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Law students who have "survived" their first year in law school (the author included) frequently maintain that their first year was the most intellectually meaningful, yet the most difficult challenge they ever faced. Scott Turow's recent book *One L* amply illustrates contemporary dismay and resentment with the terrors of the first year in law school. Turow writes:

> I began to read in the extensive psychological literature about law school and was reassured to learn that my bad spell was hardly unique. 'I have never seen more manifest anxieties in a group of persons under "normal" circumstances than is visible in first year law students,' one psychiatrist had written.[1]

Quoting a fictionalized Harvard faculty member, Turow has him say:

> I keep running into Harvard Law School graduates, people of all ages, who tell me that 'court held no fear' for them. A lot of them are men who fought in World War II or Korea or Vietnam, and most say that even having had those experiences, they never felt as scared or oppressed as they did when they were law students at Harvard; and that afterwards, by comparison, their anxiety about going into a courtroom for the first time was nothing. Well, I'm glad if we can prepare our students so that they feel self-confident about performing their professional tasks. But it doesn't fill me with pride to be part of an institution that has provided so many people with the worst times of their lives. I don't think that's an affirmative thing to say about this law school. I think there has to be something wrong with a place like that.[2]

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1. S. TUROW, ONE L: AN INSIDE ACCOUNT OF LIFE IN THE FIRST YEAR AT HARVARD LAW SCHOOL 168 (1977).

2. *Id.* at 169.

Law professors are often not so understanding. In an article some years ago, Professor Loiseaux observed the following about undergraduate pre-law education:

> Our student learned the techniques for answering true and false or multiple choice questions, and how to memorize lines, paragraphs, or even chapters. Occasionally he would be required to write a paper. Just before the deadline he compiled some materials which he hoped the instructor had not read lately and submitted the same. That was the end of the matter. Such techniques were necessary in order to enable our student to take full benefit of the non-intellectual activities which were supported and emphasized by the university . . . What reaction when our student enters professional school? Most law teachers agree, he still cannot read or write. However, there is, or should be, an intellectual crisis in our student's development . . . . The instructor is not going to tell him by organized lecture what he should know; in fact, some of his instructors are so dastardly that they only ask questions. He feels at times during his first year that he is being cheated because he came to learn the 'law.' This hurts; he is a specialist in memorization and there is nothing to memorize. He may think the object is to find and underline the best sounding principle and to collect these principles for his mental catalogue. He is reluctant to question the printed word and more reluctant to question the instructor. He is shocked when he hears, in answer to a discussion problem, that the instructor does not know the answer. Then he realizes that when principles in two succeeding cases are inconsistent either the second is an exception or one represents the majority and the other the minority rule. With this he is well satisfied until the instructor says with emphasis that he is not interested in which is the majority rule.
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> Thus the student proceeds: many trials and much sweat. This may be inhumane and needlessly brutal but he will survive and be a better man for it.[3]

Many law school faculty members would whole-heartedly agree with these observations (possibly substituting the word "person" for "man" in the last line of the quotation). Indeed, embarking upon a legal career has always been difficult, even before Christopher Co-

3. Loiseaux, *The Newcomer and the Case Method*, 7 J. LEGAL EDUC. 244, 248-49 (1954).

lumbus Langdell taught his first class. Daniel Webster wrote the following about pre-Langdellian legal education:

> A boy of twenty, with no previous knowledge of such subjects, cannot understand Coke. It is folly to set him upon such an author. There are propositions in Coke so abstract, and distinctions so nice, and doctrines embracing so many distinctions and qualifications, that it requires an effort not only of a mature mind but of a mind both strong and mature, to understand him. Why disgust and discourage a young man by telling him he must break into his profession through such a wall as this?[4]

Nevertheless, student resentment, or perhaps one should say passive resistance, whether justified or not in the eyes of the faculty is a disturbing fact of life. As Professor Francis A. Allen has observed, "it is by no means true that these tendencies were unheard of in previous student generations. What is distinctive about the present situation is the intensity of their widespread expression in recent years."[5] Professor Allen concludes:

> At no time will a teacher worthy of the name be indifferent to the expectations of his students; and in an age of consumerism student demands and dissatisfactions are likely to be given even greater attention. Law teachers have reacted in different ways to the anti-intellectualism that pervades many students' attitudes. Some have found the student demands to be consistent with their own vision of law school training. Others have succumbed after token resistance, while still others continue to resist. Some of those latter, while adhering to the values of intellectually rigorous and humanistically oriented law teaching, have encountered exceptional difficulties in achieving effective communication with their students, difficulties that leave both them and their students bemused and dissatisfied.
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> However these dynamics are to be weighed, certain consequences are clear. One of these is that lesser intellectual demands are being made on students in some law school classrooms today than a decade ago . . . . Few will mourn the passing of the savagery that sometimes defaced the teaching of

4. *Quoted by* Schofield, *Christopher Columbus Langdell*, 55 AM. L. REG. 274 (1907). The article is a beautiful tribute paid by a former student to a beloved teacher.

5. Allen, *The New Anti-Intellectualism in American Legal Education*, 21 LAW QUAD. NOTES 6, 11 (1977).

> the past. Nevertheless, little can be said for a pedagogical exercise that permits a student to leave the classroom believing that a slovenly effort at analysis or generalization satisfies acceptable professional and intellectual standards. Involved in the question of intellectual rigor is the problem of value analysis. Such analysis is the essence of humanistic education in any discipline, but a discussion of values in the classroom unaccompanied by demands for clear and responsible thought may quickly degenerate into a kind of propaganda or sentimentalism.[6]

A substantial cause of present intellectual and emotional disfunction among law students may lie in our failure to understand fully or clearly enunciate the inner dynamics of the case method itself based, as it has traditionally been, on the inductive form of reasoning. Value judgments in our classroom versions of the legal world are usually reached in unfamiliar ways that differ from the preconceptions of our students. This threat to their comfortable notions, by what seems to be an incomprehensible reasoning process, causes intolerable intellectual dissonance that is too frequently resolved in the form of apathy, resistance, sophism, cynicism and professional mediocrity or worse.[7] The law teaching profession might do better if we attempted more often to explain how and why we reason so differently in law school and just what the implications of "thinking like a lawyer" are for our students.[8]

The Case Method

It has been said that "[t]he most influential law teacher who ever lived in the United States—or for that matter in any English speaking community—was Christopher Columbus Langdell."[9] Scott Turow, dramatizing his first tour of the Harvard Law School campus has his upperclassman friend, David, stop at the law school library building, Langdell Hall, and say:

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6. *Id.* at 10.

7. *See* Gorla, *A Civil Lawyer Looks at American Law School Instruction*, 3 J. Legal Educ. 515, 517 (1951) (author comments perceptively on the tendency of American law schools to cater to the intellectually brightest students).

8. Gross, *On Law School Training in Analytic Skill*, 25 J. Legal Educ. 261, 267 (1973) makes a similar plea.

9. Radin, *A Restatement of Hohfeld*, 51 Harv. L. Rev. 1141 (1938).

> The building is named for the late Christopher Columbus Langdell, who was dean of Harvard Law School in the late nineteenth century. Dean Langdell is best known as the inventor of the Socratic method.
>
> David lowered his hand and looked sincerely at the building. 'May he rot in hell,' David said.[10]

Now *everyone* knows that Dean Langdell was chiefly responsible for the *case* method of study in law school.

> Having a course on Contracts to teach, Langdell placed in the hands of each student the decisions on the subject under discussion, chiefly English, which he wished them to read; and the change in method was made. His predecessor had placed in the hands of each of his students his own *Treatise on Contracts,* for which Langdell had made the notes.[11]

Beale states that Langdell never claimed to have discovered a method of teaching, but a method of study, "teaching to him was relatively unimportant."[12] It is to Langdell's famous pupil, James Barr Ames, that credit for introducing the Socratic teaching method must go.[13]

Langdell's program of having law students study reports of decisions in individual cases provoked great controversy in its day, but since his system has now been adopted in most American law schools, there has been little written about the subject over the last 60 years or so. A 1951 article by Professor Edwin W. Patterson of Columbia presents a comprehensive review of the subject.[14] Patterson finds four critical presuppositions of the case method (as viewed by its early protagonists). It is scientific, pedagogical, pragmatic and historical.[15] The contention that it is scientific is perhaps the most intriguing. Langdell argued that the law library was to the law student what "the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the

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10. TUROW, *supra* note 1, at 40.
11. *Beale, Langdell, Gray, Thayer and Ames—Their Contribution to the Study and Teaching of Law,* 8 N.Y.U.L.Q. REV. 385, 386 (1931).
12. *Id.*
13. *Id.* at 393.
14. Patterson, *The Case Method in American Legal Education: Its Origin and Objectives,* 4 J. LEGAL EDUC. 1 (1951).
15. *Id.* at 2.

botanical garden to the botanists."[16] Professor Arthur E. Sutherland commented:

> A weakness in the philosophy of Langdell's method lay in its assumption that the social science of the law was fundamentally like a natural science; that its essential process was observation of phenomena and derivation from that observation of constant "laws" of chemistry or physics. Langdell was a perceptive man, not naive; he knew, of course, that men could change their enacted or decisional laws to suit their convenience, whereas they could not amend the law of gravity. Perhaps the scientism pervasive among intellectuals during his youth and early middle years had constrained him to express the analogy of law to natural science as though it were an essential likeness, even when he knew it was not really so. But whatever error of perception he may have entertained, still his insistence on scrupulously exact examination of legal materials, on their classification according to essential likenesses and differences, were disciplines of great value.[17]

Patterson draws roughly the same conclusion, stating that, "the argument that the case method is 'scientific' must, then, be taken as chiefly rhetorical."[18] In none of the early discussions analogizing the case method to "science," either the experimental sciences (physics and chemistry) or the sciences largely dependent on classification, maintains Patterson, "was it recognized that a rule or principle of law is primarily normative or prescriptive in meaning, whereas scientific propositions are either true or false upon the basis of empirical observations."[19] On the whole, concludes Patterson, "the 'scientific' arguments for the case method were at bottom pedagogical."[20] The purpose of the case method was to develop the student's powers of legal reasoning.

It would be easy to view the case method as principally a pedagogical or self-study tool designed to promote student self-reliance, rigor, precision, comprehensiveness, and thoroughness of understanding; a sort of Montessori approach of law that is also of great

16. *Id.* at 3 (quoting Christopher Columbus Langdell, 3 L. Q. Rev. 123, 124 (1887)).
17. A. Sutherland, The Law at Harvard: A History of Ideas and Men, 1817-1967, 178 (1967).
18. Patterson, *supra* note 14, at 4.
19. *Id.* at 4.
20. *Id.* at 5.

pragmatic value because it simulates the thing a common law lawyer has to do all his life, namely to "extract or develop law from facts."[21] Students, of course, quickly learn that outlines and canned briefs can easily short circuit (for examination purposes at least) the admittedly time consuming, painstaking case-book method.[22] But to look at it solely in this way would, I think, be a mistake. While it would serve no purpose to quibble over a definition of the term "scientific," the case method as used in contemporary law school classes is "scientific" in at least two critical respects. First, the case method, whether "empirical" or not, is certainly "inductive," that is, it generally relies on reasoning from the particular to the general.[23] Rules, laws and principles are reached only after an examination of individual fact situations (both actual cases and "hypotheticals"). Second, the case method arrives at conclusions or opinions that themselves are hypotheses, are subject to change in the light of new data. We have long abandoned Langdell's apparent belief in fixed, immutable principles which were thought to underlie all man-made law. Our rules or principles (arrived at by the case method) are tentative—they are "hypotheses" subject to further "testing." We are not as firmly bound by precedents (at least in the classroom.) We are more willing today in an age of rapid social and technological change to recognize feedback; and to recognize that new situations tomorrow may require us to revise rules drawn up to meet today's needs. This open-endedness, this relativity of law is usually grasped more readily, I believe, by students who have had some scientific background in undergraduate school, although I can offer no systematic empirical study to prove the point. But it is here that another variable enters the picture—the ability of men to choose, to make value judgments. We discuss rules in terms of whether they, or the results they produce "make sense," are just, fair, equitable, or comport with public policy, "whatever that means!" There is a value component in our dialogues about law, a judgmental factor that is not present when studying the laws of

21. *See* Patterson, *supra* note 14, at 6 (quoting letter from Prof. J.C. Gray to Editors of YALE L.J.).

22. *See* Campbell, *Comparison of Educational Methods and Institutions*, 4 J. LEGAL EDUC. 25 (1951); Loftman, *Study Habits and Their Effectiveness in Legal Education*, 27 J. LEGAL EDUC. 418, 418 (1975). Loftman quotes Harry Pratter: "[T]hird, and perhaps most important, this course is practical because the casebook, materials and even the lectures themselves may help you understand your Gilbert's outline." *Id.*

23. Patterson, *supra* note 14, at 5 n.15, seems to concede this.

physics; and this factor enters into our studies in a unique way because of the case method. We generally do not make or propose value judgments in our classrooms based upon detailed codes of principles, but on how we *evaluate* the possible outcomes of a given case or set of cases. It is a form of inductive ethics or "situation ethics" that our students usually are not used to and moreover, never have explained to them very well. Each student in our class (within the narrow confines of a particular case) becomes his own judge and his own legislator, as well as his own pope. The implications of all of this, as discussed below, would seem to bear further investigation. Professor Sutherland has pointed out that:

> In the years that followed the Civil War a system of thought then described as 'positivism,' the concept that knowledge is based exclusively on the methods and discoveries of the physical or 'positivist' sciences, was deeply moving young Harvard intellectuals—Oliver Wendell Holmes, Jr., William James, John Fiske, Henry Adams, and Brooks Adams who 'came to history seeking science.' Langdell has left no such record of his reading as Holmes left, but he cannot have escaped the deep intellectual currents of the time. His gospel was the application of the method of the natural sciences to the science of society. To him proper study of the law, like the study of chemistry, physics, zoology, and botany, consisted in the careful observation and recording of many specific instances, and then from these instances derivation of general conclusions that the qualities of the phenomena or specimens observed would hold constant for other instances of the same classes.[24]

Langdell was apparently not, however, the dogmatic his critics supposed: the last "theologian" of the law, to use Holmes' approbation.[25]

> Professor Langdell was always willing to reconsider a conclusion in the light of new suggestions. Not infrequently in new courses with which he had not become thoroughly familiar, he would recant propositions which he had advanced as sound. A student recently informed me of a course in which Professor Langdell changed his opinion in regard to a case three times in the course of one week, each time advancing with positive-

24. SUTHERLAND, *supra* note 17, at 176.
25. *See* Noonan, *Belief in Law and Belief in Religion*, 27 J. LEGAL EDUC. 386 (1975).

> ness a new doctrine. That he could do this without losing the respect or confidence of his students shows the esteem in which he was held. They well knew that he was a teacher of originality and great industry, with no object but to discover and state truly the principles of the law. To lose confidence in him for changing his position upon a legal proposition would be as absurd as to lose confidence in Charles Darwin if he withdrew a tentative conclusion found to be false after more extended investigation. Professor Langdell studied the law as contained in the reports in the same spirit in which the great scientists study the phenomena of nature.[26]

It is surprising that the influence of nineteenth century scientism and the influence of Pierce, James and Dewey in particular, including the jurisprudential implications of their thought, are not examined and studied more.[27]

The Socratic Method: Terror and Precision

To quote the Harvard Law School *Handbook for Entering Law Students:*

> You have doubtless learned at some time of the 'Socratic method,' which is much used at Harvard Law School and is almost a corollary of the case method. This is the system of teaching in which, instead of telling you directly, the teacher by his carefully thought out questions leads you and your classmates into discovering and expressing for yourselves the points the teacher wishes to make. You may wonder at first how this can be done with so large a group. Soon you will see that it is eminently practical, for the more people there are, the more ideas there will be, and the professor will want to hear from as many of you as wish to contribute.[28]

It is most unusual to find such an unconsciously candid admission that the Socratic method can be a tool of indoctrination *par*

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26. Schofield, *supra* note 4, at 276-77.

27. For related examples of the use of the case-method and other "inductive" approaches, see Vagts, *The "Other" Case Method Education for Counting House and Court House Compared*, 28 J. Legal Educ. 403 (1977); Oleck, *Adversary Method of Law Teaching Summarized*, 27 J. Legal Educ. 86 (1975); Misner, *Teaching Contracts with Contracts*, 28 J. Legal Educ. 550 (1977).

28. Harvard Law School, Handbook for Entering Law Students 15 (1966).

excellance. Usually the descriptions of the Socratic method take a more earnest view:

> Student participation in the class discussion is still, I believe, an essential feature of the case method, and one which ought to be preserved at the sacrifice of some other values, such as additional information or a more orderly and explicit presentation of the teacher's ideas about the subject matter. The 'Socratic dialogue' was the early ideal of class discussion. A student was asked to summarize orally a case in the book, the teacher asked him questions about it or put to him a hypothetical case; the student was called upon to defend his decision in relation to the case in the book or other cases. The hypothetical case, skillfully chosen by the teacher, thus became one of the chief instruments for pulling out the significance of the main case and for extending or limiting its doctrine or principle. The teacher, like Socrates, should ask more questions than either he or the student can answer. This process can be intellectually stimulating to the entire class and can give the students clues to what they should investigate further. The creation of doubt followed by its resolution is one of the important steps in the process of learning. Yet the Socratic method calls for great skill on the part of the teacher and considerable quick-wittedness on the part of the student. When protracted to the point where interest lags, it becomes tiresome and wasteful of time . . . .
>
> One corollary of the basic principles of the case method was that the teacher ought never to lecture, or to summarize the conclusions to be derived from the cases and the class discussion. The student was supposed to work out the conclusions from the questions of the teacher. I doubt if it is strictly applied by most law teachers today.[29]

Turow speaks eloquently about the indoctrination effect on first year students. He has his fictional first year colleague, Gina, say,

> 'They're turning me into someone else,' she said, referring to our professors. 'They're making me different.'
>
> I told her that was called education and she told me, quite rightly, that I was being flip.

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29. Patterson, *supra* note 14, at 17-18. *See also* Bryson, *The Problem Method Adapted to Case Books,* 26 J. LEGAL EDUC. 594 (1974).

'It's someone I don't *want* to be,' she said. 'Don't you get the feeling all the time that you're being indoctrinated?'

I was not sure that I did, but as Gina and I sat at lunch, I began to realize that for her and many of the other people in the section, there was a crisis going on, one which had not yet affected me as acutely.

On one hand the problem was as simple as the way Nicky had put it. Students felt they were being forced to identify with rules and social notions that they didn't really agree with . . . .

But there was a subtler difficulty in our education, one which went to the basis of legal thinking itself and which became especially apparent in class. We were learning more than a process of analysis or a set of rules. In our discussions with the professors, as they questioned us and picked at what we said, we were also being tacitly instructed in the strategies of legal argument, in putting what had been analyzed back together in a way that would make our contentions persuasive to a court. We all quickly saw that that kind of argument was supposed to be reasoned, consistent, progressive in its logic. Nothing was taken for granted; nothing was proven just because it was strongly felt. All of our teachers tried to impress upon us that you do not sway a judge with emotional declarations of faith . . . .

About the same time, from three or four others, people I respected, I heard similar comments, all to the effect that they were being limited, harmed, by the education, forced to substitute dry reason for emotion, to cultivate opinions which were 'rational' but which had no roots in the experience, the life they'd had before. They were being cut away from themselves.[30]

Accompanying the indoctrination problem is the problem of "terror," especially in first year. The traditional attitude is well expressed by W. Barton Leach's eulogy to Edward H. "Bull" Warren:

Bull Warren scared the hell out of his first year students. The first and last commandment of Property I was 'Thou shalt think straight.' The transgressor was justly treated. Twice, even thrice, he was given the chance to retrieve himself, but

30. TUROW, *supra* note 1, at 90-92.

when he failed the thunderbolt struck—except when in those rare moments of Olympian self-restraint when The Bull, with apoplexy visibly threatening, would turn away as from something found under a flat stone and seek out a student in another part of the room.

It was The Bull's justice that hurt. The student who took a verbal caning knew he deserved it, that he should have avoided it, and that any other student would have received the same treatment. As one of them said, 'Sure he treated me like a fool but not until he had convinced me that I was.'

I believe that the effect on most men was good. In my case I am sure of it. . . .

Few college students have had training in precision of thought expressed in words. This is the stuff of the law, and it is well that students should early acquire a respect for it. The Bull's method inspired respect. Some students wilted. There was a Magna Cum Laude in English from a leading college who flunked out in my class, and I am convinced the Bull did it. I am also convinced that that student was no more fitted to be a lawyer than my cat. If, at the age of 21 or 22, a young man can be thrown off balance by harsh words known to be constructively intended, he ought seriously to consider whether he has the temperament to engage in a profession whose members offer themselves to the public as general trouble shooters and whose court-room traditions still savor trial by combat.[31]

Terror breeds precision and the ability and confidence necessary in the world of the courtroom. But, others would dissent from this view. Turow puts it this way:

[T]he peculiar privilege which Socraticism grants a teacher to invade the security of every student in the room means that in the wrong hands it can become an instrument of terror. I never felt that my education gained by my being frightened, and I was often scared in class. Law faculties have too long excused, in the name of academic freedom, a failure to hold colleagues within basic limits of decency. They must formulate and enforce an etiquette of classroom behavior which insures that teachers cannot freely browbeat and exploit their students. To refuse leaves them in a subtle but persistent state of

31. Leach, *"Look Well to the Right . . . ."* 58 HARV. L. REV. 1137, 1137 (1945).

> moral abdication. I know that it is hard to think of law students, headed for a life of privilege, as being among the downtrodden; and I also recognize that classroom terror has been a fixed aspect of legal education for at least a century. But the risk, the ultimate risk, of allowing students to make their first acquaintance with the law in such an atmosphere, in that state of hopeless fright, is that they will come away with a tacit but ineradicable impression that it is somehow characteristically 'legal' to be heartless, to be brutal, and will carry that attitude with them into the execution of their professional tasks.[32]

The issue of terror and intimidation aside, the problem of indoctrination must be examined further, because it is what seems genuinely to alienate and confuse students exposed to the Socratic method. With what are law students being indoctrinated? Peter W. Gross maintains that the Socratic case method "treats analytic skill instruction largely as an inchoate chemistry."[33] One purpose of the Socratic method, according to Gross, is to impart information. A second use is "to teach students to think"—that is, to teach analytical skills. Gross maintains that the Socratic method is ineffective for three reasons:

First Gross quotes Professor P. N. Savoy to the effect that: "One problem with the 'Socratic method' as it is usually practiced is the failure at some point to make explicit for students the nature of the strategies we use to defeat them or the processes by which they defeat themselves."[34]

Second, it "turns students off."

Third, it reduces the amount and quality of information imparted.[35]

If one accepts the view that law should be taught in the "grand manner," the heart of Gross' criticism is that we do not make explicit to the students the inductive nature of the analyses we expect from them, but rather permit them to pick this up, and some never do, by osmosis. This is an attractive critique of the Socratic method and the difficulties it causes students, but it does not go far enough. It fails to examine the unique system of making value judgments we "impose" on, or expect of, our students.

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32. TUROW, *supra* note 1, at 296.
33. Gross, *supra* note 8, at 268.
34. *Id.* at 307.
35. *Id.* at 307-08.

Much criticism may, of course, be attributed to the inherent laziness of students of whatever age. The Socratic case method is essentially a method requiring self-study (and this is so regardless of its inductive characteristics). It was said of Langdell that "[f]rom Socrates to Agassiz the characteristic mark of a great teacher is that he makes his pupils use their own powers and do original work. Tried by this test, Professor Langdell is fairly entitled to be called a great teacher."[36] In teaching students, Schofield contended that, "the formation of a habit is the essential thing. When once formed by a student he will apply it in all his work."[37] Perhaps the modern student is too accustomed to learning by lecture and by television to be very attracted by self-study, especially when the tendency to spoon-feed has increased in recent years (as diminishing national test scores seem to prove). Nevertheless, this sort of observation should not be used to cover up short-comings in our teaching or obscurities that should be examined more carefully.

A few observations seem to be in order on the subject of teaching law in the "grand manner" versus the vocational approach. An Italian law professor made the following observations about the place of the Socratic case method in the center of this recurring controversy:

> [T]here is a grave danger that the average student may easily lose sight of principles, insofar as the doctrine is presented to him as a disordinate aggregate of decisions, where each one has its own reason for being, completely independent of the others, without connective tissue and without system. This pitfall, though perhaps not too serious for the outstanding student, poses a serious problem for the student of average ability who has not had the experience nor the solid preparation necessary for the difficulties encountered in learning principles by the inductive method.
>
> This weakness of the method finds an ally in the tendency of the American law schools toward practicality. Notwithstanding the efforts of the great law schools to put the brakes on it, there seems an evident tendency among many schools, which cater to student desire, to make the school a preparation for the immediate practice of the profession, almost a substitute for apprenticeship.

36. Schofield, *supra* note 4, at 284.
37. *Id.* at 282.

> The very weight of the courses concentrated in three years results in the fact that for the average student the principles and theory of law are sacrificed to the purely practical side of his learning.
>
> This trade or vocational school tendency is minimized in civil law countries because there the student knows there will be a sizeable period of apprenticeship after school and expects to learn the 'trade' in the law office.[38]

Whatever the merits of Professor Gorla's view, the quarrel between the practitioners and the academicians is an old one. Professor Allen has recently written about what he regards as the new anti-intellectualism in legal education,[39] but this dichotomy has existed at least since Langdell's time,[40] if not from the beginning of time. This particular controversy must not, however, serve as a justification for regarding any criticism of the Socratic case method as an attempt to bow to student pressure or to make law school life more of an apprenticeship experience, but rather as an attempt to make rigorous academic study a more realistic goal for the majority of our students by removing those impediments that retard the achievement of that goal.[41]

Intermediate Values

It is not just inductive reasoning that stymies our students. It is difficult to grasp how we make value judgments, especially so since we often do not understand ourselves, as teachers, what is really happening. The civil lawyer, Professor Gorla observed:

> The concept of law as experience rather than logic, the rapid development of American history, the complexity and variety of the judicial precedents in forty-eight states, and the absence of general codification—all of these influence the Americans to study the law from a sociological point of view. It is the sociol-

38. Gorla, *supra* note 7, at 516-17.

39. Allen, *supra* note 5, at 7.

40. Patterson, *supra* note 14, at 11-12.

41. For more on the practical versus the academic approach, see Costello, *Another Visit to the Man Divided: A Justification for the Law Teacher's Schizophrenia*, 27 J. Legal Educ. 390 (1975); Funk, *Interstitial Jurisprudence Illustrated in Teaching Criminal Law*, 27 J. Legal Educ. 53 (1975); and Sinha and Elder, *An Enlightened Legal Pedagogy for Today*, 27 J. Legal Educ. 572 (1975).

> ogical tendency in the study of law which leads them to examine it from a point of view we call 'de jure condendo.' (The law as it ought to be.) Unlike our law schools, in the American law schools legal doctrines and cases are examined even under the aspect of their adequacy and capacity to satisfy the socio-economic exigencies of the present day world.[42]

Professor Morgan, in his classic work on the case method, describes our best law teachers in class as only beginning with a student's statement of the case.

> When the discussion of the problem presented by the assigned case has been exhausted, he suggests other states of facts either imaginary or found in the reports, and requires the student to form a judgment as to whether the variance in the facts is of legal significance, and whether the reasoning in the assigned case would require or justify the same or a different result. If the reasoning would require or justify the same result, he asks whether the result appeals to the student's sense of fairness in the adjustment of social relations, seems of doubtful validity, or goes so far as to shock the conscience. He seeks to have the student consider whether the generalization stated as the basis of decision in the principal case should be treated as universally applicable or should be modified, and to exercise his own judgment concerning the extent to which the case should be used as a precedent. In this process he generally informs the student of the result reached by the courts in the other situations which he has drawn from the reports and indicates whether the doctrines evolved by the cases have been modified by statute.[43]

Is the result a good one? or a right one? Professor Fuller has observed that "when we discuss the 'rightness' of a case, the question 'What do we mean by "right"?' is bothersome, but we are afraid to meet it head on."[44] Professor Cavers points out that when students give their classroom (or bluebook) improvisations, "they talk loosely about the court's reaching the right result (without showing what

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42. Gorla, *supra* note 7, at 516.

43. Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 384 (1952).

44. Funk, *supra* note 41, at 57 (quoting Professor Lon Fuller). *See also* Bresnahan, *"Ethics" and the Study and Practice of Law: The Problem of Being Professional in a Fuller Sense*, 28 J. LEGAL EDUC. 209 (1976).

result is right or why) or about the judge's doing what he wants to do (without showing why he wants to do what he does). They patter a little about balancing social and economic interests (without defining the interests at stake or showing how they can be weighted)."[45]

We deal with value judgments; we evaluate; we judge alternate decisions and courses of conduct, but hesitatingly! Most traditional law professors avoid broad public questions altogether. As a student, I can vividly recall how frustrating it was to reach a critical point in a discussion only to have a professor move to something else with the transitional dismissal of, "Oh, that's a policy question!" But values are inculcated (or indoctrinated?). "It is almost amusing," states Professor Llewellyn, "to see the eagerness with which the same law teachers who shun all mention of high ideals roll up their sleeves to inculcate those low ideals (which still are true ideals) known as the better doctrine or the wiser rule or the true principle in some particular aspect of some particular 'field.' And often with success."[46] Through astute use of the Socratic dialogue, we can convince students of the soundness of these "low ideals." The problem is that the students often do not understand what is happening to them (and neither do we) because we are making these value judgments in a limited way, and making them inductively, that is, through a comparison of individual cases, results, fact situations, consequences, but not solely or even substantially on the basis of *a priori* principles. This may be what those less than brilliant students have some right to complain about because they are faced with an inexact, unarticulated way of reaching value judgments that is directly contrary to rigid ethical patterns instilled early in life and never systematically reconsidered. Lon Fuller has pointed out that this matter is not entirely unrelated to the larger question of whether law school should be a trade school or a humanistic enterprise.

> The problem addresses itself finally to the law student . . . Shall he search out the professor who can expound 'the existing law' . . .? Or shall his preference lie for the man who can impart an insight into the shifting ethical background against which 'the law as it is' appears as an accidental configuration

45. Funk, *supra* note 41, at 57-58 (quoting Cavers).
46. K. Llewellyn, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 178 (1962).

> without lasting importance? A similar problem of choice confronts him in directing his own studies. The way in which the law student decides these questions transcends in importance its effects on his own career, for, through the subtle pressures he exerts on his instructors to teach him what he thinks he ought to be taught, he exercises an influence on legal education—and indirectly on the law—much greater than he has any conception of.[47]

If we are going to persuade students of the better path to pursue, we ought to devote additional energy to exploring our ways of making value judgments.

LEGALISM

The main thrust of the book *Situation Ethics,* says author Joseph Fletcher, "was against legalism. This was because almost all people in our Western culture . . . are and have been legalistic. They hang on to certain eternally invariable rules of conduct as absolutely valid and universally obliging regardless of the situation."[48] Strangely perhaps, the one group Fletcher would have to exclude from this broad grouping is the bulk of the American legal profession! Professor Morgan describes the objectives of legal education as including a capacity (on the part of the student) to "think hard and straight, [with] a settled determination to accept the *ipse dixit* of no man or group of men . . ."[49] Another commentator has suggested that in law school, "the inculcated reliance on authority must give way to reliance on more subtle uses of the understanding."[50]

> Lawyers are pragmatists. American lawyers are doubly pragmatic. They eschew 'theory for its own sake' both in their professional training and in practice—it does not produce results, and it is suspect as an excuse for avoiding the hard problems of producing results. For, it is intrinsic to the common law tradition that a constant evolution of legal rules is being sought by lawyers as a problem-solving exercise to achieve a well-working society. The common law tradition operates as a gen-

47. Allen, *supra* note 5, at 11.
48. Fletcher, *Reflection and Reply,* in THE SITUATION ETHICS DEBATE 250 (H. Cox, ed. 1968).
49. Morgan, *supra* note 43, at 391.
50. Funk, *supra* note 41, at 53.

> eration to generation striving after ever increasing usefulness of legal institutions, and so its central characteristic is the 'case by case' approach and a vigilance against becoming entrapped in the excessively constructive abstractions of 'black letter law.' One has only to think of constitutional interpretation, on one level, or the way in which commercial practice and commercial law reciprocally influence one another on a different level, to see how little likely it is that common law attorneys will be impressed by *elegantia juris* and speculative subtleties. The common law attorney prizes thought because it works well—the 'cash value' of truth forms an abiding inspiration of his professional life.[51]

Have we failed in our professed aim? Not in most cases. Fletcher is expressing the layman's understanding of law and legalistic reasoning, which is of necessity going to be the law student's understanding until such time as we help change it into a more mature view. Most beginning students cling to black letter law. The very idea that individuals in our common law system (judges, litigants, advocates) make law, in all but the simplest cases, in addition to legislators, is difficult to grasp or accept.[52] So is the idea that the law must consider the unique facts of an individual case. When problems arise, laymen tend to take the deductive approach of the civil law.[53] Life is more certain that way. Yet the American judicial process "is most at home when it disposes of a unique conflict situation unique uniquely."[54] And,

> To any student it is an important intellectual stage when he first realizes that all law is in a state of constant motion, like a kaleidoscope,. I do not remember just when this realization came to me; I know it was not while in the Law School; but as I look back, I note a great difference in all my notions about law since the time of that realization.[55]

Attempts to live with this uncertainty can be distressful, and for many people impossible. It is hardly surprising then, that students

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51. Bresnahan, *supra* note 44, at 204.

52. Even John Rawls seems to miss this point. *See* Murphy, *Book Review*, 25 J. LEGAL EDUC. 494 (1973).

53. *See* Kronstein, *Reflections on the Case Method—In Teaching Civil Law*, 3 J. LEGAL EDUC. 265 (1950). *See also*, Gorla, *supra* note 7, at 517-18.

54. Gross, *supra* note 8, at 299 (quoting Cowan).

55. *Id.* (quoting Wigmore).

will look for certainty and resent not finding it. Many assume that they have come to law school principally to learn what books they must read in order to get a definitive answer to any legal question presented, in keeping with the notion that all the answers are in the library, and that is is just a matter of finding the right book! Indeed, one must concede that there is something of this urge in the scientism of Langdell and the early case-method advocates.[56] But it is a painful process for many students to relinquish the quest for absolute rules and absolute answers.

The following may serve as a typical illustration of what has been described above as the layman's view of law. An elderly friend of the author's serves as an administrator at a large municipal hospital. From 11:30 a.m. to 1:00 p.m. the hospital cafeteria is reserved for doctors and nurses working at the hospital. After 1:00 p.m., the cafeteria is open to the general public and this fact is prominently posted about the premises. One afternoon, around ten minutes to one, an elderly gentlemen and two members of his family sought entrance to the cafeteria which by now was almost entirely empty. They just wanted to sit there until one o'clock when he planned to purchase some lunch. The cafeteria was the only pleasant place to wait at the hospital and the admission of the group would not have caused any security problems or difficulties with the clean-up crew. Nevertheless our intrepid administrator would have none of it. She got into a heated argument with this gentleman and insisted that he wait ouside until one o'clock. What was most amazing to me about this little story was the vehemence with which our administrator repeated the incident. There was no rationalization about "what if everyone tried to enter the cafeteria early" (rule utilitarianism). No, our administrator was still visibly upset over the fact that the gentleman seeking entrance could not seem to understand that "rules were rules," and that they must be followed to the letter regardless of whether the rule made any possible sense in this situation. If our administrator had been a lawyer trained at one of our finer law schools, the chances are that she would have let the old gentleman in, at least on the theory of *cessante ratione, cessat ipsa lex* (a kind of act utilitarianism).

What we as law teachers are really superintending may perhaps best be described as a maturing process amongst our students. In

56. *See* Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 799 (1967).

truly pioneering work done at Harvard's Center for Moral Development, Professor Lawrence Kohlberg has proposed, on the basis of extensive empirical research, that there are six distinct states of moral development which may be briefly described as follows:

I. Preconventional Level
At this level the child is responsive to cultural rules and labels of good and bad, right or wrong, but interprets these labels in terms of either the physical or the hedonistic consequences of action (punishment, reward, exchange of favors), or in terms of the physical power of those who enunciate the rules and labels. The level is divided into the following two stages:
Stage 1: The punishment and obedience orientation.
Stage 2: The instrumental relativist orientation.
II. Conventional Level
At this level, maintaining the expectations of the individual's family, group, or nation is perceived as valuable in its own right, regardless of immediate and obvious consequences. The attitude is not only one of *conformity* to personal expectations and social order, but of loyalty to it, of actively *maintaining,* supporting, and justifying the order, and of identifying with the persons or group involved in it. At this level, there are the following stages:
Stage 3: The interpersonal concordance or 'good boy—nice girl' orientation. Good behavior is that which pleases or helps others and is approved by them. There is much conformity to stereotypical images of what is majority or 'natural' behavior.
Stage 4: The 'law and order' orientation. There is orientation toward authority, fixed rules, and the maintenance of the social order. Right behavior consists of doing one's duty, showing respect for authority, and maintaining the given social order for its own sake.
III. Postconventional, autonomous, or principal level.
At this level, there is a clear effort to define moral values and principles which have validity and application apart from the authority of the groups or persons holding these principles, and apart from the individual's own identification with these groups. This level again has two stages:
Stage 5: The social-contract legalistic orientation, generally with utilitarian overtones. Right action tends to be defined in terms of general individuals rights, and standards which have been critically examined and agreed upon by the whole society.

> There is a clear awareness of the relativism of personal values and opinions and a corresponding emphasis upon procedural rules for reaching consensus. Aside from what is constitutionally and democratically agreed upon, the right is a matter of personal 'values' and 'opinion.' The result is an emphasis upon the 'legal point of view,' but with an emphasis upon the possibility of changing law in terms of rational considerations of social utility (rather than freezing it in terms of stage 4 'law and order'). Outside the legal realm, free agreement and contract is the binding element of obligation. This is the 'official' morality of the American government and constitution.
>
> Stage 6: The universal ethical principle orientation. Right is defined by the decision of conscience in accord with self-chosen *ethical principles* appealing to logical comprehensiveness, universality, and consistency. These principles are abstract and ethical (the Golden Rule, the categorical imperative); they are not concrete moral rules like the Ten Commandments. At heart, these are universal principles of *justice,* of the *reciprocity* and *equality* of human *rights,* and of respect for the dignity of human beings as *individual persons.*[57]

Kohlberg would presumably place the better type of reasoning pursued in law schools (which we have discussed) in stage 5 midway between stages 4 and 6, both of which stages, at least on the surface, involve deducing correct behavior from general principles. In establishing his various stages, Kohlberg relies on a number of factual examples of moral dilemmas (we might go so far as to call them "cases.") Perhaps the most famous is the case of the man who has a dying wife and who must decide whether to "steal" from an "evil" storekeeper who refuses to sell him medicine needed by the spouse.[58] These cases or dilemmas were put to children of various ages, and their responses over a period of years help form the basis of Kohlberg's conclusions. Kohlberg's theories and extensive writings have

57. Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away with It in the Study of Moral Development,* in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 164-65 (T. Mischel, ed. 1971).

58. *Id.* at 165. *See also* Mackey, *Discussing Moral Dilemmas in the Classroom,* ENG. J. 28-30 (1975); Leach, *A Professorship of Legal Education Recommended,* 2 J. LEGAL EDUC. 149 (1949). Mackey's article is startling for he presents hypothetical cases of moral dilemmas strikingly similar to cases we use in law classes. Leach's article is the only article I have found that calls for a consideration of educational psychology and its possible effects on law teaching.

been widely discussed in the fields of psychology, religion, education and philosophy. It is truly surprising that they have been so little noticed in legal education.[59] If we are engaged in helping along a process of moral maturation in our students, should we not devote more attention than we have to that process? And take greater pains to explain and understand the values and the system of making value judgments we inculcate? Should not the growth of our students in understanding be as important to us as growth in the law itself?

Some Lessons

Rather than to continue generally discussing value judgments in legal teaching, it would seem to be much more useful at this point to illustrate the way value judgments are inculcated with specific examples. All the following examples are taken from either the Casner and Leach casebook for *Property,*[60] or the Leach and Logan casebook on *Future Interests and Estate Planning.*[61] The author has taught both courses many times using these materials. Conscious of what has been called the "debilitating notion that a sound way to teach a course is from detailed blueprints prepared by an authority,"[62] there are, nevertheless, immense advantages in studying the mind of a great teacher as expressed in his ingenious and creative casebooks and teachers' manuals. In the author's case, while not having had the sense or advantage to take a course with W. Barton Leach when the opportunity presented itself, the manuals have been most helpful in illustrating the philosophy, the grand design behind many of the law school courses the author was exposed to in student days. In spite of his numerous law review articles (many of truly landmark quality, especially with respect to reform of the Rule against Perpetuities) Leach's genius is, I think, best illustrated in his case books and the manuals prepared for them. In his areas

59. For further readings in the area, see Kohlberg, *Stage and Sequence: The Cognitive—Developmental Approach to Socialization,* in Handbook of Socialization Theory and Research 347 (D. Goslin, ed. 1969); Gibbs, *Kohlberg's Stages of Moral Judgment: A Constructive Critique,* 47 Harv. Educ. Rev. 43 (1977); Giarelli, *Lawrence Kohlberg and G.E. Moore on the Naturalistic Fallacy,* 26 Educ. Theory 348 (1976); Sichel, *Can Kohlberg Respond to Critics?* 26 Educ. Theory 337 (1976). The Gibbs article contains an excellent bibliography.

60. A. Casner & W. Leach, Cases and Text on Property (2d ed. 1969).

61. W. Leach & J. Logan, Future Interests and Estate Planning: Cases and Text (1961).

62. Mueller, *There Is Madness in Our Methods,* 3 J. Legal Educ. 93 (1950).

of specialization Leach was a brilliant critic and reformer.[63] This is not surprising once one has a glimpse of his methodology, his rigorousness, his open-ended inductive approach and, I believe, his penetrating value judgments. For me, his writings illustrate not only a sophisticated approach to making legal value judgments, but also, in turn, a way of thought that virtually necessitates a reforming spirit.[64]

1. The Case of the Bees.

Problem 2.4 in Casner and Leach provides:

> O owns land in a city which has a zoning law. O's land is located in what is termed an R-1 zone, in which land may be used for "the raising of poultry, rabbits, and chincillas and the keeping of domestic animals in conjunction with the residential use of a lot." O desires to keep bees on his lot. He requests your advice as to whether such action on his part is permitted under the zoning law. What advice would you give him? See *People v. Kasold,* 153 Cal. App.2d 891, 314 P.2d 241 (1957).[65]

As the first assignment in Property I, the first unlucky student called upon will usually respond to this question by asserting that one must define what "domestic animals" are, as opposed to "wild animals." (In Chicago, the more "street-wise" student will occasionally answer that the first thing to do is to seek a zoning variance. While of course being a sensible suggestion, the teacher need merely suggest that this might be too "costly.") Where does one obtain a definition of domestic animals? Why from prior case law—or from Blackstone. Suppose no prior authorities deal with the question of whether bees are domestic or wild, or the authorities are in conflict. Then what? Now some bright student will suggest that this being a matter of statutory construction, one must look at the legislative history. But assume there is no legislative history (a reasonable assumption for a municipal ordinance). If our client is planning a

63. *See* Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 HARV. L. REV. 721 (1952); Leach, *Perpetuities: Staying the Slaughter of the Innocents,* 68 LONDON Q. REV. 35 (1952); Leach, *Perpetuities Legislation, Massachusetts Style,* 67 HARV. L. REV. 1349 (1954); Leach, *Perpetuities: What Legislatures, Courts and Practitioners Can Do About the Follies of the Rule,* 13 KAN. L. REV. 351 (1965).

64. Note, *The Law Teacher as Legal Reformer: 1900—1945,* 28 J. LEGAL EDUC. 508 (1977).

65. CASNER & LEACH, *supra* note 60, at 23.

heavy investment in bees, the only way to get a definitive answer to his question is through litigation of some sort. The question of whether bees are domestic or wild must then be decided by a judge. Usually another bright student will comment that one must ascertain the purpose behind the statute; and will conclude that the purpose of the statute was to protect passers-by from physical injury or attack. Fine. What will our client, O, attempt to argue? Why, that his bees are (or will be) harmless, not given to wanderlust, and hopefully, that the bees will be housed at a great distance from public thoroughfares. Who will win the case? Most students will rule against O on the grounds that the bees probably will be dangerous to neighbors and to the public (Although one year, there was a beekeeper in the class who strenuously maintained that most species of bees were perfectly harmless). In any event, the students are led to the conclusion that the judge ought to decide whether the bees are domestic or wild (and therefore covered or not covered by the statute) on the basis of whether the decision would result in any danger to the public. Setting aside the more difficult question of whether the distance of the hives from the public roadway or the lot line should influence the decision, one can see that students are led away from their initial inclination to assume that to apply a rule, one need merely speculate about and define the terms of the rule. They are led toward the conclusion that choice of a specific result governs how we define and apply rules, which is usually contrary to all their prior training in interpreting the rules they have come in contact with, including ethical and moral rules. In other words, what the law is, is "ruled" by legislative purpose, and by the choice of result. The result is not logically preordained and fixed deductively by the language of the statute or rule. This is, I believe, the most difficult principle to grasp for most students.

2. *The Case of the Boot-legged Whiskey.*

In their section on unconscious possession, Casner and Leach include the case of *State v. Cox*[66] wherein a hotel porter was convicted under an Oregon criminal statute prohibiting the possession of intoxicating liquor. It seems that the porter was "caught" transporting guest baggage from a railroad depot to the hotel. In one of the suitcases he was transporting were 12 bottles of whiskey. The lower

66. 91 Oregon 518, 179 P. 575 (1919) (CASNER & LEACH, *supra* note 60, at 43.).

court ignored the porter's contention that he did not know he was carrying whiskey, considering knowledge irrelevant under the statute. The Supreme Court reversed the conviction. They decided that absent an express statutory declaration to the contrary, such a criminal statute must be presumed to include the requirement of knowledge of wrongdoing. The case is, of course, an excellent introduction to the problem of liability without fault and to common law statutory interpretation, but it also can be made to illustrate an additional critical point. One must ask the students what would happen if a similar porter were "held up"while transporting concealed whiskey back to the hotel. Suppose that a highwayman carried off the whiskey and was later apprehended and charged with highway robbery. Also suppose that the highway robbery statute established as one of its crucial elements the taking of property from the possession of another. If *State v. Cox* were binding precedent in the jurisdiction, would the highwayman have a defense based on the contention that since the porter did not know about the whiskey, he was not in "possession" of it and that therefore the highwayman did not take property from the "possession" of another under the highway robbery statute? It seems like a preposterous suggestion, but if the question is put artfully, students will often have difficulty answering it. The point is that the word "possession," like other legal terms cannot be defined in any one fixed way. Legal terms and concepts take their meaning and function from the context in which they are found and may vary depending upon the legal or factual context. This contention would seem to be remarkably similar to the view taken in Wittgenstein's later writings. It is directly contrary to the layman's assumption that to apply a rule, all one must do is read the rule and define its terms. Notice how far removed it is from Kohlberg's fourth state of moral development as well.

3. *Cessante ratione, cessat ipsa lex.*

Justice Cardozo in *Doctor v. Hughes*[67] not only resurrected the feudal doctrine of Worthier Title (which doctrine turned a remainder in the grantor's heirs into a reversion in the grantor—essentially for purposes of preventing avoidance of feudal taxes); he expanded it, by construing it to be a "rule of construction," an odd result since there were no feudal taxes to avoid in New York in 1919. Among

67. 225 N.Y. 305, 122 N.E. 221 (1919).

Leach's criticisms of this landmark case, he argues, "The feudal reason for the rule does not exist in the United States, so the rule should not exist. *Cessante ratione, cessat ipsa lex.*"[68] Leach expanded on the maxim thus:

> There is a danger in our Anglo-American practice of deciding a particular case before the court and then putting into a judicially-announced verbal capsule a generalized principle upon which the case is decided—for example, 'No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.' The danger is that the verbal formulation, properly adaptable to the case at bar, will then be given quasi-legislative force and woodenly applied to other cases where the same policy issues are not involved. Too often neglected is a wise precept: 'Every opinion must be read in the light of the facts then presented.' Statements of rules as applicable to that case cannot be taken out of their context and stretched to different circumstances not before the mind of the court. (*Swan v. Justices of the Superior Court,* 222 Mass. 542, 545 111 N.E. 386 (1916), per Rugg, C.J.). The key to the Doctrine of Precedents is the old maxim: *Cessante ratione, cessat ipsa lex.* To this maxim we should like to add the correlative of our own concoction: *Durante ratione, durat ipsa lex.*[69]

And commenting on the abandonment by the House of Lords of rigid stare decisis, Leach remarks:

> Stare decisis is a habit of mind in all walks of life—the professions, business, family life. One does what one has done before in similar circumstances. It gives stability and continuity in all human activity. But when it is obvious that one's previous actions turned out badly, or that circumstances are essentially different, the intelligent human being reviews the problem anew; if, with due consideration to desiderata of stability and continuity, he concludes that something different should be done in the future, a different course is generally charted.
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> For a prodigiously thorough survey of the current willingness of American courts to overrule in one branch of the law, torts,

68. LEACH & J. LOGAN, TEACHERS' MANUAL to accompany FUTURE INTERESTS AND ESTATE PLANNING, *supra* note 61, [hereinafter cited as TEACHERS' MANUAL].

69. LEACH & LOGAN, *supra* note 61, at 884.

see Keeton, "Judicial Law Reform—A Perspective on the Performance of Appellate Courts," 44 *Texas L. Rev.* 1254 (1966). This article is a veritable textbook for the judicial reformer, even rivaling the great dissent of Vanderbilt, C.J., in *Fox v. Snow,* 6 N.J. 12, 14, 76 A.2d 877, 878 (1950).[70]

It has been pointed out that a student is left at a serious disadvantage with respect to mastering the dynamics of this maxim if he only seeks to state the rule in a case (the black letter law) without attempting to apply the principles of an earlier case to new factual situations.

> Difficult as is the judge's task in discharge of these obligations with respect to rule definition, the student's task in study brief statement of rules is harder. Thus, in prospective view, the judge's aim is clarity—but here he has his own intended meaning to guide him. In retrospective view, the judge is guided by a specific set of facts, in terms of which to frame his inquiry into the rule of a prior decision. The student has neither aid.[71]

Yet how many students understand why exclusive reliance on outlines and definitions not only retards their growth in understanding of the law, but also affects what values they themselves incorporate into the law as professionals?[72]

4. *Magic Words.*

In law, a layman's use of an apparently innocent word (or failure to use an apparently innocent word) in a will, trust, or contract may have dire consequences.

> The fatal words once used, the law fastens upon them, and attaches to them its own meaning and effect as to the estate

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70. Leach, *supra* note 56, at 803 and 803 n.19.

71. Gross, *supra* note 8, at 282.

72. Leach presents numerous examples where the maxim, in his judgment, should have been applied. He ridicules the Illinois Supreme Court's unknowing extension of the Rule in Shelley's Case in People v. Emery, 314 Ill. 220, 145 N.E. 349 (1924) (cited in LEACH & LOGAN, supra note 61, at 118). Leach excoriates the court in Re Gaite's Will Trusts, Chancery Division (1949), 1 All. E.R. 459, the famous precocious toddler's case:

> In my view the court should have said that, although they are bound by Jee v. Audley to hold that women of advanced age can have children, there is nothing that binds them to an additional absurdity by saying that a child under the age of 5 can have a child.

TEACHERS' MANUAL, *supra* note 68, at 21-85.

> created by them, and rejects, as inconsistent with the main purpose which it inexorably and despotically fixes on the donor, all the provisions of the will which would be incompatible with an estate of inheritance and which tend to show that no such estate was intended to be created; although, all the while, it may be as clear as the sun at noonday that by such a construction the intention of the testator is violated in every particular . . . .[73]

While the above was written about the word "heirs" in connection with the late lamented Rule in Shelley's Case, the question of whether the attitude expressed above is generally just or fair is another matter. In *Whitby v. Von Luedecke,*[74] a special power created in a marriage settlement was exercised by appointing that the income be divided between Ann and Lucy (children of the wife who exercised the power) during their respective lives and, at the death of any, the "survivor" to receive the whole of said income. The Court held that Lucy, who survived Ann, was not entitled to all the income because the interest in the "survivor" was "contingent" and therefore a violation of the Rule against Perpetuities. Leach points out that the same gifts could have been made incontestably valid by a mere change in the language to read, "The income one-half to Ann for life, remainder to Lucy for life; the other half to Lucy for life, remainder to Ann for life." Then all gifts would be vested and not run afoul of the Rule. This was, of course, substantially what was intended. Leach argues that the fact that a word of contingency such as "survivor" was used should not alter the result. Examples of this sort of thing fill the reporters.[75] How unreasonable, argues Leach, that words (especially when written by laymen) can be given uncertain and technical interpretations in lawsuits which thwart

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73. Jordan v. Adams, 9 C.B.N.S. 483 (1861), (reprinted in LEACH & LOGAN, *supra* note 61, at 132-33).

74. Whitby v. Von Luedecke, Court of Chancery [1906] 1 Ch. 783 (reprinted in LEACH & LOGAN, *supra* note 61, at 263).

75. In Ice v. Andley, Court of Chancery (1787), 1 Cox 324 (reprinted in LEACH & LOGAN, *supra* note 61, at 685), the famous "Fertile Octogenarian" case, the interest was struck down because the bequest referred to four "daughters," rather than naming them individually. In Walker v. Marcellus, 226 N.Y. 347, 123 N.E. 736, N. Ct. App. 1919) (reprinted in LEACH & LOGAN, *supra* note 61, at 48), Leach points out (TEACHERS' MANUAL, *supra* note 68, at 2-5) that two pieces of paper would have done the trick where one failed. And in Tygard v. McComb, 54 Mo. App. 85 (Ct. App. 1893) (reprinted in CASNER & LEACH, *supra* note 60, at 132) the failure to use the one word "trust" proved to be fatal to an attempt to set up a Totten trust.

the legitimate intentions of the grantors. Certainly no layman and few attorneys would understand, when drafting dispositive instruments, the implications of using such alternative forms of language in order to accomplish substantially the identical result. Leach cinches the argument thus:

> It is suggested that the quotations from the Court of Appeal indicate a basic misconception of the nature and function of the Rule against Perpetuities. If it is unsound policy to permit the surviving daughter to take the whole income during the balance of her life (a matter that is arguable either way as an original proposition), then this estate to the surviving daughter ties up the trust too long and should be invalidated, no matter how the direction to the trustee is expressed by T. But it is no part of the policy of the Rule against Perpetuities to require that the giving of a remainder interest be expressed in certain words and not in others. When the judicial members of our profession have stricken down the intended dispositions of a testator on the basis of an alleged supervening public policy and when we are asked to explain the iniquity of the testator, it is not impressive to reply, "Well, he used the wrong words—or rather his lawyer did."[76]

The lessons to be garnered from the problem of the magic words are at least three-fold. Draftsmen must learn what terms to avoid (or use carefully),[77] advocates must be aware that they may be called upon to argue either that a term must be given a technical meaning, or (if on the other side) that the court must look beyond the terms to find what was substantially intended. Decision-makers must look more to substance than technicality. The process of looking to the consequences of a decision rather than taking the auspices through technical word analysis is a difficult position to maintain and there is much in legal history that mitigates against it. It is often identified with the technique in advocacy of reaching a conclusion and then offering a rationalization as an after thought. The approach, however, deserves more serious consideration if justice is to be accomplished.[78]

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76. TEACHERS' MANUAL, *supra* note 68, at 8.

77. *See* LEACH & LOGAN, *supra* note 61, at 330 and TEACHERS' MANUAL, *supra* note 68, at 8-20 for Leach's candid discussion of the Divide and Pay Over Rule on this point.

78. It is particularly appropriate where looking for the intention of the donor. *See,* Llewellyn, *Book Review,* 51 HARV. L. REV. 757 (1937). *See also* Estate of Balke, 157 Cal. 448 (1910),

5. *"A" Does Not Necessarily Imply "B," or the Problem of Indicators.*

Because a document contains words or terms necessitating a result with respect to one rule or set of doctrines (result A), that need not also necessitate a result with respect to a second set of doctrines (result B), with respect to which the document is otherwise silent. Why should words requiring result A, also require result B which the draftsman probably never thought about or foresaw? For example, suppose a devise to "William for life, remainder to William's children if any, but if William has no children, to Coots and Oldfield." Coots died during William's lifetime. In *In Re Coots' Estate*[79] the court held that Coots' estate took nothing. Reasoning that since the interest was "contingent," Coots must survive William in order to take. The case was severely criticized at the time it came down, and was corrected by legislation. As Leach points out,[80] the fact that the interest is "contingent" in a quasi-feudal sense *should* have no bearing on the separate and distinct question of survivorship. Criticism can be also leveled at cases where the fact that a testamentary gift is in the traditional form of a class gift has been held to imply a requirement of survivorship as well. The majority of courts have established such a "rule of construction" but it is hard to justify, argue Leach and Logan, on the basis of strict logic or in a number of instances from an examination of the resulting distribution.[81] Similarly, the so-called double distribution rule runs afoul of the same logic. In *Baylies v. Hamilton,*[82] a residuary gift to "the children of Schuyler" was held to exclude one child born after the testator's death. This was at least arguable under the "Rule of Convenience" (which closes a class at the point of first distribution). But the court went on and excluded the afterborn child from a devise of a *remainder* in realty which was to "go with my residuary estate." "Inexcusable," protest Leach and Logan. It may be reassuring that unfair results might sometimes be prevented with logic yet to leave

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a future interest case where it is evident that the court reached a conclusion and then wrote an opinion about it. Leach discussed this case in TEACHER'S MANUAL, *supra* note 68, at 8-16.

79. In Re Coots' Estate, 253 Mich. 208, 234 N.W. 141 (1931) (reprinted in LEACH & LOGAN, *supra* note 61, at 319).

80. TEACHERS' MANUAL, *supra* note 68, at 8-18.

81. *See, e.g.*, Blackstone v. Althouse, 278 Ill. 481, 116 N.E. 154 (1917); In Re Moss, [1899] 2 Ch. 314 (Ch. App.); Roberts v. Trustees of Trust Fund, 96 N.H. 223, 73 A.2d 119 (1950).

82. Baylies v. Hamilton, 36 App. Div. 133, 55 N.Y.S. 390 (1899) (reprinted in LEACH & LOGAN, *supra* note 61, at 376).

it at that sidesteps the value problem. While these sorts of criticisms admittedly involve but one small corner of the law, where we are interpreting the will or trust, and therefore the intentions of but one person, the ramifications are more widespread. Leach and Logan force us to examine our *logic* in terms of just or sensible results—one the grantor would have wanted if he had thought about the problem.

6. *Planning at Common Law.*

The technicality ridden Rule against Perpetuities was originally developed from case law, and only the broad parameters of the Rule were set in the Duke of Norfolk's case.[83] Lord Nottingham holds that an interest which must vest within a life in being is clearly not a perpetuity. On the other hand, the settlement of an interest or an estate in tail, with remainders expectant upon it such that the tenant in tail in possession cannot dock or remove them, makes such remainders perpetuities or "perpetual clogs on the title." What of interests that might vest later than a life in being, but certainly sooner than the natural termination of a fee tail? Lord Nottingham has left such questions as this for later courts to handle. Leach was fond of Lord Nottingham's famous dictum in this case, "Where will you stop if you do not stop here? I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear; for the just bounds of . . . [a perpetuity] . . . . are not yet determined, but the first inconvenience that ariseth upon it will regulate it."[84] This, then, is the classic statement of the flexible case by case approach. Says Leach:

> The Rule against Perpetuities grew up in the finest tradition of the English common law. On several counts the Duke of Norfolk's Case could be recommended to a Civilian as typical of the best in law development by adjudication: (1) Lord Nottingham, weighing considerations of policy and logic, enunciated a principle for testing the validity of future interests under the new conditions created by the rise of indestructible executory interests; (2) he at the same time resisted the temptation to crystallize the principle into a rule before experience and cumulative wisdom should indicate exact limits . . .[85]

83. Charles Howard v. Duke of Norfolk, [1682] 3 Ch. 1, 26 (reprinted in LEACH & LOGAN, *supra* note 61, at 672).

84. LEACH AND LOGAN, *supra* note 61, at 678.

85. *Id.* at 670.

Leach also publishes a dissent from this view:

> A dissent to this eulogy of the Duke of Norfolk's Case, it seems to me, illustrates the great inherent vice of the common law system, namely: the creation of principles without indication of the extent of application.
>
> 'This vice makes it impossible for the best lawyer to know what can or cannot be done. You point with pride at the century and a half of fumbling with the rule until it was finally fixed; but every step was at the expense of costly litigation, and probably many a testotor's dispositions were wrecked—and yet at almost every lecture this year you have stressed, and rightly, the importance of intelligent drafting and avoidance of litigation . . . let us place ourselves in the office of an English solicitor in 1700. Testator wants to know for how long he can tie up the estate. The solicitor explains the limitation in the Duke of Norfolk's Case. "Yes," says the testator, "but what is the limit?" "Well," answers the solicitor, "Lord Nottingham says he will stop wherever any 'visible inconvenience' doth appear." "But what is this 'visible inconvenience'?" asks the testator. "How should I know?" responds the solicitor, "I'm not the chancellor's conscience." "What do you mean by that remark?" asks the testator. "I mean," replies the solicitor, "that the scope of 'visible inconvenience' will depend on who is the judge at the particular time the question comes up, who is the counsel, who are the parties, whether the sum involved in large enough to attract serious attention, or so small that indifferent lawyers argue the case and the judge is indifferent to the result, whether there happens at the time to be a reform wave stirring so that the judges are swayed by popular ideas of justice . . . in short, the solution depends on a multitude of unforeseeable things, and thus if you go beyond Norfolk's Case I cannot certainly advise you whether it will be good or bad." "This is passing strange," laments the testator, "the Statute of Wills tells me precisely what I may or may not do in the form or method of devising, why cannot there be a statute which tells me what I may or may not do in the creation of future estates?" "Oh," says the solicitor airily, "that is not the genius of the common law."
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> This has always seemed wrong to me. Whether a rule against perpetuities is desirable or not, should be, in my mind, threshed out in Parliament or a state legislature. People might

> well say, with reason, that families should be allowed to create perpetuities of land in certain amounts, that such an institution would make for stability of a nation. Whether this is true should be discovered by rational discussion and investigation, and statutory trial and error, rather than the extremely accidental, hit or miss, process of costly litigation, which puts the expense of working out social rules on a few unlucky individuals.[86]

We fool ourselves by thinking that this dilemma is not still with us. With the enormous growth of administrative law in recent years, it may be a more critical problem than ever.[87] Surely we ought to give more attention to the question of where to strike the proper balance such that fair results in individual cases will ensue. And if, as Leach apparently believed, the hardship of uncertainty ought to be placed on the planner in order to insure needed flexibility in the law, should we not devote more attention to the importance of solid preventative thinking rather than taking refuge behind easy but rigid dogmas?

Conclusion

Where law is rigid, fixed and certain, there is little room for reflection about conflicting values. One must essentially stand outside such a system to question it. The genius of the common law is its flexibility, its openness to change, and its ability to continually renew itself. When administrered according to its own terms, it is a self-regulating system capable of generating and acting upon feedback.[88] To be certain that the concern for doing justice in the individual case is maintained and strengthened, we as teachers must be concerned with this, our singular approach to making value judgments. It is our job to disabuse students of the possibility of achieving absolute certainty. I think this reality sooner or later dawns on most students. As Turow relates about one of his professors:

> I wondered when he would cut it out. There was no answer to these questions. There never would be.

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86. *Id.* at 670-71.

87. *See* Gray, *Administrative Law in Illinois: Recent Trends and Developments*, 8 Loy. U.L.J. 511 (1977).

88. *See* K. Deutsch, The Nerves of Government (rev. ed. 1966).

> I sat still for a second. Then I repeated what I'd just thought to myself: There were no answers. That was the point, the one Zechman—and some of the other professors less tirelessly—had been trying to make for weeks. Rules are declared. But the theoretical dispute is never settled.[89]

But the probability that there are no answers, does not mean that there are no values or that we are not constantly choosing among relative competing value concerns. We are, tentatively. The common law as taught in American law schools is laced with evaluation every time a case is decided in court and every time a hypothetical is discussed in class. But we tend to avoid the careful labeling or dissecting of values. This avoidance is a mistake because by doing so, we cloud both for ourselves and our students the methodology of the law which the professional lawyer and the student must grasp even if methodology itself is not capable of being cited in court. There has been a dearth of concern for methods as such.[90] It has been said:

> The entering student stands at the threshold of a three-year enterprise, in one sense, but of a lifelong enterprise in another sense. The student's task is to begin to become a lawyer. The task of becoming a lawyer can be meaningful to the student only to the extent he concretely understands: (a) his goals—*what* he personally is working toward; and (b) his methods—*how* the things he does in law school will carry him toward those goals. The first is a function of professional self-definition; the second is a function of professional self-development.[91]

"Thinking like a lawyer" includes knowing where the value component fits in and being able to identify it, at least intuitively. It is hoped that the examples from Property and Future Interests discussed above illustrates how values creep into our teaching through concern for individual results which serve as correctives to more general principles. But the method itself represents a certain overriding value, namely, the concern for the just result itself and how results count in a system of rules.

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89. TUROW, *supra* note 1, at 112.
90. Costello, *supra* note 41.
91. Gross, *supra* note 8, at 309.

This concern for values is not necessarily a call for a return to natural law theories. Such a concern has frequently been the hallmark of the natural law school, whose opinions have sometimes been expressed quite dogmatically.[92] Concern for values must not be allowed to be the sole property of the various natural law advocates,[93] nor a pawn in the dispute between positivists and those who take the natural law position. Our seldom admitted inculcation of values is an integral part of the case method (from Langdell's time) and its scientific spirit of free inquiry.[94]

In this respect the values inherent in the case-method and the evaluative aspects of the case method are quietly revolutionary. It was said of Langdell that, "one of the most striking facts in [his] life . . . is the deep silence which surrounds his work. He accomplished a revolution without getting into a controversy."[95]

> We sometimes in our haste think that minds that act with deliberation are apt to be too cautious to accomplish great things. Mr. Langdell acted deliberately, and his nature was thoroughly conservative; yet few men, however radical, have effected greater changes than he.[96]

We have already noted Professor Leach's vast reformation efforts in his chosen area.

John Rawls (the neo-Kantian philosopher) in his monumental *A Theory of Justice* sets up his argument for principles of justice to be agreed upon in his quasi-Lockian "original position" (a hypothetical "state of nature") with this comment: "[T]o understand these principles should not require a knowledge of contingent particulars, and surely not a reference to individuals or associations."[97] While qualified in other places (and taking into consideration the special conditions pertaining to the "original position"), Rawls elsewhere concedes the deontological nature of his theory. The quoted statement, I think, would not be readily agreed to by a common law

92. This is where I would find fault with Glasser's similar expression of concern. Glasser, *Philosophical Values and Legal Education*, 3 J. LEGAL EDUC. 60 (1950).

93. *See* Pound, *On Law Teacher and Law Teaching*, 3 J. LEGAL EDUC. 519 (1951). "Today new fashions are beginning to be set by new types of logical approach; by neo-Kantian methodology or more attractively by a rising cult of natural law and call for a trek back to Thomas Aquinas and Aristotle." *Id.* at 521.

94. *See* Schofield, *supra* note 4, at 291.

95. *Id.* at 286.

96. Beal, *Professor Langdell—Later Teaching Days*, 20 HARV. L. REV. 11 (1906).

97. J. RAWLS, A THEORY OF JUSTICE, 132 (1971).

attorney, and would in fact be objected to strenuously. Our actions should not be governed solely by blind adherence to a universal rule (or rules) that has been formed in ignorance or disregard of unique events. If this would be the automatic reaction, then such a common law attorney is in that sense taking a relatively revolutionary stand, for he would be reacting at the level of Kohlberg's fifth stage and expressing an opinion contrary to that of the vast majority of mankind.[98] Perhaps this is part of what is meant by critics when they charge that law school instruction today is geared toward an elite group.[99] It may also explain why we have so much difficulty with frustration and alienation among law students.

We have neglected to explore the relationship between our way of making value judgments in the legal field and situation ethics. The similarity is more striking, I believe, than we care to admit. It has been said:

> I do not, therefore, regard 'ethics' as theory in a way that would, at least implicitly, suppose it to be the origin of morality and of moral codes. 'Experience' is the source in human living for morality and the summaries of lived efforts to be moral. Thus, 'experience,' has to be the subject matter of analysis by the discipline of 'ethics' insofar as that discipline is prepared to search out the human basis for morality and for the expression of morality in codes of conduct of one or another kind.[100]

It might be of some benefit to our institutions if moralists, ethnicians and educational philosophers devoted more attention to the law school case-method and common law system. By the same token, law students and lawyers might benefit from a more explicit treatment of ethics in the broad sense, that is, value judgments. Professor Harold J. Berman has written:

> You probably know the famous story, from the late 19th or early 20th century, about the student at Harvard Law School who said in class discussion, 'But Sir, is that just?' And the professor replied, 'If it's justice you're interested in, you should have gone to the divinity school!' That was, perhaps, the high-water mark of the effort to view law as a self-contained isolated

98. Noonan, *supra* note 25, at 386.
99. Gross, *supra* note 8.
100. Bresnahan, *supra* note 44, at 202.

system, which is, I think, a kind of idolatry. And we are not so far from it in our courses today.[101]

The highest compliment the author ever received as a teacher occurred a few years ago when a student in Property came into the faculty offices for a chat. This particular student had been a philosophy professor at a local college. He asserted that in all his studies he had always heard or read about the "Socratic method," but this was the first time he had ever seen it practiced! Once he caught on to what was happening in class, his grades were excellent. Why is it that the pursuit of justice is often so painful? Shouldn't we strive to make it just a little easier for our students?

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101. Berman, *The Secularization of American Legal Education in the Nineteenth and Twentieth Centuries*, 27 J. LEGAL EDUC. 385 (1975).