

From Conflict to Creativity: Building Better Lawyers through Critical Self-Reflection

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Abstract: To address crisis challenges in the legal profession, law schools must teach lawyers to practice law “from the inside out” by developing deeper capacities for critical self-reflection through transformative learning models.

Collective and Individual Crisis Challenges in the Legal Profession

Over the last decade a confluence of disruptive factors has begun to reshape the economic, social and regulatory foundations of the practice of law and the lawyer’s personal experience of it. The billable hour no longer anchors lawyers to illusions of financial security. Lengthy partnership tracks, “lock-step” associate class systems, and routine layoffs litter the landscape while molding law firm culture. New technologies assure lawyers are tethered to client needs 24/7, yet artificial intelligence software makes their legal reasoning and decision-making skills redundant in more and more contexts. Further, the advent of quasi-legal service providers along with widespread acceptance of alternative dispute resolution have morphed what it means to practice law into a rather nebulous concept, even among state bar regulators. Meanwhile, lawyers struggle with some of the highest rates of depression, alcoholism and drug abuse among professionals (Seligman, 2001). Disproportionately unhappy and unhealthy, many lawyers leave practice prematurely only to be replaced by recent graduates eager to reap high salaries. But even beyond these examples, we see conspicuous evidence of the myriad ways in which collective challenges of this crisis shape individual challenges, and vice versa. Clearly, the entire system of legal advocacy that has existed —in some cases, for over a century — is in the midst of dramatic lasting change.

Moreover, scholars and observers have renewed calls for legal education reform, which both widens and intensifies the implications of crisis challenges. In part these calls arise from increasing acknowledgment among practitioners and academics alike that the case-dialogue method — the prevailing pedagogy in law schools within common law countries today — is, at best, inadequate, or at worst, detrimental, in training new lawyers for future service in what The Carnegie Report calls “a great profession suffering from varying degrees of confusion and demoralization” (Sullivan, Colby, Wegner, Bond & Schulman, 2007).

Transformative Learning Models Shape Future Possibilities

This paper argues that the case-dialogue method prioritizes critical analysis over critical self-reflection, and that both these “content neutral” skills must be integrated into legal pedagogy to equip future lawyers with the tools necessary to observe, address, and resolve crisis challenges. Without skillful practice in questioning frames of reference, and careful exposition of hegemonic assumptions that shape the lens of learning (see Sturm & Guinier 2007; also Magee 2007), law students enter the legal profession with a limited view of their own utility. Certainty eclipses possibility, conflict eschews creativity, and fallow is the legal imagination necessary for lawyers to effectively address the needs of their clients, let alone the looming crisis in their own profession.

I begin with a brief overview and criticism of the case-dialogue method to illustrate its primary deficiencies and create space for its integration with transformative learning models. Then, I introduce relevant observations and recommendations for legal education reform and explore applications of transformative learning theory to provide a framework for critical self-reflection within the broader context of legal education, and specifically in professional skills courses. What follows next are observations of my experiences drawing upon critical self-reflection as a tool in my introductory and advanced level courses in negotiation at two top-tier American law schools. I start by identifying certain frames of reference that typically accompany law students into my classroom or otherwise shape their capacity to use negotiation tools effectively. I share a synopsis of my teaching goals given these frames of reference and describe how I integrate both critical analysis and critical self-reflection within my course curricula, including specific examples of methods and materials. Later, I offer a student perspective in her own words, which highlights aspects of emancipatory learning with candid self-assessments that describe emotional dimensions of her transformation. And lastly, I share my aspirations for use of critical self-reflection in legal education to shift and transform crisis challenges now manifest in the profession.

Views into Legal Education and the Potential for Reform

The Case-Dialogue Method and its Critics

A vestige of the late 1800s with its philosophical roots in early Pragmatism, the case-dialogue method tailors Socratic questioning to analysis of domestic appellate cases with a goal of teaching students the critical thinking skills they will need as lawyers. Through a dynamic of question and answer, comment and response between professor and one or more students, narratives are whittled down to “facts” that either support or deny a stakeholder of a legal claim. (Presumably, this is how practitioners classify information as relevant or not under the ethic of “zealous advocacy” inherent to all attorney-client relationships.) Students thus begin to understand and use legal language. Then, by further practicing how to frame and express their arguments, students test their capabilities to construct new boundaries for the law based on logical extrapolation of case precedent.

Ostensibly, the case-dialogue method approaches problem solving from the viewpoint of adjudicator — not of lawyer, client or student. It arises from the adversarial idea of law as embodied within common law systems of justice. To quote Sturm & Guinier (2007), “[c]onflict . . . lies at the core of legal inquiry and intervention.” Indeed, much of legal practice is a classic zero sum game in which one side’s gain moves in tandem with another side’s loss. However, notably, as Seligman (2001) emphasizes, negative emotions — such as sadness, anxiety, and anger — saturate such situations.

Both praise and criticism of the case-dialogue method seem to focus upon the rapid and marked shifts in habits of thinking that occur in the learning process. General consensus is the case-dialogue method successfully teaches critical analysis; so, our questions might be, at what cost and to what effect? Sturm & Guinier (2007) assert the case-dialogue method grossly undervalues interpersonal and facilitative dimensions of contemporary legal practice, arguing “[it] fails to teach students ‘how to think like a lawyer’ in the world students will occupy.” Rakoff & Minow (2007) conclude the case-dialogue method “fails because lawyers increasingly need to think in and across more settings, with more degrees of freedom, than appear in the universe established by appellate decisions and the traditional questions arising from them.” Holmquist (2011) contends the case-dialogue method “obscures the interdependence of knowing and doing that is at the heart of lawyering” and “may also deny students the opportunity to engage in sophisticated higher-order thinking” about law, policy,

and creative problem solving. Matasar (2005) reminds us law school “simply does not teach wisdom and judgment” — apparently, those virtues arise “from working . . . in the real practice of law.”

Given the similarities among these and other scholarly perspectives, it would be easy to surmise that our inquiries around legal pedagogy might also lead us to a question of identity, because if we could establish the qualities and characteristics that distinguish contemporary lawyers, then perhaps we could design more effective teaching methods to skill for actual needs. However, this approach is too substantive and too linear. Much like the law itself, the legal profession and a lawyer’s identity exist in constant flux and within a spectrum. Instead, what we require now are tools that train students how to adapt to context so they can learn to be more flexible, resilient and creative in the midst of growing complexity and uncertainty. In this regard the case-dialogue method excels for substantive law because it teaches students “how to *think* like a lawyer” through critical analysis rather than through the memorization of rules that may evolve. In the same way transformative learning excels for all other dimensions of the law because it teaches students “how to *be* a lawyer” through critical self-reflection of previously unquestioned assumptions, beliefs, values, and perspectives — all of which may also evolve. Thus, the combination of both these “content neutral” tools — critical analysis and critical self-reflection — in legal pedagogy offers lawyers more of what they need to adapt skillfully to change in self-generative, self-directed, and self-corrective ways.

The Carnegie Report on the Status of Legal Education

A major influencer in the reform movement, The Carnegie Report delivers findings and recommendations to advance legal education based upon an in-depth study of American and Canadian law schools. It frames legal education as three crucial apprenticeships: *cognitive* (which “focuses the student on the knowledge and way of thinking of the profession. . . .”); *practical* (which relates to “the forms of expert practice shared by competent practitioners. . . .”); and *formative* (which “introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.”) It concludes that the case-dialogue method successfully addresses the cognitive dimension, but woefully neglects the practical and formative dimensions.

The Carnegie Report explains how law schools teach students a “distinctive habit of thinking” that swiftly forms the basis of professional development and identity as lawyers, yet fails to account for the broader context of elements that do not fit neatly into legal arguments — e.g. social relationships, systems views, morality, and ethics. It argues the case-dialogue method leads to homogenous thinking “largely at an uncritical level” and plainly calls for new methods of instruction that integrate “serious, comprehensive reflection” of background assumptions and habits of thinking in an effort to “weave together disparate kinds of knowledge and skill” essential for lawyers to resolve complex real world problems. However, the Carnegie Report fails to identify what these methods are or how such lawyers come about (Magee, 2010). Even if trained in self-reflection, as Carnegie implicitly endorses and even explicitly calls for in places (Magee, 2010), I argue lawyers also need the skills to integrate what emerges into coherent narratives that inform their future choices. And this, I believe, arises generatively and most potently through relationships within a social field — notably, through discourse with others (Mezirow, 2000) within a quality of presence (Scharmer, 2007).

Applications of Transformative Learning Theory

Based upon my reading of The Carnegie Report, legal education is primed for the application of transformative learning theory, especially in two areas: (1) the differentiation and integration of knowledge types for a complete mastery of skills relevant to contemporary legal practice; and (2) the use of content, process and premise reflection to transform habits of mind and the ways law students see themselves and the world.

Proposing a Framework

Given these considerations the framework I propose for critical self-reflection in legal education focuses on “viewing” — a certain quality of observation. Both mechanism of action and developmental process (see Shapiro & Carlson, 2009), “viewing” engages mindful awareness across the individual-to-social continuum (Cranton, 2006), the three types of knowledge (Mezirow, 1991), and content, process and premise reflection (Cranton, 2006) to shift perspective and cultivate emancipatory learning. It recognizes “uncritically accepted and unjust dominant ideologies” and “socio-cultural distortions” to identify hegemonic assumptions (Brookfield, 2000). And it encompasses a range of extrarational approaches to help students step beyond the cognitive to embrace “a holistic, whole-person understanding” of themselves and others (Cranton, 2006).

One Teacher’s Classroom

I share these perspectives with deep humility given all the questions that are emerging for me around adult learning and human development. I am a novice teacher and my framework is very much a work in progress.

Frames of Reference

By the time students arrive in my classroom, the case-dialogue method has already conditioned how they perceive, acquire and use knowledge. Answers lie “somewhere out there” as absolute truths or constructs that exist in external forms to be understood through critical analysis alone. In turn, emotions are devalued, given there is no context to address them, and identity is viewed through the system’s perspective. Moreover, students often believe that to be effective and successful, a lawyer must beat the competition through “flawless” legal positions that persuade others beyond a reasonable doubt of the one and only “right” course of action. At this point, “thinking like a lawyer” has become advocacy bias; those “habits of thinking” described by The Carnegie Report have firmly taken root. Yet, what really strikes me is how most students already see themselves in conflict with whom they believe a lawyer should be. It is as though legal pedagogy transfigures the adversarial process such that it also becomes internalized and embodied within the individual. That zero-sum game of winner and loser shifts from “out there” to “in here” and the lawyer’s war against “what is” begins.

Teaching Goals As Invitations

Given these frames of reference, I invite students to allow various forms of knowledge in our classroom. In contrast to the case-dialogue method, I emphasize the integration of “thinking,” “doing,” “being,” and “viewing” in the context of our learning, and

introduce aspects of emotion, affect, empathy and identity. I suggest our skill as negotiators depends less on “having” or “knowing” tools and more on our capacity to use them creatively in the moment and in ways resonant with the conflict at hand. I propose we master yet also move beyond the technical and strategic tools that comprise negotiation theory and practice to explore our underlying perceptions around what it means to approach, be within, and resolve conflict. I share that life itself is a negotiation, and how we show up for life humbly informs us of our capabilities and possibilities in the classroom, too.

A Framework in Action

I integrate both critical analysis and critical self-reflection within “viewing” — the lens through which we dispassionately observe our external and internal experiences, akin to mindfulness. Students participate in activities specifically designed to cultivate this lens — role plays, online simulations, case studies, small group and dyadic debriefs, listening workshops, contemplative practices, and somatic exercises — and gain exposure to multiple learning modalities to reveal and challenge styles and preferences. “Conflict” considers social norms, cultural expectations, language, personality and somatotypes, morality, ethics, and worldview to encourage a developmental process. Class discussions draw upon content, process and premise reflection to help students differentiate perspectives and skills within the spheres of the three apprenticeships while integrating toward a whole.

It is this last part — integration — that offers the most challenges and the greatest rewards. Integration belies “a weaving together” of new narratives, which calls for clear and conscious choices around fabric, pattern, stitch, needle, and thread. So, I invite students to engage in a regular practice of assessing their answers to three simple questions to facilitate emergence of new narratives: Who am I? Who are others? What am I to do? At the end of the semester, students submit creative projects that describe the evolution of their personal narratives around conflict as seen over a period of time from before entering the course to our last day to a point in the future. The sheer bounty of self-expression is remarkably vast — poems, cartoons, satires, paintings, photo essays, and once even a Shakespearean morality play written entirely in iambic pentameter complete with Chorus.

A Personal Transformation

To offer insight around the quality of emancipatory learning that occurs in the context of “viewing” as well as its emotional dimensions, I share one student’s perspective:

When I signed up for Negotiations, I dreaded the possibility it might entail intense combative exercises of me trying to win my way against peers. Instead, I wanted to find ways to effectively engage others without giving up who I am — a kind, caring and interested person. Given my experience in law school thus far, I thought I had to change who I was — become “tough” or at least put up a better front — to “win.” I was really uncomfortable with this idea, but if I had to mask empathy or act fundamentally against my nature, at least I’d be better at it by the time the course ended.

Once in class I was struck that our learning was always in the context of what *we* bring to a negotiation. We talked a lot about stories — how we enter every situation as we are, with our experiences. Negotiations are not held in a vacuum. Looking back, I wonder how we could *not* have started there. Surprisingly, I often felt most successful when I didn’t have a stunning negotiation outcome. That possibility came from debriefs where “success”

was framed not just in terms of who “won” but our insights into how we tick. What habits did we see ourselves falling into in response to others? What assumptions did we carry to our interactions? And how did these assumptions affect how we were able to engage?

“Viewing” transformed my approach in all interactions by increasing my awareness, empathy, focus and effectiveness. Moreover, it allowed me to go from “blaming” to “growing” as I learned to recognize my own blind spots — a breakthrough for me. Now, I notice judgments I make, and then I move forward to explore whether my assumptions are even valid.

“Viewing” also allowed me to organically grow as a negotiator. As I learned the framework, the “hard” results of my negotiations became better and better. While we talked about tactics, theories, pitfalls, and objectives, we also learned how we show up in the face of conflict, going into great detail experiencing our dominant yet perhaps unconscious inclinations. And it was this context that made class so effective. “Viewing” was fundamental to our ability to learn from others. We finally had the self-reflective tools necessary to speak honestly of our own experiences and reactions. It was as though we had learned a common language through cultural immersion.

What I did not expect to find out is *who I am* — empathic, friendly, creative and fun-loving — is often my biggest asset in negotiation. What an extreme relief no mask is necessary and I needn’t battle my way to a “win.” Even in hostile situations, I can always rely on my “centered” and aware, creative self to navigate the way towards a solution. Plus, these qualities often diffuse the tension, hostility, combativeness and even create allies or — dare I say it? — friends.

So many teachers miss a priceless opportunity to “go there” with students and discuss the internal process that underlies human interactions. It seems our society or maybe our view of lawyers has a bias against relational, emotional, and creative intelligence in favor of “analysis” or “bottom-line.” In my experience it’s actually the former that opens space between people to maximize the efficacy of outcomes for objectively better results. These things are not mutually exclusive, but rather a more whole picture of successful human interactions. Happily, though, trends are good. Maybe future students like me will not shy away from a class like this one that just happened to change my life. I can’t imagine if I had missed out on the most transformative and inspiring experience of my law school career (Steiner, 2010).

Final Thoughts

To effectively address crisis challenges, I believe lawyers must learn to practice law “from the inside out” and develop deeper capacities for “viewing” through seamless integration of critical analysis and critical self-reflection in legal education. I aspire for this paper to evoke a curiosity among educators to reflect further upon how transformative learning models can be specifically adapted to train lawyers to think beyond conflict toward creativity and enhanced well-being for themselves as individuals and for the legal profession as a whole.

References

- Brookfield, S. (2000). Transformative learning as ideology critique. In Mezirow, J. & Associates (eds.), *Learning as transformation: Critical perspectives on a theory in progress*. (pp. 125-148). San Francisco: Jossey Bass.
- Cranton, P. (2006). *Understanding and promoting transformative learning*. San Francisco: Jossey-Bass.
- Holmquist, K. (2011). Challenging Carnegie. *Journal of Legal Education* (forthcoming).
- Magee, R. (2010). Educating lawyers[©] to meditate? From exercises to epistemology to ethics: The contemplative practice in law movement as legal education reform. *University of Missouri-Kansas City Law Review* (forthcoming).
- Magee, R. (2007). Legal education and the formation of professional identity: A critical spirituo-humanistic - 'humanity consciousness' - perspective. *New York University Review of Law & Social Change*, 31(3).
- Matasar, R. (2005). The rise and fall of American legal education. *New York Law School Law Review*, 49(2) (pp. 465-504).
- Mezirow, J. (2000). Learning to think like an adult: Core concepts of transformation theory. In Mezirow, J. & Associates (eds.), *Learning as transformation: Critical perspectives on a theory in progress*. (pp. 3-33). San Francisco: Jossey Bass.
- Mezirow, J. (1991). *Transformative dimensions of adult learning*. San Francisco: Jossey Bass.
- Rakoff, T.D. & Minow, M. (2007). A case for another case method. *Vanderbilt Law Review*, 60(2) (pp. 597-600).
- Scharmer, C.O. (2007). *Theory U: Leading from the future as it emerges*. Cambridge: SoL.
- Seligman, M.E.P., Verkuil, P.R. & Kang, T.H. (2001). Why lawyers are unhappy. *Cardozo Law Review*, 23 (pp. 33-53).
- Shapiro, S.L. and Carlson, L.E. (2009). *The art and science of mindfulness*. Washington: American Psychological Association.
- Steiner, M. (2010). Personal reflections (unpublished).
- Sturm, S.P. and Guinier, L. (2007). The law school matrix: Reforming legal education in a culture of competition and conformity. *Vanderbilt Law Review*, 60(2) (pp. 515-554).
- Sullivan, W.M., Colby, A., Wegner, J.W., Bond, L., & Schulman, L.S. (2007). *Educating lawyers: Preparation for the profession of law*. The Carnegie Foundation for the Advancement of Teaching (herein The Carnegie Report).