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An emotionally vulnerable profession? Profession values and emotions within legal practice

Key words: Legal profession, lawyers, emotions, values, professionalism, vulnerability, wellbeing, mental health

Dr Emma Jones, University of Sheffield

Abstract

Applying Fineman's vulnerability theory, this paper will explore the role of emotions within the legal profession and the specific vulnerabilities that arise from their traditional and contemporary treatment within law. It will consider how the notion of professionalism in law has traditionally disregarded or excluded emotions as irrelevant or even dangerous in a manner which is philosophically and psychologically flawed as well as damaging to mental health and wellbeing. This approach has created longstanding unacknowledged vulnerabilities for the profession as a whole and individual practitioners. It will then explore how the shifting legal services landscape, and the resultant evolution of the profession, has led to a growing contemporary interest in the use of emotional competencies (often characterised as 'soft skills' or 'emotional intelligence'). These are now increasingly exploited as tools to enhance profitability. However, this leads to a dichotomy as, despite their increasing utilisation, emotions are still not fully acknowledged or incorporated within law's core professional values. This generates further individual and institutional vulnerabilities around mental health and wellbeing which require urgent attention to ensure the health of the contemporary profession. The paper concludes with suggestions for reforms to alleviate these vulnerabilities and promote greater future resilience within law.

Introduction

To characterise the legal profession as vulnerable appears highly counter-intuitive. Traditionally, it is lawyers who have been seen as either the protectors, or the exploiters, of the vulnerable – contrasting tropes found throughout history and still echoed within notions of professionalism that are present today.¹² In each of these roles, hero and villain, it is the lawyer who both represents and presents a form of invulnerability. Of course, these depictions have usually been generated within popular culture by non-lawyers, but the invulnerability they represent appears, at least to some extent, to have also been internalised by the profession.³ This is an invulnerability which has commonly been characterised by an ability to disregard and suppress emotions within their professional lives and thus (it is argued) remain

¹ The term 'lawyer' and 'lawyers' is used in this paper to refer to legal professionals as a whole, across jurisdictions, and including any individuals whose work involves analysing and applying the law and/or offering legal services.

² When discussing the portrayal of lawyers on television and in film, Salzman and Dunwoody refer to their roles as "the archetypal hero, villain, or bit player" Victoria S. Salzman & Philip T. Dunwoody (2005) 'Prime-time lies: Do portrayals of lawyers influence how people think about the legal profession' (2005) 58 *SMUL Review* 411, 430). See also Michael Asimow, 'When lawyers were heroes' (1995) 30 *University of San Francisco Law Review* 1131.

³ Nancy B. Rapoport, 'Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers' (2000) 14 *Notre Dame Journal of Ethics & Public policy* 49.

rational, detached and objective.⁴ This notion is reflected in a recent qualitative study of solicitors, where it was indicated that in legal practice demonstrating emotions would be interpreted as a form of weakness:

...As a lawyer I've always found that if you show any emotion in the workplace you're kind of written off as a human being" (Senior Associate, Employment, 5+ years PQE)⁵

Such a quotation suggests that emotion is associated with vulnerability and a lack of professionalism, thus the emphasis is on eradicating it from legal practice. The values commonly associated with 'thinking like a lawyer' and legal professionalism are those of reason, rationality and detachment.⁶ In contrast, emotions have been traditionally viewed as antithetical to these and associated with irrationality, bias and partiality.⁷ As Flowers observes:

The predominant reluctance to lift the role of emotions stems from the perceived risk that acknowledging their centrality may lead to the law being viewed as bias – not equal and universal, but partial and particular...⁸

Nevertheless, in recent times, the role of emotions within legal practice has moved more explicitly into the foreground in several ways. This is arguably linked to the increasing commercialisation of the profession, which requires firms in private practice to compete for clients and rankings, and reduce costs, to maximise their profitability.⁹ For example, empathy is portrayed as a valuable tool to extract key information from a client in a more efficient and effective manner.¹⁰ Sympathy and compassion are characterised as valuable sentiments to develop rapport and improve client care.¹¹ The (sometimes unspoken) implication is that utilising emotions (or, at least, appropriate simulations of emotions) will increase client retention and therefore law firms' profits. Another driver for this increased focus upon

⁴ S. A. Bandes, 'Feeling and thinking like a lawyer: Cognition, emotion, and the practice and progress of law' (2020) 89 *Fordham Law Review* 2427.

⁵ Participant quoted in E. Jones, 'The role and impact of emotions within everyday legal practice' (2021) 18 *No Foundations: An Interdisciplinary Journal of Law and Justice*. See also Susan A. Bandes, 'Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law' (2020) 89 *Fordham Law Review* 2427; Robin Wellford Slocum, 'An Inconvenient truth: The need to educate emotionally competent lawyers' (2011) 45 *Creighton Law Review* 827.

⁶ Joy Kadowaki, 'Maintaining professionalism: emotional labor among lawyers as client advisors' (2015) 22(3) *International Journal of the Legal Profession* 323; E. Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"*, Oxford University Press, 2007.

⁷ Susan Douglas, 'Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective' (2015) 9(2) *e-Journal of Business Education & Scholarship of Teaching* 56; Susan A. Bandes & Jeremy A. Blumenthal, 'Emotion and the Law' (2012) 8 *The Annual Review of Law and Social Science* 161.

⁸ Lisa Flower, *Interactional Justice. The Role of Emotions in the Performance of Loyalty* Routledge 2020, 3.

⁹ Julie Paquin, 'From partners to team leaders: tracking changes in the Canadian legal profession' (2021) 28(3) *International Journal of the Legal Profession* 351; Margaret Thornton, 'Squeezing the life out of lawyers: legal practice in the market embrace' (2016) 25(4) *Griffith Law Review* 471; : Hilary Sommerlad, 'A pit to put women in": professionalism, work intensification, sexualisation and work–life balance in the legal profession in England and Wales' (2016) 23(1) *International Journal of the Legal Profession* 61.

¹⁰ Nora Chlap & Rhonda Brown, 'Relationships between workplace characteristics, psychological stress, affective distress, burnout and empathy in lawyers' (2022) 29(2) *International Journal of the Legal Profession*, 159, 172; Jones n.5.

¹¹ Kristin B. Gerdy, 'Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering' (2008) 87 *Nebraska Law Review* 1.

emotions is the increasing incorporation of lawtech into the legal services arena.¹² As a result, ‘soft skills’ are increasingly heralded as the way forward to distinguish the offering of lawyers from online and artificially intelligent offerings vying for trade.¹³ Although the definition of such skills are somewhat vague, they commonly include behavioural dispositions and personality traits. They frequently featuring items such as inter-personal communication and team working which involve an implied emotional component, overlapping with ‘emotional intelligence’ to no small degree.¹⁴ There are now a growing number of publications guiding lawyers on how to develop and use such “soft skills” and advising on how to practise in an ‘emotionally intelligent’ manner.¹⁵

However, despite this plethora of advice to lawyers on how to utilise ‘soft skills’ and ‘emotional intelligence’, it is argued that emotions have not yet become a fully accepted part of legal professionalism, and are more commonly characterised an adjunct to be used (and manipulated) as required by the demands of the market.¹⁶ As a result, this shift towards a new contemporary paradigm exposes individual and institutional vulnerabilities which may have significant and lasting consequences in today’s neo-liberal society.

This paper suggests that lawyers are increasingly caught between two paradigms. The first traditional paradigm seeks to avoid and extinguish emotions and present lawyers as unemotive beings who have transcended such dangerous and misleading sentiments. The second, contemporary reconceptualization urges lawyers to acknowledge and utilise emotions via the application of ‘soft skills’ and ‘emotional intelligence’ whilst failing to fully incorporate an acknowledgement and understanding of emotion into key professional values. Whilst acknowledging the heterogeneous and complex nature of the contemporary legal profession, this paper uses these simplified paradigms heuristically to hone in on key issues. This paper explores the potential consequences of these paradigms for both individual legal practitioners and the broader profession. It argues that both contribute to the issues the legal profession experiences with poor mental health and wellbeing and proposes actions to be taken to foster resilience by supporting and guiding lawyers to align their experience of emotions with their professional values through cultural change across the profession.

Fineman’s theory of vulnerability

The paper will use Martha Fineman’s theory of vulnerability as a heuristic or theoretical lens through which to analyse these paradigms and their consequences. This conceptualisation of vulnerability began as a ‘stealthily disguised’ human rights’ discourse which sought to challenge the dominant focus on formal equality, based

¹² See, for example, Richard Susskind, *Tomorrow’s Lawyers. An Introduction to your Future* (2nd ed.) Oxford University Press 2017

¹³ Michael Legg, ‘New skills for new lawyers: responding to technology and practice development’ (2018) *The Future of Australian Legal Education* (Thomson Reuters 2018), *UNSW Law Research*, (18-51).

¹⁴ Susan Swaim Daicoff, ‘Lawyer, form thyself: Professional identity formation strategies in legal education through soft skills training, ethics, and experiential courses’ (2014) *27 Regent University Law Review* 205; S. Sangeetha Pazhani & T. Shanmuga Priya, ‘Need for soft skills development towards managerial efficiency’ (2012) *2(11) International Journal of Management Research and Reviews* 1895, 1895; Douglas n.7.

¹⁵ See, for example, Kiser, Randall. *Soft skills for the effective lawyer*. Cambridge University Press, 2017.

¹⁶ Jones n.5.

on providing the same treatment to all.¹⁷ Within this dominant approach, the state intervenes only to protect certain groups, classified as vulnerable on the grounds of certain identity characteristics, such as race and gender. This means that government efforts to foster social justice are narrow and centred only on particular sectors of society. As a result of this, Fineman argues that:

... Identity characteristics have become proxies for problems such as poverty or the failure of public educational systems. The focus only on certain groups in regard to these problems obscures the institutional, social and cultural forces that distribute privilege and disadvantage in systems that transcend identity categories.¹⁸

Those who do not fall within the groups which are identified as vulnerable and thus in need of protection are, by default, characterised as invulnerable. The focus is on individual autonomy and responsibility, atomising society and effectively preventing state intervention in wider issues of social justice and equality.¹⁹ As practitioners in a profession perceived as elite, lawyers are characterised as invulnerable by default within this system.²⁰

In contrast, Fineman's theory posits that everyone in society is vulnerable. This vulnerability is both 'universal and constant' and 'inherent in the human condition'.²¹ This means that the state, social institutions and individuals within society must all seek to recognise and respond to this, acknowledging this deep-seated reality of human existence and seeking to foster resilience and promote a fuller, richer form of social justice and equality.²² However, vulnerability is not limited to individuals, it is also acknowledged that institutions themselves can be vulnerable and susceptible to harm:

... Individuals influence relationships and institutions, relationships influence individuals and institutions, and institutions influence individuals and relationships. None of these aspects is completely separate from the other.²³ (Cooper, 2015, p.1356)

For example, Deghaghani and Newman's consideration of the English criminal justice system, explores the vulnerabilities of suspects, custody officers, criminal defence lawyers, the police force and the legal aid system itself.²⁴ The characterisation of all of these aspects as connected is also illustrated by Ching et al

¹⁷ Martha A. Fineman 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics* ed. M. A. Fineman & A. Gear, Routledge 2016, 13.

¹⁸ Fineman n.17, 15/16.

¹⁹ Fineman n.17; Martha A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 2.

²⁰ R. Dehaghani and D. Newman, 'We're vulnerable too': an (alternative) analysis of vulnerability within English criminal legal aid and police custody' (2017) 7(6) *Oñati Socio-legal Series [online]* 1199, 1203.

²¹ Fineman n.19, 1.

²² M. A. Fineman & A. Gear, 'Introduction - Vulnerability as Heuristic – An Invitation to Future Exploration' *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics* ed. M. A. Fineman & A. Gear, Routledge 2013.

²³ Frank Rudy Cooper, 'Always already suspect: Revising vulnerability theory' 93 (2014) *North Carolina Law Review* 1339, 1356.

²⁴ Dehaghani & Newman n.20.

in the exploration of the ethical dilemmas facing junior lawyers, where they consider the impact of changes to regulation of the solicitors profession on both individual lawyers and the profession as a whole.²⁵ Similarly, this paper considers both the position of individual lawyers and the impacts upon the legal profession more broadly. It focuses specifically upon emotional vulnerabilities and the consequences for mental health and wellbeing. In doing so, it recognises a range of factors contributing to such vulnerabilities, including the conceptualisation of the subject in liberal thought and the contemporary neo-liberal emphasis upon economic productivity and the commoditisation of individuals.

The way that vulnerability is manifested may vary between individuals and institutions, based on their embodied and embedded position within their social environment.²⁶ It may also involve different forms of harm – physical, psychological, emotional or otherwise.²⁷ However, its universality and constancy are fundamental aspects of Fineman’s theory. The other aspect which is ‘centrally important’ to vulnerability theory is resilience.²⁸ Fineman argues it enables individuals to ‘...respond to life-not only to survive but also to thrive within the circumstances in which we find ourselves’.²⁹ She identifies five different sources of resilience which organisations and institutions can provide, namely, physical (such as food, housing and money); human (such as education and experience); social (formed via familial and societal relationships); ecological (provided by our physical environment); and existential (focused around beliefs and aesthetics).³⁰ Identity characteristics, such as ethnicity and gender, are included within social resources, although Cooper argues vulnerability theory can mask some of the particularities generated by specific identities.³¹ This paper will largely focus upon human, social and existential sources in discussing addressing emotional vulnerabilities as those addressing the physical environment have relatively less salience to this topic.

Fineman’s theory of vulnerability creates interesting and contentious questions. For example, Kohn discusses the relationship between vulnerability and autonomy and argues that Fineman effectively de-values the need for autonomy as her theory ‘...privileges laws and policies that maximize a narrow conception of safety and security’.³² By viewing such safety and security as a precursor for any form of autonomy, it prioritises these concepts in a way which can lead to a paternalistic approach to law-making. This, Kohn argues, disregards the ways in which promoting individual autonomy can foster higher levels of physical and psychological wellbeing and has the potential to ‘undermine human dignity’ by failing to respect the independence and values of individuals.³³ However, Kohn suggests that Fineman’s

²⁵ Jane Ching, Graham Ferris & Jane Jarman, ‘To act is to be committed, and to be committed is to be in danger’: the vulnerability of the young lawyer in ethical crisis’ (2022) *Legal Ethics*.

²⁶ Martha A. Fineman, ‘Introducing Vulnerability’ *Vulnerability and the Legal Organisation of Work* ed. Martha A. Fineman & Jonathan W. Fineman Routledge 2017, 4; Martha A. Fineman, ‘Vulnerability and Inevitable Inequality’ (2017) 4(3) *Oslo Law Review* 133.

²⁷ M. A. Fineman, ‘The vulnerable subject: Anchoring equality in the human condition’ *Transcending the boundaries of law* ed. M. A. Fineman, Routledge-Cavendish 2010, 187.

²⁸ M. A. Fineman, ‘Vulnerability and social justice’ (2019) 53(2) *Valparaiso University Law Review* 341, 362.

²⁹ Fineman n.28, 363.

³⁰ Fineman n.27, 146.

³¹ Cooper n.23, 1365 onwards.

³² Nina A. Kohn, ‘Vulnerability Theory and the Role of Government’ (2014) 26 *Yale Journal of Law & Feminism* 1, 14.

³³ Kohn n.32, 15.

theory of vulnerability does not, inherently, have to be applied paternalistically, arguing that the theory can be used to question and ultimately prevent autonomy being abused in a way which privileges one group above another, whilst respecting autonomy when it does not infringe upon substantive equality.³⁴ Indeed, vulnerability theory has also been critiqued for potentially over-individualising issues, with Davis & Aldieri suggesting it could be seen as perpetuating individualistic forms of resilience, at the expense of the communal.³⁵

In relation to this paper, the specific value of Fineman's theory of vulnerability lies in the way it provides a theoretical stance which challenges the traditional notion of lawyers as invulnerable and instead provides an alternative basis within which to acknowledge and explore the vulnerabilities created by the profession's treatment of emotions and the dichotomies generated between professional values and the realities of practice. The emphasis on building resilience to ameliorate these vulnerabilities does require a careful and nuanced discussion in the context of law. Especially given that the legal profession has a tendency to individualise uncomfortable problems and seek to place responsibility for their resolution upon individuals, an approach exemplified by its treatment of wellbeing issues.³⁶ However, despite the concerns of Davis & Aldieri, there is a clear emphasis by Fineman upon wider forms of resilience, generated through and by organisations and institutions.³⁷ This is important in challenging law's individualistic tendencies and encouraging an approach which tackles the underlying structural and cultural factors contributing to its traditional and contemporary attitude towards emotions. Despite a trend towards liberalisation and restructuring within recent years, the legal profession remains comparatively highly regulated and hierarchical.³⁸ Therefore, there is a role for both employers, and regulatory and representative bodies, to respond to such vulnerabilities. To explore these issues, it is necessary to apply the lens of vulnerability to both traditional and contemporary notions of emotions and their relationship with professional values and examine the (as yet largely unexplored) consequences for both individual lawyers and the legal profession as an institution.

The traditional paradigm: Professionalism as an emotionless concept

Traditionally the legal profession does not engage with either the emotions of legal actors or the emotions of those around them.³⁹ There are some exceptions to this, for example, the construction of courtroom narratives which can skilfully manipulate the emotions of listeners.⁴⁰ However, the accepted traditional role of the lawyer is to

³⁴ Kohn n.32, 22-23.

³⁵ Benjamin P. Davis & Eric Aldieri, 'Precarity and Resistance: A Critique of Martha Fineman's Vulnerability Theory' (2021) 36 *Hypatia* 321.

³⁶ Richard Collier, 'Wellbeing in the legal profession: reflections on recent developments (or, what do we talk about, when we talk about wellbeing?)' (2016) 23(1) *International Journal of the Legal Profession* 41.

³⁷ Fineman n.26, 147.

³⁸ John Armour & Mari Sako, 'AI-enabled business models in legal services: from traditional law firms to next-generation law companies?' (2020) 7(1) *Journal of Professions and Organization* 27.

³⁹ T. A. Maroney, 'Law and emotion: A proposed taxonomy of an emerging field' (2006) 30 *Law and human behavior* 119.

⁴⁰ S. Bergman Blix & A. Wettergren, *Professional Emotions in Court. A Sociological Perspective*, Routledge

be rational, detached and objective, remaining aloof from the maelstrom of feelings and emotions which their client and others involved in a legal issue may be experiencing. This notion of professionalism has commonly been instilled into aspiring lawyers throughout their legal education and training and perpetuated by the established norms of legal culture and practice.⁴¹ As James explains ‘Law schools collude with legal systems and corporate employers to continue privileging intellect over other human qualities’.⁴² This is an approach which perpetuates the traditional approach of the law to emotions overall. An approach in which law and emotions are dichotomised, with law characterised as the epitome of reason and rationality and emotions as irrational and potentially dangerous.⁴³ A form of Cartesian dualism is at play, whereby law is associated with the controlled and calm function of cognition and emotions with the animal impulses of the body.⁴⁴

In many ways the story of the evolution of this form of legal professionalism is the story of the development of the modern liberal subject. This is a conceptualisation of the individual developed by classic liberal thinkers such as Locke which portrays people as autonomous beings, free to choose to contract with the state for the protection of rights.⁴⁵ In terms of the law, Grear refers to the ‘quintessentially rational, autonomous, juridical (male) individual of liberal legalism and capitalist economic theory’.⁴⁶ Thought of in these terms, the lawyer is the ultimate liberal subject – a disembodied, autonomous, rational being who can ‘glide along a grid of linear, smooth, mutual and neutral interaction in order to operationalise a putatively unproblematic formal legal equality’.⁴⁷ In other words, the very subject that Fineman seeks to challenge the existence of through her theory of vulnerability.⁴⁸

It should be noted that the ‘grid’ referred to by Grear operates within the public realm or sphere of life within the state.⁴⁹ The distinction the state has traditionally drawn between the public and private spheres is well established within critical and feminist literature generally.⁵⁰ It is also reflected in Fineman’s writings where she identifies

2018; L. Flower, ‘The (un)emotional law student’ (2014) 6(3) *International Journal of Work Organisation and Emotion* 295.

⁴¹ E. Jones, *Emotions in the Law School: Transforming Legal education Through the Passions* Routledge 2019; Bergma Blix and Wettergren n.40; Flower n.40.

⁴² C. James, ‘Seeing Things as We Are-Emotional Intelligence and Clinical Legal Education’ (2005) 8 *International Journal of Clinical Legal Education* 123, 129.

⁴³ R. Grossi, ‘Understanding law and emotion’ (2015) 7(1) *Emotion Review* 55; Kathryn Abrams & Hila Keren, ‘Who’s Afraid of Law and the Emotions’ (2009) 94 *Minnesota Law Review* 1997; T. A. Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 13(2) *Law and Human Behaviour* 119.

⁴⁴ J. Conaghan, *Law and Gender* Oxford University Press 2013.

⁴⁵ J. Locke, *Second Treatise of Government*, Hackett Publishing Company 1992.

⁴⁶ A. Grear, ‘Vulnerability, Advanced Global Capitalism and Co-Symptomatic Injustice: Locating the Vulnerable Subject’ *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics* ed. M. A. Fineman & A. Grear, Routledge 2016, 44.

⁴⁷ Grear n.46.

⁴⁸ Fineman n.18. See also the critique of the liberal subject in D. Bedford, ‘Introduction. Vulnerability Refigured’ *Embracing Vulnerability. The Challenges and Implications for Law* ed. D. Bedford and J. Herring, Routledge 2020.

⁴⁹ Grear n.46.

⁵⁰ See, for example, N. Naffine, *Law and the Sexes Explorations in Feminist Jurisprudence*, London, Allen & Unwin 1990.

the restraints placed on the state by its rigid, identity-based notion of equality.⁵¹ This is a divide which dichotomises the public and private spheres and allows state intervention only within the public sphere whilst characterising the private domain as an intimate space which cannot and should not be infringed upon by state intervention.⁵² As the uber-liberal being, the lawyer falls firmly within the public sphere of society, acting as a servant of the state and the upholder of the rule of law. Lawyers have even been described as a ‘broker’ of the constantly shifting inter-connections between social relationships and law.⁵³ In other words, the legal profession not only adheres to, but also has a role in, monitoring and even negotiating the divide between the public and private spheres, balancing the interests of the state and the public for the greater long-term good.⁵⁴ Viewed in these terms, the lawyer represents the state in negotiating and delineating its sphere of influence, categorising those who are vulnerable and those who are not. As such, they themselves are unquestioningly portrayed as invulnerable.

To preserve its role and status, and emphasise its invulnerability, the legal profession detaches itself from emotions and emphasises its separateness from the private, seemingly less rational and more messy, sphere of the family and intimate life. By doing so, it fosters the public/private divide which maintains and restricts the boundaries of the liberal state. As agents of, even defenders of, the state, lawyers uphold and demonstrate its liberal ideals through their behaviour and their traditional notion of professionalism. Thus, they refuse to admit the private and the emotional into the sphere of law, instead focusing on, and perpetuating, the notion of the public domain as a site of reason and rationality where the state can impose forms of formal equality on certain groups, whilst allowing those it does not class as vulnerable to contract, interact and trade within a liberal free market economy. As such, the professional values of the legal profession become those which are perceived as upholding this separation and ideals, namely, reason, rationality and detachment.⁵⁵

Challenging the traditional paradigm: The pervasiveness of emotions

This traditional notion of detached, unemotional professionalism has been increasingly challenged on several grounds. First, and perhaps most fundamentally, is the fact that its underlying assumptions do not fit with recent scientific and philosophical work on the role and importance of emotions. This increasingly demonstrates that emotions pervade reasoning, decision-making and all other so-called cognitive functions in every aspect of life and work.⁵⁶ Claims to separate reason and rationality from emotions are fundamentally flawed. As Harris and Schultz vividly explain:

⁵¹ Fineman n.19 & n.22.

⁵² Fineman n.19.

⁵³ Y. Dezalay & B. Garth, *Lawyers and the Rule of Law in an Era of Globalization*, Routledge 2008, 1.

⁵⁴ R. Roiphe, ‘The Decline of Professionalism’ (2016) 29 *Georgetown Journal of Legal Ethics* 649, 651.

⁵⁵ Kadowaki n.6.

⁵⁶ See, for example, A. Damasio, *Descartes’ Error*, Vintage 2006; M. Nussbaum, *Upheavals of thought: The intelligence of emotions*, Cambridge University Press 2001.

The polarization of reason and emotion prevents either from enriching the other, resulting in emotion that is undisciplined, unexamined, and unowned, as well as thinking that is hard and shallow.⁵⁷

Thus, a notion of professionalism which disregards or suppresses emotions is not only misguided, but also potentially damaging to reasoning, judgement and decision-making. If emotions have an inescapable impact on legal work, this needs to be explored and examined, not hidden and belittled. By failing to do so, lawyers are exacerbating their inherent vulnerabilities, failing to develop resilience and leaving themselves ill-equipped for the demands of professional practice.

Aligned to this lack of synchronicity between scientific and legal perceptions of emotions is the emerging understanding that to try and maintain and perpetuate such a seemingly unemotional professional status demands significant amounts of emotional energy and investment.⁵⁸ This has most commonly been characterised using the term 'emotional labour'. A concept devised by Hochschild (drawing on the earlier work of Goffman) who describes it as 'the management of feeling to create a publicly observable facial and bodily display'.⁵⁹ She categorises this either as 'surface acting', where a person deliberately and knowingly will 'deceive others about what we really feel' and 'deep acting', where a person also effectively deceives themselves by altering their actual feelings.⁶⁰ Hochschild views both these forms of acting as having potentially negative consequences in estranging people from their true feelings and relinquishing their healthy sense of integration and wholeness. This could lead them either to separate their sense of self from their job role in a way which leads them to view their role as inauthentic, or to burnout.⁶¹

Within the literature on the legal profession, this form of emotional role-playing has been identified amongst various groupings, including law students, barristers and immigration solicitors.⁶² There is also increasing discussion of the possibility of vicarious trauma amongst members of the legal profession who are dealing with traumatic and harrowing cases on a daily, on-going basis.⁶³ This suggests that there is a divergence between the notion of professionalism (and the values this encompasses) held by the legal profession and the realities of daily practice. For example, Melville & Laing in their empirical work on family law solicitors found that

⁵⁷ A. P. Harris & M. M. Schultz, "'A(n)other Critique of Pure Reason": Toward Civic Virtue in Legal Education' (1993) 45(6) *Stanford Law Review*, 1773, 1779.

⁵⁸ Flower n.8; Bergman Blix & Wettergren n.40; Kadowaki n.6; Patricia Weir, Liz Jones, Nicola Sheeran & Mark Kebell (2022) A diary study of Australian lawyers working with traumatic material, *Psychiatry, Psychology and Law*, 29:4, 610-630.

⁵⁹ A. R. Hochschild, *The managed heart: Commercialization of human feeling*, University of California Press 2003, 7; E. Goffman, *The Presentation of Self in Everyday Life*, University of Edinburgh Science Research Centre 1956.

⁶⁰ Hochschild n.59, 34.

⁶¹ Hochschild n.59.

⁶² Flower n.8; C. Westaby, 'Feeling like a sponge': The emotional labour produced by solicitors in their interactions with clients seeking asylum' (2010) 17(2) *International Journal of the Legal Profession* 153.; L. C. Harris, 'The Emotional Labour of Barristers: An Exploration of Emotional Labour by Status Professionals' (2002) 39(4) *Journal of Management Studies* 553.

⁶³ See, for example, C. James, 'Towards trauma-informed legal practice: a review' (2020) 27(2) *Psychiatry, Psychology & Law* 275.

their role was often 'part-counsellor, part-solicitor' in a way which was 'emotionally draining'.⁶⁴ There is an implication that, in this arena, professionalism and the actualities of practice are in tension, if not conflict.

In their study of immigration practitioners and others involved in the asylum process, Baillot et al referred to the emotional responses which the accounts of clients generated amongst such practitioners.⁶⁵ They found that two key coping strategies employed in their work were, firstly, one of 'detaching' or 'distancing' themselves from their clients' narratives and, secondly, by attempting to 'deny or shift ultimate responsibility' for the outcome to the client (2013, pp.528, 533). It was argued that both of these strategies had the potential to become 'maladaptive', generating a reluctance to engage with harrowing narratives, a potential scepticism and sense of disbelief, the possibility of becoming 'case hardened' and a lack of engagement with, and ownership of, the clients' case.⁶⁶ Once again, this illustrates the ways in which the traditional paradigm exacerbates vulnerability. The lack of acknowledgment and discussion of emotions means that opportunities to equip lawyers with positive, adaptive coping strategies are lost.

To date, much of the work on the role of emotions in the legal profession has focused on those representing specific groups who are most obviously vulnerable, such as asylum-seekers and clients seeking guidance over family disputes. In the same way that the dominant state narrative on social justice and equality is based on identity characteristics⁶⁷ this, somewhat conveniently, places the emotions involved in legal transactions and disputes into a form of silo – if they can be identified with a particular group or groups of individuals, this does not challenge overall notions of professionalism. Instead, it simply suggests there may be certain, limited exceptions to the traditional (unemotional) paradigm governing legal professionalism. However, just as emotion pervades every area of life, so there is an emotional aspect to every legal transaction and practice. This has been addressed to a limited extent in the academic literature, with Barkai and Fine arguing (when discussing empathy) that:

... Virtually every legal case has significant emotional components for the client." These emotional components are tied to the fact situation, to the client's relationship with the lawyer and to the client's encounter with the legal system.⁶⁸

In terms of clients, even in the corporate and commercial sphere, a businessperson may have complex feelings and emotions around an issue (conflicting loyalties, anxiety over cash flow, embarrassment at an oversight or error, to name a few) or around the process of consulting and instructing a lawyer.⁶⁹ For the legal professional themselves, there may also be a range of emotions involved, for example, anxiety over impressing a new client, excitement at the prospect of

⁶⁴ A. Melville & K. Laing, 'I just drifted into it': constraints faced by publicly funded family lawyers' (2007) 14(3) *International Journal of the Legal Profession* 281, 286.

⁶⁵ Baillot, Helen, Sharon Cowan, and Vanessa E. Munro. "Second-hand emotion? Exploring the contagion and impact of trauma and distress in the asylum law context." *Journal of Law and Society* 40.4 (2013): 509.

⁶⁶ Baillot n.65, 528-536.

⁶⁷ Fineman n.17.

⁶⁸ J. L. Barkai & V. O. Fine 'Empathy training for lawyers and law students' (1983) 13(3), *Southwestern University Law Review* 505, 506.

⁶⁹ C. Westaby & E. Jones, 'Empathy: an essential element of legal practice or 'never the twain shall meet?'' (2018) 25(1) *International Journal of the Legal Profession* 107.

obtaining a settlement, happiness at resolving an issue, anger and frustration at failing to resolve it.⁷⁰ The traditional paradigm of professionalism as an emotionless concept, with its focus on rationality, objectivity and detachment, is thus flawed and incomplete when it comes to considering and examining both negative and positive emotions. No area of law, no part of practice is wholly devoid of emotions, and nor should it be so. By portraying lawyers as invulnerable and failing to the pervasive nature of emotions within its portrayal of professionalism, it fails in any claim to philosophical or scientific credibility. It also fails its members who are seeking to navigate the daily realities of life in practice and the tensions this creates with their professional identity.

The consequences of this should not be underestimated. There is a substantial body of evidence within the US and Australia, and a growing body elsewhere, demonstrating that lawyers as a grouping have lower levels of wellbeing and higher levels of mental health issues than the general population.⁷¹ There appear to be a range of causes of this, including high workloads and a heavy reliance on billable hours.⁷² However, there is also evidence that the traditional paradigm of emotionless professionalism also contributes in a number of ways. In particular, it leads to the deification of a potentially unhealthy form of ‘thinking like a lawyer’ which is narrow, rigid and fails to account for the role of emotions.⁷³ The lack of focus on inter- and intrapersonal skills leaves lawyers ill-equipped for the emotional demands of legal practice.⁷⁴ It also means they may not have the self-awareness to recognise early emotional cues that their wellbeing is deteriorating.⁷⁵ Such wellbeing issues themselves have wider consequences which impact the whole institution of the legal profession. These include exacerbating the potential for unethical decision making and eroding public confidence in the profession.⁷⁶ While the past response of the profession has largely (intentionally or not) been to stigmatise those individuals’ experiencing wellbeing and mental health issues, there is now an increasing awareness that this approach is fundamentally flawed both practically and ethically, although it still arguably dominates within at least some sectors of legal practice⁷⁷

The evolution of the legal profession

The traditional paradigm discussed previously has been challenged in recent years due to the broader evolution of the legal profession and its notions of professionalism. This evolution has begun to impact upon the legal profession’s perception, and use of emotions. This has arguably assisted in building resilience in dealing with the emotional vulnerabilities generated by the traditional paradigm, by acknowledging a potential role for emotions within legal practice. However, it has

⁷⁰ Jones n.5.

⁷¹ See, for example, *International Bar Association, Mental Wellbeing in the Legal Profession: A Global Study* (2021) < <https://www.ibanet.org/Mental-wellbeing-in-the-legal-profession>>; R. Collier, ‘Love Law, Love Life: Neoliberalism, Wellbeing and Gender in the Legal Profession’ (2014) 17(2) *Legal Ethics* 202, 206-210.

⁷² I. Campbell & S. Charlesworth, ‘Salaried lawyers and billable hours: a new perspective from the sociology of work’ (2012) 19(1) *International Journal of the Legal Profession*

⁷³ Emma Jones, *Emotions in the Law School: Transforming Legal Education through the Passions*, Routledge 2019; C. James, ‘Lawyers’ wellbeing and professional legal education’ (2008) 42(1) *The Law Teacher* 85.

⁷⁴ James n.73.

⁷⁵ E. Jones, N. Graffin, R. Samra & M. Lucassen, *Mental Health and Wellbeing in the Legal Profession*, Bristol University Press 2020, Chapter 6.

⁷⁶ Jones et al n.75, Chapter 1.

⁷⁷ Collier n.36; Jones et al n.75.

also created new emotional vulnerabilities which now need to be acknowledged and addressed. As the legal profession begins to characterise emotions as valuable commodities, there is an expectation that lawyers can and will utilise them within their work in the form of 'soft skills' and 'emotional intelligence'.⁷⁸ With professionalism increasingly associated with high standards of personalised client care, the question of how to reconcile the notion of professionalism as one of reason, rationality and detachment with the emotional competence now being demanded within daily practice is becoming increasingly pressing.

This shift from the traditional paradigm is aligned to wider societal shifts away from both more traditional liberal thought, and the contrasting Keynesianism of the welfare state, towards a form of neoliberalism. This, Blalock argues, has supplanted liberalism as 'the dominant paradigm of legitimacy' and now constitutes 'the new common sense of the age'.⁷⁹ It is worth noting that some commentators suggest we have now reached a 'post-neoliberal' age, within society more generally, but strong elements of neoliberal doctrine still dominate in the legal sphere.⁸⁰ The manner in which neo-liberalism prioritises the demands of the market has exacerbated the fundamental tension between law as a form of calling or public service and law as a business.⁸¹ This is not a new tension, certainly not in the public's perceptions of lawyers. Nicolson (writing about pro bono work) encapsulates the idea of a lawyer as a form of public servant in his argument for a return to 'an older ideal of professionalism' which is based on the idea that:

... law involves a calling to devote one's training, skills and privileges to assist those who require law's benefits or protections, and hence a true legal professional is a lover of justice.⁸²

In contrast, as early as 1853, the author Charles Dickens in his novel *Bleak House* was suggested that: 'The one great principle of the English law, is to make business for itself'.⁸³ However, amongst academic commentators there appears to be a strong perception that, in recent years, it is the model of law as a business that has prevailed.⁸⁴ Changes in the regulation of the legal profession; cuts in public legal aid funding through the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁸⁵; the de-regulation and fragmentation of legal services through the Legal Services Act 2007⁸⁶, meaning they can now be provided by a much wider range of businesses (for example, will writing consultants); a growing focus on technology to 'unbundle' legal services and provide innovative solutions (for example, online legal advice services);

⁷⁸ See n.14 and n.15.

⁷⁹ C. Blalock, 'Neoliberalism and the crisis of legal theory' (2014) 77 *Law & Contemporary Problems* 71, 72, 83.

⁸⁰ William Davies & Nicholas Gane. 'Post-neoliberalism? An introduction' (2021) 38(6) *Theory, Culture & Society* 38 3; Collier n.71.

⁸¹ See n.9.

⁸² D. Nicolson, 'Calling, character and clinical legal education: A cradle-to-grave approach to inculcating a love for justice' (2013) 16(1) *Legal Ethics* 36, 36.

⁸³ C. Dickens, *Bleak House*, Bradbury and Evans 1853, 385-6.

⁸⁴ A. Boon, L. Duff & M. Shiner, 'Career Paths and Choices in a Highly Differentiated Profession: The Position of Newly Qualified Solicitors' (2001) 64(4), *The Modern Law Review* 563; see also n.8.

⁸⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012 c.10.

⁸⁶ Legal Services Act 2007 c29.

and potential clients increasingly exercising consumer choice and demanding lower and fixed fees have all contributed to this.⁸⁷ As a result, there is significant pressure on legal service providers to gain new clients, keep existing clients and generate profits. This can lead to members of the legal profession being required to generate as many fees as possible from as many clients as possible and take part in many marketing activities to promote both themselves and their organisation.⁸⁸

In effect, the changes to the legal profession have mirrored wider shifts in society, which emphasise the importance of market forces, the importance of economic success and the pre-eminence of corporate values.⁸⁹ The focus on the autonomous, rational being has now become inextricably linked within neoliberalism to the promotion of the free-market economy and an emphasis on maximising economic growth and success. Thus, newer notions of professionalism can be seen to be driven by the form and standard of service required by consumers of legal services, framed through competency frameworks and professional accreditation.⁹⁰ The state is rolled back to allow the free market to determine demand and supply and thus the lawyer's role as a public servant or protector becomes (through neoliberal eyes, at least) of less value or necessity.⁹¹

There are different perspectives on whether the notion of legal professionalism has been either derided or discarded, or simply changed and evolved to meet the demands of the 21st century.⁹² However, there remain signs that professionalism is not viewed, either by the public or the legal profession themselves, as simply being about standards of competency and service and meeting consumer demand. The provision of pro bono work by a significant number of the legal profession is one illustration of this, with many lawyers viewing it as part of their sense of professional responsibility.⁹³ Similarly, despite the liberalisation of legal services, the legal profession itself remains relatively heavily regulated with individual lawyers and law firms required to adhere to specific ethical Codes of Conduct (for example, by the Solicitors Regulation Authority and the Bar Standard Board). This all implies a sense that lawyers remain, at least to some degree, in thrall to its traditional notion of professionalism whilst at the same time seeking to adapt to neoliberal society. Given the tensions and contradictions which remain in overall notions of professionalism, the question for the next part of this paper is whether (and if so how) the growing role of emotions within legal practice interacts with law's professional values. Exploring this question enables a consideration of newer vulnerabilities which have emerged as a result of such wider shifts and changes.

⁸⁷ S. Caserta, 'Digitalization of the legal field and the future of large law firms' (2020) 9(2) *Laws* 14.

⁸⁸ Joanna Bagust, 'The legal profession and the business of law' (2013) 35(1) *The Sydney Law Review* 27.

⁸⁹ V. Holmes, T. Foley, S. Tang & M. Rowe, 'Practising professionalism: Observations from an empirical study of new Australian lawyers' (2012) 15(1) *Legal Ethics*, 29; J. Wallace & F. Kay, 'The professionalism of practising law: A comparison across work contexts' (2008) 29(8) *Journal Of Organizational Behavior* 1021.

⁹⁰ See, for example, Legal Education and Training Review, *Setting Standards: The future of legal services education and training regulation in England and Wales* 2013. Available at: <https://letr.org.uk/the-report/index.html> (accessed 17th March 2023).

⁹¹ A. T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, Harvard University Press 1993.

⁹² For a useful discussion, see Paquin n.9.

⁹³ Francesca Bartlett & Monica Taylor 'Pro bono lawyering: personal motives and institutionalised practice' (2016) 19(2) *Legal Ethics* 260.

The emergent paradigm: Emotions as a professional commodity

In terms of the legal profession's engagement with emotions, such wider shifts in professionalism have had a complex and to-date largely unanalysed impact. As explored above, when commentators highlight the changes and arguable decrease in professionalism, what they tend to be discussing is a decline in the form of values and ideals which are associated with the model of a lawyer as a public servant or protector.⁹⁴ If such values and ideals are to be ignored or discarded, it would seem to suggest that emotions will also become (even more) irrelevant and reviled. The pre-eminence of financial survival and profit maximisation seem to militate against the admission of such wider, less economically necessary considerations.

However, there is evidence that, in fact, some forms of emotion are becoming more widely acknowledged within the profession as its corporatisation grows. In particular, the growing interest in concepts such as 'soft skills' and 'emotional intelligence' has already been noted.⁹⁵ Indeed, in England and Wales, the Legal Education and Training Review identified 'affective and moral' competencies as 'critical to legal practice' and listed (amongst others) 'emotional intelligence', 'resilience' and 'empathy' as key in those domains.⁹⁶ The legal press has demonstrated an increasing interest in the use of 'emotional intelligence' as a key way to enhance service and combat the perceived threat of artificial intelligence.⁹⁷ Bodies such as the American Bar Association⁹⁸, the International Bar Association⁹⁹ and the Law Society of England and Wales¹⁰⁰ have also provided information and resources on this concept.

Once again, this development mirrors wider shifts within society. Whilst it is arguable that classical liberal thought had little (if any) engagement with emotions,

⁹⁴ Nicolson n.82; Kronman n.91.

⁹⁵ Daniel Goleman, *Emotional Intelligence*, Bloomsbury 1996; Kiser n.14; P. Salovey & J. D. Mayer 'Emotional Intelligence' (1990) 9(3) *Imagination, Cognition and Personality* 185.

⁹⁶ Legal Education and Training Review n.90, para 4.83 and table 4.3.

⁹⁷ A. Aldridge, 'City law firm brings in emotional intelligence training to ward off threat from robots' *Legal Cheek*. Available at <http://www.legalcheek.com/2016/05/city-law-firm-brings-in-emotional-intelligence-training-to-ward-off-threat-from-robots/> (accessed 17th March 2023).

⁹⁸ American Bar Association, 'How emotional intelligence makes you a better lawyer', American Bar Association, 2017. Available at: <https://www.americanbar.org/news/abanews/publications/youraba/2017/october-2017/how-successful-lawyers-use-emotional-intelligence-to-their-advan/>
<https://www.americanbar.org/news/abanews/publications/youraba/2017/october-2017/how-successful-lawyers-use-emotional-intelligence-to-their-advan/> (accessed 17th March 2023).

⁹⁹ Polly Botsford 'Why lawyers need to be taught more about emotional intelligence', International Bar Association, 2017. Available at: <https://www.ibanet.org/article/bc769d24-a76e-447a-aff1-fd92903bbd60> (accessed 17th March 2023).

¹⁰⁰ Paula Young & Penny Owston, 'Emotional intelligence: The essential tool for business success', The Law Society of England and Wales, 2016. Available at: <https://www.lawsociety.org.uk/topics/in-house/emotional-intelligence-the-essential-tool-for-business-success> (accessed 17th March 2023).

neoliberal ideology has a more complex relationship with affect.¹⁰¹ In fact, as an ideology, it contains a wide range of emotional components.¹⁰² As Freeman argues:

The manner in which feelings are incited, produced, and exchanged in the marketplace and in the psyches and embodied experiences of individuals has become an integral part of late capitalism.¹⁰³

However, these emotional components are validated and even incited for very specific purposes. They are not intended to foster genuine connection and care within society.¹⁰⁴ Instead, one aim is to create attachments to neoliberal ideology, and hence dissipate resistance to it.¹⁰⁵ Another is to assist in generating the 'human capital' required for economic productivity.¹⁰⁶ In other words, the creation of workers who have affective capabilities such as emotional intelligence and empathy is now viewed as providing greater economic productivity, one of the holy grails of neo-liberal thought. Given this use of emotions to strengthen ideological ties and regulate a person's workplace behaviour, it is perhaps unsurprising that the usual focus is on self-improvement and personal growth, with an increasing expectation that people will take individual responsibility for their wellbeing and emotional development¹⁰⁷. As such, in neo-liberal ideology, emotions are valuable to the extent they can be applied to enhance self-advancement, economic productivity and financial success despite the forms of atomisation such an individualised approach can engender.¹⁰⁸

In terms of the legal profession, this use of emotions is demonstrated by the focus on individual lawyers having (or developing) appropriate 'soft skills' and 'emotional intelligence'. Such skills are positioned as turning individuals into 'better' lawyers who are more productive, obtain higher revenues and cost less in terms of healthcare and liabilities caused by ethical lapses.¹⁰⁹ This focus on individual self-actualisation is also echoed in the treatment of mental health issues such as stress, anxiety and depression, which have been found to be virtually endemic throughout

¹⁰¹ K. Lynch, 'Carelessness: A hidden doxa in higher education' (2010) 9(1) *Arts & Humanities in Higher Education* 54.

¹⁰² A. M. D'Aoust, 'Ties that Bind? Engaging Emotions, Governmentality and Neoliberalism: Introduction to the Special Issue' (2014) 28(3) *Global Society* 267, 269.

¹⁰³ C. Freeman, 'Feeling Neoliberal' (2020) 1(1) *Feminist Anthropology* 71, 71.

¹⁰⁴ P. J. Burke, 'Re/imagining higher education pedagogies: gender, emotion and difference' (2015) 20(4) *Teaching in Higher Education* 388. K. Lynch, 'Neoliberalism and Marketisation: The Implications for Higher Education' (2006) 5(1) *European Education Research Journal* 1.

¹⁰⁵ D'Aoust n.102, 274.

¹⁰⁶ N. J. Kiersey "'Retail Therapy in the Dragon's Den': Neoliberalism and Affective Labour in the Popular Culture of Ireland's Financial Crisis' (2014) 28(3) *Global Society* 356, 358; see also Otto Penz & Birgit Sauer, *Governing Affects: Neoliberalism, Neo-Bureaucracies, and Service Work*, Routledge, 2019.

¹⁰⁷ E. Cabanas, 'Rekindling individualism, consuming emotions: Constructing "psytizens" in the age of happiness' (2016) 22(3) *Culture & Psychology* 467.

¹⁰⁸ S. Binkley, 'The Emotional Logic of Neoliberalism: Reflexivity and Instrumentality in Three Theoretical Traditions' in S Binkley, D Cahill, M Cooper, M Konings, D Primrose (eds.) *The Sage handbook of neoliberalism*, Sage, 2018

¹⁰⁹ American Bar Association (2017). How emotional intelligence makes you a better lawyer. Available at: <https://www.americanbar.org/news/abanews/publications/youraba/2017/october-2017/how-successful-lawyers-use-emotional-intelligence-to-their-advan/> (accessed 1 December 2023).

the legal profession internationally.¹¹⁰ At least until recently, this has been (largely unquestioningly) positioned as a problem for individuals suffering from psychological distress.¹¹¹ This in itself reflects Fineman's critique of traditional conceptions of vulnerability.¹¹² If certain individuals, or at most groups of individuals or specific silos of legal practice (such as immigration practitioners), can be classified as vulnerable, this retains the invulnerable status of the legal profession as a whole. The notion of vulnerability remains contained and segregated from mainstream practice. The focus upon 'soft skills' and 'emotional intelligence' is more broadly promoted across the profession, but their use is characterized as a functional tool within client care, a carefully honed mechanism to perpetuate the status of the profession and its invulnerability. The emphasis is on regulating and managing emotions in a manner which creates a form of 'emotional rationality', harnessing them to the specific needs of the legal workplace in a way which will facilitate interactions with clients and colleagues and thus productivity.¹¹³ The underlying assumption is that lawyers remain emotionally detached, but are able to instrumentally utilise emotions to demonstrate their commitment to their role/organization, assist their client-facing work and, therefore, boost their productivity and profitability. To the extent emotions become integrated into professionalism, the focus on maximization of performance therefore becomes part of the specific discourse identified by Evetts:

The use of the discourse of professionalism as operationalized by managers in work organizations is also a discourse of self-control which enables self-motivation and sometimes even self-exploitation.¹¹⁴

Whilst it is tempting to assume that any acknowledgment of emotions by the legal profession must, by its very nature, be positive, in fact, there are significant difficulties with the way emotions are being conceptualised and managed within this emerging discourse. For those who still hold onto a more traditional notion of legal professionalism, it is possible that they may see the danger of this emergent paradigm as one akin to the 'floodgates' argument, well-rehearsed in tort cases. In other words, it may be suggested that allowing emotions to infringe on the reason and rationality of law could lead to inappropriate, embarrassing or even offensive displays of emotions.¹¹⁵ However, this misses the key point (discussed above) that it is not being argued lawyers should 'let it all hang out' and endlessly emote in all situations. Instead, what the weight of evidence suggests is that emotion is a part of legal practice, working life, even the law itself.¹¹⁶ The form of emotional detachment required by the traditional lawyering paradigm in itself demands (often unrealistic and unhealthy) levels of emotional regulation.¹¹⁷ The use of concepts such as 'soft skills' and 'emotional intelligence' in the profession therefore initially appears positive in

¹¹⁰ See, for example, L. S. Krieger & K. M. Sheldon 'What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success' (2015) 82 *The George Washington Law Review* 554.

¹¹¹ Collier n.35; P. Baron, 'Althusser's mirror: lawyer distress and the process of Interpellation' (2015) 24(2) *Griffith Law Review* 157.

¹¹² Fineman n.17; Fineman n.19.

¹¹³ Cabanas, n.107, 471-472.

¹¹⁴ Julia Evetts, 'Professionalism: Value and ideology' (2013) 61(5-6) *Current sociology* 778, 787.

¹¹⁵ Abrams & Keren n.43.

¹¹⁶ S. A. Bandes 'Introduction' in S. A. Bandes (ed.) *The Passions of Law*, New York University Press, 1999.

¹¹⁷ Bergman Blix & Wettergren, n.44.

that it goes some way towards acknowledging this, and suggesting that therefore lawyers need to engage with emotions in their professional lives.

At the same time, the focus on these concepts present real and complex challenges. Both of these concepts are somewhat vague and arguably lack the scientific and philosophical bases of wider discussions on emotions. The definition itself of 'soft skills' is extremely broad and lacks clear definitional boundaries.¹¹⁸ On occasion, such definitions therefore include abilities, values and personality traits, and also overlap with definitions of 'skills' more generally.¹¹⁹ The definition of "emotional intelligence" is even more opaque, as there are a range of differing models each of which arguably values, and tests, different things.¹²⁰ Such concepts have only limited explicit engagement with the broader scientific and philosophical work being conducted on emotions and therefore can be seen as potentially impoverished or, at best, as a form of shorthand for a very wide range of emotional competencies.¹²¹

A second significant issue relates once again to the concept of emotional labour.¹²² If individual lawyers are being asked to upskill by acknowledging and using emotions this could place a burden on them (particularly those who may not be neuro-typical) in expecting them to give of their personal self in a work context. There is evidence that women and those with precarious working conditions are likely to face more such emotional demands, further exacerbating existing diversity issues within the legal profession.¹²³ Without sustained, well-informed and nuanced training, support and resources in place, such emotional labour could pose a risk to individuals' wellbeing and mental health, including individuals belonging to historically disadvantaged groups who are already experiencing lower levels of mental health and wellbeing than other legal professionals.¹²⁴ This is not a new problem, as referred to above, the wholesale suppression and disregard of emotions inherent in traditional notions of professionalism in itself required high levels of emotional labour, but an increasing emphasis upon this aspect of practice will arguably exacerbate such risks.¹²⁵ Of course, it could be suggested that this will not occur as emotional

¹¹⁸ M. L. Matteson, L. Anderson & C. Boyden, "'Soft skills': A phrase in search of meaning' (2016) 16(1) *Libraries and the Academy* 71.

¹¹⁹ A. K. Touloumakos, 'Expanded yet restricted: A mini review of the soft skills literature' (2020) 11 *Frontiers in psychology* 2207.

¹²⁰ B. R. Palmer, 'Models and measures of emotional intelligence' (2007) 14(2) *Organisations and People* 3-10; K. V. Petrides & A. Furnham, 'Trait Emotional Intelligence: Psychometric Investigation with Reference to Established Trait Taxonomies' (2001) 15(6) *European Journal of Personality* 425.

¹²¹ E. Jones, 'Affective or defective? Exploring the LETR's characterisation of affect and its translation into practice' (2018) 52(4) *The Law Teacher* 478.

¹²² Hochschild n.59.

¹²³ C. Veldstra (2020) 'Bad feeling at work: Emotional labour, precarity, and the affective economy' 34(1) *Cultural Studies* 1-24. C. Westaby & A. Subryan (2020) 'Emotional labour in the legal profession' in C. Westaby & A. Subryan Eds. (2020) *Emotional Labour in Criminal Justice and Criminology*. (Routledge) 34-53; H. Sommerlad (2016) "'A pit to put women in": professionalism, work intensification, sexualisation and work-life balance in the legal profession in England and Wales' 23(1) *International Journal of the Legal Profession* 61-82.

¹²⁴ International Bar Association (2021) *Mental Wellbeing in the Legal Profession: A Global Study*. Available at: <https://www.ibanet.org/document?id=IBA-report-Mental-Wellbeing-in-the-Legal-Profession-A-Global-Study> (accessed 29 November 2023); A. A. Grandey & G. M. Sayre, 'Emotional labor: Regulating emotions for a wage' (2019) 28(2) *Current Directions in Psychological Science* 131; C. Westaby "'Feeling like a sponge": the emotional labour produced by solicitors in their interactions with clients seeking asylum' (2010) 17(2) *International Journal of the Legal Profession* 153.

¹²⁵ Kadowaki n.6.

regulation and displays are simply being used as cognitive tools, without emotions being authentically experienced. In other words, emotions are being mimicked and manipulated in the service of professional gain, in line with neoliberal ideology. However, this still involves a form of emotional labour in the surface acting it requires to control and portray specific emotions.¹²⁶ In fact, it is such surface acting that is most strongly linked with negative consequences in terms of individual wellbeing and productivity, with deep acting being associated with more positive outcomes on occasion.¹²⁷ Although it should be noted there could also be harmful effects from deep acting, particularly if it leads to more insidious forms of absorption of neoliberal ideals, which are harder to identify and counter.

As the contemporary notion of professionalism becomes increasingly complex and contentious, neoliberal ideology and discourse has unquestionably led to some acknowledgment and interest in emotions. However, there remains a sense of unease or tension in reconciling such a discourse with professional values within the profession. There are growing demands for individual lawyers to demonstrate 'soft skills' and 'emotional intelligence' but, at the same time, a sense that these are peripheral to professionalism. There is little to suggest that the traditional core values of reason, rationality and detachment are being in any way conceptualised differently to integrate or encompass emotions. Instead, emotions are characterised as a useful client care tool that can be used to promote the business of legal practice, but only whilst carefully and selectively applied to ensure the core values of law are not challenged or compromised. Consequently, this emerging paradigm exposes new vulnerabilities related to wellbeing and mental health by requiring individual lawyers to perform complex and challenging emotional balancing acts, involving high levels of emotional labour, with little appropriate support, training and resources. Given this, it is vital the legal profession considers how it can utilise Fineman's theory of vulnerability to build resilience in healthy and sustainable ways.¹²⁸

Fostering resilience through the integration of emotions into professional values

It has already been emphasised in this article that the form of resilience envisaged by Fineman challenges the highly individualised notion of resilience as conceptualised within neoliberalism. Instead, to foster resilience to emotional vulnerabilities at the level of both individual lawyers, and the legal profession as an institution, it is necessary to develop a more holistic approach to legal practice and professionalism. This must be one which integrates emotions into its core values and seeks to provide a more nuanced and well-informed narrative around their role, purpose, and use. Professional values in law are supported by a complex and related web of regulation, expectations, perceptions performance and practice.¹²⁹ Therefore, fully incorporating emotions into these will require a significant cultural shift. There are already some movements within law which have, implicitly at least,

¹²⁶ Hochschild n.59.

¹²⁷ Grandey & Sayre n.119; for a summary of the literature and different perspective see D. Zapf, M. Kern, F. Tschann, D. Holman & N. K. Semmer, 'Emotion work: A work psychology perspective' (2021) 8 *Annual Review of Organizational Psychology and Organizational Behavior* 139.

¹²⁸ Fineman n.27; Fineman n.28.

¹²⁹ E. Wald, E., & R. G. Pearce, 'Being Good Lawyers: A Relational Approach to Law Practice' (2016) 29 *Georgetown Journal of Legal Ethics* 601.

begun to acknowledge and consider ways to ameliorate the legal profession's emotional vulnerability and foster resilience, in particular, the integrative law movement¹³⁰ and the growth of interest in trauma-informed legal practice.¹³¹ However, such movements tend to be somewhat broad and arguably lack full coherence, sometimes appearing to offer a Smörgåsbord of different perspectives and solutions, from mindfulness to mediation. Therefore, there is a danger that these will perpetuate the perception of emotions as peripheral or even incompatible with core professional values rather than effectively mainstreaming them within legal practice.

To promote mainstream individual and institutional change, it is necessary to foster an acknowledgment and understanding of emotions. One which conceptualises them in accordance with the rich scientific and philosophical discourses available on this topic, rather than narrowing them to a set of emotional competencies. This can be achieved, at least in part, by integrating emotions into the both the law degree and the forms of vocational training undertaken by lawyers.¹³² Continuing Professional Development could also encourage reflection on emotions within practice.¹³³ It also requires the key regulatory and representative bodies in law to integrate emotions, both into their required competency frameworks and through the provision of appropriate training resources to enable lawyers to upskill themselves in a healthy, evidence-based and sustainable manner. In doing so, it is possible to follow the example of the CILEx Regulation (regulatory body for Legal Executives in England and Wales) who introduced provisions requiring an awareness and understanding of emotions and wellbeing into their Education Standards in 2021 (under 'self development').¹³⁴ Such integration can also take place through wider discussions on professional identity and professionalism, for example, the American Bar Association's law school accreditation standards require law schools to provide students with a substantial focus on professional identity formation, including an understanding of the relevance of wellbeing.¹³⁵ This provides a valuable opportunity to introduce emotions as foundational to legal practice and professionalism.

Such regulatory and representative bodies also need to consider how an explicit recognition of emotions could influence a holistic approach within the profession as a whole. For example, regulation on issues such as equality, diversity and inclusion; workplace culture and ethical codes of conduct could all potentially acknowledge facets of emotions and their role within aspects of professional life. Statements of professional values could explicitly refer to emotions. Holding relevant events, issuing press statements and modelling good organisational practice in this area

¹³⁰ J. K. Wright, *Lawyers as Changemakers: The Global Integrative Law Movement*, Chicago, ABA Book Publishing, 2016.

¹³¹ Helgi Maki, Marjorie Florestal, Myrna McCallum and J. Kim Wright, *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing*, American Bar Association, 2023.

¹³² Jones n.41; S. S. Daicoff, Expanding the lawyer's toolkit of skills and competencies: Synthesizing leadership, professionalism, emotional intelligence, conflict resolution, and comprehensive law (2012) 52 *Santa Clara Law Review* 795.

¹³³ See, for example, www.fitforlaw.org.uk.

¹³⁴ CILEx Regulation, *Chartered Legal Executive Handbook* (2021). Available at: <https://cilexregulation.org.uk/wp-content/uploads/2021/06/General-CLE-Handbook.pdf> (accessed 31st March 2023); see also Jones n.119.

¹³⁵ [American Bar Association](https://www.americanbar.org/standards-and-rules-of-procedure-for-approval-of-law-schools), 2023-2024 Standards and Rules of Procedure for Approval of Law Schools, Standard 303(b).

could all produce a sense of cultural change and challenge damaging aspects of the traditional and contemporary paradigm. The key will be to purposefully avoid unthinkingly replicating the neoliberal conception of emotions and instead purposefully developing a discourse which acknowledges the importance and relevance of concepts around care and connection. There are already a range of examples, resources and frameworks to draw upon and utilise from other professions such as nursing, medicine and social work to assist with this.¹³⁶

Of course, employers (such as law firms) will also have an important role to play in this, due to their role in shaping professional values.¹³⁷ Given their largely profit-based model and adherence to the demands of the market economy, these may potentially be the most challenging group to work with to promote meaningful change. However, at the same time, their practical recognition of the role of emotions in daily practice and willingness to embrace 'soft skills' and 'emotional intelligence' suggests a potential for using and adjusting pre-existing narratives rather than having to introduce and embed entirely new notions. In effect, there is already a proven 'business case' for emotions, so addressing existing vulnerabilities can, at least in the shorter term, simply be about evolving the understanding of how emotions can and should be conceptualised.¹³⁸ In other words, even within the existing neoliberal model there is scope for some form of cultural change around emotions.

The more radical alternative to this is to require broader systemic change, challenging market-driven narratives across the legal profession. This certainly should not be disregarded but may be impossible to achieve within contemporary neoliberal society. The aforementioned integrative and trauma-informed law movements (and similar) go some way towards mounting this more fundamental systemic challenge and there are broader societal arguments suggesting this is vital discussion to have in the future.¹³⁹

Conclusion: Supporting an emotionally vulnerable profession

Having considered the traditional and emergent contemporary paradigms determining the legal profession's relationship with emotions, it is clear that both of these lead to largely unacknowledged vulnerabilities around mental health and wellbeing. Taking Fineman's theory of vulnerability and using it as a heuristic or theoretical lens exposes these and highlights the continuing failure to integrate emotions into professional values. Whether ignored or treated as a useful adjunct, emotions have not yet been reconciled with longstanding notions of reason, rationality and detachment. This failure has detrimental consequences upon both individual lawyer wellbeing and the health of the profession as a whole. There is the need for a new paradigm to be developed. One which runs through legal education, training and practice, fostering a legal culture in which emotions and professional values are reconciled. This will involve individual lawyers, employers and regulatory and representative bodies within law revisiting their discourses (or lack of discourse) around emotions and explicitly addressing the place of emotions within core

¹³⁶ See, for example, Alessio Tesi, 'A dual path model of work-related well-being in healthcare and social work settings: the interweaving between trait emotional intelligence, end-user job demands, coworkers related job resources, burnout, and work engagement' (2021) 12 *Frontiers in Psychology* 660035.

¹³⁷ Holmes et al n.89.

¹³⁸ Jones n.5.

¹³⁹ Kathleen Lynch (2021) *Care and capitalism* (John Wiley & Sons).

professional values. Such an approach will generate valuable resources to create both individual and institutional resilience. Despite the challenges involved, in taking this step the legal profession may find that they are no longer the invulnerable liberal subject, or the reconceptualised knowledge producer of neoliberal ideology, but instead rediscover their humanity.