Cogito, ergo sum or *I think, therefore I am* [a lawyer?]

A Comment on "Is 'Thinking Like a Lawyer' Really What We Want To Teach?"

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"*I think, therefore I am.*" From centuries past, this statement of the French philosopher, Rene Descartes, still rings true in the Langdellian[2] model of legal education evaluated in "Is 'Thinking Like a Lawyer' Really What We Want to Teach?" As Dean Rapoport accurately states, the majority of law faculties are fixated on the "thinking" process through the use of the Socratic method,[3] rather than the "doing process."[4]

Dean Rapoport's overall premise, that law schools could do much more to aid the transition from theory-only to theory-applied skills, is laudable. In her paper, moreover, Dean Rapoport provides a comprehensive explanation of the limitations of the Langdellian model, as well as an understanding of why desperately needed change in legal education has not been forthcoming. What Dean Rapoport's paper lacks, however, and what this comment will attempt to set forth, are concrete ideas concerning curricular reform from a legal writing perspective.

Dean Rapoport artfully explains that educating lawyers is different from, and inferior to, educating almost every other profession that uses principles of inductive and deductive reasoning. Legal education focuses on the "thinking" part, unlike every other profession that focuses on the transition from "thinking" to "doing" to "being."[5] However, to "think" is not "to be" a lawyer. The absurdity of applying Descartes' statements in the context of

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2. *See generally* Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 Alb. L. Rev. 213, 218 (1998) (citing Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. Leg. Educ. 241, 242 n. 23 (1992)).

3. *See generally* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools,* 20 Seattle U. L. Rev. 1, 12 (1996) (citing Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 Hastings L.J. 725, 728 (1989)).

4. Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?,* 1 J. ALWD 91, 92 (2002).

5. *Id.* at 92-93.

legal education illustrates why reform is necessary to bridge the gap between "thinking" and "being."

To fully comprehend the failings of the current legal education model and be an effective advocate for curricular reform, however, we must focus on our student population because "[l]earning theory is essential to pedagogy."[6] The majority of today's students are from "Generation X." These students tend to exhibit the following characteristics:

- Generation Xers are "relevancy oriented"—they need to know why they are learning something;
- Generation Xers are practical and problem solvers;
- Generation Xers are technologically literate and prefer quick access to sources for locating information;
- Generation Xers are conditioned to expect immediate gratification; and
- Generation Xers crave stimulation and expect immediate answers and feedback.[7]

Although the Langdellian method is "tried and true," it does not appear to be consistent with generally accepted principles of how today's students best learn. Dean Rapoport's goal is to have an "active, thriving curriculum committee at all schools—one that constantly asks what could be improved in the school's curriculum."[8] To meet this goal, curricular reform must focus on preparing students for life after the classroom.[9] After all, "if students do not retain the information and cannot easily retrieve it for use later, then the best lecture is of little value."[10]

Long-time professors will undoubtedly feel threatened if complete change is advocated, especially because so many academicians have never practiced law for a significant amount of time. Therefore, to successfully sell the idea of broad curricular reform, we should not advocate that the traditional legal model does not "offer a 'successful education' to the students, but that, based on pedagogy, we do not [currently] provide an educational experience designed to promote" the most effective educational experience for today's students.[11]

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6. Friedland, *supra* n. 3, at 3.

7. U.S. Department of Education, *New Learning Strategies for Generation X* <http://www.ed.gov/databases/ERIC_Digests/ed.411414.html> (last updated May 19, 2000).

8. Rapoport, *supra* n. 4, at 94 n. 10.

9. Rodney J. Uphoff, James J. Clark & Edward C. Monahan, *Preparing the New Law Graduate to Practice Law: A View From the Trenches*, 65 U. Cin. L. Rev. 381 (1997) [hereinafter Uphoff, *Preparing*].

10. Friedland, *supra* n. 3, at 4.

11. Vernellia R. Randall, *A Reply to Professor Ward*, 26 Cumb. L. Rev. 121, 121-22 (1995-96). Professor Ward's criticisms of legal education generally mirror those set forth in Dean Rapoport's paper. Professor Ward adds the following shortcomings: (1) "we do not clearly communicate student-centered leaning objectives;" (2) "we teach basic legal analytical skills in

How can we persuade our law schools to move from a theory-based to a theory-applied curriculum? After prioritizing the student as the most important component of the learning process, a curriculum committee striving for improvement should start with small advances towards injecting practical skills.[12] This could be as simple as adding further opportunities for clinical education. Dean Rapoport, however, accurately discusses some of clinical education's limitations, specifically that clinical education is expensive and, because of the need for low student-faculty ratios, is not accessible to all students.

Law schools have more economical options, in addition to, or instead of, further clinical offerings. For instance, law schools could adopt one or more additional upper-level legal writing courses. Adding legal writing classes is not as cost-prohibitive as external or internal clinics, but may achieve similar results if their objectives are clear and the curriculum is relevant to the students.[13] In addition, due to the individualized nature of the legal writing course, the high level of student-teacher interaction, and emphasis on student-teacher conferences, "a legal writing course readily lends itself to working with students' individual strengths."[14]

If an institution adds more upper-level legal writing courses, it should adopt a flexible three-tiered approach tailored to the student's interest: a transactional tier, a litigation tier, and a judicial/academic tier. This system allows the student interested in transactional work to draft contracts and agreements, the student interested in litigation to draft trial briefs and pleadings, and the student interested in a clerkship or academic career to draft judicial opinions and scholarly articles. Having another technical writing course focusing on specific areas of student interest is consistent with many of the learning characteristics of today's students. An upper-level technical writing course also facilitates effective work habits and motivates students to maximize their lawyering capabilities so they can "hit the ground jogging."[15]

Every law school can further integrate legal writing skills into the doctrinal curriculum. Integration, while adding relevance for the student, also more fully assimilates the legal writing and doctrinal faculties. Integration can be achieved in a variety of ways. With respect to legal research assignments, instead of designing hypothetical research problems, the research assignments could follow the reading assignments in the students' doctrinal courses. A

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extremely large classrooms (an oxymoron at best);" (3) "we know little about pedagogy, learning theory or evaluation and seem singularly reluctant to learn;" and (4) "we do little to help our students understand how they learn to maximize their learning in law school." *Id.*

12. *See* Suzanne E. Rowe & Susan P. Liemer, *One Small Step: Beginning the Process of Institutional Change to Erase Lines Between Doctrine and Skills*, 1 J. ALWD 218 (2002).

13. "These courses focus not only on legal research and writing skills, but also on legal reasoning and critical thought. Students in these courses are routinely asked to write and rewrite on a regular basis. Cloudy writing may signify difficulty with writing skills, but it also may indicate that the writing is based on cloudy thinking." Friedland, *supra* n. 3, at 13-14.

14. Boyle & Dunn, *supra* n. 2, at 221 (citing J. Christopher Rideout & Jill J. Ransfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 80 (1994)).

15. Rapoport, *supra* n. 4, at 103.

problem-oriented type of assignment, rather than "treasure hunt" for a specific type of source, is consistent with how adults learn these valuable skills.

With respect to legal writing, all doctrinal courses could benefit from injecting short drafting assignments based on concepts learned in class. Looking at the first-year courses traditionally offered:

- **Contracts** – a student could draft a simple contract after covering principles of offer, acceptance, and consideration;

- **Torts** – a student could draft a complaint in a negligence suit covering all of the substantive elements of a particular claim or prepare a settlement proposal after covering principles of causation and damages;

- **Civil Procedure** – a student could draft a motion to dismiss for lack of personal jurisdiction or insufficiency of service of process to illustrate Federal Rule of Civil Procedure 12;

- **Property** – a student could draft an easement or a restrictive covenant; and

- **Criminal Law** – a student could draft a motion in limine to exclude evidence obtained through an unlawful search.

The possibilities are endless and can be easily adapted to most, if not all, upper-level courses. Dean Rapoport articulates the obvious benefit that "[h]elping law students apply a newly learned theory is more likely to help them better understand the theory."[16] Short writing assignments may also compliment the Langdellian method by appealing to students whose learning styles are not consistent with the lecture or Socratic format, by evaluating students' thinking outside the "oral performance" context, by focusing on problem-solving—rather than memorization skills, and by combating the student passivity that comes from "watching class."[17]

The primary objection to incorporating short writing assignments is lack of time to review the student's finished product. These types of exercises need not be time-consuming. First, written exercises do not need to be as elaborate as drafting a written pleading. "A simple assignment asking students to respond in writing to questions or exercises based on assigned reading can achieve important purposes."[18] Second, written assignments do not

16. *Id.* at 95.

17. Carol M. Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 575 n. 53 (1997).

18. *Id.*

necessarily need to be graded or graded elaborately.[19] Students can receive appropriate feedback through class discussion of the exercise, general comments of what the exercise is designed to produce, peer analysis of the exercise, and comparison of the exercise with one or more models provided by the professor.[20] If a professor has time to read the written assignments, however, it may provide information concerning the students' progress as a whole, as well as individually.[21] Whether or not faculty have the time, or inclination, to grade the written exercises, the students' ability to apply classroom theory will be enhanced. This, in turn, will begin to bridge the gap between "thinking" and "being," or, in other words, between law school and the practice of law.[22]

Dean Rapoport's paper concludes with a section from Lewis Carroll's *Alice in Wonderland*:

> "Would you tell me, please, which way I ought to go from here?"
> " 'That depends a good deal on where you want to get to,' said the Cat."
> " 'I don't much care where . . .' said Alice."
> " 'Then it doesn't matter which way you go,' said the Cat."

In the struggle for broad-based curricular reform in legal education in general, and in legal writing in particular, Dean Rapoport should also focus on Lewis Carroll's next two lines of the text:

> " '[S]o long as I get somewhere,' Alice added as an explanation."
> " 'Oh, you're sure to do that,' said the Cat, 'if you only walk long enough.' "[23]

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19. *Id.* at 575.
20. *Id.*
21. *Id.* at 577.
22. *See generally* Uphoff, *Preparing*, *supra* n. 9.
23. Knowledge Matters Ltd., *Alice's Adventures in Wonderland, Lewis Carroll, Chapter 6—Pig and Pepper* <http://www.literature.org/authors/carroll-lewis/alices-adventures-in-wonderland/chapter-06.html> (last updated June 29, 1999).