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The Use of Appellate Case Report Analysis In Modern Legal Education: How Much Is Too Much?

Steven I. Friedland*

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The Use of Appellate Case Report Analysis In Modern Legal Education: How Much Is Too Much?

Steven I. Friedland**

Steve Friedland is an Assistant Professor of Law at Nova Law Center, where he teaches Constitutional Law and Advanced Criminal Procedure and Criminal Law.

A Thursday, October 1985. A discussion between two people, "Z" and "T."

I.

Z: The integral role played by appellate case report analysis in modern legal education reminds me of a bumper sticker I saw recently: "United States Get Out of North America."

T: How is that slogan analogous to the role played by appellate case report analysis in legal education?

Z: It's almost as difficult to imagine a legal education without appellate case report analysis — or even reduced amounts of such analysis — as it is to imagine North America without the United States. Perhaps it is time, however, to begin picturing an alternative to legal education orthodoxy.¹

T: Why?

Z: Because the excessive reliance on appellate case report analysis in traditional legal education fails to provide students with enough of the individual skills necessary for good lawyering or an appropriate understanding of what is supposed to be accomplished through the legal education process.² Students do not learn during their education how the

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1. "[L]egal education orthodoxy" refers to the dominant modern system of legal education in the United States which relies on appellate case report analysis — and, specifically, doctrinal analysis — as its centerpiece.

2. "A consensus is emerging that law schools must equip their graduates with more of the skills they will need in practice and impart to them a broader perspective

different things they do in school — from case analysis to clinical training to simulation — relate to each other or to actual lawyering. Among the more significant consequences of the over-reliance on appellate case report analysis are: the neglect of important lawyering skills such as listening,³ legal writing,⁴ and fact arrangement;⁵ the misleading inference to students that case analysis dominates lawyering in the same way it dominates legal education;⁶ the omission of a more accurate

on the important role they are to play in society.” “Academic Planning Project: Interim Report,” UNIVERSITY OF MONTANA SCHOOL OF LAW, 3 (1983) [hereinafter cited as *Montana Report*]. “Surveys of recent law graduates and current law students indicate that both agree on the desirability of greater law school emphasis on various skills important to the practicing lawyer. [However, the law students exhibit] great confusion about precisely what training is practical.” “Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools, American Bar Association Section of Legal Education and Admissions to the Bar,” at 14, n. 4 and 5 (1979) [hereinafter cited as *ABA Report*].

The contemporary crisis in American legal education is that “[w]e are unable to identify a common purpose other than training in the kind of ‘knowledge, analytical skills, and insight’ that are needed to perform effectively, as lawyers.” Berman, *The Crisis of Legal Education in America*, 24 B.C.L. REV. 347, 350 (1985) [hereinafter cited as *Berman*].

3. The skill of listening is a necessary prerequisite to the exercise of many other lawyering skills and therefore should receive much more attention than it does.

4. “Law schools should provide every student [with] at least one rigorous writing experience in each year of law study.” *ABA Report* at 3.

5.

Law schools should provide instruction in those fundamental skills critical to lawyer competence. In addition to being able to analyze legal problems and do legal research, a competent lawyer must be able effectively to write, communicate orally, gather facts, interview, counsel and negotiate. Instruction in such areas need not and should not be approached less rigorously than those traditionally emphasized in law schools, nor should they be viewed as ‘training’ that is somehow detached from the research and academic mission of the school.

Id. at 3, 16.

6.

[The invention of appellate case report analysis] is responsible for confining legal education in a strait mold which was to dissociate it from the living context of the world about it. Disregarded were the broad premises for the study of law . . . unrecognized was the fact that prospective lawyers needed training in various areas of learning and skill.

Harno, *Legal Education in the United States*, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION, 220 (Nolan ed. 1980) [hereinafter cited as *Harno*].

“[C]ase instruction, by focusing on the abstract legal principles propounded by the highest courts, distorts and falsifies what it teaches by ignoring the significance of the

multi-dimensional conception of law, legal problems and legal analysis; the inability of too many students to overcome attention to minutiae in cases and to see the forest for the trees; and the effective discouragement of students engaged in case analysis from playing an active, involved role in their education.⁷ I would propose, therefore, that case analysis generally, and doctrinal analysis specifically, be de-emphasized.

T: What would you offer in its place?

Z: I would propose an alternative model of legal education that includes case analysis, but which focuses on an array of specific lawyering skills such as listening, fact gathering, issue formulation, and effective communication, as well as a better integration of the different layers or perspectives of the law. The model promotes the direct practice of these skills both inside and outside the classroom. It promotes skills learning primarily by switching the emphasis from case analysis to legal problem solving. The problem solving approach, rather than being derived from predominantly "prepared" appellate cases, more closely parallels cases as they might actually be presented by clients. The heart of these problems are unprocessed — or minimally processed — facts.

Through the second significant characteristic of the model, approaching legal problems from different perspectives, students are taught to recognize and understand the various dimensions of legal analysis within a single legal problem — the ethical, moral, political, advocacy and doctrinal dimensions, among others. In addition to teaching students about what the different dimensions of a problem are, students should also be shown how the various dimensions of a legal problem, and even an entire legal education — doctrines, themes, and courses — fit together.

This new model affords students the opportunity not only to learn and practice fundamental lawyering skills, but to obtain a broader un-

facts of a particular case to lower courts, and the role of trial courts, administrative agencies and legislatures." J. SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL*, 157 (1978) [hereinafter cited as *Seligman*].

"[The case method's] emphasis upon rigorous doctrinal analysis set constricting limits Preparing students only for mastery of judge-made law, it deluded practitioners into believing that law was a science, not policy, and that other scholarly disciplines, and even practical experience had nothing to offer." J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA*, 79, 80 (1976).

7. "From [the students'] point of view, close reading of cases seems inefficient and pointless, and they resist it." *Montana Report* at 6.

derstanding, or “big picture”, of the legal education process and of lawyering while still in school. By permitting students to observe the nexus between lawyering, legal training and the rationales underlying the educational methods used, by providing students with a general roadmap of an effective education, and by promoting more active student involvement in the educational process, the new model should avoid many of the deficiencies caused by an over-reliance on case report analysis in legal education orthodoxy.

II.

T: Why do you have such a concern?

Z: There are three reasons — the responsibility of law schools to the students, to the profession, and to the public. For the students, law schools take three years of their lives. Schools owe them something for that. Schools then send their graduating students off to become members of the legal profession, sometimes for life. Schools owe the profession something for that. And schools can influence the way students practice law on behalf of clients. So schools owe the public as well. The real problem, therefore, is not whether the quality of legal education is important, but how to improve that quality.

T: Before you suggest how to improve the quality of legal education today, could you state why the modern legal education needs changing?

Z: Let me present my case. A good place to begin is with the historical antecedents of the case analysis method of legal instruction. For that, we must journey back to the colonial era. At that time, the dominant form of a lawyer’s education was the apprenticeship.⁸ Generally, an apprentice learned through the observation of an experienced lawyer or through practice.⁹ Some books were used in the apprentice’s education,

8. “In the Seventeenth and first half of the Eighteenth Century prospective lawyers lacked the funds to finance a trip to England [to study in the inns of court]. Consequently they either studied on their own or with a practitioner.” McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION, 198 (Nolan ed. 1980) [hereinafter cited as *McKirdy*]. A. CHROUST, 2, *THE RISE OF THE LEGAL PROFESSION IN AMERICA 173* (1965).

9. A prospective lawyer would enter the office of a bar member and absorb the law “by study, observation and occasionally by direct teaching from his senior.” C. WARREN, 1 *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA*, 132 (1970) [hereinafter cited as *Warren*].

but the scarcity of books served as a built-in limitation.¹⁰

Soon after the Revolutionary War, law schools and organized legal instruction became more common.¹¹ The instruction generally consisted of veteran lawyers dispensing their collected wisdom to eager students.¹²

In the early 1800's, students received their legal training at inns of court, at the offices of practicing attorneys, and at law schools.¹³ The quality and quantity of education varied considerably.¹⁴ In 1871, a revolution of sorts occurred. Christopher Columbus Langdell, then a professor at the Harvard Law School,¹⁵ published a landmark book evidencing a radical new perspective on the methodology of legal instruction.¹⁶ In his book, *A Selection of Cases on the Law of Contracts*,¹⁷ appellate case reports were gathered under one cover for the purpose of systematic study.¹⁸

The impact of the book was both immediate and controversial. The book generated supporters who felt that Langdell's selection of appellate case reports created "consistency out of what seemed a chaos of conflicting actions."¹⁹ Detractors, however, concluded that:

10. "Acquisition of the law is difficult without ready means of access to the books of the law and these were sadly lacking in the American Provinces." Prior to 1776, only thirty-three law books including at least eight repeated editions were even printed in America, most of which were manuals and treatises. *Warren* at 126, n. 1.

11. "Formalized apprenticeship, together with the severing of ties with England, also led to the establishment of private law school." R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 3, n. 7 (1970) [hereinafter cited as *Stevens*]. "With the close of the Revolutionary War there began a new era in legal education. [T]he first American law professorship was founded . . . in 1779." *Warren* at 165, 169.

12. "[The newly established law schools] were generally outgrowths of the law offices of practitioners who had shown themselves to be particularly skilled, or popular as teachers." *Stevens* at 3, n. 7.

13. See *supra* notes 7 & 9.

14. "[Students'] individual experiences were as varied as the men who trained them." *McKirdy* at 202.

15. Christopher Columbus Langdell began his professorship at Harvard Law School on February 21, 1870. On September 27, 1870 the law school's faculty elected Langdell to be the law school's first dean. Langdell retired in 1895. *Seligman* at 32, 42.

16. Langdell changed the way law was taught with the invention of the casebook in 1871. See *id.* at 33, 45.

17. *Harno* at 218.

18. See Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived As Clinical Instruction in Law*, 5 *NOVA L.J.* 323, 334 (1981).

19. C. WARREN, *A HISTORY OF THE AMERICAN BAR* 550 (1911).

There is just as much sense in endeavoring to instruct students in the principles of law by the exclusive reading of cases as there would be in endeavoring to instruct the students of West Point Military Academy in the art of war by compelling them to read the official reports of all the leading battles which have been fought in the world's history.²⁰

Langdell's case method approach to legal instruction provided great impetus to the view of law as a pure academic science.²¹ Stated one observer: "The very heart of the case method was the assumption that the cases, once they were sorted out and properly classified, would themselves fall into patterns suggesting the true underlying principles."²² The cases were "the data from which the true legal principles could be derived."²³ Langdell strongly agreed with this view. He stated, for example, that:

Law, considered as a science, consists of certain principles or doctrines . . . the growth [of which] is to be traced in the main through a series of cases; and much the shortest if not the best, if not the only, way of mastering the doctrine effectively is by studying the cases in which it is embodied.²⁴

This view of the law and the accompanying case method eventually spread throughout the legal education community by the second decade of the twentieth century.²⁵ The influence of Langdellian ortho-

20. *Id.* at 551.

21. Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 699, 713 (1968) [hereinafter cited as *Woodard*].

22. *Id.*

23. *Id.*

24. C. LANGDELL, *Preface to A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871). *See also Harno* at 306.

25. "By the early twentieth century, Langdell's casebook approach to teaching law was well established." *Seligman* at 45.

In those days [1890] at least, it was not obvious that Langdell's law school would sweep the country . . . the ultimate triumph of that system, even in the narrow world of the university—affiliated day law school, was not apparent until at least 1910 when the West Publishing Company thought that the market was large enough to support an entire series of case books. Ronefsky & Schlegel, *Mirror, Mirror On the Wall: Histories of American Law Schools*, 95 HARV. L. REV., 833, 837 (1982) [hereinafter cited as *Ronefsky*]. *See also* 2 AM. L. SCH. REV. 276 (1909).

See also Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 882

doxy grew to the extent that law school appeared to be a "three year graduate program of 'pure law' taught from cases."²⁶

T: But that was long ago. A lot has changed over the years.

Z: True. But the significance of the Langdellian case method approach to legal education lies in its imprimatur on modern legal education orthodoxy. Langdell's case method approach has transcended generations of lawyers and law teachers.²⁷ In many law classes, the study of appellate case reports has become the sole pedagogical tool, and students as well as teachers have come to believe that the only resource necessary for an adequate legal education is a bound volume of appellate case reports. As a by-product of this emphasis, however, social context has been given less than adequate attention, as have political overtones, ideologies, and for the most part, competing methods of instruction.²⁸

T: The case analysis method and its "law-as-science" underpinnings did have some opposition; didn't they?

Z: Yes. A prime illustration was the movement known as legal realism,²⁹ which occurred after World War I. This movement rejected the

(1985); Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, 3 RES. in L. Soc. 3 (1980); R. UNGER, *LAW IN MODERN SOCIETY* (1977).

26. *Ronefsky* at 833, 837.

27.

In the next seven decades, Langdell's model of legal education would spread from Harvard Law School and become the model for virtually every American law school. After Langdell's retirement, the spread of the case method quickened. By 1902, 12 of the 98 law schools had unequivocally accepted the case system; by 1908, over 30.

Seligman at 42, 43.

28. "The trouble is not with the students. The trouble is with the educational process, its materials and the environment where law school law is pronounced. Law school 'law' is the law pronounced in the courtroom by an appellate court." Brown, *The Trouble With Law School Education: A Consultation As A Microcosm*, 18 CREIGHTON L. REV. 1343, 1347 (1985). "Law teachers and law students of 1984 are more one-sided, and more mistaken in their view of the nature of law than were their predecessors in any other period of American history." *Berman* at 348.

"The near universal emulation of Harvard Law School'[s] [use of appellate case reports as the sole teaching tool] has limited the emergence of rival theories of legal education." *Seligman* at 201.

However, other forms of instruction such as lectures did persist. See *Ronefsky* at 833, 837.

29. "Legal realism" is a philosophy essentially founded in the late 1920's by a group of legal scholars who believed that "law is, basically, an argumentative tech-

view of law as a science.³⁰ This movement attempted to reconnect law to the social sciences, and to debunk the legal scientists' narrow conception of law as a self-informing group of principles found in appellate case reports.³¹ The legal realist critique, while focused primarily on judicial decision-making, spilled over to the methods used in legal instruction. Professor Leon Green, for example, reacted to the traditional organization of casebooks by legal concepts by organizing his 1965 torts casebook, *The Judicial Process in Torts Cases*,³² functionally by subject matter — such as automobile accidents. “Green seemed to be saying that the participants in a case, the atmosphere it created, and the interests at stake were what determined its outcome, quite independent of rules and principles.”³³ Karl Llewellyn's *The Bramble Bush*³⁴ further illustrates this position.

T: How?

Z: Llewellyn wrote:

So of the cases. Put yourself into them; dig beneath the surface, make your experience count, bring out the story, and you have here dramatic tales that stir, that make the cases stick, that weld your law into the whole of culture. These are the parties. There are, as well, the judges: working out, shaping the law to human needs. In every case the drama of society unrolls before you — in all its grandeur, in all its humor, in all its futility, in the eternal wonder of the coral reef. . . . Humanity and law — not two, but one.³⁵

Thus, to Llewellyn and other realists, the doctrinal synthesis of the rule of law constituted an artificial “laboratory” far-removed from real-

nique. The judge, it is thought, decides on the basis of his political, economic, or psychological prejudices; legal reasons are merely rationalization.” *Berman* at 349; *Seligman* at 50.

30. One commentator stated: “The major tenet of the functional [realist] approach which they have so vigorously espoused, is that law is instrumental only, a means to an end, and is to be appraised only in light of the end it achieves.” McDougal, *Fuller v. the American Legal Realist: An Intervention*, 50 *YALE L. J.* 8027, 8034-35 (1941); *Woodard* at 717.

31. See, e.g., Hutchinson & Monahan, *Law Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *STAN. L. REV.* 199, 204 (1984) [hereinafter cited as *Hutchinson*].

32. L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* (1965).

33. G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 85 (1980).

34. K. LLEWELLYN, *THE BRAMBLE BUSH* (1960).

35. *Id.* at 127-128.

ity that did not reflect the true nature of the politics of law. A legal education methodology based on doctrinal synthesis of the rule of law, moreover, was equally suspect.

T: Have there been any recent critiques of legal education?

Z: Yes, there have been several recent strains of attack on legal education orthodoxy. The recent attacks range from disagreements with the law-as-science underpinnings of doctrinal analysis,³⁶ — including the

36. Several strains of this attack have been labeled for convenience as one group — critical legal studies. See Gordon, *Legal Historiographies*, 36 STAN. L. REV. 199 (1984). According to some critical legal scholars, legal reasoning and law are indeterminate. This means that legal decision-making can only be explained “by reference to criteria outside the scope of the judge’s formal justifications.” Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 19-20 (1984). The critical legal theorists also take issue with much of the realist dogma. “However, the thrust of Realist Scholarship was essentially negative and iconoclastic; it lacked any unifying thread or positive political program. Thus while the Realists accepted the indeterminacy of legal reasoning, they remained firmly committed to liberalism.” Hutchinson at 204. The movement shares with the realists, however, a disdain for the science of law approach: “Legal reasoning is not distinct, as a method of reaching correct results, from ethical, and political discourse in general (i.e., from policy analysis) . . . Put another way, everything taught, except the formal rules themselves and the argumentative techniques for manipulating them, is policy and nothing more.” D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 20-22 (1983).

In addition,

Several observers of critical legal scholars have concluded that: “Like traditional jurists, the Critical scholars are obsessed with the judicial function and its alleged central importance for an understanding of law in society. Yet while they share this infatuation, they adopt a radically different view of the judicial process: All the Critical scholars unite in denying the rational determinacy of legal reasoning. Their basic credo neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.

Hutchinson at 206.

Recently, two law professors wrote that:

[O]ur unease about our graduates as lawyers is not a unique product of our situation at a regional nonelite law school. Professors at elite law schools may have more confidence in the prospects of their graduates. If they do, however, it is because their students arrive at law school with many of the qualities that make success more likely.

Feinman and Feldman at 880. These professors have created a course which focuses on the overlap between contracts and torts. This course, which they call “contorts,” accepts the premise that the “traditional organizing categories — contract and torts — fail to provide meaningful distinctions.” *Id.* at 887. This leads them to consciously attempt to prepare students for the “inherent ambiguity in . . . legal discourse.” *Id.*

premise that judicial decision-making is largely determinate — to the view that the skewed forms of the dominant vision have minimized the interpersonal “humanistic” aspect of law and lawyering.³⁷

37. This group, which has been labeled the “humanists,” are perhaps best represented by E. DVORKIN, J. HIMMELSMITH, H. LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981) and the program adopted at C.U.N.Y. Law School at Queens College. The “humanities” have been defined as “the system of values, traditions and customs with which we live and which we may wish to change.” Byman, *Humanities and the Law School Experience*, 35 J. LEGAL ED. 76 (1985). The humanists’ stated purpose is to broaden “the scope of traditional education to include a focus upon the persons of teachers and students, the human dimensions underlying the subject matter, and the experience of learning.” *Id.* The goal of this approach, however, “is not to replace the traditional strengths of the profession, but to include them in a larger context.” *Id.*

The humanists also reject the conception of law as a laboratory science to be gleaned from and understood through appellate case reports. They seek in legal education to reunite efforts at technical proficiency and other aspects of human life. Similarly, they believe the professionalization process of law school has profound consequences for students and, after graduation, the community-at-large. Thus, the humanists abandon the narrow goal of orthodox legal education — to teach students to ‘think like a lawyer’ — in favor of a broader notion of professional responsibility.

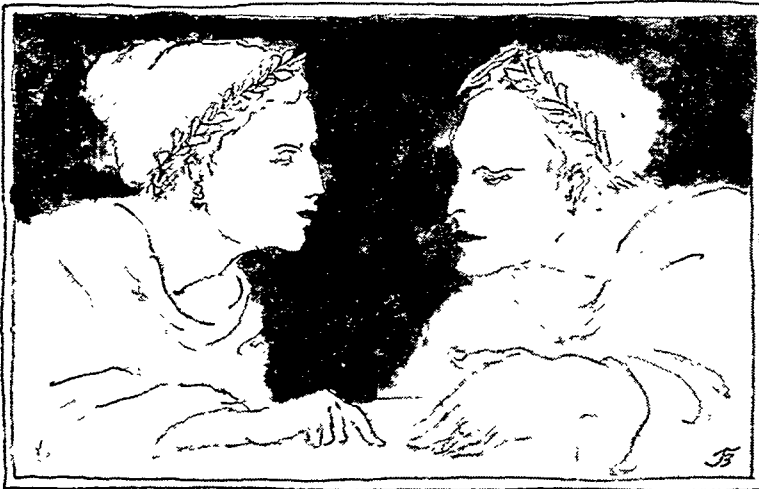
Humanists adopt a radical restructuring of the goals of legal education and of the means used to achieve those goals. Several law schools have adopted some of these humanist principles in implementing new approaches to legal education. The C.U.N.Y. Law School was conceived and staffed by several of the leading humanist scholars. The University of Montana School of Law, established in 1911, revised its first year curriculum in 1984 after an extensive reevaluation. The predecessor to these schools was Antioch Law School, which integrated clinical and substantive law training in an effort to train lawyers in large part for public interest and poverty law careers.

The University of Montana’s criticisms of the orthodox method of instruction are particularly interesting because the University’s changes came on the heels of a lengthy tradition. The faculty committee assigned to analyze the first-year curriculum complained that the appellate case method approach had too narrow a focus, was the wrong end of the judicial process to show students first, encourages passive learning, becomes redundant, does not provide adequate skills training, and omits the necessary social science context by continuing to voice a “science of law” ideology. *Montana Report* at 6-7.

An additional recent critique was offered by Professor Warren Schwartz of Georgetown University Law Center. Professor Schwartz proposed curriculum reform based on the assumption that “the two objectives of legal education are to improve our understanding of how governments function and how they ought to function.” Schwartz, *The Failure of Economics in Legal Education: The Prospects For a New Model Curriculum*, 33 J. LEGAL ED. 314 (1983). The courses Schwartz proposed were: “(1) Government Coercion and the Allocation of Resources, (2) Government Coercion and the Just Distribution of Social Products, (3) Government Process, (4) Empirical Methodology and (5) Law and Culture.” *Id.* at 316.

T: Your historical analysis, however, certainly indicates that the orthodox model has been extremely durable and adaptable. And looking at the success of the students who have been taught under the orthodox case-oriented approach, it also appears that the model is effective. Perhaps there are good reasons for the model's success?

For example, legal education orthodoxy divides up the substantive areas of law into manageable components that are recognized in the practice of law. These components include labor law, taxation, commercial law, and the like. In the first year, students are thoroughly schooled in the fundamentals of private law, from torts to contracts.³⁸ They are also taught a whole new style of analysis endemic to the legal profession. This analysis teaches them to "think like lawyers."³⁹ The study of appellate cases "works the mind," challenging the intellectual capacities of the students. Through a careful analysis of the cases, students truly learn about doctrines of law, and the policies underlying those doctrines. When students read appellate case reports, they gain insights into judicial decision-making and the application of legal principles. Thus, it's reasonable to believe that the only raw materials a law student truly requires for a proper legal education are a pen, paper, and a casebook containing appellate case reports.



Conversation between 2 professors

38. A typical first-year program for law students includes courses in legal writing, civil procedure, torts, contracts, property and criminal law. The orientation of these courses, with the possible exception of contracts, and its study of the Uniform Commercial Code, and criminal law and the analysis of the Model Penal Code, is on the common law.

39. See, e.g. Motley, *The Law School Essay-Exam: A Foolish Consistency*, 10 NOVA L.J. 723 (1986).

The argument that the dominance of case analysis has excluded all other forms of legal education, moreover, is simply inaccurate. In the second and third years of study, students at most schools have the option of participating in a clinical program,⁴⁰ or interning with practicing attorneys. The division of academic and clinical training in this manner is similar to the formats used in other graduate programs, such as medical training. Saving clinical programs for a later point in a student's education permits a student to apply the academic classroom learning of the first two years of school. The argument that legal education has an insufficient nexus to lawyering, moreover, is specious. Students take a course in legal writing⁴¹ and have the opportunity to practice their appellate advocacy,⁴² in addition to whatever clinical or simulation courses they may choose to attend.

The orthodox case-oriented method, moreover, is not confined to the study of core courses such as contracts, torts, constitutional law, property and the like. Students also are schooled in legal ethics, and may learn about the relationship of law to other disciplines in courses specifically devoted to the interaction of law with the social sciences.

Besides, don't you miss the mark when you attack the Socratic method?⁴³ That method involves posing a series of thought-provoking questions to students about a case, forcing students to think about the cases and actively piece together applicable rules and principles. While the method may cause students to struggle to understand concepts, it is precisely this struggle that permits students to learn to think like a lawyer.

40. "It is primarily the failure of American law schools to graduate attorneys competent in lawyering skills that has buoyed the movement for clinical law school training." *Seligman* at 160.

A broadly-defined clinical program may be run by the school or may consist of an "externship" with a state or local agency, or even a private law firm. The student in a clinical program generally has a participatory role, from assisting on written memoranda to the court, to actually trying cases as a student-prosecutor.

41. The legal writing course in most schools is generally a one-credit or two-credit course in the first year. The course is often pass/fail, and may be combined with legal research and ethics.

42. This generally occurs in the first-year moot court competition.

43. The Socratic method, as it is called, generally is considered to be a teaching technique in which a series of questions are put to students. By tying together the series of questions and answers, a new insight or point is illuminated. Interestingly, the Socratic method as it is practiced in law schools today is likely much different than the teaching technique applied by Socrates, after whom the method was named. See BROWN, V PERSPECTIVE 6 (1981) [hereinafter cited as *Brown*].

Z: If I may now interrupt; I really must disagree with your assertion that I am attacking what is called the Socratic method. While I personally am not a proponent of that method, I strongly believe that academic freedom protects the many different styles of law teachers. This would include the Socratic style. The Socratic method is swept into the critique of appellate case report analysis only incidentally, since the Socratic method often occurs in the context of case analysis.

T: And you ask whether this system works? One need only look as far as the nearest bright and successful lawyer — of which there are thousands.

Z: Contrary to your assumption, I do not view the “success” of law graduates as a measure of the orthodox model’s vitality. Students may succeed despite their law school education, not because of it. The relevant issue is whether legal education orthodoxy can improve its design and delivery of legal instruction.

III.

T: Well, what exactly is it about case analysis that has you reconsidering its utility?

Z: To best answer your question, perhaps it would be helpful if I first state my assumptions. I presume that effective lawyering involves a series of processes extending far beyond the intellectual sifting of appellate case reports. For a lawyer to solve a problem or complete a task, she must generally first listen to the statement of the problem, sort out or separate the information received, analyze the information — arranging the facts, identifying the applicable law, and then applying the law to the facts — and finally communicate the processed information to others.⁴⁴ An effective training would include rigorous and direct attention to each of these phases of lawyering.

Case analysis, however, fails to undertake such rigorous skills training. Within case analysis, general skills such as listening are likely to be completely overlooked, and law-specific skills such as fact arrangement or development are probably confronted only incidentally. Consequently, students graduate without understanding or practicing

44. The skill of communication is touched upon briefly in law school in appellate advocacy. The consideration, however is only peripheral. The focus of the oral advocacy program is primarily upon oral legal analysis. The skill of communication should be a more direct focus of legal education. Students need to learn to speak precisely and clearly; this requires practice of the type not generally offered in law school today.

significant aspects of lawyers, and are forced to obtain many of these skills from on-the-job training.

This defect in appellate case analysis is partially built-in. Opinions at the appellate stage of a proceeding present the reader with "prepackaged" facts and issues. This affords students little opportunity to identify and practice those skills.⁴⁵

T: Are there any other deficiencies?

Z: The analysis of appellate case reports is also deficient because the appellate phase of a case is not representative of the entire judicial process. Appellate case reports do not provide students with sufficient exposure to the trial stage of a case, where a careful crafting of facts often determines success, or to the pre-trial stage of a case, where strategy, development of facts, and negotiation with opposing counsel often are dispositive.⁴⁶ For example, students do not often use documents during the educational process, and generally do not know how to deal with them upon entering practice. Students are often equally unfamiliar with complaints, motions, transcripts of trials and the like,⁴⁷ except for those students who take upper level clinic, intern or simulation classes.⁴⁸

A corollary problem to the lack of attention paid to different phases of the judicial process is the misleading implication to students. Students end up believing that the trial and pre-trial stages of litigation, and lawyerly functions like document analysis, are distinct from and even secondary to "pure" legal analysis.

A further deficiency occurs from the focus of orthodox case analy-

45.

The report of an appellate case . . . only presents those facts which have already been determined to be legally relevant. Most of the analysis has already been done *sub silentio* in the process of formulating a single narrow issue which alone remains for determination. The remaining issue, however, is often highly obtuse and arises out of an untypical fact situation, otherwise there would hardly be an appealable issue.

Montana Report at 7.

46. "The trouble is that the mindset of the students is on litigation and litigation only. There was not in their thinking process negotiation, settlement, compromise, collaboration or deal-making." *Brown* at 1345.

47. "After a year of traditional instruction reading appellate cases, students usually have not seen a complaint, an answer . . . The raw materials of appellate cases remain abstractions." *Montana Report* at 6.

48. These include "in-school" clinical courses and extern programs whereby students participate in community legal programs, as well as certain simulation courses such as pre-trial practice.

sis on private law,⁴⁹ particularly in the first year of school when courses such as torts, contracts and property are common fare. As a result of this private law orientation, the study of other sources of law, particularly legislation or administrative regulations, have been effectively restricted to the second and third years of school. This suggests to students that the primary source of law today is the common law. While this may or may not have been historically correct, a strong case certainly can be made that prolific legislatures have increased codification of common law rules to meet the demands of an increasingly technological society, thus shifting the primary source of law from the common law to the legislative and administrative areas. The excessive focus of case analysis on private law in the first year of instruction thus not only misleads students about the relative importance of statutory law, but also fails to supply students with a sufficient ability to understand and interpret statutes or administrative regulations.⁵⁰

On a different level, the repetitive study of appellate case reports and case components often has a negative impact on students, creating what I call a "blinders" effect. This effect occurs when students are overwhelmed by the mass of minutiae in the cases, causing them to lose sight of the forest because they are concentrating too hard on the trees.

Similarly, the case method fails to accurately and adequately convey to students how legal doctrine ties into legal ethics, economics, the promotion of different values, or other dimensions of lawyering. The traditional law curriculum separates cases and courses by legal concepts without generally providing the linkage between cases or subjects. T: Does your critique extend to casebooks?⁵¹

Z: Very much so. The use of casebooks as the conduit of appellate case analysis perpetuates and further limits the orthodox methodology. The reliance on casebooks is by no means unexpected. In an educational process dominated by the case method, it is almost a matter of course

49. "Private" law generally means the common law. In comparison, "public" law is generally composed of statutes or administrative regulations.

50.

[R]eading appellate cases . . . fails to provide the students with a systematic overview of the legal system as a whole, its origins, its current features, and its operation. This approach also creates an early impression that appellate cases are the primary source of law and minimizes the importance of legislation and administrative rules.

Montana Report at 6.

51. "Case" books are textbooks that primarily contain edited versions of important appellate case reports as well as comments and questions about the cases.

that textbooks contain mostly appellate case reports.

Extreme reliance on these books, though, has several drawbacks. Since casebooks generally omit the briefs and oral arguments of the parties, students do not observe how lawyers present their case — how the arguments are emphasized or arranged, or how the facts are presented. Even when dissenting opinions are included in the text, all of the views presented to the students are from a judicial perspective. This perspective, while useful, may likely not be a complete substitute in educational value for the arguments and issue formulations of the parties.

The editing of cases also creates problems. A heavily-edited case makes it difficult for the student to visualize the full range of considerations presented by the facts and legal arguments. Students often are not exposed to how a case originated, what its specific facts are, and how those facts gave rise to the issues, among other things. A casebook may utilize only that portion of a case report that pertains to a solitary issue within the case. Although this may be readily justifiable on efficiency grounds, a pigeonholing of cases by issue further distorts the student perspective of the propositions for which important cases stand, and deprives students of the opportunity to practice identifying and separating the various issues that are being confronted within a legal problem.

The use of casebooks, combined with the underlying belief that the law is derived from cases, also serves to limit the flexibility of the educational process. The settled expectations of teacher and student often are such that the substantive⁵² materials in the casebook are not only expected to define the coverage of the course but to provide the priorities of the course as well. Unless the teacher provides a significant group of supplementary materials, the course is constrained by the adopted textbook.⁵³ If the teacher does provide supplementary materials, there is a natural and perhaps reasonable assumption by students that those materials are less important than the text.

Finally, I come to the defects of the methodology of case analysis itself. The case analysis method is inductive,⁵⁴ leaving for students the derivation of the parameters of rules and principles. Unfortunately, stu-

52. The word "substantive" refers to cases specifically and doctrines generally.

53. Some teachers end up structuring an entire course around supplementary materials.

54. "Inductive" reasoning means to generate general principles from specific examples.

dents often are not provided with sufficient feedback about whether the framework of analysis they construct is an appropriate one. This is not to suggest that students should be “fed” answers, but to say that the rudiments of analysis should be better communicated during instruction so that students will have the tools by which to capably resolve legal problems. For example, it may be important in a statute-based course for the teacher to emphasize that in resolving legal problems the initial reference for the student is to the statute itself. An attempt to convey this information indirectly through case analysis will likely be a less than adequate substitute.

The analysis of appellate case reports, moreover, has additional deficiencies. Case analysis often sends students confusing messages, if only because several messages are in fact being sent in close proximity. Cases are often analyzed for distinct reasons. Within the broad umbrella of doctrinal analysis, the focus may be on the judicial decision-making process, or on the application of the rules and principles derived from cases to different fact patterns. Since the dominant case method accepts that students are not supposed to be expressly told what exactly they should learn from reading a case and why they are to learn it, students are often fog-bound as to the real reasons cases are being discussed, and what they are supposed to look for in them.⁵⁵ One need only ask students what they look for when reading a case, or what they are supposed to learn from it, to see the extent of the confusion surrounding the orthodox methodology. The confusion, or to be more accurate, the lack of understanding about the purpose of the methodology, even extends to second and third year students as well as to those in their first year.⁵⁶

This failure to specifically illuminate the purpose and content of doctrinal analysis often prevents students from enhancing their understanding of case analysis on their own during the three years of law school, and may sap students of the motivation to improve their skills during the course of a semester. While the stagnation of second and

55. The bewilderment of legal education is caused by “using cases as the primary material of instruction, but we hardly ever teach the doctrine of precedent. We go on offering basic courses in contracts and torts in the first year, but many teachers of these subjects spend a good deal of time proving that there really is no such thing as ‘law of contracts’ or ‘law of torts.’” *Berman* at 350.

56. For example, students in a second-year law school class were asked why they read cases, and what they looked for when reading them. The responses varied, but indicated that students really did not have a firm grasp as to what methodology was being used and why it was being used to train them.

third year students is not excused by this observation, it perhaps explains in part why students rapidly become disinterested in the repetitive review of cases in the second and third years of school.⁵⁷

The lack of a particularized definition of doctrinal analysis,⁵⁸ and consequently the lack of an understanding of how to do it correctly, spawns a related problem. Students who are expected to learn the law through the inductive case method but apparently do not, as evidenced by an unsatisfactory course grade, often feel dejected and lose motivation to improve. The commonly voiced lament is that the student is a "C" student regardless of the effort he or she puts in. The student may attribute the lack of success to the failure to understand case analysis. Yet students often literally only have a series of oblique clues about how to do case analysis, and the grade received may be attributable to any one of a number of variables.

The lack of a clear understanding of what constitutes doctrinal analysis also has a significant impact on students who aspire to a successful academic performance. These students, unclear about the purpose and content of the methodology, turn to what they perceive the teacher "wants," and how the teacher "thinks" — instead of taking the initiative to learn what the law is, how it was formulated, or what its significance is. The result all too often is unnecessary disillusionment, and the perpetuation of passive, reactive students who do not play an active role in the learning process.

Perhaps the greatest failing of the case method is, in fact, its tendency to foster a passive/dependent approach by students to their legal education. The socialization of students weaned on the case method leads them to become dependent upon the teachers — the questions they pose, the comments they make about the cases — and on the casebooks. Independent questioning and thought is not sufficiently encouraged or facilitated by case analysis for the average student.⁵⁹ The lack of a directed framework of analysis and the absence of stated goals in reading cases may lead students to read cases for substantive content and not much more. Even when dissenting opinions are in-

57. Students often may be heard to complain about the repetition of case analysis.

58. Doctrinal analysis, in the way it is generally practiced, has no substantive meaning for students. (Even exams don't bring doctrinal analysis in focus, since most exams use "issue-spotting" fact patterns.)

59. "Most students rapidly concluded that the study of law is the study of rules." *Montana Report* at 6.

cluded in the text, for example, students may take advantage of their inclusion by relying on them as a crutch instead of formulating counter-arguments on their own. While this passivity may in part be attributed to several factors, such as the existence of one set of exams at the end of each semester and the lack of feedback during the semester, the stated design of the case method — to provoke questioning on the part of the students — simply doesn't work well enough.

IV.

T: How would you implement your model?

Z: The model posits that training, whether it be athletic, vocational, or professional of any kind, involves breaking down aggregate activities into fundamental skills. Thus, a similar division and identification of fundamental skills should occur in the legal education process. Specific skills, such as listening, fact analysis, issue formulation, identifying, extending and comparing holdings of cases, statutory analysis, regulatory analysis, and clear and concise communication, should receive direct attention in class. For example, students may practice listening skills by having questions put to them as to what they heard other students say. The questioned student can be asked to reformulate or clarify the original speaker's expression. In all likelihood, students do not listen carefully enough to what other students say in class and do not practice reformulating or simplifying concepts and expressions.

Direct attention may also be given in class to improving students' advocacy skills. Students may be taught to identify and manipulate forms of argument. Case reports or briefs of the parties may be used to help identify and counter different types of arguments. Students may learn, for example, whether the court declined to resolve an issue as a matter of judicial competence, or to label the type of argument made by the proponent of a right. Thus, by giving models of argument direct attention, students should be better able to respond to arguments presented by other lawyers, or to formulate ones of their own.

T: But aren't you simply advocating spoon-feeding?

Z: Not by any means. I agree that students will not actively learn material, and more importantly, really understand that material if they are simply fed information by a teacher. Rather, "hiding the ball" to encourage inquisitiveness has appeal. But under the orthodox model, it is unclear what is being hidden and why. I just don't see how the kind of confusion the orthodox model generates serves as a helpful means or end to the legal process. Instead, to maximize the efficiency of the prac-

tice of fundamentals, students should be expressly told what is being practiced, why it is being practiced, and how that skill fits into the overall schematic. While students are therefore assisted by the teachers in developing a framework of analysis, they are still left to implement the framework on his or her own and to refine the identified skills.

Students can play a more active role in their education by participating in more simulations in basic courses, in more individualized classroom exercises, or, on a different level, by formulating and refining a series of general questions that they ask themselves when analyzing a legal problem. Students can and should be directly taught to structure their own questioning processes in reading cases and attacking legal problems throughout the semester, not just when preparing for finals. Class time can be specifically set aside to erect a framework or frameworks of analysis and to discuss the questions students are asking themselves.

T: Isn't this more spoon-feeding?

Z: No, because the framework of analysis is only a necessary first step students must take. Students are still left to probe and sift through the facts, issues, arguments and values, determining what's important and what's not. Students are simply being shown the importance of such frameworks.

Significantly, the practice of "framework development" and other skills can readily occur outside of class. For example, students could practice issue formulation and fact arrangement through periodic take-home assignments involving unedited fact patterns. These assignments could range from drafting motions to responding to a court's question at trial.

T: Doesn't your model have a second major component?

Z: The second component of the new model involves a multi-dimensional approach to legal problem solving. As part of this approach, appellate case analysis plays less than an all-encompassing role in a well-rounded legal education. Thus, students must be shown different parts of the process such as the trial and pretrial stages, and receive an integrated view of the different layers of legal problems. So, for example, a question of ethics can be discussed in conjunction with a problem about the rules governing the filing of an answer in federal court, or the resolution at a case can be discussed in terms of its economy or political expediency. In essence, student awareness of the roles played by politics, judicial values, interviewing skills, fact gathering and the many other dimensions of legal problems, and of the relationship of these dimensions to the entire process, should paint a more realistic and use-

ful picture for the student.

T: What about feedback?

Z: This model relies on the systematic and regular distribution of feedback to students. Without that, their skills would not improve efficiently, and students also would have less impetus to better those skills. Feedback can take the form of a series of short written assignments during the semester which are reviewed by the professor, or even pass/fail oral examinations.⁶⁰ An oral examination, for example, can serve several purposes, not the least of which is immediate feedback from the professor. The professor can also learn from such an examination how effectively concepts and points are being communicated to the students. While oral examinations would obviously require a teacher to devote more time to the educational development of students, even ten minutes spent with students in small groups or on an individual basis may prove more productive overall than several large class meetings.

T: Does the new model necessitate modifying the traditional law school curriculum?

Z: To a certain extent, I suppose so. The curriculum should reflect and emphasize the specific skills used in lawyering and provide the students with an accurate "big picture" of law and lawyering. Thus, for example, I would advocate a three-year writing program, integrated with the substantive courses. I would also support a greater emphasis on statutory and regulatory law in the first year, more simulation or clinical experiences at an earlier time, and the integration of ethics and the social sciences into the mainstream of legal education. I would also contemplate a reorganization of some course content on a functional basis. Perhaps "wrongs to others" could be taught as one course, or public law as another. It is not so much the restructuring of the traditional curriculum that is required for the new model to be effective, but rather the de-emphasis of case analysis in, and the adoption of a skills/multi-dimensional and integrated approach to, legal instruction.

V.

T: It is getting late. Any concluding remarks?

Z: The traditional model of legal education provides deficient training

60. Oral examinations have been tried by law teachers in different circumstances. The advantages of pass/fail exams as a supplement to written course requirements are many. Students often find oral examinations in which there is instantaneous feedback and commentary from the professor to be especially productive.

for law students because it over-emphasizes the doctrinal analysis of appellate case reports. A new model, focusing on specific lawyering skills and a multi-dimensional approach to law and legal problem solving would overcome many of the orthodox model's deficiencies. The Langdellian era of case analysis may indeed have been the "Glory Days" of legal education, but maybe it's time to "stop sitting back trying to recapture a little of the glory of."⁶¹

61. B. Springsteen, *Glory Days, BORN IN THE U.S.A.* (1985).