Legal Education Digest

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FROM THE EDITOR

This edition of the *Digest* is pleased to mark the successful culmination of the 70th Annual Australasian Law Teachers Association (ALTA) Conference which took place in July of this year in Wellington, New Zealand, with the Victoria University Wellington Law School as the hosts. As always, despite concerns prior to the Conference as to whether there would be sufficient interest by ALTA members to attend, and with enough enthusiasm for some to submit conference papers the outcome was a great success with 145 delegates and in excess of 100 conference paper presentations. This success was obviously due to the leadership of the then ALTA President Professor Mark Hickford, the Dean of the Victoria University Law School and the Chair of the Conference Committee, Associate Professor Alberto Costi.

Apart from the milestone of the 70th Anniversary of the establishment of ALTA in 1946, the Association was pleased to honour its distinguished supporters in New Zealand, the Hon. Sir Geoffrey Palmer and Dame Sian Ellis, Chief Justice of the New Zealand Supreme Court as Honorary Life Members of ALTA. This honour was also conferred on two longstanding New Zealand Executive Committee Members, Associate Professor Alexandra Sims and Dr John Hopkins.

There were also important innovations introduced at the conference meeting of the ALTA Executive Committee under the leadership of the Committee's Chairperson, Professor Stephen Bottomley which will hopefully impact on greater involvement by ALTA members in the activities of the Association. This will include greater contact and influence by Interest Group Convenors and Law School ALTA Representatives. The impact of these and other improvements were assisted by information gathered by a members' survey which was another outcome of the meeting. It is hoped that many of these innovations will have taken place prior the Association's 2017 Conference which will be held at the University of South Australia Law School 5–8 July 2017. Professor Rick Sarre is the Chairperson of the Conference Committee and Professor Wendy Lacey, the Dean of the University of South Australia Law School is now the ongoing President of ALTA.

Moving on to the book review for this edition, as it stated in the review, *Leading Cases in Australian Law* by Daniel Reynolds and Lyndon Goddard is a bold move by Federation Press to encourage students and practitioners to purchase a text which summarises leading Australian Law Cases despite the fact that all of them would also be available in various electronic versions. Read the review to ascertain whether in the editor's view there could be a successful outcome to this publishing venture.

As to the articles digested in this edition the first by Gibbons comes under the heading of **Assessment Methods** and is concerned with complexities of having a reflective report as an assessed component of the LLB.

Under **Clinical Legal Education**, Sage-Jaconson and Leiman are concerned with teaching and learning opportunities which arose within staff and students at the Flinders Legal Advice Clinic (FLAG), a student operated university legal service based in Adelaide, South Australia. There was an innovative approach in the evaluation of FLAC's operation using the technique of Appreciative Inquiry (AI). One of the outcomes of this project was the unexpected personal relationships which developed between the staff involved in the clinic.

The internationalisation of the law curriculum is becoming increasingly important to law schools and Mijatov within the heading of **Curriculum** describes how this impacts on content of the law degree programme, obviously a matter of general concern to all those law academics who have a major responsibility for the 'integrating the international dimension into the … major functions of a university course.'

History is a subject becoming of a major interest for incorporation into law degree programmes. This could mean that many accept the merit in the advocacy of Tiscione in arguing that the teaching of the history and philosophy of rhetoric could provide the stimulus for the development of inspirational legal scholars and practitioners.

Under **Individual Subjects/Areas of Law** Oppenheimer argues that using a simulated case file to teach civil procedure is probably as good a way as any to teach what many would regard as a tough subject to learn. The author is to be complimented on the many ingenious techniques which are described in the article to stimulate the interest of the student.

Interdisciplinary Aspects is the subject heading for the article by Lemmer by which the lecturer challenges the ongoing focus of the law school curriculum on case law analysis by advocating as an alternative the concept of competitive intelligence and its role as a business development tool in developing fundamental decision-making skills in the corporate and transactional contexts.

Law Schools is the heading for the well-known Kirby *Ten Commandants for Australian Law Schools* which the author has set out to counter the *Unmet Needs for Legal Services in Australia*. In its conclusion there is an exhortation for Australian law teachers to not only be aware of the faults and dangers of their subject, but also to praise its strengths and its achievements.

Under **Learning Styles** Grimes claims that Problem-based Learning (PBL) techniques can play a major role in problem analysis rather than problem-solving, arguing that PBL is central to all learning across both foundation and optional subjects.

The key subject of **Legal Ethics** continues as a major topic for all law programmes and Travis describes a course which is being trialled at the University of Exeter in the United Kingdom which aims to consider legal ethics not from the standpoint of the profession but from the perspective of the society that it serves.

Philosophy of Legal Education is the subject heading for two articles. In the first, Virgil explains the importance of professional education in imparting knowledge of subject matter, discrete skills and technical application towards tasks performed during practice. In the second article, Grose describes an experiment with a technique for learning by looking beyond the words used and considering them within their context under the title of 'critical reflection'. The article considers the importance of critical reflection both in the classroom and clinic and in one's own personal and professional life.

Professional Skills also incorporates two articles. In the first, Kate and Haldar deal with the complex issue of how law schools should teach trauma-informed lawyering, particularly in the law clinic setting. In the second article under this category, de Maine offers both a primer on information governance for law librarians and other legal educators whilst also discussing the importance of, and methods for, teaching law students about information governance.

It is unusual to have an article classified under **Testing** but this is an appropriate heading for Frost's article on the problems faced by law academics teaching large classes in providing adequate feedback to students. The author discusses how the provision of formative feedback can further a student's learning ability.

In the concluding article by Tooma, under the heading of **Undergraduate Legal Education**, the author explains how the University of Western Australia has endeavoured to overcome the transitioning experience of first-year law students by developing an induction programme whereby the students participate in a moot which involves recreating a recent appellate tax case. It is argued that this particular process is an effective teaching strategy for a law induction programme, whilst also acknowledging that it should obtain further guidance by offering students the opportunity to participate in an evaluation of this learning exercise.

As always the variety and depth of these articles are an illustration of the continuing efforts of law academics to explore how their teaching techniques can continue to stimulate and encourage their students.

Emeritus Professor David Barker AM
Editor

ASSESSMENT METHODS

Oh the Irony! A Reflective Report on the Assessment of Reflective Reports on an LLB Program

J Gibbons
The Law Teacher, Vol 49(2), 2015, pp 176–188.

I was asked to explain the meaning of irony recently — it was a long car journey with a seven-year-old and an old Alanis Morissette CD. It was only later when I took the seven-year-old to a piece of (in)famous local graffiti that the meaning got through. It reads: “Things I hate: 1. Vandalism, 2. Irony, 3. Lists”.

I was reminded of this conversation this summer when I was responsible for coordinating the marking of the reflective report element of the LLB foundation stream at York Law School (YLS). As with all credited assessments, the reflective reports are marked against prescribed and readily available marking criteria (the marking standards), which are modified and expanded for each year of study to reflect the transition between, and requirements of, levels four, five and six of the Framework for Higher Education Qualifications (FHEQ).

I facilitated the moderation meetings of all three marking teams, which comprised 10 staff in total, mostly problem-based learning (PBL) tutors (a role I will explain below). During all of the meetings the conversation within the room kept returning to the inherent irony of trying to apply objective marking standards to such a subjective piece of work: the more the students’ writing became creative, individualised and truly reflective, the further away it seemed to be from the marking standards.

Fortunately for the students the comment above was made in jest, and the robustness of the moderation process ensured that consistency prevailed, but the experience led me to undertake some research on reflective practice within legal education and discover another example of irony: the lack of reflective writing about the assessment of reflective writing on the LLB.

YLS is a relatively new department, and offers an innovative LLB programme, which teaches all of the QLD subjects and the majority of optional modules through PBL to small groups of up to 13 students, known as student law firms (SLFs).

The PBL tutors are not recruited as subject experts but have a background in legal practice and/or legal education. Although the PBL tutors are given tutor notes by the relevant module leaders, there is no obligation on the PBL tutor to impart any of this information within the PBL session, as it is the responsibility of the SLF to achieve the learning outcomes.

From my first day at YLS it was clear that there was far more emphasis placed on reflective practice on the LLB at YLS than on other comparable programmes on which I had worked. This is because reflective practice is an important part of experiential learning and an integral part of the PBL approach, and, as such, it is firmly embedded as an assessed element at YLS.

At this time I realised that to fulfil this role effectively I needed to know more about the theoretical underpinning of reflective practice to be able to establish realistic benchmarks about the format and quality of the reflective reports as part of the marking and moderation process.

The reflective report task requires students to reflect upon their experience of, and their engagement with, independent research, as well as their appreciation of some of the theoretical and legal concepts that underpin legal education, and the interrelationships between and among the foundation stream modules. I found nothing from my admittedly limited research that was going to help me with this.

Another concern I had at this time was my growing awareness, which mostly stemmed from informal discussions with open and candid students during plenary sessions, that the concept of reflective practice is not universally popular.

It is clear from these discussions that by assessing reflective practice there is a risk that students will choose to generate strategic beliefs and opinions as a way to pitch their reflection at the relevant marking standards.

My concern is not with the concept of having the reflective report as an assessed component of the LLB, but with the potentially negative influence of subjective factors

when marking the reflective report. To illustrate this I will consider an example extract from a first year reflective report (which was evaluating the balancing of rights, interests and social need) that demonstrates how difficult it can be to maintain marker consistency when assessing reflective reports.

An extract from a first year reflective report

> Often when preparing for a PBL feedback session, I would do relatively basic research and reinforce that with the plenaries. My understanding remained rudimentary until the stage of evaluating arguments and creating my own was undertaken. I am convinced that my understanding of the balance of Article 8 ECHR in all modules is weakest in Property Law due to a lack of normative research and engagement. I think I can improve my understanding of rights engagement if I do more of the suggested reading for future PBL (sessions).

Looking at this extract in isolation is obviously of limited benefit, as the assessment of reflective reports should be at the whole paper level, as identified by Kember et al., but it does raise some important issues, and gives a taster of the types of discussions that took place during the moderation process.

A positive evaluation of this extract would identify that there has been engagement with the PBL process and an appreciation of the need to construct legal arguments. It would also highlight that the student shows self-awareness in their perceived weakness in Property Law and has identified ways to develop as a learner through better engagement with appropriate legal sources.

A negative, or more critical or perhaps cynical, marker would stress the lack of specificity here. This leads me back to the central irony of this piece as identified by the marking team at YLS, which is the difficulty of applying objective marking standards to such a subjective piece of work. I would like to extend this further and ask whether it is possible for members of a marking team, who individually have their own subjective interpretation of the ostensibly objective marking standards, to ever consistently and fairly mark such a subjective piece of work.

The Reflective Practitioner and Educating the Reflective Practitioner by Schon have been hugely influential — even canonical (as described by Finlay) — in the way reflective practice is perceived and applied to practical and professional training and education.

Schon's most famous and enduring contribution was to identify two types of reflection: reflection-on-action (after the event thinking) and reflection-in-action (thinking while doing). The widespread use of learning journals in practical education is an example of a method aimed at capturing reflection-in-action, and this approach is commonly used in clinical legal education and legal skills.

As preparation for the reflective reports the students are introduced to these two concepts in the course material, as well as Kolb's learning cycle, and encouraged to engage with reflection-in-action during the year, and after specific PBL sessions.

In addition to models such as Schon's based on types of reflection, there are also models that recognise different levels of reflection.

Bain et al. also consider levels of reflection and introduce a useful and memorable 5Rs framework of Reporting, Responding, Relating, Reasoning and Reconstructing. These levels increase in complexity and move from description of, and personal response to, an issue or situation, to the use of theory and experience to explain, interrogate and ultimately transform practice. I rather like the simplicity and memorability of Bain et al.'s approach, but do not have any compulsion to introduce it to the students on the LLB.

If any student, or group of students, speculated on a learning outcome along the lines of "What model of reflection will be used to mark my reflective report?" they would quickly discover that the marking team do not routinely follow any of the established models, but base the marks purely on the specific task and assessment criteria, and the marking standards.

I was involved in a range of LLB marking this year and without a doubt the reflective reports were the most enjoyable assessment item to mark, but also the most challenging.

One of the main things I have learned is to always bear in mind the purpose of reflective writing. Much of the academic literature in this area focuses on the development of a reflective practitioner, be it a nurse, a teacher or a social worker, meaning that not all that is written about reflective practice is relevant to what I do.

Nevertheless, the reflective report is an assessed component of the LLB, which means that the students need to understand against which standards their work is being appraised. Although I am reluctant to adopt any of the models already available, I am

aware that students need reassurance that their work will be assessed fairly and consistently, which is why I've identified that training of the marking team is so important.

In advance of the marking period I arranged a marker training session with the whole marking team where we discussed our own experiences of reflective practice and some of the models of reflection, having all read Finlay in advance.

There was a fantastic range of opinion within the room from the self-confessed "reflection geek" to people who shared the scepticism articulated by some of the students. As part of this training we also evaluated some examples of reflective reports and calibrated these with the marking standards and grade boundaries, to establish the benchmarks to be used during the marking process.

For next year I have already identified areas where improvements can be made, and have submitted some minor modifications to the reflective report task for Board of Studies approval, with a view to giving the students more support about the purpose of the task, the focus of their reflective writing and the change in expectation between the FHEQ levels. For year three this includes a requirement to include reflection on the student's own plans for the future as a way to personalise the submission and focus the students on their continuing educational development beyond YLS. This time next year I will review whether this extra component of the process has led to more individualistic and truly reflective content in the submissions of the more assessment focused students.

In addition, I would like to experiment with alternative approaches to moderation and marking to expand upon the collaborative approach that was so enjoyable and successful this year.

What is very clear to me now is that writing reflectively is not an intuitive process, and is really rather difficult. It certainly does not come naturally, particularly to people like me who are more familiar with an impersonal and passive writing style. I would advocate that anyone who is involved in the assessment of reflection should experiment with writing themselves, as this assists with developing an empathetic approach as a marker.

CLINICAL LEGAL EDUCATION

Identifying Teaching and Learning Opportunities within Professional Relationships between Clinic Supervisors

S Sage-Jaconson and T Leiman

Legal Education Review, Vol 24, No. 1&2, 2014, pp 157–173.

University student-operated legal clinics seek to balance competing objectives of effecting student learning, with both social and community justice goals, and providing professional and competent legal advice for clients. Grounded in experiential learning pedagogy, clinics allow law students to explore and grow a personal sense of ethical, moral and professional identity while developing wide ranging skills: interviewing clients, collaborating in teams, maintaining client files and providing written legal advice. Working under the close supervision of their law teacher/supervisors, students interact with each other and with their supervisors in new ways, different from those they have previously encountered in their law studies.

Observing the work practices of, and interactions between, experienced practitioners is recognised as being of pedagogical value in 'generat[ing] the kind of knowledge that makes explicit what was tacit and [in] generat[ing] a richer understanding about practice'. The ontological value of this learning can pose challenges to supervisors as they recognise their responsibilities as teachers of and models for student interns. Regularly reflecting on and evaluating the nature of clinical supervision and operation of supervisory teams is particularly important in view of this multilayered nature of clinical education. Appreciative Inquiry is an evaluation tool with this positive purpose, and a form of action research often used as a tool in evaluating the effectiveness of organisations and people.

Flinders Legal Advice Clinic (FLAC) is a small, fledgling student-operated University legal service based in the southern suburbs of Adelaide, South Australia.

When establishing FLAC at Flinders Law School in 2011, staff intentionally sought to draw on best practice models from other leading Australian student legal clinics. FLAC was therefore designed to operate as a 'spoke and hub' model of legal service, with a legal office 'hub' established within the Law School, supervised by the clinic manager. Each clinic day, the other staff supervisors travel to various 'spoke' outreach locations

where they supervise clinic student interns who meet and interview clients and take client instructions.

FLAC interns are generally in at least the third year of their Bachelor of Laws and Legal Practice (LLBLP) studies, with the majority enrolled in the elective topic *Social Justice Internship* for which they receive academic credit for their participation. Those interns who are enrolled students are assessed via seminar participation, clinical placement and a reflective report. All assessment is graded on the scale of non-graded pass, to reflect the authenticity of the various assessment forms, to encourage a fully collaborative learning environment, and to allow students to develop an intrinsic motivation for learning, rather than the extrinsic grade driving their activities.

FLAC was established with minimal financial resources at a time when Australian law schools were facing increasing budgetary pressures amidst dire warnings of an ongoing gloomy financial future. Although perhaps a financially inopportune period, the choice to establish a provider of high quality clinical legal education (CLE) in Australia was timely. The decisions and process surrounding the establishment of FLAC were informed by research into best practice in the Australian context subsequently published in *Best Practice: Australian Clinical Legal Education* (the 'Report').

Given the initial reliance on the Report, it was again consulted when seeking a measure to evaluate FLAC's program around the two year anniversary in early 2013. However, while FLAC had been modelled on the Report, in reality, due to factors beyond staff control, many of the key best practice indicators still remained aspirational.

The Report highlights three key areas of proficiency that clinic supervisors need to maintain to not only ensure the best teaching outcomes for students and the highest standards for clients, but also safeguard the supervisor's own ongoing well-being in the demanding CLE context. Clinic supervisors must have extensive current general technical legal skills and knowledge of legal practice, expertise across the access to justice and social justice landscapes and a working knowledge of the large and complex body of higher education teaching and learning practice and research, locally, nationally and internationally. Each of the supervisors at FLAC felt confident in their level of performance in their roles at the clinic, but were concerned that only an extremely rare and exceptional individual lawyer could possibly meet such high standards of competency in all three quite disparate areas simultaneously.

The FLAC supervisors believed that only as a team, collaboratively bringing together all of the individual strengths of each supervisor, could they collectively maintain all three proficiencies sustainably and at best practice levels. Implicit in this, however, is that supervisors will also be highly skilled in effective teamwork and collaboration and know how to develop and maintain positive workplace relationships.

During the first 18 months of FLAC's operation, the positive personal relationships between staff and students, and, unexpectedly, between the staff themselves, emerged as a key feature of the operation of FLAC: professionally, pedagogically, and personally. Giles' notion that 'relationships matter' in the learning experience provided the catalyst for deciding to evaluate FLAC's operation using Appreciative Inquiry (AI). AI is a lens through which to reflect on past experiences, seek insight into positive events, identify peak performance, and explore possibilities for creating future successful practice.

The process involves four steps. The first step is participants discovering or describing the best of 'what has been' and 'what is', identifying 'what gives life to this process' in relation to the activity they are seeking to evaluate. Using this discovery, the second step asks participants to 'dream' or consider 'what our practice could look like if we were fully aligned around our strengths and aspirations'. In the third step,

> attention turns to creating the ideal organization so that it might achieve its dream… The design starts by crafting provocative propositions… [which] bridge "the best of what is" (identified in Discovery) with "what might be" (imagined in Dream)… They … [present] compelling pictures of how things will be when the positive core is fully effective in all of its strategies, processes, systems, decisions and collaborations.

The final step in the AI process asks participants to articulate a destiny or goal 'to ensure that the dream can be realised' by creating 'convergence zone[s] for people to empower one another to connect cooperate and co-create'.

In 2012, a questionnaire designed using the AI process was administered to the staff involved in the FLAC. Each of the three lengthy written responses were shared and analysed to identify key themes and commonalities. Four themes emerged. The first two

reflect the literature concerning the fundamental social justice ideals and the rich pedagogic opportunities in CLE. These themes were as follows:

Theme 1• A shared vision of the potential for future expansion of FLAC to maximise the opportunities for CLE at Flinders for both teaching and social justice aims.

Theme 2• The importance of teaching intentionally in the clinical context, and the transferability of lessons learned as supervisors to teaching in more theoretical traditional law contexts.

The third theme highlighted the significance overall of relationships:

Theme 3• The significance of intimate working relationships that developed between students and clinic supervisors; the positive impact for all being part of the process as students' progress from anxious novices to newly emergent 'beginning' lawyers.

The fourth theme specifically addressed the relationship between supervisors:

Theme 4• The value of collaborative team work and strong relationships between FLAC supervisors to provide a safe, diverse and complementary environment which in turn produces unexpected learning opportunities for both staff and students.

Of the four themes, the theme concerning the relationships between supervisors was expressed most strongly by the participants.

Modelling positive professional practice allows students to 'take over ways of being from others, embodying and making [these] ways of being [their] own'. Students are enabled to gain 'self-understanding' of what it may mean for them to be a lawyer in this specific professional context and what they learn is 'intertwined' with who they are becoming. As a role model 'knowingly or unknowingly, [supervisors'] words and actions become living lessons'.

While the focus of the AI responses was on the positive, once identified, participants were also able to consider the centrality of these relationships to minimising problems arising in practice and dealing with ethical dilemmas arising during their work with FLAC. By doing so, supervisors have been enabled to recognise more clearly both an 'ethics of care' and a 'virtue ethics' approach exemplified in their collaborative legal practice leadership.

The challenge for FLAC staff emerging from the AI process was how to practically embed the key learning interactions and opportunities that had been identified as part of the CLE pedagogy adopted by FLAC into the future. A first important response was therefore to intentionally design opportunities to ensure the relationships continue to be given time to be built, interactions occur and be witnessed. Secondly, a need to teach and model for interns more explicitly the skill of how to develop positive professional relationships in the legal practice context was clearly recognised.

A number of changes have occurred as a result of undertaking the AI process. The first of these has been to modify the compulsory intern induction training program. Training now includes an explicit discussion about the diversity of professional experience of each supervisor and how this complements that of the other supervisors for the benefit of the team as a whole.

The second change at FLAC resulting from the AI process was to ensure that a meeting style 'hand over' occurs with the Practice Manager when supervisors and interns return to the 'hub' office from the 'spoke' outreach clinic.

Another change to FLAC that occurred following the AI process in response to identifying the importance of modelling professional behaviour, was the method adopted by the team to travel to 'spoke' outreach locations. In order to capture the importance of the informal interactions between supervisor and interns during the 30 minute drive to and from campus, where previously interns had a choice about transport, now they must all travel in a minivan with the supervisor. Supervisors have found these unguarded conversations create space to embed any implicit expectations about the tasks ahead and allow interns to be honest about any anxieties or concerns they may have regarding meeting clients.

University student-operated legal clinics are environments where there are often significant tensions between the competing objectives for which they are established. Financial sustainability and the resource limitations are stressors on both teacher, supervisors and student interns, as are negotiating the new professional relationships involved, where those relationships are significantly different from those previously

developed at law school. Using Appreciative Inquiry as a tool enabled the Flinders Legal Advice Clinic to review clinic operations from a positive perspective and seek to implement improvement wherever possible. The process was effective in empowering clinic staff to reflect on past experiences, gain insight into positive events, and identify moments of peak performance.

CURRICULUM

Why and How to Internationalise Law Curriculum Content

T Mijatov
Legal Education Review, Vol 24, No. 1&2, 2014, pp 141–156.

The selection of course content will always be an important part of the design of a legal curriculum. One idea for redesign is to 'internationalise' the curriculum. By internationalisation is meant 'the process of integrating the international dimension into the … major functions' of a university course, where 'international' means an intercultural, global outlook and where 'dimension' includes perspectives, activities and programmes with that end in sight. This article reappraises both the justifications behind and the methods for implementation of internationalisation.

This article concludes that internationalisation *is* valuable, and proceeds to the next enquiry: identification of ways in which curriculum content can actually *be* internationalised. This research uses tort law as a lens for consideration of internationalisation, because it is a compulsory course at most law schools and because it regulates many non-criminal wrongs in social life, whether that be negligently-built leaky homes, the nuisances caused by a neighbour or compensation for personal injury.

The unique depth of perspective gained in this research relies on the mixed methods approach adopted. The data sources were an extensive literature review and case studies from two Australasian universities: the University of Western Australia ('UWA') and the University of Otago, New Zealand ('Otago'). The case studies consisted of (1) interviews with people involved in curriculum design at each University (such as the course co-ordinator), (2) a survey of students currently taking or recently having taken the torts class at each university, and (3) an analysis of course documents for international content.

Those writing about internationalisation of curriculum content offer a variety of reasons why it is valuable. A close analysis of this literature reveals a fairly consistent taxonomy of benefits of internationalisation: economic, political, humanistic, and academic.

The dominant benefit (both for students and universities) of internationalising curriculum content is regarded as being economic. There are three steps to the argument. The first step is the observation that today's world is highly globalised. The second step in the argument is the contention that law graduates and universities cannot survive in a globalised world with a legal education that focuses only on domestic law. The third step in the economic argument does not rely on the first two. It is the recognition that curriculum redesign is by definition 'a future-oriented activity', and that internationalisation of the curriculum will be valuable if those futures in which internationalisation is valuable are likely to occur.

It may seem strange then that the academics interviewed at UWA and Otago did not emphasise the economic benefits that flow from internationalisation in torts. Both academics believed most of their graduates practice domestically, making further internationalisation unnecessary.

Against this less than supportive outlook from the academics can be considered the student responses. Few UWA respondents mentioned job prospects or other economic reasons as a strong justification for internationalisation. One stated that internationalisation was *not* useful 'in a practical sense given that most students will go on to practice domestically.' When asked for their personal opinion about how much internationalisation there was in their course, 75% of UWA respondents thought there was 'too much focus' on it. Otago students, on the other hand, frequently mentioned the economic justification for internationalisation. Fewer than two percent of the Otago respondents thought there was 'too much focus' on international material.

In addition to the economic benefits, political benefits arise from having an internationalised law course. It seems two types of political argument are made when this

rationale is invoked. The first is that an increase in internationalisation can produce a more equal distribution of power within the classroom. The second, related argument is macroscopic. Internationalising curriculum content can reinforce or shatter underlying notions about what is the 'best' legal system. It is concerning that narrow (for example Western) conceptions of law curriculum content are sometimes subtly reinforced under the guise of internationalisation. Herein lies the political power — and danger — of internationalisation. Neither academic from the case studies reported observing either kind of political benefit in action in their classrooms, though both (and the UWA academic in particular) raised the law reform function of internationalisation. Only a minority of surveyed students saw the potential for law reform as a major reason to internationalise curriculum content.

There are also 'humanistic' benefits to internationalising curriculum content. In some continental European legal systems, humanistic benefits such as the good that arises from social and personal reflection are promoted as the most important reason to internationalise. Certainly within common law systems, and across law courses within that tradition, the same point can be made: having a wider range of experiences is good for critical thinking and self-development.

Those responsible for curriculum form and reform should be aware that an internationalised curriculum enhances a sense that more is arguable. Usually this will be a desirable outcome, but it must be kept in mind that some aspects of any area of law are probably not resolved by recourse to clever argumentation, nor by reliance on international material alone or dominantly.

Finally there are academic benefits to internationalising law curriculum content. These benefits arise if internationalisation helps one to see there is no single right way to solve a legal problem or to see that legal systems are connected by history.

The resulting benefit is that legal research output will be less parochial and accordingly more able to deal with the diversity and complexity that exists in law. The hope is that internationalising curriculum course content will play its part in encouraging legal research to move beyond what the law *is*, to explore the more interesting and arguably more useful question of *why* the law is how it is.

The only references to this sort of benefit by the academics have been discussed above: law reform and critical thinking. This benefit was not otherwise explicitly contemplated by academics or by students.

Some claim that internationalising curriculum content is not valuable, or not valuable enough to be worth implementing. One objection to internationalisation is that teaching more international material takes away resources and time from teaching the domestic component of the course. Other arguments against internationalisation have recently been identified as the impossibility of gaining any meaningful understanding of a foreign legal system in a short span of time; the likelihood of rendering a disservice to the study of comparative law by conducting oversimplified comparisons of legal systems; and the dispensability of studying international treaties due to the incorporation of international provisions into domestic law through enabling legislation.

The main response to the first objection is to point out that internationalising curriculum content need not reduce the quality of domestic law teaching. It is inexpensive to implement, faculty resistance can be overcome and lecturers can easily be taught how to internationalise.

The second and third objections are not persuasive because they are not relevant. Internationalising is not primarily valuable for its ability to thoroughly teach a foreign legal system or to inspire students' interest in comparative law. Instead, internationalising curriculum content has a broad range of serious rationales as explained above.

The fourth objection incorrectly characterises common law legal systems' use of international treaties. In reality, courts regularly rely on even non-ratified treaties in a range of ways. Additional to these cogent responses is the practical point that 'the controversy over internationalisation has abated', with many law schools internationalising. The trouble is that many other law schools have not made moves to internationalise. At Otago and UWA, for instance, the arguments about doing students a disservice were emphasised by the interviewed academics. Both stressed that time and knowledge constrained the ability to internationalise curriculum content, whatever its value.

Accordingly an investigation into how to implement internationalisation follows. A

structured approach to internationalising is offered.

There are two steps to take in identifying the characteristics of an internationalised law curriculum. First, an institution must choose the broad approach it will adopt to achieve internationalisation. Secondly, an institution has several specific tools it may use to implement its chosen approach. The concepts and specific suggestions presented below can be applied to any legal course.

There are two broad approaches an institution can choose. The first is to simply quantitatively increase 'global exposure'. The second is to push for a "paradigm shift to educate lawyers in the new world reality", requiring 'a qualitative rather than a quantitative change in legal education'. With the paradigm shift approach, the curriculum focuses on the legal problem and then provides a range of solutions to that problem drawn from a number of jurisdictions. This is done instead of providing students with a single–domestic–response to that problem.

Neither the UWA nor the Otago courses neatly fit a single approach. In fact, both interviewed academics indicated they had no particular internationalisation strategy. One described the present approach at their law school as 'holistic' while the other's was described as 'ad hoc' and based on 'impression'.

Consciously selecting an approach, or a hybrid of approaches, has the advantage that the institution can then specifically make its courses more internationalised with the broad approach always in mind. Regarding the quantitative approach, the most frequently cited specific way to internationalise is to increase the number of international cases used. The paradigm shift approach, however, would see these mere quantitative increases as insufficient to reap the benefits of internationalisation. Instead, it stresses the importance of having a broad range of sources, and of explaining any jargon contained within the international materials.

It will be seen there are many parts to any legal subject that are amenable to internationalisation. It is important, however, for the specific changes to be guided by clear purpose. And it seems that fuller enjoyment of the benefits of internationalisation will be had if the paradigm shift approach is the goal. It avoids the risks of tokenism, and of undermining the central importance of internationalisation.

With only past and present as reference points, achieving change can be difficult. Change becomes most unlikely unless the 'creative imagination' of those who can effect it is engaged. This article has tried to do so by re-examining the reasons why internationalisation of law curriculum content is valuable. And although attention was devoted to tort law in particular, the appraisal of internationalisation applies generally. Internationalisation makes economic sense, it sheds egalitarian light on right and wrong in the classroom as well as between legal systems, and it develops critical and incisive law students. The teaching of law in areas other than torts can reap similar rewards. The implementation of internationalisation should therefore proceed, and this article has suggested how: clarity of purpose is important, and specific reforms will follow. Armed with these new reference points, change will hopefully be forthcoming.

HISTORY

How the Disappearance of Classical Rhetoric and the Decision to Teach Law as a "Science" Severed Theory from Practice in Legal Education

K K Tiscione

Wake Forest Law Review, Vol 51(2), 2016, pp 385–402.

Classical rhetoric combined theory and practice to train lawyers and politicians for careers in public service. Aristotle and other classical rhetoricians took a holistic approach to teaching analytical reasoning, reading, writing, and speech on a variety of subjects.

Aristotle, a student of Plato and the teacher of Alexander the Great, studied political, judicial, and ceremonial speech. His treatise, *Rhetoric*, explores the rhetorical process — now known as the canons of rhetoric — by examining how appeals to logic, emotion, and credibility work together to persuade, resulting in one of the first great psychological studies of motive.

According to Perelman, lawyers and philosophers use rhetoric — appeals to logos, pathos, and ethos — to convince their audience, and for that reason, law and philosophy are part of the same process.

More recently, rhetoric professors Andrea Lunsford and John J. Ruszkiewicz have suggested that "*every* text is also an argument, designed to influence readers," even those intended to inform, convince, explore, and help us make decisions. If Perelman, Lunsford, and Ruszkiewicz are right, and I believe that they are, law does not give rise to rhetoric. Rather, rhetoric gives rise to law, making the study of rhetoric in law school essential.

To answer the question of what happened to rhetoric, we must go back in time to ancient Greece (circa fourth century B.C.E.), where rhetoric was born. At that time, young boys started their education by studying grammar — "the art of inventing symbols and combining them to express thought." As they got older, the students moved on to logic and rhetoric.

Logic is the art of reasoning: the analytical process used to deduce knowledge. If one's premises are indisputably true and one's reasoning is valid, the resulting conclusion is similarly indisputable.

Rhetoric, on the other hand, is the art of persuasion: the use of the analytical process to invent and arrange arguments, choose an appropriate speaking style, and deliver a convincing speech.

Rhetoric involves a five-step process: invention, arrangement, style, memory, and delivery.

In the early fifteenth century, an explosion of creativity in the arts and sciences occurred in Europe. For roughly two centuries, the study and practice of rhetoric was once again valued as it had been in ancient Rome.

Enter now our first villain: Peter Ramus. Ramus was a French logician and philosopher interested in educational reform.

According to Ramus, the creation of knowledge was a function of logic, and the expression of knowledge was a function of rhetoric.

The result, "Ramism", had an enormous impact on the teaching of rhetoric. Like Plato, Ramists considered rhetoric to be devoid of substance, teaching only expression. By the end of the nineteenth century in the United States, the study of style had evolved into the study of literature and literary criticism, and the study of delivery was divided among speech and communication departments in university education.

In the seventeenth century, a major shift in thinking occurred regarding how knowledge is acquired. Bacon argued that Aristotle's version of logic — primarily deduction — can explain only the relationship among things already known.

Instead, Bacon argued, knowledge is acquired by induction: a systematic method of careful observation that leads from particular observations to more general conclusions about the nature of things. But because human perception is flawed, these conclusions must be tested.

Throughout the seventeenth and eighteenth centuries, philosophers struggled to understand what knowledge is and how to define it. Bacon thus ushered in the Scientific Age, which, in turn, had a profound effect on education in the United States, particularly at the turn of the nineteenth century.

In 1870, Charles Eliot, the president of Harvard University, hired Christopher Columbus Langdell — enter now our second villain — to be the dean of the law school. Both Eliot and Langdell were interested in reforming legal education because there were no admissions or attendance requirements, exams, or grades. Together, they established a law school entrance exam, annual exams at the end of each academic year, a three-year curriculum, and the obligation that law faculties conduct research. To these curricular advances, Langdell added both the case and Socratic methods we know today.

Langdell's motivation in introducing these methods is attributed partly to a declining belief in natural law after the Civil War (since natural law had been used to ostensibly legitimize slavery). This decline contributed to the rise of legal positivism — the idea that law is not handed down by God but created by man.

Positivism, in turn, led to the need to justify the fairness and objectivity of the law.

Langdell's answer to this question was that the common law is a coherent system of objective and enduring principles that judges use to make their decisions.

To discover these enduring principles, Langdell adopted a scientific method for teaching law akin to that first laid out by Bacon. He replaced textbooks with appellate opinions and practitioner-teachers with scholars, who had little, if any, practice experience.

Teaching law as a science meant that only the law was relevant to a good legal education. The sole focus on law was radical: traditionally, judges had relied more broadly on justice, fairness, and public policy concerns in making their decisions.

According to Langdell, though, these could be manipulated to reach a decision either way.

Langdell was criticized, even then, for his novel methods. To give the man his due (which I threatened not to), the desire to "scientize" law was consistent with the prevailing view that "science was the model for all human inquiry," and the concept of social science did not really exist at the time. Nonetheless, there were and continue to be significant flaws in Langdell's method. First, it focuses exclusively on judicial decisions (and only *select* judicial decisions) to the exclusion of statutes and administrative law, which make up the bulk of law in the United States today.

Moreover, most legal scholars agree that the social sciences, such as political science, sociology, and psychology, "provide the most useful analogies for the academic study of law in the sense, that they, like law, are 'human sciences' . . . [and] the insights of these fields can be applied directly to extensive areas of law, which is not true for the natural sciences." On this, law faculty on both sides of the theory-practice divide can agree.

The case method is also confusing to students. It perpetuates the idea that law exists "out there" for them to discover. Yet law — encompassing statutes, regulations, and judicial decisions — is a social construct, and the study of law is "the study of human beings, with all the complexity, normativity, and subjectivity that this study necessarily implies."

Rhetoric does in fact give rise to law, not the other way around. Nor can the law be reduced to the mechanical application of objective rules, as Oliver Wendell Holmes recognized in 1881 (about ten years after Langdell joined Harvard Law School).

Judges must consider public policy in making their decisions because the law alone can lead to absurd and unfair results.

Finally, and perhaps most important to this story, Langdell's "legal science" transformed law school into a primarily theoretical endeavor. Just as Ramism severed logic from rhetoric, Langdell severed theory from practice and focused on theory in legal education.

In real life, lawyers are called upon to think more multi-dimensionally and diversely. They must be both doubters and believers, zealous yet able to compromise for the good of their clients, and tough but empathetic as well. No one can seriously argue that Langdell's methods teach these skills.

With rhetoric reduced to the canons of style and delivery — considered an unintellectual pursuit — and logic replaced with science, classical rhetoric ultimately disappeared. Practical skills training did not seriously appear in legal education until the late 1960s.

The resistance with which skills faculty have been received in the legal academy is evident: the overwhelming majority of clinical and skills faculty are ineligible for tenure and earn substantially less than their traditional faculty counterparts.

In this hierarchy, we see the reification of the theory-practice divide and the influence of both Ramus and Langdell. First-year students learn "the law" — knowledge — in their traditional casebook courses using the case and Socratic methods. Then, they learn style and delivery — how to express that knowledge — in their experiential courses, such as legal research and writing, advanced legal writing, internships, externships, and clinics. The net effect is to keep theory separate from practice and to perpetuate a hierarchy, primarily within the legal academy, that values one over the other.

We do not do a good job explaining to students the goals of the case and Socratic methods or making explicit connections between what they learn in casebook courses and what they learn in experiential courses.

Clinical and other skills courses feel "awkwardly tacked on" to the traditional curriculum, and many of the practice-ready programs law schools have hastened to put in place feel "haphazard" because they are not related to "an overall larger strategic change."

Classical rhetoric taught the theory and practice of the art of persuasion. Both the acquisition of knowledge and the expression of knowledge were viewed as inseparable, each informing and refining the other. When Ramus assigned Aristotle's canons of

invention and arrangement to logic and then style and delivery to rhetoric, he severed theory from practice. In so doing, he relegated rhetoric to its lesser status and paved the way for Langdell to focus on theory in legal education.

By the nineteenth century, logic as the source of knowledge had been replaced by Bacon's "science" — the rejection of Aristotelian deduction in favor of induction. Langdell's decision to teach law as a natural science meant that law students no longer needed to learn logic, be well rounded in the humanities, or learn practical skills. All they needed to do was study the law.

I believe our students crave what rhetoric provides. It is what they expect to learn when they arrive for their first year of law school. Teaching the history and philosophy of rhetoric could provide the context and perspective students need to be inspired legal scholars or practitioners. Finally, rhetoric would work well as an organizing principle for legal education.

INDIVIDUAL AREAS OF LAW

Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution
D B Oppenheimer
The Journal of Legal Education, Vol 65(4), 2016, pp 817–839.

Civil procedure is tough.

Two big sources of student frustration are (1) their inability to view the course materials in a context that makes them seem real, and (2) our failure to engage them through active learning. I believe we can solve (well, address) these problems by using a semester-long simulated case to help structure the course, while preserving the time needed to cover the core material of the course.

I confess. I used to start my civil procedure class each year with *Pennoyer v. Neff*.

Now, I start with a YouTube video of a witness interview.

By the end of three or four classes, my students are ready to draft a complaint — but not from scratch. I mean, they could, but it would take several hours, and they'd mostly be copying forms. In a clinic, or in practice, lawyers may take days, or even weeks, drafting a complaint.

Whether through simulation or clinical practice, our colleagues who study learning theory repeatedly urge us to use practical skills, context, and active learning as a method of teaching the essential intellectual and cognitive skills described by Shultz and Zedeck: analysis and reasoning, creativity and innovation, problem-solving, and practical judgment.

In 1976, attorney Gerald M. Stern wrote a book about a 1972 mining disaster and flood that had killed over 100 people living in the valley of Buffalo Creek in West Virginia. Stern represented many of the survivors in a civil action against the Pittston Corporation, owner of the mining company that built the dams that failed, causing the flood. His book *The Buffalo Creek Disaster* is an engrossing story of how he litigated the case, from his initial client meetings through pleading and discovery to trial preparation and settlement.

Grosberg saw that Stern's book was a wonderful tool for organizing a civil procedure course. He found copies of the pleadings, and in the days before email and Web posting, he made photocopies available to civil procedure instructors and clinic directors around the country. He made a series of videotapes of simulated interviews and depositions of one of the parties, which he distributed to anyone who asked.

In 1995, Jonathan Harr published the award-winning nonfiction book *A Civil Action*, the story of a personal injury, wrongful death and environmental tort lawsuit on behalf of several children and their surviving family members. In 1999 law professors Lewis A. Grossman and Robert G. Vaughn published a companion volume with the pleadings and other materials to use in civil procedure classes.

Grossman and Vaughn's *Documentary Companion* provides over eight hundred pages of text, photos, newspaper articles, interview notes with the participants, supplemental commentary, and, most important, the actual pleadings from the Woburn case. For each of the scores of procedural issues raised by the case, introductory text sets the stage, and a number of thoughtful concluding comments and questions put the pleadings into context and stimulate further consideration and discussion.

In 2002, a third case made its way into civil procedure classrooms when Nan D.

Hunter published *The Power of Procedure: The Litigation of* Jones v. Clinton. The book republished the critical pleadings and related documents from Paula Jones' sexual harassment case against President Clinton, which was the case that led to his impeachment trial and disbarment. Hunter annotated the materials with insightful commentary on the reasons the lawyers were framing the arguments as they were, and how the various pleadings met the requirements of the Federal Rules of Civil Procedure.

In 2005, a fourth best-seller was adopted in many civil procedure classrooms with the publication of *Storming the Court: How a Band of Yale Law Students Sued the President — And Won* by Brandt Goldstein. The book tells how the students and faculty of the Allard K. Lowenstein International Human Rights Law Clinic at Yale Law School took on a seemingly hopeless case — *Haitian Centers Council v. McNary* — to help Haitian refugees seek asylum in the United States.

The most ambitious effort to date to use real cases to structure a civil procedure course is probably the civil procedure casebook authored by Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, Thomas O. Main and Alexandra Lahav. The book includes extensive portions of the case files of two actual cases, *Carpenter v. Dee*, a Massachusetts state court wrongful death action, and *Zoll et al. v. City of Cleveland*, a federal court class action claiming sex discrimination in the hiring of firefighters. Forty-two practice exercises, most of which are drawn from the two cases, are embedded throughout the book.

Where Grossman and Vaughn are exhaustingly comprehensive, Hunter is admirably lean. Her *The Power of Procedure* weighs in at just under two hundred pages, but they are dense with her annotations of the pleadings — a very effective way to draw the student into thinking critically about the pleading as s/he reads it.

Michael Vitiello's *Civil Procedure Simulations* gives students a good, realistic look at a series of pleadings, deposition transcripts, and other discovery documents.

But because the substantive law of the case (Connecticut defamation law) is difficult and complex, the materials include a disproportionate amount of substantive law.

The Subrin, Minow, Brodin, Main, and Lahav casebook is the best integration of any of the material available. The exercises are embedded in every section of the book, and require the students to be deeply thoughtful about the work that lawyers do.

Part of the problem of adding simulation exercises to add context and active learning to the study of civil procedure is the limited time we're given to teach the course. Exacerbating the time crunch is the inefficiency of most simulation.

My answer to this problem has been to organize the semester around a simulated case file, with pleadings and briefs that are 90% complete. This way the students can put all their effort into completing the most challenging and important part of the simulation.

Now all they need to do is the hard part — the intellectually hard part. They need to comb the transcript of the interview, from the video they watched the first day of class, to find enough facts to make the claim seem plausible.

If my students can review a transcript of a 2L student interviewing a client and extract the facts necessary to state a claim that meets the requirement of FRCP Rule 8 as interpreted by the Supreme Court in the cases we're studying in class, they're engaged in active learning and putting our classroom study into context. If they can do it in a few hours, they still have time for all the other work we require of them. And they can (and do) complete the assignment in a few hours, because the 90% I didn't need them to focus on is supplied. That's it, my 90% solution.

I hand out "clickers" at the start of every class to have them vote on questions raised during class. The clicker votes tell me that on day one, when I ask if we have enough information to file a lawsuit, they start out as skeptics. But once required to do their best to complete a draft complaint on her behalf, they become believers. Uh-oh, time to switch sides.

On the second week, they do switch sides. They draft a motion to dismiss the complaint for failing to state a claim upon which relief can be granted — but again, not the whole motion; that would take forever.

Then, to make it seem real, I send the students to court to watch a "law and motion" session.

As the semester continues, they will move to amend to add a state law claim, thus covering Rule 15 (amendment of pleadings) and section 1367 (supplemental jurisdiction); oppose a motion for intervention by a local fair housing group; and, after things get a little

out of hand in a deposition (all on videotape, and another chance to teach something about professionalism), complete cross-motions to compel discovery and for a protective order, with both sides seeking sanctions. As a capstone, they represent one side or the other and attempt to negotiate a settlement of the case.

What are the benefits of structuring my course around this semester-long simulation? For one, my students are writing, and writing often, even if briefly. For another, they're reading trial-level original legal documents, transcripts, and exhibits — the (simulated) real things that real lawyers work with.

The students also get to (are required to) work collaboratively.

But I think the biggest benefits come from two well-known phenomena about learning: We learn from doing, and we learn from context. By giving the students 90% of the material already completed in each simulation, we can find the time for them to do active-learning simulation exercises frequently through the semester, immersing themselves into the work lawyers do, without giving up the time needed to also study the doctrine through more traditional methods.

INTERDISCIPLINARY ASPECTS

Using Competitive Intelligence Instruction to Develop Practice-Ready Legal Professionals
C Lemmer
Legal Reference Services Quarterly, 2015, Vol. 34, No. 4, pp 268–292.

Despite robust criticism, much of the law school curriculum continues its focus on case law analysis using the Socratic Langdellian teaching model. Competitive intelligence instruction, delivered either as part of a legal research curriculum or as a stand-alone unit incorporated into a corporate law or business organizations course, introduces students to basic corporate, regulatory, and transactional documents and helps students develop the critical decision-making and business-development skills necessary to be successful lawyers.

The literature on the *failure* of the legal academy to prepare students for legal practice is not new.

Although law schools have responded with a variety of innovative programs, an objective measure of the success of these programs remains elusive. One measure of perceived success might be found in a survey of recent graduates and the lawyers with whom they work post-graduation.

In 2015 in the first annual *BARBRI State of Legal Field Survey*, 76% of third-year law students reported they were practice-ready, but only 56% of lawyers who work with recent law school graduates believed that, in general, recent law school graduates were practice-ready. Similarly, 71% of recent law school graduates believed that they possessed sufficient practice skills; in contrast, only 23% of the practicing lawyers who work with recent law school graduates believed that these graduates possessed sufficient practice skills.

I propose that one reason for the significant difference between the responses of law students and practicing lawyers is because we are not teaching our students the "right" skills or giving equal attention to the corporate and transactional context.

In the rush to create practice-ready law graduates, the legal academy has focused too often on adding more writing and experiential learning through litigation-based clinics and externships and internships, which do not focus on higher decision-making skills or business-development skills and do not address the basics of corporate and transactional law practice.

As a law school graduate in the 1980s, I joined a large Chicago law firm where I immediately had the benefit of lawyers who provided feedback that improved my work product and opportunities to attend client meetings and participate in negotiations. In this environment I became practice-ready, or in other words, I added problem solving, work place skills, client management, and decision-making skills to the analytical case-based reasoning skills I mastered in law school.

Today's law firms no longer take on and manage this burden for a variety of reasons including, among others, reduced profits due to competition from non-legal entities and paraprofessionals, clients more interested than ever in controlling outside legal costs, the impact of technology on routine work, and a lack of interest in investing in lawyers who

are unlikely to stay with the firm for the long haul. As a result, law schools need to bring to the curriculum opportunities for students to engage in and be assessed on problem solving and decision making and to explore and practice concepts that underlie business development and client management.

How best to accomplish this objective is the instructional challenge.

One way is to understand how we engage with and process information. Outside the legal academy, there is significant literature on how the human mind processes information and on the development of decision-making skills in business executives and leaders. The resulting big picture is this: Our inability to deal with prolonged ambiguity means that sustained exploration of the alternatives — the very skill needed for intelligent decision making — is lost.

The best solutions to the instructional challenge of teaching decision-making skills force our law students to override natural inclinations to take the first answer and challenge them to process multiple alternatives to reach the best solution for the particular client.

Networking, marketing, and business development (aka building a book of business), and client relationship management are challenging and may be scary processes for law students to envision. In the real world the quality and caliber of a lawyer's work is one factor among many, including many over which a new lawyer has no control. In this environment, professional success can look like an ever-distant mirage.

Many law students have little experience developing and maintaining professional and business relationships and may not realize the work, time, and skill it takes to develop and maintain such relationships.

The big business of developing business can be broken down into two separate skill sets: development skills all law students will need to be successful practitioners. The added benefit for those students interested in legal careers outside the courtroom, or for those whose courtroom interest lies in commercial litigation, is the corporate and transactional context.

The difference in how law students evaluate their level of preparedness for practice compared with how practicing lawyers who work with these same law students rate their preparedness suggests we are not developing the right skill sets and professional acumen in our law students. Competitive intelligence instruction using authentic assessments is one option to develop practice-ready legal professionals who are well versed in business development and networking and ready to contribute to the financial well-being of the firm.

LAW SCHOOLS

Unmet Needs for Legal Services in Australia: Ten Commandments for Australian Law Schools

M Kirby
Law in Context, Vol 34(1), 2016, pp 115–142.

A Assure a More Diverse Intake

Inability to secure effective access to the law can sometimes make our claims about the rule of law sound hollow. The beginning of a response to this problem is a realisation that it is a problem. Such a realisation is unlikely to come about if the legal profession, and its leadership, derive overwhelmingly from economically and socially privileged backgrounds.

All Australian law schools should ask themselves what they are doing to ensure that the profile of their students aligns more closely with the profile of the community that law graduates will need to serve on gradu-ation.

B Help the Vulnerable to Graduate

In addition to addressing the intake of new law students, law schools must be aware of the challenge of survival during the course.

Common experience, and also recent research in Australia, have demonstrated the importance of depression, low self-esteem, disillusion-ment, bullying and suicidal thoughts for students generally and law students in particular.

Similarly, the inability to delegate some tasks in the law; the long hours of work; the relentless concentration that is needed on particu-larities; and the public character of many legal performances combine to impose a potential toll in stress and diminished self-confidence. Because the culture is imbibed by, and evident in, most law schools, the response must begin there. The pedagogical and legal duty of care requires a strategy on the part of law teachers.

C Include the Teaching of Poverty Law

Inevitably, perhaps, the law course will normally be designed in Australia around the 'Priestley 11' subjects, endorsed for instruction, eked out with selected optionals.

Because of the cost ratio of time required to the amount at stake, it is unlikely that many of the subjects of the law of concern to poorer citizens will ever secure much time in a law course.

It sometimes happens, when cross disciplinary issues arise within particular legal firms, that links are perceived that allow the grouping of cases having common elements, appreciated because of the development of particular expertise.

Some Australian lawyers are unsympathetic (even hostile) towards group litigation. Though this — a combination of litigants, sharing common legal claims — may be the only effective way to bring ordinary people, affected by a common legal wrong, to a realistic chance of asserting their legal rights and obtaining redress.

Law teachers who accept the rhetoric of the rule of law will, at the least, endeavour to alert their students to the necessity of translating the law's fine words and theory into practical reality. These are matters that should be thoroughly addressed in every law course.

D Encourage Diversity and Civic Engagement

Even where a law student's background and experience has been narrow and privileged, their eyes may be opened by engagement with civil society and with colleagues having different backgrounds and life experiences.

This is why it is desirable for law schools to reflect the diversity that now exists in the Australian nation.

For lawyers, anything that moderates the centrality of self, and aspirations defined in terms of the mega salaries of top tier law firms and of leading barristers, is prone to be beneficial.

E Encourage the Culture of Legal Aid

Following the disappearance of the Chamber Magistrates of postwar Australia and the decline of public legal aid after the hopeful days of the 1970s, new and different strategies have been adopted to address unmet legal needs. They reflect the fact that the law does not (and arguably cannot) deliver justice to large sections of the community without private, voluntary supplementation.

Law students need to be alerted to this development and to a realisa-tion of its importance for their long term careers in law.

The official response of the organised legal profession is improvisation and voluntary activ-ity.

However, the entire pro bono system is an imperfect one. Most people in need of legal assistance who cannot afford it, fall between the cracks under the current arrangements.

Law students should be encouraged to be impatient, inventive and insistent and to suggest long term solutions.

F The Special Importance of the Law of Costs

Thinking freshly about costs is difficult for lawyers trained in the Australian legal tradition. Yet it may be vital if one goal of the law is to encourage litigants to come forward to uphold important constitutional and legal principles.

At least a little time in a modern law course should be devoted to the irksome necessities of costs and their importance for the vindication of legal rights. Likewise the importance of the procedural rules governing orders for security for costs.

At the very least, more law teachers should familiarise themselves with the realities of the procedural and costs obstacles that exist on the journey towards vindicating legal rights presently unmet in our system of law and justice.

G Enhance Technology for Access to Law

Great strides have been made in recent years to facilitate access to the letter of the law. Great credit for this must be given to three outstand-ing Australian academic lawyers, Graham Greenleaf (UNSW), Andrew Mowbray (UTS) and Philip Chung (UNSW). The establishment under their direction of AustLII (the free internet provision of basic legal data) was quickly followed by similar online services that provide effectively free access to legal information in a growing number of mainly English-speaking jurisdictions around the world.

Because of the presently unmet needs for legal assistance and advice, these facilities become of even greater importance in helping self-represented litigants. Without legal training, they may simply clutch at straws.

Judges and scholars who expound the law thereby influence the content of the law by their writing. They need to write more simply. Learning the skills of expressing the law simply can be taught at law schools.

H Establish Clinics and Miscarriage Projects

Some mistakes are inherent in any human system of justice. However, the risk of error is exacerbated by the pressures imposed on courts of criminal appeal, where panels of judges have to handle large numbers of cases, so that mistakes are overlooked.

The only avenue of redress available in most Australian jurisdictions for an alleged miscarriage of justice, once the application process has run its full course, is an application to the Executive Government under statute or for the exercise of the royal prerogative of mercy. In default of an independent, transparent legislative or judicial remedy, the creation of a university student-led 'innocence project' could sometime help establish a case of arguable innocence.

For similar reasons, I believe that law schools should be engaged with community legal services. They introduce law students to the privilege of being entrusted with the confidences and legal concerns of their fellow citizens.

I Engage in Empirical Research and Law Reform

Institutional law reform has also suffered severe recent funding cutbacks. This has led to a reversion, in some Australian jurisdictions, to the part-time model of law reform which the Scarman model in England of 1965 had aimed to replace. More law teachers should promote, amongst their students and in the community, the need for more, not less, long term, empirically-based, institutional reform of the law.

One of the many reasons why Australia needs to adopt legislation enshrining universal rights is so that legal process, affording access to the courts, will identify any serious departures from basic legal principles, including the principle of equal justice for all. An attitude that scruti-nises critically the state of the law is appropriate. It should be encouraged from the earliest days in law school.

J Consider Lessons From Foreign Systems

Most of the countries of the world follow the civilian tradition of the law, copied substantially from the Napoleonic Codes of France. In many ways, it is a more efficient system for resolving legal disputes. The common law system may be more transparent in its procedures. But with its emphasis on adversarial litigation and the accusatory procedure in criminal trials, it is generally slower and more expensive.

The need for outstanding law teachers, capable of addressing such fundamental questions, has never been greater. Significant national and international business interests will continue to call on lawyers of the greatest ability. It is equally important that lawyers of talent and imagination should be available to other interests in society.

K Attaining Balance

It was unsurprising that WS Gilbert and Sir Arthur Sullivan should have addressed many times the faults and foibles of the law. WS Gilbert was, after all, a barrister.

But it is his gavotte in *The Gondoliers* that helps to make my final point. The words in question have nothing specific to do with the law; still less with legal education. However, they address an issue that is very English. The words appeal to the maintenance of a balance in all things.

This, I suggest, is the challenge that faces law teachers in Australia — engaged in a kind of intellectual gavotte. To be aware of the faults and dangers of their subject. To

praise its strengths and its achievements. But in doing so, to avoid unbending stiffness or uncritical pride.

It is to address those unmet needs for legal services that I have proffered my new ten commandments. I can only hope that they will be learned by the teachers and lawyers of tomorrow. If they learn well, and practise what they have learned, they will leave the law in a state better than they found it. And that should be every lawyer's ambition and duty.

LEARNING STYLES

Problem-based Learning and Legal Education — A Case Study in Integrated Experiential Study

R Grimes

Revista de Docencia Universitaria, Vol 13(1) pp 361–375.

Problem-based learning (PBL) can be found in several disciplines in higher and further education, principally in health care and medicine but rarely, at present, adopted by legal educators. Following a model already established at the University of York's medical school the York Law School (YLS) was founded on, and its core programmes designed around, a PBL model.

In England and Wales, for better or worse, (I suggest the latter) we currently divide legal education into three stages — the so-called 'academic' (normally a 3-year full-time degree (or equivalent on a part-time basis) covering foundation subjects and a range of electives or a shorter conversion course for non-law graduates); the 'vocational' (a year-long full-time course looking at the application of knowledge, skills and values (but assuming much of the 'knowledge' component)); and, a period of 'apprenticeship' (currently a 2-year training contract for a solicitor and a 1-year pupillage for a barrister).

In order to meet professional regulator requirements those graduating in law or doing the conversion course must presently cover what are known as the 7 foundation subjects.

Law schools in England and Wales therefore are caught by a requirement that the content of much of their programme must be directed at legal basics to satisfy the professional regulatory bodies (one each for solicitors and barristers).

PBL questions both the value of this academic and vocational divide and the concept of top-down education where the academic, as expert, instructs the student who, in the main, sits passively like an empty vessels waiting to be filled at the dictate of the teacher and institution. The philosophy of PBL as implemented at YLS also calls for law to be taught in a holistic way where rules, competencies, attributes and attitudes are seen as interlinked.

Working on given scenarios (fictitious or real but anonymised and designed by the educational provider) students, in small groups (typically 6–12 in each), deconstruct and analyse 'problems'.

In most instances the aim is not to 'solve' the problem as such (although that may be a spin-off requirement as explained below) but rather to recognise what they need to understand to appreciate the implications of what the 'problem' involves. It is problem analysis rather than problem-solving.

The usual setting for PBL is a small group. At YLS this is normally a collection of 12 students from the same year of study.

There are various models for PBL. The one adapted by and used at YLS has 10 'steps' or 'stages'. These are:

1. Read and clarify the problem
2. Identify parties and interests
3. Set out chronology of events
4. Mind-mapping possible 'issues'
5. Identify issues and give problem a name
6. Organise themes
7. Define learning outcomes from themes
8. Plan, agree and carry out research
9. Share results
10. Check to see if learning outcomes are met

The basic approach to PBL outlined above has a number of variants. The extremes are represented by what can be broadly described as 'open' and 'guided' discovery

models. Simply put the former allows students a largely free hand in determining their own outcomes whereas the latter expects students to reach pre-determined outcomes albeit under their own initiative with some tutor-guidance where necessary.

From Day 1 in Year 1 each student at YLS is allocated to a SLF and remains with that firm for the entire study year. At the start of the following academic year, students are assigned to a new firm. Each SLF is asked to discuss and formulate rules for their SLF (the rationale and analogy used is the need for laws in wider society) to govern how the group will operate, what it will do to ensure learning progression and how it will handle challenges and conflict.

A set of key values and principles drive and inform learning and teaching. Although YLS does not have a 'written constitution' which captures all of these ideas, a philosophy has emerged organically through practice. Students are equally important in this process and the consultations that take place to emphasise and reinforce these values and principles are significant in securing the necessary 'buy-in' from the learners to make the whole process work effectively.

It should also be acknowledged that YLS is fortunate indeed to have customised teaching facilities, a relatively new law school where practices are not entrenched and inflexible and a situation where all staff have been appointed knowing that a commitment to PBL nd this overall philosophical approach is the norm. The University of York in general and YLS in particular also has a very able student body. That said the atmosphere at YLS feel very different from other law schools.

In terms of the learning environment one other issue needs to be raised. PBL is central to all learning across both the foundation subjects and the options. It also permeates the taught postgraduate courses. Whilst there are occasions when large group sessions will be held — for example there are plenary sessions once a week in the foundation subjects to raise issues pertinent to topics covered in the current or past PBL cycle — a lecture style is avoided.

Although the plenary sessions are subject specific, the PBL sessions are normally not limited to one legal subject area. Depending on the exact learning outcomes expected one factual scenario may lead to a range of legal considerations. The number and range of outcomes is a matter for curriculum design but the point is this — students are asked to think about how the law relates to a given scenario and the parties involved or implicated — not just looking into one or more legal pigeonholes.

Much has been written elsewhere on the benefits and challenges associated with clinical legal education (CLE) and in particular the 'win-win' situation for all participants — clients, students, educational institutions, prospective employers and the wider community. Suffice it to say for present purposes that PBL adds an overtly doctrinal, critical, interesting, and I suggest valuable, dimension to clinical work.

The 'doctrinal' relates to the need, in the PBL process, to identify legal principles as they affect all parties in a given scenario.

The 'critical' is linked with this overarching view of problem scenarios — the need to recognise all those who might be affected and to muse on the workings and impact of the law including the role of social and economic policy and the desirably of law reform.

The 'interesting' component, albeit based largely on personal and anecdotal reflection, is in the time taken by students to progress from a real-client interview to producing an advice letter that is professionally acceptable, for despatch to the client.

Students with PBL experience appear to be able to progress the case to the point of advice more quickly and more accurately than students without such an exposure to PBL.

I suggest that the 'valuable' aspect of PBL and Clinic is in the overview students appear to get when seeing the client's problem from the perspective of all interested parties.

Both nationally (in the UK) and internationally there is increasing recognition of how educational 'best practice' might be translated into a legal education context. Whilst some countries have followed a clinical line for many years others are beginning to explore these possibilities. Experiential methods are now to be found across the world including in those places that have previously resisted such a major shift in pedagogic practice.

YLS perhaps represents an extreme version. What is irresistible is the movement towards a more rational alignment of what we teach and learn, how that is achieved and why such changes are necessary.

LEGAL ETHICS

Teaching Professional Ethics Through Popular Culture

M Travis

The Law Teacher, Vol 50(2), 2016, pp 147–159.

For the past three years, I and a colleague (Craig Newbery-Jones) have been trialling a course entitled “The Lawyer, Ethics and Popular Culture” at the University of Exeter. This course aimed to consider legal ethics not from the standpoint of the profession but from the perspective of the society that it serves. As a result, the obligations that lawyers owe are measured against popular representations of the lawyer. This approach was utilised for a number of reasons. First, the course aimed to engage students and stimulate their interest. Secondly, the course encouraged students to think critically about the legal profession and its relationship with society historically, presently and in the future.

Law schools in the UK have a number of stakeholders from the legal profession who ensure that legal education is fit for the purpose of creating graduates capable of practising law. As such, law schools are committed to offer a number of “compulsory” modules so that students may attain a qualifying law degree.

The limited amount of optional modules for students has led the law school curriculum to be described as “narrow”. This is, for Greenfield and Robson, “partly due to the professional requirements of legal study … and partly because of a broader adherence to the black-letter tradition”. The black-letter tradition to which they allude refers to the conservatism inherent in many law schools and a consequent unwillingness to engage in interdisciplinary or “law in context” style research or teaching.

Though the study of law will likely always be practice-facing, it has been argued powerfully by a number of law and popular culture theorists that this must be seen in its context. Film and television, in particular, offer a valuable critique of the legal profession that can offer alternative approaches to professional regulation.

Teaching professional ethics could mean a tacit acceptance of the vocational element of the law degree. Teaching professional ethics in a manner that makes students aware of the limitations of the profession (particularly in terms of regulation and commercialisation) allows students to understand legal ethics, whilst also acknowledging the importance of law as a liberal arts degree.

Moreover, for those not thinking about entering the legal profession, the course considers meanings of justice, access to justice, concepts of fairness as well as encouraging a broader understanding of the role of law and society.

The course that this article refers to places importance on students understanding the context in which the legal profession operates and the views of the society which the profession serves. As such, the course offers students the chance to re-anchor their understanding of law (and lawyers) into a moral framework: a moral framework which the traditional teaching of the core modules has perhaps left behind. This enables the course to tap into the idealism and excitement that drove many of them to consider the legal profession as an avenue for their (often considerable) talents.

For the past three years a 15-credit course entitled “The Lawyer, Ethics and Popular Culture” has been offered to third year undergraduate students as an elective module. The course consists of 22 hours of lectures and five one and a half hour small group workshops.

Mandatory workshops mapped on to the structure of lectures and had a number of set readings that were used to generate discussion. Each workshop would also have questions that covered the themes of these set readings and were closely linked to the assessment.

Students are assessed by a 3750-word essay designed by the module convenor.

The formative assessment in this course is a 500-word essay plan and a 500-word annotated bibliography.

The course charts an overarching trajectory away from professionalism (broadly conceived) towards commercialisation. This trajectory culminates in deregulation and the rise of alternative business structures. The gradual corporatisation of the profession can be read alongside an increasingly negative representation of lawyers in popular culture. As a result, the course does not look at films as “thought experiments” encouraging students to think what they would do in a similar position. Instead, popular culture

becomes a jumping off point for considerations of societal dissatisfaction with the legal profession.

Consequently, the skills that are really honed are critical understandings of the legal profession and the way in which it is regulated.

This course introduces the lawyer, the system in which lawyers operate and the ways in which the lawyer is regulated and the bodies that undertake this. As such, no knowledge of the legal profession is assumed. This course goes beyond simply questioning the "realism" or factual accuracy of legal films though, instead questioning why filmmakers have presented the legal profession in particular ways.

Studies on the nature of law and film have often focused on the legal profession, a recurring theme being that "if movies usually show lawyers who are greedy and dishonest, this is evidence that many people share this view — or, at least, that filmmakers believe that they do". This course goes further than this and questions why society (in general) and popular culture (in particular) might give a negative portrayal of lawyers.

Indeed, this course follows this juxtaposition of law and justice. In a system in which regulation is felt to be lacking it seems obvious that popular culture would attempt to show that justice can only be achieved through a departure from that system. The cultural texts studied are used not as an end, but as a starting point for discussion around self-regulation, commercialisation and the perceived lack of professional ethics.

The first year that we ran the course it attracted 47 students. The syllabus first directed students to consider why lawyers in contemporary society were important before questioning the nature of popular culture.

Before the course began, Craig and I prepared by presenting at a conference on Law and Literature at Trinity College, Dublin. Each of us decided to prepare a paper on an element of teaching that would be offered on the module. This would offer a supportive and "fun" environment to try out our ideas before they were presented to students. The initial run of the module was exciting to teach.

Overall 85% of students agreed or strongly agreed that the module was intellectually stimulating. There were, however, some weaknesses with the module in its conception. Some students (particularly weaker students) were perturbed by the lack of research on the relationship between the lawyer and popular culture. Stronger students were able to recognise that there was a huge amount of research in the separate fields of professional ethics and law and popular culture and that their role was to synthesise these two schools of thought.

The following year the course recruited 64 students. Looking at the assessments I felt that whilst the students understood the relationship with law and popular culture they had struggled with professional ethics. This year I separated the two, spending much more time in the first six weeks of the course discussing professional ethics, regulating bodies and the adversarial system without any discussion of popular culture. That year students felt that:

This programme was outstanding. I could not commend it enough, it was interesting, progressive, challenging, it had depth and covered various issues and encouraged us to really analyse and engage with the topics. …

Professional ethics can be a bit of a boring topic, but considered and taught in light of popular culture references makes it far more interesting, and puts professional ethics in an important context.

In part, the positivity around the module is due to the restructuring of the course and the directed reading found in workshops.

This year we have 75 students taking this module. So far the course has benefited from the fact that "students bring with them a literacy in popular culture that is certain to produce lively and contentious class discussions of particular films or television shows". More than this, however, the course has challenged students "to understand how law is actually applied on the ground, as well as to understand why and how law changes, [through a consideration of] factors outside the formal written law, including popular culture". Though the module continues to generate good feedback there are still improvements that can be made. The main challenges seem to be ensuring that all of the students participate fully and vocally in workshops (in order to feel like they have gained something from them); to make sure the course has variety but is also linked to the assessment; and to convince the wider body of students that the study of professional

ethics through popular culture is important (particularly high-performing students).

In part, at least the third challenge is being met with increased research (and publication in the area).

However, this module (and the research direction that is linked to it) is reliant upon a permissive approach being taken by the law school.

Societal views of the legal profession are an important part of the dialogue that needs to take place in our reconstructions and reformulations of legal regulation. The development of this course has certainly been influenced by the hard work of academics who have strived to make law and film studies a “legitimate” law school subject.

PHILOSOPHY OF LEGAL EDUCATION

The Role of Experiential Learning on a Law Student’s Sense of Professional Identity

S Virgil

Wake Forest Law Review, Vol 51(2), 2016, pp 325.

While law schools prefer to have excellent teachers, it is fair to say that they make important decisions based more on scholarship than teaching effectiveness. With so much effort and importance placed on scholarship, it is worth asking, as we do today, what a research agenda looks like in an era of reform, which seems to be where we are at this moment. It is common to hear that law schools must change or risk finding themselves out of business or irrelevant. It seems perhaps inevitable that part of such a change will involve new directions for scholarship.

Professional education must impart knowledge of subject matter, discrete skills, and technical application regarding tasks performed during practice. In addition, professional education should aim to develop within the student a sense of self, or identity, that runs across the teaching of knowledge, skills, and technical application and toward a personal understanding of the individual role of the profession in our society.

Professional identity is not a stable concept but is instead “an ongoing project of construction by a given individual together with the others with whom she comes into contact.” Indeed, the process of professional identity development is one of “continual interplay between structural and attitudinal changes that result in a self-conceptualization as a type of professional.” This self-conceptualization frames the professional’s role in society and informs his or her professional decisions and development.

Individual professional identity development in this ongoing process is influenced by several factors, including individual motivation, professional competence, personal commitment to the profession, and experiences of frustration. Traditionally, legal education has followed what has become a standardized system — course work delivered in a lecture hall format and following the case method. Professional identity is derived from experience, not case study.

Moreover, the development of professional identity is not accomplished through isolated or discrete events. The process of developing professional identity may be understood as the movement of the individual professional along a continuum of identity — movement that is influenced by contextual factors and personal characteristics and is ongoing for the individual in the context of work and community throughout a career.

Finally, one’s professional identity involves self-recognition as a certain “kind of person” in a given context. As such, identity is an ongoing process wherein the professional’s notion of self and the notion of the professional held by the broader community is in continual dialogue across multiple settings, times, and frames. The traditional law school classroom, while valuable for some things, simply lacks opportunities for interplay between the student and any other constituency.

The emerging emphasis on experience-based instruction may change this.

Experiential instruction, including clinical work and field placements, places legal education in the context of proven pedagogical approaches and aligns it with established service learning pedagogy and instruction methods.

Service learning is a particular pedagogy that incorporates student experiences into a course curriculum in a way that reflects what is being taught and leads to a better understanding of the course work as well as a stronger sense of personal agency for the student. Legal clinics and well-designed field placements are excellent examples of this pedagogy.

In addition to enhancing the understanding of the material covered in a course, effective service learning is perhaps the best tool available for promoting engaged citizenship among graduate students. How this happens may be seen by considering the beneficiaries with an interest in the instruction: the student and the client.

Ideally, service-learning courses integrate substantive course content on the topic with meaningful work that is valued by both the student and the client being served. Effective service learning provides students with responsibility, challenging tasks, and the latitude to make decisions that will impact the outcome of the work performed. When realistic work experiences incorporate student decision making in a manner that also integrates academic course content, highly valuable learning results. Such learning reinforces the student's understanding of doctrinal material while also building the notion of the professional identity.

The impact of service learning is not limited to the student. Reciprocity, meaning that the work delivers value to the student as well as the client in the course work, is a core value of service learning.

Instances of reciprocity do not easily happen. To occur, faculty must work to develop relationships of trust with clients and organizations in the community where students will work. Faculty must also prepare students to understand the needs of the clients being served.

Service learning in a law school context promises meaningful, relevant outcomes for students. First, clinics and field placements provoke mental processes that enhance learning. Through such courses, law students are placed in situations where they are required to process factual scenarios that involve substantive legal issues and require analysis. The student's experience, therefore, reflects the practice of law that will follow licensure. These types of experiences have also been shown to lead to enhanced fact retention and mastery of complex ideas and processes. Students in service learning courses have been show to understand course material better and retain it longer, leading law students to a better understanding of both the substantive law as well as the role of the lawyer.

Second, like all service learning, clinics and field placements promote outcomes that are of concern to and valued by law schools.

Clinical legal education places students in the complex interpersonal dynamics that shape the practice of law and requires them to take on problem solving in real-world contexts. This environment and context demand that students bring structure and order to the chaos of situations presented by clients. Through this process, law students practice the technical skills of legal practice and experience the transformational power of being a professional in service to a client.

Because the service component of a service-learning class intends to help students develop both their understanding of the content as well as the professional's role in society, it is important for students to have opportunities for reflection. It is through reflection on their work and experiences that students gain an understanding of social dynamics that are at work in the community and the ability to identify and understand social problems.

Finally, many experiential education programs offered through law schools require students to work in multidisciplinary environments. Such multidisciplinary environments serve as conduits for information and resources, while also playing a role in creating and shaping the law student's sense of professional identity.

Law students generally live and work in redundant social networks occupied by other law students, law professors, and lawyers.

The multidisciplinary character of many clinical programs offers students a unique place to find new sources of information about being a professional and practicing law.

In these ways, clinical programs and field placements become effective tools for shaping professional identity, enhancing critical thinking, and developing civically engaged members of the legal profession.

Law students graduating in 2016 will find themselves confronting a very different practice environment than the one that faced graduates even a few years earlier. Law firms can no longer afford to train new lawyers, and there is a growing demand for new hires to become profitable sooner. For generations, lawyers have served as sources of information and offered clients expertise in a particular subject matter along with applied technical skills that enabled the client to achieve a goal. Law schools trained lawyers with

an emphasis on mastering law through the case method applied in a lecture-style classroom. The method does develop critical thinking and the ability to dissect a case, identify the relevant rule, and then apply that rule with some facility. Even when the case method made sense, however, it contained significant limits.

The practice of law involves much more complex relationships than those explored through a reported case. The traditional case method that is applied in most law school classes is incapable of reflecting such complexities.

While a deep knowledge of substantive law and the interconnection among areas of law is required when advising a client, the higher-value additive functions performed by a lawyer depend on the lawyer doing more than applying discrete knowledge to a task.

As students enter the next generation of practice, they must be prepared with the core competencies that are suited to the dynamic world of which they will be a part. A clear sense of professional identity that involves more than simply being a provider of information or key to accessing institutions is perhaps the most core of these competencies. The lawyer must know and be comfortable in his or her role, and this can only come from experience; a reality that law schools have accepted.

The current shift to a practice-focused — or at least practice aware — curriculum will result in law schools dedicating increasing budgets to experiential learning, encouraging faculty to integrate practice into doctrinal classes, and generally responding to the new expectations placed upon them. This is a significant change that offers a great opportunity to train the next generation of lawyers in ways that will lead to a greater sense of purpose as they enter the practice of law.

Drawing on the body of research surrounding service learning, we can feel comfortable that experiential education is headed in the right direction. But, as legal education moves to new models, research is needed that focuses on the impacts that result.

Specifically, research agendas should assess the impact experiential education has on the development of professional identity among law students and lawyers.

Uncovering and Deconstructing the Binary: Teaching (and Learning) Critical Reflection in Clinic and Beyond

C Grose

Clinical Law Review, Vol 22(2), 2016, pp

The contours and contexts of the debates around abortion and gun control shift from year to year — when I started writing this, Sandy Hook and “legitimate rape” were fresh on everyone’s minds. And as they once again make their appearance in Rachel Maddow’s opening monologue and Bill O’Reilly’s interviews, I have begun to fear that how I feel and talk about these two wrenching social issues might present an internal tension.

I am writing this, then, as both a confession and an invitation. My confession is that I am prone to self-righteous and sometimes shrill proclamations designed to drown out the beliefs of people who don’t share mine. This is what I call binary thinking. At its extreme, binary thinking identifies just two ways to look at the world — my way and the wrong way.

In this binary construction, we insist that words should mean the same thing whenever we use them, without consideration of context.

So what I am trying to do in this paper is to describe and experiment with a technique for learning how to look beyond the words to consider context. In other writing I have called this practice “critical reflection.” This essay considers how we learn and teach critical reflection, both in the classroom and clinic and in our own personal and professional lives.

I know I am not the only one who has heard or had conversations like the ones below about reproductive freedom *and* about guns:

> “You can still obtain a _____. You just need to _____.”

> “The right to _____ is not absolute and unrestricted. The government can impose limits and restrictions in order to protect _____.”

And I know I am not the only one who has noticed the use of the same formulation in discussing these two issues. There is a natural tendency, I think, to require that language and narrative when used in one context mean the same thing when used in a different

context.

Framed as it is using the language of “choice” and “life” and “rights,” there doesn’t seem to be an internally consistent rhetorical frame that allows you to be both pro-choice on abortion and pro-regulation on guns. According to our binary worldview, words should mean the same thing. But really, the extremes of both positions are absurd: arguments over when life begins (at, before, after conception, or some other time?) and arguments over what kills people (guns, bullets, people, or something else?) seem equally beside the point.

One of my teaching goals has always been to help students become more critically reflective, critically thinking practitioners, and I gear all of my teaching toward some version of that goal. One of the teaching methods I use, to that end, is a version of structured case rounds introduced to me several years ago by Deborah Epstein. These rounds contain four distinct phases: fact gathering, diagnosis, problem-solving, and evaluation.

The week before a Client Rounds class, I ask the students to email me a question about something in one of their cases. I tell them that the question should concern a real, live, issue — something the student is really struggling with — and that it should *not* be a purely legal question (e.g., something that can be answered simply using legal research tools). I review all the questions submitted and pick the one I think will lead to the most fruitful discussion.

The class itself begins with the pre-selected student or team briefly presenting their question. The class then proceeds through the four stages: fact-gathering, diagnosis/problem-definition, problem-solving, evaluation.

She introduces her issue with a very brief description of the question or problem she is grappling with. I then have the other students write down at least three questions or topic areas they want to explore. Once they have done that, the presenting student fields their factual questions for twenty minutes.

At the end of twenty minutes or so, I have the students take thirty seconds to write their answers to a simple question: “What did I just learn?” The students, of course, have gathered a lot of information about this client and her situation. But that’s not what they tend to write in response to my question. Rather, they reflect with surprise and humility on how much information they do not have, have not gotten, about this client and her situation.

Once the fact-gathering stage and reflection thereon is over, we transition to the second stage: diagnosis or problem definition. Here I ask the students to brainstorm ideas about the contours of the problem itself. To do this, they have to integrate the factual information they have gathered and come up with a plausible explanation for the behavior presented.

In order to jump start the brainstorming, I have the students do another quick-write, this time around Jean Koh Peters’ and Sue Bryant’s “Parallel Universe Thinking” exercise. I ask each student to write a plausible explanation for the situation he learned about in the first phase and also any additional information he believes he needs in order to flesh out or confirm that explanation. When the students have completed that, I have them imagine a parallel universe and come up with a second, equally plausible, explanation for the situation described in the first phase and any additional information they believe they need in order to flesh out each explanation.

The students force themselves and each other to consider hypothetical explanations beyond the knee-jerk ones; they explore different avenues and wonder about other possible unknown/unknowable facts. The originally stated problem becomes both bigger — more universal — and more intimate — focused on a particular relationship with a particular client. This brainstorming leads to discussions of ethical considerations and empathy and context.

Having gathered information and determined both what they know and what they don’t (but should?) know, and developed a working understanding of the presenting student’s “problem,” the students now turn to the task of solving the problem. I have them do another quick write, outlining three concrete things the presenting student should do when he leaves the classroom. We then spend twenty minutes or so discussing the students’ proposed strategies.

I find that this is the stage and set of tasks that students are most comfortable with. In many ways, it is what they (we) do all the time, as law students and lawyers: strategize

actions based on information we have gathered. In fact, we tend, if left to our own devices, to *start* in this phase, and only work backwards to fact gathering and problem definition if forced to slow down and deconstruct the problem more fully.

The final stage of the rounds class is shorter than the first three. I have the students engage in a final quick write, answering again the question, "What did you learn?" In fact-gathering, we explored among other things the personal feelings/positions of the relative characters; in diagnosis, it became evident that those personal feelings were very important in the ultimate decision-making, but that they couldn't totally control the decision because of competing needs; the decisions of how to act, though, took those concerns seriously and attempted to address them.

Students tend to reflect on the distinct phases as being more or less helpful, depending on the problem presented. Pretty consistent takeaways, though, are to linger in the definition/diagnosis phase for deeper, richer, more holistic understanding of the problem and the solution. Almost universally, semester after semester, rounds after rounds, students identify the importance of going through each phase in order to prepare for the next, and ultimately to come to a satisfying set of strategies.

I use this structured rounds in my clinics as a way to teach the theory and skill of critical reflection. By critical reflection, I mean the process by which we self-consciously locate ourselves within the system in which we are operating and in relation to the other players in that system.

We hope that experiences such as those described in the Client Rounds exercises will open up awareness and prompt discussion about the students' assumptions. As teachers, we participate in this process by watching our students grapple with the decentering they experience and then by reflecting on it with them, encouraging them to explore their feelings of disorientation and to recognize what space opens once they identify their assumptions and analyze their thoughts and thought process.

Too often, lawyers unconsciously rely on their knowledge of and familiarity with their own experience in the world and with the tools of their new craft — the language and rituals of the law. They skip over the necessary step of attempting to see and hear their client. The story they tell to the audience outside the relationship, therefore, is at best a distorted version of the client's story and at worst the lawyer's own version of what she thinks the client's story is or should be. In neither case is the client herself able to speak or be heard.

Slowing case rounds down and getting students to focus piece by piece on the elements of a problem and the stages of problem-solving is one way to get students to engage actively in critical reflection. Through time and deliberate effort — asking questions and really listening to the answers — the lawyers might put together truly effective solutions to their clients' problems.

As supervisors leading these rounds, we have a role to play along with the students. First, we might recognize that we have what Elliott Milstein and Sue Bryant describe as a "choice moment" about how to proceed.

This is important not only so the supervisor herself can make a conscious and intentional choice about how to proceed, but also because she might be able to use her process of reflection, either openly or implicitly, to teach her student to engage in a similar process. I don't have all the answers, and I try hard to take the opportunities presented by these client rounds to learn more about the practice and theory of critical reflection.

Clinicians and other reflective practitioners have long believed that in order to achieve actual positive social change, we might need to be willing to participate in a less binary dialogue; a dialogue that makes room for a multiplicity of voices and opinions, and for the possibility of common ground, even if it means opening our clenched fists just a little bit. We work with our students to be responsible participants in and creators of this dialogue.

I offer these reflections, then, not to change anyone's mind — even my own — on abortion and guns. But rather, I offer these reflections to affirm the utility and effectiveness of using these structured client rounds as a technique to teach and practice critical reflection and complex critical thinking.

More than that, though, I have come to believe that the underlying process of information-gathering/problem-definition/strategizing is a powerful tool in all kinds of contexts, well beyond the clinic classroom, or even the law school classroom. Critical reflection works as a problem-solving method. And this jewel-in-the-crown of clinical pedagogy teaches not only our students, but also us, to be effective, thoughtful, socially

responsible problem-solvers.

PROFESSIONAL SKILLS

The Pedagogy of Trauma-Informed Lawyering
S Katz and D Haldar
Clinical Law Review, Vol 22(2), 2016,

As one practitioner has explained, "[t]rauma-informed practice incorporates assessment of trauma and trauma symptoms into all routine practice; it also ensures that clients have access to trauma-focused interventions, that is, interventions that treat the consequences of traumatic stress. A trauma-informed system also focuses on how services are delivered, and how service-systems are organized.

An event is defined as traumatic when it renders an individual's internal and external resources inadequate, making effective coping impossible.

The trauma experiences of clients have a direct relationship to how they relate to their attorneys and the courts, because trauma has a distinct physiological effect on the brain, which in turn affects behaviour in the short-term and long-term.

For many individuals who have experienced trauma, specific conditioned stimuli may be linked to the traumatic event (unconditional stimulus) such that re-exposure to a similar environment produces recurrence of fear and anxiety similar to what was experienced during the trauma itself.

In response to traumatic experiences, an individual may feel intense fear, helplessness, or horror. People process these reactions differently, resulting in different indicators of trauma. Four common behaviors are: anxiety and depression, intense anger towards self or others, the formation of unhealthy relationships, and denial.

Vicarious trauma, also sometimes called "compassion fatigue" or "secondary trauma," is a term for the effect that working with survivors of trauma may have on counselors, therapists, doctors, attorneys, and others who directly help them.

Professionals experiencing vicarious trauma may experience painful images and emotions associated with their clients' traumatic memories and may, over time, incorporate these memories into their own memory systems. As a result, there may be disruptions to schema in five areas. These are safety, trust, esteem, intimacy, and control, each representing a psychological need. Each schema is experienced in relation to self and others.

Becoming trauma informed results in the recognition that behavioural symptoms, mental health diagnoses, and involvement in the criminal justice system are all manifestations of injury, rather than indicators of sickness or badness — the two current explanations for such behavior.

As a result, trauma-informed services and programs are more supportive (rather than controlling and punitive), avoid retraumatizing and punishing those served, and avoid vicarious traumatization of those serving the survivors.

Attorneys can learn how to identify trauma, and to adjust their methods of counseling and representation to incorporate an understanding of their clients' trauma history. Attorneys can also help clients identify the need for behavioral health intervention, or help clients secure trauma-informed therapeutic services. Attorneys can also employ methods of self-care to prevent vicarious traumatization.

Systemic implementation of these methods form trauma-informed legal practice.

Rather than waiting until lawyers enter practice to learn these skills, law schools can and should teach trauma-informed lawyering, particularly in the law clinic setting.

Clinical legal education has always had a social justice focus, in its mission to provide much-needed legal services for the indigent, and also in its goals of exposing law students to the lack of legal services for the poor, and to the limits and realities of the legal system.

Teaching trauma-informed lawyering in clinics reinforces the social justice value of clinical education because it causes students to be exposed to the realities and limits of the legal system.

Recognition that the legal system may not always be an effective mechanism of pursuing the client's goals is particularly relevant when the client has experienced trauma.

Additionally, teaching students trauma-informed lawyering, and specifically focusing

on the ways in which the current legal system may not be able to meet a client's goals, encourages students to think critically about the legal system as it affects litigants who have been subject to trauma in their lives.

Teaching trauma-informed lawyering in clinics also reinforces one of clinical legal education's central tenets, the importance of client-centered lawyering. Client-centered lawyering focuses on understanding clients' perspectives, emotions, and values, including the possible effects of prior trauma on a client's decisions and actions.

The goals of client-centered lawyering focus on maintaining respect for a client's decision-making authority within the lawyer-client relationship. The four central tenets of client-centered lawyering can be summarized as follows: 1) it draws attention to the critical importance of non-legal aspects of a client's situation; 2) it cabins the lawyer's role in the representation within limitations set by a sharply circumscribed view of the lawyer's professional expertise; 3) it insists on the primacy of client decision-making; and 4) it places a high value on lawyers' understanding their clients' perspectives, emotions, and values.

The student must take into account the effect of the trauma on the client and the effect on the client's current decision-making, even though that decision process may be different from the process that the student is using to make a decision as a legal advocate.

Teaching trauma-informed lawyering in law clinics will also encourage students to circumscribe their view of their own expertise, emotional understanding and role as law students in the representation, and will encourage students to focus on the primacy of client decision-making as emphasized in the client-centered lawyering model.

Through learning about trauma-informed lawyering, law students will become better advocates because they will gain better interviewing skills; more effectively build trust with their clients; and more effectively tackle problems that clients face. Students who interview clients may be better able to identify signs of such trauma such as:

– clients experiencing difficulty telling their story in a linear manner;
– clients describing violent or upsetting events in a flat, detached matter;
– clients seeming disassociated or emotionally absent during interviews; and
– clients not remembering key details of abuse.

Rather than thinking a client is difficult or uncooperative, a student who has been taught trauma-informed lawyering will be able to recognize the preceding characteristics as signs of trauma, and will develop the skills to counteract the specific trauma symptoms which arise during client interviews.

While acknowledging that teaching trauma-informed practice is an important goal, clinical law professors may struggle with how to integrate it into their clinics. This section will first describe four key hallmarks of trauma-informed lawyering: (1) identifying trauma; (2) adjusting the attorney-client relationship; (3) adapting litigation strategy; and (4) preventing vicarious trauma.

To teach law students to identify trauma, the students must learn the definition of trauma and why it is relevant to the practice area in the clinic.

Frequently, students have preconceived notions about how a survivor will present; the student expects the client to be forthcoming and compliant in relaying her story. An effective way to teach law students to identify trauma is to incorporate this learning goal into exercises focused on learning interviewing skills.

Because trauma presents differently, it is helpful to make students aware that it is quite common for a trauma survivor to present as withdrawn and with flat emotion, *or* to flood with an overload of information, *or* to be angry and/or suspicious.

Once students learn to identify trauma in their clients, the next step is to enable the student to make adjustments to their strategy for building an attorney-client relationship. Without this backdrop, it can be hard for students to understand why their clients behave in certain ways.

Once students are informed about the effects their clients' trauma experience may have on the client's behavior, the clinical professor can help the students develop strategies for working with these clients.

Students should learn that working with clients with trauma experience requires investing extra time in the attorney-client relationship, perhaps scheduling more in-person meetings than might otherwise be usual practice, and being particularly patient and consistent with the client.

Clinical professors should be aware that students, just like clients, may also present with their own trauma history. Working with particular clients may present triggers for certain students.

To the extent that the client may have to testify about the traumatic events, many triers of fact might assume that if something really horrible happened that the client will be able to testify about it with great specificity. In contrast, clients with trauma experience can make terrible witnesses for a variety of reasons.

Students can utilize extra preparation time to work on mental safety-planning with the client. Allowing the client to be an active participant in planning for how to handle going to court can help empower the client and normalize the experience of the court hearing.

Perhaps the most crucial aspect of the pedagogy of teaching trauma- informed lawyering in law clinics, and certainly the aspect that students have the greatest need to carry forward with them in their legal practice, is the awareness of vicarious trauma and the need to take preventive measures against its effects.

One very effective way to teach students about preventing vicarious trauma is to encourage good self-care and model good selfcare.

Self-care, in the sense of setting appropriate boundaries between the advocate and the client, is recognized to be a protective factor against vicarious trauma. Sandra Bloom divides self-care into several components: personal physical; personal psychological; personal social; personal moral; professional; organizational/work setting; societal.

This article is not meant to be an exhaustive treatise on how to teach these subjects in law school clinics. Rather the message is simple: a little knowledge about trauma goes a long way in helping students adjust their practice skills to competently and zealously represent clients who have experienced trauma.

Preparing Law Students for Information Governance

S David deMaine

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This article offers a primer on information governance for law librarians and other legal educators who want to understand the rising importance of information governance. It then discusses the importance of and methods for teaching law students about information governance.

The concept of information governance has been around since businesses began using computers for everyday activities, but it has become a pressing issue in the last several years thanks to a convergence of events. The first is e-discovery. Over the last two decades, discovery has shifted from production of mostly paper documents to production of vast quantities of electronic information (referred to in the field as ESI, or electronically stored information).

Responding to e-discovery requests for all these data can be disruptive, difficult, and expensive. A large portion of the disruption and expense can be chalked up to two main factors: dealing with information that was unnecessarily retained and accessing information that was not well preserved.

Predictive coding, in which a sample of hand-picked relevant documents are used to "teach" computer software to identify other potentially relevant documents, is seldom understood or used despite evidence that it is more effective and less costly than other search methods. With phenomena such as cloud storage, bring-your-own-device policies, and social media, the challenges involved in e-discovery are growing considerably faster than the knowledge of many attorneys. Failing to preserve data and to collect potentially relevant ESI can result in sanctions (monetary penalties and/or adverse rulings) for both client and counsel.

The complexities of e-discovery are not the only catalyst driving information governance.

E-discovery's breakout converged with increased regulation and data collection in several key areas.

Management of information has typically been siloed into departments such as IT (hardware and software, storage, security), records (regulatory compliance, retention), marketing (customer data), library (research, external information sources, knowledge databases), and legal (litigation holds, e-discovery). Information governance cuts across these siloes and sees information first and foremost as a business asset. Understanding

the business value of information requires simultaneous consideration of opportunity and risk, both of which can be difficult to identify and measure.

To be successful, information governance must address data through its entire lifecycle — from creation, use, retention, and destruction — and anticipate problems before they arise. Information governance envisions an entire framework of policies, procedures, technologies, organizational systems, and enforcement mechanisms that bring about reliable compliance by all participants in the enterprise.

Information governance helps with many of the tasks involved in e-discovery. Because information governance provides for all aspects of the information life cycle, including discovery in litigation, an information governance plan will also ease the implementation of litigation holds, data collection, winnowing for relevance, review for privilege, and then production. Finally, information governance helps defend the destruction of data through the routine application of standard policies.

Organizational and information experts employ a slew of acronyms and terms to talk about coping with information. The distinctions between information governance and other information management models are an important part of the shared vocabulary that contributes to information governance's success.

Because it is intended to cover the entire life cycle of information in all parts of the organization, information governance is generally viewed as the most expansive of the information management schemes.

As IT expert Chris Curran writes, "IT is stressing under the weight of applications, emerging tech, vendors and systems and sans the support of a seamless, flexible and sturdy integrated infrastructure." IT governance focuses on managing hardware and software resources to help alleviate the stress. Information governance includes IT governance but at the same time looks beyond the hardware and software to the content of the data and the information that can be pulled from it to determine its use and handling.

It is also important to understand what may help or hinder information governance. Factors that enable information governance include:

(1) an organizational strategy that focuses on customers and innovations;
(2) technology strategies that align with customer/innovation focus and call for specific behaviors;
(3) a centralized organization with centralized IT;
(4) standardization and integration of IT systems;
(5) a culture that promotes strategic use of information;
(6) being subject to regulations that specify requirements for collection/retention; and
(7) an awareness of accelerating data growth.

Factors that inhibit information governance include:

(1) product complexity and a broad product mix;
(2) outdated departmental silos (IT and others) and low process integration;
(3) pack-rat mentality in the organizational culture; and
(4) decentralization.

Experts largely agree that information governance requires buy-in, and preferably direction, from the top of the organization. A top-down approach to information governance brings together a team of leaders from key areas such as compliance, legal, IT, marketing, and operations.

Top-down implementation of information governance is particularly effective at taking the holistic view of information that lies at the heart of information governance. Top-down approaches make the most cost-effective use of outside consultants, happen more quickly, and leave fewer areas of duplication and overlapping effort.

On the other hand, the top-down approach to information governance may contribute to "analysis paralysis" — so much to do that no one knows where or how to start. The size and complexity of an enterprise-wide project may be overwhelming, and a bottom-up approach may be more feasible. Small projects can be undertaken and then expanded to create the larger framework that will eventually support an enterprise-wide system.

A bottom-up, small project approach to information governance may also result in fewer disruptions of current practices and deal more immediately with real problems. It may avoid misunderstandings, unsuitable policies, and resistance that may follow when information governance is handed down from on high.

Tallon refers to these as "structural practices." In addition to these structural practices,

successful information governance requires significant “relational practices” such as instruction, communication regarding user needs, and feedback on the effectiveness of policies and procedures.

This idea that both structural and relational practices are necessary highlights the fact that, in the end, comprehensive information governance requires both top-down and bottom-up input and commitment.

According to the *Law Firm e-Discovery Strategy Survey* published in April 2015 by HBR Consulting, “[a] law firm’s capability to provide e-discovery services has gone from a novelty to a business necessity.” This is echoed in a 2015 advisory opinion from the California State Bar’s Standing Committee on Professional Responsibility and Conduct stating that the professional obligation of competency requires facility with e-discovery for any attorney dealing with litigation.

Education is key to creating this competence. Basri and Mack assert that “this means formal law school training for law students... [T]he demand for lawyers who understand the law and technology... will outstrip the supply of qualified professionals.”

Similarly, law firms are under pressure from clients to demonstrate that they “maintain[] high quality internal information governance... strategies and practices.” Clients want assurances that law firms are equipped to address data security and privacy concerns. Lawyers need to be able to discuss information governance knowledgeably and to show that their own practice is engaged in rigorous information governance.

A few schools are already including information governance in their e-discovery or “technology of law” curricula. Gallagher notes that

> [c]lasses that follow the Electronic Discovery Reference Model (EDRM) beginning with Information Governance would give students real world understanding of the flow of data. Corporations are working harder than ever to balance legal and regulatory obligations with business efficiency and a goal of reducing the cost of electronically stored information (ESI), limiting liability, and increasing process efficiency.

Nonetheless, the vast majority of schools are not teaching information governance, even at a time when students are searching for ways to differentiate themselves in a tight job market. To ameliorate this situation, more law librarians and other legal educators need not only the basic knowledge about information governance provided in the previous sections but also ideas about how it can be taught.

Information governance has a unique manifestation in every enterprise, and to an extent, teaching information governance is about communicating a mind-set and a deep understanding of information and its uses. It is not about a specific set of skills or knowledge. This makes the topic ill-suited for the lecture- and question-based approaches typical of law school classrooms. Instead, it invites a hands-on, active learning pedagogy such as problem-based learning or the case-study method.

One drawback of using problem-based learning to teach information governance is that PBL, at least in theory, embraces an open inquiry model in which students decide what the questions are and how to seek answers. Conceivably, students could pursue avenues that do not help them learn about information governance.

The case-study method provides a more structured and guided inquiry than PBL and may be more appropriate depending on learning objectives and time considerations. The case-study method referred to here is the business school approach in which students are presented with business situations and dilemmas based on real companies and background materials to help them understand these dilemmas. Students take on the role of decision makers and explore through discussion, debate, and analysis what could or should be done and what the consequences might be. Students then examine what decisions were actually made and how those decisions played out.

In a PBL approach, the groups of students can be expected to conduct their own research and learn how to look beyond the legal sources such as cases and statutes with which they are familiar. This may prove too time-intensive, though, due to the large number of articles and business blog posts on information governance. Using a more guided-inquiry approach, the instructor can create an electronic library or bibliography for students to draw on.

For the case-study approach, the instructor can select a real-world information governance problem in which the company’s actual solutions are documented.

With either problem-based learning or a case-study approach, students will be immersed in realistic issues and expected to explore information governance literature

and propose solutions — all designed to simulate a real-world situation arising out of the e-discovery context.

Implementing information governance is difficult, especially given the exponential growth trajectory of information, but the effort pays off. Information governance leads to reductions in risks, errors, costs, and lawsuits, and improves decision making, customer satisfaction, and effective use of data.

Trends in business management come and go, and information governance has its detractors who claim it is already passé thanks to cheap storage and powerful search algorithms. Nonetheless, the purposes and principles of information governance — regardless of what it is called or exactly how it is defined — are both timeless and timely.

TESTING

Feedback Distortion: The Shortcomings of Model Answers as Formative Feedback

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For many law professors, especially those teaching large classes, the reality of providing individual feedback to each student on every paper or exam is daunting. So instead, in place of individual feedback, many professors post model answers after assessment events like writing projects, midterm exams, or final exams. The assumption is that a student can compare his own work to the posted model and assess his strengths and weaknesses.

Providing model answers as a method of providing feedback is an offshoot of the Vicarious Learning and Self-Teaching models of education, which have pervaded legal teaching since the nineteenth century. Under the Vicarious Learning Model, students are supposed to learn in class by watching other students interact with the professor.

Under the Self-Teaching Model, the professor expects a student to learn on his own what he needs to learn and do.

Similarly, with model answers as feedback, professors expect a student to know what theory or skills he needed to have learned and to decipher what was effective about the model. Then, based on the model, the student must assess his own work.

Using model answers as a method of providing feedback can be effective, depending on the pedagogical goal. If the professor's goal is simply corrective — for example, conveying that intent is an element of assault — a correct model can convey that. However, for most purposes where the pedagogical goal is more complex, providing a model answer in the absence of individualized feedback will not further student learning. And the more flawed a student's understanding of the information is, the less likely the model is to help correct that understanding.

Feedback can accomplish multiple purposes but falls into two primary categories: It can be formative or summative. The purpose of formative feedback is to further the student's learning.

For formative feedback to be effective, three conditions must be present: A student must (1) understand the goal or standard aimed for in the assessment; (2) compare his actual level of performance against that goal or standard; and (3) take appropriate steps toward closing the gap.

Therefore, a professor's goal in providing formative feedback should be to help identify the gap between the standard and a student's current performance and guide him toward the appropriate steps. Formative feedback coincides with a process-oriented method of teaching because it is not focused on assessing the correctness of the final product, but on the process of continued learning.

By contrast, summative feedback, which coincides with a product-oriented approach to teaching, evaluates the student's work as a final product at the end of an instructional unit. Summative evaluations are meant to rate and rank a student's knowledge or performance as of the date of the exam or paper's due date — considering a student's ability fixed at that moment — but not to provide feedback for continued learning.

Professors choose to provide students with model answers as a method of conveying formative feedback for many reasons. First, some professors believe that providing a student with a model encourages a student to self-teach, which is a valued skill for a practicing lawyer.

Second, professors may provide models to respond to student requests. Third, providing a model answer might expedite feedback because a professor needn't comment on every student's work. Fourth, providing a single model answer instead of individual feedback reduces the risk of alienating students with excessive negativity or perceived personal critiques.

The effectiveness of that feedback — whether a student can use the model answer to assess his own strengths and weaknesses and whether a student can improve his knowledge based on that feedback — depends on two variables. First, effectiveness will depend on the particular characteristics of the student. Second, effectiveness will depend on the type of knowledge being assessed.

Some students may be able to glean the relevant information and improve their own learning from reviewing a model answer, but many cannot. In particular, then, affective learner characteristics of students can make model answers less effective teaching tools. Affective learner characteristics include a student's sense of his own academic capability and "attributions of success or failure."

The research about metacognition is fairly clear: People are not very good at estimating their own ability and evaluating their performance. Metacognition is the "knowledge of one's own cognitive processes (i.e., knowing what one knows) and state of knowledge." And metacognitive skills are not distributed evenly among us.

Students who perform well on assessments tend to have stronger metacognitive skills. Yet they are still not excellent predictors of their own ability. By overestimating their peers' ability, they think of themselves as more average than they are.

In contrast, those who perform poorly on assessments generally tend to have the weakest metacognitive skills — they are least able to accurately self-evaluate. Whereas top performers underestimated their abilities, performers in the bottom quartile tended to overestimate their performance by an average of fifty percentage points.

Owing to their lack of expertise, poor performers are first unable to produce a skilled or correct response, and then, through that same lack of expertise, unable to see that their work is inadequate.

Confidence affects how much time a student will spend reviewing feedback. A student who is confident in his response will spend less time reviewing feedback on it than his less confident peers. Coupled with the research about students' abilities to self-assess, and understanding that their levels of confidence might not correlate with their actual performance success, a professor should aim to provide efficient feedback that does not require extensive study time for the student to absorb.

Ineffective feedback can be debilitating. Summative feedback, such as a grade or score, with only vague additional feedback, has a negative effect on learning. Students who have to partake in information-processing activity to decode the professor's feedback may suffer from cognitive overload and decreased motivation.

Similarly, a student who feels uncertainty about his performance will be less motivated to learn. It follows, then, that feedback that includes more specificity and provides greater certainty about the student's performance and steps for remediation would increase motivation and allow a student to learn more efficiently.

Adding to the problem of misplaced confidence is the related concept of perceptual fluency. Perceptual fluency is the familiarity or ease one feels when material is presented to him. A person can gain perceptual fluency with material just by repeated exposure to it; repeated exposure to a term will create the perception of knowledge of the term. That repeated exposure is an example of superficial priming.

Metacognitive deficiencies explain why poor-performing students might not be able to distinguish better answers from weaker ones. But perhaps it's not solely one's substantive knowledge that determines his ability to self-assess; perhaps our mindset creates another fault in the self-awareness landscape.

In Carol Dweck's research on mindsets, she determined that mindset affects our ability to self-assess. First, she divides mindsets into two primary categories: growth and fixed. A person with a growth mindset believes that her abilities can be developed through training and effort. By contrast, a person with a fixed mindset perceives his abilities as fixed — he is either smart or dumb, capable or incapable. Students with a growth mindset are better able to accurately estimate their current abilities — even when lacking.

Students with a fixed mindset, on the other hand, tend to be less aware of their

inadequacies.

Moreover, students with differing mindsets view the very purpose of testing differently. Those with a growth mindset are more likely to believe that testing is an opportunity for continued learning. Students with a fixed mindset, on the other hand, perceive testing as merely a way to check knowledge and ability.

When a student uses cognitive strategies effectively, he can guide his own processing, which means he can take part in self-regulated learning.

But feelings of self-inefficacy — the student's belief that he is not able to complete a particular task — can lead to motivation problems, which can impede efficient use of cognitive strategies that allow self-regulated learning.

Self-efficacy is tied to motivation, and motivation is key in self-regulated learning; students who are highly motivated are more capable of self-regulation than students with lower motivation.

Students with a higher sense of self-efficacy work harder, are more persistent, and are better at self-reflection. For those students, a model answer might provide more meaningful feedback, even without additional input or instruction.

A student with lower self-esteem may have a harder time self-assessing based on a model answer, and the same answer itself can actually spur those feelings of low self-esteem. When students receive normative feedback that compares them with others, which a model answer surely does, the poorer-performing students tend to lose confidence and motivation. Feedback that referenced the student's individual efforts, however, had less of an effect on a student's self-esteem and motivation.

Thus, the ineffectiveness of the model-answer feedback continues to spiral.

The effectiveness of a model answer as a method of providing feedback depends largely on the instructional goal.

At the very least, no matter the instructional goal, formative feedback should contain the correct answer or demonstrate how performance could have been improved. A model answer as the sole feedback message can provide correct answer feedback in some circumstances, but in most circumstances it cannot provide guidance for skill remediation or continued learning.

For a model answer to provide a meaningful representation of the goal or assignment, it should be annotated. Those annotations will act as a guide through the document, offering students insights into its organizational, analytical, and mechanical strengths.

Whereas an unannotated model answer requires a student to fend for himself in figuring out what made an answer weak or strong, margin comments leave less room for error or misinterpretation. Further, because he'd be on notice of the learning objectives and the basis of a professor's evaluation, a student comparing his own work against the annotated model answer might better see beyond the superficial differences between the two documents, which might not be obvious to a novice reader.

Therefore, a model answer should be paired with individual comments on a student's work to provide more effective formative feedback.

The individual comments on the student's work should mirror those on the model answer, identifying areas where the standards were and were not met.

Providing multiple model answers of student work can help dispel the common notion that there is but one way to produce effective legal writing or answer an exam question — a secret for students to decode.

A professor might consider posting a sample effective answer and a sample ineffective answer, both with annotations, to model the work of contrasting for students.

While model answers can provide a helpful learning tool for students in some contexts, model answers are not a particularly effective method for conveying formative feedback.

UNDERGRADUATE LEGAL EDUCATION

Why First-Year Law Students Should Read At Least One Appellate Tax Case!

R Tooma

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Recent research on the first-year law student experience has noted that first-year law students want what is required to learn law to be made more explicit.

The University of Western Australia has reported on the transitioning experiences of first-year law students who find the experience 'hostile, competitive, difficult and lonely'. Importantly for the purposes of this article, one of the reasons for this is thought to be the difficulty of adjusting to an independent, self-directed learning style.

Accordingly, some law schools have developed law induction programs. Law induction programs tend to have multiple aims, including introducing students to the study of law and legal research, as well as fostering a cohesive cohort.

An introduction to issues of law and policy through students participating in a moot based on an appellate tax case should have two important aims. First, there must be engagement. Second, the moot should build confidence through participation.

It is argued that a moot recreating a recent appellate tax case is an effective teaching strategy for a law induction program.

It may be useful to provide commencing first-year students with a brief that explains the material facts and issues raised by the case.

Mr Thiess engaged a customs broker to act for him in importing a yacht into Australia. The broker misclassified the yacht's weight, and Thiess paid $494,471.74 customs duty, and $49,447.17 GST on customs duty in December 2004. In fact, no customs duty/GST should have arisen in respect of the yacht, if it were properly classified by its correct weight by the broker. Thiess was not aware of the broker's mistake, and that no customs duty or GST should have been paid, until October 2006, when he was alerted of the mistake in making plans to sell the yacht.

Then on 15 December 2012, Thiess filed a claim in the Trial Division of the Supreme Court of Queensland. On 19 June 2012, Fryberg J ordered referral of the matter to the Court of Appeal.

The *Customs Act 1901* (Cth) provides for the refund of customs duty in s 163, and for disputes in s 167.

Relevantly, the *Customs Act 1901* (Cth) provides for a refund of customs duty paid by mistake under s 163. However, the problem for Thiess was that regulation 128A(5) requires an application for refund of duty under s 163(1)(b) to be made within 12 months of the duty being paid where, under regulation 126(1)(e), 'duty has been paid through manifest error of fact or patent misconception of the law'.

Rather, Thiess argued that s 167(4) of the *Customs Act 1901* (Cth) did not apply to prevent the application of common law restitution.

Common law restitution allows for a longer period of time within which Thiess could seek to recover the mistakenly paid customs duty and GST. Thiess therefore needed to establish that s 167(4), which requires payment to have been made under protest, did not operate to prevent the bringing of an action for restitution under common law.

The Queensland Court of Appeal described the action brought by Thiess as being on a 'quasi contractual or restitutionary basis'. In *David Securities Pty Ltd and Others v Commonwealth Bank of Australia*, the High Court found that money is prima facie recoverable if a mistaken belief has caused the payment. Under the common law, the time limitation for restitution is generally six years.

Thiess argued in the alternative before the Queensland Court of Appeal that if, contrary to his position, s 167(4) of the *Customs Act 1901* (Cth) did extinguish the right to recover mistakenly paid customs duty at common law, it contravened s 51(xxxi) of the *Australian Constitution* because it amounted to an acquisition of property otherwise than on just terms.

The Queensland Court of Appeal did not accept this constitutionality argument.

The Court of Appeal unanimously decided the matter in favour of the Collector of Customs on 22 March 2013. Thiess applied for Special Leave to Appeal to the High Court of Australia, which was granted on 11 October 2013.

Leave was granted, and the High Court dismissed the appeal by a judgement dated 2 April 2014.

The moot itself requires students to familiarise themselves with various provisions of the customs duty legislation. However, the reflective workshop following the moot ought also to alert students to the importance of statutory interpretation.

The principles of 'purpose' and 'context' for the interpretation of legislation have been in use for centuries and it is widely considered that Australia shifted from a literal approach to statutory interpretation, to a purposive approach from the 1980s.

It has been questioned whether, in some areas of the law, there is a body of

interpretative principles that are more or less specific to those areas. In a taxation context, the 'special rule' for interpreting taxation legislation provides an example.

A choice between competing interpretations of legislation may ultimately involve a choice between favouring the revenue or the taxpayer. The special rule regarded revenue law as 'special', so that there was a presumption against the construction urged by the tax collector.

The special rule was rejected by Kirby J, who stated that the court's duty is to determine what Parliament meant when it enacted the provision.

The Queensland Court of Appeal agreed with the argument of Customs that, on Thiess' construction, the consequences would be 'odd' if taking care and paying duty under protest would mean an importer would only have 6 months to claim a refund–whereas the careless importer who does not pay under protest would not be bound by that limitation period.

The appeal to the High Court of Australia was limited to the construction of s 167(4) of the *Customs Act 1901* (Cth). Thiess again argued that s 167(4) cannot have application in the absence of a 'dispute' within the meaning of s 167(1).

The High Court considered that the scheme of the *Customs Act 1901* (Cth) is clear. That is: Customs has control over goods imported into Australia; goods are entered for home consumption via an import entry advice; and the payment of customs duty is a condition of Customs relinquishing control of the goods by giving an authority to take the goods into home consumption. The function of s 167 within that scheme is to provide, by s 167(1) a mechanism for payment under protest, so as to allow goods to be entered for home consumption.

Section 167(4) of the *Customs Act 1901* (Cth) clearly states that no action shall lie for the recovery of any sum paid to customs, other than in two circumstances: first, if under s 167(2) the duty is paid under protest and the action is commenced within the prescribed timeframe; and second, if there are rights to a refund of duty under s 163 of the *Customs Act 1901* (Cth). The High Court concluded that s 167(4) of the *Customs Act 1901* (Cth) enhances the operation of the scheme of the Act by creating an incentive for the owner to be vigilant in the process of entering goods for home consumption, to identify what the owner of the goods considers to be the duty payable.

The third issue to be workshopped following a moot based on the *Thiess* case follows on from the previous examination of statutory interpretation. It asks whether the courts can imply a duty requiring taxpayers to ensure that they pay the correct tax.

There is much academic commentary on self-assessment of income tax in Australia.

It particularly allows for analysis of the argument by Thiess that the courts cannot cite self-assessment as the basis of a duty being imposed upon the importer to ensure that the correct duty and GST are paid.

At this point, it is important to consider some policy issues that arose with the *Thiess* case. It is often questioned, in the self-assessment of income tax context, whether the regime adequately protects taxpayers. Arguably, in the case of self-assessment, revenue bodies have some responsibility to assist taxpayers' efforts to comply with relevant taxing statutes.

Both the Queensland Court of Appeal and the High Court in *Thiess* considered that the self-assessment regime places a burden on the taxpayer/importer to ensure that they understand their obligations and their rights, as is the case under Australian income tax legislation.

The fourth and final issue to be discussed in the *Thiess* example is a tension that is often at the centre of taxation cases: the balance between the rights of the individual taxpayer and the common good pursued by the tax collector.

Thiess argued before the Queensland Court of Appeal (but not the High Court) that, if s 167(4) of the *Customs Act 1901* (Cth) were effective to prevent Thiess recovering its mistaken payment, then s 167 contravened s 51(xxxi) of the *Australian Constitution* and was invalid as appropriations of the plaintiffs property otherwise than on just terms. Although this argument was not accepted by the Court nor allowed as a ground for appeal before the High Court, it does demonstrate the tension between the rights of the individual taxpayer and the collection of revenue for the common good. However, there may be good reason for limiting the time within which a taxpayer can recover overpayments–such as protecting the certainty of the revenue base.

This idea of the revenue being thrown into chaos raises interesting human rights

issues. If the revenue base is uncertain, governments may be forced to adopt austerity measures that they otherwise might not adopt. Austerity measures may breach Australia's human rights obligations, as the Australian Government is required to use the 'maximum available resources' to secure the economic, social and cultural rights of its population.

The engagement of new law students in a moot during a law induction program ought to enable the students to appreciate that case law is adversarial, and parties must make their arguments by reference to authority, that is, statutes and case law.

Through discussion of the workshop exercise that would follow the moot of the appellate tax case, this article has demonstrated that analysis of a recent Australian High Court case on mistakenly paid customs duty and GST raises issues of: statutory interpretation; constitutional law; policy (as to the adequacy of warnings to importers on recovering overpaid customs duty); and even human rights.

While the benefits of studying an appellate tax case during law induction have been analysed here, one needs to be cautious about reaching conclusions based on limited experience. For this reason, student evaluations should follow the induction program.

A student evaluation of a law induction program could also achieve two further goals, if properly drafted. First, if properly framed, the questions in the student evaluation should lead the student to understand that learning is not a passive exercise in which teachers provide, and students receive, knowledge. Rather, questions on an evaluation ought to 'orient students more to the collaborative nature of the teaching-learning process'.

Second, the questionnaire should indicate that its purpose is for successful planning of future induction programs.

BOOK REVIEW

Leading Cases in Australian Law

Daniel Reynolds and Lyndon Goddard
The Federation Press 2016 444 pp

This might be regarded as a bold attempt by Federation Press to reverse the current trend of law students being encouraged to access any current cases which they might need to refer to or cite in any essays or papers via the digital process of AustLII or any other current digitised legal information providers.

This is the question posed by the Chief Justice Robert French who states in his foreword:

'What is the point of a compilation of leading cases in an age in which a small legal library can be carried around on an iPad or personal computer?' His response to this self-posed question would resonate with most senior law academics of a certain age, including this reviewer, when the Chief Justice goes on to state: 'There is much to be said for reading text on paper in a hardcopy book. It presents information with visual cues in two dimensions comprising the eight corners of the pages when the book is opened, and in three dimensions by the thickness of the book as the reader progresses through it. All of this is linked to the tactile experience. That combination cannot be reproduced on a flat screen with a cursor telling the reader what percentage of the book remains to be read.'

This is not an argument made to ignore searchable legal databases but to encourage law students to consider that there could be limited situations where it might be more opportune to adopt the printed word in contrast to the digitised version.

The additional question which then needs to be asked is whether this is such a text which needs to be adopted for this purpose?

With regard to seeking to answer this question the authors themselves in their Introduction to the book argue that their book is following in a great tradition created 179 years ago when in 1837 John Smith first published his innovative book with the title: *A Selection of Leading Cases on Various Branches of the Law with Notes,* a book which led to the publication of a number of similar texts of which the most recent was Simpson's *Leading Cases in the Common Law* published in 1995.

If it is accepted that the argument has been sustained for the continuation of such publications, the question then to be asked is: does this particular book warrant being purchased for the long-time use of its reader?

In support of this proposition the authors argue that whilst there are current eminent

casebooks published in Australia, most of these are thematic collections which only deal with one or two areas of law and that in contrast their particular text provides a summary of the 200 leading cases in Australian law *at large*.

Examination of the contents of *Leading Cases in Australian Law* does point to some changes which might be regarded as first-time innovations in an Australian Law book of this kind. Illustrative of this concept was the decision by the authors to seek the assistance of LexisNexis in ranking all those cases known to Australian Law by the frequency with which they had been cited in later decisions. This means that the chosen cases are those which have most often been cited by practising lawyers. In addition there are five appendices in the book which are illustrative of the innovative approach adopted the authors. These incorporate a single sentence heading *(Appendix 1)*, the top 20 cases in each area of the law–as defined by the 'Priestly 11' *(Appendix 2)*, the 20 English cases most frequently cited in Australian courts *(Appendix 3)*, a 'hall of fame' listing the 20 judges chiefly responsible for the expressing the statements for which the listed 200 cases are usually cited *(Appendix 4)*, the cases which have been decided in the last five years and which have already been cited for in such sufficient cases as to make them the 'fast risers' to gain early entry into a future list of leading cases *(Appendix 5)*.

An examination of these principles put into practice may be illustrated by the consideration of the entry regarding the well-known case of Donoghue v Stevenson [1932] AC 62 which summarises the proposition considered in the case that the 'Modern law of negligence imposes a general duty of care on every person to take reasonable care to avoid acts or omissions which could forseeably injure others.' This is followed by a succinct statement outlining the facts and decision of the case whereby the purchase of bottle of ginger beer by a friend of May Donoghue led to her drinking the ginger beer from a bottle which contained the decomposed remains of a snail. The eventual outcome was that the House of Lords *Held:* That David Stevenson, the drink's manufacturer owed a duty to the plaintiff as a consumer of the beverage to take care that it contained no 'noxious element' and that he had neglected this duty. This account also incorporates, *Key statements* relating to the judgment including the observation of Lord Aitkin at page 580 where he answers the question 'Who then is my neighbour?' with the answer 'it seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.' In the accompanying *Commentary* there is an observation that whilst the doctrine of proximity originally propounded in the case has fallen out of fashion, it has still been 'remarkably successful over more than half a century in supplying a touchstone for coherence within the tort of negligence' (*Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at [181]). The entry concludes with some helpful *Cross-references* quoting appropriate references to the case in a selection of textbooks on the topic, including R Balkin and J Davis, *Law of Torts* (LexisNexis, 5th ed, 2013), C Sappiden and P Vines (eds), *Fleming's Law of Torts* (Thomson Reuters, 10th ed, 2011) and P Stewart and A Stuhmcke, *Australian Principles of Tort* (Federation Press, 3rd ed, 2012).

It is not surprising that Donoghue v Stevenson is also listed as fourth in the top 20 English decisions most frequently still cited in Australian Courts. As the head note to *Appendix 3* explains, whilst modern Australian courts resort to English authorities less frequently since 1986, the date which marked the cessation of a right of appeal to the Privy Council, there are still some English authorities which have remained as staples to the diet of the practising lawyer.

Obviously the debate will continue as to the value of compendiums of such collections of cases as *Leading Cases in Australian Law,* but in the view of this reviewer the Guide to the 200 Most Frequently Cited Judgments would add value to any law library and also act as a helpful book of reference to either the hard pressed law student, academic or the busy law practitioner.

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Editor