both higher and legal education. Birks was published in 1996, the year before the publication of the 1997 National Committee of Inquiry into Higher Education ('the Dearing Report') was tasked to take account of the principle that '... learning should be increasingly responsive to employment needs and include the development of general skills, widely valued in employment'³⁰. This principle, and the subsequent report and recommendations it generated, reflected the growth of a political-governmental ideology of neoliberalism, commonly associated with the 1980s Thatcher administration in the UK³¹. This emphasised the need for universities to produce 'commercially oriented professionals rather than public-interest professionals'.³² As a result, there was an increased discourse around skills, with a particular focus on employability skills. In other words, on equipping students to be 'job ready', to enter the workforce upon graduation as productive members of the new knowledge economy.³³ Developments within the US also influenced this focus, including the neoliberal ideology of the 1980s Reagan administration, the academic skills revolution of the 1980s and (within legal education) pressure from the legal profession.³⁴ Toddington's statement precedes a long line of governmental reports which all emphasise the importance of skills, particularly those relating to employability. This includes the 2016 white paper 'Success as a Knowledge Economy: Teaching Excellence, Social Mobility & Student Choice' which refers to higher education as generating 'the know-how and skills that fuel our growth and provide the basis for our nation's intellectual and cultural success'.³⁵ This demonstrates that the focus upon skills, specifically employability skills, continues to be prevalent within higher education. It forms a part of the wider marketization of higher

²⁹ Susan Bartie, 'The Lingering Core of Legal Scholarship' (2010) 30(3) *Legal Studies* 345, 348

³⁰ National Committee of Inquiry into Higher Education, *The Dearing Report: Higher Education in the Learning Society (Education in England, 1997)*

<<http://www.educationengland.org.uk/documents/dearing1997/dearing1997.html>> accessed 3 January 2021, 3

³¹ Sophie E.F. Bessant, Zoe P. Robinson, and R. Mark Ormerod, 'Neoliberalism, New Public Management and the Sustainable Development Agenda of Higher Education: History, Contradictions and Synergies' (2015) 21(3) *Environmental Education Research* 417-432

³² Kathleen Lynch, 'Neoliberalism and Marketisation: The Implications for Higher Education' (2006) 5(1) *European Education Research Journal* 1

³³ Tim Moore and Janne Morton, 'The myth of job readiness? Written communication, employability, and the 'skills gap' in higher education' (2017) 42(3) *Studies in Higher Education* 591, 591; see also Jo Frankham, 'Employability and higher education: the follies of the 'Productivity Challenge' in the Teaching Excellence Framework' (2017) 32(5) *Journal of Education Policy* 628

³⁴ Robert Stevens, *Law School. Legal Education in America from the 1850s to the 1980s* (The University of North Carolina Press, 1983)

³⁵ Department for Business, Innovation and Skills, *Success as a Knowledge Economy: Teaching Excellent, Social Mobility and Student Choice* (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/52354/6/bis-16-265-success-as-a-knowledge-economy-web.pdf> accessed 5 January 2021, 7

education and consumerisation of students, although this remains a site of contention and (on occasion) resistance.³⁶

The repercussions of this overall marketization agenda are widespread, diverse, and often damaging throughout higher education. Law schools are certainly not immune from such repercussions, although the extent of resistance to them is disputed.³⁷ It is therefore unsurprising that there is evidence of skills, particularly employability skills, becoming a widely accepted part of the law school curriculum since 1996 at undergraduate level.³⁸ In a 1996 survey with responses from 76 law schools offering undergraduate and postgraduate courses in law, Harris and Jones found that a total of 43 included ‘vocational skills’ within their undergraduate provision, commonly via either discrete modules or their incorporation into the study of substantive legal topics (or both).³⁹ The majority of such provision was offered within ‘new university’ settings.⁴⁰ In the same year, the ‘First Report on Legal Education and Training’ by the Lord Chancellors’ Advisory Committee on Legal Education and Conduct highlighted some deficiencies in skills within both academic and vocational legal education, citing legal research skills and the increasingly diverse range of more generic skills required within the legal profession.⁴¹ A subsequent 2004 survey by Harris and Beinart with 58 responses to questions on skills found that around 25% had compulsory modules (or parts of modules) on ‘lawyers’ professional responsibilities’, around 33% had included compulsory ‘mooting’ and ‘courtroom skills’ and around 66% had ‘other practical skills’ as compulsory components.⁴² Since then, a steady stream of articles around skills development, often featuring law school-specific case studies, suggests that this provision has continued to expand.⁴³ This can perhaps be linked, at least in part, to the commensurate growth of clinical legal education provision in law schools.⁴⁴ Such provision is often viewed as playing an important role in developing students’ skills, particularly those, such as client care, which are prized within legal practice.⁴⁵ Although the notion that students could become ‘practice

³⁶ See, for example, Fiona Cownie and Anthony Bradney, ‘Gothic Horror? A Response to Margaret Thornton’ (2005) 14(2) *Social & Legal Studies* 277; Kathleen Lynch, ‘Neoliberalism and Marketisation: The Implications for Higher Education’ (2006) 5(1) *European Education Research Journal* 1; Richard Collier, ‘“Love law, love life” Neoliberalism, Wellbeing and Gender in the Legal Profession – the Case of Law School’ (2014) 17(2) *Legal Ethics* 202; Michael Tomlinson, ‘The Impact of Market-Driven Higher Education on Student-University Relations: Investing, Consuming and Competing’ (2016) 29 *High Education Policy* 149

³⁷ Ronald W. Staudt and Marc Lauritsen ‘Justice, Lawyering and Legal Education in the Digital Age: Introduction’ (2013) 88 *Chicago-Kent Law Review*, 687 <
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335470> accessed 15 August 2021

³⁸ Jessica Guth, ‘The pasts and futures of legal skills in English law schools’ in Emma Jones and Fiona Cownie (eds) *Key Directions in Legal Education: National and International Perspectives* (Routledge, 2020) 163.

³⁹ Phil Harris and Martin Jones, ‘A survey of law schools in the United Kingdom’ (1996) 31 (1) *The Law Teacher*, 38-126, 49-50

⁴⁰ *Ibid.*, 50

⁴¹ The Lord Chancellors’, *Advisory Committee on Legal Education and Conduct, First Report on Legal Education and Training* (London, 1996)

⁴² Phil Harris and Sarah Beinart, ‘A survey of law schools in the United Kingdom’ (2004) 39(3) *The Law Teacher* 299

⁴³ See, for example, Juliet Turner, Alison Bone, and Jeanette Ashton ‘Reasons why law students should have access to learning law through a skills-based approach’ (2018) 52(1) *The Law Teacher* 1; David Rigg, ‘Embedding employability in assessment: searching for the balance between academic learning and skills development in law: a case study’ (2013) 47(3) *The Law Teacher*, 404; Simon Brooman and Sarah Stirk, ‘Who Am I?: Using Reflective Practice and Self-determination to Redefine ‘Employability’ in Legal Education’ (2020) 41 *Liverpool Law Review* 79

⁴⁴ James Marson, Adam Wilson, and Mark Van Hoorebeek, ‘The Necessity of Clinical Legal Education In University Law Schools: A UK Perspective’ (2005) 7 *International Journal of Clinical Legal Education* 29, 43

⁴⁵ Ann Thanaraj, ‘Understanding how a Law Clinic can contribute towards Students’ development of professional responsibility’ (2016) 23 *International Journal of Clinical Legal Education* 89

ready' as a result of this experience has been criticised⁴⁶, the growth of clinical legal education within English law schools (and the commensurate focus upon skills) has continued.⁴⁷ There has also been speculation about whether the introduction of the Solicitors Qualifying Examination ('SQE') will result in a greater focus upon legal skills, for law schools to prepare 'SQE-ready' graduates.⁴⁸ While the first part of the SQE focuses upon (what the Solicitor Regulation Authority) regard as 'functioning legal knowledge' the second part is focused upon legal skills, such as interviewing, advocacy, analysis, reading, writing and drafting.⁴⁹ If law schools decide to market their degree courses as preparing students to be 'SQE-ready' this could therefore result in a greater focus upon those practical skills required by the legal profession.

It is notable that the 1996 and 2004 surveys referred to above appear to equate legal skills to professional legal skills.⁵⁰ This is also a key focus within clinical legal education and would be at the heart of any adjustments to curricula as a result of the SQE.⁵¹ However, this should not be taken to mean that skills which could be termed as academic legal skills have been ignored. Indeed, there is arguably an increased focus on these with the Quality Assurance Agency's 2019 Subject Benchmark Statement for law, which provides guidance on the academic standards expected from law graduates in the UK, emphasising that 'The study of law involves the acquisition of legal knowledge, general intellectual skills and certain skills that are specific to the study of law'.⁵² Guth suggests that the broader widening participation agenda in higher education and the changes in how knowledge is conceived and accessed have both contributed to a 'consensus' that 'students should not be required to learn the basic skills... by osmosis as was previously expected'.⁵³ Such academic skills appear to have become largely integrated into the teaching of substantive law as an accepted part of the legal curriculum.⁵⁴

Overall, what evidence there is on the integration of skills into the undergraduate legal curriculum suggests that there is an increasing focus on both academic and professional

⁴⁶ D.J Cantrell, 'Are Clinics a Magic Bullet?' (2014) 51 *Alberta Law Review* 831; Margaret Martin Barry, 'Practice Ready: Are We There Yet?' (2012) 32 *Boston College Journal of Law & Social Justice* 247; Robert J. Condlin, "'Practice Ready Graduates": A Millennialist Fantasy' (2014-2015) 31 *Touro Law Review* 75

⁴⁷ James Sandbach and Richard Grimes, 'Law School Pro Bono and Clinic Report 2020: LawWorks and CLEO (Clinical Legal Education Organisation)' (2020) <https://www.lawworks.org.uk/sites/default/files/files/LawWorks%20Law%20Schools%20Report%202020_0.pdf> accessed 7 May 2021

⁴⁸ Dawn Jones, 'Legal skills and the SQE: confronting the challenge head on' (2018) 53(1) *The Law Teacher* 35; Ben Waters, 'The Solicitors Qualification Examination: something for all? Some challenges facing law schools in England and Wales' (2018) 52(4) *The Law Teacher* 519

⁴⁹ Solicitor Regulation Authority, 'SQE1 and SQE2 Assessments' <<https://www.sra.org.uk/students/sqe/sqe-assessments/>> accessed 7 May 2021

⁵⁰ Phil Harris and Martin Jones, 'A survey of law schools in the United Kingdom' (1996) 31 (1) *The Law Teacher*, 38-126, 49-50; Phil Harris and Sarah Beinart, 'A survey of law schools in the United Kingdom' (2004) 39(3) *The Law Teacher* 299

⁵¹ James Marson, Adam Wilson, and Mark Van Hoorebeek, 'The Necessity of Clinical Legal Education In University Law Schools: A UK Perspective' (2005) 7 *International Journal of Clinical Legal Education* 29, 43; Ann Thanaraj, 'Understanding how a Law Clinic can contribute towards Students' development of professional responsibility' (2016) 23 *International Journal of Clinical Legal Education* 89

⁵² Quality Assurance Agency 'Subject Benchmark Statement: Law' <https://www.qaa.ac.uk/docs/qaa/subject-benchmark-statements/subject-benchmark-statement-law.pdf?sfvrsn=b939c881_18> accessed 7 January 2021, 4

⁵³ Jessica Guth, 'The pasts and futures of legal skills in English law schools' in Emma Jones and Fiona Cownie (eds) *Key Directions in Legal Education: National and International Perspectives* (Routledge, 2020) 163

⁵⁴ Jessica Guth, 'The pasts and futures of legal skills in English law schools' in Emma Jones and Fiona Cownie (eds) *Key Directions in Legal Education: National and International Perspectives* (Routledge, 2020) 163

skills, with the latter mirroring the wider emphasis on employability within higher education overall. In terms of such employability skills, there is little (if any) indication that Toddington's assessment of the conceptualisation of legal skills has changed. It appears that much of what is termed as an employability or professional skill in law is still dictated by the practical needs of professional legal practice (for example, the use of mooting skills).⁵⁵ Indeed, it has even been argued that this nexus with the legal profession is what 'ultimately guarantees its distinctive disciplinary identity'.⁵⁶ This continued adherence to the (perceived) wishes of the Legal Profession is somewhat surprising given that figures demonstrate only a minority of law graduates will go on to enter the legal profession.⁵⁷ Indeed, the introduction of the SQE will remove the requirement for aspiring solicitors to have a qualifying law degree, simply requiring them to be graduates in any discipline (or have equivalent experience or qualifications).⁵⁸ Even if preparing students for professional legal practice was to be accepted to be a legitimate aim of the undergraduate law degree, the stratification of legal practice and the fast-paced development in areas such as technology and digital lawyering would suggest that this would be a Herculean undertaking.⁵⁹

Much of what is integrated into the legal curriculum today seems to fall squarely outside Toddington's category of 'legal skills' and instead fall into his categorisation of generic academic skills and professional skills (both generic and specific). If his analysis is accepted, this means therefore that there remains a gap within undergraduate legal education – there must be legal skills that should be included and integrated into the law degree to achieve his conception of the legal enterprise, but currently are not. Even if his categorisation of skills is not accepted, it is necessary to consider what types of legal skills should be included within the law school curriculum. It is therefore necessary to consider Toddington's conception of the normative ideal of law, how this relates to his categorisation of legal skills and what this could mean in terms of identifying whether such a categorisation is both sufficient and appropriate.

Identifying the legal enterprise

Toddington's description of the normative ideal of law views it as a mechanism to appropriately guide and co-ordinate society.⁶⁰ He also takes great care to distinguish legal skills from vocational skills.⁶¹ His approach to both of these points indicates an adherence to

⁵⁵ For a discussion of how this is reflected in law schools' marketing see Graeme Broadbent and Pamela Sellman, 'Great expectations? Law schools, websites and "the student experience"' (2013) 47(1) *The Law Teacher* 44

⁵⁶ Douglas W. Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) *Journal of Law and Society* 163.

⁵⁷ The Law Society of England and Wales, 'Entry Trends' (25 November 2020) <<https://www.lawsociety.org.uk/en/career-advice/becoming-a-solicitor/entry-trends>> accessed 26 February 2021; Lawyer Monthly, 'Law Graduate Opportunities Aren't Passing the Bar, Official Data Suggests' (January 2019) <<https://www.lawyer-monthly.com/issues/2019/01/9/>> accessed 26 February 2021

⁵⁸ Solicitors Regulation Authority, 'Solicitors Qualifying Examination ('SQE') (February 2021) <<https://www.sra.org.uk/students/sqe/>> accessed 26 February 2021

⁵⁹ In relation to the impact of technology on the legal profession, see Brian Simpson 'Algorithms or advocacy: does the legal profession have a future in a digital world?' (2016) 25(1) *Information & Communications Technology Law* 50

⁶⁰ Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 77

⁶¹ *Ibid*, 77

the tenets of a form of liberal legal education.⁶² Although definitions of liberal legal education (and liberal education more generally) tend to be particularly diffuse⁶³, a useful overall summary is that of Guth and Ashford who state:

A liberal legal education is one which does not focus on education for a particular purpose other than education itself. It is not aimed at preparing students for a particular job or profession and is not concerned with notions such as employability. It is, however, concerned with pursuing knowledge for knowledge's sake and developing skills of knowledge acquisition through research, critical thought and debate.⁶⁴

Such a form of liberal education could be viewed as a purely individual enterprise, one focused upon developing a 'better person'.⁶⁵ In other words, conceptualising learning as a means of personal development and growth, with the individual involved potentially choosing not to participate in, or contribute to, the life of the community and the development of the legal enterprise. However, there is a strong argument that such personal transformation is likely to lead to a sense of citizenship, often premised upon social justice, which will lead to many individuals wishing to contribute to the legal enterprise in some way.

Indeed, a number of writers on legal education have suggested that an appropriate end for a liberal approach to legal education is that of the 'good citizen'.⁶⁶ For example, Burrigge and Webb suggest the product of a liberal legal education will be 'rational participants in the life of the community', once again reflecting Toddington's focus on contributions to civic society.⁶⁷ The normative ideal of what constitutes a such a citizen is potentially problematic, with Pue suggesting that appropriate citizenship is commonly equated to an individual with particular liberal values – 'Liberal states rest on the manufacture of liberal souls'.⁶⁸ Other writers on liberal legal education tend to focus more on the concept of the 'good people'.⁶⁹ However, Brownsword suggests that there is no dichotomy between the two, arguing:

None of this presupposes that liberally-educated law graduates will be 'good citizens' in the sense that they will take a particular party-line in politico-legal debates, or even

⁶² For a seminal discussion of liberal legal education, see Anthony Bradney, *Conversations Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing, 2003). For a discussion of the history of tensions between liberal and vocational forms of legal education see James Crook, 'A Brief History of Liberal Legal Education: The Battle Between Law as a Science and Law as a Liberal Art' (2017) 17(2) *Legal History* 30 and Susanna Menis 'The liberal, the vocational and legal education: a legal history review – from Blackstone to a law degree (1972)' (2020) 54(2) *The Law Teacher* 285

⁶³ Sheldon Rothblatt *Tradition and Change in English Legal Education. An Essay in History and Culture* (Faber and Faber, 1976) 195

⁶⁴ Jessica Guth and Chris Ashford, 'The Legal Education and Training Review: regulating socio-legal and liberal legal education?' (2014) 48(1) *The Law Teacher* 5, 6
5-19

⁶⁵ Roger Burrigge and Julian Webb, 'The Values of Common Law Legal Education Reprised' (2009) 43(2) *The Law Teacher* 263, 264

⁶⁶ Roger Brownsword, "Law Schools for Lawyers, Citizens and People" in Fiona Cownie (ed), *The Law School: Global Issues, Local Questions* (Aldershot, 1999)

⁶⁷ Roger Burrigge and Julian Webb, 'The Values of Common Law Legal Education Reprised' (2009) 43(2) *The Law Teacher* 263, 264; Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 77

⁶⁸ W. Wesley Pue, 'Legal education's mission (2008) 42(3) *The Law Teacher* 270, 272; see also Kate Green and Hilary Limb, 'A Lib-Lib Pact: Silences in Legal Education' (1987) 21(3) *The Law Teacher* 256

⁶⁹ Anthony Bradney, *Conversations Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing, 2003)

that they will be conscientious in supporting the ordinary democratic processes associated with representative government. However, it does presuppose that ‘the law’ will hold no mystery for these graduates and that they will be capable of making a rational assessment of the arguments relating to debates arising in and around the practice of law.⁷⁰

It is worth noting the reference to a ‘rational’ assessment here, which mirrors Toddington’s several references to rationality when discussing the normative ideal of law.⁷¹

Toddington only refers to his normative ideal of law relatively briefly. Therefore, it is not possible to precisely divine who he is envisaging as the product of his suggested focus on legal skills. However, it does appear to chime with the liberal notion of good citizenship, someone who will be able to contribute to the public debate around, and development of, law and legal institutions.

Viewing Toddington’s conceptualisation of the legal enterprise and the normative ideal of law as focused upon good citizenship gives it enormous relevance and value for contemporary legal education. Particularly at a time where inequalities are increasingly pronounced, and new forms of authoritarianism are on the rise.⁷² This gives the sense of authentic legal skills as those which both develop (and potentially transform) the individual but also contribute to a sense of citizenship and a contribution to society.

Authenticity and the legal enterprise

Focusing, then, on the liberal notion of good citizenship, what are the authentic legal skills required to achieve such a normative ideal? Perhaps Toddington was deliberately vague about this to facilitate further debate on the matter, or perhaps he simply did not have the space in Birks to do this topic justice. Either way, it is arguably somewhat difficult to align the notion of citizenship with the narrow categorisation of legal skills he focuses upon.

Of course, there are potential benefits in such a narrow categorisation. In particular, it effectively ring-fences an area of skills which are discipline-specific, thus potentially lessening any ‘fears for the future of law as a distinct discipline’.⁷³ At the same time, it clearly delineates the academic discipline of law from the professional practice of law and thus suggests the potential for evolution within the discipline. In other words, it carves out a specific niche for legal skills to occupy. There is a sense here of stripping away the illusion of finery bestowed by the Legal Profession and instead reverting to a form of pure, authentic legal skill.

References to authenticity in legal education have tended to focus upon the recreation or simulation of aspects of legal practice, implying that authenticity comes from absorbing those

⁷⁰ Roger Brownsword, ‘Law Schools for Citizens, Lawyers and People’ in Fiona Cownie (Ed.) *The Law School – Global Issues, Local Questions* (2018 reissue, , Routledge), 30

⁷¹ Stuart Toddington ‘The Emperor’s New Skills: The Academy, The Profession and the Idea of Legal Education’ in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 77, 88

⁷² Michael Marmot and Jessica Allen, ‘Covid-19: exposing and amplifying inequalities’ (2020) 74(9) *Community Health* 681-682; Jerzy J. Wiatr (ed), *New Authoritarianism: Challenges to Democracy in the 21st century* (Barbara Budrich Publishers 2019)

⁷³ Douglas W. Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31(2) *Journal of Law and Society*, 188

skills developed through legal practice.⁷⁴ If it is accepted that the relationship with the legal profession shapes laws' distinctive disciplinary contours, then eschewing professional legal skills could be seen as damaging. However, as noted above, it is difficult to divine the logic in continuing to harness law to the wishes of a profession which a dwindling number of law graduates actually enter.⁷⁵ Therefore, it can be argued that one strength of Toddington's categorisation lies in the way it recasts the notion of authenticity as one which is not reliant on the Legal Profession, nor is it reliant on other generic academic or professional skills (which, it can be surmised, he would view as effectively swapping one invisible garment for another). The notion of identifying authentic legal skills by their relationship to legal practice is no longer sustainable – it represents the new clothes of the eponymous fairy tale – perpetuating an illusion that law as an academic discipline should be focused upon professional formation, whether in terms of more traditional professional lawyering skills or “SQE-readiness”. Therefore, Toddington's work is important in upholding the intellectual value and strength of law as a discipline of study.

Toddington's approach also flies in the face of the wider employability agenda within higher education. Such an agenda has become increasingly significant in the marketised academy with Römgens *et al* suggesting that ‘the importance of employability is generally agreed-upon by policy makers and scholars alike’.⁷⁶ The ways in which the employability agenda are conceptualised and implemented in practice within universities are highly contested.⁷⁷ Nevertheless, references to authentic skills within higher education more generally tend to mirror this emphasis on employability, focusing on the notion that ‘students demonstrate their knowledge and skills by performing real-world tasks’.⁷⁸ Whether eschewing this view of authenticity is seen as a benefit or disadvantage of Toddington's approach will once again depend upon the underpinning conceptualisation of the purpose of law and the law school. A number of proponents of liberal legal education have argued against employability being a key aim of undergraduate legal education, with Bradney stating:

Both professional knowledge and technical information have value but in a liberal education they are acquired, if at all, not for the value that they have in their own terms but because they can facilitate the wider learning that constitutes a liberal education.⁷⁹

⁷⁴ See, for example, Linda Kam, Michele Ruyters, Clare Coburn and Mary Toohey, 'Ger Real; A Case Study of Authentic Learning Activities in Legal Education' (2012) 19 Murdoch University Law Review 17

⁷⁵ The Law Society of England and Wales, 'Entry Trends' (25 November 2020) <<https://www.lawsociety.org.uk/en/career-advice/becoming-a-solicitor/entry-trends>> accessed 26 February 2021; Lawyer Monthly, 'Law Graduate Opportunities Aren't Passing the Bar, Official Data Suggests' (January 2019) <<https://www.lawyer-monthly.com/issues/2019/01/9/>> accessed 26 February 2021

⁷⁶ Inge Römgens, Rémi Scoupe, and Simon Beusaert, 'Unraveling the concept of employability, bringing together research on employability in higher education and the workplace' (2020) 45(12) *Studies in Higher Education* 2588

⁷⁷ Mariana Alvio Gaio Alves and Michael Tomlinson, 'The Changing Value of Higher Education in England and Portugal: Massification, Marketization and Public Good' (2020) *European Educational Research Journal* 1; Nickolas J James, 'More than Merely Work-Ready: Vocationalism versus Professionalism in Legal Education' (2017) 40(1) *University of New South Wales Law Journal* 186

⁷⁸ Laura M. Greenstein, *Assessing 21st Century Skills: A Guide to Evaluating Mastery and Authentic Learning* (Corwin, 2012) 51

⁷⁹ Anthony Bradney, *Conversations Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing, 2003) 41

The continued tensions between vocational (employability-focused) and liberal conceptions of legal education demonstrate that there is no single shared notion of what constitutes an authentic set of legal skills within legal education. Given Toddington's apparent sympathy with the liberal aims of legal education, and emphasis on citizenship, mean it seems likely he would characterise his own conception's rejection of the employability agenda as a benefit, despite it requiring resistance to wider policy agendas within institutions. His reference to generic professional skills and his concern that they focus on commercial and administrative functions also indicates his eschewing of a focus on employability.⁸⁰ This has a great value in challenging increasingly dominant narratives around employability and emphasising the intellectual worth of the law degree. It once again positions undergraduate legal education in a way which removes its dependence on the vagaries of neo-liberal agendas and restates the importance of both the legal enterprise, and the study of law as a part of that. In particular, it carves out the academic space to focus upon notions of citizenship and social justice, preventing such discussions from being 'crowded-out' of the curricula.

The above discussion demonstrates that Toddington's narrow categorisation of legal skills has appeal in the sense that it avoids the dangers of donning the trappings of the employability agenda. However, it is arguably harder to support Toddington's approach when it comes to the distinction he draws between generic academic skills and legal skills.⁸¹ While he acknowledges such academic skills as 'vitaly important' within legal education, he suggests that these are the precursors to specifically legal skills.⁸² Examples he gives of such generic skills include 'logical reasoning', 'sifting information into the relevant and irrelevant' and 'evaluating arguments'.⁸³ Returning to Toddington's normative ideal of law, it is difficult to see how these skills, when applied to legal rules and institutions, are not fundamental legal skills. Although they may be applied within other (if not all) academic disciplines, by applying them to legal subject-matter it is credible to suggest that they therefore become authentically legal skills. To look at this point another way, what does a law student need in addition to these skills to succeed? It is difficult to pinpoint what could fall within the category of legal skills in the academic context which is not based on the application of these more generic skills. This is especially the case when wider professional and employability skills have already been excluded from this categorisation.

Even if legal skills were to be defined solely by reference to a doctrinal approach to law, which has sometimes been characterised as being at the very core of legal research and, by extension, legal education⁸⁴, it is hard to see how legal and academic skills can be clearly delineated, for example, Hutchinson and Duncan's discussion of the definitions of doctrinal research refers to a range of skills which appear to be academic in nature, including finding and categorising relevant information (case law) then applying critical analysis to legal issues (legal reasoning).⁸⁵ Indeed, the genesis of the doctrinal approach was largely based upon a desire to carve out a specific 'academic' niche for law and law schools, suggesting a legal

⁸⁰ Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 76, 86

⁸¹ *Ibid*, 82

⁸² *Ibid*, 82

⁸³ *Ibid*, 82

⁸⁴ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83

⁸⁵ *Ibid*, 83

education based upon, and compatible with, a wider academic skillset.⁸⁶ It is possible that when Toddington refers to specifically legal skills he is thinking of the concept of ‘thinking like a lawyer’ in the sense it is sometimes applied within legal education, as ‘a form of linear analysis in a constricted paradigm’.⁸⁷ However, this in itself is an amalgam of wider academic skills – such as synthesis and analysis, despite it being focused upon legal issues. It should also be noted that doctrinal approaches have commonly been associated with a focus on the Legal Profession and professional skills in a way which seems potentially incompatible with Toddington’s normative ideal.⁸⁸

Returning to the QAA Benchmark Statement for Law, the skills listed in this clearly demonstrate the way in which generic academic skills become legal skills when applied in a legal context. For example, it refers to:

[I]ntellectual independence, including the ability to ask and answer cogent questions about law and legal systems, identify gaps in their own knowledge and acquire new knowledge, and engage in critical analysis and evaluation⁸⁹

Each of these can be easily identified as generic academic skills, for example, a historian would be required to critically question and explore historical sources. Similarly, although an ability to ‘recognise uncertainty and deal with ambiguity in law’⁹⁰ may at first glance appear to be a legal skill, this will also apply in other disciplines, for example, a historian dealing with differing accounts of an event given in a range of secondary sources. The reference to values and ethics within the Statement is also not exclusive to law. Indeed, it is arguable that there is a more generic academic skill at the core of each academic legal skill. Therefore, rather than trying to make an artificial separation, it should be accepted that an authentic legal skill in the context of undergraduate legal education is, at its heart, an academic skill. This appears to be a logical conclusion given that law, in the form of the law degree, is an academic discipline. It also reflects both Toddington’s normative ideal and the tenets of liberal legal education by assisting law students ‘to inquire into, and to strive to understand, the regulatory practice that we identify as the practice of law’.⁹¹ As such, it provides them with an insight and understanding necessary to contribute to society.

The above discussion on the categorisation of skills which flows from Toddington’s normative ideal of law indicates that his definition of legal skills, whilst having significant benefits in preserving key tenets of liberal legal education, also has significant disadvantages when trying to determine a discrete class of legal skills which is separate from (what he terms as) generic academic skills. A broader, but more nuanced, approach is to identify the specific manifestations of such academic skills which are particular to the discipline of law and include these within the category of legal skills. This moves Toddington’s category of legal skills into one which is more aligned with liberal legal education’s conception of good citizenship, individuals who have the skills to make ‘a rational assessment of the arguments

⁸⁶ David Sugarman, ‘Legal Theory, the Common Law Mind and the Making of the Textbook Tradition’ in William Twining (ed) *Legal Theory and Common Law* (Basil Blackwell, 1986); Susan Bartie, ‘The Lingering Core of Legal Scholarship’ (2010) 30(3) *Legal Studies* 345

⁸⁷ Colin James, ‘Lawyers’ wellbeing and professional legal education’ (2008) 42(1) *The Law Teacher* 85, 91

⁸⁸ See, for example, Rita K. Stropus, ‘Mend it, bend it, and extend it: the fate of traditional law school methodology in the 21st century’ (1996) 27(3) *Loyola University of Chicago Law Journal* 449

⁸⁹ Quality Assurance Agency ‘Subject Benchmark Statement: Law’ <https://www.qaa.ac.uk/docs/qaa/subject-benchmark-statements/subject-benchmark-statement-law.pdf?sfvrsn=b939c881_18> accessed 7 January 2021, 5

⁹⁰ Quality Assurance Agency ‘Subject Benchmark Statement: Law’ <https://www.qaa.ac.uk/docs/qaa/subject-benchmark-statements/subject-benchmark-statement-law.pdf?sfvrsn=b939c881_18> accessed 7 January 2021, 5

⁹¹ Roger Brownsword, ‘Where are all the law schools going?’ (1996) 30(1) *The Law Teacher*, 1, 2

relating to debates arising in and around the practice of law'⁹² and to, as Toddington himself puts it, 'attempt to regulate and co-ordinate social life in a principled and rational fashion'.⁹³ An authentic legal skill therefore becomes one which assists in meeting legal education's normative ideal of the development of good citizenship. For proponents of liberal legal education this is the genuine legal enterprise which lies below the flashier (and more marketable) trappings of preparation for legal practice.

Within this new definition of authentic legal skills there is a need to acknowledge and accept wider academic skills, in their application to legal issues, as an important movement towards an evolved version of Toddington's vision which can be applied within contemporary legal education. However, if we are to truly align the normative enterprise of legal education with the notion of fostering citizenship, simply incorporating these wider academic skills, as currently conceptualised, will not be sufficient on its own. The remainder of this chapter will illustrate this by exploring two areas of skill development which are largely viewed as non-academic or non-legal in nature, and have therefore largely been ignored or disregarded in more traditional conceptualisations of legal education, namely, digital skills and so-called 'soft skills'.⁹⁴ It is unsurprising that Toddington did not fully acknowledge these within Birks as their future potential and impact was only nascent within the legal academy at the point. However, to provide a definition of authentic legal skills which is fit for the purpose of contemporary legal education it is now necessary to build upon and broaden Toddington's original vision by exploring the value and importance of these.

Broadening the skills required of the 'good citizen'

It has already been argued that Toddington's normative ideal conforms to the liberal notion of a 'good citizen'.⁹⁵ He refers to the 'need for skills appropriate to the problems of institutional design in the modern state' and the need to focus upon 'rational and democratic administration'.⁹⁶ Whilst it is not possible within one chapter to tease out the myriad of skills that could be accommodated if this is translated into a broader category of legal skills, focusing upon the two areas of digital skills and skills involving emotions and applying these within the legal context is sufficient to highlight two sets of skills which are vital within this enterprise. Therefore, to meet Toddington's ideal it is necessary to ensure that these two areas are incorporated within liberal education.

Digital skills

The reference to digital skills refers to the use of digital technologies, from word processing programmes to emails and internet search engines to Artificial Intelligence and Blockchain.⁹⁷ These skills are often equated with 'digital lawyering', in other words, the application of

⁹² Roger Brownsword, 'Law Schools for Citizens, Lawyers and People' in Fiona Cownie (Ed.) *The Law School – Global Issues, Local Questions* (2018 reissue, New York and London, Routledge), 30

⁹³ Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 77

⁹⁴ In relation to 'soft skills' and emotions see Emma Jones, *Emotions in the Law School: Transforming Legal Education Through the Passions* (Routledge 2019)

⁹⁵ Roger Burridge and Julian Webb, 'The Values of Common Law Legal Education Reprised' (2009) 43(2) *The Law Teacher* 263, 264

⁹⁶ Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 78

⁹⁷ Emma Jones, Francine Ryan, Ann Thanaraj and Terry Wong, *Digital Lawyering: Technology and legal practice in the 21st century* (Routledge 2022)

these technologies within legal practice.⁹⁸ This focus would suggest that digital skills fall within Toddington's conceptions of either professional or entrepreneurial skills.⁹⁹ However, the reach of digital skills go far beyond those skills required for the world of legal practice or work more generally. Such skills are now essential for successful academic study generally, impacting upon academic performance and attainment.¹⁰⁰ Prior to the onset of COVID-19 there was a need for students (at a minimum) to be able to send and receive emails and undertake at least some forms of online information-gathering and research, with English universities increasingly focusing upon the development of digital competency frameworks.¹⁰¹ The onset of COVID-19 has accelerated the emphasis on blended and remote learning within higher education with students now being required to access virtual learning environments, attend lectures and seminars online, conduct groupwork and undertake assessments virtually.¹⁰² As well as having a generic academic application they also have discipline-specific implications, for example, within law schools there are specific digital skills which are necessary from using online legal databases to find legislation and case law to. There are also a range of emerging digital skills which are becoming increasingly valued, from analysing digitally simulated legal scenarios to designing applications to promote access to justice.¹⁰³ Such skills also enable students to understand and explore the intersections between law and contemporary society, which is increasingly digital in nature. The impacts of digital literacy, digital poverty and the digital divide are all areas which impact upon issues such as access to justice in crucial ways. In future, citizenship will require individuals to engage with these issues to fully contribute to society and to ameliorate potentially detrimental impacts.¹⁰⁴

Earlier in this chapter it has been argued that Toddington's definition of a legal skill must be broadened to incorporate the legal manifestations of more general academic skills. At present, digital skills are not usually conceptualised as 'academic' in nature. However, they increasingly provide a vital foundation for students to be able to display and demonstrate their academic skills. They also have value in their own right in enabling students to navigate

⁹⁸ Ann Thanaraj, 'Making the case for a digital lawyering framework in legal education' (2017) 2017(3) *International Review of Law*.

⁹⁹ Stuart Toddington 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 87

¹⁰⁰ Mahboobe Mehrvarz, Elham Heidari, Mohammadreza Farrokhnia, and Omid Noroozi, 'The mediating role of digital informal learning in the relationship between students' digital competency and their academic performance' (2021) 167 *Computers and Education*; Laura Pagani, Gianluca Argentin, Marco Gui, and Luca Stanca, 'The impact of digital skills on educational outcomes: evidence from performance tests' (2016) 42(4) *Educational Studies* 137

¹⁰¹ Fiona J. L. Handley, 'Developing digital skills and literacies in UK higher education: Recent developments and a case study of the digital literacies framework at the University of Brighton, UK' (2018) 48(1) *Publicaciones*

¹⁰² For an international overview of impacts see Amy W. Thornberg, Robert J. Ceglie, and Dixie F. Abernathy, *Handbook of Research on Lessons Learned From Transitioning to Virtual Classrooms During a Pandemic* (IGI Global, 2021)

¹⁰³ See, for example, Hugh McFaul, Elizabeth FitzGerald, Francine Ryan, and David Byrne, 'A mobile app for public legal education: a case study of co-designing with students' (2020) 28 *Research in Learning Technology* 2434; Emily Allbon, 'Too cool for (law) school? Using technology to engage students in legal skills' (2013) 4(1) *European Journal of Law and Technology*; Paul Maharg 'Negotiating the Web: Legal Skills Learning in a Virtual Community' (2001) 15(3) *International Review of Law, Computers & Technology* 345

¹⁰⁴ For examples of these intersections see Christopher Lawless and Alex Faulkner (eds), *Material Worlds: Intersections of Law, Science, Technology, and Society* (Wiley-Blackwell, 2012)

the intersections of law and today's digital society. To accept these into an enlarged definition of legal skills is to acknowledge the importance of digital technologies within society. In doing so, it is necessary to ensure that these do not simply become a form of professional skillset focused upon digital lawyering, but to emphasise their academic value and their necessity for contemporary citizenship.

Skills involving emotions

Another important set of skills which it is argued should be accepted as authentic legal skills are skills involving emotions, when applied within the legal context. A common short-hand for this type of skill is to refer to them as 'soft skills'¹⁰⁵, although this implies adherence to tenets of neo-liberal ideology¹⁰⁶, as well as drawing a form of distinction from other key skills which is misleading. They are also sometimes encompassed by the terms 'emotional literacy' or 'emotional intelligence'.¹⁰⁷ Emotions can be defined as '...A particular, conscious event, high in intensity but short-lived and easily labelled and recalled'.¹⁰⁸ There is a large body of scientific evidence demonstrating that they are intertwined with all aspects of reasoning, judgment and decision-making.¹⁰⁹ However, despite this, higher education, and legal education in particular, has a history of ignoring emotion and affect or viewing it as a purely pastoral issue, unrelated to teaching and learning.¹¹⁰ Although there are some notable exceptions, particularly within clinical legal education where self-reflection is often encouraged, these are by no means the norm.¹¹¹

There is a large body of evidence demonstrating that, in fact, emotions impact upon (and are impacted by) every aspect of a student's experience, including teaching and learning.¹¹² In other words, they are real and authentic elements of the law school experience. This means it is important for students to have the skills to enable them to study effectively, engage with the subject-matter and also look after their own wellbeing.¹¹³ Law-related examples could

¹⁰⁵ See, for example, Randall Kiser, *Soft Skills for the Effective Lawyer* (Cambridge University Press, 2017)

¹⁰⁶ Anne-Marie D'Aoust, 'Ties that Bind? Engaging Emotions, Governmentality and Neoliberalism: Introduction to the Special Issue' (2014) 28(3) *Global Society* 267

¹⁰⁷ Daniel Goleman, *Emotional Intelligence* (Bloomsbury, 1996)

¹⁰⁸ Brian H. Bornstein and Richard L. Wiener, 'Emotion and the Law: A Field Whose Time Has Come' in Brian H. Bornstein and Richard L. Wiener (eds) *Nebraska Symposium on Motivation. Emotion and the Law. Psychological Perspectives* (Springer, 2010) 1, 1

¹⁰⁹ *Ibid* n 108; Bandes and Blumenthal in discussing emotions observe that 'They influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate' (Susan A. Bandes and Jeremy A. Blumenthal 'Emotion and the Law' (2012) 8(1) *Annual Review of Law and Social Science* 161).

¹¹⁰ Emma Jones, *Emotions in the Law School: Transforming Legal Education Through the Passions* (Routledge 2019)

¹¹¹ Kate Seear, Lisa Bliss, Paula Galowitz, and Catherine F. Klein, 'Exploring the role of emotions in clinical legal education: inquiry and results from an international workshop for legal educators' (2019) 53(4) *The Law Teacher* 487-499

¹¹² See, for example, Mary Helen Immordino-Yang, *Emotions, Learning and the Brain: Exploring the Educational Implications of Affective Neuroscience* (W. W. Norton & Co, 2016); Chai M. Tyng, Hafeez U. Amin, Mohamad N. M. Saad, and Aamir S. Malik, 'The Influences of Emotion on Learning and Memory' (2017) 8 *Frontiers in Psychology* 1454

¹¹³ Craig Thorley, 'Not by Degrees: Improving Student Mental Health in the UK's Universities' (*Institute for Public Policy Research*, March 2017) Institute for Public Policy Research <https://www.ippr.org/files/2017-09/1504645674_not-by-degrees-170905.pdf> accessed 3 March 2021; Gareth Hughes and Leigh Spanner, 'The University Mental Health Charter' (*Student Minds*, 2019) <https://www.studentminds.org.uk/uploads/3/7/8/4/3784584/191208_umhc_artwork.pdf> accessed 3 March

include a student who finds the subject-matter of a particular case upsetting and has to be capable of interpreting their emotional response to understand the issue, a student who has had a previous experience with the law which or a group of students working together on a task requiring the social and emotional skills to navigate complex intra-personal relationship. As with the academic skills discussed above, these are not necessarily law-specific skills, for example, a historian may well have to deal with graphic accounts of disturbing events in history. However, they have specific manifestations when applied to legal study which appears to qualify them for inclusion within a broader category of authentic legal skills.

It was noted earlier that Toddington refers several times to rationality when discussing the normative ideal of law.¹¹⁴ Law has often prized a certain form of rationality which positions itself as antithetical to emotions.¹¹⁵ This is commonly reflected in the writings of proponents of liberal education, and liberal legal education, who largely focus on cognitive processes at the expense of acknowledging emotions.¹¹⁶ One interesting exception to this is Nussbaum who, writing about liberal education generally, argues that it should focus on developing a form of citizenship which requires ‘narrative imagination’, beginning by ‘understanding the world from the point of view of the other’.¹¹⁷ This suggests a form of empathy, which is generally understood to have both cognitive and affective components.¹¹⁸

Legal education still appears reluctant to incorporate emotions as integral component, meaning it is rarely expressly acknowledged, let alone emotional competencies being emphasised or taught.¹¹⁹ but it is arguable that this is gradually changing as legal educators begin to pioneer teaching methods which explicitly explore and validate emotional responses to topics and how students can regulate their reactions in healthy ways.¹²⁰ It also is likely that this process will be accelerated as a result of the COVID-19 global pandemic when the wellbeing of staff and students has come to the fore as a key issue for universities.¹²¹

2021; Aspasia I. Tsaoussi, ‘Using soft skills courses to inspire law teachers: a new methodology for a more humanistic legal education’ (2020) 54(1) *The Law Teacher* 1

¹¹⁴ Stuart Toddington ‘The Emperor’s New Skills: The Academy, The Profession and the Idea of Legal Education’ in Peter Birks (ed) *Pressing Problems in the Law: Volume 2: What are Law Schools for?* (Oxford University Press, 1996) 77, 88

¹¹⁵ Terri A. Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 13(2) *Law and Human Behaviour* 119; Susan A. Bandes and Jeremy Blumenthal, ‘Emotion and the Law’ (2012) 8(1) *Annual Review of Law and Social Science* 161

¹¹⁶ Emma Jones, *Emotions in the Law School: Transforming Legal Education Through the Passions* (Routledge 2019) Chapter 1.

¹¹⁷ Martha Nussbaum, *Cultivating Humanity. A Classical Defence of Reform in Liberal Education* (Harvard University Press, 1997) 11

¹¹⁸ Amy Coplan and Peter Goldie (eds), *Empathy. Philosophical and Psychological Perspectives* (Oxford University Press, 2011) XXXIII-XXXIV

¹¹⁹ Emma Jones, *Emotions in the Law School: Transforming Legal Education Through the Passions* (Routledge 2019); Paul Maharg and Caroline Maughan, ‘Introduction’ in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate Publishing, 2011) 1-10

¹²⁰ For reference to affective skills in particular see Guth (*ibid* n 14). For interesting case studies which acknowledge the role of emotion see Sira Abenoza and César Arjona, ‘Emotions and the frontiers of legal education’ (2017) 51 (4) *The Law Teacher* 453-468; Senthurun Raj ‘Teaching feeling: bringing emotion into the law school’ (2020) 55 (2) *The Law Teacher*

¹²¹ See, for example, Matthew J. Savage, Ruth James, Daniele Magistro, James Donaldson, Laura C. Healy, Mary Nevill, Philip J. Hennis, ‘Mental health and movement behaviour during the COVID-19 pandemic in UK university students: Prospective cohort study’ (2020) 19 *Mental Health and Physical Activity* 1; Richard Collier, ‘Moving Across Silos: Legal Academic Wellbeing and the Legal Professions – Some Reflections on the UK Experience’ in Janet Chan, Prue Vines, and Michael Legg (eds), *Wellbeing in a Changing World: The Impact of Technology and innovation on the Legal Profession*, (Insentia, 2020) 311-360; Richard Collier ‘Anxiety in the Legal Community – a study of junior lawyers, legal practice and legal education’ in Alex Davies (ed), *Lawyer Health and wellbeing: How the legal profession is tackling stress and creating resiliency* (Ark Publishing, 2020)

Although, understandably, much of the discussion on the pandemic within legal education to date has been on the need for law schools to shift to online delivery and assessment¹²² the massive implications for mental health and wellbeing amongst law students (and many other populations) will have to be acknowledged and processed.¹²³ This is arguably particularly the case in relation to law students, given the international evidence that their exposure to the discipline of law may render them particularly vulnerable to mental health and wellbeing issues.¹²⁴ The pandemic has demonstrated the interlinked nature of affect, emotion and wellbeing in a far more dramatic manner than the gradually building body of scientific evidence. Working out the implications of this for law schools and their students will require careful consideration of how so-called ‘soft skills’ can and should be manifested within legal education, for example, via the incorporation of greater reflective practice, introducing law and emotions are a component of the curriculum and foregrounding wellbeing within all aspects of law school life.¹²⁵ The citizen of the future will also require an understanding, awareness and ability to apply ‘soft skills’ to enrich their relationship with society in the way heralded by Nussbaum.¹²⁶

Conclusion

Since Toddington’s chapter in Birks, it may well be that the way in which some skills are demonstrated within legal education has changed. However, as discussed above, the types of skills required are still largely dictated by the (perceived) needs of the Legal Profession. This approach is neither justifiable nor sufficient. Toddington’s categorisation of legal skills is effective in pointing out the illusory nature of reliance on these legal professional skills, and more generic professional skills. In contrast, his attempts to distinguish generic academic skills from legal skills is less convincing. It leaves a very narrow category of legal skills whilst at the same time failing to clearly identify what these could be. It seems unlikely such a vanishingly small category could assist in achieving Toddington’s normative ideal of law, which appears commensurate with good citizenship, a normative ideal commonly referred to as an end of liberal legal education.

Taking the development of good citizens as the appropriate end for legal education in English law schools means recasting the notion of an authentic legal skill as one which is required to develop students’ understanding and engagement in citizenship, in other words, to shape individuals who will contribute to the positive development of society. As well as acknowledging the importance of the legal manifestations of general academic skills within this normative ideal, it is also necessary to encompass additional skills which are vital to the

¹²² See, for example, Yvonne Dutton and Seema Mohapatra, ‘COVID-19 and Law Teaching: Guidance on Developing an Asynchronous Online Course for Law Students’ (18 May 2020) St. Louis University Law Journal, 2021, Forthcoming, Indiana University Robert H. McKinney School of Law Research Paper No. 2020-7 <<https://ssrn.com/abstract=3604331>> accessed 3 March 2021

¹²³ Mental Health Foundation, ‘Nine-Month Study Reveals Pandemic’s Worsening Emotional Impacts on UK Adults’ (*Mental Health Foundation*, 17 December 2020) <<https://www.mentalhealth.org.uk/news/nine-month-study-reveals-pandemics-worsening-emotional-impacts-uk-adults>> accessed 3 March 2021

¹²⁴ See, for example, Natalie K. Skread and Shane L. Rogers, ‘Do law students stand apart from other university students in their quest for mental health: A comparative study on wellbeing and associated behaviours in law and psychology students’ (2015) 42-43 *International Journal of Law and Psychiatry* 81

¹²⁵ For the importance of a ‘whole university’ approach to wellbeing see Gareth Hughes and Leigh Spanner, ‘The University Mental Health Charter’ (*Student Minds*, 2019) <<https://www.studentminds.org.uk/charter.html>> accessed 21 April 2021

¹²⁶ Martha Nussbaum, *Cultivating Humanity. A Classical Defence of Reform in Liberal Education* (Harvard University Press, 1997)

legal enterprise in contemporary society, namely, legal digital skills and skills involving emotions in a legal context. Both could, at least in part, be classed as integral to academic skills in contemporary legal education. However, they also go beyond these as crucial skillsets to ensure that the citizen of the future is one who can not only develop personally but also engage effectively with key issues facing society, issues which are likely to become even more pressing within a post-pandemic landscape. That is not to imply that these skillsets alone are required to achieve this normative ideal. There are undoubtedly a range of others whose contributions can and should be acknowledged and explored. However, the two chosen to consider within this chapter have a broad significance, from regulating emotions when dealing with complex legal issues to understanding the challenges posed by digital inequalities in ensuring access to justice.

Toddington's message that we must strive to identify authentic legal skills remains pertinent and important within today's law schools. By using the term 'authentic' to represent those skills which reflect the normative ideal of legal education and equating this to the development of the liberal notion of citizenship, this chapter has provided a framework to expand upon Toddington's original, narrow, and somewhat nebulous conceptualisation of legal skills. At present, it seems the Emperor is still wearing his new clothes, and the need to find an authentic and real outfit and avoid equally glittering but diaphanous alternatives is as pressing as ever. It is hoped that this chapter will assist in developing the debate around legal skills by identifying two crucial skillsets to add to this concept and by providing a way to separate the authentic and real from the illusionary and false.

Reference List