

# Contemplative practice in the law school: Breaking barriers to learning and resilience<sup>1</sup>

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## **Abstract:**

*In this chapter we argue that the increasing use of contemplative practices in law schools is significant not just in relation to enhancing resilience and diminishing stress and depression, but that they also have major benefits in the development of traditional legal roles. However, there is an attitudinal barrier that needs to be overcome as law students and legal academics have commonly been resistant to the use of these practices. It is interesting and somewhat ironic, therefore, that just as we are developing some level of openness to practices that often seem alien to those in the law, we also find evidence that they indeed enhance capacities for legal and educational practice such as level of focus, ability to prioritise, the optimisation of objectivity, higher order thinking and so on. Further, the management of ethical issues of professional practice, which are frequently triggers for depression, may also be improved by contemplative practices as they enhance students' and lawyers' ability to articulate their personal and professional ethics. In turn, this knowledge can be used to help break down remaining barriers to the use of contemplative practices within the legal academy. To reiterate, until recently the supposition was that the remedial benefits of contemplative practices ameliorated negative aspects of legal education and practice. However, now it appears that the enhancement may also be linked to a direct correspondence between contemplation and the law.*

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<sup>1</sup> Fully reference for this chapter from the book: "Promoting law student and lawyer well-being in Australia and beyond": **P.Vines, & P. Morgan (2016). Contemplative practice in the law school: Breaking barriers to learning and resilience.** In Field, R., Duffy, J., James, C. (Eds.), Promoting Law Student and Lawyer Well-being in Australia and Beyond, Vermont, USA: Gower-Ashgate.

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## Introduction

The rise of depression in society generally<sup>3</sup> and disproportionately in legal education and practice<sup>4</sup> has become increasingly significant. In this chapter we discuss one response in tertiary legal education: the use of contemplative practices in order to help to combat this seeming epidemic.

I think it is just getting worse and worse and as a society we put such a value on multi-tasking, which is just the opposite of mindfulness. So you know if I'm answering 3 emails at once, and talking on the phone, and trying to write a legal brief, and dealing with my secretary, and someone's got a problem in the office, and thinking about some personal problems, and all of the appointments that I have, and my personal emails - how do you do it all? You can't possibly be healthy if you do that.<sup>5</sup>

This comment, made by a legal academic and lawyer in Los Angeles in 2009, is illustrative of the pressures underpinning the practice of law in the US. We know that lawyers and law students suffer disproportionately high levels of psychological distress and depression and the accompanying substance abuse and high rate of suicide. This has been apparent in the United States<sup>6</sup> for some time and the pattern has now been confirmed in Australia.<sup>7</sup> Although there are many differences between legal practice and legal education in the United States and Australia, it is apparent

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<sup>3</sup> R Eckersley, *Well and Good: Morality, Meaning and Happiness* (2<sup>nd</sup> ed, Text, 2005); R Eckersley, 'Is Modern Western Culture a Health Hazard?' (2006) 35 *International Journal of Epidemiology* 252; Australian Bureau of Statistics, 'Mental Health' in *Australian Social Trends* 4102.0 (2009) : [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication25.03.094/\\$File/41020\\_Mentalhealth.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication25.03.094/$File/41020_Mentalhealth.pdf).

<sup>4</sup> W Larcombe and K Fethers, 'Schooling the Blues? An investigation of factors associated with psychological distress among law students' (2013 ) 36 *University of New South Wales Law Journal* 390.

<sup>5</sup> Unpublished transcript from fieldwork conducted for: Patricia Morgan, *Learning Feelings: Foundations of Contemplative Practice* ( PhD Thesis, UNSW 2013).

<sup>6</sup> William Eaton, et al., 'Occupations and the Prevalence of Major Depressive Disorder' (1990) 32 *Journal of Occupational Medicine* 1079,1083; G Andrew Benjamin, Elaine Darling and Bruce Sales, 'The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse among United States Lawyers' (1990) 13 *International Journal of Law and Psychiatry* 233, 240; Martin Seligman, Paul Verkuil and Terry Kang, 'Why Lawyers are Unhappy' (2005) 10 *Deakin Law Review* 1, 5; Martin Seligman, *Authentic Happiness* (Nicholas Brearley Publishing, 2004) 177; American Bar Association, *At the Breaking Point: the Report of a National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives –Its Impact on Law Firms and Client Services* (1991); Amiram Elwork *Stress Management for Lawyers: How to increase personal and professional satisfaction in the law* (Vorkell Group Inc., 2007

<sup>7</sup> Below, n 8.

that in this field findings in the United States are very often replicated in Australia. For this reason we draw on both United States and Australian literature in this chapter. Lawyers came second only to patent attorneys in unhappiness in a 2006 survey of 7000 Australian professionals in which 45% of young lawyers wanted to leave their job within two years and 9% planned to leave law altogether.<sup>8</sup> A survey of 741 law students in 13 Australian law schools as well as 924 solicitors and 756 barristers across Australia, confirmed these findings, showing that over 35% of law students and almost a third of solicitors and one-fifth of barristers had levels of depression regarded as disabling.<sup>9</sup>

Before they enter law school there appear to be no differences in well-being between law students and the general population.<sup>10</sup> Indeed law students may enter law school with feelings of well-being higher than the rest of the student population, feeling that they have done extremely well to be offered a place. However, we also know that approximately a third of law students begin to suffer elevated levels of psychological distress within six to 12 months of beginning their studies.<sup>11</sup> Why this is so remains unclear and at present a number of theories about its cause exist. They include the idea that law students may select themselves into a highly stressful profession because of a personality that aims to please others rather than themselves. There is some force in this and the literature is highly persuasive.<sup>12</sup> Another line of thought emphasises what happens in law school and in

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<sup>8</sup> Beaton Consulting, *Annual Professions Survey 2007: Short Report* (2007), 2, 2.

<sup>9</sup> Norm Kelk et al, *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Legal Practitioners* (2009)14, 42; Colin James, 'Lawyer Dissatisfaction, Emotional Intelligence and Clinical Legal Education (2008) *Legal Education Review* 123, 124. See also Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law school: a View from Australia (2010) 4 *Phoenix Law Review* 21; Norm Kelk et al, 'Distress and Depression among Australian Law Students: Incidence, Attitudes and the Role of Universities (2010) 32 *Sydney Law Review* 113; Wendy Larcombe et al 'Does an Improved Experience of Law School Protect Students against Depression, Anxiety and Stress?' (2013) 35 *Sydney Law Review* 407; Larcombe and Fethers, above n 3.

<sup>10</sup> G. Andrew Benjamin et al., 'The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers'(1986) *American Bar Foundation Research Journal* 225, 240; Kennon M. Sheldon and Lawrence S. Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values and Well-being' (2004) 22 *Behavioural Science & Law* 261, 262; Kennon M Sheldon and Lawrence S Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: a Longitudinal Test of Self-determination Theory' (2007) 33 *Personality and Social Psychology Bulletin* 833, 890-891.

<sup>11</sup> Above n 8 and Ann Iijima, 'Lessons Learned: Legal Education and Law Student Dysfunction' (1998) 48(4) *Journal of Legal Education* 524,526; Benjamin et al above n 8, 241.

<sup>12</sup> Massimiliano.Tani and Prue Vines, 'Law Students Attitudes to Learning: a Pointer to Depression in the Legal Academy and the Profession?' (2009) 19 *Legal Education Review* 3, 39; S Daicoff, *Lawyer Know Thyself: a Psychological Analysis of Personality Strengths and Weaknesses* (American Psychological Association, 2004).

the profession.<sup>13</sup> This is also very persuasive. For example, Riskin in his discussion of these issues in the US observes:

The most prominent reasons are that law schools tend to over-emphasize analytical reasoning at the expense of developing interpersonal skills, and they incline students to seek satisfaction from external sources such as “winning” in general, and especially through grades, awards, and prestigious jobs – rather than from internal sources, such as a secure sense of self.”

.....Much of our discomfort is a by-product of assumptions and attitudes commonly shared within the law school and attorney communities. These assumptions revolve in significant part around the notions that only the ‘best’ will reliably find success in their lives, and that performance and appearances are crucially important. Such beliefs undermine the ability to have satisfying and healthy lives as lawyers by generating stress and anxiety as baseline life experiences for many of us.<sup>14</sup>

A further line of thought notes the significant changes in the legal profession over the later part of the 20th century, with its increasing emphasis on the commercial and a lesser emphasis on the role of professional.<sup>15</sup> Anthony Kronman, in his book *The Lost Lawyer*, has emphasised the damage to the profession created by the loss of the ideal of the ‘lawyer statesman’,<sup>16</sup> a person who exercises greater ethical judgment and wisdom than the business lawyer model. If a profession is, as Roscoe Pound claims, “a group...pursuing a learned art as a common calling in the spirit of a public service”<sup>17</sup> then the lessening of a sense of this ‘calling’ may be an important factor in the distress law professionals suffer. Whatever the cause of this distress, what is needed is ethically resilient lawyers<sup>18</sup> who have turned to what has been termed an older vision of the lawyer: that

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<sup>13</sup> Seligman, Verkuil and Kang above n5,, 5.

<sup>14</sup> Leonard Riskin, ‘Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients’ (2002) 7 *The Harvard Negotiation. Law Review* 1, 10.

<sup>15</sup> LS Krieger, ‘The Inseparability of Professionalism and Personal Satisfaction: perspectives on values, integrity and happiness’ (2005) 11 *Clinical Law Review* 425; See also Rachael Field, James Duffy, Anna Huggins, *Lawyering and Positive Professional Identities* ( LexisNexis Butterworths, 2014).

<sup>16</sup> Anthony T Kronman, *The Lost Lawyer: Failing the Ideals of the Legal Profession* (Harvard University Press, 2003).

<sup>17</sup> Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 5 (1953) cited in Thomas D Morgan, ‘Creating Life as a Lawyer’ (2003) 38 *Valparaiso University Law Review* 37-64, 45.

<sup>18</sup> Colin James has argued this comprehensively: Colin James, ‘Lawyer Dissatisfaction, Emotional Intelligence and Clinical Legal Education (2008) *Legal Education Review* 123,; see also Patrick J Schiltz, ‘On Being a Happy, Healthy , and Ethical member of an Unhappy, Unhealthy, and Unethical Profession’ (1999) 52 *Vanderbilt Law Review* 871-951.

Leaders in the legal community have called for a return to older visions of the lawyer...the nineteenth-century ideal of the 'lawyer-statesman', a person of good judgement and 'prudence' or practical wisdom...there is a need for a special kind of ability to deliberate, which includes both compassion and detachment.<sup>19</sup>

## The integration of contemplation into legal study and practice

As noted above, one argument is that the high rates of stress and depression lawyers and law students suffer is in part due to the "adversarial mind-sets that tend to dominate the way most lawyers think and most legal education is structured".<sup>20</sup> To ameliorate this Riskin<sup>21</sup> proposes the use of mindfulness meditation and details a range of law schools and firms in the USA that are currently integrating contemplative practices into their programs and activities.<sup>22</sup> Although the contemplative movement in legal education can be said to have started in the USA it is rapidly spreading to other countries. Currently in Australia there are a number of programs considering the wellness of law students, including Law schools at the Universities of Wollongong,<sup>23</sup> UNSW,<sup>24</sup> ANU,<sup>25</sup> Newcastle,<sup>26</sup> QUT,<sup>27</sup> UTS and Macquarie, and the Tristan Jepson Memorial Foundation,<sup>28</sup> which is working to

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<sup>19</sup> Riskin, above n 13, 8, 19.

<sup>20</sup> Ibid.; Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash University Law Review* 43.

<sup>21</sup> Leonard Riskin, 'Contemplative Practices in Law Schools: A Search for Balance in the Whirlwind of Law School' (2005) <<http://www.aals.org/am2006/program/balance/riskin.outline..pdf>>, 37-41.

<sup>22</sup> Riskin lists the for-credit courses at Yale and Columbia, Denver, Hastings, Miami, Missouri-Columbia, North Carolina, Stanford, and Suffolk; non-credit courses at the University of Missouri-Columbia and the University of North Carolina, and the meditation groups at Harvard, Yale, Columbia and Berkeley Schools of Law many other contemplative law programs in the USA and refers to the expansion of initiatives and literature in the area: Riskin, above n 13, 8.

<sup>23</sup> 'Vitality for Life and Law', UOW, <<http://lha.uow.edu.au/law/vitality/index.html>>.

<sup>24</sup> Vines has developed a number of mentoring programs and the website 'Surviving and Thriving in Law School' and Vines and Morgan have conducted a number of seminars and lectures on resilience, mindfulness and the study of law.

<sup>25</sup> Associate Professor Kath Hall, Professor Molly O'Brien and Stephen Tang at the Australian National University (ANU) in Canberra, have been conducting research into issues of wellbeing for law students through the 'Student Wellbeing' program: Learning Communities, ANU, <<http://students.anu.edu.au/studentlife/learning-communities.php>>.

<sup>26</sup> Kate Lindsay and Sher Campbell working with first year students, Newcastle University, NSW.

<sup>27</sup> Rachael Field, Teaching Fellowship to Reduce Law Students' Distress, QUT: Report: <<http://www.olt.gov.au/resource-promoting-law-student-well-being-through-curriculum>> She has also established the Wellness Network for Law through the Fellowship: <<http://wellnessforlaw.com/>>. see also R Field and M Duffy, 'Better to Light a Single Candle than to Curse the Darkness: Promoting Law Student Well-being through a First Year Law Subject' (2012) *Queensland University of Technology Law and Justice Journal* 133.

<sup>28</sup> Tristan Jepson Memorial Foundation, <<http://www.tjmf.org.au/>>.

decrease the causes of depression and anxiety in the legal profession. These and other programs in Australia and the USA engage in a range of contemplative practices, though many focus on mindfulness meditation. Mindfulness meditation is a secularised version of Buddhist Vipassana or Insight Meditation, which was introduced to the West in the early 1970's by Western Buddhist practitioners and scholars. The Berkeley Law School's Initiative for Mindfulness in Law defines mindfulness as:

...being fully present in the moment, in a state of clarity and receptiveness. In the legal profession, with its culture of speed and adversarial energy, mindfulness - cultivated most commonly through meditation - can offer a source of inner calm in the midst of intense intellectual and emotional pressure. It is a method to create and, when lost, to regain a grounded and centered state of being amidst the often contentious and stressful nature of the legal profession.<sup>29</sup>

Increasingly law students and practitioners are turning to mindfulness and other contemplative practices for these remedial benefits. They were the initial focus of the contemplative law movement, though theorists in this area<sup>30</sup> are now finding other links between contemplative practices and some of the necessary roles of lawyers. The varying ways that contemplation can support lawyers as analysts, fact-finders, counsellors, negotiators, problem-solvers and advocates<sup>31</sup> are introduced by the following sketch of the positive physiological and psychological outcomes of contemplation.

### **Physiological and psychological benefits of contemplation**

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<sup>29</sup> Berkeley Law, *Berkeley Initiative for Mindfulness in Law* (2012) <<http://www.law.berkeley.edu/mindfulness.htm>>.

<sup>30</sup> As a fast growing theoretical area it is impossible to name all of the current researchers thought they include: Douglas Codiga, 'Reflections on the Potential Growth of Mindfulness Meditation in the Law,' (2002) 7 *Harvard Negotiation Law Review* 109; Susan Daicoff, 'Law as a Healing Profession: The Comprehensive Law Movement,' (2005) *Pepperdine Dispute Resolution Law Journal* 6; Steven Keeva, 'Practicing from the Inside Out' (2002) 7 *Harvard Negotiation Law Review*, 97; Larry Spain, 'Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law', (2004) 56 *Baylor Law Review* 141.

<sup>31</sup> J. Patton Hyman, 'The Mindful Lawyer: Mindfulness Meditation and Law Practice' (2007) *Vermont Bar Journal* 40.

The last forty years of neuroscience, psychology and meditation research has provided evidence for the benefits of contemplation generally and specifically in education. This section introduces some of that research starting with the positive impacts of meditation on stress, anxiety and depression described by Riskin,<sup>32</sup> and Hart.<sup>33</sup> These contemplative theorists have found that meditation lowers stress by lowering cortisol levels. In addition it lowers blood pressure, heart rate and positively impacts chronic migraines, depression and heart disease.<sup>34</sup> These findings provided the initial impetus for teaching contemplative practices to law students and lawyers. However, Riskin contends that they also enhance the capacity to relax, deal with anxiety and improve the ability to concentrate and increase performance not just in ordinary life but also on tasks involving high levels of mental functioning, such as the study and practice of law.<sup>35</sup>

The educational psychologist Tobin Hart supports Riskin's propositions with findings from neuroscience and psychoneuroendocrinology research.<sup>36</sup> These results outline some of the detrimental impacts of the hyperarousal of the hypothalamus-pituitary-adrenal axis<sup>37</sup> and the elevated levels of the hormone cortisol produced by chronic stress. These effects include obesity, loss of memory and the underlying neurobiology of suicide. He claims that "chronic stress or corticosterone treatment induces pathological alterations [in the brain], such as dendritic atrophy in hippocampal neurons...which are paralleled by cognitive deficits."<sup>38</sup> The results he cites also suggest that meditation can provide physiological relaxation, lower stress and anxiety symptoms, slow metabolism, produce feelings of calm, improve concentration, empathy, perceptual acuity and provide heightened self-awareness or metacognition. These benefits of mindfulness meditation are being reported by a

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<sup>32</sup> Riskin, above, n 13.

<sup>33</sup> Tobin Hart, 'Interiority and Education: Exploring the Neurophenomenology of contemplation and its potential role in learning' (2008) 6 *Journal of Transformative Education* 235, 250.

<sup>34</sup> Craig Cormack, 'Lawyers Turn to Meditation to Fight Stress and Improve Performance' (2009) *Mar Canadian Lawyer* 1.

<sup>35</sup> Riskin above n 13.

<sup>36</sup> Hart, above n 32, 250.

<sup>37</sup> The hypothalamus-pituitary-adrenal axis ) is a complex of interactions between the hypothalamus in the brain with the pituitary gland and the adrenal glands. It is the part of the neuroendocrine system that controls reactions to stress and many bodily processes.

<sup>38</sup> Hart, above n 32, 246.

range of research psychologists studying meditation who describe it as a counterbalance to the exponential growth of stress and stress related diseases.<sup>39</sup>

In a comprehensive review of meditation in higher education, Shapiro and her colleagues drew on four decades of meditation and education research identifying similar physiological benefits. However, they were only one aspect of three key findings, discussed under the titles: cognitive and academic performance, mental health and psychological well-being and what they term the development of the 'whole person'.<sup>40</sup> In the first category they found that meditation can improve the ability to maintain preparedness, orient attention, improve the ability to process information quickly and accurately, and that over time it may have a positive impact on academic achievement.<sup>41</sup> In the second category related to mental health, Shapiro et al, found that meditation can decrease stress, anxiety and depression and that it supports better regulation of emotional reactions and the cultivation of positive psychological states.<sup>4243</sup>

These findings confirm Hart's proposition that meditation can increase students' ability to focus, retain and retrieve information. These skills are important for law students who rely heavily on memory and recall,<sup>44</sup> as well as on the ability to objectively analyse situations and arguments. The development of these skills is due, he suggests, to 'physiological coherence', a state in which the physiological, cognitive and emotional systems and neural communication networks become aligned.<sup>45</sup> The physiological relaxation that results is said to positively impact

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<sup>39</sup> John Miller, Ken Fletcher, John Kabat-Zinn, 'Three-year Follow-up and Clinical Implications of a Mindfulness Meditation-based Stress Reduction Intervention in the Treatment of Anxiety Disorders' (1995) 17 *General Hospital Psychiatry* 192-200; Putai Jin 'Efficacy of Tai Chi, Brisk Walking, Meditation and Reading in Reducing Mental and Emotional Stress' (1992) 36 *Journal of Psychosomatic Research* 361; Vidya Anderson et al, 'The Effects of Meditation on Teacher Perceived Occupational Stress, State and Trait Anxiety, and Burnout (1999) 14 *School Psychology Quarterly* 3.

<sup>40</sup> Shauna Shapiro, Kirk Brown, and John Astin, 'Toward the Integration of Meditation into Higher Education: A Review of Research' (2008) 113 *Teachers College Record* 493, 528.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Jain, Shamini, et al, 'A Randomized Controlled Trial of Mindfulness Meditation Versus Relaxation Training: Effects on Distress, Positive States of Mind, Rumination, and Distraction' (2007) 33 (1) *Annals of Behavioral Medicine*, 11.

<sup>44</sup> Steve Wilson, Phillip Kenny, *The Law Student's Handbook* (Oxford University Press, 2007).

<sup>45</sup> The correlates of physiological coherence include a regular heart rhythm, decreased sympathetic nervous system activation, increased parasympathetic activity and increased heart-brain synchronization. The sympathetic nervous system basically stimulates the 'fight or flight' distress system in the body, while the



emotional response, cognition and learning. Research such as Hart's is currently being augmented in the contemplative law movement by neuroscience research specific to law.<sup>46</sup> Evidence from this field is now being referenced in law schools, such as Berkeley and Florida in the US and UNSW and University of Wollongong in Australia to name just a few, as they use mindfulness meditation to cultivate focus, concentration and the capacity to pay attention.

### **Intrinsic links between contemplation and law**

It seems incongruous: lawyers – whose professional work tends to focus on the external and to rest on thinking, judging and action – are engaging in a practice that, in contrast, focuses on the internal and rests on *not* thinking, *not* judging, and *not* acting.<sup>47</sup>

Why would lawyers and law students seek out a practice that seems so inconsistent with what is generally assumed to be their rationalist and externalist focus? Possibly, because paradoxically, the non-thinking and non-doing of meditation can heighten lawyers' ability to 'think' and 'do', as it can remedy the negative physiological and affective issues that may block their analytical skills.<sup>48</sup>

In his reflection on Riskin's work, the legal theorist Steven Keeva describes the outcome for lawyers who routinely maintain a combative rationalist approach, as them "living above the surface alone."<sup>49</sup> He suggests that this results from a life profoundly out of balance. Discourse related to the imbalance in law students and

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para-sympathetic nervous system manages resting and digesting. Both are part of the autonomic system which automatically regulates the body.

<sup>46</sup> See 'Neurolaw' <http://www.neulaw.org/>. Henry Greely, 'Law and the Revolution in Neuroscience: An Early Look at the Field' (2009) 42 *Akron L. Rev.* 687, 716; Thomas Scott, 'Neuroscience may Supersede Ethics and Law' (2012) 18 *Science and Engineering Ethics* 1,5; Michael Freeman, *Law and Neuroscience* (Oxford University Press 2011); Brent Garland, *Neuroscience and the Law: Brain, Mind, and the Scales of Justice: A Report on an Invitational Meeting Convened by the American Association for the Advancement of Science and the Dana Foundation* (Dana Press, 2004); Pauline Tesler, 'Neuro-resolution', presented at *Practical Neuro-literacy: Where Divorce Practice, Neuroscience, and Legal Conflict Resolution Intersect* (2012) Concord, New Hampshire: <<http://cuttingedgelaw.com/blog/practical-neuro-literacy-where-divorce-practice-neuroscience-and-legal-conflict-resolution-intersect>>.

<sup>47</sup> Riskin, above n 13.

<sup>48</sup> Ingrid Loreen, 'Therapeutic Jurisprudence and the Law School Asylum Clinic' (2004) 17 *St Thomas Law Review* 835, 844.

<sup>49</sup> Keeva, above n 29, 97.

lawyers lives has until recently been focused on lawyers' 'outer lives', as Keeva describes it, the 'thinking, judging and action' of the legal life. He outlines recent attempts to rectify the imbalance in some law students and lawyers' lives, such as the development of programs to support work-life balance. However, Keeva believes this is not enough, for

the fundamental problem of imbalance cannot be addressed by merely rearranging the furniture, so to speak, of one's life so that it comports with some externally agreed-upon ideal. Instead, it is only by observing that "furniture" clearly and non-judgementally through the *inner* experience of awakened mindfulness that lawyers or law students are able to see their situations for what they are and then redress this crucial, but often overlooked, lack of balance.<sup>50</sup>

To return balance Keeva suggests that lawyers practice from the 'inside out', which involves them giving equal attention to their 'outer' and 'inner' or subjective worlds by engaging contemplative practices. He is not suggesting that lawyers discard linear, rational or analytical thinking. Rather, through contemplation law students and lawyers can learn to 'tether [the mind] to its moorings',<sup>51</sup> which is the calm, balanced interior space that can be found in contemplative reflection. Keeva claims that the practice of mindfulness allows law students and lawyers to watch their thoughts, make choices about how they react or identify with them, and use "specific thoughts, or types of thought – legal analysis being one example – as *tools*, rather than allow them to be tyrants."<sup>52</sup> This awareness of thoughts, otherwise known as 'metacognition', arising from contemplation, is according to Keeva, currently being sought by many law students and lawyers.

Such self-awareness is a valuable tool for lawyers whose practice often requires them to make arguments for a person whose moral values may not be theirs, and to be in an adversarial situation without becoming combative. Metacognition allows them to take a metaphorical step away from the situation so that they can more effectively analyse their situation and manage the different perceptions of reality which might exist in a legal dispute and determine their best approach.. It allows

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<sup>50</sup> Ibid, 97, 99, 107.

<sup>51</sup> Ibid.

<sup>52</sup> Keeva, above n 29, 100.

them to perceive their emotional responses clearly, to provide an ‘inner’ reflective space so that a comprehensive understanding of the situation under investigation can be gained. This metacognition, because it allows a space to stand aside from emotional responses and observe situations acutely and realistically, also allows the practitioner to make better ethical and personal evaluations.

### **Contemplation and lawyers’ roles: Hyman’s model**

Hyman<sup>53</sup> has given one of the clearest accounts of the value of contemplative practices in law through his re-examination of legal roles. He has shown how metacognition arising from contemplative practice can rework the adversarial and stressful nature of legal practice. Hyman describes metacognition as being ‘awake’ in many of the situations lawyers find themselves in.<sup>54</sup> Specifically he emphasises that meta-awareness underpins the roles of a mindful lawyer including: legal analyst, fact finder, counsellor, negotiator, and advocate. As a ‘legal analyst’ the lawyer not only needs to know the legal rules but their subtleties and lacunae. For instance those lawyers who are uncomfortable with a lack of clear rules may make hasty or incorrect analyses in order to provide themselves with certainty. Hyman provides the example of lawyers who rush to a conclusion, or who in wanting to ingratiate themselves with their clients may lead them to believe that their case is stronger than it is. Mindfulness can be a useful ‘inner tool’ in these instances for it assists lawyers to recognise thought patterns and processes that can alert them to underlying emotions driving faulty analyses.

The second role Hyman outlines is the lawyer as ‘fact finder’, where in creating legal strategy they need to identify and develop a comprehensive understanding of the facts involved in their cases. Lawyers distracted by ‘mental static’, and or unconscious preconceptions, are more likely to be misled by incorrect information that is intentionally or negligently provided by clients, witnesses and others. The mindful lawyer, who has less mental static and a heightened awareness of their habitual patterns, is more likely to bring a clear and empirical attitude to investigating the ‘facts’ that are presented to them. Lawyers trained in mindfulness can see past

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<sup>53</sup> Hyman, above n 30.

<sup>54</sup> Ibid 42.

their limiting beliefs or behaviours, so making them more effective as a fact finder. Before this training they may have failed to delve deeply enough into their clients' stories not wanting to intimidate them, or conversely missed important information because of an overly aggressive approach. Hyman notes that rather than directing the mindful lawyer, meditation heightens metacognition and facilitates a calm attitude, which helps them clarify the 'pushes and pulls' of the situation.<sup>55</sup>

The lawyer as 'counsellor', the third role in Hyman's schema, refers to the work lawyers do to support their clients' informed decision making. This can be stressful as the lawyer-counsellor is frequently navigating an environment of uncertainty. In some instances the approach that needs to be taken in a case is unclear, while in others the merits of alternative approaches have to be outlined. The anxiety that this produces may result in the lawyer falling back on habitual mental patterns. However, lawyers trained in mindfulness learn to be present in the moment, which can inhibit their reversion to old, possibly redundant, mental patterns. Through the practice of mindfulness, or moment to moment awareness, mindful lawyers are able to apply professional detachment in their roles as counsellors. This provides the 'psychological space'<sup>56</sup> from which the required insight can arise.

Engaging mindfulness in the fourth role of 'legal negotiator' can help lawyers avoid becoming trapped in negative thought patterns and to overcome rigidity, inflexibility, resistance and aggression. The metacognition they develop through mindfulness meditation supports awareness of their reactivity, making it less likely for them to become embroiled in combative situations where they respond in kind to aggressive statements by opposing counsel. Riskin alludes to this issue in his engagement with research relating to mindfulness and lawyers' problem solving abilities, claiming that meditation helps "lawyers negotiate better, enabling them to enhance their awareness of, and distance from limiting mind-sets and habitual behaviours associated with negotiation and the impulses, assumptions and cravings that support them."<sup>57</sup> Both Riskin and Hyman ask us to engage with the concept that the mindful

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<sup>55</sup> Ibid 43.

<sup>56</sup> Ibid.

<sup>57</sup> Riskin, above n 13, 57. See also Leigh Thompson, Janice Nadler, Peter Kim, 'Some Like it Hot: The Case for the Emotional Negotiator', in Leigh Thompson, John Levine, David Messick (eds), *Shared Cognition in Organizations: The Management of Knowledge* (Psychology Press, 1999) 139, 156.

legal negotiator attempts to remain open to a range of possible solutions and creative approaches, which can lead to them becoming a more successful legal negotiator or deal-maker.

The role of legal advocate, the last of the roles considered by Hyman, can be very stressful for lawyers, with the anxiety arising from speaking on behalf of a client often described as akin to stage fright. When the legal advocate is required to respond immediately and precisely it can lead to them falling back on rote responses or possibly freezing. Mindfulness can support lawyers to overcome this kind of anxiety because of the equanimity, calm and flexibility of mind that can develop through its practice. These relaxed states then help lawyers to become mindful advocates and more readily think on their feet. The reduction of stress and anxiety and the development of equanimity and metacognition that mindful lawyers experience, can support them in their roles as advocates, negotiators, counsellors, fact finders and analysts.

### **Using contemplative practices in legal education**

Law Schools are beginning to recognise that contemplative practices may be useful in assisting our students with their greater levels of anxiety and depression.<sup>58</sup> However, there is some resistance to what is often initially seen as irrational, ‘touchy-feely’, ‘new age’ material, which has no place in the tough and ‘survival of the fittest’ world of the law school<sup>59</sup>. So it is ironic that just as we are developing some level of openness to a practice which seems alien to us, we also find evidence that this practice indeed greatly enhances essential legal roles and skills. In turn, this knowledge can be used to help break down the barriers to the use of contemplative practices within the legal academy. Indeed in our own work with first year students in law school, we have found that giving this information to students greatly reduces their resistance to contemplative practices.

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<sup>58</sup> See fn 29 above.

<sup>59</sup> The experience of Prue Vines in discussing these issues with the members of the Committee of Australian Law Deans is illustrative. Initial resistance based on the view that it is not the job of academics to deal with the mental health of law students, gave way to recognition that mental health was closely connected to legal education. See also Christine Parker *University of New South Wales Law Journal* [I don’t know this one, but Rachael suggested it.].

The ability of contemplative practices to enhance the capacity to articulate personal and professional ethics is another significant reason to use contemplative practices in legal education. Specifically because ethical dilemmas are known to frequently be the trigger for people dropping out of a school or the profession.<sup>60</sup>

The positive impacts of contemplation in supporting an ethical stance and its remedial affects have until recently supported the argument that these practices enhance legal life and learning. However, now it appears that the enhancement may also be related to a direct correspondence between contemplation and the law.

## Conclusion

This chapter has considered how contemplative practices might be used to help develop greater resilience to depression and anxiety in law students and lawyers. Although the 'non-thinking' and 'non-doing' emphasised in these embodied, calm and reflective states of consciousness appear contrary to common assumptions about the sharpness of the analytical legal mind, the evidence shows that mindfulness can not only reduce stress and anxiety, but also enhance and complement many of the roles, analyses and judgments of lawyers. Legal theorist Rhonda Magee argues that the contemplative movement in law:

does much more than merely specify skills missing from traditional legal education that are crucial to effective and sustainable lawyering.... The movement goes much further, suggesting a new approach to the foundation of legal education – one which may better instil in young lawyers an abiding sense of an inspiring professional identity, embodying self-reflective civic engagement and practical, ethical judgement by broadening their ways of learning what they need to know to practice and to lead effectively in a changing world.<sup>61</sup>

There is good reason to think, as Magee does, that the use of contemplative practices in legal education can benefit students well beyond the reduction of stress. The process of self-reflecting, better focus and concentration, and the increase in

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<sup>60</sup> Schiltz, above, n 17.

<sup>61</sup> Rhonda Magee, 'Educating Lawyers to Meditate' (2010) 79 *University of Missouri Kansas City Law Review* 535, 593, 538.

metacognition may indeed develop in our students an ability to reflect on themselves, their values, ethics and their practice, which moves them further towards Anthony Kronman's 'lawyer-statesman' and away from his 'lost lawyer'.<sup>62</sup>

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<sup>62</sup> Kronman, above, n 15.