

## CLASS PARTICIPATION AS A LEARNING AND ASSESSMENT STRATEGY IN LAW: FACILITATING STUDENTS' ENGAGEMENT, SKILLS DEVELOPMENT AND DEEP LEARNING

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### I INTRODUCTION

Assessment<sup>1</sup> has widely been described as being 'at the centre of the student experience'.<sup>2</sup> It would be difficult to conceive of the modern teaching university without it. Assessment is accepted as one of the most important tools that an educator can deploy to influence both what and how students learn.<sup>3</sup> Evidence suggests that how students allocate time and effort to tasks and to developing an understanding of the syllabus is affected by the method of assessment utilised and the weighting it is given.<sup>4</sup> This is particularly significant in law schools where law students may be more preoccupied with achieving high grades in all courses than their counterparts from other disciplines.<sup>5</sup> However, well-designed

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1 Assessment can be broadly defined as 'occurring whenever one person ... is conscious of obtaining and interpreting information about the knowledge and understanding, or abilities and attitudes of ... [another] person': Derek Rowntree, *Assessing Students: How Shall We Know Them?* (Kogan Page, 2<sup>nd</sup> revised ed, 1987) 4.

2 Berry O'Donovan, Margaret Price and Chris Rust, 'Know What I Mean? Enhancing Student Understanding of Assessment Standards and Criteria' (2004) 9(3) *Teaching in Higher Education* 325, 325.

3 See, eg, Graham Gibbs, 'Using Assessment Strategically to Change the Way Students Learn' in Sally Brown and Angela Glasner (eds), *Assessment Matters in Higher Education: Choosing and Using Diverse Approaches* (SRHE & Open University Press, 1999) 41 ('Using Assessment Strategically'); Peggy Nightingale et al (eds), *Assessing Learning in Universities* (University of New South Wales Press, 1996) 7.

4 Gordon Joughin, 'The Hidden Curriculum Revisited: A Critical Review of Research into the Influence of Summative Assessment on Learning' (2010) 35 *Assessment & Evaluation in Higher Education* 335, 341.

5 Massimiliano Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19 *Legal Education Review* 3, 24–5.

assessment can be seen as more than this. It can be a vehicle for encouraging students to learn and engage more broadly than with the minimums required to complete the assessment activity. In that sense assessment need not merely 'drive' learning,<sup>6</sup> but can instead act as a catalyst for further learning beyond what a student had anticipated.

In this article<sup>7</sup> we reconsider the potential roles and benefits in legal education of a form of interactive classroom learning we term assessable class participation ('ACP'),<sup>8</sup> both as part of a pedagogy grounded in assessment and learning theory, and as a platform for developing broader autonomous approaches to learning amongst students. We also consider some of the barriers students can face in ACP and the ways in which teacher approaches to ACP can positively affect the socio-emotional climates in classrooms and thus reduce those barriers. We argue that the way in which a teacher facilitates ACP is critical to the ability to develop positive emotional and learning outcomes for law students, and for teachers themselves.

Assessment of class participation has at times been criticised, with problems including perceived bias and subjectivity on the behalf of teachers grading class discussions,<sup>9</sup> and the risk that discussions will become sidetracked, stagnant, or confusingly unstructured.<sup>10</sup> Issues of this sort may well be linked to the environment within which ACP operates, including key factors such as class sizes, teaching styles, and student expectations. As such, many of these issues may well be overcome with appropriate staff training, class structure and clear communication of expectations to students. Examination of these issues is critical to any successful use of ACP in a course. However, this article examines a different, and prior, question. That is, the question of whether ACP has the potential to deliver learning outcomes that makes the search for effective implementation strategies worthwhile. By establishing that such benefits can exist in a classroom with a supportive socio-emotional climate, this article

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6 Edward Phillips et al, 'Exceeding the Boundaries of Formulaic Assessment: Innovation and Creativity in the Law School' (2010) 44(3) *The Law Teacher* 334, 363; See also Joughin, above n 4, 335.

7 This article is part of a larger research project into assessment practices at the University of New South Wales ('UNSW'), and a related examination of ACP within the UNSW Law School. The project involves developing theoretical positions on key forms of assessment, seeking student and staff views on those forms of assessment, and developing best practice guides from those sources. Significant initial funding was provided by the Office of the Deputy Vice Chancellor (Academic) as part of the UNSW Assessment Project.

8 We adopt the term assessable class participation and the abbreviation 'ACP' from the work of Armstrong: Marilyn Armstrong, 'Assessing Students' Participation in Class Discussion' (1978) 3 *Assessment in Higher Education* 186; Marilyn Armstrong & David Boud, 'Assessing Participation in Discussion: An Exploration of the Issues' (1983) 8 *Studies in Higher Education* 33.

9 See, eg, Jeffrey A Mello, 'The Good, the Bad and the Controversial: The Practicalities and Pitfalls of the Grading of Class Participation' (2010) 14(1) *Academy of Educational Leadership Journal* 77, 78–80; Clive Gilson, 'Of Dinosaurs and Sacred Cows: The Grading of Classroom Participation' (1994) 18 *Journal of Management Education* 227.

10 Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007) 227; James B Levy, 'As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher' (2006) 58 *Maine Law Review* 50, 72–4.

provides a justification for further examination of optimal ACP assessment regimes.

The article begins by defining what is meant by assessable class participation, and provides some context by describing its use in the UNSW Law School. It then examines the advantages of using ACP to enhance learning by first situating it within social learning theory, and then considering its potential impact in terms of enhancing deeper and more reflective learning, building stronger student engagement, and in providing integrated formative feedback while noting the importance of its summative aspects. The article then considers the ability of ACP to reinforce degree program learning outcomes, particularly through building skills of professional communication and professional values, and as a form of situated learning. Complementing this analysis of the learning benefits of ACP, the article goes on to examine how the efficacy of ACP can be affected by the socio-emotional climate created in the classroom, and some of the ways teachers can act to lower barriers to participation.

## II WHAT IS ASSESSABLE CLASS PARTICIPATION?

Class participation can be used to describe a range of student activities undertaken before, during and after class. It can mean different things to staff and students, ranging from attendance to formal oral presentations.<sup>11</sup> It is not always part of the formal assessment of a course. Where it includes student oral contributions it can take a range of forms from ‘cold-calling’ to pre-prepared answers. As a result, it is important to begin by outlining our definition of ACP.

In this article, ACP is defined as an active learning technique, based on social learning theory principles, which seeks to promote students’ learning and understanding through interactions with their peers within the physical or virtual classroom. ACP involves not only ‘the thoughtful engagement by students with the core concepts of the course’,<sup>12</sup> but just as importantly, a reflective engagement with classmates as part of a community of learning and social development. As such, ACP is sharply distinguished from many traditional forms of summative assessment<sup>13</sup> as being directed primarily at achieving a peer-based attainment of competency and awareness, rather than the assessment of essentially private work by the teacher.

The importance of this two-fold definition is that it both extends the forms of participation that can be assessed beyond verbal contributions to class, but also

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11 Linda Marie Fritschner, ‘Inside the Undergraduate College Classroom: Faculty and Students Differ on the Meaning of Student Participation’ (2000) 71 *Journal of Higher Education* 342.

12 Raymond C Jones, ‘The “Why” of Class Participation: A Question Worth Asking’ (2008) 56 *College Teaching* 59, 59.

13 The two main categories of assessment in higher education are summative assessment, which is student work (such as an exam or essay) that is formally graded and counts towards a student’s overall course grade, and formative assessment, which often takes the shape of feedback to students and does not count directly towards the final result for the course: Nightingale et al, above n 3, 8; Greg Sergienko, ‘New Modes of Assessment’ (2001) 38 *San Diego Law Review* 463, 465.

limits it to forms of participation that are linked to reciprocal interaction between students and the teacher in the classroom. Thus, our definition includes preparation for class as an assessable form of participation if the assessment of the preparation is mediated through a social form of learning in the classroom, such as where a student's level of preparation is assessed by the degree to which they can draw on pre-reading in a class discussion of a topic. Similarly, the skills of sitting quietly and listening actively and empathically can be a valid aspect of participation,<sup>14</sup> so long as there is some method by which the student's reflections can be shared with the class – such as through a concluding comment or a post-class online discussion board. Conversely, we would not see a formal class presentation by a student as ACP because it is essentially a performance for a marker, rather than an activity that, by itself, encourages group discussion about a topic. It might, however, amount to participation if the formal presentation was the beginning or culmination of a wider class discussion, or if students provided written feedback in a way that was shared with the class as a whole. Despite this flexibility of definition, we believe it is important to keep the notion of verbal discussion central to the idea of ACP.

Another fundamental feature of ACP is that it ideally occurs in an environment of safety and support, where students are encouraged to explore their understanding in a way that minimises negative judgments about ability, and as far as possible reduces the level of stress caused by an expectation of contribution. Thus, ACP is primarily concerned with participation for engagement, with participation for mastery constituting an important yet secondary aim. The emphasis on class participation as building reflective engagement with fellow law students means extreme forms of Socratic questions and answers, such as those caricatured in *The Paper Chase*,<sup>15</sup> do not amount to ACP. This is because there is no real sense that the students are being invited to discuss concepts amongst themselves. Instead there is only one correct answer – the teacher's – and students' contributions are largely judged in a negative manner against this benchmark.

### A Assessable Class Participation at UNSW Law

In order to further contextualise our understanding of ACP, it is useful to briefly describe the approach taken to ACP at the UNSW Law School, where we have been teachers and students. ACP has been a defining aspect of teaching in the UNSW Law School since its inception in the early 1970s. Currently, it is a compulsory form of assessment in most courses taught, and is predominantly utilised in two hour classes of 30–45 students. There are a range of approaches taken to its practice, with some courses emphasising ad hoc discussion, some

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14 See, eg. John Seely Brown, Allan Collins and Paul Duguid, 'Situated Cognition and the Culture of Learning' (1989) 18(1) *Educational Researcher* 32, 40, who refer to "legitimate peripheral participation," where people who are not taking part directly in a particular activity learn a great deal from their legitimate position on the periphery', noting that '[i]t is a mistake to think that important discourse in learning is always direct and declarative'.

15 *The Paper Chase* (Directed by James Bridges, Twentieth Century Fox Film Corporation, 1973).

preferring the use of more structured discussion topics, and some using small groups responsible for generating discussion, which are assigned for each class. Assessment is primarily on the basis of a final holistic mark, and there are a range of practices as to how that mark is determined, such as through mid-semester preliminary marks, self-assessment or peer assessment.

The UNSW Law School made a break with the traditional lecture-based approach to teaching law in Australia, seeing the curriculum as one in which ‘students mattered’ and ACP based upon ‘discussion’ as a significant aspect of teaching.<sup>16</sup> In the ‘Dean’s Letter to New Students’ in the 1971 *Student Handbook*, Foundation Dean Professor Hal Wooten told students:

We will be striving to keep our classes as small as possible. We will use them mostly not to tell you things you can learn from textbooks, or notes, or in the law library, but to help you develop your understanding of the law, and the skills a lawyer needs, by active discussion with your teachers and with each other.<sup>17</sup>

Although the approach to student discussion drew upon the form of Socratic dialogue-based teaching common in the USA, it was fundamentally different in key ways. As the quotes above indicate, discussion was not conceived of as a set of interrogations of students called on randomly to demonstrate their knowledge to the lecturer. Instead, students would bring their understandings of the pre-assigned readings to class and the students and teachers would discuss the readings as equals, with guidance by the teacher only to the extent that the students themselves had not understood the issues.

This approach became central to UNSW law students’ education. A survey of student attitudes in 1976 found 75 per cent of students were in favour of ACP.<sup>18</sup> An attempt in 1992 to move to larger classes to deal with budgetary issues led to a student strike where, fittingly, students refused to speak in class.<sup>19</sup> A 2012

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16 Marion Dixon, *Thirty Up: The Story of the UNSW Law School 1971–2001* (UNSW Law School, 2001) 5, 15 (*‘Thirty Up’*). In doing so it also rejected the confrontational form of the Socratic method of teaching. The success of this approach was underlined by the 1987 Pearce Report of Australian Law Schools, which stated: ‘The law course at UNSW reflects what is possible in legal education’, providing an ‘undergraduate program that is innovative and well balanced’: Commonwealth Tertiary Education Commission, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission: A Summary* (AGPS, 1987) 38–9 (*‘Pearce Report’*).

17 Dixon, *Thirty Up*, above n 16, 17. Wooten’s emphasis on small group teaching, discussion and assessable active class participation was influenced by the ‘boring experience’ of attending lectures during his own law studies from 1940–45:

You had lecturers, almost all part time, who would come in and, for the most part, read out notes that had been issued to you. Sometimes they would make little side comments and so on, but without any sort of context. [Law] was just something that you found in the statutes and in the cases. The idea that there were social and economic and political and personal and other forces operating was something that was never looked at. It was just a self-contained study presented in a dry way in which the biggest thing you were expected to do was to memorise the law and display some capacity for applying it by analogy. But it was really a pretty boring experience to be at law school: at 14.

18 Armstrong, ‘Assessing Students’ Participation’, above n 8, 188.

19 Charles McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (AGPS, 1994) 94.

student survey<sup>20</sup> found continuing high levels of support for ACP amongst law students, with 63 per cent of respondents agreeing that ACP enhanced their learning, and 69 per cent agreeing that ACP made classes more interesting. Significantly, 77 per cent of respondents thought ACP should be worth 10 per cent or more of their final grade.<sup>21</sup>

In hindsight, it is clear that this approach is based on a constructivist approach to learning, which argues that true learning cannot be achieved by transmission of knowledge from lecturer to student and via dissemination of written materials. Instead, meaningful knowledge is created through a 'process of discoursing',<sup>22</sup> and by students assembling content into meaning through interaction with it. Echoing Wooten's vision of an 'active learning'-based student environment, Chickering and Gamson note:

Learning is not a spectator sport. Students do not learn much just by sitting in classes listening to teachers, memorizing pre-packaged assignments, and spitting out answers. They must talk about what they are learning, write about it, relate it to past experiences and apply it to their daily lives. They must make what they learn part of themselves.<sup>23</sup>

### III ASSESSABLE CLASS PARTICIPATION'S ROLE IN ENHANCING LEARNING

ACP presents a number of significant advantages as an assessment strategy. It is a form of social learning that can act to direct students who might otherwise have taken superficial approaches to learning towards more reflective understandings of material, build engagement, and contribute to the development of communication and professional skills.

#### A Theoretical Underpinnings: Social Learning Theory

Social learning theory, sometimes referred to in psychological literature as social cognitive theory, seeks to explain and refine the ideas of early social learning theorists in terms of the modern understanding of cognitive structures. That is, it attempts to better understand and explain the underlying processes of development and learning with reference to those cognitive structures. Social learning theory is also the basis for a number of other approaches such as 'social

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20 UNSW Law School Student Assessment Survey (UNSW Ethics approval no 12 058). This survey, which is unpublished to date, was an online survey to which 276 students (both LLB and JD) responded. The survey data is currently being analysed.

21 Only 12 per cent of survey respondents thought it should not form part of the final grade.

22 Andrew Northedge, 'Rethinking Teaching in the Context of Diversity' (2003) 8 *Teaching in Higher Education* 17, 19 (emphasis in original).

23 Arthur W Chickering and Zelda F Gamson, 'Seven Principles for Good Practice in Undergraduate Education' (March 1987) 39(7) *AAHE Bulletin* 3, 3.

situatedness' and 'situational learning theory', 'authentic learning', 'socio-emotional' and 'socio-cultural' learning theories.<sup>24</sup>

The schematic foundations of social learning theory<sup>25</sup> are located in Lev Vygotsky's research on the 'zone of proximal development' and the importance of a more knowledgeable 'other';<sup>26</sup> in Albert Bandura's research into vicarious learning<sup>27</sup> and self-efficacy<sup>28</sup> and their relationship with student motivation and persistence; and the related learning concept of 'social situatedness' which posits that individual intellectual and emotional development requires a social and cultural context, and that cognitive development properly occurs as a result of a close interplay between the agent (the learner) and the environment (the classroom).<sup>29</sup>

A key principle of social learning theory is that '[p]eople do not function in isolation. As social beings, they observe the conduct of others and the occasions on which it is rewarded, disregarded, or punished'.<sup>30</sup> Similarly, Vygotsky began from the premise that 'human learning presupposes a specific social nature and a process by which children grow into the intellectual life of those around them'.<sup>31</sup> He argues that:

Learning awakens a variety of internal developmental processes that are able to operate only when the child is interacting with people in his environment and in cooperation with his peers. Once these processes are internalized, they become part of the child's independent developmental achievement.<sup>32</sup>

A significant defensible assumption of ACP is that students learn better by being engaged in learning which can be facilitated through action and reflection with others.<sup>33</sup> Research has demonstrated that students who create their own 'cognitive aids' through interaction with others learn better and have superior understanding than those who have been instructed through simple 'repetitive reinforced performance'.<sup>34</sup> Meaningful learning takes place in an environment in 'partnership' with others, in which we observe, try, reflect and ultimately internalise 'thought processes', allowing humans to contribute critically and

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24 These all retain the basic premises of early social learning theory, but some have expanded certain aspects.

25 See, eg, Albert Bandura, *Social Learning Theory* (General Learning Press, 1971).

26 See especially L S Vygotsky, *Mind in Society: The Development of Higher Psychological Processes* (Harvard University Press, 1978) 79.

27 See, eg, Albert Bandura, 'Vicarious and Self-Reinforcement Processes' in Robert Glaser (ed), *The Nature of Reinforcement* (Academic Press, 1971) 228.

28 See, eg, Albert Bandura, 'Self Efficacy: Toward a Unifying Theory of Behavioral Change' (1977) 84 *Psychological Review* 191; Albert Bandura, 'Human Agency in Social Cognitive Theory' (1989) 44 *American Psychologist* 1175.

29 For a general introduction, see, eg, Roger H Bruning, *Cognitive Psychology and Instruction* (Pearson/Merrill/Prentice Hall, 4<sup>th</sup> ed, 2004) 8–9. On 'social situatedness' see Seely Brown, Collins and Duguid, above n 14, and for the classic foundations of this theme see Vygotsky, above n 26.

30 Albert Bandura, 'Behaviour Theory and the Models of Man' (1974) 29 *American Psychologist* 859, 860.

31 Vygotsky, above n 26, 88.

32 Ibid 90.

33 Peter T Knight, 'Summative Assessment in Higher Education: Practices in Disarray' (2002) 27(3) *Studies in Higher Education* 275, 275.

34 Bandura, 'Behaviour Theory and the Models of Man', above n 30, 865.

constructively to the ‘unending conversation’ which takes place in public as well as within each individual.<sup>35</sup> At the core of social learning theory is communication or conversation within ourselves and with others. It is through communication with others in a community that our internal communication becomes identifiable as a thought. As Bruffee states:

To the extent that thought is internalized conversation, then, any effort to understand how we think requires us to understand the nature of conversation; and any effort to understand conversation requires us to understand the nature of community life that generates and maintains conversation. Furthermore, any effort to understand and cultivate in ourselves the kind of thought we value most requires us to understand and cultivate the kinds of community life that establish and maintain conversation that is the origin of that kind of thought. To think well as individuals we must learn to think well collectively – that is, we must learn to converse well. The first steps to learning to think better, therefore, are learning to converse better and learning to establish and maintain the sorts of social context, the sorts of community life, that foster the sorts of conversation members of the community value.<sup>36</sup>

ACP properly conceived, with its social learning emphasis on abstract thinking, promotes cognitive development, thereby facilitating deeper and more reflective learning.<sup>37</sup> These notions of recognising learning as a social construct, of learning in partnership with others and through conversation, are also critical to practice as a lawyer where truth is contested and can vary for different parties.

In addition to the direct benefits of ACP, students may also receive indirect benefits from a deeper learning approach fostered by an active classroom. Even if individual students choose not to regularly engage directly in discussion, consistent with social learning theory, many may still find a classroom that encourages discussion to be a significant learning benefit. Such students still observe normative behaviour and hear the perspectives and voices of others, including a perspective that does not come from the teacher. Students remain exposed to an environment that encourages them to critically assess their own opinions and to reflect on their persuasiveness. Immersion in such classes reinforces the decentred and conflicting nature of much opinion, particularly legal opinion.

## B The Impact of Assessment on Learning

In socio-cultural theories of learning, university is conceived of as a ‘knowledge community’ or a ‘discourse community’ where the ultimate goal of learning is to enable students to engage meaningfully with the discourse – ‘what is said’ – within that community.<sup>38</sup> Learning and the role of education then can be seen as ‘a process of becoming increasingly competent as both: a user of various *specialist discourses*; [and] a participant within the relevant *knowledge*

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35 Kenneth A Bruffee, ‘Collaborative Learning and the “Conversation of Mankind”’ (1984) 46 *College English* 635, 638–40.

36 *Ibid* 640.

37 Vygotsky, above n 26, 89.

38 Northedge, above n 22, 20.

communities'.<sup>39</sup> This theoretical approach has been adopted across Australian higher education with universities increasingly reorientating themselves towards concentrating on 'learning' rather than 'teaching'.<sup>40</sup> The move to describe courses and degree programs in terms of learning is based on the belief that course design should begin with what is learnt as opposed to what is taught, and that the use of learning outcomes to guide curriculum planning situates student achievement clearly at the centre of this process.<sup>41</sup>

The type of learning strategies students can employ range across a spectrum from what has been described as surface learning through to deep learning. The forms of assessment that are set can encourage or require students to engage with different levels of learning on this spectrum. A deep approach to learning has been described as one in which '[t]he student attempts to make sense of what is to be learnt, which consists of ideas and concepts. This involves thinking, seeking integration between components and between tasks, and "playing" with ideas'.<sup>42</sup> Students thus actively and critically engage with, and construct meaning from, material – both autonomously and with others. On the other hand, a surface approach is one in which '[t]he student reduces what is learnt to the status of unconnected facts to be memorised. The learning task is to reproduce the subject matter at a later date (eg, in an exam)'.<sup>43</sup> Students potentially miss out not only on substantive content, but also on developing a deeper understanding of salient conceptual and contextual aspects of the material. It has been argued that 'strategic' students undertake assessment not with an intention of deep learning, but with the intention to maximise grades.<sup>44</sup> Such students are likely to adopt

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39 Ibid 22 (emphasis in original).

40 Chris Rust, 'The Impact of Assessment on Student Learning: How Can the Research Literature Practically Help to Inform the Development of Departmental Strategies and Learner-Centred Assessment Practices?' (2002) 3 *Active Learning in Higher Education* 145, 146.

41 Joanna Allan, 'Learning Outcomes in Higher Education' (1996) 21 *Studies in Higher Education* 93, 104.

42 Graham Gibbs, *Improving the Quality of Student Learning* (Technical and Educational Services, 1992) 2.

43 Ibid.

44 A strategic learner allocates their time overwhelmingly to what is to be assessed: Gibbs, 'Using Assessment Strategically', above n 3, 42. In addition to adopting a deep or surface approach to learning (both discussed above) students may adopt a 'strategic' (or what Ramsden has referred to as 'achieving': Paul Ramsden, *Learning to Teach in Higher Education* (Routledge Falmer, 2<sup>nd</sup> ed, 2003) 53) learning approach. Strategic students may adopt a deep or a surface approach in varying degrees according to the depth of understanding they think they will require in a particular assessment task in order to maximise their grades. The distinction between the different types of approach lies in the motivation of the student – for a strategic student the motivation is generally to maximise grades and not just 'pass'. The concern is that while a strategic student may outwardly display reasonable grades these do not offer any assurances that the student has gained an adequate comprehension of all the course material: Elena Marchetti, 'The Influence of Assessment in a Law Program on the Adoption of a Deep Approach to Learning' (1997) 15 *Journal of Professional Legal Education* 203, 205–7. The implication is that having a form of continuous assessment based around course outcomes and graduate attributes helps provide a more realistic understanding of a student's achievement by orientating them to the whole of the course content. See also Nicolette Rogers, 'Improving the Quality of Learning in Law Schools by Improving Student Assessment' (1993) 4 *Legal Education Review*, 113, 114–15; Diana M Tribe, Anthony J Tribe and Julie Fitzgerald, 'Law Students' Attitudes Towards Assessment' (1989) 14(1) *Assessment & Evaluation in Higher Education* 31, 38.

surface learning techniques wherever possible, as these seem to be more efficient methods of obtaining good grades.

Deep learning has, of course, always been an aspiration and assumption of higher education. However, a deep approach is not automatic for the majority of students. Instead, students commonly adopt a surface approach, which may have been reinforced by their high school experiences. Studies from Australian universities have found that this focus on a surface approach does not simply disappear over time as is often assumed, and that in fact students are less likely to adopt a deep approach the further they progress through their program.<sup>45</sup>

Thus despite the widespread claim that ‘assessment drives learning’, it is clear that different forms of assessment send different signals about the nature of learning required in a course, and that some forms of assessment can be counterproductive to the development of deeper learning.<sup>46</sup> As Brown notes, the assessment assigned ‘defines what students regard as important, how they spend their time and how they come to see themselves as students and then as graduates’.<sup>47</sup> The assessment scheme thus has a profound impact on how students approach course material and, consequently, how and what they learn.<sup>48</sup> If an inappropriate assessment regime is established, this can encourage students to adopt a surface approach to learning as opposed to a desirable deep approach.<sup>49</sup>

Traditional assessment methods extensively relied upon by law schools such as examinations provide fertile conditions for students to adopt a surface approach, and can even ‘implicitly encourage and reward’ student emphasis on learning the minimum required to answer examinable questions.<sup>50</sup> Final exams focus student attention exclusively on that task (students will cram for the exam), rather than encouraging students to deploy their efforts and time more uniformly across the entire semester and subject matter.<sup>51</sup> This can be partly ameliorated by setting additional forms of assessment which encourage deeper learning and reflection and that are due midway through the semester. A common example of such an alternative assessment in law schools is the research essay. While this assessment type can develop critical professional skills, it generally encourages learning in specific areas only, and often in areas not covered in class readings or discussions. Essay-based assessments thus generally fail to encourage the social engagement with other learners intended by classroom attendance. There is also a significant time cost in setting, writing and marking these types of written assessment items repeatedly in a single semester.

In contrast to end of semester exams or high value assignments, continuous assessment throughout the semester has been found to significantly enhance

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45 Gibbs, *Improving the Quality of Student Learning*, above n 42, 3.

46 Joughin, above n 4, 335, 342.

47 George Brown, Joanna Bull and Malcolm Pendlebury, *Assessing Student Learning in Higher Education* (Routledge, 1997) 7.

48 Gibbs, ‘Using Assessment Strategically’, above n 3, 41.

49 Joughin, above n 4, 342.

50 Gibbs, *Improving the Quality of Student Learning*, above n 42, 17, 166.

51 Gibbs, ‘Using Assessment Strategically’, above n 3, 45.

student engagement.<sup>52</sup> However, the increased workload for staff often associated with continuous assessment is seen to be a significant limitation, as are students' tendencies to become more concerned with marks maximisation than learning if assessment is composed of numerous, discrete tasks (such as tutorial papers or mini-tests).<sup>53</sup>

### **1 ACP and Deep Learning**

When added to the suite of assessment types in a course, ACP has the potential to overcome the limitations of traditional, written mid- or end-of-semester assessments. As a form of continuous assessment throughout the semester, ACP helps orientate students towards a deeper understanding of the course material – particularly because assessment is strongly aligned to evidence of student engagement with the content of the course. The continuous nature of the assessment directs students towards preparation and engagement throughout the whole semester rather than at set due dates. Because of its performative and group dimensions, ACP also contributes to the development of socially mediated key professional skills and attitudes. Preliminary indicators of a final ACP grade can be released at points throughout the semester; the indicative nature of the preliminary marks both emphasises the continuing nature of the assessment, but also leaves the grading as formative in nature, and thus less inhibiting of the learning process. The interweaving of a summative element into the assessment also encourages strategic students who might otherwise be disengaged to maintain a level of preparation and engagement that they consider necessary to achieve the grades they would like. Such preparation and engagement thus becomes an intentional part of the student's assessment strategy.<sup>54</sup> Importantly, because student activity, feedback and even possibly grading occur within the classroom, it is a form of assessment without significant workload increases for either teachers or students. ACP is thus arguably unique amongst other assessment practices in that the assessment does not take place externally to the dynamic learning environment in which the students participate (and also create).<sup>55</sup> This promotes the creation of an authentic learning space which further supports students' engagement and motivation.

### **2 ACP and Engagement**

It has already been noted that one of the rationales for ACP is that it enhances student engagement with the learning process. Student engagement has been defined as 'students' involvement with activities and conditions likely to generate high-quality learning', and is recognised as important for a 'superior

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52 Eileen Trotter, 'Student Perceptions of Continuous Summative Assessment' (2006) 31 *Assessment & Evaluation in Higher Education* 505.

53 Rosario Hernández, 'Does Continuous Assessment in Higher Education Support Student Learning?' (2012) 64 *Higher Education* 489.

54 Polly A Fassinger, 'Understanding Classroom Interaction: Students' and Professors' Contributions to Students' Silence' (1995) 66(1) *Journal of Higher Education* 82, 94.

55 Armstrong and Boud, 'Assessing Participation in Discussion', above n 8, 34.

education'.<sup>56</sup> Engagement has been demonstrated to have a positive impact on a student's motivation to learn and their subsequent achievement, and it is argued that this means that 'motivation is of paramount importance' to facilitate learning.<sup>57</sup> Motivation has been described as 'those inner processes that determine whether learners will engage in a task, the amount of effort they will expend, the length of time they will persevere and the persistence they will show when obstacles are encountered'.<sup>58</sup>

Evidence suggests that an important way to make learning 'interesting' is for teachers to create active learning opportunities through which students engage in knowledge creation independent of the teacher's extrinsic demands.<sup>59</sup> Participation in such a shared process of inquiry, conducted within a normative framework that is supportive of positive connections and interactions, not only creates meaningful interest through shared experience and interpersonal awareness, but also enhances understanding of material.<sup>60</sup> This is one of the significant benefits of well-facilitated ACP. If examination of the subject matter of a class is conducted significantly through student contribution and discussion, the actual learning outcomes of that class are at least partly created by the students themselves. Moreover, in light of studies showing that first year law students often feel alienated and discouraged because they lack the skills to appropriately navigate the course materials, engaging law students in the language of discourse as early as possible in their academic career is vital to their persistence.<sup>61</sup> This underlines ACP's dual role as both a learning and an engagement strategy.

### 3 *ACP as Situational Learning*

Class participation is an example of 'learning by doing'. Situational learning theory<sup>62</sup> argues that student learning is enhanced when learning activities are undertaken within a 'practice context', which provides an opportunity for both substantive knowledge development and skills acquisition contemporaneously.<sup>63</sup> To learn a skill the student must perform that skill in an environment in which

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56 Ali Radloff and Hamish Coates, *Doing More for Learning: Enhancing Engagement and Outcomes: Australasian Survey of Student Engagement* (Australian Council for Educational Research, 2010) 3 <<http://research.acer.edu.au/cgi/viewcontent.cgi?article=1011&context=ausse>>.

57 Alan Jenkins et al, *Reshaping Teaching in Higher Education: Linking Teaching with Research* (Kogan Page, 2003) 32.

58 Ibid.

59 Anne Hewitt, 'Producing Skilled Legal Graduates: Avoiding the Madness in a Situational Learning Methodology' (2008) 17 *Griffith Law Review* 87, 87.

60 Vincent Tinto, 'Classrooms as Communities: Exploring the Educational Character of Student Persistence' (1997) 68 *The Journal of Higher Education* 599, 601.

61 Phillips et al, above n 6, 337; see also Dominic Fitzsimmons, Simon Kozlina and Prue Vines, 'Optimising the First Year Experience in Law: The Law Peer Tutor Program at the University of New South Wales' (2007) *University of New South Wales Faculty of Law Research Series* 7.

62 As has been noted previously, situational learning theory is based upon principles of social learning theory. For a specific discussion on situational learning theory see, eg, Seely Brown, Collins and Duguid, above n 14.

63 Hewitt, 'Producing Skilled Legal Graduates', above n 59, 87–9.

the student can receive feedback about their performance in order to improve.<sup>64</sup> As Sadler notes, acquiring proficiency in a skill:

[R]equire[s] practice in a supportive environment which incorporates feedback loops. This usually includes a teacher who knows which skills are to be learned, and who can recognize and describe a fine performance, demonstrate a fine performance, and indicate how a poor performance can be improved.<sup>65</sup>

This occurs naturally in a supportive classroom discussion environment. Students demonstrate their level of skill in orally communicating a complex idea that they have internally analysed and translated from its written form. Other students and teachers can then provide instant feedback in terms of the comprehensibility, persuasiveness and the underlying logical analysis of the idea that the student has articulated. Importantly, classroom discussion goes beyond the teacher-centred approach Sadler outlines to incorporate a peer review-based learning process. Often, the role of the teacher may be merely to moderate the peer discussion and feedback.

A significant aspect of learning a skill is being able to identify quality. A supportive environment, which a classroom based around principles of active learning such as ACP seeks to develop, is one in which students can gain ‘experience in making judgements’<sup>66</sup> and engage with teachers and other students in ‘evaluative conversations’<sup>67</sup> to develop a ‘concept of quality’.<sup>68</sup> Learning to recognise quality work is an essential skill for students if they are to become effective deep and self-directed learners and capable graduates in the workplace.

### C Formative and Summative Assessment

Assessment practices in higher education are largely summative. This emphasis on summative assessment has increasingly been questioned,<sup>69</sup> but is not surprising given the perceived need to rank students for future employment and higher degree study. Traditional summative assessment practice has been criticised for focusing on specific contextual and factual elements that the teacher

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64 Anne Hewitt, ‘A Critique of the Assessment of Professional Skills’ (2007) 17 *Legal Education Review* 143, 157–8.

65 D Royce Sadler, ‘Formative Assessment and Design of Instructional Systems’ (1989) 18 *Instructional Science* 119, 120. Modelling, guidance and feedback are important aspects of social learning theory. Vygotsky emphasised the need for a more experienced ‘other’ in addition to one’s peers: Vygotsky, above n 26. Research conducted by Volet in 1991 using an instructional model derived from Vygotsky demonstrated that ‘modelling, coaching and guided learning techniques’ in a ‘socially supportive’ framework to facilitate learning, as opposed to competition, promoted the successful ‘development and efficient use of metacognitive strategies’: Simone E Volet, ‘Modelling and Coaching of Relevant Metacognitive Strategies for Enhancing University Students’ Learning’ (1991) 1 *Learning and Instruction* 319, 333.

66 D Royce Sadler, ‘Beyond Feedback: Developing Student Capability in Complex Appraisal’ (2010) 35(5) *Assessment & Evaluation in Higher Education* 535, 544.

67 *Ibid.*

68 *Ibid.*

69 Liz McDowell, ‘Challenging Assessment?’ (2010) 35(3) *Assessment and Evaluation in Higher Education* 263, 263–4. See also Peter T Knight, ‘Summative Assessment in Higher Education: Practices in Disarray’ (2002) 27(3) *Studies in Higher Education* 275.

or an external party (such as an accreditor or future employer) considers important, while ignoring elements of the course which aid the student in learning.<sup>70</sup> Summative assessment is also often seen as external to the learning process (as something that measures learning), rather than a significant aspect of this process (something which can assist learning). However, appropriately considered and constructed summative assessment can contribute to the learning process, not hinder it. Assessment can be integrated within the proposed learning outcomes to not only ‘evaluate students’ attainment of intended learning outcomes, but also support and encourage that attainment’.<sup>71</sup>

While the benefits of formative assessment (primarily through the provision of feedback to accompany summative evaluation of a student’s work) are not in dispute, the actual practice of formative assessment has increasingly come under scrutiny. When linked to traditional summative assessment tasks (such as an essay), there is a question whether the benefits of the assessment task for a student’s learning achievement are fully realised. One recent study showed that while law academics believed that giving feedback was important (and their preference was for individual written comments despite this form of feedback being the most time consuming), they felt that students did not consistently act upon it.<sup>72</sup> Reconciling this divide between ‘feedback given’ and ‘feedback acted upon’ is critical to developing deep student learning.<sup>73</sup> Part of the reason for this gap is that students often do not understand the feedback that they are given, even when provided with a written description of criteria and standards.<sup>74</sup>

### ***1 ACP as Integrated Formative Assessment***

Because of its strong association with the benefits of formative assessment, feedback to students should be considered an essential element in ‘the development and enhancement of learning’.<sup>75</sup> Well-designed assessment can contain both summative and formative elements which are engineered to be mutually supportive in a ‘feedback – feed-forward’ loop in which the aim is not just to encourage student reflection on past performance, but also to provide advice on how students

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70 Tribe, Tribe and Fitzgerald, above n 44, 37; Benjamin Andoh and Phil Jones, ‘Students’ Self-Assessment in Law’ (2008) 42(2) *Law Teacher* 200.

71 Chloe J Wallace, ‘Using Oral Assessment in Law: Opportunities and Challenges’ (2010) 44(3) *Law Teacher* 365, 366. Ramsden argues that ‘[j]ust as we should inform our choice of teaching methods by the nature of the subject matter we are teaching, so in our choice of assessment methods we should consider our goals for student learning’: Paul Ramsden, *Learning to Teach in Higher Education* (Routledge Falmer, 2<sup>nd</sup> ed, 2003) 184.

72 Vera Birmingham and John Hodgson, ‘Feedback on Assessment: Can We Provide a Better Student Experience by Working Smarter than by Working Harder?’ (2006) 40(2) *Law Teacher* 151.

73 Patricia Cartney, ‘Exploring the Use of Peer Assessment as a Vehicle for Closing the Gap Between Feedback Given and Feedback Used’ (2010) 35(5) *Assessment & Evaluation in Higher Education* 551, 552, 560.

74 See, eg, Graham D Hendry, Nikki Bromberger and Susan Armstrong, ‘Constructive Guidance and Feedback for Learning: The Usefulness of Exemplars, Marking Sheets and Different Types of Feedback in a First Year Law Subject’ (2011) 36(1) *Assessment & Evaluation in Higher Education* 1.

75 Alistair Mutch, ‘Exploring the Practice of Feedback to Students’ (2003) 4(1) *Active Learning in Higher Education* 24, 36.

can perform better against the same criteria in the future. For summative assessment involving products, such as assignments, this is generally attempted by the insertion of some form of discrete feedback to students, either during or after the activity, that provides concrete suggestions addressing what in the activity needs improvement and how a student can enhance their performance.<sup>76</sup> By contrast, ACP, as a form of continuous classroom-based activity, need not require the deliberate addition of formal feedback points because it is inherently formative. It is formative in the sense that conversations within the classroom based upon the respectful probing, both by teachers and fellow students, of a participant's construction of perspectives, ideas and concepts provide for instant feedback for the entire 'learning community' of the classroom. Feedback is inherent in the response to any contribution – and the feedback can come from both teachers and peers. Significantly, this is feedback that can be immediately utilised and put into practice by the student and other students for whom the feedback is relevant (in an example of 'feedback' and 'feed-forward').<sup>77</sup> ACP is thus a highly efficient method of providing meaningful feedback to students – not just in the time saved, but also because the feedback generated within the classroom is immediately able to be used in an ongoing 'loop'.

Rather than students seeing a moment as 'feedback', as opposed to class learning, the feedback in ACP is authentically part of the learning process. As Maznevski notes:

I want students to participate so they can learn from each other. We know that active involvement in learning increases what is remembered, how well it is assimilated, and how the learning is used in new situations. In making statements to peers about their own thoughts on a class topic, students must articulate those thoughts and also submit them to (hopefully constructive) examination by others. In listening to their peers, students hear many different ways of interpreting and applying class material, and thus are able to integrate many examples of how to use the information. Especially in a course that stresses application of material [such as law], extensive participation in class discussions is an essential element of students' learning.<sup>78</sup>

The intertwining of feedback as learning can thus increase the amount and quality of interactions between students and teachers. In addition to improving their learning achievements, such intertwining can lead to enhanced positive emotional and personal effects for students.<sup>79</sup>

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76 Hendry, Bromberger and Armstrong, above n 74, 2.

77 What is meant as a process of 'feed-forward' in this context is the way in which feedback against criteria is received by the student/s and is able to be utilised to directly improve *future* learning performance. Often feedback pertains to a specific task the student is not likely to repeat again in the short term. As such, it may contain little information that a student can use to immediately improve future performance. On the other hand, assessment that incorporates opportunity for 'feed-forward' not only provides clear criteria and expectations for assessment (and behaviour), but allows a student to actively improve future achievement because feedback is given in such a way that it can be explicitly used by the student to monitor their own learning.

78 Martha L Maznevski, 'Grading Class Participation' (University of Virginia Teaching Resource Center, January 1996) *Teaching Concerns: Newsletter of the Teaching Resource Centre for Faculty and Teaching Assistants, University of Virginia*.

79 Jean J Endo and Richard L Harpel, 'The Effect of Student-Faculty Interaction on Students' Educational Outcomes' (1982) 16(2) *Research in Higher Education* 115, 132.

## 2 ACP as Summative Assessment

This raises the question of whether the formative benefits of ACP could be achieved with a form of class participation that does not contain summative elements – that is, participation that is not graded. We would argue that without a summative element, many students would not take participation seriously and would not contribute to the learning environment with ‘intention’ if they feel that their final grade would not be ‘positively’ influenced in some manner by their participation.<sup>80</sup> The summative element is thus necessary to encourage engagement and learning.

A summative element is also necessary to demonstrate the importance of program learning outcomes. Program learning outcomes and graduate attributes are increasingly being mandated by universities and external regulatory bodies. They are important in that they signify to the student (and other stakeholders) what the university, faculty or school values as a result of education. While this provides valuable guidance on course design generally, declared learning outcomes may not be met unless a *meaningful* evaluation of existing assessment practices is undertaken to determine which practices explicitly support their achievement.<sup>81</sup> Despite moves to align learning outcomes and the assessment tasks designed to evaluate students’ acquisition of these outcomes, the connections are often indiscernible to students.<sup>82</sup> Snyder’s seminal work on the ‘hidden curriculum’ demonstrated that in the absence of clear expectations and structure, students construct their own meaning of what the aims of the curriculum are. The way in which students ascribe value to an assessment task could be, and often is, quite at odds with the teacher’s actual aims for the course.<sup>83</sup> Arguably, the choice of assessment method adopted, rather than the topic of the task, has a more significant impact on what students see as valued qualities of graduates. The skills necessary to complete the activity communicate to students, both implicitly and explicitly, what type of learning is valued.<sup>84</sup> Summatively assessed class participation reinforces to students that developing graduate skills such as flexible critical thinking, social communication and professional values is important.

A student’s inability to ascertain the values of the curriculum can exacerbate their disengagement from the learning process,<sup>85</sup> which has implications for student engagement, motivation and deep learning. For students to become intrinsically motivated and consequently more likely to adopt a deep approach towards learning, ‘they need to see the relevance [and understand] the importance

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80 Fassinger, above n 54, 94. The implication is that the percentage of marks awarded for participation that count towards a student’s final grade must not be too low.

81 Rust, above n 40, 147, 156.

82 Ibid 147. See also Diana Tribe and Anthony Tribe, ‘Assessing Law Students: Lecturers’ Attitudes and Practices’ (1988) 13(3) *Assessment & Evaluation in Higher Education* 195, 205.

83 Benson R Snyder, *The Hidden Curriculum* (MIT Press, 1973).

84 John C Bean and Dean Peterson, ‘Grading Classroom Participation’ (1998) 74 *New Directions for Teaching and Learning* 33, 33.

85 Maureen F Fitzgerald, ‘Rite of Passage: The Impact of Teaching Methods on First Year Law Students’ (2008) 42(1) *Law Teacher* 60, 78.

of what they are being required to do'.<sup>86</sup> This means assessment structures must be mapped comprehensively against the stated learning outcomes of the course or program in such a way that students can see unambiguously how one relates to the other.<sup>87</sup> Consequently, the choice (and weighting) of assessment tasks is central to enabling students to identify the aspects of the curriculum to which they should most apply themselves, and to developing a sense of what knowledge, skills and attributes are valued both as students and as graduates in professional life.

However, it is just as important that the proportion of the overall grade allocated to ACP not be so great as to tip the balance of emphasis from formative to summative assessment in the minds of students. The correct percentage would be determined by the cultural and learning environments of the course.<sup>88</sup>

## D Learning Outcomes and Graduate Attributes

In addition to disciplinary knowledge, graduate attributes and learning outcomes often describe broader professional values, communication skills and group skills. In the discipline of law, these include values such as ethical dispositions, respect for the rule of law, a sense of justice, and a capacity to describe legal concepts to non-lawyers.<sup>89</sup> While these attributes can to some extent be captured in written work, fundamentally these attributes are developed through dialogue and discussion.

### 1 Professional Communication Skills

In recent years there has been a greater focus on teaching professional skills. For law students these skills have been described as 'what lawyers need to be able to do', as opposed to simply teaching students 'what lawyers need to know'.<sup>90</sup> The latter was characteristic of the traditional law school model, which was seen to produce graduates who, while technically competent, may lack generic or 'employability' skills, such as communication and teamwork, which

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86 Rust, above n 40, 150.

87 Richard Johnstone, 'Whole-of-Curriculum Design in Law' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 2011) 1–2; Sally Kift, '21<sup>st</sup> Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law' (2008) 18(1) *Legal Education Review* 1, 16–20.

88 The experience at UNSW Law suggests 10–20 per cent of the final grade is appropriate, an approach supported by respondents to the 2012 student survey (46 per cent of respondents preferred a final mark of 10 per cent, 30.4 per cent preferred a mark of 20 per cent, 12 per cent would have liked no grading of ACP, and 11 per cent preferred a final mark of 5 per cent): Law School Assessment Survey, above n 20).

89 See Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement December 2010' (Australian Learning and Teaching Council, 2011) <<http://www.cald.asn.au/assets/lists/Resources/KiftetalLTASStandardsStatement2010%20TLOs%20LLB.pdf>>.

90 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 126 [2.21].

employers have been shown to value.<sup>91</sup> As Susan and Robert Hayes argue, '[o]ral expression and the ability to present and develop an argument under pressure are salient aspects of a lawyer's role, and encouraging the development of these skills during a law course is one of the law teacher's important functions'.<sup>92</sup> Indeed, the agreed Australian minimum learning outcomes for law, the Threshold Learning Outcomes ('TLOs'),<sup>93</sup> include communication as a necessary learning outcome for every Bachelor of Laws<sup>94</sup> and Juris Doctor graduate.<sup>95</sup> Similar requirements are emerging across all degrees.<sup>96</sup>

The Australian Law Reform Commission ('ALRC') has suggested adopting a philosophy based on the premise that '[i]n a changing environment, the best preparation that a law school can give its graduates is one which promotes intellectual breadth, agility and curiosity; strong analytical and communication skills; and a (moral/ethical) sense of the role and purpose of lawyers in society'.<sup>97</sup> As Sally Kift notes:

The push for higher education institutions to play their part in the development of students' employability skills in a liberal educational continuum of lifelong learning is not only relentless ... but is also indisputably valid in terms of defensible pedagogy (for example, by embracing active versus passive learning, harnessing authenticity, and in its accommodation of diverse learning styles). Effective integration of skills and attitudes into learning and teaching design delivers higher quality learning outcomes for students (by explicitly equipping them with the intellectual rigour to use their technical knowledge to do what the modern workplace demands of them). It further secures a robust foundation for future careers and citizenship in the knowledge economy, where graduates will be

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- 91 Elisabeth Peden and Joellen Riley, 'Law Graduates' Skills – A Pilot Study into Employers' Perspectives' (2005) 15 *Legal Education Review* 87, 119. That study demonstrated employers seek to recruit graduates who are 'ethical' and are able to 'think independently and work co-operatively', in addition to having skills in navigating cases and legislation and being able to communicate that knowledge through written and oral advice. They found '[a]ll organizations rated generic skills as of overall higher importance than legal skills' and concluded that 'it is clear that generic skills are valued by employers, even more perhaps than purely legal skills': *ibid* 116, 119. See also Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration?' (2000) 11 *Legal Education Review* 207, 207.
- 92 Susan L Hayes and R A Hayes, 'Towards Objective Assessment of Class Participation' (1972–73) 12 *Journal of the Society of Public Teachers of Law* 323, 323.
- 93 These TLOs were developed through an Australian Learning and Teaching Council project on Learning and Teaching Academic Standards and have been endorsed by the Council of Australian Law Deans: Kift, Israel and Field, above n 89.
- 94 This requirement is contained in TLO 5: Communication and Collaboration: *ibid* 20.
- 95 JD TLO Sub-Committee of the Associate Deans' Law Network, *Juris Doctor Threshold Learning Outcomes* (Council of Australian Law Deans, 2012) 4 <[http://disciplinestandards.pbworks.com/w/file/attach/57628366/JD%20TLOs%20\(March%202012\).pdf](http://disciplinestandards.pbworks.com/w/file/attach/57628366/JD%20TLOs%20(March%202012).pdf)>.
- 96 For example, the Australian Qualifications Framework requires all Bachelor degree graduates to have 'communication skills to present a clear, coherent and independent exposition of knowledge and ideas'. At the Graduate Diploma level, that requirement is 'communication skills to transfer complex knowledge and ideas to a variety of audiences', and at the Masters level 'communication and technical research skills to justify and interpret theoretical propositions, methodologies, conclusions and professional decisions to specialist and non-specialist audiences': Australian Qualifications Framework Council, *Australian Qualifications Framework* (2<sup>nd</sup> ed, 2013) 9–10, 11–17.
- 97 David Weisbrot, 'From the Dean's Desk' (1994) 3(1) *Sydney Law School Reports* 1, cited in Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 142 [2.89]. Note Recommendation 2 at 142 which reflects this philosophy.

continually challenged to learn and engage with new ideas that extend beyond the content of their university courses.<sup>98</sup>

Due to its interactive nature, ACP is well suited to developing students' oral expression and communication skills, and verbal agility through defending and explaining their positions.<sup>99</sup> Small group work can also help to build these skills, as can formal presentations. But where group work is primarily a private conversation, and presentations are often pre-prepared rhetoric, class participation sits between these extremes, offering scope for short unstructured dialogues or partially prepared contributions. It can build skills of flexibility in thought, the ability to listen and absorb alternative perspectives and the ability to communicate with respect whilst disagreeing.<sup>100</sup> The flexibility of class participation allows for a range of contributions across a semester, without the need to necessarily assess those contributions atomistically. Rather than needing to construct additional communication skills-related assessments, ACP can enable a seamless integration of communication skills development into the teaching and learning of content and other skills.<sup>101</sup>

## 2 *ACP and Professional and Ethical Values*

Beyond the ability to develop communication skills, ACP is also well suited to developing students' understanding of professional values and ethics. This is an increasingly important aspect of legal education and is recognised as such in the TLOs for the Bachelor of Laws. In addition to having knowledge of 'the principles and values of justice and of ethical practice in lawyers' roles', under TLO 2: Ethics and Professional Responsibility, graduates are also expected to be able to demonstrate:

- (a) an understanding of approaches to ethical decision-making,
- (b) an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts,
- (c) an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community, and
- (d) a developing ability to exercise professional judgement.<sup>102</sup>

Similar higher order requirements are included in the TLOs for the Juris Doctor degree.<sup>103</sup> While the attainment of these abilities will be a substantial

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98 Kift, '21st Century Climate for Change', above n 87, 76.

99 Stephanie M Wildman, 'The Classroom Climate: Encouraging Student Involvement' (1988-90) 4 *Berkeley Women's Law Journal* 326, 327. For Wildman, the implication for students is to get involved in class participation sooner rather than later. Her article provides some useful practical tips for how students and teachers can improve participation.

100 James E Heyman and John J Sailors, 'Peer Assessment of Class Participation: Applying Peer Nomination to Overcome Rating Inflation' (2011) 36(5) *Assessment & Evaluation in Higher Education* 605, 605.

101 The development of these skills can be highlighted in particular courses by including them as specific criteria in final grades. They can be gradually introduced through a degree, increasing in complexity as students gain competency.

102 See Kift, Israel and Field, above n 89, 10.

103 JD TLO Sub-Committee of the Associate Deans' Law Network, above n 95.

focus of courses dealing with legal ethics and the legal profession, the authenticity of those responsibilities and values will be reinforced by their relevance to other courses in the degree program.

ACP provides the opportunity for students to articulate their own perspectives on legal issues and to receive feedback from peers and teachers on where those perspectives sit in a professional setting. Teachers and students can prompt each other to think more broadly about the social implications of particular legal positions and, at times, consider alternative and opposing perspectives.

As Sullivan et al note in relation to teaching in their influential work, *Educating Lawyers*:

Although some people believe that law school cannot affect students' values or ethical perspectives, in our view law school cannot *help* but affect them. For better or worse, the law school years constitute a powerful moral apprenticeship, whether or not this is intentional. ... In law school, students learn from both what is said and what is left unsaid. There is a message in what the faculty [teachers] address and what they do not. ... This message shapes students' habits of mind, with important long-term effects on how they approach their work. ... [W]hen faculty discuss ethical-social issues routinely in courses, clinics, and other settings, they sensitize students to the moral dimensions of legal cases.<sup>104</sup>

These arguments are even stronger when, in the context of a supportive ACP environment, the issues are raised by students themselves. ACP has the potential to facilitate efficient development of these professional values and related graduate attributes in a way that is not artificial or an assessment by proxy of students' values. The expression of perspectives and values orally rather than in writing easily permits elaboration or refinement of positions in light of feedback. The continuous nature of the assessment and the peer-to-peer aspect of student discussion in class also minimises the possibility that a student maintains an attitude or approach that is not genuinely their own and, if necessary, can provide significant scope for feedback on unprofessional or unethical attitudes.

### **3 Assessment Integrity and Support Advantages**

ACP can also assist teachers with their supervisory roles. One advantage of ongoing class participation is the effect it can have on levels of plagiarism. Clearly, ACP is a form of assessment that cannot be plagiarised. Any assistance a student seeks to obtain outside of class to assist with class participation is likely to be a positive addition to their learning experience. Just as importantly, ACP can help to build bonds between staff and students leading to higher levels of trust and respect. This could act as both a disincentive for students to choose to plagiarise, and also an incentive for students to approach a teacher for assistance with learning difficulties.

From a pastoral perspective, teachers who engage with students in class will more likely be alerted to students who are struggling with the course. This then

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104 William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) 139–40 (emphasis in original).

permits either intervention prior to assessment crisis points arising, or the making of targeted investigations into written assessments that seem inconsistent with the student's knowledge and skills demonstrated in the classroom.

#### IV CREATING AN OPTIMAL SOCIO-EMOTIONAL CLIMATE FOR ACP

There are a number of potential obstacles to class discussion that may, if left unaddressed, detract from the learning benefits articulated above. These potential obstacles can be described as both instructional, relating to the techniques a law teacher uses to facilitate class discussion and the assessment and grading methods adopted,<sup>105</sup> and socio-emotional, which describes a law teacher's influence on the learning environment through the 'emotional milieu' created by the quality of their interactions with students.<sup>106</sup> These elements are linked in that the instructional approach adopted by the teacher strongly influences the socio-emotional climate created. In describing the socio-emotional climate, there are two main facets: first, law students' emotional experiences of ACP, including the anxiety experienced by some students as a result of mandatory participation assessment regimes; and secondly, the related issue of law teachers' interpersonal styles and rapport with their students, and the impact this has on both emotional and learning outcomes for students.

One of the issues associated with ACP arises when law students feel anxious about speaking in front of the teacher and their peers, an anxiety which may stem from a variety of personal, cultural and class dynamic-related factors. It should be noted that a certain amount of nervousness or anxiety before speaking in public is a common experience for many people; this is not, in itself, problematic, especially as anecdotal evidence from students suggests that repeated practice at speaking in public commonly ameliorates the intensity of these symptoms.<sup>107</sup> However, it is increasingly acknowledged that Australian law students, like their American counterparts,<sup>108</sup> experience disproportionately high levels of stress, depression and anxiety compared to their age matched peers at university and in the broader community.<sup>109</sup> It is possible that the study of law attracts students

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105 It is beyond the scope of this article to discuss effective teaching methods in detail. Describing such methods is an aim of the broader research project of which this article forms a part: see above n 7.

106 Levy, 'As a Last Resort', above n 10, 51.

107 See, eg, Wildman, above n 99.

108 See, eg, G Andrew H Benjamin et al, 'The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers' (1986) 11 *American Bar Foundation Research Journal* 225; Matthew M Dammeyer and Narina Nunez, 'Anxiety and Depression Among Law Students: Current Knowledge and Future Directions' (1999) 23 *Law and Human Behavior* 55; Kennon M Sheldon and Lawrence S Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261.

109 Norm Kelk et al, 'Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers' (BMRI Monograph 2009-1, Brain & Mind Research Institute: University of Sydney, January 2009) <<http://www.cald.asn.au/docs/Law%20Report%20Website%20version>

who are predisposed to perfectionism and pessimism, which can be precursors to psychological distress,<sup>110</sup> yet it is noteworthy that American and Australian research suggests that law students have average or above average levels of wellbeing when they commence their degrees, and that elevated symptoms of distress become evident during the first year of law school.<sup>111</sup> This suggests that something occurs at law school that activates or exacerbates some students' pre-existing vulnerabilities to elevated distress levels.<sup>112</sup>

Some commentators have identified 'the way law and its culture are taught and ... the isolated, competitive environment that can exist at law school' as potential contributing factors to law students' high levels of distress.<sup>113</sup> In American legal education literature, the stress and humiliation experienced by some law students as a result of the Socratic method, whereby students, who may be cold-called, are repeatedly questioned about legal issues and reasoning and their application to hypothetical fact scenarios,<sup>114</sup> has been pinpointed as contributing to heightened distress levels.<sup>115</sup> In Australian legal education, the pure Socratic method is rarely used, yet some law teachers employ a pseudo-Socratic method, which adopts some elements of the pure approach. Thus, whilst the criticisms of the pure Socratic method are not directly applicable to the Australian system, some of the factors identified in the American literature as contributing to students' distress in these types of law class discussions may nonetheless be relevant. This American research shows that law students with introverted personality types,<sup>116</sup> women,<sup>117</sup> and students from non-English

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%204%20May%2009.pdf>; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149; Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 21; Anthony Lester, Lloyd England and Natalia Antolak-Saper, 'Health and Wellbeing in the First Year: The Law School Experience' (2011) 36 *Alternative Law Journal* 47; Catherine M Leahy et al, 'Distress Levels and Self-Reported Treatment Rates for Medicine, Law, Psychology and Mechanical Engineering Tertiary Students: Cross-Sectional Study' (2010) 44 *Australian and New Zealand Journal of Psychiatry* 608; Wendy Larcombe et al, 'Does an Improved Experience of Law School Protect Students Against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students' (2013) forthcoming *Sydney Law Review* (copy on file with author) 35 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2147547](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147547)>.

110 Nickolas James and Rachael Field, *The New Lawyer* (John Wiley & Sons, 2012) 348.

111 Benjamin et al, above n 109, 240; Sheldon and Krieger, above n 108; Townes O'Brien, Tang and Hall, above n 109, 159–60; Lester, England and Antolak-Saper, above n 109, 48; Alan Reifman, Daniel N McIntosh and Phoebe C Ellsworth, 'Depression and Affect Among Law Students During Law School: A Longitudinal Study' (2001) 2(1) *Journal of Emotional Abuse* 93, 102.

112 Anna Huggins, 'Autonomy Supportive Curriculum Design: A Salient Factor in Promoting Law Students' Wellbeing' (2012) 35 *University of New South Wales Law Journal* 683, 690.

113 James and Field, above n 110, 348.

114 Michael Hunter Schwartz, *Expert Learning for Law Students* (Carolina Academic Press, 2<sup>nd</sup> ed, 2008) 16–17.

115 For an overview of this literature, see, eg, Robert Schuwerk, 'The Law Professor as Fiduciary: What Duties Do We Owe to Our Students?' (2004) 45 *South Texas Law Review* 753, 771–2; Levy, 'As a Last Resort', above n 10, 54.

116 Susan Daicoff, *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* (American Psychological Association, 2004) 32–6.

speaking and other minority backgrounds<sup>118</sup> may be less likely to participate in class discussions, and may find such interactions stressful when they do engage. Whatever the reasons, if students are overwhelmed by anxiety about their ACP performance, their ability to learn and retain information will be undermined.

It is likely that the socio-emotional climate of law classes will either contribute to or mitigate law students' anxiety about contributing to class discussions. If so, the way in which a law teacher facilitates ACP will be critical to accommodating students with different characteristics and preferences, and creating a safe learning environment where all students can experience deep learning. As Hess and Friedland note, 'teachers need to establish a social environment conducive to discussion and rapport with their students to facilitate student participation'.<sup>119</sup> Simple strategies to achieve this include learning students' names, encouraging student questions and expression of students' personal viewpoints,<sup>120</sup> and seeking student feedback and input into aspects of their course experience.<sup>121</sup> Creating a 'somewhat democratic' dynamic within classes, where the teacher is responsible for maintaining appropriate structure and discipline, but avoids an authoritarian approach, is supportive of eliciting student contributions.<sup>122</sup> Similarly, explaining the rationale behind adopting ACP as a learning strategy,<sup>123</sup> and acknowledging students' perspectives and feelings, including expressions of negative effect, can support student autonomy and build trust and connection between teachers and students.<sup>124</sup> Being cognisant of the likelihood that some students may experience anxiety as a result of participating in class discussions, teachers can be mindful not to exacerbate any potential embarrassment experienced by a student who says something inaccurate, and seek to validate positive aspects of students' responses where possible.<sup>125</sup> Additionally, making some allowances for students who for various reasons do not feel comfortable engaging in extemporaneous class discussions, such as

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117 For an overview, see Jennifer L Rosato, 'The Socratic Method and Women Law Students: Humanize, Don't Feminize' (1997) 7 *Southern California Review of Law and Women's Studies* 37, 37–8.

118 For an overview, see Elizabeth Mertz, *The Language of Law School: Learning to 'Think Like a Lawyer'* (Oxford University Press, 2007) 178–85.

119 Gerald F Hess and Stephen Friedland, *Techniques for Teaching Law* (1999) 62, quoted in Stuckey et al above n 10, 230.

120 Ibid.

121 Huggins, above n 112, 706–8.

122 Lynn Daggett, 'Using Discussion as a Teaching Method in Law School Classes' in *The Science and Art of Law Teaching: Conference Materials* (1995) 14–16, quoted in Stuckey et al, above n 10, 229.

123 Stuckey et al, above n 10, 218–9.

124 On the importance of providing meaningful rationales and acknowledging students' perspectives and feelings to support law students' autonomy, see generally Huggins, above n 112, 705–8.

125 Lynn Daggett, 'Using Discussion as a Teaching Method in Law School Classes' in *The Science and Art of Law Teaching: Conference Materials* (1995) 14–16, quoted in Stuckey et al, above n 10, 229. One strategy is that, if a student is called upon to answer a question and they appear flustered or unable to answer that question, the teacher can simply call upon another student or ask for another volunteer in order to minimise the public embarrassment and/or humiliation experienced by the student: Stuckey et al, above n 10, 219.

creating online discussion forums, may also be supportive of law students' divergent backgrounds and preferences.<sup>126</sup>

It is also important to recognise that in class discussions the teacher is only one of the discussants – although clearly the most influential. The style that the teacher adopts in eliciting discussion and responding to student contributions will set the tone for the class as a whole. Teachers' interventions should thus be reflective of the style that they wish to encourage in the class. Significantly, law teachers can learn to become more supportive and warm in their classroom interactions with students, and more self-reflective regarding the behaviours to employ and encourage, as well as the behaviours to avoid, in order to foster an optimal socio-emotional climate for learning.<sup>127</sup> Such approaches, when combined with a confident and enthusiastic interpersonal style,<sup>128</sup> facilitate the creation of a positive and supportive learning environment where students have an optimal opportunity to experience the potential benefits of ACP. It is important to note that this should not be confused with lowering the standards expected of students; indeed, research suggests that law students appreciate and respect teachers who set high standards for them.<sup>129</sup> As well as being supportive of students' wellbeing, the creation of a positive and supportive socio-emotional climate in law school classrooms may increase students' intrinsic motivation, self-efficacy and academic achievement.<sup>130</sup> This reinforces the argument that whilst the instructional techniques for facilitating class participation are important, the way a law teacher engages and interacts with students is vital for optimising the potential emotional and learning outcomes associated with this pedagogical approach.

Facilitating an informal and respectful class participation environment also increases teacher vulnerability and openness. Teachers must leave the mindset of a lecturing dais and, to the extent possible, become a peer to the students. This opens teachers up to having their views and values questioned by students. Successful ACP thus requires the teacher to be reflective about their own values and ideologies and to recognise where they wish to take particular discussions and the possibly opposing perspectives of some students.<sup>131</sup> While a teacher has a significant role as guide and instructor, ACP encourages teachers to step back and reassess their own positions. Encouraging discussion can often lead to fresh insights for the teacher and new ways of seeing class materials. This means that ACP can amount to a learning activity for the teacher as well as the student. It

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126 Peggy Cooper Davis and Elizabeth Ehrenfest Steinglass, 'A Dialogue about Socratic Teaching' (1997) 23 *New York University Review of Law and Social Change* 249, 275.

127 Levy, 'As a Last Resort', above n 10, 55, 65, 86. See also Filippa Marullo Anzalone, 'It All Begins with You: Improving Law School Learning Through Professional Self-Awareness and Critical Reflection' (2001) 24 *Hamline Law Review* 325.

128 Michael Hunter Schwartz, Sophie Sparrow and Gerald F Hess, *Teaching Law by Design: Engaging Students from the Syllabus to the Final Exam* (Carolina Academic Press, 2009) 110.

129 Levy, 'As a Last Resort', above n 10, 74–7.

130 Ibid 60; Gerald F Hess, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52 *Journal of Legal Education* 75, 99.

131 See Schuwerk, above n 115.

can also encourage teachers to themselves model the behaviours and graduate qualities the curriculum expects of students.

## VI CONCLUSION

Well-designed assessment can do more than just drive learning. It can act as a catalyst, encouraging students towards deeper learning and broader understanding. As we have argued in this article, ACP is uniquely suited to achieve both these aims. In contrast to most traditional forms of assessment in legal education, ACP is based on social interaction between peers and the teacher within the classroom. Reinforcing a constructivist understanding of learning, ACP provides an incentive for students to be actively involved in the construction of knowledge in the classroom, making what they learn part of their personal experience of law school. Reflecting core tenets of social learning theory, the social nature of the learning experience contributes to students developing more sophisticated and nuanced understandings of issues, and can provide benefits not only to those engaged in the dialogue, but also to those listening.

Due to its nature as a form of continuous assessment, ACP can motivate students inclined towards surface learning to move to a deeper approach where preparation for class and engagement in class become integrated aspects of their academic achievement. Further, students' continued involvement is a form of situated learning, through which they learn to perceive quality in both their own and others' oral analysis via peer-mediated critique. The constant feedback loop that student-to-student critique and praise – facilitated by the teacher – provides an integrated form of authentic formative assessment, and a form of feedback that can be further explained, questioned and acted upon immediately.

As a form of summative assessment, the underlying intention of ACP is to assess participation for engagement, rather than being limited to assessing content mastery. Students can be rewarded for the extent to which they are willing to grapple with broader issues, rather than merely demonstrating their understanding of doctrinal matter. Setting the summative quantum of ACP as a meaningful proportion of a final grade can provide significant motivation for continued engagement throughout a semester, motivation reinforced by the student's own sense of achievement in contributing to the learning generated by student-led class activity. This summative element of ACP not only provides motivation but also signals that engagement with broader issues, critical thinking, and social and communication skills are valued aspects of learning at law school, as well as being relevant to students' future careers.

ACP builds the fundamental legal skills of oral communication, verbal agility and respect for diverse opinions. It can also be a vehicle for encouraging students to consider the broader social aspects and implications of the law, and for developing students' ethical dispositions and professional judgment. While such skills may deserve development in dedicated courses, reinforcement of these skills through reflection on them using ACP in other courses can accentuate their

importance, both personally and professionally, to students. ACP can provide significant support for claims of demonstrated program learning outcomes in these areas, which are now part of the discipline-wide TLOs for both the Bachelor of Laws and Juris Doctor degrees. It is also a form of assessment that is plagiarism-proof and can facilitate early identification of students in difficulty.

In order for these benefits of ACP to be realised, teachers must be able to create a supportive learning environment where students feel able to contribute, to explore different positions and perspectives, and to be a part of the learning experience, rather than perceiving that they are excluded from it. Overcoming the barriers to such an experience may not be a simple task for some students, and teachers should be aware of the ways in which teacher and student responses to contributions can increase or decrease anxiety levels. Teachers should strive to use techniques that build rapport with students and humanise the teacher, so that the classroom is somewhat democratic and incorporates a degree of flexibility to cater for students' diverse preferences. Fundamentally, the style of the teacher is likely to set the tone for the class as a whole, and thus effective ACP requires a reflective approach from the teacher – both to be open to learning from students, and to themselves model the behaviours expected of students.

In light of the significant advantages that ACP can bring to the learning experience and outcomes of law students, there are strong arguments for retaining and more deeply embedding ACP as a linchpin of Australian legal education practices. To support this, additional empirical research into ACP at both individual law schools and comparatively across institutions would be beneficial to further illuminate how ACP occurs in practice, and what teaching styles and assessment approaches<sup>132</sup> are most supportive of students' actual and perceived learning and emotional outcomes.

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132 Starting points for this discussion in the legal education context include Armstrong and Boud, above n 8; Diane Dancer and Patty Kamvounias, 'Student Involvement in Assessment: A Project Designed to Assess Class Participation Fairly and Reliably' (2005) 30 *Assessment & Evaluation in Higher Education* 445. For a review of studies in non-law contexts see Kelly A Rocca 'Student Participation in the College Classroom: An Extended Multidisciplinary Literature Review' (2010) 59 *Communication Education* 185.