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### The First-Year Courses: What's There and What's Not

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# 4

## The First-Year Courses: What's There and What's Not

David L. Chambers

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For many of you, law school will be a full-time occupation for three school years; for others, a second job squeezed in at night over four or five years. Whatever your route to a degree, whatever sort of law school you attend, the beginnings of law school are likely to be much the same.

You will face initially a set of required courses that will probably bear the same titles as the titles of our next six chapters: Civil Procedure, Contracts, Criminal Law, Property, Torts and Constitutional Law. The six are likely to be taught in ways that resemble each other on the surface. Each will have a "casebook" slightly heavier than a medicine ball. Each casebook will devote more pages to the decisions of courts of appeals than any other form of material, and your assignments will come almost entirely from the casebook. Your professors will have an arched eyebrow for every confident assertion a student makes, though they will probably be far less cold and crusty than the caricature of the film *Paper Chase*. They will lecture in varying degrees, but nearly all will call on students who have not volunteered, asking questions about the assigned cases and the issues they raise.

In a year, you may conceivably look back and find the next six chapters like the ads for Happy Valley Estates in sunny Arizona: lured by the promise of bracing experiences in the land of Property and Torts, you will have arrived on the site and found nothing but sand, mesquite and a drainage ditch. I hope not. When, as he does, one of our authors exults about his subject, "At times, highly technical! At times, even arcane! But mostly, highly stimulating," I hope you can forgive his enthusiasm or, better yet, come to share it.

For many people, the first year of law school is an intellectual sunrise, the most exciting year of their life as a thinking individual. Unlike the huckster from Happy Valley, most of us in teaching believe in what we have to sell.

## Variety and Similarity Among the First-Year Courses

I can be somewhat more specific about the varieties and similarities of courses and what your teachers are likely to be trying to achieve by discussing the varieties of approaching one course, Criminal Law, as an example. In a later chapter, Lloyd Weinreb will entice you with some of the issues that lie in wait for you in criminal law. Here I wish merely to skip across the surface, comparing approaches of teachers. I have picked Criminal Law in part because it involves many matters you've probably argued about with others before law school. You've probably even committed a crime or two—stolen an apple out of a farmer's orchard, smoked marijuana or littered.

To provide you with some rough sense of the similarities and differences among courses, I sent a questionnaire to forty teachers of Criminal Law randomly selected from the principal available list of law teachers.<sup>1</sup> Of the forty questionnaires mailed, one questionnaire was returned, to my slight alarm, marked "addressee unknown," and twenty-five were returned completed. The sample, though random, is not large enough to permit me to speak with confidence about the exact portion of teachers that teach one way or another at schools across the nation, but such precise information would probably be unhelpful to you anyway.

At all but two of the respondents' schools, Criminal Law was a required course, typically taught for three credit hours in either the first or second semester of the first year. In a few schools, but only a few, the course was given as a four-, five- or six-hour course. (Several of the other first-year courses, particularly Contracts, Civil Procedure and Property, are allotted five or six hours' credit at most schools.) Two-thirds of the courses were taught in classes of 60 to 90 students. Only one responder typically taught a class with fewer than 50 students; three typically taught a class of more than 110.

For all responding teachers, the grade in the course was deter-

mined substantially from the result of a single examination given at the end of the course. (This is, in itself, a source of anxiety for many students because they have few clear signals about how they are doing week by week during the term.) A few teachers assigned a paper in addition to the final exam, a few others gave one or more quizzes or a midterm, and a few more took into account class participation. At my request, many sent me copies of their final examinations. By far the most common sort of question on these examinations was a request to discuss a hypothetical and slightly unreal situation that sat in nervous juxtaposition between the situations in cases discussed in class. ("During a heated verbal argument between D and X, D pushed X and a fist fight ensued. Knowing himself to be a hemophiliac, D told X . . ." or "Abercrombie coveted Basil's Terraplane Roadster . . . [H]e persuaded Basil to lend the car to him . . ." Dire events follow. But were they crimes?) You can anticipate precisely such questions in most of your other first-year courses.

So much for the package. What's inside? For example, what sorts of crimes are covered in the basic course? As we will see in a moment, asking about the courses this way may be misleading, but it still may be interesting to see the similarities and differences among teachers.

All who answered the questionnaire indicated that they spend time on the law of homicide, that is, the law of murder and manslaughter, most spending more than four class sessions. No other crime received such universal approbation. On sex offenses, by contrast, more than half spend no time whatever and no one spent more than four classes. Faced with choosing between sex and death, law professors choose death every time. Similarly, although you might suspect or hope that sentencing matters—the use of the death penalty or fixed terms of imprisonment, for example—would be given substantial attention, only one teacher devotes more than four classes, and well more than half spend none whatever or only one class on all sentencing issues.

About most other subjects there was more diversity in the extent of coverage. For example, about half the respondents indicated that they spent a few class sessions on the insanity defense and half a few classes on the law of conspiracy, but the remaining half (not necessarily the same persons as to each subject) were about evenly split between spending no time at all and spending more than four sessions. Similarly, while about half the teachers spent a few class sessions on property offenses, such as larceny and obtaining by false

pretenses, that were developed in the common-law courts, six teachers spent no time on them while eight spent more than four classes.<sup>2</sup>

Comparable variations can be expected in other first-year courses. Beyond a few matters, there is no common agreement among law teachers about the specific subject matters that must be covered in any of the courses. As a student, I had a course in torts that never reached the law of libel and slander, and still can't remember the difference between them or whether the difference makes any difference. Most Torts professors across the nation probably spend a fair amount of time on libel and slander. Civil Procedure courses are similarly likely to differ widely in the extent of their coverage of the problem of the choice of federal or state law in certain suits in federal courts, Contracts courses in their degree of emphasis on the Uniform Commercial Code, and so on.

The variations in coverage derive in substantial part from the fact that most instructors will be using discussions of particular crimes or torts or issues in the law of contracts only in part as ends in themselves and to an equal or larger extent as a vehicle for serving other functions. It is in this regard that my list of crimes that are discussed in first-year courses is misleading. For two professors at the same school can each discuss "homicide" for weeks and students with the different teachers who talk to each other will hardly believe they are taking courses with the same title, let alone discussing the same sort of human misbehavior. Conversely, two courses that never deal with the same particular crime may seem quite alike to students who talk to each other because of the identical themes the teacher will have stressed. The themes professors chose to emphasize differed dramatically in the responses to the questionnaire I sent.

In the questionnaire, I tried to learn about the focus of courses in a couple of ways. First, there was a checklist of possible areas of emphasis. Second, there was a more open-ended question, "If you had to reduce to one or two the most important functions you intend your course to serve, what would you mention?"

Most teachers, in responding to the checklist, said they placed a "great deal of emphasis" on "the general state of the law in the United States today." In the examinations mailed to me, this emphasis revealed itself through the frequency of questions that called for a recollection and application of specific doctrines. On the other hand, in answering the question about the "one or two . . . most important functions" they hoped their courses to serve, far fewer

than half stated that their central purpose was to convey an "understanding of substantive criminal law" or "the elements of common law crimes." One, but only one, saw his purpose quite bluntly as the "coverage of substantive criminal law needed for the bar exam" and only three placed substantial emphasis on the state of the law in the state in which their school was located. Doctrine it would thus appear has a secure but limited place in most teachers' views of their course. More than half the professors gave as their two most central themes concerns broader than the teaching of specific doctrines. It is these broader themes that explain the haphazard coverage of specific crimes among courses.

The first broader theme encompassed issues distinctively raised by the criminal law but larger than the concerns raised by any single offense. Framed in different ways by different respondents, various professors used the course to explore "concepts of blameworthiness" or "the moral, social and ethical implications of the criminal law." So framed, materials about almost any criminal offense can suffice. If a teacher is interested, for example, in inducing students to think about the state of mind the criminal law ought to require a person to have had when he does a certain act before it is appropriate to punish him, it may make little difference whether discussion focuses on the taking of automobiles or the taking of lives. On comparable grounds, many teachers in our survey would probably justify spending large amounts of time on homicide but little on sex offenses: the case of the man charged with murder who admits to having fired the fatal shot but claims to have believed the gun was empty permits the teacher to raise some of the same sorts of issues as the case of the man charged with rape who claims to have believed that the complaining witness consented to intercourse.

Secondly, several respondents said they stressed issues that underlie almost all government regulation of human activity, not simply activities regulated as criminal. One stated that his central goal was "to establish the limits and limitations of law as a mode of social control" and two others used almost identical language. Another named only a slightly different emphasis "the inherent limitations on court-made rules as problem-resolving mechanisms." A third stressed the theme of "approaching the study of law from the legislative point of view" and another "the role of statutory law in a legal system." The criminal law is, to be sure, a particularly apt subject for examining the appropriate limits of the law and the roles of courts and legislatures, but it is simply one of endless subjects that could serve. For example, the same themes may well be

raised in your course in torts through considering the movement of both courts and legislatures toward imposing liability on certain persons who cause injury (in auto accidents, for example) without requiring proof of their blameworthiness.

A third more general function claimed by the responding teachers was the training of students in the analytic skills lawyers need. In responding to a long list of possible themes, two were checked more frequently than any others as receiving "a great deal" of emphasis and a third was not far behind: training in perceiving the functions lying behind various doctrines, training in the careful reading of appellate decisions and training in the reading of statutes. In the boot camp of the first year, most of your five or six teachers will probably spend large blocks of time simply working on developing your capacity to read legal materials accurately, a much more difficult knack to master than might be guessed in advance. Training students to look for the functions lying behind rules may be regarded as similarly indispensable. Without attention to the functions rules are to serve, it is often impossible to determine how a statute should be construed in a novel situation. It is even less possible to decide wisely how common-law rules, those developed through the courts alone, should be applied in novel situations.

We have thus seen that the first-year instructors will be emphasizing concerns other than the mastery of specific doctrines or rules. It is equally important to understand that these other concerns will vary among your teachers. By no means all who responded to the questionnaire mentioned the same themes. While several, as I've indicated, placed great emphasis on training in statutory interpretation, several others said they gave it little or no emphasis at all. Similarly, while a majority of instructors said they gave a "moderate amount" of emphasis to "the historical development of doctrine," or to "the tactical problems of attorneys" or to the "ethical problems of attorneys," several said they gave one or more of these a great deal of attention, and as many or more said that they accorded these concerns no attention whatever. Criminal Law teachers not only differ in what subjects they teach but in how they use the same subjects. And all your other first-year courses are susceptible to such widely varying approaches.

How will this stress of larger themes affect your experience in the first year? I believe many students are confused or irritated by the fact that their teachers and the writers of casebooks are only partly concerned about conveying the "law" of crimes or contracts. Some of the irritation is just. Often the teacher will fail to make clear

what his worthy purposes are, Criminal Law seeming simply a "bait-and-switch" gimmick to snare you into learning about the close reading of cases or statutes.

Indeed, despite their titles, nearly all the first-year courses may turn out to be the same course—how to think about legal problems. While this subject may well be the most important of all, the courses may be frustrating not so much because they are redundant but rather because you will find it more difficult to know when you have grasped a process or a way of looking at the world than when you have correctly memorized a rule. You may also feel cheated if your teacher in the service of these other goals fails to reach large areas of a subject clearly within the scope of the course's title; in fact, he may never reach the last ten dollars of your twenty-dollar casebook.

The heavy reliance on appellate-court decisions in all your courses may in fact prove a disservice to you. Most teachers of first-year courses and casebook editors probably would say, if asked, that they use the opinions of appellate courts not because the holdings of the courts are so important in themselves but rather because they are vehicles for learning to read closely, they are repositories of interesting fact situations that generate discussion, and they include one person's (the judge's) reasoning for reaching a given result, thus providing a foil for debate about the issues. While it is probable that after the first year you will have developed a just skepticism of the wisdom of many appellate judges, it is also probable that at some level you will have absorbed a sense that law nonetheless emanates primarily from appellate judges or, put another way, that matters with which appellate judges do not become concerned are really not law. The medium becomes a part of the message.

As we have seen, for example, Criminal Law courses typically accord sentencing issues scant attention. Later courses in criminal procedure typically include little more. I suspect that one reason for the lack of coverage is that judges in this country have almost everywhere been given broad discretion to fix sentences any way they wish up to certain fixed limits, and thus there are few appellate decisions drawing nice distinctions upon which law professors can force students to dwell. Without the obvious opportunity for fine-honed analysis of doctrine, the subject seems unworthy of attention. Indeed to many teachers it may not even feel like law. This inattention is unfortunate. In the United States, most defendants in criminal cases plead guilty. For them, and even for most defendants who go to trial, the sentencing hearing is the most critical moment. Few



attorneys today devote much effort to the sentencing hearing, despite the fact that an industrious attorney can have an impact on many judges' decisions. I do not know with certainty why attorneys do so little, but I suspect that the absence of coverage of sentencing within law schools contributes to a sense attorneys have that sentencing is outside the area of their principal responsibility.

## What You Will Have Derived from the First Year and What You Won't

If you arrive at law school overweight and unable to play the cello, you are likely to finish law school overweight and unable to play the cello. There's only so much we can do.

On the other hand you will be different. Your friends who are not law students may now find you slightly offensive, as if your mind had been chewing garlic.

You will know a lot you didn't know before. You will have learned the concepts of "offer" and "acceptance" in contracts and "negligence" and "contributory negligence" in torts. You will be familiar with some of the current content of the Uniform Commercial Code and your own state's or the federal court's rules of judicial procedure. You are likely to have acquired a valuable way of approaching legal issues other than those you have ever directly considered: a knowledge of the common sources of the law, an alertness to the need to understand the arguments on both sides of an issue and to strip away the arguments that will be considered irrelevant, some special language to wrap around some commonplace notions, a developing sense of the procedures through which problems can be addressed and resolved. These are valuable skills. Your head will never be quite the same again.

For whatever you have learned, however, there is a great deal you will not have learned. There are dozens of attributes of fine lawyers other than the capacity to recall doctrine and to analyze new legal problems. It is these other attributes of the fine lawyer that are likely to remain undeveloped after the first year.

Let us consider a few skills of lawyers or aspects of lawyers' work about which you are likely to hear very little except in anecdotes in your opening year:

Lawyers are fact-assemblers. When they receive a new matter, they must often pull together a complex story from jumbled bits of information scattered out to the horizons of their client's vision. The facts do not come dehydrated and prepackaged as they do in the opening paragraphs of the opinion of a court of appeals. Although most Civil Procedure courses include materials on the rules available to attorneys to compel the other side in a litigation to reveal information in its possession in advance of trial, not many schools give students early exposure to the art of investigating and organizing factual material.

Lawyers are interviewers. They interview people who, embarrassed, devious or blinded, reveal only part of a story. Corporate clients are often said by their attorneys to be no more likely to tell their attorney the whole truth about a disputed financial dealing than the defendant in a murder case about his whereabouts on the night the victim was shot. The lawyer needs to develop a second sense, a skill at learning how to ask or ferret out what he wants to know. Few schools give early training in interviewing.

Lawyers counsel people about much more than the law. The practitioner retained by a corporation finds her advice sought on purely business matters almost unrelated to issues of law and may find it harder and harder to separate her role as attorney from a developing role as entrepreneur. In family matters, it is often a matter of near chance whether a client has been directed initially to a lawyer, minister or family doctor. The person considering divorce may simply want wise counsel—not about whether he can obtain the divorce as a matter of law but whether he will be happier if he does. What should a lawyer do? How should he define the limits of the advice he will give? Few law schools give early training in the ethical issues or the techniques of counseling.

Lawyers are negotiators. A dispute between two large corporations or two next-door neighbors that has led to a lawsuit is far more likely in this country to be resolved by a settlement than by a judicial ruling or a jury's award. Criminal charges in this country are far more likely to be resolved by a plea of guilty than they are to be resolved at trial. Few schools give early training in the art of negotiation.

Lawyers make money. They will have to decide how much to charge for their services, what clients to charge a full rate, what clients to charge less. Like medical students, law students may never be asked to ask themselves whether there is anything inappropriate about making \$75,000 a year from other people's problems. Few law

schools provide early exposure to the economics of practice, as it applies to the individual practitioner. Nor do they expose students to the way that money determines who does and who does not receive legal services in this country or to the various plans, in use or in proposals, for assuring adequate services to poor and middle-income persons.

All these and much more are likely to be missing from your first year. But there are, after all, three years of law school. Will not the deficiencies be redressed in the remaining years? In most schools, probably not. The vast bulk of courses offered in your remaining years of law school will provide training in substantive or procedural doctrine and the analysis of problems not covered in the first year. You will find courses in the law of corporations, taxation, conflicts of law, trust and estates, criminal procedure and so forth. In some schools, particularly ones with small faculties, many of these courses will be required. At the same time, in most schools, it is possible to slide through three years without ever taking courses that give you useful training in many of these other lawyer skills or in the nature and structure of the profession of which you will be a part. At some schools such courses simply do not exist.

What should you do about these possible gaps in your education? Here are a couple of pieces of advice.

First, don't let the prospect of incompleteness stand in the way of your soaking in as much as you can from the courses of your first year. Although it is true that many things will probably be missing, much of what is there—for example, training in careful reasoning and training in the close reading of legal materials—will be of great value to you in practice and probably cannot be mastered later if you do not master it in law school. Throw yourself into it. Screw up your courage and participate in class discussions. Form a study group with others who are not quite like you and haggle over the issues raised in your course materials.

Second, give serious consideration to taking whatever courses you can after the first year that provide training in skills or exposure to the nature and structure of the legal profession. One particular sort of offering deserves mention: courses in what is commonly referred to as "clinical law." These are courses in which law students handle cases for actual clients, usually indigent, under the supervision of instructors or private practitioners.

At their best, Clinical Law courses provide students with opportunities to work with experienced lawyers who share their ideas

about skills and with whom the students can share their own observations, doubts and fears about all aspects of practice. Elements of successful negotiating, interviewing and counseling can be identified and reflected upon. It is difficult, of course, to determine how well clinical courses succeed in their goals. We know almost nothing about the long-term impacts of any law-school teaching techniques, clinical or classroom, on the later performance of students in practice. We can simply hope that when students appear to progress over the scope of a term, as many students in clinical programs appear to do, the progress is genuine and lasting.

Clinical programs were rare a decade ago. Today slightly more than 80 percent of the law schools approved by the American Bar Association report offering at least one clinical program for credit.<sup>8</sup> Despite this growth, in many schools that do have clinical programs, there are slots for only a limited portion of the students who would like to enroll and, for the students who do enroll, inadequate supervision and support. Consider taking such courses nonetheless. They are likely to provide valuable experience for you, even if you are contemplating a career of serving clients who are different from those served in the clinic at your school.

Many students and law teachers share an unjustified expectation that students will develop these skills adequately in the first years of practice. The faculty member often envisions a model career pattern in which the student steps from law school into a large or middle-sized law firm where the older lawyers nurture him well in the practical skills of practice. The fact is, however, that large numbers of students start out immediately on their own or in Legal Aid offices or in prosecutor's offices with no elbow to work at the side of. They are immediately given substantial responsibility for matters that affect large numbers of people's lives. That's fairly alarming. To overstate the matter slightly, how would you like an appendectomy to be performed on you by an unsupervised young doctor who had heard many lectures on the intestinal canal but had never held a scalpel in his hand?

Even the group of young practitioners who do start in a well-supervised law office are likely to serve as apprentices to lawyers who developed their own skills in an unreflective, haphazard way. It is not simply a recent development that law schools offer little such training. The senior partners didn't get any either.

What are the dangers for you in failing to work toward developing these skills while in law school? I believe there are several.

There is first, of course, the lost opportunity to absorb techniques and receive sheltered experiences in their use and the consequent possible harm to your later clients. Beyond this obvious loss, there is the loss of another opportunity that skills training can offer: the opportunity to help you discover some of your own strengths and limitations and understand better your own emotional responses to people and problems.

Your emotional response to a client, an opposing counsel or a legal issue will affect in important ways how you conduct an interview, how you give advice, and how ardently you press your client's claims. The lawyer who finds her client or her client's goals offensive or unsettling will often find a way to ensure that the client loses or obtains less than he wants. The lawyer may never understand why things went wrong. Think of the last time you "forgot" to do something important you had promised someone you'd do. Experience with yourself may alert you to ways of avoiding such traps. It may also, before it is too late, steer your career plans away from particular forms of practice you discover to be more painful than you had imagined or toward forms of practice more satisfying than you had expected.

There is a danger that the typical training in law school will inhibit your attaining these skills and self-insights after you graduate. Let me quote at some length from the speech of a law teacher and psychiatrist who saw in law training the seeds of Watergate:

When law students spend three years in an atmosphere which teems with intellectual activity and ideas, but which at the same time, constantly obscures, downgrades or actively criticizes emotional issues and reactions, being very bright students, they get the point! They logically deduce that if they are to be competent, effective and respected lawyers, they must learn how to banish emotionality from their lawyer work. Such a goal obviously seems difficult but in fact, it is totally delusional. On the other hand, it is possible to learn how to imagine that intellect had been separated from emotion. Regrettably, that is an all too common result of much legal education since little or nothing is presented in the current curriculum to teach a person how to know and deal with the ubiquitous emotional responses to professional stress. In addition, because these tensions and potential problems are at first highly palpable to law students and cause them much pain and anxiety, they are forced by psychological necessity to do something to alleviate their discomfort. They defend themselves against such unpleasant feelings by learning how not to feel, and this is an ominous result.<sup>4</sup>

There is a final danger for you of taking only courses that operate in the realm of ideas or doctrine and shield you from real people with problems: you are likely, while a student, to fail to see yourself as a lawyer. Throughout law school, students can refer cynically to lawyers as "they." Such detachment permits the student confidently to deny to himself that he will engage in shady practices that an extremely high portion of practitioners engage in and then later, in practice, when the opportunity for misbehavior occurs have no prior reservoir of pain about the issue to guide him.

I believe the law student's lack of a sense of identity as a lawyer—a sense that apparently develops much earlier for medical students who start in about their second year having patients who look up to them—also accounts for an important part of the nearly universally reported restlessness of third-year law students. Especially itchy are law students who come directly to law school after college; by the last term of law school they are typically in their nineteenth consecutive year of sitting on their behinds in classrooms. Students not only become bored; they become anxious as they head untested into practice. I recently spoke to a young law-school graduate, highly regarded by her teachers, who described her reaction on graduation day to the gift of a briefcase from her sister and brother. "I felt," she said, "that I was still a child about to play dress-up."

I advise you strongly to use your law-school years to come to know yourself better. Apart from considering clinical offerings, I'd urge you to involve yourself in extracurricular activities that permit you to work with people on their legal problems under the tutelage of people with experience. And put some heat on the faculties of your school to do more. It is not an easy time for law schools. Budgets are tight. Well-supervised clinical programs are expensive to operate. So are small classes that may give students an opportunity to reveal more of themselves and discover more about themselves. Apply the heat anyway.

Of course, even if you have the most traditional of educations, I do not contend that you will get little from law school. The next chapters that follow amply demonstrate the excitement that awaits you. These years may well be the most exciting time in your life as an intellectual, a Fourth of July picnic of ideas. They were just that for me. Maybe I should be a little more tempered. Elizabeth Ashley, asked by a reporter how she enjoyed her return to New York City after a time away, replied, "Well, it's not as good as homemade chocolate mousse, but it's a whole lot better than grape juice." May you have more mousse than juice.

## NOTES

1. A list of the teachers at the more than 150 law schools that are approved by the American Bar Association. I picked every fourteenth teacher from a list of teachers of Criminal Law at these schools published in the American Association of Law Schools, *Directory of Law Teachers* 242-47 (Supplement 1975). The law teachers who responded came from schools in seventeen states. They are schools of widely varying size and widely varying standards for admission.
2. In nearly all the schools, procedural aspects of the criminal law—for example, the use at trial of confessions or rights to counsel or trial by jury—are covered in advanced courses and fewer than a third of respondents indicated that they covered such subjects at all as part of the first-year introductory course.
3. Council on Legal Education for Professional Responsibility, *Survey and Directory of Clinical Legal Education*, iii (May 1975).
4. Andrew Watson, "Watergate Lawyer Syndrome: An Educational Deficiency Disease," 26 *J. Legal Ed.* 441 (1974).