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Learning the Law by Avoiding It in the Process: And Learning From the Students What They Don't Get in Law School

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"Learning the Law by Avoiding it in the Process" appears to be an oxymoron. At best it sounds like something devised in a cellar by wild-eyed law students.

And it was.[1] But it is also a seminar that is in its seventh year at the University of Minnesota Law School. It has been oversubscribed by as much as 300 percent. Students have described the course as "*A must*," "*A course I will remember long after I have forgotten most of the substantive courses*," and "*Tremendously helpful, it should be required.*" A student headed for Wall Street and no shrinking violet when finding problems with the course, said "Exposure to this kind of thinking moved me two years ahead as a lawyer."

The course's purpose is to help students learn that they can resolve what the law should be, and usually is, just by "thinking it through." The technique is simple: focus on the facts of the case and remember that the law is only answers to human problems—and that those answers come from logic, instinct, judgment, experience, imagination, impulse, anger, common sense, and every other human mental activity. From exercising "this kind of thinking" before resorting to the books, the students understand the law and themselves better

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1. Three students, including Cox, who were married with children, had full-time jobs and improvidently were involved in substantial law-school activities such as the law review, were seriously short of time for studying. By chance they resorted to periodic drills with the so-called Ballentine's Law Quizzer (Henry Winthrop Ballantine and Warren Abner Seavey, Ballentine's Problems in Law for Law School and Bar Examination Review (4th ed., St. Paul, 1957)) in someone's basement where one would read the question, all three would attempt to answer it, the reader would read the answer, and the three would then discuss that. The system worked, and in an early introduction to injustice, they did well in school.

   Cox never forgot the process and after only 40 years thought it might be suitable for a law-school class.

and are often provoked to look beyond what the cases say in searching for answers. They look to basic human thought processes and from that figure out the answers to human problems in human terms.

The course is not offered as a form of jurisprudence or substantive law, but as a technique applicable to every aspect of understanding and putting the law to use. And it is one that is missing in law school.

The course fulfills its purpose. And thanks to some wholly unintended consequences that turn out to be inevitable, it goes further.[2]

How It Works—In Spite of Itself

The class is limited to sixteen students, but because of fallaways from the waiting list—and because of those for whom the first class had been *more* than enough—classes do not exceed twelve. The course runs for seven two-hour sessions. Students sit on three sides of a square table, an instructor on the fourth. Students are given one-page summaries of facts taken from lawsuits. The summaries are from cases at every level, trial, appellate, and last resort. The facts in the summaries are loaded with as many legal issues and areas of law as possible without identifying them. A sample problem follows.

> Operator v. Commissioner
>
> Human services notified Operator by mail that her family-care license would be revoked in fifteen days for a number of claimed violations. The notice was received. The notice also advised Operator that to contest the revocation she had to appeal in writing by certified mail received by the Commissioner ten calendar days after Operator's receipt of the notice. All of these provisions were statutory.
>
> Operator sent her appeal by certified mail six days after receiving the Commissioner's notice. Thanks to the post-office department, it was not delivered to the Commissioner for six days, two days past the ten-day limit. The Commissioner rejected it. Six months later Operator went to court. Two months after the late delivery of the appeal, the legislature had amended the statute to provide that to be timely an appeal had to be postmarked within ten days of receipt of the notice of revocation.[3]
>
> Following the facts are two questions:
>
> 1. What *should* the law be?
> 2. Why?

Simple? Listen to a dozen open-minded law students go after the answer by examining the facts almost one word at a time, free of precedent, legal

2. Student statements about the course are in italics and are from weekly journals and essays submitted by students at the end of the course. Some statements are set out separately, others are grouped. In varying degrees, all are representative of similar statements by other students.

3. Based on Ostergaard v. Commissioner, 2002 WL 31840624 (Minn. App. Dec. 6, 2002).

doctrine, fear of professorial scorn, a bad grade, or partially suppressed student smirks.

The class discussions are free-for-alls under a semblance of control. Someone speaks, someone follows. There is no structure beyond speaking to *answer the question*, with reasons good and bad and hopefully not too long or short. The students talk to each other. When things are going best, the instructor might as well be in the hall. When exchanges get hung up, after seemingly endless painful silence the instructor gets involved enough to get things moving. On rare instances there may be reason to exhort the class to *think*. Ideas about what established law may be are out-of-bounds.[4] Keeping out of the discussions requires determination on the part of the instructor.

Directed at answering the questions, nothing else, the discussions are not to be recitations directed at the instructor or trips through the tulips of philosophy. Outpourings of imaginative–and unimaginable–ideas are offered. Ideas either will or will not contribute to answering the question by getting things started or building on what has gone before. As ideas are offered and then bent and whittled, to the extent they have value they create a semblance of organization and direct the discussion toward answering the question.

The class survives, and prospers, on three inviolable rules:

1. Absolute openness;
2. There is no such thing as a dumb idea; and
3. Only one person speaks at a time.

With the constant application of these rules, the process carries itself.

After the students go as far as they can in reaching an answer, and agreeing on a consensus to the extent possible, the instructor tells them the court's decision, its reasons, and the citation of the case from which the facts were taken. The students then compare their thinking to the court's. The instructor participates as appropriate, and that should be very little here as elsewhere in the class.

The students read the decisions before the next class where they are discussed with the instructor and then compared to their conclusions. The initial discussions–those in reaching the answer–are not carried over to the next class session.

For the first class, students read the first and fourth chapters of John Noonan's *Persons and Masks of the Law*.[5] Although not written to do so, the

4. Inevitably, terms like "negligence" and "contract" and other legal concepts get into the discussions but to the extent possible they are limited and used in the ordinary meaning of the words. The mischief that results from letting the law into the discussions is a major problem.

5. John T. Noonan, Jr., Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks (Berkeley, 2002). Noonan has served as a judge on the Ninth Circuit Court of Appeals since his appointment in 1986 by Ronald Reagan. Prior to this appointment Noonan taught at Notre Dame and the University of California-Berkeley. Noonan's published scholarship has focused on the intersections of government policy and religion as well as several publications on the history of moral thought. Notre Dame Center

chapters foster the idea that a legal matter can be thought through *before* reading cases. The readings reveal how so many decisions, presumably arrived at to resolve all varieties of human problems, disregard and consciously avoid the details about the humans involved.

Chapter 1 is heavy going. It is beyond brief summary so it is described in a sentence: While laws are for people, from the workings of the law little is to be learned about who the people really are, how they are affected, and what effect that information may have. Chapter 4, which deals with the extensive unreported facts of the widely known *Palsgraf* case, discusses the many unacknowledged factors that *might* have influenced the New York Court of Appeals decision, such as the class disparities between the justices and Ms. Palsgraf, and Justice Cardozo's ambitions to influence the content of the First Restatement of Torts.[6] Noonan discusses considerations of justice that were absent from the court's decision, and were rejected by reducing *Palsgraf* to the issue of proximate cause. Cardozo sidestepped the question of whether a highly profitable railroad should be required to compensate a passenger for an injury resulting from the acts of its employees as a cost of doing business, regardless of the injury's foreseeability. From this reading students get a look at the many factors outside the law that may, and arguably do *or should*, affect a decision.[7]

Though problem solving starts with the second class, a reasonably comfortable adjustment does not set in until the third or fourth or even the fifth class. By then the students see that the process works, that they can reach answers by free-for-all thinking, and that they can throw out ideas without wincing. The best thought is the best authority.

> *Hearing the ideas of others caused us to rethink our own ideas and accept them as flawed. We learned to accept and use contrary views for our own purposes.*
>
> *I was impressed by how we were able to build on so many perspectives.*

Two weeks after completing the course, the students submit weekly journals and a written report of at least five pages. The student submissions reflect seven weeks of saying exactly what comes to mind and the fearlessness of pass-fail grading. Though less numerous than praise for the course, criticisms also are thoughtful and in plain English.

Benefits

It was expected the course would teach that legal questions can be answered without reference to law and would produce unique problems in handling the class. We were almost flabbergasted by the benefits students found simply

for Ethics and Culture, John T. Noonan, Jr., available at <http://www.nd.edu/~ndethics/about/noonan.shtml> (last visited Dec. 9, 2008).

6. Noonan, Persons and Masks of the Law, *supra* note 4, at 149-50.

7. See, e.g., Judith Wegner, Chapter 1: "Law is Gray": "Thinking Like a Lawyer" *in* the Face of Uncertainty 31 (2003) (unpublished manuscript, on file with Roy Stuckey).

from the unrestricted exchanging of ideas on the way to answering the two questions–"what" and "why"–without the guided tour of a court's decision or an instructor's views. Fortunately, the problems were far fewer.

Year-in and year-out, while the answers are as varied as the students, they are surprisingly consistent as to benefits achieved, whether intended or not. Trying to separate intended from fortuitous would be of little value. In loose categories, the benefits are as follows.

1. In Reaching Answers Entirely From Class Discussion Students Develop Quick Appreciation For Others' Ideas And How To Use Them. They analyze and use the ideas of others rather than resist them. They learn the benefits of absorbing others' ideas for their own purposes, and to weigh the ideas of others in reaching a goal, *what is right*, rather than first reacting to a contrary idea through an adversarial lens. They see how much can be learned from listening receptively to fellow students. They learn to change their minds, to accept and work with better ideas to the end of answering the question.

> *Even dealing with wrong issues was helpful. It helped us to see all sides.*
>
> *I learned to keep my mind open during the discussions. It compels us to change our minds.*
>
> *By taking a step back from strictly legal analysis, it can become clear what the best answer is.*

2. The Discussions Provide Reasons Beyond Those Stated In Court Decisions. The ideas are not in reaction to an opinion but are developed originally on the way to reaching the answer. The class discussion is likely to hit the problem from all sides, not the usual two, and can illustrate that there may be more to resolving a problem than appears in a court's decision.

> *Arguments in depth and with real thought before reading a decision will provide insights. We learn how facts can so influence a court. I will be better for being able to decide using considerations outside the law.*

The discussions may express ideas differently and more effectively than do published arguments. And that may include ideas presented to but omitted by the court. It can illustrate how the omission of details that were involved in decisions can change the outcome. And after answering a legal question by class discussion, reading the case from which the facts were taken is done more effectively. Unrecorded thoughts that were used or implied but did not appear in the reported decision may be helpful in a new setting. Considerations dealt with but not appearing in the opinion may sustain or weaken the opinion and be valuable in considering it as a precedent, whether for or against.

> *If you first determine what the law should be, you'll be better able to see where a court goes with its decision, particularly if it conflicts with your own view.*
>
> *The best thing about the course was talking about what the courts should have done.*

3. The Best Consideration of a Problem Starts With the Help of Open-minded Ignorance. The students accept that a court's decision states the law but they do not reflexively accept it as the best possible answer. First answering questions in terms of "what is right" inclines students to find ways around, over, or under the law.

> *I learned that the first step to a full understanding is to start blind. To best solve a problem, first think it through devoid of legal reasons. Instead of going along with a court's decision, I now actively find weak spots in the court's reasoning.*

While the students start without a court's guidance, more importantly they start without the intimidation of what a court said. The good or bad aspects of a court decision do not have the head start of imprinting a point of view without immediate contrary thinking, no matter how fallacious that contrary thinking may prove to be. The discussions provide a constant assortment of points of view to sustain or minimize an opinion. Reasoning is less likely to be accepted just because it is in a decision that states the law for a particular case.

The students comfortably express such views as courts fiddle with the facts to justify decisions and at times focus more on precedent and consequences in cases *that may never happen* than in doing justice to the matter at hand. Whatever may be said in the course of United States Supreme Court confirmation hearings about the sanctity of precedent, the students learn that precedent is only a way station until something *irresistibly more attractive to the majority* comes along.

> *It is a misconception that judges are "bound by precedent." They are only "bound" by the judges sitting above them. Many discussions focused on the way courts form law out of thin air rather than by using the facts of the case.*

4. "Thinking It Through" Shows Students the Extent to Which Their Biases and Emotions Affect Presumably Logical Thinking. This effect was faintly apparent in the discussions answering problems, but the real power of bias became apparent when discussed in the evaluation papers. The realization comes as a surprise; but once realized, the value is not misunderstood or underestimated. Students see that lawyers who at least cannot keep their biases under control, if not in the closet, are deficient advocates.

While second- or third-year law students certainly understand they have biases, apparently they do not understand how biases so color their supposedly logical thinking.

> *It was interesting to see the biases people brought to class and how these come out in their analyses.*
>
> *I was surprised by the consistencies of peoples' slants.*

And it is this perception, along with other things learned, that greatly helps students to accept and understand ideas that otherwise might be rejected summarily.

> *I saw the power and effect of personal bias and the need to try to avoid it.*

An illustration of the human effect on legal analysis and the awareness of that which the course provides is that several students noted the absence of women in one year's class as a loss in a course where individual perspectives are so telling.

5. Other Benefits and Impressions That Are Too Varied To Be Wedged Into Categories.

- It taught me what is almost impossible to learn through legal research on Westlaw or in a law library.
- It put three years of law school in perspective.
- I learned how simple ideas of right and wrong can be used in reaching a decision.
- One of the unique things about the class is that it was both really simple and really complex. Often times we resorted to basic ideas about right and wrong, but crafting these ideas into legal arguments required a lot of ingenuity.
- It is a practical way to learn legal reasoning skills and it challenged us to be critical thinkers.
- Law school involved too much assimilation, too little critical thinking.
- I hope that the result of this is that law students are able and motivated to argue effectively for extension and changes in the law.

Without prodding or direction, and in their own ways, the students absorb the reality that the law is the endless need to answer human problems, and that is done through a mix of logic, experience, indignation, anger, instinct, sixth sense, common sense, some unavoidable nonsense, and all other mental and emotional processes. And these mental and emotional processes, the students discover, are the same ones they use in figuring out what the law should be for the problems they are to solve.

Problems Peculiar to the Course

The course's problems appeared soon enough. And they reflect its difference from regular classes and seminars. But subject to a few simple and almost imperceptible controls, the course virtually carries itself (as it did by the students providing grist for the mill while the authors were figuring out how to put to profit what they had on their hands).

Providing Some Form of Control That Makes the Course a Manageable Free-for-all with a Goal

Without some intervention by the instructor things can drag and time is wasted on trips up dry creeks. Although these excursions provide some value, the scenery is not worth the time. With significant intervention, however, the course implodes into lecture-recitation. Both the authors and the students identified the problem. The answer, after nearly seven years, is only that it is a touchy issue requiring constant attention, like drivers watching the highway.

Certain students who dominate the discussions with the quantity of words rather than the quality of content are present as in any class. Although that problem requires more care in a class that survives on a confident outpouring of ideas, increasing participation by all students soon provides the necessary squelching.

Keeping Legal Doctrines out of the Discussions

The purpose of the course is to identify, if not invent, what the law *should* be. While that usually turns out to be reasonably close to, if not the same as, law expressed in the cases, getting there by individual thought is a very different process than assimilation of written decisions. Along the way an almost endless list of legal concepts such as negligence, mistake, consideration, and causation are employed, although they are expressed as plain-English ideas and not as legal doctrines or legal "building blocks."[8] They are just ideas arising from and used in the discussions, thoughts on the way to "thinking it through." Once some version of established law is in the discussion, however, the well is poisoned. While that can be remedied to some degree and the discussion in doing so can have value, that value is far less than reaching the answer through no more than the exchange of ideas. And an orderly recovery cannot be counted on. What students may silently think the law is probably presents enough of a problem itself. Every class should be preceded by clear admonitions that notions of what the law is are to be checked at the door.

Making Certain That Each Discussion of What the Law Should Be Reaches an Answer

Ensuring that the class reaches an answer helps substantially in keeping the discussions focused. Discussions with an answer reached provide more value, no matter how interesting the ideas were that went nowhere. Learning to reach answers from head, viscera and off the wall, and getting the additional benefits that were initially viewed as unintended consequences, is what the course is to teach.

There always should be some form of vote on the answer to a problem. No matter how inconclusive, it is helpful to the later discussions about the problem. And it tends to force discussions to the important end of *answering the question.* Voting is always intended, but it sometimes suffers the fate of many good intentions: it gets lost.

Developing Productive Statements of Facts

Like the three degrees of porridge, there cannot be too many facts, giving the answer away, or too few, leaving a wasteland to wander on. However, cases with too few facts have created worthwhile discussions started by some student's "What ifs?" The intentional omission of inescapable facts

8. A few more concepts that show up "out of uniform," so to speak: clean hands, fairness, spreading the risk, forseeability, notice, waiver, timely, measure of damages, precedent, and unjust enrichment.

also promotes helpful mental searches of the landscape. A problem for the instructor is tending to stay with a statement of facts that works at the expense of not trying new material.

School's Out, Now What?

The course shows the value of the independent, unrestricted *exchange* of ideas by a group of people about what the law should be. However, whatever the value of the class to law students and whatever unique training that provides, beyond law school most legal matters are not going to get the benefit of group-think. Except for large or unique matters, group-think well may be a waste of money.

With the available help from the "next office" and being constantly aware of the value of off-the-wall, out-the-window thinking, a person doing it alone still achieves something. Just being aware of the value of independent problem-solving can remind a lawyer that unfettered individual thinking is productive.

Surprisingly, while the students believed the course will be of significant value to them as lawyers, not one addressed the problem of how the think-it-through process can be used consistently and effectively after law school, although several students already were using it part-time in clerking jobs. One student started the practice with fellow clerks in doing legal research and found that it was very effective in reaching results. Another, clerking with an appellate court, found that the class's considerations of a problem, with its off-the-wall ideas and thinking unencumbered by what the law is, sounded much like the court's case discussions. Others reported similar experiences.

Conclusions

As two students said in slightly different words,

This may be more than you had in mind.[9]

The course should be offered widely. It well might be required.[10] It provides a thinking process that is applicable to every kind of legal thinking but overlooked in legal teaching. It is surprising that it has been overlooked. Unconsciously, and in varying degrees, it is used constantly. Much of the value of the course may well come from developing a mindful awareness of the method and an intent to use it. To the extent the method is not used in solving a legal problem, the solution has been short-changed.

9. It certainly was.

10. As a required course, the logistics of many small seminars present a problem that probably is more apparent than real. For instance, rather than classes of twelve each, the process might well work better as a class of approximately thirty-five students divided into three groups. Each week one group would work as if it were the only group. The others would observe, basking in the brilliance of their untouched, unspoken and thus probably unscarred ideas. In seven weeks each group would conduct the exercise twice. It would be easy to undertake and could be discontinued with little distraction if it did not work.

From each other, the students learn how to think about the law in ways they might not learn as lawyers for a long time, maybe never. And while each class reflects its own individual composition more than classes that follow an instructor's itinerary, they are surprisingly consistent in their results and how they function.

The students—and it really is the students—have developed a valuable way of learning the law and how to use it. They seem to have much to show about what they need to learn and how to do it. The legal teaching profession should take a hard look at that and, after gulping, consider seriously taking a lesson from the students about what they want to learn and how to teach it.