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The Pedagogy of Legal Reasoning: Democracy, Discourse and Community

Abstract

Learning legal reasoning is a central part of any undergraduate law degree and remains a threshold concept: one which is vital for any law student to grasp, but which is often difficult to explain. It is a form of reasoning which is very distinctive to the discipline. This article explores the applicability of learning theories typically used to ground pedagogy in higher education to the specific task of teaching legal reasoning. Constructivist or experiential theories of learning are highly applicable in all forms of higher education, but they need to be used with a clear focus on the specific nature of legal reasoning, which does not fit neatly within the assumptions about learning which underpin some experiential approaches. Situated learning theories, which place emphasis on the role of the community in constructing knowledge, can also be of value. However, steps need to be taken to avoid replicating the hierarchy of the legal community within educational communities. Overall, the pedagogy of legal reasoning needs to pay attention to the specific nature of legal argument, take seriously students' individual starting points, and treat tutors and other legal scholars as models of discourse and argument.

Keywords: legal pedagogy; legal reasoning; learning theory; experiential learning; situated learning

5911 words

The Pedagogy of Legal Reasoning: Democracy, Discourse and Community

Pedagogical innovation has become a necessary part of higher education in general, and legal education in particular. Within university legal education, this trend has focused on developing non-traditional learning contexts, such as clinical legal education;[1] problem-based learning;[2] and simulations and the 'gamification' of learning.[3] All these approaches have involved deep reflection on pedagogy and learning theory. However, less attention has been paid to pedagogy and learning theory within the most traditional activity of undergraduate legal education: the teaching of legal reasoning. Given that this remains a central part of what law graduates are expected to be able to do, reflection on its pedagogy is important.

[1] For example, D. Nicholson 'Education, education, education: legal, moral and clinical' (2010) 44 *Law Teacher* 145; L.K. Bleasdale Hill and P. Wragg 'Models of Clinic and Their Value to Students, Universities and the Community in the post-2012 Fees Era' (2013) 19 *International Journal of Clinical Legal Education* 257; E. Campbell 'A dangerous method? Defending the rise of business law clinics in the UK' (2015) 49 *Law Teacher* 165

[2] For example, J. Clough and G.W. Shorter 'Evaluating the effectiveness of problem-based learning as a method of engaging year one law students' (2015) 49 *Law Teacher* 277

[3] P. Maharg *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century* (Aldershot: Ashgate Publishing, 2007); C. Newbery-Jones 'Ethical experiments with the D-pad: exploring the potential of video games as a phenomenological tool for experiential legal education' (2016) 50 *Law Teacher* 61; B. Waters '"A part to play": the value of role-play simulation in undergraduate legal education; (2016) 50 *Law Teacher* 172

In this article, the pedagogy of legal reasoning will be considered through a discussion of theories of learning. An introductory section will focus on the nature of legal reasoning. Next, a range of learning theories will be analysed with emphasis on their applicability to legal reasoning. Finally, a range of strategies for teaching legal reasoning will be explored. Throughout, it will be argued that the specific nature of legal reasoning requires a discipline-specific approach to pedagogy, informed by a range of learning theories.

The nature of legal reasoning

Whilst the development of contextual and socio-legal scholarship has transformed the work going on in law schools, doctrinal legal reasoning remains central to legal scholarship; Cownie's empirical work suggests that scholars who self-define as socio-legal frequently consider that doctrinal competence is important in doing good socio-legal work.[4] The development of such competence should, therefore, form a central part of an undergraduate legal education. However, understanding how doctrinal reasoning works, and therefore becoming competent at it, is challenging for students.

Legal reasoning, as the term is used here, and as Twining and Miers describe it, is a process of interpretation and application of legal rules and principles. [5]It is used within, but is distinct from, the processes of rule-finding and rule-making engaged in by actors within the legal process, notably judges. Learning legal reasoning is not, therefore, learning to 'predict' the outcomes of judicial decision making, but rather about being able to evaluate the reasoning of

[4] F. Cownie *Legal Academics: cultures and identities* (Oxford: Hart, 2004), at p 58.

[5] Fn Twining

others from witin the perspective of the legal community (taking the internal point of view) and make ones own judgment as to the correct position to take. [6]

However, understanding what legal reasoning requires of them is challenging for students, because of its highly specific and sui generis nature. Finch and Fafinski observe that students often expect legal reasoning to be a mechanical process; reasoning towards a right answer like a mathematical problem.[7] Instead, legal reasoning reasons *from* accepted authorities (legal authorities) towards a normative statement as to how the law should be applied,.[8] The framework used is thus based on accepted legal authorities and the interpretation needs to make sense and be coherent within the legal system itself.[9] Within this framework, some reasons for a particular interpretation (a clear precedent on obviously similar facs; an unambiguously applicable statute) are conclusive.. To an outsider, this may look like a 'correct' solution, where all other possible interpretations are 'incorrect'. However, the 'correctness' of the interpretation derives from its support by existing agreed interpretations of authority, and not from consistency with some observable external truth. [10] In other cases, however, arguments leading towards one interpretation or another are only persuasive and are open to discussion. There may, thus, be two opposing interpretatins which are equally defensible, but also some interpretatinos which are not defensible because not supported by reasoning which is permissible, or valid, within the system.[11] Therefore, what law students need to learn is this process of valid reasoning, which may lead them to a response which is supported by a consensus within the system, or to one of a number of defensible responses.

[6] Fn allen

[7] Fn

[8] W. Twining and D. Miers *How To Do Things With Rules* (Cambridge: CUP, 5th ed, 2010)

[9] Dworkin

[10] Allen

[11] Twining

As such, much of the reason why legal reasoning is difficult for students is because it is different to other forms of reasoning which they may have learned previously, and because it is thus in many ways counter intuitive. Understanding this reasoning from authority can be seen as a threshold concept within legal education; a concept which transforms a student's learning, but which can be troublesome as it is difficult to grasp and thus to explain.[12]. The focus of this article, therefore, will be on what different theories of learning have to tell us about the pedagogy of helping students cross this threshold.

Theories of learning in higher education

Constructivist or experiential theories

Thinking about learning and teaching in higher education has been dominated for many years by constructivist learning theories, often characterised as learner centred approaches.[13] It is therefore important to start by considering these approaches and what they assume and argue about learning, because they are pervasive in university learning and teaching policy and practice. The roots of these theories of learning can be found in the work of John Dewey. Dewey challenged traditional approaches to learning, which were driven by behaviourist

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[12] J.H.F. Meyer and R. Land 'Threshold Concepts and Troublesome Knowledge 1 – Linkages to Ways of Thinking and Practising' in C. Rust (ed.) *Improving Student Learning – Ten Years On*.(Oxford: OCSLD, 2003); A. Ricketts 'Threshold Concepts in Legal Education' (2004) 26 *Directions: Journal of Educational Studies* 1; R. Huxley-Binns 'Tripping Over Thresholds: a reflection on legal andragogy' (2016) 50 *Law Teacher* 1

[13] For example J. Biggs *Teaching for Quality Learning at University* (Maidenhead: OUP, 2003)

theory whereby learning is evidenced by changes in behaviour, rather than by cognitive development.[14] Behaviourism, he argued, involves teachers imposing standards, methods and subject matter onto learners, without consideration of the individual learner, their experience or starting point. The role of the learner is to accept the established body of knowledge and be able to recall it in uniform ways. Dewey considered this approach to be ineffective and undemocratic, as it ignores the 'organic connection' between education and individual personal experience.[15] Learning, in his view, is a process whereby individuals take on board new ideas and add them to their existing conceptual frameworks, with the intention of reaching a goal, such as the solution to a problem. The role of the teacher is to support this process, assisting learners in the process of reconstructing their experience in the face of new ideas, and relating it to the external conditions of the problem.[16] This constructivist view of learning therefore demonstrates a clear ontological shift from behaviourist approaches: whilst behaviourists perceive the object of learning as an objective reality to be accessed by the learner, constructivist theorists understand the learning process as the construction of individual understandings on the part of individual learners.

Dewey's ideas about learning from experience have developed into a theory of learning known as experiential learning, whose most well-known proponent is Kolb.[17] Many learning

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[14] J. Dewey *Experience and Education* (New York: Macmillan Co, 1938), particularly Chapter 1

[15] *Ibid*, Chapter 3. On Dewey and democracy, see I. Ward 'Legal Education and the Democratic Imagination' (2009) 3 *Law and Humanities* 87

[16] Dewey, *ibid*, Chapter 4

[17] D. Kolb *Experiential Learning: Experience as the Source of Learning and Development* (New Jersey: Pearson Education, 2015)

and teaching texts contain a version of Kolb's learning cycle, in which a learner starts from an experience, on which they reflect, leading to further conceptualising or learning, followed by experimentation with the new understanding to see if it is effective in making sense of the experience.[18] The tutor creates a learning environment to support the kinds of experiences which lead to effective learning, and Kolb proposes four types of learning environment which support learning from experience.[19] An affective environment involves learners experiencing concrete events; a symbolic environment involves learners working with abstract conceptualisations; a perceptual environment engages learners in observation and appreciation; a behavioural environment confronts learners with real consequences of their actions. All four learning environments can, and should, be created within higher education. However, Kolb suggests that traditional forms of learning in higher education, (lectures, tutorials and seminars) involve, in particular, perceptual and symbolic environments; learners think about abstract ideas, rather than concrete situations, and their engagement constitutes active observation and reflection.[20]

To be effective, however, learning environments must be complex. Symbolically complex learning, for example, involves presenting learners with a problem to which there is usually a right answer or best solution, but which is complex in that it is not easily reached. The tutor guides students through the process to the best solution in a fairly interventionist way. Perceptually complex learning, on the other hand, requires reflection on different perspectives, defining problems and selecting relevant information. The process rather than the solution is emphasised, and individual differences in outcome are encouraged. Learners

[18] *Ibid*, Chapter 2

[19] *Ibid*, Chapter 7

[20] *Ibid*.

determine their own perspective rather than follow that of the tutor, who is less interventionist. The difference, crucial for our purposes, between these two learning environments lies in whether the assumption is that the problem to be solved has one right answer, or multiple possible responses.

A final relevant theme within constructivist theory is the relationship between learning and development, building on the work of Lev Vygotsky.[21] One of Vygotsky's core arguments is that properly organised learning leads to the transformation of the learner.[22] His notion of properly organised learning depends on his idea of the Zone of Proximal Development (ZPD).[23] This is the space between a learner's actual development level, represented by what they can do unaided, and their potential development level, represented by what they can do with assistance. If a learner only operates at their actual development level, they will not develop further, so they need to work within their ZPD, using support known as scaffolding to assist them until they can work unaided. Imitation is important as part of this scaffolding: learners, Vygotsky argues, cannot correctly imitate something until they have understood it,

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[21] L.S. Vygotsky *Mind in Society: The Development of Higher Psychological Processes* (ed M Cole, V John-Steiner, S Scribner) (Cambridge, Mass.: HUP 1970)

[22] *Ibid*, Chapter 6. Vygotsky sees this transformation in the context of child development. However, it is suggested, following Hager and Hodkinson, that it is possible to view all learning through a lens of transformation, whereby the individual learner is transformed from a student or pupil into a scientist or mathematician (or legal scholar): P. Hager and P. Hodkinson 'Moving beyond the metaphor of transfer of learning' (2009) 35 *British Educational Research Journal* 619

[23] *Ibid*

and imitation is therefore a stage along the way of being able to do something themselves.[24] A tutor is a model to be imitated, through social interaction and discourse. Further, by engaging learners in debate, a tutor involves them in discourse and helps them to use that discourse to order their own internal concepts and to get them to a point where they can work independently without imitating tutor-generated models.

Situated Learning Theories

These constructivist theories share an understanding of learning as acquiring something: a body of knowledge, a set of concepts, or a skill.[25] Once acquired, it is 'owned' and thus remains and moves with the individual who owns it into different contexts, either to support the acquisition of more advanced learning, or to be applied in a different place, such as a workplace. A second wave of learning theories, based around the idea of the social construction of knowledge, and many of which are known as situated learning theories, have developed which reject this understanding and use a different metaphor: learning as participation. These theories build on social approaches within constructivist thinking, such as Vygotsky's emphasis on discourse and social context in learning and Dewey's discussion of experience and democracy. However, they are distinguished from them in that participation theories see learning as an integral part of lived social practice, rather than as a

[24] *Ibid*

[25] See A. Sfard 'On two metaphors of learning and the dangers of using just one' (1998) 27 *Educational Researcher* 4

thing to be acquired.[26] On this view, context is essential: what is learned will vary depending on the context in which it is learned.

A central idea is that learning involves being a legitimate peripheral participant within a community of practice.[27] A learner is peripheral to the community, in that they lack the experience of other participants, but legitimate, in that they have a contribution to make to the development of knowledge within the community. Lave and Wenger describe this contribution as being "constructively naïve", asking important questions from the perspective of inexperience and being supported in doing so by more experienced members of the community.[28] The community is understood as the locus of learning: situated learning theories seek to decentre the individual in the analysis of learning, and focus on the community in which learning takes place. Consequently, learning activity should be situated authentically within the community, rather than artificially within a school, college or university, which has a culture of its own.[29] Whilst this means that situated learning theories

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[26] J. Brown, A. Collins, P. Duguid 'Situated Cognition and the Culture of Learning' (1989) 18 *Educational Researcher* 32; J. Lave and E. Wenger *Situated Learning: Legitimate Peripheral Participation* (Cambridge: CUP, 1991); B. Rogoff *Apprenticeship in Thinking: Cognitive Development in Social Context* (Oxford: OUP, 1990)

[27] Lave and Wenger, *ibid*. E Wenger and M Nückles 'Knowledge acquisition or participation in communities of practice? Academics' metaphors of teaching and learning at the university' (2015) 40 *Studies in Higher Education* 624

[28] *Ibid*, Chapter 4

[29] For example, Lave and Wenger, *supra* n. 26, chapter 4

are often considered most suitable for workplace learning, Lave and Wenger suggest that educational contexts can be understood as communities of practice of 'schooled adults.'[30]

It is the community of practice which grounds what Lave and Wenger refer to as the 'learning curriculum.'[31] They argue that, whilst a teaching curriculum involves imposing requirements on learners, with the teacher mediating those requirements, a learning curriculum is constituted by the learning resources provided by the learning community understood from the perspective of the learner, not the teacher. The community defines the learning curriculum and questions relating to it are addressed within the developmental cycles of the community, rather than as separate issues. In particular, the curriculum should not sequester learning from the activity of the community, whether that be professional activity or the activity of a scholarly community.

Finally, building on Vygotsky's work, the role of discourse is critical in situated learning. Lave and Wenger distinguish between talking about and talking within, and argue that learners need to learn to use language from within the practice or community, rather than stand back from it and talk about it.[32] Learners participate within the social practices of a community by engaging in discussion, making arguments and solving problems in the same way as more experienced members of that community do.

Whilst situated learning theories often take as their starting point approaches found in constructivism, the two approaches are clearly different, Sfard, however, argues that neither approach is fully satisfactory on its own. Instead, different learning theories are

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[30] *Ibid*

[31] *Ibid*

[32] *Ibid*

complementary, rather than contradictory, and different learning theories exist, not because of an ontological disagreement as to what learning in general looks like, but because learning looks different in different contexts and different subjects.[33] The rest of this article will discuss how different theories of learning might be applied in the particular context of the teaching of legal reasoning.

Theories of learning and legal reasoning

Constructivist theory, and in particular the work of Dewey, already has a place in thinking around legal pedagogy. Ferris points out that Dewey used law as one of the paradigms of social enquiry which he considered as 'outstanding instances' of his model.[34] Maharg discusses Dewey's work on the law curriculum at Columbia Law School, considering the relationship between his philosophical pragmatism and the legal realism around which the Law School were trying to reorganise the curriculum.[35] Whilst the experiment was not entirely successful, it demonstrates the potential applicability for legal education of both Dewey and the constructivist/experiential thinking that followed him. Ferris argues that real client clinical education fulfils many of the conditions which Dewey considered necessary to be an effective learning context in law.[36] Newbery-Jones, building on Maharg's work on

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[33] *Supra*, n 25

[34] G. Ferris 'The legal education that is visible through a glass Dewey' (2009) 43 *Law Teacher* 102

[35] *Supra* n 3

[36] *Supra*, n 34

simulations, has explored using video games as a form of experiential learning to teach concepts such as justice and ethics.[37] Problem based learning also tends to follow a process that owes much to constructivist and experiential approaches to learning.[38]

Kolb's work, however, offers the possibility that experiential learning can also be applied in classroom contexts, where doctrinal legal reasoning is typically learned. This is important because, whilst clinical learning, as the most visible application of traditional experiential learning within legal education, has great value, it also has significant limitations. Ferris pints out , in particular, that real client clinical work lacks the scope for in-depth legal analysis, largely because it does not facilitate generalisation from a particular experience to the broader set of discourses known as 'the law'[39] Krieger argues that students learn best from clinical work if their relevant doctrinal legal knowledge is already secure.[40] Doctrinal and clinical legal learning are thus separate but complementary. They are complementary in particular because they take place within different learning environments, in Kolb's terms. Whilst clinical learning typically takes place within effective and behavioural contexts, where learners experience concrete events and see the consequences of their problem solving, experiential learning can extend beyond these contexts..[41] It is thus worth considering whether Kolb's perceptual and symbolic learning environments, where learners wrok with

[37] *Supra*, n 3

[38] Clough and Shorter, *supra* n 2

[39] *Supra* n 34

[40] S.H. Krieger 'Domain Knowledge and the Teaching of Creative Problem Solving' (2004) 11 *Clinical Law Review* 149

[41] *Supra* n 19 and surrounding text

abstract conceptualisations and observe and evaluate process, may have more to offer to the teaching of legal reasoning.

A symbolically complex environment, where students are helped to use abstract concepts to solve abstract, classroom-based (rather than ‘real-life’) problems may look superficially attractive, given the centrality of problem questions in traditional legal pedagogy. However, the weakness of this approach is that it presupposes that the problem has one right answer. As has been argued above, whilst an outside observer may see the outcome of legal reasoning as a ‘right answer’, this is not what is happening from an internal point of view. Indeed, insofar as the notion that a process of valid reasoning may lead to a number of defensible responses is a threshold concept, such a learning approach may be actively harmful, in that it appears to confirm the outsiders point of view. A perceptually complex environment, where learners observe, evaluate and reflect on problems from different perspectives, may work better, in that it acknowledges the possibility of more than one valid outcome. However, this is equally unsatisfactory on its own. The outcome of legal reasoning is not an individually constructive solution or perspective; it has to be valid. And what makes it valid is neither the opinion on which it may be based, nor its compliance with external facts or values, but rather its ‘fit’ within the rules, principles and values of the legal community. Outcomes of legal reasoning are socially, rather than individually, constructed. The ongoing process of social construction means that, on some issues, consensus has not been reached, and thus diverse possibilities remain present, but these possibilities are all socially validated.

The emphasis on the social construction of knowledge leads naturally to a consideration of the applicability of situated learning approaches to legal pedagogy. However, I do not argue that the insights of constructivism and experiential learning, dominant as they are within pedagogic thinking within higher education, have no place in the teaching of legal reasoning. In particular, the emphasis within constructivism on discourse and scaffolding remain of

value. The relationship between doctrinal knowledge and problem solving is important here. Pollman has argued that a significant characteristic of a legal education is the sheer quantity of its basic 'domain knowledge', and that this is a reason why experiential and problem solving models which place tutors in the background are not well suited to the early years of legal education.[42] Drawing on cognitive load theory, she argues that, given the quantity of domain knowledge, insufficient support in answering problems means students will tend to focus on outcomes (right/wrong answers), with little attention to process. She argues instead for the use of 'worked examples', paradigmatically, legal judgments, to show students how legal rules and reasoning work. This use of an active model of discourse is familiar from Vygotsky, and provides a useful framework to support the transformation of law students into legal scholars. Thus, important lessons can be drawn from experiential learning approaches, as long as they are tailored to the specific context of legal reasoning.

Discourse provides a useful bridge from constructivist thinking on learning to more socially consructionist approaches. The notion that law derives its authority from is community and is thus socially constructed is well established in legal thinking (fn Cotterrell), as is the role of the legal community in legal education (fn). Situated learning approaches, where learners engage in a process of "cognitive apprenticeship": learners are enculturated into ways of

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[42] T. Pollman 'The Sincerest Form of Flattery: Examples and Model-based Learning in the Classroom' (2014) 64 Journal of Legal Education 298. See also P.A. Kirschner, J. Sweller and R.E. Clark 'Why Minimal Guidance During Instruction Does Not Work: an analysis of the failure of constructivist, discovery, problem-based, experiential and inquiry based teaching' (2006) 41 *Educational Psychology* 75; C.E. Hmelo-Silver, R. Golan Duncan and C.A. Chinn 'Scaffolding and Achievement in Problem-based and Inquiry Learning: A response to Kirschner, Sweller and Clark (2006)' (2007) 42 *Educational Psychology* 99.

thinking through activity and social interaction[43], are appealing here. It is important, however to be clear as to the community we are talking about. Within the context of academic legal education, defining the relevant community as the community of legal scholars; people who are interested in and educated about the law, means that a university Law School can be understood as an authentic learning environment in which students participate. Situated learning approaches, then, give us a way to engage with the central role of the community in legal reasoning and authority. However, the idea of community as a defining feature of legal education needs to be interrogated critically. Inherent in the traditional ideas of legal community is the idea of hierarchy. According to Coke "(…legal cases) are not to be decided by natural reason, but by the artificial reason and judgement of law, which law is an act which requires long study and experience, before that man can attain the cognisance of it."[44] Thus, the traditional community of the law is not one which a learner can join immediately as a legitimate peripheral participant; they must study for many years in order to be seen as legitimate, and, to be legitimate, must accept the authority of the legal order without question.

The problems inherent in the relationship between law students and their community of practice form the basis of some critical approaches to legal education. Notably, Duncan Kennedy has argued that the legal profession has a hierarchical culture which is replicated within legal education.[45] Thus, whilst the law may be the product of a community, it is a community of which students form at best a hierarchically inferior part. At worst, bright law students, from diverse backgrounds and with ideas of their own, are required through the

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[43] *Supra* n 26

[44] *Prohibitions del Roy* 12 Co Rep 65

[45] D. Kennedy 'Legal Education and the Reproduction of Hierarchy (1982) 32 *Journal of Legal Education* 591.

legal education process to lose their critical faculties and simply learn to second-guess their tutors; as Douzinas et al argue, the professor within the academy takes on the role of authorising judge.[46] "Good" students adapt to an educational culture which is high pressure, aggressive and hierarchical, on the assumption that learning to adapt to that culture will help them as they progress into legal practice.

Kennedy presents this as an absence of "left pedagogy" However, the root of the problem looks more like an absence of good pedagogy. The authoritarian model of the professor he describes looks very similar to the undemocratic teachers that Dewey characterised as old-fashioned behaviourists. They ignore the past experiences or learning of students, treat them as subordinates who are expected to be deferential, and subject them to brutal judgment if they do not precisely replicate expected answers. Kennedy acknowledges that bad teaching often lies at the heart of the problem with legal education.[47] Importantly for our purposes, he characterises bad teaching as a failure to distinguish between what is obviously right or wrong and what is arguable: professors, he suggests, teach legal reasoning as though it produces a uniquely 'correct' answer, whereas legal reasoning is a technique of argument. Bad teaching, therefore, does not recognise and adapt to the very specific nature of legal reasoning as falling somewhere between objective right/wrong, and subjective discussion. His discussion of the difference between students being judged as right or wrong, and the pluralistic acceptance of all views is very reminiscent of Kolb's perceptually and symbolically complex learning environments. In both cases, the reality is that much learning of legal reasoning falls somewhere between these two points. This would suggest that

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[46] C. Douzinas, S. McVeigh and R. Warrington 'Postlegality: After Education in the Law' (1990) 1 *Law & Critique* 81

[47] *Supra* n 45 at p 596

constructivist approaches using the tutor as a model to follow, rather than an authoritative judge, can be used to balance the authoritarian tendencies of the legal community. The final section of this article will discuss how that balance can be made in practical terms.

Towards a pedagogy of legal reasoning

The first lesson that a study of the literature of learning theory teaches is that there is no one 'correct' theory of learning and thus that one theory or approach is insufficient on its own. Each does, however, bring its own insights. The constructivist focus on process rather than outcome is important, bearing in mind Dewey's emphasis on individual cognitive development, rather than measuring behaviours. If we want to teach students to 'think like lawyers', then it is to their thought processes that we need to pay attention, and this is inherently difficult to do. Vygotsky's emphasis on the role of discourse as a way for learners to order their newly developed internal understandings can assist here. A focus on the discourse which students use by helping them to talk like lawyers will, in turn, help them learn to reason, and observing their use of discourse assists in the difficult job of evaluating how successful their learning is.

Given that a big part of learning to talk like a lawyer is learning to debate and reason around different interpretations of legal rules in context, serious attention must be paid to avoiding the traps of classic constructivist pedagogy, with its focus on finding ones way to a right answer, or on developing individualised understandings of situations or texts. Some aspecgts of Kolb's perceptually complex learning environment, where students look at things from different perspectives, can be helpful. In this environment, the tutor's role is to model the use of appropriate discourse in approaching an issue, rather than to correct unsatisfactory outcomes. However, tutors do need to be sufficiently interventionist to ensure that students

understand that, from an internal perspective, some approaches to a problem are more valid than others. The model of a moot may be helpful here, in that students are encouraged to argue problems from either side, and a distinction is made between rewarding the quality of reasoning and identifying which case has been the most persuasive. Tutors need, however, to be very explicit when asking questions as to whether they are looking for one right answer (to a basic factual question, for example), a legally valid argument, or a discursive response. Further,

when the task is to produce a legally justifiable argument, the feedback needs to focus on the argument, not the outcome, to avoid students feeling rewarded or punished for a right or wrong answer.

In combination with these kinds of experiential approaches, the notion of the community of practice has much to offer legal pedagogy. However, warnings as to the pervasiveness of authoritarian structures within the culture of law must be taken seriously.

Lave and Wenger's advice to not sequester learners from the activity of their community is vital here; students need to feel part of, and respected by, their scholarly community from the outset.[48]

This can be done through involving students in the scholarly life of law school, and, importantly, by designing that scholarly life so that it forms an accessible part of the learning curriculum in the same way as lectures, seminars and library resources do. This approach, naturally, takes us beyond the realm of doctrinal legal reasoning and into the kinds of socio-legal and theoretical debates which often dominate the scholarly life of law schools.

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[48] *Supra* n 26

However, as was suggested at the start of this piece, doctrinal law often underpins the social practice of law schools and legal communities.

What is important here is to encourage and facilitate students' direct access to the discursive activity of the legal community, in its many forms, rather htan relying on separate educational activities which carefully scaffold learning, but where the students' only contact point to the community of practice is their own tutor. This is made much easier with the advent of social media: beyond the physical space of the law school, students can be encouraged to follow and engage with external legal debates. Legal developments are responded to increasingly quickly by means of Twitter and blog posts, and discussions of considerable depth take place through these media. Any student following the social media activity surrounding R(Miller) v Secretary of State for Exiting the EU[49], for example, sees a clear model of how academic disagreement on matters of doctrinal law develops and is expressed and, in particular, is swiftly disabused of the idea that law is a 'one right answer' discipline. A useful pedagogic model is Kelly's idea of a living curriculum.[50] Kelly suggests that overly precise learning outcomes constrain the teaching of law as a dynamic subject, because they limit the possibilities for responding to events. Syllabus and learning curriculum need to move with the preoccupations and activity of the community of practice in order to enable students to observe and participate in authentic discourse, which tends, in legal scholarly communities, to be used most commonly to discuss recent events and legal change.

A focus on the legal community as a community of practice finally helps us think about the hierarchical nature of doctrinal legal learning, and returns us to Dewey's discussion of

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[49] [2017] UKSC 5

[50] G. Kelly 'The role of serendipity in legal education: a living curriculum' (2015) 49 *Law Teacher* 353

democracy. This problem comes from two self-reinforcing sources: behaviourist, undemocratic teaching of the type that Dewey criticised, and the inbuilt hierarchy within the legal community as pointed to by Kennedy. The mind-set encouraged within situated learning offers a counterweight to this problem, by encouraging us to look to the nature and structure of the community of practice. Kennedy's solution to the problem of hierarchy in legal education was for students to rise up against hierarchical power. Murray, rightly, contests this: it is for all members of a community, but more particularly the most senior members, to pay attention to its structural faults and work to remedy them.[51] A powerful community of practice for students in higher education is one which takes them seriously. From a pedagogic point of view, this means paying attention to their cognitive development, reasoning skills and critical insights, rather than expecting replication of the solutions and insights of hierarchically superior staff and 'research stars'.

Conclusion

It has been argued throughout this article that some of the specific characteristics of legal reasoning require a specific pedagogic approach. Because legal reasoning is neither a 'one right answer' type of exercise, nor a highly individualised process-focused discussion, adopting pedagogic strategies wholesale from constructivist approaches is likely to lead to students misunderstanding the nature of this crucial aspect of their learning. Nevertheless, Dewey's emphasis on the importance of a democratic attitude towards the educational process, and Vygotsky's embedding of learning processes into language and discourse, are important lessons from the constructivist tradition.

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[51] M.E. Murray '"I'd Like To Thank The Academy" Eminem, Duncan Kennedy and the Limits of Critique' (2005) 55 *Journal of Legal Education* 65

Ultimately, however, if we perceive legal reasoning as a socially constructed, interpretive practice, then individualised constructivist solutions cannot be sufficient and we must pay attention to what situated learning theorists tell us about the importance of a learning community. The hierarchical community of the law poses particular challenges in ensuring that learners are truly treated as legitimate peripheral participants. Nevertheless, it has been argued that treating students as such participants in a community of practice is a helpful mind-set on the road of making legal learning more democratic.

Above all, however, this exploration requires academic legal educators to have confidence in what we do. Warnings against inauthenticity call us to be straightforward about the fact that ours is a community of legal scholarship, not vocational training, whilst arguing that becoming part of a legal scholarly community is of value to future legal practitioners. The new qualifications framework of the Solicitors Regulation Authority prioritises individual content knowledge, through its statement of legal knowledge, with little attempt to require future solicitors to demonstrate the ability to participate actively on an intellectual level within the legal community.[52] Careful reflection on good pedagogy and democratic principles within education is increasingly necessary in order to ensure that adaptation to the new environment that changing SRA rules may require neither cuts the legal profession off from

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[52] Statement of Solicitor Competence, published by the SRA on 11th March 2015, at http://www.sra.org.uk/solicitors/competence-statement.page, See R. Fletcher 'Legal education and proposed regulation of the legal profession in England and Wales: a transformation or a tragedy?' (2016) 50 *Law Teacher* 371, arguing in particular that the competence statement places too much attention on outcomes and not enough on cognitive development.

the intellectual benefits of the scholarly legal community, nor harms the developments of our students into critical citizens with voices worth hearing in the turbulent times ahead.