DEMYSTIFYING LEGAL PEDAGOGY: PERFORMANCE-CENTERED CLASSROOM TEACHING AT THE CITY UNIVERSITY OF NEW YORK LAW SCHOOL

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INTRODUCTION

The proliferation of roles that lawyers perform in our modern culture underlies the discussion about the ends of legal education and the myriad views as to what and how law professors should teach in law schools. This essay sets forth one approach to answering the following questions: Which primary end of legal education should law professors pursue? What should law professors teach, and how should they teach it? I detail my pedagogic choice for a performance-centered approach to develop the array of interlaced doctrinal, analytical and critical skills in a more enabling and humane classroom culture. This approach has emerged through my experience teaching three third-year courses and the first-year criminal-law course in the innovative program at the City University of New York Law School.[1]

The novel features of this approach include a more student-centered teaching and learning method that stresses a short, written analysis by each student as the centerpiece of most classes,

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[1] The City University School of Law, founded in 1982, has a special focus and mission. As stated in the beginning of its Brochure: "The faculty and staff of CUNY Law School at Queens College believe that we have a responsibility to help create a bar that is more diversified, and more representative of the full range of peoples that make up New York City and the United States. Accordingly, we actively seek to recruit, employ, retain, promote, and train students, faculty, and staff of all races, national origins, classes, and belief systems, without regard to sex or sexual preference. This commitment is reflected in all that we do, beginning with our admissions policies: we look at the whole applicant in accordance with the broad and inclusive criteria approved by the Board of Trustees of the City University of New York, described in detail elsewhere in this Brochure." 1990-1991 CUNY LAW SCHOOL AT QUEENS COLLEGE BROCHURE 3 [hereinafter BROCHURE].

rather than the traditional oral exchange about appellate cases between the instructor and some students while most other students listen and mentally react to the exchange. Moreover, the approach presents a more collaborative learning experience that includes systematic student critiques in small groups of their written analyses and comparisons of those analyses with a teacher-prepared model analysis.[2]

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[2] The core principles underlying and animating this analysis can be explicitly stated:

1. Choices from the array of primary ends that may be served by legal education are inevitable for teachers and law schools. These choices should be informed by the variety of perspectives on such choices.

2. A teacher's choice of pedagogic approach, method and technique is not simply a matter of cogitating on the spectrum of such approaches. Such choice should also be informed by the embedded choices of the law school and its faculty, its history, its stated goals, the professional roles traditionally filled by its graduates and their hopes and aspirations.

3. Each teacher is responsible both for her teaching and for the learning of her students and thus must continually reflect on her teaching and their learning.

4. Each student is responsible for her own learning and thus must continually reflect as to how she learns.

5. Teaching and learning are intrinsic moral enterprises and, therefore, teachers, to serve their students and to avoid becoming unwitting hired guns for the status quo, should include critical perspectives that promote moral, as well as technical, assessments of existing jurisprudence, doctrine and practice.

6. Legal theory, history and practice all require that the teaching of doctrine, especially in the third year, should transcend narrow subject-matter categories and the substantive/procedural dichotomy because such dichotomies are "false and unworkable."

7. An emphasis on written performance, in some form, is one excellent means for teaching and learning that stresses blended doctrine and skills, blended doctrine from different subject-matters and blended substance and procedure.

8. Because active learning is more effective than passive learning, each course and class should exemplify active learning. An emphasis on systematic written performance exemplifies active learning by automatically "calling upon everyone" to write for each class, by systematic role playing by each student in each class, and by creating a course expectation that promotes heightened preparation for each class.

9. Active learning is also promoted by an emphasis on structured written performance, which can alter the course and classroom culture from a personal effort stressing teacher-centered learning (all eyes on the professor) to a teaching and learning enterprise that also stresses self-learning and collaborative learning by students teaching one another from materials, problems and model answers.

10. The teacher's responsibility is to help students unfold the complex historical, jurisprudential and doctrinal complexity embed-

My approach and pedagogic choice are not presented as "objective," the result of scientific research, or as recommendations for all teachers in all law schools. Rather, the thesis is that my experience at the CUNY Law School illustrates one path for determining what and how to teach in American law schools at the end of the century, and thus, may interest those seeking their own paths through the thicket.[3] Underlying my approach and choice are my twenty years of experience in teaching many different law-school courses and some prior teaching of social science subjects.[4]

In exploring these questions, I start by recognizing that lawyers perform amazingly diverse professional roles in our culture. They practice law in a multitude of settings: as solo practitioners, in small, medium-sized and large law firms,[5] in corporate law de-

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ded in virtually any area of law; not to mystify this challenge by adding artificial complexity or obscurity through "hide-the-ball" teaching. An emphasis on learning by modeling, written performance and model analyses so that students can routinely verify their progress or lack of it, offers one alternative to the affliction of hide-the-ball teaching.

11. Doctrine and related lawyering skills should be presented from challenging basics to complexities. The required written performance, therefore, should embody this progression, which, step-by-step, also builds student confidence in their learning, analytical and performance skills.

12. Because the traditional dichotomy between teaching doctrine and skills is "false and unworkable," the teacher should explicitly blend the teaching of doctrine with related legal reasoning skills in each class.

13. For many students, the learning of analytical and performance skills requires repetitive written practice.

14. Discourse with a diverse student body should and does change the discourse of legal teaching and learning.

[3] My assumption is that there are many such path seekers and many such paths.

[4] I have taught or co-taught courses in Advanced Constitutional Law (First Amendment), Criminal Law, Advanced Criminal Law, International Criminal Law, Comparative Criminal Law, Legal Methods, Legal Analysis, Advanced Legal Analysis, Sociology of Law, Criminal Justice Planning and Reform, Correctional Planning and Reform, and Police Administration. Prior to law school teaching, I taught the following social science courses at Fordham University: Introduction to Sociology, Sociology of Knowledge and Criminology.

[5] One estimate is that of the 650,000 lawyers in the country, 420,000 are in private practice. MARK BYERS, DON SAMUELSON & GORDON WILLIAMSON, LAWYERS IN TRANSITION, PLANNING A LIFE IN THE LAW (1988). The list of legal specialties includes: Securities, Tax, Antitrust, Patents, Banking, Public Utilities, General Corporate, Probate, Municipal, Admiralty, Civil Litigation, Labor, Real Estate, Commercial, Environmental, Personal Injury, Civil Rights/Civil Liberties, Criminal, General Family, Debtor/Creditor, Condemnations, Landlord/Tenant, Divorce and Poverty. *Id.* at 18-19.

partments,[6] and in government agencies ranging from a solo district attorney's office to vast official bureaucracies like the United States Department of Justice and huge private/public bureaucracies such as the Legal Aid Society of New York.[7] Many thousands of other lawyers perform as chief executives, commissioners, judges, legislators and legislative aides at the village, town, city, county, state and federal levels. While constituting a smaller group, others teach in law school, or in undergraduate and graduate criminal justice, business and political science programs. Many other lawyers work in business or as agents, mediators and arbitrators.[8]

Given the diversity of work that lawyers actually perform, the lack of consensus about the ends of legal education is understandable and presents law teachers with the challenge of choosing which primary goal to pursue.[9] These pedagogical choices become more complex because, in addition to the diversity of work that lawyers perform, there is a corresponding diversity of perspectives about how lawyers should carry out these varied activities, the comparative value of such activities, and how best to prepare students to perform them. Consider, for example, a professor who chooses to focus on preparing students to "practice law." In customary form, this focus leads to an emphasis on "thinking like a lawyer" with traditional doctrine and forms of legal reasoning as the answer to "what" professors should teach. This probably entails some form of the Socratic method of decoding cases and statutes as the response to "how" professors should teach. But in more recent reformist garb, the identical focus also leads clinical and other legal educators to favor simulation, field and clinical education because these methods more closely resemble what many lawyers actually do in practice.[10]

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6 Ninety thousand lawyers work for corporations. *Id.*

7 Sixty thousand lawyers work for the government. *Id.*

8 Eighty thousand lawyers work in teaching and miscellaneous categories. *Id.*

9 Different approaches to lawyerly functions in our society have been prevalent since the beginning of systematized legal education started in the 1870's at Harvard and Yale Universities. A broad view, however, is revealed by what Chief Justice Vanderbilt described as the five essential functions of a great lawyer: counseling, advocacy, improving the profession (including the courts and the law itself), leadership in molding public opinion, and the unselfish holding of public office. Arthur T. Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A. J., 31-32 (1954).

10 *See, e.g.*, BROCHURE, *supra* note 1 at 9-10. As the CUNY brochure points out:

> The work of the Houses continually places students in the roles of lawyers, confronted with responsibilities that intersect with substantive material from the courses . . . students learn not only to take a

A law teacher, such as Roscoe Pound,[11] may view lawyers essentially as problem solvers in diverse settings. Consequently this teacher will prepare students for problem solving, both in practicing law and in public and private roles. The answer to "what" should be taught might also stress pragmatic/realist jurisprudential thinking for problem solving.[12] The answer to the "how" question might stress, *inter alia*, skills in negotiation, mediation and arbitration that may be usefully applied in problem solving, especially as an alternative to formal adjudication. If a law teacher, instead, takes a broad view of "practicing law," including the many thousands of lawyers who work as chief executives, judges, legislators and legislative aides, that teacher may prepare students by stressing the broad policy infrastructure and historical context within which both doctrine and problems emerge, ripen, evolve and sometimes fade, as well as the landmark cases and analytical materials that aid in unfolding this policy framework. The principal objective of this teaching approach is to develop finely honed critical skills in policy analysis within evolving political/historical contexts. These skills can subsequently be ap-

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> more active, responsible part in their own education, they learn to approach the practice of law in a way that is active and responsible as well . . . the three-year progression of courses expresses the broad concept of "clinical education" to which the Law School subscribes. One or another variety of clinical study is a part of the program of every student throughout the three years.

Id.

Criticism of both the strengths and limits of legal education has been especially acute over the past fifty years. *See, e.g.*, Karl N. Llewellyn, *Lawyer's Ways and Means and the Law Curriculum*, 30 IOWA L. REV. 333 (1945). Llewellyn noted four main points about law curriculum in the 1940's that he attempted to modify in his own teaching practice while at Columbia University and the University of Chicago. The first is that the curriculum was "not doing its work." *Id.* at 333. Second, the limitations of the curriculum included graduating students with some knowledge of prevailing legal doctrine but who were ill equipped to the "practice of law." *Id.* Third, Llewellyn opined that, by nature, the legal curriculum is a compromise between the "demands for legal information and the demands for inculcation of craft skills." *Id.* at 334. And lastly, that "curriculum implied a reasonably standardized, communicable, body of ways and means sufficiently organized and policed to get results throughout the whole body of prospective graduates." *Id.* at 335.

For other relevant works by Llewellyn, see KARL N. LLEWELLYN, THE BRAMBLE BUSH (8th ed. 1981); Karl N. Llewellyn, *On What is Wrong With So Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

[11] Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

[12] For further discussion of Pound's contention regarding lawyers' roles in our society, and the tasks of teaching law students to prepare them for their careers, as well as Llewellyn's criticism and response to these views, see John W. Van Doren, *Implications of Jurisprudence to Law Teaching and Student Learning*, 12 STETSON L. REV. 613 (1983).

plied in practice and in public and private roles.[13]

Yet other teachers may choose to emphasize history, a liberal arts emphasis on the theoretical content of law or what the law ought to be, either from traditional natural law and utilitarian perspectives[14] or from newer jurisprudential perspectives rooted in feminism,[15] economic analysis or critical legal studies.[16] Indeed, as doctrine explodes in many areas, one entirely defensible response is to go deeper into such theoretical frameworks rather than race superficially through a mass of doctrine in an inevitably doomed effort to present most of it. Given this multitude of competing purposes, choice of a dominant purpose or purposes is inescapable.

Clearly, each choice of a distinctive primary end of legal education leads to related choices concerning "what" should be taught and "how" it should be taught. Choice is inevitable in these areas as well, whether there is conscious awareness of the scope of available options or not. Indeed, conscious choices are postulated as superior to implicit choices that are made without considering the scope of possibilities. With awareness of the need for choice, there can be an explicit weighing of the advantages and disadvantages of each option in light of the instructor's experience, knowledge, skills and jurisprudential commitments. Moreover, the instructor's view of the history and current situation of her law school and its students becomes important. This professorial clarity can be specifically communicated to students, thereby giving them fair notice as to the course's end, substance,

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[13] Clearly, these categories are not distinct and mutually exclusive—there are numerous shadings and overlapping. To illustrate, while all lawyers need critical skills, the nature and scope of such skills varies dramatically. There are real differences, for example, between the practical and case-oriented critical skills required in representing a criminal defendant at sentencing and the policy-oriented critical skills required in legislative assessment of the validity of any sentencing range, the purposes to be served thereby and the range of alternatives.

[14] For an introduction to the importance of these traditional jurisprudential perspectives in making sense of the first year of law school, see JOHN DELANEY, LEARNING LEGAL REASONING, BRIEFING, ANALYSIS AND THEORY 154-66 (1983).

[15] *See*, Elizabeth M. Schneider, *The Dialectics Of Rights And Politics: Perspectives From The Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983, 1987); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980).

[16] *See, e.g.*, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984); Ed Sparer, *Fundamental Human Rights, Legal Entitlement and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

methods and materials. Such clarity may also be contagious among colleagues.

Because these choices impact upon students, as do the curriculum and pedagogy of the school, they are not simply personal choices expressing the teacher's experience and preferred jurisprudence and pedagogy. Students must rely upon and are surely impacted, for better and worse, by instructors' choices. Therefore, these choices must have clear moral content. Thus, a teacher should be ready to explain and to justify those choices, first to oneself, then to colleagues and to students. The premise is that choices that have intrinsic and inescapable moral content should be made in light of the interests of the students, the faculty, the institution and oneself. An inevitable corollary of this premise is that moral conversation about such choices, at least with oneself and ideally with colleagues and students, is unavoidable. No teacher is an island unto herself: her choices influence colleagues and their choices; and the web of faculty choices enmeshes students and the school for good and ill.

To begin this conversation, institutional context is essential. Key questions include: Is a clear choice as to the primary end of legal education inherent in the history of the law school, its students and the interests it serves? Does the current faculty, in whole or in part, support or acquiesce in this embedded history, in its particular culture? What is the impact of these historical choices, exemplified in the school culture, upon the current student body as well as the stream of future students soon to come?

To analyze these questions, other questions are generated: Who are the students in terms of class background, education, learning, and analytical and performance skills? What are their aspirations upon graduating from law school? What have their predecessors done upon graduation? Do professorial choices empower these students to fulfill the lawyerly roles they historically undertake upon graduation? Do professorial choices ignore student needs, largely or partially, and emerge from a prism centered mostly on meeting the instructor's ideological and pedagogic needs? How does one teacher's choice of primary end relate to the choices made by other teachers, in the same year and in other years? How do these choices fit the school's historical mission? Lastly, is there an obligation on first-year teachers to stress foundational skills so that virtually all conscientious students are enabled to acquire a common legal grammar, vocabulary and mode of discourse, a springboard for advancing to more

complex forms of legal discourse and materials? By such empowerment, students are better able to make their own choices about electives, summer employment and initial career choices. Inherent in asking, reflecting upon and responding to these key questions is engagement with the art and craft of teaching and learning.

INSTITUTIONAL CHOICE

At CUNY Law School, there is a clear and emphatic institutional choice as to the primary end of legal education and to its choice of school culture. In the words of its catalogue, the CUNY Law School "gives public interest and public service law the primacy."[17] Indeed, the school boldly seeks to distinguish its curriculum from other curricula by its "rethinking of the nature, function and structure of legal education. The curriculum represents a reordering of legal knowledge, with an attempt to break down false and unworkable distinctions between theory and practice, doctrinal analysis and skills development."[18] This public-interest choice includes a strong mandate, in the words of Dean

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[17] BROCHURE, *supra* note 1, at 5.

[18] Howard Lesnick, one of the architects of the CUNY Law School, describes the aims of the school as:

> [A] dual commitment: to make its educational premises and purposes explicit, and at the same time open to question; and to design an educational program responsive to its premises and purposes. . . . We sought to address four fundamental aspects of the learning environment:
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> 1. To teach subject matter in ways that integrate, rather than dichotomize, different fields, in order to facilitate, rather than impede, the effort to articulate and draw in question the implicit premises and value choices underlying legal development;
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> 2. To study legal development in the context of lawyering decision-making, in order to encourage students to see that law has significance only in reference to underlying human problems;
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> 3. To study lawyering in the context of moral and political theory, and as an aspect of interpersonal communications, in order to encourage students to see their task as the mastery of skills that are not disembodied from questions of identity and values in their work;
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> 4. To actualize students' capacity to be active, reflective learners, in order to create a teacher-student relation that is less role-defined and more empowering of students, so as to enhance, rather than impair, the capacity of students to adopt in their law practice a less role-defined, more empowering relation with their clients.

Howard Lesnick, *Infinity In a Grain Of Sand: The World of Law and Lawyering As Portrayed In The Clinical Teaching Implicit In The Law School Curriculum*, 37 U.C.L.A. L. REV. 1157, 1183-84 (1990). There is an overarching purpose for these four goals: "[T]o enable students to exercise responsibility in the practice of law." *Id.* at 1184. Lesnick also acknowledges: "The core meaning of the idea of responsibility is rec-

Haywood Burns, to open the law school's doors "to women, and people of color, and others who have historically been underrepresented in the legal profession. . . ."[19] This law school mission flows naturally from the City College/City University ideal of providing access to excellent higher education for immigrant and other struggling communities.

CUNY's stated institutional choice has led to an important emphasis upon experiential learning as embodied in simulation, field and clinical pedagogic methods. The premise is that these methods best equip students to be effective advocates for the clients they will predominantly represent upon graduation, including tenants, criminal defendants, working and middle class clients, the homeless, AIDS victims and other disempowered people. This institutional choice also leads to a pervasive emphasis not only on learning the law as it is, but also on learning the law as it ought to be, with strong doses of ethical issues as well as relevant "historical, sociological, and economic considerations. . . ."[20]

My personal preference for public interest law as the primary end of legal education is in accord with the institutional choice. In addition, though definitions and emphasis vary, the faculty overwhelmingly shares this commitment to public interest law. These institutional, faculty and personal goals impact upon a student body that is different from most law schools, a student body that significantly realizes the CUNY mandate to promote access to legal education for historically excluded groups.[21]

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ognizing that the choices one makes as a lawyer (like those one makes elsewhere in life) affect people's lives." *Id.*

19 *See* BROCHURE, *supra* note 1, at 5.

20 *Id.*

21 In 1989-1990, the CUNY Law School enrollment included 37.6% minority students and ranked sixth in the nation in the percentage of minority law students enrolled. THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 50-57 (1988-89) (published by the Law School Admission Council/Law School Admission Services in cooperation with the American Bar Association and the American Association of Law Schools). The 1990-1991 CUNY Brochure/Catalogue details the diversity:

> [The students admitted are] a remarkably rich and diverse group of . . . students. Approximately 52% are women, 48% men, the youngest student is 20 years old, the oldest over 60, and the median age is 30; over a third of the class are members of identified minority groups, and 20 states are represented, although roughly 80% of our students are New York residents. . . . All of them, in one way or another, have evidenced a commitment to the special mission of the Law School. . . . [F]or the current academic year, we received seat deposits from 54% of the students we admitted, a figure that is one of the highest among law schools.

FACULTY AS PROMOTERS OF DREAMS

For many CUNY law students, becoming a lawyer is a transforming experience, a dream fulfilled for the students and their families. These students are often the first family members to obtain higher education, much less to enter professional ranks of any sort. For these students, becoming a lawyer creates an array of new personal life possibilities and a different magnitude of familial aspiration. If a parent, uncle, aunt, brother, sister, or grandparent is a lawyer, the idea of becoming a lawyer, or other professional, can have vibrant existential reality for young family members. Such an aspiration becomes part of the family culture, dreams and goals, and creates a rippling effect that reaches out to neighbors and even communities that may have relatively few lawyers who emerge from the community. Thus, each new Black, Latino, Asian-American or Native American lawyer may empower not only individuals, but families and entire communities. Each new lawyer from a disenfranchised group enables the struggle for equal rights for other people.[22]

The formidable challenge then for the deans and faculty at CUNY has been to promote this dreaming by creating a curriculum and pedagogy that translates these lofty goals into effective modes of teaching and learning. For those faculty who are so inclined, there is an exciting role: to be agents of this transformation, this dream fulfillment. For those who undertake it, the task has many dimensions of challenge and reward.

First, it is a moral and psychological challenge to commit a substantial part of one's professional energies, talent and emotions to this enabling task. Second, there is a relentless and complex technical challenge to deepen one's teaching art and craft to be increasingly effective with an array of students whose "school

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BROCHURE, *supra* note 1, at 5.

Nevertheless, it is important to note that not all students share this formal law school choice of mission. Though it is hard to pinpoint the exact number, it is clear that a significant number of students do not share the school's philosophy. They seek only to empower themselves, to transform their own lives. But given the composition of the student body with many Blacks, Latinos, women and gay students, this personal pursuit splashes over and impacts families, neighborhoods and larger communities. The personal here is surely political.

22 Because dreams traverse the landscape of values, there is no expectation that all students from disenfranchised groups will be committed to empowering their communities. Indeed, the assumption is that pursuit of virtually any common legal specialty is useful in providing role models for other members of such communities. Proliferating examples of such role models are also important for the dominant community to experience.

skills" traverse the spectrum.[23] And finally, enabling such students to transform their lives is a powerful source of professional-life meaning and reward. As for myself, a moral and political dream is engaged: to transmit to students whatever understanding, insights and skills I have acquired in over thirty years as a lawyer/teacher/writer. For me, the transmission is charged because so many of the students personify underrepresented groups in the legal profession and many will utilize their lawyering skills in a public interest form to aid others. The objective, over time, is to graduate many hundreds of such lawyers.

CUNY's Curricular and Pedagogic Choices

In the early 1980's, the organizing faculty and deans' commitment to a public-interest school that placed emphasis on the rethinking of the nature, function and structure of legal education led them to weigh simulation, house, field placements and clinical forms as the predominant curricular and pedagogic method at the school.[24] Those pedagogic choices exemplify the school's public interest commitment and are detailed and justified elsewhere.[25] Because I mainly have taught courses, have only participated in simulations on two occasions and never have

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[23] CUNY law school students have skills ranging from outstanding to very weak. While there are very strong students as measured by the LSAT and undergraduate grade point average scores, many students have modest scores. To illustrate, of the 155 applicants admitted as of March 1991, the median LSAT is 32 and the median grade point average is 3.04. Admissions criteria have decreased the number of students with very weak LSAT scores. In the class that started in September 1990, there were seven students admitted with LSAT scores of less than 20. In contrast, the 1991 graduating class had 27 students with LSAT scores of less than 20. In addition, the Law School has a serious bar-passage problem with the difficult New York State Bar Examination. The passing rate for first-time takers from the Law School has ranged between 43% in 1986 to a low of 26% in 1987. From the 1987 low, the rate has gradually improved to 42% in 1990 and 48.7% in 1991. These first-time rates compare with a range between 72% and 81% for all first-time takers during the identical period. The graduates do better, of course, upon subsequent retaking of the exam. To illustrate, 80% of the first graduating class in 1986 had passed the bar exam by 1990.

[24] BROCHURE, *supra* note 1, at 9-10.

[25] In Howard Lesnick's words:

> [B]elieving that revisions in course content and design would not suffice to accomplish the stated purposes, we explicitly made all of the course work an input to the carrying out of simulated lawyering work. In what came to be called "Houses," groups of approximately twenty students worked in association with a faculty member (a "House counselor") who acted as a senior lawyer—one with the time and commitment to teach his or her juniors. More than half of first-year

taught in the clinics, this article concentrates on what should be taught in such courses and how the courses should be taught. These questions are formed by the institutional, faculty and personal choices described above. As detailed below, these classes are, at least in substantial part, somewhat different from the traditional law-school curriculum in name, subject-matter, role and structure in the curriculum.[26]

The dominant pedagogic method in large and small classes

> students' scheduled "class" week was to be done in the Houses on the simulations.
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> We were explicit that, in using simulations as a teaching vehicle, we were not simply adding the teaching of skills to that of knowledge, but were seeking to integrate both in a context that emphasized choice, responsibility for choice and an awareness of purpose. Each task that students undertook in the simulations had a three-part structure—planning, doing, and reflection. We spent considerable effort seeking to overcome the tendency to over-emphasize the "doing phase."

Lesnick, *supra* note 18, at 1187.

Lesnick explains that one of the repeatedly taught, first-year, month-long simulations, "The Mussel Bay Simulation," was designed to "capture as full a range of the foregoing purposes as possible; if only once, we meant to show our students 'the world in a grain of sand.' " *Id.* at 1189-92. Briefly, the simulation concerned:

> [A] small group of people who work together as a theater group and who had recently rented a theater in 'Mussel Bay,' a suburban community. They are interested in buying a house in the community [in all their names], have found one . . . and have reached agreement on contract terms with the seller. . . . [But] a local ordinance and a deed restriction may each prohibit ownership or occupancy by unrelated adults. Two of the group are a couple, not married. . . .

Id. at 1189.

Each student, while working alone, with small groups and with the House Counsellor, acts as:

> [A] junior lawyer in a small firm . . . in role . . . conducted an initial interview . . . prepared a memorandum" concerning "a description of the client's goal and priorities and a recommendation whether to undertake the representation; prepared a memorandum . . . on the legal issues presented, with an analysis of the options, followed by a letter to the client counseling opinions; conducted a counseling interview with the client; and (as client) made a decision among the options.

Id. at 1189-90.

"Out of role," each student, *inter alia*, prepared reflection memoranda, received feedback from the client and participated in House sessions in which the counsellor also took part. *Id.* at 1190. The steps in the process "generated . . . needs for knowledge of the law," that were met by courses, by House meetings, and by both individual and small group efforts. *Id.*

[26] For example, in a traditional law school, a first year student will probably study Constitutional Law, Contracts, Criminal Law and Torts, whereas the different curriculum at CUNY provides the comparable material in a substantially different manner as portrayed by these course titles and descriptions. I suggest that these course titles and descriptions, as all such titles and descriptions, are symbolic and expressive of ideals and directions rather than a literal description of course subject

is usually quite traditional, entailing various forms of the Socratic method with substantial teacher discourse interspersed with modest to extensive professorial questioning and student answering. This traditional pedagogy can be effective in teaching, clarifying and integrating doctrine, presenting related modes of legal reasoning and introducing some critical perspectives for assessing doctrine.[27] The questioning and answering embodies an emphasis on oral performance of case skills for those students who answer the questions, ranging from a few students to as many as fifteen or more. But this customary pedagogy strikingly fails to serve two imperative needs in large classes: the need for systematic active participation by each student in each class; and, in all classes, the need of many students to learn and to demonstrate in writing their command of a variety of legal reasoning

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matter and context. They are significant precisely as expressing different symbols, ideals and directions:

> *Liberty, Equality and Due Process, in Historical and Philosophical Context*: This course studies the legal expression of our concepts of liberty and equality, and our commitments regarding them. It commits significant time and effort to the study of historical events—such as the antecedents of the Bill of Rights in the English and American revolutionary periods; slavery, the anti-slavery movement and Reconstruction; the reign and fall of White Supremacy; the fear of Communism, 1880-1980; free immigration and the closing of the gate; and the rise of the labor movement—that have shaped our national consciousness, and the law, with respect to such issues as free speech and racial equality. The course similarly attempts to connect constitutional concepts to moral and political theory; it studies the First Amendment as part of the study of liberty, Equal Protection as part of the study of equality. Explicit functions of the course are to help students overcome the tendency to view law and legal doctrine as simply a system of analytic reason, and to learn from the experience of grappling with emotionally charged and divisive issues and with values and perceptions sharply different from one's own.
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> *Law and a Market Economy*: This course focuses on the ways that law shapes and responds to economic transactions between and among people, acting individually or in association with others. It studies the traditional core areas of economic activity—Contracts, Property, and aspects of Torts and Corporations—in ways that address their functional and ideological interrelation, and also introduces students to the study of administrative regulation. The course is a three-semester sequence.

BROCHURE, *supra* note 1, at 10-11.

[27] For those students who are self-disciplined, who can concentrate and whose attention span is strong, they can learn well from the oral performance of other students and from the teacher. Although these students do not speak, they are participating in a form of active learning. Nevertheless, even with this group of students, writing a short analysis for class, which becomes a subject for self-criticism and comparison with a model analysis, is clearly a more intense form of active learning than listening and reacting to others.

skills corresponding to a variety of doctrine (e.g., from narrow positivist formulation and analysis to broad policy-oriented or natural law reasoning).

Gradually, based on my experience with the CUNY student body from the fall of 1983 to the present, I have developed a pedagogy that, for me, best embodies the ideal of active learning by all, or virtually all, students in each class. That pedagogy is a highly structured, performance-centered approach stressing written analysis as the centerpiece of each class.[28]

The process by which this method emerged from 1983 to 1986 is worth noting. Initially, my approach embodied a typical conversational mode of teaching: a modified Socratic method in which I would ask many questions and utilize answers as a basis for clarifying, elaborating and criticizing doctrine, case skills and related issues. I gradually became disenchanted with this mode of teaching because it did not exemplify the ideal of active written performance; there was still too much teacher talk, too little student talk from the entire class,[29] and hardly any written demonstration of analytical skills and doctrinal dexterity at all (outside of law exams). In sum, there was too little active learning and performance by the entire class. In addition, if law is, as I believe, an important derivative discipline, making appellate cases the centerpiece for learning deemphasizes the ground of doctrine in history, politics, economics and culture. Appellate "snapshots" of what is at stake, of what is "really real," do not enlighten either the able or the struggling student as to this ground.

The Socratic dialogue, a single valuable pedagogy, even in modified conversational form, had become predatory and canni-

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[28] *See* Stephen Nathanson, *The Role of Problem-Solving in Legal Education*," 39 J. OF LEGAL EDUC. 167 (1989). My discussion highlights the Criminal Law and Legal Reasoning courses, though I also teach Advanced Constitutional Law where the problem-solving method is equally effective. For further discussion on using the technique for a course such as Constitutional Law or any other course, see Robert P. Davidow, *Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing*, 34 J. OF LEGAL EDUC. 533 (1984).

[29] In a large class, for example 150-160 first-year students at CUNY, there is an illusion of outstanding student participation inspired by the fact that perhaps a dozen, fifteen or even a few more, may ask and answer questions in a single class. From the instructor's standpoint, the experience is a class with excellent participation. But the overwhelming mass of students in such a class (145/160) have not asked or answered questions; rather, they have listened with varying degrees of concentration, discipline and attention span. As classes decrease in size, it is possible to improve the percentage of participants (15/80 or 15/60), but still most students only listen in these classes with "outstanding" participation.

balized other approaches. The oral class dialogue simply did not enable the mass of struggling students in these classes to acquire and demonstrate the necessary doctrinal, reasoning and critical skills. To be sure, those students with excellent learning, analytical and performance skills at the beginning of the course usually benefitted from the dialogue and performed excellently at the end. Those with mediocre skills benefitted less and usually performed in mediocre fashion while those with weak skills seemed to benefit very little and usually performed weakly. It seemed clear that this teaching approach was inherently biased in favor of the already skilled and against those struggling to develop doctrinal, analytical and critical skills. Participating in the dialogue by listening, thinking and speaking from time to time did not enable them to identify, analyze and correct their weaknesses. In addition, the method seemed to work against those whose temperament and cultural socialization produce shyness and reticence about speaking out in large groups and arguing for one's position. The Socratic method resulted in predominantly teacher-centered teaching, rather than student-centered teaching.

I was also troubled by the gradual realization that the acquisition of these learning, analytical and performance skills appeared to be strongly correlated with the student's economic class position and the quality of earlier schooling. The SAT and LSAT results, for example, are correlated with family economic class position.[30] Although there are many individual and some cultural group exceptions, generally those students from more affluent class backgrounds have much stronger learning, analytical and performance skills than those from lower economic class backgrounds. My conclusion was that law school teaching, which does not address this class-based difference, unwittingly perpetuates these differences and is, therefore, objectively class-biased, even if the teacher is subjectively well intentioned, unaware of this result and doing her very best. In contrast, teaching that promotes the acquisition of this array of skills in basic form is akin to helping an apprentice carpenter learn to use a saw, hammer and other tools: she can then "go forward on her own." In other imagery, the potential of performance-centered teaching is

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30 *See* Nader/Nairn Report on the Educational Testing Service, and *A Response to Charges in the Nader/Nairn Report on ETS* Feb. 1980 (prepared by Educational Testing Service, Princeton, New Jersey). The ETS critique on the Nader/Nairn Report concedes that "there is, in fact, a relationship" [between family income and test results] and concentrates on the claim that "the relationship is more moderate than [the Report] suggests." *Id.* at 7.

to get all students on a common springboard of foundational skills so that they can "jump-start" their own learning.

How to Teach: The Four Steps

What follows is a response to the how-to-teach question—a detailed description of the performance-centered approach that emerged during these years. First, one or more mini-problems are usually distributed to students well before each class. Each mini-problem is a fact pattern of at least one or two paragraphs. Some are longer. The solution to each mini-problem requires a lawyerly analysis that presupposes a good understanding of the previously assigned materials for that class, including cases, statutes and contextual materials. All students are required to write an analysis of the problem before the class, typically a lawyerly analysis of the facts, the issue(s) posed, the governing principle or rule and the application of the facts to the rule.

In the second step, the class begins with students discussing their written analysis of the assigned mini-problem in small groups of three to five students. Many students, but not all, follow a recommended structure for such small-group discussions. As one student reads her analysis, the other two or three group members are asked to play the role of student: listening carefully and asking the reader questions about unclear or apparently incorrect parts of her analysis. The reader/teacher plays the role of instructor. The underlying premise is that teaching is learning. If a student can explain her skills-centered understanding,[31] such explanation presupposes a deeper type of learning than that necessary to recognize the doctrine and issues or merely talk about them. Thus, in this second step, the ideal is that students learn from each other by repeated peer-group teaching and active questioning that fosters within each group a cooperative learning exchange and spirit.[32] In addition, those students with more developed skills than their colleagues, aid those whose skills are less advanced.

In the third step, one to three students play the role of plaintiff's lawyer, defendant's lawyer or judge by presenting their

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[31] Skills-centered understanding means that the student can explain and apply the required doctrine utilizing the relevant legal reasoning forms of analysis including, where appropriate, a critical appraisal of both doctrine and the reasoning.

[32] *See* Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. of Legal Educ. 654 (1984) (discussing the effectiveness of the problem-solving method and the use of role-playing to enhance this teaching technique for students).

analysis/argument to the class. These presentations simulate arguments to the court at pre-trial, trial or appellate stages, or to a "super-judge" or scholar who decides whether a trial or appellate judge was correct in her decision. When the answers are excellent, I will sometimes ask the student to read her answer slowly a second time and ask the class to concentrate on understanding exactly why it is excellent. When answers are poor, in whole or in part, strengths and weaknesses are briefly pinpointed, both in doctrine and in analytical skills (e.g., issue formulating, interweaving, use of policy). These readings usually trigger student questions and comments about the analyses and related issues, including the assigned doctrine, relevant skills and, less frequently, contextual matters such as the underlying history, politics or economics. In responding to some of these questions and comments, I strive to be succinct and to resist the temptation to lecture at length about the issues missed or about doctrinal matters. My belief that law is mostly a derived discipline leads me to interject the relevant context in history, politics, economics or culture where the specific doctrine triggers such context.[33] Thus, in this third step, students learn from positive modeling of the excellent and good student analyses, negative modeling of the weak analyses, student questions and comments, and professorial answers and other criticisms.

In the fourth step, a model analysis for the mini-problem is distributed in class. These model analyses vivify the ideal of a written, skills-centered understanding, a lawyerly performance blending two dimensions: form and doctrinal sophistication. Lawyerly form is illustrated by application of one or more of the appropriate writing formats set out in my book, *How To Do Your Best On Law School Exams*.[34] This series of writing formats is designed to track positivist, policy-oriented and other jurisprudential modes of formulating, analyzing and deciding legal issues. They correspond to what I call the varying "architectures" of law and are designed to meet student needs for explicit structures in performing, learning and analyzing.[35] The written law-

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[33] For example, that medieval canonists had worked out the basic conceptual framework between justification and excuse by 1120 A.D., or that the modern rules of larceny and embezzlement are rooted in medieval history.

[34] JOHN DELANEY, HOW TO DO YOUR BEST ON LAW SCHOOL EXAMS (1988). For other works by John Delaney, *see, e.g.*, JOHN DELANEY, LEARNING LEGAL REASONING, BRIEFING ANALYSIS AND THEORY (2d ed. 1987).

[35] The fact that law inherently exemplifies deep structures or patterns leads to explicit models for analysis that reflect these structures. These models serve as road maps for students at basic, intermediate and advanced levels. *See* DELANEY,

yerly performance also includes doctrinal sophistication in the sense of selection and presentation, by elements or tests, of the precise principle or rule required to resolve the issue(s) posed by the relevant facts. Thus, in this fourth step, students learn analytical legal writing by modeling such writing or, more likely in the beginning, by struggling to emulate it.

To aid in this emulation, students are encouraged, individually and in small groups, to compare carefully their analyses with the model analysis. I also discuss, especially in the early stages of the course, the essential parts of every lawyerly analysis, including the categories of key evidentiary facts, the parts necessary for articulating a legal issue, the role of authoritative rules and principles in resolving issues, the application of such rules and principles to the facts and the uses of policy. We also discuss what is distinctive in a particular analysis, such as the structure of a complex rule statement and its application to resolve the posed issue by interweaving key facts with the elements of the rule/principle or relevant tests or factors. Depending on the doctrine and forms of legal reasoning at stake, I may encourage criticism of the doctrine, reasoning and underlying assumptions.

After applying this four-step process to the first assigned mini-problem, we immediately repeat the same four steps in analyzing a second mini-problem. The minimum requirement for each class is the written analysis of at least one such problem and often a second problem. In addition, a third or even fourth mini-problem may be orally analyzed, sometimes first in small groups and sometimes without such discussion. The constant repetition of the four steps develops and reinforces the learning of doctrine as well as skill development. While discussing many of the problems, I introduce other legal reasoning and jurisprudential issues that are raised by the problem, the relevant doctrine and related case law. Raising and exploring these doctrinal, legal reasoning and jurisprudential issues enable students to appreciate more advanced issues and insights that are inherent in the concrete problem and its resolution. Students also learn that theory and history are embedded, not artificially added, by professors and that the legal cosmos truly may be in "a grain of sand."

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supra note 34, at 31-32, 42-45. While useful for all students, they are essential for those who crave structures as an escape from what otherwise might seem like a befuddling randomness and arbitrariness—e.g., appellate decisions that, for the novice, appear to be without pattern. The failure of many teachers to make these patterns explicit may be related to the vestigial power of "hide-the-ball" teaching.

At the end of each class, some students, in accordance with a distributed weekly schedule, are required to hand in their analyses for written assessment of strengths and weaknesses by third-year teaching assistants who work under my supervision. These assessments, which are written directly on the student analysis and generally returned within three or four days, promote individual teaching and learning. The assessments promote confidence through the confirmation of evolving strengths and highlight persistent weaknesses for student follow-up. Because of the class size, I do not attempt to provide any direct individual assistance to students. If a substantial pattern of specific weaknesses is revealed in the student analyses, I may address those weaknesses in class discussion. These regularly submitted student analyses and weekly conferences with the teaching assistants enable me to verify and correct my class impressions of collective strengths and weaknesses, to "feel the pulse of the class," and to attempt corrective action as the course progresses. In addition, each student receives her mid-term and final exams back with comments and a teacher-prepared model analysis. Those who fail or do poorly on the mid-term are urged to seek assistance from one of the experienced teachers who staff the Professional Skills Center, which provides individual assistance to struggling students. Through these means, I seek to make the exams, especially the mid-term exam, a learning experience as well as an evaluation.

Comparison with Traditional Methods

In traditional law school classes, professors teach by assigning cases and other materials, lecturing, asking questions and playing off student answers.[36] With written performance-centered teaching, students learn in the usual ways—studying materials, listening and mentally reacting in class to the teacher and to other students, occasionally participating in discussion, taking notes, reviewing and outlining courses. For many, these usual methods are sufficient and effective. But for others, these methods are insufficient. Performance-centered learning offers a different approach to the classroom. In addition to the usual

[36] Traditional law school classes favor those who learn well by studying cases, listening in class as others talk, reacting to such talk, occasional participation, note taking, subsequent scrutiny of such notes, review of the assigned cases and outlining courses. The performance-centered approach supplements this medley of methods and techniques with other techniques and with constant opportunities for students to assess their learning, analysis and performance.

methods, students learn by struggling to write analytical responses for each class, systematic role playing, collaborative teaching and learning from each other in small groups. The students also develop skills through reading, listening and reacting to written analyses in class. Outside of class, students compare their analyses, mid-term and final exams with model analyses. Moreover, a modest number of students learn through occasional, individual conferences with the teaching assistants. Because learning theory and research indicate that we learn in different ways and that multiple modes of learning and feedback are preferable, it is more effective, in principle, to teach in a way that provides various modes of learning with regular opportunities for assessing one's strengths and weaknesses. At a minimum, performance-centered teaching offers one remedy when traditional Socratic methods do not work.

WHAT TO TEACH

While the doctrine presented in my first-year criminal law course is conventional in scope—including homicide, larceny, inchoate crimes, justification and excuse—the CUNY Law School's commitment to teaching law in a more integrated approach is embodied in my third year classes by a cross-cutting doctrinal approach.

Exemplifying the CUNY rationale, the problems in the third-year legal analysis classes are grouped into the overlapping subject-matter categories which attorneys commonly confront, including criminal law and federal and state constitutional criminal procedure; common law contract and the Uniform Commercial Code; commercial paper and surety; and wills, trusts and estates. In addition, the problems in the private law areas typically incorporate at least one issue rooted in civil procedure. The principle, derived from history, theory and practice, that substantive issues always have a procedural context, compels a substantive and procedural blend in most problems. In addition, the choreography of blended substantive subjects flows from the premise that, though sometimes justified by doctrinal complexity, artificial compartmentalization "into analytically distinct subject headings," does not prepare students for practice, is theoretically unprincipled and is historically unjustified.

Thus, the overlapping subject matters blended into each problem enable third-year students to transcend learning in artificial single subject-matter categories that do not correspond

either to the history, theory or practice of law. Rather, students emulate the more complex challenge posed by real-life legal problems, which always present issues combining substantive and procedural categories and often cross-cut several substantive realms. Students learn this blend of procedure and diverse substance by playing a particular role in decoding these problems: lawyer for plaintiff or defendant, or trial or appellate judge. Such role playing and blended teaching and learning is preferable in principle to teaching and learning with the tunnel vision inherent in single subject matter focus or the unlawyerly pretense of an undefined "neutral" role.

Because application of the performance-centered approach requires constant writing and doctrinal analysis for each class, careful preparation of the assigned sequences, cases, statutes and related materials becomes a precondition for the class, *a sine qua non*. Without this careful preparatory learning, it is manifestly impossible to decode the problems. In fact, without at least an initial understanding of the relevant doctrine and related reasoning, even the struggle to decode them is difficult. This reality creates inherent psychological, moral and peer pressure on students to prepare sufficiently to be able to struggle with the problems, which is also the minimum course expectation. In contrast with classes where Socratic and lecture-questioning methods are applied and the chance of being called upon in a large class is slight, the application of the written performance-centered approach means that teachers automatically "call upon everyone" to perform in each class, so that heightened preparation becomes essential. Without it, one simply cannot participate in the class. Indeed, this heightened preparation becomes an essential element of the different class culture that is promoted by the performance-centered approach.

In addition to a heightened intensity of preparation, the direction and focus of such preparation changes. For many students, the objective changes—from knowing the materials well enough to understand and respond to infrequent professorial questioning to later coping with the exam—to a performance-centered understanding, which enables students to produce a written, lawyerly analysis. In philosophical terms, this change embodies the altered ontology of the class. Its essence becomes a struggle for lawyerly written performance rather than simply "knowing" the materials well enough to talk about them in class and write a typical first-draft exam answer at the end of the term.

Professorial Preparation

This heightened preparation and changed focus also applies to teacher preparation. The need for precisely formulated problems designed to raise a variety of issues at different levels of complexity, as well as the need for answers that capture lawyerly responses to the issues raised, demands meticulous teacher preparation. The intense preparation inherent in the creation of written problems and answers is objectified in the aggregation, over time, of an expanding set of course problems and answers that can be fine-tuned each year and used again and again. Thus, while the initial preparatory effort is probably greater than with other teaching methods, the required subsequent preparation is less time-consuming. Eventually, more time gradually becomes available to refine the course theory, method, technique and materials, and to pursue research and writing goals.

Building-Block Teaching and Learning

The third-year problems exemplify the principle of building-block teaching and learning in two ways. First, the array of problems illustrate a building-block approach to learning by posing issues at escalating levels of complexity and challenge. Second, each problem itself is a building block in a sequence of problems that begin at a challenging but straightforward level and gradually become more difficult.

As to the first meaning, each third-year problem usually presents four or five primary issues. In addition, the problem may contain up to four secondary issues. The primary issues customarily present a range of difficulty that begins with a challenging initial issue. In tort negligence, to illustrate, it might be a forthright example of clear tort negligence—e.g., a motorist looking away and causing injury to another. In contract, a straightforward example of a valid or invalid offer and acceptance may be used. In criminal law, a basic example of felony murder involving robbery and larceny as well as homicide is typical. Though the doctrine may be straightforward or even simple, for many students these initial issues are nevertheless challenging because they require not simply doctrinal knowledge, but rather a skill-centered understanding that leads to a lawyerly performance, including skills in issue-identifying, rule application and interweaving. Because skills are necessary for performance and cannot simply be reduced to their knowledge dimension, a formidable challenge for many first-year students is the blended doc-

trinal/skills performance needed to resolve the basic issues presented in the initial tort negligence or contract problem.

The need for this blended doctrinal/skills performance explains why a significant number of students, not only first-year students, experience serious difficulty in mastering straightforward doctrine such as intentional torts, intentional homicide or offer and acceptance. If they are conscientious, they can probably memorize, even understand, the driving policy and elements. They can often discuss these areas and are convinced that they "know" the doctrine well. They cannot, however, apply their doctrinal knowledge by identifying the issues, selecting the applicable rule or principle, interweaving key facts with elements or tests to resolve the issue, applying applicable policy in different ways and performing all these tasks with lawyerly writing. They also have difficulty applying the doctrine to a series of varying fact patterns. In short, they lack the skills-centered understanding essential to a skills-centered, lawyerly performance. Often, this absence of a skills-centered understanding and performance is also correlated with the absence of skills-centered learning.

When students experience difficulty in acquiring this skills-centered doctrinal understanding and embodying it in a skills-centered performance, the response is to require the student to decode and analyze other problems of at least comparable difficulty rather than struggling with easier problems. Students cope with difficult problems in various ways: self-learning, learning from each other, repetition and reinforcement, continuous struggling to perform the lawyerly tasks necessary to decode and answer the issues in difficult problems, and relentless effort, often met with initial failure but rewarded by eventual success for the persistent.

For some students, however, persistence is not enough. They also need individual assistance to identify and correct deficiencies. The relatively modest number of conscientious students in this category sometimes benefit from a few individual sessions and are then able to progress on their own.[37]

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[37] Despite these efforts, a modest number of students fail each term and a few students are given near-fail evaluations. With only occasional exceptions, most students who fail or do poorly do not apply themselves conscientiously, sometimes because of life complications. The inescapable conclusion, however, is that most students learn well from this approach: the strong get stronger and the weak improve their skills.

From Teacher-Centered Class Learning to Student-Centered Learning

It is not only problems that are objectified: teaching and learning are also objectified by transforming the reliance mainly upon the teacher as a fount of information, analysis and evaluation, into a view of the teacher as architect and general contractor of a teaching and learning enterprise in which students play an active and major role in self-teaching and peer group teaching. Students do not simply engage with the teacher: they engage intensely with themselves and each other by individually unraveling the problems, partaking in small group discussions, and question and answer sessions with the teacher, and again with themselves in confronting their strengths and weaknesses as revealed through repetitive comparison of their analyses with the model analyses.

Thus, the politics and ambience of class culture are changed. The hierarchical relation of each student with the teacher is complemented by regular student-to-student interaction. By rejecting the "teacher-as-fount-of-wisdom" ideal, the teacher becomes a facilitator of self-learning and small-group learning, a "coach" of the students who play the role of performers, what I call lawyers in training. In addition, with its emphasis on individual performance in each class as an important key to learning, this method operationalizes the ideal that each student is responsible for her own learning. Students discover that repeated efforts at written classroom performance promote more effective learning than listening to teacher talk, listening and reacting to others respond to professorial questions or even personally responding to questions in an occasional class.

The repeated lawyerly performance also exemplifies active learning and rejects passive learning. While I ask a fair number of questions and answer student questions, I seek to exercise restraint and usually resist impulses to talk at length, answer interesting but irrelevant or hypothetical questions, or even encourage or permit a proliferating series of questions unless they are of extraordinary quality.

Central to the journey from teacher-centered learning to student-centered learning is the principle of mutual aid embodied in the small-group learning partnerships that are an integral step in the four-step process applied in class. Initially, the ideal of personal responsibility for one's learning unfolds in self-help and self-learning. This ideal is enriched by another ideal—mutual aid that unfolds in small group learning. Thus, the learning experi-

ence in each class entails both a collaborative enterprise and an individual effort.

By rejecting any notion of exclusively individual learning, the emphasis upon collaborative learning also expresses a moral ideal inherent in the CUNY Law School's philosophy. In learning, as in life, collaboration and caring are critical dimensions of the struggle for a civilized existence. Whatever teachers and students do together has inescapable moral significance: whether they struggle together to aid and empower one another to deepen their understanding and skills or, at the other extreme, wage warfare upon one another by seeking to harm one another's learning.

Because of this transformation of teaching and learning into an enterprise, the quality of the classes is stabilized at a higher level. In contrast to classes dominated by teacher talk with many questions and student responses, there is less unpredictability and fewer classes that vary sharply in quality or effectiveness. Moreover, there is far less vulnerability to idiosyncratic and fortuitous factors such as teacher, student or class personality, temperament and transient moods, the lingering effect of the prior class, winter "blues" and so forth. For example, the fact that the teacher may be experiencing an "off" day has less impact when teaching and learning is less hostage to the teacher's personality and mood—the students can still perform well even though the coach is in a slump. The excellence that is gradually built into the problems and analyses over time and the cultivated skills and habits of students in carrying out the four-step process mostly transcends personalities, moods and temperaments on a particular day.

Teaching Students with Sharply Varying Skills

The performance-centered approach also offers one response to the challenge posed by a class filled with students at sharply different skill levels. The reason is that problems can embody facts that raise issues at sharply different levels of difficulty. Thus, the first mini-problem in a first-year criminal law topic can present an initially challenging but straightforward issue, while the subsequent mini-problems present gradually increased magnitudes of challenge. Virtually all students who have prepared and who have minimum or better skills should be able to decode the first mini-problem in a doctrinal area and write a lawyerly response, though at quite different qualitative levels. Those stu-

dents with greater doctrinal and skill sophistication should be able to decode and write a lawyerly response to the more difficult second mini-problem, while those with the highest level of doctrinal and skill sophistication can also succeed with the subsequent and most difficult mini-problems.

But all students, especially those with the weakest doctrinal and skill sophistication, are encouraged to struggle towards excellence and to decode and resolve all problems. Our experience is that such struggle, when repeated consistently, usually yields at least an incremental building-block progress that motivates students to continue to struggle, and over time aggregates to demonstrable, sometimes impressive, progress in a semester. I encourage the view that any student's skill level is a fluid, not static, reality. Progress in skills is not always gradual and incremental. Occasionally, the repetitive written analyses detail a breakout to higher skill levels, a surprising, even thrilling, experience for the student that builds self-esteem and self-confidence about one's capacity to persevere and succeed in learning. The learning insight that has emerged is that understanding not only precedes performance as we are trained to believe and ordinarily expect; sometimes, understanding emerges during the performance, or even trails after it. Thus, repetitive written performance provides different paths for different students towards the goal of understanding.[38]

Because students are encouraged to view learning as a process aimed at blending skills and doctrinal understanding with performance, any dichotomizing of learning into two learning tasks, doctrinal understanding and then a skills-centered performance is discouraged. The tendency of many students, often those with weaker skills, to reduce the learning of law merely to knowledge, sometimes even to the utter fallacy of memorization, is correlated in our experience with the tendency to dichotomize their learning task into these two consecutive steps.

Thus, by simultaneously engaging all students at different levels of challenge, the problem method offers one partial rem-

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[38] This learning insight reflects the behaviorist emphasis that the way to change behavior is to focus on the behavior itself, and not to see behavior as an artifact of the mind. *See, e.g.*, B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971). The important point is the recognition that behavior can change before there is complete understanding of the change, and this insight does not require a rejection of the conventional emphasis that understanding precedes and ignites performance. Both approaches can be effective. In athletics, for example, it is not uncommon for performance to exceed past-based expectations about levels of performance.

edy for the difficulties posed by teaching a class whose students range across the skill spectrum, without discouraging the weaker students or unduly boring the stronger students.[39]

Modeling and Rejection of "Hide-the-Ball" Teaching

The emphasis on written performance with distribution of model answers is antithetical to any "hide-the-ball" teaching, i.e., any approach that intentionally adds obscurity or artificial teacher-based complexity to the doctrine and legal reasoning skills presented. Indeed, the distribution of specific direction in the form of model written analyses is central to the important learning by modeling dimension of the written performance approach. As noted, students learn, in part, by repeatedly comparing their analysis, in detail, with teacher-prepared model analysis. In straightforward positivist form, this model analysis includes focus on both skill and doctrinal quality as expressed, for example, in the statement of the conclusion, the formulation of the issue, the specification of the governing principle/rule and relevant tests, the interweaving of key facts with the elements of the principle/rule or tests, the application of relevant policy and the blending of these parts into an organized and appropriately succinct lawyerly answer. In pragmatic/realist, policy-oriented or natural-law form, the model analysis varies to reflect these different jurisprudential frequencies.

The repeated comparison of student analysis with model analysis aids their struggle towards the ideal of excellent analysis by enabling them, class by class, to identify, analyze and strive to correct their doctrinal, reasoning and critical deficiencies in light of an exemplar. Equally important, the students are able to verify their strengths and build upon them, a step that is useful for all students and essential, even immensely reassuring, for those lacking in confidence about their skills. Thus, learning by modeling is a key means for students throughout the course to apply the principle that each person is responsible for her own learning and each person, step-by-step, should strive to become expert about it. Students in the first-semester criminal-law class espe-

[39] Student evaluations in the third-year Legal Analysis and Advanced Legal Analysis courses are almost unanimously very positive and many students have recommended that the courses be mandated. In the first-year Responsibility for Injurious Conduct course (criminal law part), the student evaluations are about 85% favorable, 10% mixed and the rest are critical.

cially appreciate the specific direction "as to what is expected" of them as detailed by the model analyses.

In addition, I reject any notion that it is necessary for law teachers to add obscurity or artificial complexity to the presentation of doctrinal materials, which typically emerge from evolving historical, political and jurisprudential frameworks. In sharp contrast, the teacher's role is seen as aiding students to unfold the formidable complexity that is usually inherent in the doctrinal materials and its historical and jurisprudential contexts, especially as measured by the ideal of a skills-centered mastery of these materials that is captured in written performance. The absurdity of adding obscurity or artificial complexity to what is already intrinsically complex is illustrated by the following example.

Performance and Unfolding Complexity

Unfolding complex doctrine and related legal reasoning skills through the performance-centered approach is illustrated in the presentation, possibly in a first-year criminal-law course, but more likely in an advanced course, of the prohibition of cruel and unusual punishment embodied in the Eighth Amendment and many penal codes.[40] The Eighth Amendment cases concerning excessive sentences[41] implicate constitutional, statutory and case principles and rules.[42] The justifications of punishment,[43] implicit notions of federalism and separation of powers, and both activist and restrained conceptions of the role of the federal judiciary are likewise implicated. In addition, historical insight is essential because the landmark constitutional case law stresses both common-law and constitutional history[44] as a ground for diverse arguments, principles and holdings. Because the sentencing of criminals is also intensely politicized and ideological, it is surely

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[40] The Eighth Amendment to the United States Constitution specifies: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *See also*, NEW YORK PENAL LAW § 1.05(4). I have taught this doctrine in advanced courses rather than in the first year.

[41] *Compare* Rummel v. Estelle, 445 U.S. 263 (1980) *with* Solem v. Helm, 463 U.S. 277 (1983). Both cases are derived from and dispute the principles and reasoning detailed in *Weems v. United States*, 217 U.S. 349 (1910).

[42] *See Weems*, 217 U.S. at 375-82; *Rummel*, 445 U.S. at 267-80; *Solem*, 463 U.S. at 281-84, 287-302.

[43] *Weems*, 217 U.S. at 381.

[44] *Id.* at 367-75; *Rummel*, 445 U.S. at 287-90 (Powell, J., dissenting); *Solem*, 463 U.S. at 284-87.

important to point out the political and ideological frameworks, both to prevent what could be the misleading reduction of sentencing to jurisprudence as well as to illustrate the relentless choreography of jurisprudence on a stage of history, politics and ideology.[45]

Absent an entire course on cruel and unusual punishment, no teacher has the time to unfold all of the dimensions inherent in the question of excessive punishment. It is plainly the inescapable responsibility of the teacher, however, to be aware of all these dimensions and their interaction so that pedagogic choices to unfold some of them, touch on others and omit yet others are informed by an awareness of the complex reality at stake. The presentation of this intricate reality by problems or other methods demands that class unfolding, insight and clarification does not oversimplify its intrinsic, challenging complexity. Indeed, deciphering complex legal realities may trigger, even in conscientious and able students, initial befuddlement, anxiety and possible discouragement. These feelings are followed, however, by gradual understanding accompanied, for some, by a real boost in learning self-esteem and power as they gradually grasp the intrinsic complexity and exemplify it in written analysis. There is no need, however, for artificially added professorial complexity.

Problems and Jurisprudential Frame Shifting

The performance-centered approach can and should track the spectrum of jurisprudential perspectives embedded in the materials in each course and embedded in the teacher's pedagogic choices. To illustrate, if a teacher of the basic torts course ordinarily presents intentional torts in concrete positivist form, stressing the rules and a narrow slice of legal policy, this pedagogic choice can be embodied in a series of building-block problems that exemplify the predominantly rule-dominated positivist presentation. But if the same teacher presents the realm of negligence refracted through a predominantly policy-oriented jurisprudential prism, this pedagogic choice, too, can be exemplified in a series of building-block problems presenting the

[45] If this illustration of complexity appears "loaded" (not typical of first-year criminal law courses), consider the complexity of murder and manslaughter, including capital punishment, which is more typically presented in a basic criminal law course. The topic is embedded with red-hot politics, common-law history, moral philosophy, justifications of the criminal law, nuanced doctrinal rules and principles, social science theories and research, and a burgeoning and bewildering capital-punishment case law.

principal policy-oriented issues chosen by the teacher as the focus of her presentation. Moreover, if this same teacher prefers to present negligence as a blend of intertwined policy and rules, this pedagogic choice can also be similarly exemplified in a series of problems blending both broad policy-oriented and narrow rule-oriented issues.

The clear principle is that the performance-centered approach can exemplify whatever explicit or implicit jurisprudential frequencies inform a teacher's choices as to issues, doctrine and materials. The presumption is that all pedagogic choices, as indeed all lawyerly arguments and judicial decisions, reflect jurisprudential perspectives, whether or not the teacher, student, lawyer or judge is explicitly aware of such choice. That the problems applied in this performance approach can also ring across the spectrum of jurisprudential frequencies reflects this inescapable reality and presents abundant teaching possibilities.

Problems also provide an excellent means of directly manifesting and teaching the jurisprudential perspectives inherent in the course materials as well as in each teacher's pedagogic choices. More specifically, problems can vividly portray the frame-shifting possibilities offered by these varying perspectives and their contrasting modes for formulating facts and issues. Indeed, problems can portray how key facts and issues are constructed from contrasting perspectives into separate frames by issue formulation that leads to varying analyses and, usually, different conclusions.

More vividly, problems illustrate that any application of core legal skills always expresses a particular jurisprudential framework. If the construction of key facts into an issue establishes a particular jurisprudential framework, then it is axiomatic that the additional skills required to resolve the issue (selection of a principle/rule, interweaving, use of policy and lawyerly writing) will embody this identical framework. With such awareness, students gain insight from advanced legal reasoning: that each application of these core skills inevitably embodies a selected jurisprudential frame. These core skills are not simply technical with meaning independent of the jurisprudential frame imposed or presupposed.

Thus, the unfolding of jurisprudential frame-shifting through the use of problems introduces jurisprudential depth into ordinary doctrinal courses. My own experience leads me to begin with building-block positivist problems that exemplify law

as "legal engineering" and, gradually, to introduce policy-oriented and justice-oriented problems. Later in the course, I introduce explicit frame-shifting problems and exercises which ask students, for example, to re-envision a policy-oriented case or problem from a positivist perspective, or vice-versa. We may also distribute a simple problem and ask students to argue both sides from positivist, policy-oriented and justice perspectives. The conclusion is clear: problems can embody the panorama of embedded perspectives as well as capture pedagogic choices from this panorama. Indeed, they can offer challenging possibilities for teaching jurisprudential frame shifting in any course. Hence, the problem method can be employed to teach all forms of legal reasoning, not simply the positivist form. The legal and pedagogic imagination of the teacher is decisive.

These frame-shifting exercises that utilize the identical problem or case offer students an opportunity to transform their understanding of legal reasoning from a positivist monolith into a jurisprudential pluralism. Two powerful insights, much emphasized by many law professors, emerge for students, both for theoretical understanding and for practice, from the experience of decoding problems that cut across the jurisprudential spectrum. First, there is a range of vigorous forms of legal reasoning, that includes, but is not limited to, positivism. Second, rules are epiphenomena: they are important artifacts of the particular jurisprudential perspectives embedded in the particular subject's doctrinal materials[46] and are also artifacts of the choice of jurisprudential perspective, explicit or implicit, by the lawyers arguing a case and by the judge deciding it from the available choices in each subject.[47]

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[46] To illustrate, a fair measure of legislative and court-made rules are intended to be strictly interpreted to serve particular policy purposes, while other rules are intended to be flexibly interpreted to serve other policy purposes. Concrete narrow-textured rules, to be strictly applied, include, for example, the technical requirements for executing wills (signing at the end in front of two witnesses with the precise verbal incantation, which is designed to prevent fraud); the statute of limitations for civil causes of action and criminal prosecutions to limit citizen exposure to litigation and liability; or the general criminal-law mandate that penal statutes be strictly interpreted to restrain state power and preserve liberty by barring flexible police and prosecutorial interpretations beyond the narrow intent of the legislature. In vivid contrast, open-textured statutory and case rules, to be flexibly applied, "sparkle with words indicating broad principles such as 'equitable,' 'just,' 'fair,' 'reasonable,' 'proper' . . . 'restraint of trade' . . . or 'best interests of the child.' " DELANEY, *supra* note 14, at 154-55.

[47] In criminal law and procedure, there are many cases, for example, whose issues may be formulated, analyzed and decided from either a crime control perspec-

To become lawyers—indeed, to cope with the array of cases in the first-year casebook—it is essential that all students gradually become aware of this inescapable jurisprudential complexity, and of the relationship between rule and jurisprudential ground, if only to understand that a shift in the jurisprudential frame that is being applied typically changes the formulation of the issue, the rule applied and the result.[48] For a slice of students, however, these insights are liberating and even thrilling. They see, sometimes for the first time, that legal reasoning is not only technical, but is as broad as policy-oriented, pragmatic, utilitarian, justice-oriented, feminist and critical modes of legal formulation and analysis. That these varied jurisprudential modes are integrally related to their corresponding general philosophical frames[49] in varied and evolving historical, political and social contexts demonstrates that law and legal reasoning traverse a broad terrain of the history-laden human enterprise and that to be a lawyer or judge is to be a jurisprudent and thus an actor in the human enterprise.

Limitation of This Form of Performance-Centered Teaching

There are also disadvantages to this form of performance-centered teaching and learning. First, it is not magical: it does not work for a significant percentage of the class. In my fall 1991 criminal-law course, 19 of 156 students failed. Second, the transfer of the analytical skills (e.g., in formulating issues, specifying rules and interweaving) from the criminal law course to other first-year courses (torts, contracts) is extremely mixed: some are able to do so, some cannot. Third, those students with the

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tive, emphasizing the facts of the crime, or a due process perspective, stressing the failure of the police to comply with the defendant's constitutional rights. *See, e.g.*, Herbert L. Packer, *Two Models in the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

48 A classic illustration is the landmark case, *Javins v. First National Reality Corp.*, 428 F.2d 1070 (1970), in which Judge Wright "substituted a contract framework in formulating the issue in a landlord-tenant case. . . . This framework and resulting formulation contrasted sharply with the traditional application of a real-property framework in issue formulation. . . ." DELANEY, *supra* note 14, at 95. *See also* K-Mart Corp. v. Cartier, 108 S. Ct. 1811 (1988) (contrasting positivist emphasis on "statute's plain meaning" by Justice Kennedy's majority opinion with Justice Brennan's policy-oriented emphasis that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intentions of its makers").

49 To illustrate, it is illuminating to see that legal positivism is related to philosophical logical positivism; that pragmatic/realist jurisprudence is related to utilitarianism and pragmatism; and that natural law jurisprudence is derived from natural law philosophy.

strongest learning, analytical and performance skills need far less reinforcement and far fewer repetitions of the four-step process than students whose skills are mixed or weak. I might use this performance-centered approach substantially less with a class of students whose skills are generally very strong. I would then be able to devote more class time to dissecting additional landmark cases and their roots. Fourth, this approach eats up class time, even if students write their responses before class rather than writing them in class. There is less time available for decoding cases, for learning and refining the skills of case briefing, analysis and uncovering case roots. This is a real loss inherent in the application of this performance-centered approach detailed in this article. To do the problems is to not dissect as many cases and as much history and context. For anyone committed, as I am, to the theory that learning and perfecting case skills in a historical context is central to the teaching and learning enterprise in law school, this loss is troublesome.

Although different, both methods emphasize class performance and, therefore, can complement each other. It is also noteworthy that the skills involved in writing responses to problems do not necessarily lead to case skills. Lastly, the expenditure of professorial time can be intense, depending on how frequently written analyses are collected and assessed and on the number of individual conferences with students.

CONCLUSION

Any teaching and learning approach informed by the principles underlying the performance-centered approach prods teachers and students to progress towards the ideal of making their teaching and learning subjects for reflection. Beyond teaching and learning by writing, role playing, collaboration and modeling is the ideal of transforming teaching and learning from activities that one performs in response to school tasks to a subject for critical life-long reflection and integration, a life-long existential enterprise demanding moral courage, psychological insight and pedagogic art and craft. The moral courage for teachers and students is the fortitude to continually assess one's strengths and weaknesses and to act on that assessment. The psychological insight, in confronting teaching and learning strengths and weaknesses, is to refine insight into one's strengths and one's evasions, escapes and denials. The pedagogic art and craft is the experiential challenge, day by day, to refine understanding of

one's approaches, methods and techniques including critical perspectives. Teaching and learning become then a sensibility, an inseparable dimension of one's mode of being in the world with manifest implications for one's moral, emotional and technical growth.