THE CITY UNIVERSITY OF NEW YORK LAW REVIEW

City University of New York Law Review

Volume 5 | Issue 1

Summer 2002

Teaching Legal Reasoning Skills in Substantive Courses: A Practical View

David Nadvorney
CUNY School of Law

TEACHING LEGAL REASONING SKILLS IN SUBSTANTIVE COURSES: A PRACTICAL VIEW

*David Nadvorney**

Law professors often lament the quality of the work their students produce on essay exams. This seems especially true of faculty who teach in the first year. They express disappointment - and surprise - at their students' final exams: missed issues, incomplete or inaccurate rules, poor use of facts - these are only some of the skills students fail to demonstrate at the level their teachers expected. What happens between the class and the exam, and why are our expectations routinely disappointed?

Much has been made of the connection between teaching and testing, and how important it is to "test what we teach." Long a concern in other disciplines, issues regarding testing have increasingly been of concern to law school professors. Last summer, the Institute for Law School Teaching at Gonzaga University devoted its annual conference to the subject of testing and assessment. This essay is a brief adaptation of a presentation I made at that conference, and will address the issue of tests in law school from a practical perspective. It will examine some of the practices that contribute to students' unexpected (to their teachers, at least) performance on law school exams, and suggest ways to help students learn to do what we want them to. Although the ideas and methods discussed in the article are applicable throughout all three years of law school, they are most relevant and powerful, I believe, in the first-year curriculum.

As an academic support provider, I have had the opportunity to speak with faculty from various schools around the country, who teach the range of law school courses. When the discussion comes around to student performance on exams - as it almost always does - I ask the professor to list the most common exam-writing shortcomings their students demonstrate on final essay exams. The results are what you might expect: students miss issues, state the doctrine incorrectly or incompletely, misapply the rule even when they set it out accurately, ignore relevant facts or rely on unwarranted factual assumptions, write in a disorganized or inefficient

* Director, Irene Diamond Professional Skills Center, City University of New York (CUNY) School of Law. M.A., Columbia University,1979, J.D., CUNY School of Law, 1986, LL.M, Georgetown University Law Center, 1989.

style, fail to analyze arguments on both sides, either ignore or abuse policy, and make unsupported legal conclusions. In addition, professors report that students' exams demonstrate lack of understanding of some basic legal concepts and structures such as relevance, scope of judicial review, differing burdens of proof, and the role of appellate courts.[1]

I then ask the professor to list, from his or her own course syllabus, the topics that the course covers. These results are also for the most part predictable. Torts classes nationwide cover intentional torts, negligence, products liability, etc.; a typical contracts syllabus usually starts with contract formation (although some few start with damages) and goes on to include defenses, parol evidence and third-party beneficiaries. Civil procedure courses cover personal and subject-matter jurisdiction, the Erie Doctrine, venue, etc.

Is there something wrong with this picture? We want our students to learn the legal reasoning skills necessary to develop sound legal argument, yet the message we send them, at least on paper, is that today we're studying homicide, tomorrow theft crimes, next week and for the rest of the semester, doctrine of some other name. Of course, reasoning skills are taught in law school classes. Professors highlight it as they analyze cases and other materials, develop it when they use hypotheticals, and refine it during Socratic dialogue (whether "hard" or "soft"). But it seems as if they hardly ever, except in legal methods or legal process courses, explicitly teach it. As a former reading teacher, I believe this is a critical failing of legal education: case reading is the fundamental skill of first-year law school, the source of understanding much more than black letter law. But the students are intent on finding rules, doctrine, "the law" in cases, and overlook the wealth of information about how the law works contained in the cases. In fact, their course syllabi tell them to look for the law and not much else. It would be great, I thought, if we explicitly taught, say, issue spotting through the regular cases we use in class, and included it as a topic on the syllabus. We could direct the students to pay particular attention to a case for its illustration of the skills we expected them to learn for the final exam.

Based on these observations, I began to think about incorpo-

[1] This list is not exhaustive, I know, and it may make students' work appear generally to be worse than it really is. It is not my intention to do so, but only, within the scope of this piece, to highlight some of the major problem areas that stick in professors' minds about their students' work.

rating some real legal methods objectives into a traditional first-year syllabus. I thought it should be possible to identify particular cases and readings throughout the syllabus that would lend themselves to explicit teaching of one or more of the analysis skills we are trying to teach. Just as the author of the casebook searches out cases that set out a rule of law in a certain way, and the professor constructs the syllabus to particular sections of the casebook, in a particular order, so we could match up some of those choices with skills instruction. I realized that it couldn't intrude too much on the established design of the course, and that it should reflect some logical progression of skills.

I began to look at the readings assigned to first-year students in torts, contracts, and criminal law courses. My idea was to locate places in first-year syllabi where the readings were appropriate vehicles for teaching the skills the professors had mentioned their students were weak in. Those skills would then be incorporated into the syllabus, either by name only or with a short notation. This is a work in progress, easier thought of than done. Here are some initial results. I found a case in a contracts casebook, *Evergreen Amusement Corp. v. Molstead*,[2] involving the "new business rule," that I thought presented a wonderful opportunity to teach (or at least reinforce) the concept of relevance. (The rule provides that in a breach of contract action, new businesses are generally not entitled to damages for lost profits.) The trial court had excluded evidence proffered by the plaintiff regarding the profits of several similar nearby businesses. I sat in the class in which the professor taught the case, and that point was not discussed beyond a short mention. I spoke to the students immediately after class, referred them to the page and line in the case, and asked why the trial court had excluded the evidence. Their answers were fact-based - variations on "the trial court excluded the evidence because a new business isn't comparable to established businesses." They weren't wrong, but they weren't articulating the legal basis for the exclusion.

I used the case in a skills workshop I ran later that week, and had a wonderful, wide-ranging discussion with students about the central role that relevance plays in legal analysis and the relationship between facts and rules. The students had been so caught up in reading the case for the contracts doctrine it provided that they missed other important information the case provided.

I also discovered, however, that the casebooks themselves con-

---

[2] 112 A.2d 901 (Md. 1955).

tribute to the problem. I found *Sunday v. Stratton Corp.*,[3] included in the section of a torts casebook on assumption of the risk. A skier was seriously injured when his ski hit a bush concealed by snow on the novice trail. The trial court had denied the defendant's motion for a directed verdict on the basis of assumption of the risk. The author of the casebook noted that the evidence was that the defendant maintained a very smooth novice trail, and then included relevant portions of the opinion regarding assumption of the risk. What the author omitted, however, was that in its opinion, the Vermont Supreme Court set out and relied on a vast amount of specific, factual evidence that had been adduced at trial regarding the equipment and methods the defendant had dedicated to the maintenance of the novice trail. Reading that, the court's reasoning was crystal clear. With those facts included in the casebook version, this would have been a great case in which to discuss the intricate connection between rules and facts. Without those facts, the students learned something about assumption of the risk, but not much about legal reasoning.

Some professors use handouts of cases not included in the casebook, but useful for teaching particular aspects of the law. An example is *Hymowitz v. Eli Lilly and Co.*,[4] This negligence case was brought by daughters of women who took the drug diethylstilbestrol during their pregnancies, and discusses factual cause in the context of mass torts. The opinion could be severely edited to illustrate simply the application of market share liability. However, the full opinion contains wonderful demonstrations of case synthesis and the use of policy. The New York Court of Appeals traces the development of the doctrine of factual cause through a number of cases, and provides an outstanding example of how to use cases in analyzing both the state of the law and its application to a set of specific facts. It then goes on to develop its own rule, using a combination of legal doctrine and policy. It is well worth spending time on, to give students the chance to see complex, sophisticated legal analysis at work in its entirety. I can only imagine what would be left in the opinion in a typical casebook.

In my work with beginning law students, I urge them to try to resist, at least a little, the overwhelming seductive power of doctrine, and to remember that one of the major tasks in their first year is to learn how the law works, and not only what the law is. It's an uphill battle, confounded by convention in both legal education

---

[3] 390 A.2d 398 (Vt. 1978).

[4] 539 N.E.2d 1069 (NY 1989), *cert. denied*, 493 U.S. 944 (1989).

and the materials law professors tend to use. But it is becoming increasingly clear to me that we can integrate the teaching of reasoning skills into substantive courses more effectively, and that doing so will enrich both the teaching and the learning of law.