

University at Buffalo School of Law

Digital Commons @ University at Buffalo School of Law

Journal Articles

Faculty Scholarship

2007

A Damn Hard Thing to Do

John Henry Schlegel

University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/journal_articles



Part of the [Legal Education Commons](#)

Recommended Citation

John H. Schlegel, *A Damn Hard Thing to Do*, 60 Vand. L. Rev. 371 (2007).

Available at: https://digitalcommons.law.buffalo.edu/journal_articles/454



This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

A Damn Hard Thing to Do

*John Henry Schlegel**

Back in the mid-eighties, I offered a first year, second semester “un-elective” called American Legal Theory and American Legal Education. It scrunched together two history courses I had taught irregularly before. I liked the way the two topics fit together and still do, but with so many recalcitrant law students enrolled in it, the course was an unmitigated disaster. As is always the case with such attempts at offering perspective, amidst the shambles I had acquired at least a few devoted students. At the end of the last class one of them came up to the front to ask a somewhat rhetorical question. He said, “Do I read you correctly? You have been arguing that if we want to change legal education, we have to change the categories of legal thought?” I nodded in agreement, to which he replied, “You know that’s gonna be damn hard?”

I remember this comment not just because of the student’s insight but also because it pretty much marked the end to my active participation in attempts at significantly reforming the curriculum at the University at Buffalo Law School. An attempt to comprehensively reform the first-year curriculum had recently broken down when one crucial participant offered a “my way or the highway” alternative that none of us could understand. Such a result was a fitting tombstone to a career that had started back in 1967 when I was a third-year law student. Gerhard Casper, then new to the University of Chicago Law School faculty, gathered a group of my classmates together to discuss revision of that school’s curriculum. As a member of this group, I suggested that the first year be given over to tutorial work designed to bring all students up to master’s degree level of competence in a range of relevant social sciences. I then suggested that the existing first year be moved to the second; the existing second, to the third; and the balance heaved overboard. At the time I did not understand that Gerhard was already running for dean, but in retrospect, it should

* Professor of Law and Roger and Karen Jones Faculty Scholar, State University of New York at Buffalo. This piece is for Ken Marvald who understood what generations of reformers of legal education have not. Bert helped, though in the end it turned out to be help with a future piece. Except for Bert, all of the rest of my “whole sick crew” was afraid to touch this one.

have been obvious from his reply to my suggestion: "Mr. Schlegel, we are here to talk about reform, not revolution!"

Gerhard's comment seemed odd at the time, as I did not think that I had proposed exterminating the kulaks, but by the end of my twenty-year run at law school curriculum reform, I had adjusted my efforts to the more limited objective of understanding why the kulaks at least thought I had suggested expropriating the expropriators. From time to time I have offered such limited understandings in person and in print.¹ Generally, they have been met not even with a hostile scowl, but with stolid indifference, though once I generated a quite angry response from Tony Kronman, who was on that occasion my host. Still, when Ed Rubin, dean of the Vanderbilt University Law School, asked that I participate in this conference, true to my grandfather's reported observation when watching me as a young child try to force the large pot into the small one—"Determined son-of-a-gun, isn't he"—I agreed to try again.

Let us begin with familiar territory. One might argue that the primary obstacle to curricular change is the bar exam, though I suspect the bar examiners would jump on board were the bar supportive of a significant change. Or, if not the bar examiners, then the bar, though I think that the upper echelons only care that we sort our students enough to save them interview time in the hiring process, and the lower echelons, that we teach a bit of procedure and the ability to take directions. Or, if not the bar, then the students, who after over sixteen years on the academic treadmill prefer to have any knowledge delivered "straight in the vein," though I note that many students show a real interest in our present efforts up until they are exposed to practice in the summer before their second year and might well continue their interest had not that work experience disabused them of the notion that the first year of law school was a foundation for practice. Or, if not the students, then the faculty, who, not wholly wrongly, fear that significant reform would cause their existing storehouse of knowledge to be vastly reduced in value and thus themselves made redundant. Although these are all real obstacles, to

1. See, e.g., Bob Gordon et al., *Legal Education Then and Now: Changing Patterns in Legal Training and in the Relationship of Law Schools to the World Around Them*, 47 AM. U. L. REV. 751 (1998); John Henry Schlegel, *Between the Harvard Founders and the Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985); John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We to Do?*, 57 U. MIAMI L. REV. 955 (2003); John Henry Schlegel, *Law and Endangered Species: Is Survival Alone Cause for Celebration?*, 28 IND. L. REV. 391 (1995) [hereinafter *Law and Endangered Species*]; John Henry Schlegel, *Revenge, or Moon (Over) Your Law School*, 41 J. LEGAL EDUC. 467 (1990); John Henry Schlegel, *Searching for Archimedes - Legal Education, Legal Scholarship and Liberal Ideology*, 34 J. LEGAL EDUC. 103 (1984); John Henry Schlegel, *Walt Was Right*, 51 J. LEGAL EDUC. 599 (2001).

my mind, all but the last is generally overrated. Rather, in keeping with my student's remark, and with a nod to my University of Chicago Law School heritage, I wish to focus on the impediment presented by the categories with which law professors think about teaching law.

At the outset, it is important to understand that the basic categories that we assume today—contract, tort, property, crime, constitutional law, etc., together with the oppositions of public/private, individual/state, subjective/objective, rules/standards, substance/procedure, etc. and of course rights and their lack—are not timeless. They have a history. For example, Langdell tried to toss constitutional law out of the law school curriculum in the 1870s, and the course did not become particularly important until the 1930s. Even then, it was soon dismembered, when in the 1960s pieces were given over to various other courses. As late as 1911, John Henry Wigmore maintained that torts could only be understood by using a category system common in the mid-nineteenth century that emphasized the nature of the tortfeasor—railroads, autos, houses, bicycles, factories, stores, etc.² There were no courses in administrative law until the 1910s; neither labor law nor anti-trust became part of the curriculum until the 1920s, nor federal taxation until the 1930s. The law of sales was a part of property, namely personal property, and thus organized in terms of title until the 1960s. So, changing the categories is no big deal as an historical matter; instead, it is really interesting as such.

In the seventeenth and early eighteenth centuries, law was primarily organized in terms of the writs that defined the forms of action at common law, each writ arranged with a body of law appended to, and coincident with, its scope, the totality looking like a string of those electrically illuminated icicles that adorn houses at Christmas time. Blackstone attempted to make sense out of all of this in the late seventeenth century by explicitly pulling out relationships of status, and thus dependency—husband/wife, parent/child, guardian/ward, master/servant, landlord/tenant—as had been done earlier for estates in land and its wills and trusts cognate, future interests. Then he appended to the resulting structure the notion of powers absolute within their spheres, designed to keep the British Crown from interfering both in local affairs and in the economic transactions of the growing commercial classes.³

But it was the pleading reforms of the early nineteenth century, which abolished the writ system, known in this country as the introduction of code pleading, that brought the question of the

2. See JOHN HENRY WIGMORE, *SELECT CASES ON THE LAW OF TORTS* (1912).

3. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 209 (1979).

organization of law, and so of the study of law, to a head. At this time, some modest attempt was made to reorganize law on the model of Roman Law, with its basic distinction between persons and things. This attempt continued even into the early twentieth century, but as one might guess, the idea did not go anywhere. Instead, after some finagling, the writs of Trespass on the Case and Assumpsit provided the outlines for Torts and Contracts, respectively, and Property was gathered together from several different writs. Thus, procedure came to be seen as so independent of substance that that oldest of procedurally based distinctions, law and equity, disappeared with the one civil action created by the Federal Rules of Civil Procedure.

Now, no one would argue that the set of categories created in the late nineteenth and early twentieth centuries was perfect or has come down to us unadulterated. For instance, the course in Quasi-Contracts, contracts made without explicit agreement, represented by the Writ of Indebatus Assumpsit, died a quick and painless death. Also listed among the departed are Bailments, Carriers, Mortgages and Suretyship; on life support are Agency, Future Interests and Negotiable Instruments; and many schools have waved goodbye to the full year of the classic three common law subjects as well as the once "required" aspect of a dozen or so courses.

Still, in a legal world that is overwhelmingly statutory, there is no first-year course rooted in a statute. Contracts has not morphed into Commercial Law, Torts into Insurance Law I or Property into Land Use Planning. Even Criminal Law, a course founded on the proposition that all crimes must be statutory, starts with theories of punishment and focuses on homicide and theft, the most common law-like of crimes. Likewise, Civil Procedure spends the least time on discovery, the most statutory-heavy part of pre-trial practice, and even strict constructionists have to fulminate against a Constitution that is as much a matter of common law as that horrid example of legal excreta, the English "unwritten" constitution.

On the other side of the great divide that a law student crosses his or her first summer stands a curriculum that in its cornucopia of delights makes it clear that the old categories no longer make much sense. Name a sexy topic—election law is the latest, God Bless *Bush v. Gore*—and there one finds a course that either follows a statute in detail or synthesizes material from all over the categories of the pre-World War II curriculum. There is no grand intellectual structure left, but the elective system hides this fact, as does the treaty that separates first year from upper division teachers.

Why has this intellectual house of cards not collapsed? First, consider the sociological aspects of the matter, the profession that is law teaching. The profession as we know it today was created at about

the same time as the rest of the university disciplines—the late nineteenth and early twentieth centuries. Significantly, this was at about the same time the current curricular structure fell into place. As part of this collective exercise of academic product differentiation, the law professors chose (or were left with, because no one else wanted) the rules of law as their separate special subject matter and “thinking like a lawyer” as their separate special method. Notice particularly, the choice of method. It was not “acting like a lawyer,” except in the narrow sense that the focus on the rules of law evoked one aspect of the appellate practice of lawyers and judges, the somewhat unusual circumstance where the question of what is the proper rule of law is central to an appeal, rather than evidentiary issues or other procedural matters.

The interesting part of this choice is that the point of the teaching of the first full-time law professors was relatively continuous with that of the part-time teachers—retired judges and unsuccessful lawyers—who were the law professors of the earlier years of the nineteenth century. The content of the instruction delivered at that earlier time was, at least in part, an exercise in justification. This exercise implicitly argued that the existing rules of law, while not perfect—that would have been implausible—were, overall, acceptable. Criticism, if limited to circumstances at the edges of the rules of law, was quite proper and often offered, but criticism of the core was neither acceptable, nor tendered. Langdell’s case method class changed this lecture-based monologue of justification into the pedagogically more effective—at least if drawing forth the implicit assent of the student was the objective—dialogue that we call Socratic. Otherwise, it changed nothing. Part of the object of every class remained justification by occasional criticism, a method of justification that has proven to be mighty resilient. Indeed, it survived intact as, in the middle years of the twentieth century, the grounds for justification shifted from the slippery ground of logical entailment to the different, but equally slippery, ground of policy acceptability.

For the legal academic, the choice of the law school’s subject matter and method was Fat City. First, one got to play judge, always a heady activity for one so far from the bench. Second, scholarship in the discipline required no messy social science-y fieldwork. Someone else created the materials for research, and then the postal service delivered them to the library. Third, one didn’t really have to know anything about what “real lawyers” did all day, which in any case obviously appeared to be mostly a tedious routine accompanied with the worry that clients might not appear, or if they appeared, not pay for services rendered. And fourth, even in the early years the salaries were generous by standards elsewhere in the university system. The

only downside was the need to grade great quantities of exams, a complaint that persists unabated today.

Little has changed to make being a law professor any less of an exercise in light lifting. True, getting tenure has become more difficult. But teaching has become easier. US News rankings and the LSAT have combined to make student ability more uniform within each school, and the growth of faculty has both reduced teaching loads and increased the possibilities for specialization. The supposed rigor of the Socratic method has largely died out, as has the rigor of grading except at those schools that unaccountably support a mandatory curve for an academically all-but-homogenous group of students. Moreover, at least in many schools, salary growth in the Law School has far outpaced that in the College of Arts and Sciences. How could one complain?

Well, of course, I can and do complain. As always, I am the skunk at the garden party, the person whose job is to say, "that idea just ain't radical enough to make much of a difference in so entrenched a social formation as the American law school." So, what do I have to complain about? To mangle a quote from Marlon Brando, "Whaddya got time for?" After all, once in my life I was known for being able to create a new and different first year curriculum on request. Today, in a more expansive mood, I will offer a full three years of law study.

I begin with an observation that I believe is true, but that I will not take your time to defend, that "if you want to do something new, you have to think something new." I wish to locate my something new in an observation that Bayless Manning, fancy Yale Law Professor, fancy Stanford Dean and fancy Wall Street lawyer, made over fifteen years ago. He hazarded that the lawyer's favorite verb was the verb "to do."⁴ Just what do lawyers do all day that might ground a law school's entire curriculum?

Let me get out of the way something that is not coming next. What follows is not a plea for more clinical education. I have trashed the MacCrate report previously⁵ and am not afraid of getting into

4. Cf. Bayless Manning, *From Learned Profession to Learned Business*, 37 BUFF. L. REV. 658 (1989) (providing a much edited version of a livelier oral presentation).

5. See *Law and Endangered Species*, supra note 1. The MacCrate Report, named for Robert MacCrate, chair of the group that produced the document, is properly known as *Narrowing the Gap: Legal Education and Professional Development - An Educational Continuum*, 1992 A.B.A. SEC. LEG. EDUC. & ADMISSION TO BAR 1. It is generally understood that the panel was dominated by clinicians and that its recommendations instantiated a particular, disputable view of clinical legal education that underpins its emphasis on the "skills and values" necessary for the practice of law. It argued that law is a "unitary profession with its core body of knowledge, skills and values, common educational requirements and shared professional

further hot water with clinicians. Clinical legal education, as it is contemporarily delivered in most schools, has as its purpose both the salving of the conscience of liberal law professors and the amusement of students with short attention spans and a fear of having their values compromised. The sanitized version of practice to which we expose our students in our clinics is captured by the following, crucially imperfect, analogy: clinical legal education is to what lawyers do as a good night kiss is to the best night of sex you can imagine. Good lawyers are passionate and sweaty. Their work goes hot and heavy, on and on, without enough sleep. Unfortunately, however, the practice of law, *pace* W.H. Auden,⁶ has nothing to do with love or even lust, unless it be the lust for money. Nor is it an heroic activity. Lawyers are significantly less like the ethically reflective practitioner of the clinical literature, than like the Greek god Charon, ferrying souls across the rivers of Hate, Woe, Forgetfulness, Wailing and Fire, hopefully to the Elysian fields, but oft times to a much less hospitable place. And don't forget to bring the coin to pay the ferryman or you will not even get in the boat!

So in the pursuit of the verb "to do," let me start with what lawyers don't. They don't do much appellate work and they don't do much trial work. Except for new associates, they don't do much legal research and writing, and no one would confuse memo writing, which they don't do, with the endless letters giving unwelcome advice to a client, or worse, the detailed reports of events that didn't lead to closing on a matter that a client cares about, which they do do. On the further down side, lawyers do go to lots of inconclusive meetings, do a lot of discovery, prepare lots of documents, and in between spend lots of time on the phone or sending and receiving e-mail. They also spend much time on planes, in cars, in hotel rooms, eating bad takeout, schmoozing with public and private officials whose blessing or money a client needs, and, of course, not getting enough sleep. They are themselves bureaucrats busy satisfying the needs of public and private bureaucracies (including their own law firms, it should be remembered) for obeisance, paper, and the diminution of the fear of things that go bump, either in the public press or in the dark of night. No one would do this job if paid only in course credits, much less pay tuition for the pleasure.

Thus, if one is going to make something out of Bayless Manning's aphorism, one must abstract somewhat from what lawyers do as a daily matter. Such abstraction is commonly known as theory

standards." *Id.* at 86. From this litany the only assertion that might withstand empirical analysis is that of "common educational standards," and even that assertion is dubious.

6. See W.H. AUDEN, *Law Like Love*, in *THE COLLECTED POETRY OF W. H. AUDEN* 74 (1945).

—descriptive theory, not the normative swill that passes for theory in law school classrooms and journals. Descriptive theory is often captured in images. My favorite positive image of a lawyer at work is not that of Charon in his boat, but of a wilderness trail guide leading people through a thicket, some rough terrain with many switchbacks and perhaps some swampy areas, to a desired destination – sometimes a quiet lake, other times a mining claim, still other times just to the other side of the forest. In doing such work, the guide needs to know a good deal about what the client wants and even more about the local rocks, rivers, flora, and fauna. Only for lawyers, none of the terrain is picturesque and none of the fauna, cute. The terrain is bureaucratic and the bureaucrats in it, whether public or private, are likely to be indifferent to the client's passing and not particularly cuddly.

Note, there is nothing in this image close to classroom law. This omission is intentional. Somewhere between the foreground of client needs and the background of social institutions may be found some legal doctrine, the stuff that no matter what we say, we actually teach, because we regularly test. Sometimes this layer of rules is relatively thick—I think of the rules of law in tax practice as being relatively thick in this sense. Sometimes it is quite thin—I think of the rules of law in much corporate practice in this sense. Sometimes lawyers use the rules of law to bridge the gap between the client and the institutions—I think of the bulk of criminal practice in this sense. Other times the rules of law are used to avoid that gap—I think of much of securities practice in this sense. But I never think of the role of law as rule in practice in any classroom sense, for the structure of practice—background of institutions, foreground of client circumstance and mid-ground of rule systems of varying thicknesses—is not to be captured in the normative justification by doctrinal elaboration that is the common content of the law school classroom. Rather, Bayless Manning's language best captures the role of legal rules in law practice: Lawyers do things with rules, but only when rules turn out to be useful tools to the project at hand.⁷ Thus, as my colleague, Milton Kaplan, theorized many years ago in a piece that deserved to be published in a less obscure place, the practice of law can be seen in the image of a checker board—black squares, law; white squares, not law.⁸ Lawyers move across the board stringing moves together in whatever order the problem presents—for example, white,

7. For a dissimilar use of the same metaphor, see WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION* (1976), a work that is intentionally modeled on J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

8. Milton Kaplan, *The Colonia and Fudalia Tapes: Dialogues on Legal Change and Shelter for the Urban Poor*, 1 URB. L. & POLY 349, 379-80 (1978).

white, white, black, white, black, white—and almost any other conceivable sequence, limited only by ethical rules against bribery and excessive self-interest.

The first year categories are not very helpful in filling out the image of the practicing lawyer either as trail guide or as checker player. The most helpful is Civil Procedure, but to the extent that course is about anything, it is about orderliness; thus, it would make more sense were it combined with the untaught, purely procedural part of criminal procedure and the procedural part of administrative law. The great questions of personal jurisdiction, collateral estoppel, the process that is due, and federal-state relations are much less tied to the doing of procedure than is the study of proof, especially relevance, which is never included in the course. Torts, beyond the simple notion of wrong, and so standard of care, is of no general use in most practices, and Contracts, actually the law of incomplete or missing documents, is useful only for questions of interpretation and performance, which are seldom, if ever, the centerpiece of the law school course. Property is a grab bag held together by a final exam; Criminal and Constitutional Law, excursions into political theory, when not simply occasions for disciplining the rhetoric of political life by studying examples of its use. The course in research and writing is useful only to the extent that it is preparation for the experience of intense boredom, admixed with the terror of not understanding what one is doing, that is an associate's position in a bad law firm.

Upper-division courses fit better with the notion of lawyer as wilderness guide, at least if one appends to the image the fact that there are all sorts of highly specialized guides, depending on where a client wants to go. Some existing courses track real legal practices quite well, at least as far as the narrow rule content of that practice is concerned. Federal Taxation is a good example. Environmental Law, unfortunately a dying practice area, is another. Labor and Employment Law tracks some lawyers' practices, or at least it would if a heavy dose of counseling directed at avoiding law were central to it. At the other extreme, Administrative Law, Constitutional Law, Conflict of Laws, and Federal Jurisdiction track no legal practice. In between are all sorts of courses that contribute to one or another legal practice. Corporations is a modestly helpful underpinning to a corporate practice, but not as important as would be a course in financing business activity, a distant relative of the Corporate Finance course. Health Law might track part of a practice were it to spend lots of time on insurer and governmental reimbursement, though even then it surely would miss all of the employment issues. And Family Law might track a discrete practice, if it did not avoid all of the very

complex issues about finances that are crucial for all clients who darken the family lawyer's door.

By now my empirical point ought to be apparent. Even the upper division courses that track the identifiable practices—in the sense of both clients' typical problems and lawyers' routine activities—do not do this very well, though some will manage to examine rather exhaustively some narrowly rule bound aspects of the area in question. However, the only "to do" that holds many of them together is the "to take an exam on this swatch of doctrine without more than a passing consideration of the socio-economic background or the detailed foreground that is a typical client." And the first year courses offer no recognizable theory that might explain the contours of the practices that are touched on in the upper division. Thus, what is really wrong with law school is that its category system offers little theory in the classic social science sense. That is, law school is full of normative theory that tends to reify the prejudices of either the law or the law professor and little practice. Practice, in this sense, would be the systematic examination of how theories about the practices of lawyers might work out by exploring in significant depth the actual practices of lawyers.

If the old categories are not very helpful and so need to be abandoned if one wants to try to change legal education significantly, the question of what ought to be substituted in their place is surely a question on the mind of every reader who has not already decided that I should be either shunned or tarred, feathered, and ridden out of town on a rail. In truth, I am not terribly interested in this subject any more. I cannot imagine that whatever would be substituted for the old categories could be any worse than what we have now. So, as long as a school tried to fill the first year with theories about the practices of law and the second two with some representative practices in which lawyers make the comfortable living to which most students aspire, and as long as the school made clear that an intensive exposure to any one such practice would be helpful in whatever area a student eventually pursues, I would be pleased to watch what would transpire. But, I know that no one will take me even modestly seriously unless I offer some concrete suggestions. So, here goes this month's law school curriculum, catalogue ready.

First YearFall Semester

- **Doctrinal Structures.** How bodies of law are typically organized, whether common law or statute, with special emphasis on recurrent patterns and significant variants.
- **Doctrinal Tools.** The basic building blocks with which legal arguments are made, including distinctions such as public/private, rule/standard, rule/exception, and concepts such as estoppel, laches, unclean hands, and especially the contextual appropriateness that is the notion of wrong.
- **Backgrounds: Bureaucracies.** An exploration of the basic ordering principles that underlie the most common organizational structures of public and private institutions, with special emphasis on incentives not to act.
- **Backgrounds: Money.** A detailed examination of the economic structure of the United States, with special emphasis on financial institutions of all kinds.
- **Backgrounds: Social Inequality.** A detailed examination of the social structure of the United States, with a special emphasis on the middle classes.

Spring Semester

- **Doctrine in Detail.** A single, conventionally defined doctrinal area, chosen for the convenience of the instructor, examined for the purpose of exploring the extent to which this area follows the structures and tools explored in the first semester.
- **Order.** The commonality of procedure across legal institutions, as well as that involved in such legal activities as the closing of a major purchase or credit agreement and the operation of a representative legislature in a party system.
- **Practices: Routine.** The daily activities of lawyers, including drafting from models and developing plans for action.
- **Practices: Differentiated.** The structure of the bar and of a selection of practice areas within it.

- Writing. Client letters (writing law for non-lawyers) and representative legal documents will be prepared until the student is capable of journeyman work. Individual students will be required to continue this course in future semesters until students achieve an appropriate level of competence.

Second Year

Fall & Spring

- Practice I. A single conventionally defined practice area, explored in detail, including the necessary additional social and economic background and specialized doctrine, with an emphasis on the common practices of lawyers specializing in that area. Representative transactions will be reviewed in detail and at length, utilizing actual practice materials. Preparation of documents appropriate to the particular area of practice will be required. (12 credits over 2 semesters)⁹
- Practice II. A single conventionally defined practice area, explored in detail, including the necessary additional social and economic background and specialized doctrine, with an emphasis on the common practices of lawyers specializing in that area. Representative transactions will be reviewed in detail and at length, utilizing actual practice materials. Preparation of documents appropriate to the particular area of practice will be required. (12 credits over 2 semesters)
- Self-Teaching Doctrine. Using the knowledge of the structures and tools developed in the First Year, students may select areas of doctrine that traditionally appear on state bar exams for self-study and short answer examination. (1 or 2 credits each: 3 credits per semester)

9. I would insert in this and similar courses a clinical experience for all students were it not the case that the bar would go postal if law schools were to begin offering clinics in areas where fees are regularly charged, if not earned, by numerous of its members. I find it interesting, even hopeful, that one of the participants in this conference, Nicholas Zeppos, the University's Provost and a member of the Vanderbilt law faculty, suggested the establishment of such fee generating clinics on the model of clinical practices in medical schools.

By this point, it should be painfully obvious that the two-year sequence I have laid out proceeds generally from theory to practice, with only the modest deviations of a simple writing course in the second semester of the first year and the self-teaching courses for bar exam preparation purposes during the second. It ought also be apparent that there is more real theory in this curriculum than in the entire three years of law school today. It is "academic" with a vengeance, just not academic as theory types today use that loaded word or as students use it to disparage our efforts. Personally, I would reverse the sequence and build theory out of practice examples, but there is much to be said for dealing didactically with things that can be dealt with didactically, and besides, my preferred ordering would bring more anxiety to many first year students than even is the case today.¹⁰

It ought also be reasonably obvious that after these two years the necessary part of any law student's education would be complete. Not that it will turn out to be so, as Preble Stolz made clear years ago;¹¹ the transition costs of going to a two-year law school are more than any law faculty can support. Given that we cannot get rid of the appendix that is the third year, I don't think it matters much what gets taught in it. But, to finish my job, I will simply say that my third year would consist of either Practice III, or for those students who fell in love with either Practice I or II, an advanced version of their love, plus another year of Self-Teaching Doctrine and whatever stuff from the old curriculum that had to be preserved as a matter of political compromise with late-middle-aged faculty.

So, as I suppose you have figured out by now, Gerhard Casper was right. I am a revolutionary. But, I have no interest in exterminating the kulaks. I truly believe that the kulaks can be re-educated, and not in the Maoist sense either. I have re-educated myself before, and it has been the most fun of my entire academic career, other than the occasional summers or parts of sabbaticals when the writing has gone well. But whether or not you agree about re-education, much less find my curriculum intriguing, I think I have demonstrated the way in which the greatest impediment to the reform

10. I should note that I am beginning to believe that this is not the case for a growing portion of law students at other than the fanciest law schools. Those students who fail to earn the gold ring of acceptance at one of the fifteen or twenty law schools that claim that in a well-run world they would be included in the top ten, the reward always proffered during seventeen to twenty years on the academic treadmill exude a "teach me, I dare you" attitude. It is possible that this attitude can most readily be undermined by eschewing theory until practice is well understood.

11. See Preble Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37 (1973) (describing the rejection of an ABA proposal that would have authorized law schools to grant degrees to students completing two years of study).

of legal education is not the bar or the profession or the students; it is our attachment to the categories within which we teach. Questions about the full-year contracts course or about Torts in the first semester versus Torts in the second or the required course in corporations or even of a required clinical experience do not make for reform. Such questions are, however, not to be compared with rearranging deck chairs on the Titanic, for the old craft of legal education is not about to sink. Rather, they are much like rearranging the squares on a Rubik's Cube for the aesthetic pleasure of the patterns of color—well worth doing, but not worth fighting about.

So, as I wish you well on your way to curriculum reform, I will end by saying that I hope you make a significant change in legal education at Vanderbilt; every little bit helps. But, unless you are going to change fundamentally the categories within which that education is taught, do not fight about that change. The resulting destruction of social relations is not worth it, and besides, the new patterns on your Rubik's Cube just might be lovely to contemplate.