

# Chapter 5

## Education for the Law: Reflective Education for the Law

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This chapter will briefly trace the progression of legal education from the days of Christopher Columbus Langdell to the present era of experimentation in the legal academy. One of the teaching methods that has garnered particular attention is that of reflective practice, especially in, but not limited to, clinical settings. Encouraging lawyers to become intentional and reflective about their learning is a key to developing attorneys who are successful as life-long learners. Since law is a graduate program in American law schools, reflective practice treats nascent attorneys as adult learners and helps them to step back during the learning process to critically examine themselves and the nature of the profession that they are about to enter.

### Introduction: Why Reflective Practice in Law?

Learning to be a lawyer, becoming an advocate, is a complicated process. Lawyers learn to navigate and work within a complex framework of rules that are gleaned from the dissection of cases and the understanding of a vast array of statutes and regulations. In addition to a facility with the law itself, that is, understanding the law, knowing where to find it, how to analyze it, and when and how to apply it, lawyers have to know about the myriad implicit laws and customs of the jurisdictions in which they will practice. Thus, learning the law is not easy and it is not a straightforward task to teach students how to become lawyers. Introducing students to the profession of law has taken on a challenging and rather adversarial caste, especially in the first year classroom. The infamous 1 L classroom has been depicted as arduous and even torturous in modern popular literature and media.<sup>1</sup>

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<sup>1</sup>See e.g., Turow, S. (1988). *One L*. New York: Farrar Straus Giroux. See also, *The Paper Chase*. (1973). Twentieth Century Fox Film Corporation, Beverly Hills. The film was based on the novel by John Jay Osborn, Jr.

Moving students from novice to expert levels of understanding is the process of teaching students to think like lawyers.<sup>2</sup> Although there have been modifications, this process has been accomplished predominately by the legendary method of Socratic dialogue, also known as the case dialogue method, in most American law schools. William Prosser, the great torts scholar, compared the teaching of nascent lawyers to herding sheep. “You run around behind the students and bark at their heels, and head off the ones that start for the hilltops, and after a while, if you create enough commotion, they move down the valley and arrive at a destination without ever knowing how they got there.”<sup>3</sup>

Reflective practice is one way to deal with this lack of knowing because it provides opportunities for students to examine and test beliefs and principles against what is being learned doctrinally. Reflective practice helps students vet their own beliefs and value systems against the mores and norms of the legal profession. Through reflection, they are invited to examine themselves and the profession they are about to enter as they learn how to be lawyers. Reflective practice is used to achieve reflective equilibrium, a term first coined by coherentist philosopher Nelson Goodman. Reflective equilibrium is an attempt to explain the “end of a deliberative process in which we reflect on and revise our beliefs.”<sup>4</sup> Reflective equilibrium is associated with political philosopher John Rawls who used it in his work.<sup>5</sup> The term is used to describe the point at which a society’s leaders will examine the rules and laws of a society to ensure that they cohere with and act to bring about a just society in accordance with a rationally determined set of norms and values. Revision of both laws and values to increase justice and fairness follows, and is repeated as needed.

The use of reflection in law school teaching acts as both an antidote to the dissociative elements of the law school experience and a step toward incorporation of the intellectual and the emotional; it is a step toward integration of the whole person into the learning process itself.

Reflective practice can also provide balance, and even solace from the challenging, doctrine-laden law school pedagogy. The stress of law school leads many students to question their decisions to become lawyers. Reflective practice techniques, especially if used in the communal setting of the classroom, help students realize that they are not alone in their feelings of self doubt and anxiety. Using reflection helps students contextualize their learning and remember why they wanted to become lawyers in the first place. Reflective practice is integrative and even healing, it can encourage learners to draw on their own life experiences before and during law school, thus coming to the understanding that learning how to become a professional lawyer is not just about what takes place in the sometimes daunting law school classroom. Reflective practice encourages deep learning at the same time that it sets students, who are entering a career synonymous with justice, on the path to becoming successful lifelong learners.<sup>6</sup>

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<sup>2</sup>The teaching and learning of law as an inductive science via the scientific case method, or Socratic method, was promulgated by Christopher Columbus Langdell at Harvard Law School in the latter part of the nineteenth century. For an excellent early look at its efficacy, see Redlich, J. (1914). *The Common Law and the Case Method in American University Law School: A Report to the Carnegie Foundation for the Advancement of Teaching*. New York: The Carnegie Foundation.

<sup>3</sup>Prosser, W. L. (1948). Lighthouse No Good. *Journal of Legal Education*, 1(2), 257-267. The article is the transcript of a speech that Prosser gave at Temple University Law School when he was Dean of California School of Jurisprudence.

<sup>4</sup>*The Stanford Encyclopedia of Philosophy*. Retrieved October 14, 2008, from <http://plato.stanford.edu>.

<sup>5</sup>See Rawls, J. (1999). *A Theory of Justice*. Cambridge: Belknap Press.

<sup>6</sup>For an excellent look at individual and collective attempts to humanize and integrate both mind and heart in lawyering, see Keeva, S. (1999). *Transforming Practices: Finding Joy and Satisfaction in the Legal Life*. Chicago: Contemporary Books.

Although the ancient philosopher Confucius esteemed the act of reflection as a noble learning method,<sup>7</sup> it has not been given any space in law school pedagogy until the latter part of the twentieth century.<sup>8</sup> For a greater appreciation of the novelty of the use of reflective practice in legal education, we will turn first to a review of the evolution of American legal education itself.

## Some Background on American Legal Education

Eighteenth century American law students did not attend classes; they apprenticed as clerks in law offices to learn the law. It was not a perfect system<sup>9</sup> but it endured until the early twentieth century when the study of law started moving into the classroom as the first law schools in America opened in the East. The first school, the Litchfield Law School,<sup>10</sup> opened in Connecticut in 1784. Because of its success, a number of imitators followed, including the New Haven Law School which was later to become Yale Law School and part of Yale University. The number of small schools that flourished during this period are often seen as the bridge between apprenticeship legal training and the university-based law degree. Some students combined attendance at these early schools with apprenticeship since their classes usually met for little more than an hour a day. This period in legal education has been described as a time of “vague aspirations and crude beginnings.”<sup>11</sup> Legal education as career preparation still lacked the élan of a university degree even though professorships and law departments were being actively established in a number of universities during this time.<sup>12</sup> These so-called law departments were not separate faculties in their respective universities; instead, their lectures were part of the general curriculum for the appreciation and general education of gentlemen.<sup>13</sup>

It was not until Christopher Columbus Langdell took over the Dane professorship of law at Harvard,<sup>14</sup> established 40 years earlier for Joseph Story, that legal education took on a systematic and theoretical approach, and the case method study of the common law became

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<sup>7</sup>The actual quote attributed to the Chinese philosopher and reformer who lived from 551 to 479bc is: “By three methods we may learn wisdom: first, by reflection, which is noblest; second, by imitation, which is easiest; and third by experience, which is the bitterest.”

<sup>8</sup>Reflection and the value of reflective practice started showing up in the literature of legal education when clinical legal education became widespread. For more information about clinical legal education, see Grossman, G. (1973–1974). Clinical Legal Education: History and Diagnosis. *Journal of Legal Education*, 26(2), 162-193.

<sup>9</sup>In 1858, Abraham Lincoln opined that the best legal training was to “read Blackstone’s Commentaries, Chitty’s Pleadings, Greenleaf’s Evidence, Story’s Equity and Story’s Equity Pleadings, get a license, and go to the practice, and keep reading. That is my judgment of the quickest, cheapest, and best way...” Nortrup, J. (1968). The Education of a Western Lawyer. *American Journal of Legal History*, 12(4), 294-305, quoting from a letter dated Dec. 2, 1858 to James F. Thornton in Basler, R. P., ed. (1953–1955). *The Collected Works of Abraham Lincoln*. New Brunswick: Rutgers University Press.

<sup>10</sup>The Litchfield Law School was founded by Judge Tapping Reeves, who eventually became the Chief Justice of the Superior Court of Connecticut in 1814. See Custer, L. B. (1993). Litchfield Law School: Educating Southern Lawyers in Connecticut. *Georgia Journal of Southern Legal History*, 2, 183-218.

<sup>11</sup>Stone, H. F. (1924). Some Phases of American Legal Education. *Central Law Journal*, 97, 241-246.

<sup>12</sup>See Friedman, L. M. (1985). *A History of American Law*, 2nd ed. New York: Simon & Schuster.

<sup>13</sup>Ibid.

<sup>14</sup>Langdell joined Harvard Law School in January of 1870 and became Dean that fall. Until he resigned as Dean of the Harvard Law School in 1895, Langdell reformed legal education and established the case method of legal education that is still the predominant form of law school classroom teaching. See Kimball, B. A. (1999). Warn Students that I Entertain Heretical Opinions, Which They Are Not to Take as Law: The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870–1883. *Law and History Review*, 17(1), 57-140.

the dominant construct to teach law students to “think like lawyers.” Langdell’s decanal reforms were instituted to improve the study of law and to elevate legal pedagogy from the pedantry of mere career training to that of an analytical science worthy of a university degree. With Socratic dialogue, Langdell hoped to encourage his students to move beyond the mere recitation of rules of black letter law to greater depths of understanding and analysis of the doctrine extracted from the cases that they were reading and discussing.<sup>15</sup> Although Langdell’s pedagogical innovations were not popular in his day,<sup>16</sup> the case dialogue method, also known as Socratic dialogue or the Socratic method in law schools, has been the bedrock of legal education for close to a 140 years. Except for the legal realist movement in the 1930s,<sup>17</sup> most late nineteenth and early twentieth century attempts at educational reform did little to move away from Langdell’s theoretical conceptualism.<sup>18</sup> Real change in the legal academy would have to wait until the advent of the clinical legal movement.

### **Transformation Begins in the Legal Academy; Making Way for the Use of Reflective Practice**

The twentieth century clinical movement has been one of the most radical innovations in law school pedagogy. Although it did not take lasting effect until the 1970s, the ideas for experiential education in the law schools actually germinated with Judge Jerome Frank’s criticism of Langdell’s dependence on the doctrine of *stare decisis* and a pedagogy rooted in formalism and books.<sup>19</sup> In fact, the last 40 years have been a time of navel gazing in the legal academy as it attempts to adjust and realign itself to strike the right balance between traditional theoretically based learning modes and learning by doing.<sup>20</sup> Although most law schools offer some form of clinical legal education, not every student can avail him or herself of the opportunity to participate in a clinic because clinics usually can accommodate only a small number of students. Thus, some critics of legal education have opined that there should be even more broad-based emphasis on practice in legal education. One such noteworthy critic was Robert MacCrate. In 1992, while a partner at New York’s Sullivan and Cromwell, MacCrate led a task force sanctioned by the American Bar Association’s Section on Legal Education and Admission to the Bar. The task force issued an appraisal<sup>21</sup> of legal education that specifically called for more emphasis on practice and the development of legal skills in law schools. Although the scope of the task force report has since been

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<sup>15</sup>Sosteng, J. O. et al. (2007). A Legal Education Renaissance: A Practical Approach for the Twenty-First Century. *William Mitchell Law Review*, 34(1), 303-472.

<sup>16</sup>*Ibid.*

<sup>17</sup>The legal realist movement is most closely associated with Jerome Frank and Karl Llewellyn. Legal realists were more instrumental in their approach to understanding the law than their contemporaries who espoused the Langdellian philosophy of legal logic and conceptual purity. See note 12 above.

<sup>18</sup>For an excellent discussion of the evolution of legal education and its various reform movements, see note 12 above.

<sup>19</sup>For a description of his ideas about legal education, see Frank, J. (1932–1933). Why Not a Clinical Lawyer School? *University of Pennsylvania Law Review*, 81(8), 907-923. See also, Frank, J. (1947). A Plea for Lawyer-Schools. *Yale Law Journal*, 56(8), 1303-1343.

<sup>20</sup>See *Report and Recommendations on the Task Force on Lawyer Competency: The Role of Law Schools*. (1979). American Bar Association, Section of Legal Education and Admissions to the Bar. This particular task force was led by Roger Cramton, who later criticized the legal curriculum for being neither sufficiently theoretical nor practical, see Cramton, R. (1982). The Current State of the Law Curriculum. *Journal of Legal Education*, 32(3), 321-335.

<sup>21</sup>*Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*. (1992). American Bar Association, Section of Legal Education and Admissions to the Bar.

criticized for not going far enough in its assessment of legal education,<sup>22</sup> the so-called MacCrate Report was a momentous wake-up call to the legal academy. It stands as the most significant paradigm shift in legal education for over a century<sup>23</sup> and it added impetus to the work of the clinical legal movement in American law schools.

In addition to the aspiration of providing students with valuable experiential learning through interactions with real clients,<sup>24</sup> one of the most important goals of proponents of experience-based education in the academy has been the objective to provide students with tools to think about the role of lawyers. Law students are, after all, studying to become members of a profession. Thus, it is vital that students think about the role of lawyers in society and critically examine the legal profession that they are about to enter. Looking at what lawyers do and examining what roles lawyers play gives students a context for reading and understanding cases in the traditional classroom. It creates a foundation upon which students can develop and build their own professional skills. Examination of the legal profession along with exegesis of one's personal value system can help learners cultivate practices for decision-making.<sup>25</sup>

In addition to providing insight into the role of lawyer as professional, reflection on role issues also brings a social and affective<sup>26</sup> element to the study of law. Like most higher education, legal education is fundamentally based on intellectual inquiry. Reflective practice is an opportunity to slow down and step back during the cognitive process to critically examine one's own reactions to the material. The process of reflective practice brings the student into the learning in a way that is both personal and social. It is a form of affective learning, that is, a way of bringing the emotional self into what is largely an intellectual process.

The most recent study of the legal academy to reignite interest in educational reform is a 2-year study sponsored by the Carnegie Foundation. The authors, a team of respected legal educators and researchers,<sup>27</sup> examined the teaching and learning taking place in a cross

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<sup>22</sup>See Pearce, R. G. (2002–2003). MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values. *Pace Law Review*, 23(2), 575-598.

<sup>23</sup>For a look at the continuum of legal education reform efforts leading up to the MacCrate Report, see Engler, R. (2001). The MacCrate Report Turns 10: Assessing Its Impact and Identifying the Gaps We Should Seek to Narrow. *Clinical Law Review*, 8(1), 109-170. The author notes that MacCrate and others "placed the Report in the context of previous efforts including the Reed Report (1921), the writings of Jerome Frank in the 1930s and 1940s, and the Cramton Report (1979)."

<sup>24</sup>See e.g., Givelber, D. J. et al. (1995). Learning Through Work: An Empirical Study of Legal Internship. *Journal of Legal Education*, 45(1), 1-48. With co-authors Meltsner and Rowan, Givelber examines the cooperative externship program at Northeastern University Law School, internships in general, and their impact on law students' learning. See also, Jaszi, P. et al. (1999). Experience as Text: The History of Externship Pedagogy at the Washington College of Law, American University. *Clinical Law Review*, 5(2), 403-436. This piece reviews the development of a supervised externship program at the American University.

<sup>25</sup>See Amsterdam, A. G. (1984). Clinical Legal Education – A 21st Century Perspective. *Journal of Legal Education*, 34(4), 612-618. Amsterdam is one of the one of the giants of the clinical legal movement. See e.g., Baker, B. K. (1994). Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning. *Arizona Law Review*, 36(2), 287-356. This article suggests a paradigm shift in what is viewed as educative in the law school curriculum.

<sup>26</sup>Bloom's Taxonomy of Learning has three domains of educational activities: cognitive, affective, and psychomotor. The cognitive domain includes knowledge and intellectual skills such as recognition of patterns and procedures. In the order of degree of difficulty, the six categories within the domain are: knowledge, comprehension, application, analysis, synthesis, and evaluation. Each skill needs to be mastered to move on to the next. The affective domain includes the manner in which we deal with things emotionally i.e., feelings values, attitudes, enthusiasms, and motivations. The five categories, listed in order of complexity are: receiving phenomena, responding to phenomena, valuing, and organization, then internalization of values. For more information on the cognitive and affective domains, see Bloom B. S. (1956). *Taxonomy of Educational Objectives, Handbook I: The Cognitive Domain*. New York: David McKay Co Inc. and Krathwohl, D. R., Bloom, B. S., Masia, B. B. (1973). *Taxonomy of Educational Objectives, the Classification, of Educational Goals. Handbook II: Affective Domain*. New York: David McKay, Co., Inc.

<sup>27</sup>The Carnegie Foundation team members were William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Shulman.

section<sup>28</sup> of American and Canadian law schools during the 1999–2000 academic year. The Carnegie Foundation research team’s provocative study has reopened and reenergized the dialogue on legal education’s goal of training students to “think like lawyers.”<sup>29</sup>

Legal education has tended to focus its pedagogy on doctrinal analysis to accomplish its goal of turning uninitiated novices into practicing attorneys. This concentration on cognition has been to the detriment of other worthy educational goals; namely, the improvement of problem solving and interpersonal skills. It has also exacerbated a disconnect between the legal academy and the profession. Law schools are being called upon to take up their responsibilities and give students the tools to scrutinize the social construct of what it means to be a professional lawyer.<sup>30</sup> Law students are introduced to more than mere “thinking like a lawyer” in the law school classroom; they first encounter the conceptual framework of what being a lawyer means in their classes as well.<sup>31</sup> It is incumbent on law professors, then, to help students make the connection between the instrumental and the meaningful in the study of law. The question of how to keep law students, and ultimately lawyers, from limiting, disjunctive perceptions,<sup>32</sup> thereby experiencing serious disintegration in law school and in their professional lives, continues to beleaguer the academy.<sup>33</sup>

One of the ways that some legal educators have encouraged their students to become more intentional about their learning is by encouraging students to become more thoughtful about what they are doing and to become more reflective in and about the learning

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<sup>28</sup>The 16 schools that the team examined were Northeastern University School of Law; City University of New York School of Law at Queens College; New York University School of Law; North Carolina Central University School of Law; Vanderbilt University School of Law; Indiana University School of Law; Notre Dame University Law School; University of Minnesota Law School; Hamline University School of Law; University of Texas School of Law; University of New Mexico School of Law; California Western School of Law; Santa Clara University School of Law; Boalt Hall, University of California at Berkeley School of Law; University of British Columbia; and Osgoode Hall, York University.

<sup>29</sup>The study’s findings have been published in a book: Sullivan, W. M., et al. (2007). *Educating Lawyers: Preparation for the Profession of Law*. San Francisco: Jossey-Bass.

<sup>30</sup>For an interesting commentary on the state of legal education from the popular press, see Stracher, C. (2007, January 26). Meet the Clients: Law schools rarely teach students how to be lawyers. *The Wall Street Journal*. Retrieved from <http://opinionjournal.com>. Mr. Stracher’s article was prompted by the arrest of a paralegal who was practicing law illegally and doing quite well. “Legal education has been taking a beating recently. This month the Carnegie Foundation for the Advancement of Teaching issued a report criticizing the Socratic case method that dominates law-school teaching. According to the report, it does little to prepare lawyers to work with real clients or to resolve morally complex issues. Several months ago Harvard Law School announced a reform of its first-year curriculum to require classes in ‘problem solving,’ among other things. There appears to be an emerging consensus that although law schools may teach students how to ‘think like a lawyer,’ they don’t really teach them how to be a lawyer.”

<sup>31</sup>Kronman, A. (1993). *The Lost Lawyer: Failing Ideals of the Legal Profession*. Cambridge: Harvard University Press.

<sup>32</sup>This was eloquently expressed by Greg Kalscheur, S. J.: A crisis in meaning and value results when law students arrive at law school and experience themselves being formed to play the restricted role of skilled technician, a role, disconnected from larger questions of human aspiration. Instead of being introduced to the law as a deeply human activity that itself involves a search for meaning and value, law students can experience law school as an alienating trade school. In short, law school can be experienced as a form of narrow training that diminishes something central to the human person: the fundamental human drive to question and to follow those questions wherever they lead. Kalscheur, G. A. (1996–1997). Law School as a Culture of Conversation: Re-Imagining Legal Education as a Process of Conversion to the Demands of Authentic Conversation. *Loyola University Chicago Law Journal*, 28(2), 333-371.

<sup>33</sup>A number of writers have written on holistic teaching and the spiritual side of lawyering. See, e.g., Hall, D. (2005). *The Spiritual Revitalization of the Legal Profession: A Search for Sacred Rivers*. Lewiston: Mellen Press. See also, Menkel-Meadow, C. (1994). Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report-of Skills, Legal Science and Being a Human Being. *Washington Law Review*, 69(3), 593-624. Menkel-Meadow aims for an intertwined and conjunctive “art” of lawyering that does not privilege theory over skills or craft over doing good.

process itself. Getting busy, competitive law students to slow down and reflect about their education is an essential component of preparing them for fulfilling careers in the law. Working with students to cultivate habits of reflection while in law school will help them to ultimately become reflective practitioners who will be more purposeful about life choices and more deliberative about decision-making in law practice. Professionals who are able to manage the intellectual and the emotional facets of practicing law will be happier and less prone to the debilitating effects of depression and alienation that plague the legal profession.<sup>34</sup>

Additionally, because law is a graduate program in American law schools, its students are, for the most part, adult learners. Fostering the use of reflective practice in the classroom is an adult learning best practice because it encourages students to be independent learners. Using reflective practice in the classroom is a means of modeling a holistic<sup>35</sup> approach to learning that students will need to become empowered adult learners in their own law practices. Practicing attorneys who pay attention to their affective learning domain as acutely as their cognitive domain will have developed the learning skills and ability to become such successful life-long learners.<sup>36</sup> This is important because the law school experience has been generally criticized for infantilizing<sup>37</sup> learners and contributing to psychological distress and disintegration.<sup>38</sup>

One commentator has written that lawyers tend to demonstrate an overemphasis on analytical thought and rationality in situations without regard to the emotional or compassionate side of decision-making, and that lawyers tend to rely on legal solutions to problems that do not require legal action.<sup>39</sup> Encouraging students to be reflective is an invitation to students to assess and evaluate their work as whole human beings. It is learning to discern on a humanistic as well as an analytical level. With reflective practice, students examine their actions and judgments. It helps students decide when a legal action is necessary and when it may not be the solution called for in a particular client's situation.

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<sup>34</sup>It has been well documented that practicing lawyers suffer higher levels of depression, and alcohol and drug abuse than the general population. The causes are attributed both to the high stress of practice and the to the study of law. See Beck, C. J. A., et al. (1995–1996). Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns among a Sample of Practicing Lawyers. *Journal of Law & Health*, 10(1), 1-60.

<sup>35</sup>The term holistic is used ubiquitously in legal education today. In fact, “holistic lawyering” has become a term of art used to explain the idea of integrating personal values within the legal practice of an individual lawyer or group of attorneys. The International Alliance of Holistic Lawyers (IAHL) hosts conferences and workshops to help lawyers achieve this integration in their daily practices.

<sup>36</sup>For an excellent and inspiring reflection on teaching, see Palmer, P. (1998). *The Courage to Teach: Exploring the Inner Landscape of a Teacher's Life*. San Francisco: Jossey-Bass. Palmer's teaching philosophy is rooted in connectedness and authenticity.

<sup>37</sup>James Boyd White asserts that the core of the problem in legal education “lies in the definition of roles and relations: the definition of the teacher as the powerful and knowledgeable manipulator; of the student as a kind of child or infant without any responsibility beyond preparing for a routine examination...” White, J. B. (1986). Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be. *Journal of Legal Education*, 36(2), 155-166.

<sup>38</sup>Gerald Hess, a leading authority on teaching and learning in law school, writes, “Legal education literature documents a number of disturbing effects of law school on law students. Many students experience the law school environment as stressful, intensely competitive, and alienating. Many suffer from high levels of psychological distress and substance abuse. During law school a significant number lose self-confidence, motivation to do public interest work, and their passion for learning.” Hess, G. F. (2002). Heads and Hearts: The Teaching and Learning Environment in Law School. *Journal of Legal Education*, 52(1), 75-111. See also, Krieger, L. S. (2002). Institutional Denial about the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence. *Journal of Legal Education*, 52(1), 112-129.

<sup>39</sup>See Daicoff, S. (2004). *Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses*. Washington, D.C.: American Psychological Association.

An examination of the literature about legal education reveals that the use of reflective practice techniques is most often written about in clinical legal educational settings.<sup>40</sup> This is understandable because it is in the clinical setting that law students put what they have learned theoretically into practice. One commentator has opined that “there is a sound and empirical basis for requiring law students to engage in the active process of extracting the common patterns in appellate cases, there is an equally sound basis for requiring clinical students to keep and maintain journals reflecting on the initial experience of practice.”<sup>41</sup>

The question however; remains what is the legal academy’s obligation in regards to teaching law students how to learn? Many law students complete their 3 years of law school, go on to successfully pass the bar examination, and enter practice without ever having had a clinical experience, an internship, or an externship as a required part of their legal education. Other law students come to legal education with highly developed analytical abilities and excellent learning and knowledge acquisition skills. They may already possess well-honed monitoring and self-diagnosing tools to satisfactorily assess their learning. Whether participating in a clinic or not, all law students would stand to benefit from using reflective practice techniques. It is the obligation of the legal academy to provide students with both a solid educational experience and, at the same time, to give them the tools to be able to take that experience apart, to reflect on what they have learned.

One way to look at the experience of law school is to see it as a “cognitive apprenticeship.”<sup>42</sup> The Carnegie Foundation Research team identified four basic methods that law school instructors used to advance case-dialogue, that is legal analysis, in class. The methodologies observed by the team were: “(1) modeling, by making cognition visible; (2) coaching, by providing guidance and feedback; (3) scaffolding, by providing support for students who have not yet reached the point of mastery; and (4) fading, by encouraging students when they are ready to proceed on their own.”<sup>43</sup>

The team also observed that students learn best when they have opportunities to “reflect on” their knowledge and performance in relation to models supplied by the teacher<sup>44</sup> and that preparation for the professions is rarely confined to learning concepts in one kind of setting. The goal of law school, as for most professional schools, is to help students develop the ability to transfer learning so that they can successfully apply it.<sup>45</sup>

Reflective practice prepares students to deal with the uncertain and to develop competence in what Donald Schon<sup>46</sup> has named the “indeterminate zones of practice,” to learn a “professional artistry” that he defines as “the kinds of competence practitioners sometimes display

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<sup>40</sup>See e.g., Weinstein, I. (2006-2007). Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to My Clinic. *Clinical Law Review*, 13(1), 573-604; and for a classic article that explores self-directed student learning in a clinical setting, see Meltsner, M., Schrag, P. G. (1978-1979). Scenes from a Clinic. *University of Pennsylvania Law Review*, 127(1), 1-55. A notable exception to this statement is an interesting article about teaching a traditional podium course that introduces the notion of judgment and decision-making via the use of casuistry. The author spent a semester teaching a course sponsored by the Carnegie Foundation in 2001. The seminar was for students pursuing joint divinity and law degrees at Vanderbilt and it focused on professional formation. An essential question for the author is that students be able to recognize the importance of answering the question, “What’s going on?” as a means of developing professional judgment. To be able to answer that question, a student would be assigning meaning – often gleaned from the expertise and practice of other disciplines. Welch, D. D. (2004-2005). “What’s Going On?” In the Law School Curriculum. *Houston Law Review*, 41(5), 1607-1624.

<sup>41</sup>See Blasi, G. L. (1995). What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory. *Journal of Legal Education*, 45(3), 313-397.

<sup>42</sup>See note 29 above.

<sup>43</sup>Ibid.

<sup>44</sup>Ibid.

<sup>45</sup>Ibid.

<sup>46</sup>See Schon, D. A. (1987). *Education the Reflective Practitioner*. San Francisco: Jossey-Bass.

in unique, uncertain, and conflicted situations of practice.<sup>47</sup> Learning how to practice law is then not an entirely cognitive activity. Legal education's explicit recognition of the teaching/learning dyad as having both an emotional/passionate side as well as a cognitive/intellectual side would go a long way to encourage student learning.<sup>48</sup>

The legal academy has heard its critics and commentators and has slowly been retooling its curriculum<sup>49</sup> to meet the challenges of preparing lawyers ready for practice in the twenty-first century. In the rest of this chapter, we examine the conceptual framework of reflective practice and look at some of the creative ways that legal educators have used to incorporate this powerful learning methodology into their teaching.

## Teaching Law Students to Become Reflective Practitioners

Chris Argyris, who worked with Donald Schon, has a message that is resonant for law school teachers and learners. Basically, Argyris posits that the smartest people we know, and this means well-educated professionals and professionals in the making, probably do not know how to learn.<sup>50</sup> Why? Because successful people who have never, or seldom, experienced failure may have a hard time mustering the humility that it takes for the critical self-examination and discernment that is synonymous with reflective practice. Argyris suggests that intelligent professionals are usually self-conscious about their own behavior – sometimes to the point of self-defensiveness.<sup>51</sup> Argyris proposes that critical self-reflection can help professionals become more self-aware and that, by an examination of their own behaviors, professionals can discover how their actions may be contributing to, or detracting from, the health of their respective organizations.<sup>52</sup> Thus, reflective practice would seem particularly useful for professions with a proscribed code of ethics or conduct<sup>53</sup> such as law. It is instructive to apply Argyris' proposals to learning the law. To

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<sup>47</sup>Ibid.

<sup>48</sup>Stephen Brookfield has written that to “devote yourself to keeping classrooms free from the messiness of emotions is to deny much of the power of learning and teaching.” Brookfield, S. D. (1990). *The Skillful Teacher: On Technique, Trust, and Responsiveness in the Classroom*. San Francisco: Jossey-Bass.

<sup>49</sup>Although reform efforts are as old as legal education itself, the most recent Carnegie Report has spurred a number of programs, conferences, articles, and blogs. See e.g., the Best Practices for Legal Education Blog, sponsored by Albany Law School. The site has two stated goals: “1) to create a useful web-based source of information on current reforms in legal education arising from the publication of Roy Stuckey's Best Practices for Legal Education and the Carnegie Foundation's Educating Lawyers; and 2) to create a place where those interested in the future of legal education can freely exchange ideas, concerns, and opinions.” Best Practices for Legal Education. (2008, October 14). About this Blog. Post on <http://best-practiceslegaled.albanylawblogs.org/>.

<sup>50</sup>See Argyris, C. (1991). Teaching Smart People How to Learn. *Harvard Business Review*, 69(3), 99-110.

<sup>51</sup>Ibid.

<sup>52</sup>Ibid.

<sup>53</sup>Judy McFarlane writes that “A reflective-practice model requires each practitioner to develop a capacity for reflective self-analysis of their effectiveness in practice situations and to adopt a systematic approach to the learning that accrues. Reflective practice increases professional effectiveness by enhancing awareness of the impact of contextual factors and constraints, raising the level of responsiveness and flexibility, and emphasizing self-growth which builds on experience. Research consistently demonstrates that the individual practitioners considered by their peers to exemplify excellence are significantly better than both novices and their more experienced colleagues at successfully integrating their new experiences into their existing models of action and knowledge. McFarlane, J. (2002). Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model. *Osgoode Hall Law Journal*, 40(1), 49-88, quoting from Chi, M. T. H., Glaser, R., Farr, M. J. (1988). *The Nature of Expertise*. Hillsdale: Erlbaum.

illustrate, law students must study and learn substantive, black letter law. They also study the code of professional responsibility that regulates attorney behavior. And they already, presumably, have ingrained belief systems and mental models of their own. By learning techniques of reflective practice, that is, how to step back, compare, and think about the convergence and divergence of their own values with the law and the regulation of attorney behavior, they would have a sorting mechanism, so to speak, a way to carve out a meaningful response to the plethora of information that they are taking in on a daily basis. “In order to make sense and achieve a deep understanding of material and experiences students need to relate new information to existing knowledge and experiences. This is best achieved through a process of reflection.”<sup>54</sup>

In a recent book on best practices for legal education, helping students to improve their “self-directed learning skills” was identified as a best practice for general instruction. The rationale offered is that, after graduation, students would not always have opportunities for feedback and critiques from others; thus, since law school graduates will be learning for the duration of their professional lives, the skill set of self-directed learning skills must be developed while still in school. The authors identify self-directed learning skills as “a cyclical process in which self-directed learners appropriately classify the demands of a learning task, plan strategies for learning what needs to be learned, implement those strategies while self-monitoring the effectiveness and efficiency of the chosen strategies, and reflect on the success of the process afterwards, especially how the learner will handle a similar, future task.”<sup>55</sup>

In the next section, we turn to a description of some thought-provoking and exciting examples of pedagogical techniques that have been, and are being used in, American law schools to encourage law students to be reflective about their work so that their learning becomes a transformative process as they become legal professionals.

## A Look at Some Uses of Reflective Practice in Legal Education

Some legal educators are using creativity and insight to bring reflective practice into American law schools. Some of the initiatives are used in the curriculum, in the classroom and others are used outside, co-curricular, law school activities. A number of legal educators use journaling,<sup>56</sup> writing responses, and peer discussion groups as reflective practice methodologies in both substantive classes and clinical settings. Some legal educators concentrate their efforts on role plays and simulations, with directed readings, discussions, and writing following the presentations. Other law schools offer co-curricular opportunities such as guided retreats or weekends devoted to individual and group reflection.

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<sup>54</sup>Hinett, K. (2002). *Developing Reflective Practice in Legal Education*. Warwick: UK Centre for Legal Education, University of Warwick.

<sup>55</sup>Stuckey, R. et al. (2007). *Best Practices for Legal Education: A Vision and A Road Map*. New York: Clinical Legal Association, quoting from Schwartz, M. H. (2005). *Expert Learning for Law Students*. Durham: Carolina Academic Press.

<sup>56</sup>Interestingly, one legal educator communicated that she now uses the terms “reader’s memos” or “writer’s memos” instead of “journals” because of the visceral reactions that some students have had to the latter word. Professor Linda Berger, of Thomas Jefferson Law School, shares that she has observed that fewer students seem willing to be reflective. She attributes this perceived trend to the increased use of journals and other reflective practices at both the undergraduate and high school level. E-mail to author, 13 March 2008.

One such interesting and effective co-curricular offering is Boston College Law School's Sidebar<sup>57</sup> program. Sidebar retreats usually take place once a semester. A group of about 20 students, accompanied by four or five faculty members and a coterie of student leaders, go away for 3 days and 2 nights of reflection, writing, and discussion. The Sidebar retreats are rooted in the Jesuit concept of discernment.<sup>58</sup> The Sidebar weekends give students an opportunity to slow down, to stand back from their busy schedules and examine how they feel about their decisions to become an attorney. Through solitary reflection and writing and guided discussions and group sharing, students are encouraged to examine their personal value systems against what they have learned and are learning about being a lawyer. This process of self-reflection gives the students time and space to critically look at the profession and their place in it. It also emphasizes the need for community and the importance of self-care in practice.

At the Franklin Pierce Law Center, a law professor,<sup>59</sup> who directs the school's honors program,<sup>60</sup> reports that his students work on a number of individual and collaborative reflective practice assignments. At the conclusion of each honors course, the students write a reflective paper on the course itself, their participation in the course, their perceived strengths, and areas for improvement. The students use the skills and values identified in the MacCrate Report<sup>61</sup> as a rubric. The honors students do reflective group work as well. For example, third year law students in the honors program's capstone course explored the complex dynamics involved in an initial client meeting and interview. After readings and class discussion, the students participated in class interview simulations. After each session, the interchange was orally critiqued by peers. After the class feedback, the interviewer had an opportunity for comments. The last piece of the reflective practice loop was accomplished when the instructor distributed an evaluation form for the class to complete. The form is based on feedback from the point of view of the client – the person interviewed.<sup>62</sup> The students fill out this form after observing the next class interview. Both oral comments and the forms are made available to the student "lawyer" completing the interview in question. The class continues in this way, role playing interviews followed by peer critiques. As the simulations continue, they contain increasingly complex potential conflicts. After the initial in-class interview simulations, pairs of students, each with a different fact pattern, are paired with a client that

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<sup>57</sup>I participated in a Sidebar retreat in January 2008. The other faculty members were: Professors R. Michael Cassidy, Gregory A. Kalscheur, S. J., Mark Spiegel, and Dean for Students Norah Wylie. We considered issues of vocational and professional choices and discernment. The questions that the group considered, based on video lectures by Professor Michael J. Himes of the Boston College Theology Department, can be summed up as follows: What gives you joy?; Are you good at it?; and, Does the world need it? The thematic questions led, of course, to more complex presentations of materials with ensuing discussions. Both faculty and student leaders shared their own reflections and stories with the group. There was a wonderful sense of authenticity and camaraderie among the Sidebar participants which was very affirming for all involved. The group was diverse, in age, race, and faith-tradition. It was exhilarating for "experts" entrenched in their careers to share and be humble with "novices" who were idealistically beginning the second semester of their first, second, or third year in a competitive law school.

<sup>58</sup>Cultivation of the habit of discernment is the goal of a Jesuit education. Jesuits describe an education as having three parts: being attentive; being reflective; and being loving. Such an education results in "good decision-making" that was described by Ignatius of Loyola, the Jesuits' founder, as discernment. See Boston College Office of University Mission and Ministry. 2003. *A Pocket Guide to Jesuit Education*. Retrieved from <http://www.bc.edu/offices/mission/publications/guide.html>.

<sup>59</sup>Professor John Burwell Garvey, Franklin Pierce Law Center.

<sup>60</sup>The Daniel Webster Scholar Honors Program.

<sup>61</sup>See note 5 above.

<sup>62</sup>According to Professor Garvey, the form is based upon work done by Paul Maharg, of the Glasgow Graduate School of Law, and Clark Cunningham, of Georgia State Law School, in connection with "standardized clients."

they are instructed to interview outside class time. The students tape the interviews and the “client” completes an evaluation form. Before the “lawyer” reads the client’s evaluation form, she watches the tape of her own interview and completes an evaluation of her own performance. The students then compare the client and lawyer evaluation forms. After consideration of differences between the two assessments, the students write a short reflective paper that discusses discrepancies between their analyses of the interview. Finally, the students reflect upon what they have learned from this process. Afterwards the class discusses the entire progression. The decision-making skills that this reflective exercise encourages will help young lawyers to methodically take apart their problem-solving skills and help them develop critical thinking skills. It is also a wonderful way of helping students recognize that personal point of view and values can color the way one reads a situation.

At Southern Methodist University Law School, a faculty member<sup>63</sup> who supervises legal externships in various practice settings, requires his students to keep and submit journals every 2 weeks. His externship memo to the students provides requirements to help the students configure their journal entries. The faculty member’s directions to the students is a manifesto of why reflective practice is important to the learning process. The directions to the students are as follows:

A journal has many functions, but for our purposes the most significant are these:

- (a) It provides a deeper and more detailed reflection on how, during the externship you implement the skills, knowledge, and values learned in law school
- (b) It provides a systemic way to reflect on and analyze your experiences during the externship by pushing you to critically examine and clarify your performance, thoughts, and feelings
- (c) It provides you and me with common data for discussion
- (d) It provides me data by which I can evaluate the pedagogical value of the externship and the quality of your supervision

In short, your journal should not be just an account of your activities. Rather, it should record what you are thinking and feeling about your externship experiences. There are no strict requirements for the content of your journal entries. Record entries that assist your own learning. If you have a problem in deciding what to record, you might try to write entries for one or more of the following topics:

- (a) Critique your performance of a task, or the feedback you received for some work you did or a task you performed
- (b) Explore the technical skills being learned in terms of the broader web of professional and personal values in the context in which the skills are being learned
- (c) Examine what you are learning about how you learn from experience. How do you best learn a specific type of content or process? What facilitates your learning? What inhibits your learning?
- (d) How do group dynamics impact your learning?
- (e) How do you see applying what you are learning now to your future endeavors? Is your learning transferable to other settings? How might this best be accomplished?
- (f) What are your perceptions or feelings about the legal system, or the professional ethics of lawyers you observed?<sup>64</sup>

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<sup>63</sup>Professor Frederick C. Moss, Dedman School of Law, Southern Methodist University. E-mail to author, 10 March 2008.

<sup>64</sup>Memorandum from Professor Moss to his students, 11 January 2008.

At other schools, legal educators have experimented with using contemplative<sup>65</sup> techniques in the classroom. Contemplative practice is esteemed for its mild stabilizing qualities. At the University of San Francisco Law School, an adjunct professor,<sup>66</sup> who is also a practicing attorney, has been experimenting with these techniques for almost a decade. In her real estate transactions and real estate securities law classes, she asks students to take a few moments in silence at the end of class to meditate. The professor reports that “students sit up straight, close their computers, put their feet flat on the floor, and (most of them) close their eyes.”<sup>67</sup> The professor leads the students through 5 minutes of guided meditation and, at the end of the session, reads a poem to the class. She reports that the students respond positively to the closure of the class and that she has received enthusiastic comments on teaching evaluations for the past 8 years about the exercise. Because of the enthusiastic response to this class closure exercise, a group of faculty members at the law school are planning to inaugurate a weekly 45 minute guided contemplative practice time in a library conference room. The group plans to also make the room available for self-guided meditation and reflection for an hour every other day of the week. The instructor is currently developing a semester long course on Contemplative Practices for Lawyers that will be launched in Spring 2009. Attempts to humanize law practice have important implications for the future of the practice of law. It can increase empathy and transform practitioners to be “more compassionate, wise, and effective in every walk of lawyering.”<sup>68</sup>

However, not all attempts to bring reflective practice techniques into the classroom are successful. A professor<sup>69</sup> at Georgia State University College of Law reports that she has experimented with a reflective assignment in her civil procedure class. According to the professor, the point of the exercise is to help the students learn to parse a legal rule into its component parts and to use facts to argue both sides of a legal rule. The students write an essay answer to a one-page, fact based question. The professor then gives the students a detailed, annotated model answer to the problem. On the first assignment, the students write a reflective exercise that identifies what they did well, improvements that they need to make, and how they plan to improve. The reflective piece is due a week after receiving the model answer. The students are also required to do two other writing with reflection exercises: one, immediately after they complete their answer but before

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<sup>65</sup>The Center for Contemplative Mind in Society sponsors a Law Program. The following paragraph is from the Program’s Web site:

The Law Program explores ways of helping lawyers, judges, law professors, and students reconnect with their deepest values and intentions, through meditation, yoga, and other contemplative and spiritual practices. We run retreats and events, which provide a framework for considering ways in which contemplative awareness can enhance and enrich our professional and personal lives, and bring them more into balance. Our retreats address questions and ideas from both a contemplative and legal perspective: the nature of winning and losing, the role of compassion in adversarial situations, truth and “right speech,” Socratic and contemplative methods of inquiry, action and nonaction, separation and connection, and listening. See The Center for Contemplative Mind in Society. The Law Program. Retrieved October 14, 2008 from <http://www.contemplativemind.org/programs/law/>.

<sup>66</sup>E-mail to author, 10 March 2008. Judi Cohen, with Stein Rudser Cohen & Magid LLP, of Oakland, CA, teaches at the University of San Francisco Law School.

<sup>67</sup>Ibid.

<sup>68</sup>See note 6 above.

<sup>69</sup>Professor Andi Curcio, Georgia State University College of Law. E-mail to author, 14 April 2008.

they receive a model answer<sup>70</sup>; and the second is in class, immediately after receiving a model answer.<sup>71</sup> The professor reports that while some people find the initial reflective exercise to be useful, other students consider it a waste of time. None of the students have liked doing the second reflective exercise without the annotated answer and, by the third reflective exercise, very few students find the reflective practice assignment worthwhile.

This reaction may be due either to reflection overkill or it may be simply that students are unwilling to reflect on their work for a sustained period of time, and that they are anxious to move on with something new. It does seem that Chris Argyris' belief<sup>72</sup> that the best learners find it difficult to be reflective about their learning may be a factor in the students' reaction to this thoughtfully constructed series of assignments.

## Conclusion

Twenty-first century lawyers are moving into a world that is far more complex and nuanced than the nineteenth century milieu of Christopher Columbus Langdell. Langdell's law students' needs had eclipsed the unregulated apprenticeships of the eighteenth century that had preceded legal education's move into the classroom. Although the case method and Socratic dialogue will probably always have a place in legal education, it will not be, and has not been, the sole pedagogy of the legal academy.

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<sup>70</sup>Reflective exercise to be completed after doing a draft answer.

Where did you look to identify all the applicable subparts of the rule?

In the last exercise you may have identified what you would do differently to identify and lay out subparts of the applicable rule. Did you do that in this exercise? Did it help you organize your answer? If not, how would you do it differently next time?

As you wrote out the answer, were there any places in which you were not sure what the law meant or how to apply it? If so, what did you do to clarify your understanding of the legal rule or its subpart?

How did you choose which facts to use to make your arguments? Underline the facts you did not use. In re-reading your answer, can you think of some place you might use those facts?

Looking over your draft answer, identify each place you did not argue for both sides. Can you now think of any argument you could make but you did not make?

Looking over your draft answer, identify each place you made a conclusory argument (i.e., didn't use facts to support your argument). Rewrite that sentence or paragraph so that you argue using the facts.

If, in the earlier exercise, you noticed that you were making conclusory arguments and came up with a plan to avoid making those arguments this time, did you use your plan? Was it effective? How would you improve upon that plan?

<sup>71</sup>Reflective exercise after getting the model answer.

Did you identify all the subparts of the rule that you see in the model answer? If no, why do you think you missed a subpart? What will you do differently next time?

In comparing your use of facts to the way that the facts were used in the model answer, what is same and what is different? If the model answer used facts more extensively than you did, how can you work more facts into your analysis next time?

Identify how the model answer incorporated a policy analysis. Is it similar to what you did? If not, how is it different? If you did not incorporate a policy analysis and wanted to do so what would you do differently next time?

In reviewing the model answer and your answer, do you now see any places where you could have argued both sides and failed to do so? How can you make sure you argue both sides in future answers?

In reviewing the model answer and your answer, do you now see any conclusory statements that you didn't see before the comparison? How can you avoid making conclusory statements next time?

<sup>72</sup>See note 50 above.

The issue facing legal education at this point in time is that of finding the right balance, the right mix of pedagogical methods. The Carnegie Foundation findings are the most recent in a long line of critiques of the academy. According to the Carnegie team,

Legal education may have a problem of diminishing returns – one that a better integration of the cognitive apprenticeship with the practical and professional could help to prevent. On the curricular level, this need for integration points toward a reconfigured third year (and probably some reconfiguration of the second year as well), marked by pedagogies of practice and professionalism that enable students to shift from the role of students to that of apprentice professionals.<sup>73</sup>

In legal education, as in law, tradition is honored and change can be slow. The use of reflective practice concepts in the law school classroom and in co-curricular activities with law students is a realistic, achievable, and measurable way to improve learning. While we wait for broad-based curricular reform, and while the academy thoughtfully discusses the pros and cons of reconfiguring the second and third year of the law school curricula, the use of reflective practice techniques will help this generation of law students develop the “types of knowledge, skills and abilities that are expected of graduates in today’s society. Reflective practice also provides a way of ensuring that students gain the resilience and resourcefulness they need to continue to be lifelong learners and effective lawyers. The introduction of reflection into legal education poses pedagogical, practical and political challenges to the existing status quo, but it has the potential to transform learning for teachers and students alike.”<sup>74</sup>

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<sup>73</sup>See note 29 above.

<sup>74</sup>See note 53 above.