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Linda L. Berger
University of Nevada, Las Vegas -- William S. Boyd School of Law

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Do Best Practices in Legal Education Include Emphasis on Compositional Modes of Studying Law as a Liberal Art?

Reporter's Notes on "A Liberal Education in Law"

Linda L. Berger[1]

My reporter's notes on studying "law as a liberal art" began as what some composition theorists call "patchwriting."[2] The concept of "patchwriting" as a writing process reflects the insight that any piece of writing is composed from many other pieces of writing, that you patch this and that and the other together, you cite to the sources you remember, and you hope that something of a whole emerges. This patchwork concept not only is descriptive of how these notes emerged, but also seems an apt metaphor for the study of law as a liberal art. Like patchwriting, the study of a liberal art is composed by many sources in the hope that the resulting interactions, comparisons, and contrasts will broaden, deepen, and open understanding. These notes thus patch together Professor Carol Parker's presentation with the comments of the commentators, the moderator, and the audience with glue provided by bits and pieces from all over.

To discuss whether "best practices in legal education include [an] emphasis on compositional modes for studying law as a liberal art," we should first decide what it means to study anything as a liberal art. "Liberal" study conveys an approach to learning that is both wide-ranging and tolerant;[3] studying the "liberal arts" conveys a process of preparing for life and for further education. By becoming acquainted with history, philosophy, literature, science, and the arts, the student will be able to turn in her future endeavors to many different modes, disciplines, and cultures to enrich and

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1. © Linda L. Berger 2002. All rights reserved. Linda L. Berger is an Associate Professor at Thomas Jefferson School of Law. She formerly was Director of Legal Writing and Director of Academic Support at Thomas Jefferson.

2. *See e.g.* Rebecca Moore Howard, *The Dialogic Function of Composition Pedagogy,* in *Under Construction: Working at the Intersections of Composition Theory, Research, and Practice* 51 (Christine Farris & Chris M. Anson eds., Utah St. 1998).

3. "Liberality" has been described as "the free, open and generous characteristics of individuals . . . who elevated themselves above narrow interest and prejudice." Phillip Hamburger, *Liberality*, 78 Tex. L. Rev. 1215, 1227 (2000) (describing Eighteenth Century liberalism).

enlighten her work.[4] For some, teaching and studying law in this way, as a liberal art, is the most natural approach: "In my experience, 'thinking like a lawyer' was never anything other than training in good reading and good talking."[5] Until fairly recently, this proposal would have been unnecessary: legal studies were integrated into a liberal arts education.[6] Today, however, like other professional schools in the U.S., law schools expect both the "liberal" and the "arts" part of the education to have taken place before the student arrives.[7]

Professor Parker suggests a return to the study of law as a liberal art; by that, she means that the students should be told to "use your imagination." In this phrase, "imagination" is the ability to envision alternatives while suspending judgment. Following James Boyd White, Professor Parker views the law student not as a recipient of rules, but instead as an actor who participates in the making of meaning, a composer of new compositions.

Professor Parker defines "your" as meaning that we should be concerned about the education of the individual mind, rather than the indoctrination into a profession.[8] As for "using" your imagination, she describes an entry into the active practice of lawyering work in an authentic context rather than the study of "doctrine in a vacuum." More specifically, her proposal is to provide complex and "real" lawyering problems in a setting in which students will learn to engage in the kinds of social negotiations that are an integral part of lawyering and learning. Within this environment, Professor Parker would ask students to examine problems they are interested in from multiple perspectives and to pause form time to time to monitor, evaluate, and plan.

Studying law as a liberal art finds support in learning and teaching theory.

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4. The concepts of the separation of liberal arts and legal education and the requirement of liberal arts education before law study were first proposed at Harvard Law School in 1816. The college education requirement was adopted by the American Bar Association in 1924. *See generally* Juergen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 Vand. J. Transnatl. L. 301, 306-19 (1993) (discussing the evolution of American legal education).

5. Lief N. Carter, *Bows and Arrows, Bows and Cellos*, 20 Ga. L. Rev. 793, 803-04 (1986) (reviewing James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (U. Wis. 1985) [hereinafter White, *Heracles' Bow*]).

6. *See* Robert Weisberg, *The Law-Literature Enterprise*, 1 Yale J.L. & Humanities 1 (1988).

7. Some doubt whether this sequence actually occurs. "Students entering law school today were educated in a period following massive changes in American higher education . . . . These students often have no more than a dilettante's exposure to the central teachings of the liberal arts." James O. Freedman, *Liberal Education and the Legal Profession*, 39 Sw. L.J. 741, 746 (1985). Freedman also observes that by adding interdisciplinary courses, law schools are trying "to overcome the stigma of Burke's observation that the study of law sharpens the mind by narrowing it." *Id.* at 748.

8. The importance of the individual voice and the mind of each reader and writer recurs throughout Professor's White's writings: "In this book I am trying to work out a way of reading that is not reducible to a technique or technology, but is rather a way of talking about text and language that always assumes the presence of an individual reader's mind, different from others, that is responding to the text and trying to make sense of it, and the rest of life, in compositions of its own." White, *Heracles' Bow*, *supra* n. 5, at x n. 1.

First, learning theory endorses active learning in the context of real world problems. In active learning, students are doing something other than listening: they are involved in analysis, synthesis, and evaluation rather than information reception, and they are engaged in activities such as reading, writing, or discussing. In critical writing, for example, the writing process itself serves as "an independent source . . . that alters and enriches the nature of legal thought [by providing a] continuous and reciprocal feedback . . . between a writer's partially completed text or texts and her thoughts, memories, and instincts about a chosen subject."[9] This requires the writer to "confront and control hard issues more directly and more creatively than is possible with non-written thought," and it can "enhance the creation of new thoughts, the articulation of complex thoughts, and the recognition of the subtleties, nuances, and qualifications that are so important to the art of lawyering."[10] If beginners do not develop the habit of "learning, developing, and applying the law through a critical writing process, they are less likely to be interested in or capable of engaging in the continual task of learning, creating, and applying the law by writing when they enter practice."[11]

Second, compositional approaches in authentic settings reflect other good learning and teaching practices; they encourage faculty-student contact, support cooperative learning, provide prompt feedback, and accommodate diverse learning styles.[12] By establishing a setting for sustained practice with higher-order cognitive skills such as evaluation and synthesis, these approaches promote the "deep understanding" of a subject that the literature indicates is necessary for learning. Moreover, compositional modes and processes allow the teacher to get to know her students' work well enough to correct individual misconceptions.[13] Because writing things down focuses attention and gives students something to react to, it encourages the self-reflective behavior also found essential to learning.

Moreover, researchers agree that a student will more quickly become accomplished if he learns and practices skills in the context in which he will use them. Only through much active practice in real settings can the student become an expert. In addition to studies of how people think, recent attempts to create artificial intelligence support this principle.[14] Thus, even though the computers were full of "the esoteric facts one found in reference works, textbooks and the brains of experts," they could not reason effectively without "the vast fabric of ordinary facts and observations that humans acquire and use almost subconsciously and without which life would be

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9. Phillip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 Vand. L. Rev. 135, 140 (1987).

10. *Id.* at 140.

11. *Id.* at 141.

12. For articles on good teaching practices, *see generally* 49 J. Leg. Educ. (1999).

13. *See* National Research Council, *How People Learn: Brain, Mind, Experience, and School* (John D. Bransford et al. ed., Natl. Acad. Press 1999).

14. Michael Hiltzik, *Birth of a Thinking Machine*, L.A. Times A1, A18 (June 21, 2001).

unintelligible."[15] In legal reasoning as well, learning occurs not by memorizing rules, but "from the doings and beings of role models. We learn . . . by attempting, fumbling at first, to incorporate and then elaborate the models we admire."[16] Similarly, making connections to concepts and knowledge that students are already familiar with can reduce their sense of isolation while enriching their study and making it more imaginative.

Social negotiations—the kind that take place in authentic contexts—will help students develop professional lawyering skills. As practitioner Bryn Vaaler noted during the discussion of Professor Parker's proposal, very few practicing attorneys would quarrel with it because much of a lawyer's work takes place within such settings surrounding the production of a written document. Negotiating an acceptable text among collaborating and competing parties encompasses many of the skills needed by a new lawyer, and, in particular, requires the development of judgment. Providing simulated opportunities to negotiate documents and exercise judgment in law school can prepare students for the same work in practice.

Finally, Professor Parker's proposal supports a more democratic, more student-centered classroom, in part because it allows students to lay claim to their knowledge of other disciplines as a plus and to view their experience in practicing other liberal arts as valuable in practicing law. Anxiety, isolation, competition, and negativism are barriers to learning that can be alleviated, to some extent, by practices that value other concepts, disciplines, cultures, and experiences.

But arguments against proposals such as this one are made by serious people and should be taken seriously. First, opponents will argue, the study of law as a liberal art cannot take place in large classes and large classes are necessary to law school. Not only do large class sizes make economic sense, they are also in the best interest of some law school faculties. Instead of a few large sections, smaller classes may mean more, though smaller, sections to teach. Economics aside, however, large classes surely interfere with student learning. They allow students to be passive and less accountable, and they diminish the ability of professors to use active learning techniques, provide feedback, and encourage reflective behavior. Second, opponents will argue that the study of law as a liberal art will make it difficult to adequately cover the necessary doctrine. Law schools that need to worry about their bar passage rates must take this objection seriously. On the other hand, the latest learning studies support proposals such as Professor Parker's because of their finding that a deep understanding of some part of the substance of the law is necessary for long-term learning improvements.

Looking again at practical effects, opponents may claim that studying law as a liberal art does not adequately prepare students for the bar examination. This concern is different from the coverage objection; it is aimed more at the

15. *Id.*
16. Carter, *supra* n. 5, at 799.

product that students produce in a law-as-a-liberal-arts course than at the substance of what will be covered in the course. Again, however, courses that build overall learning skills appear likely to be the most effective way to improve bar passage rates over the long term.[17]

Next, there are risks—although they may not be labeled as such—associated with the teaching of law as a liberal art. The professor will lose some measure of control in the classroom. Whenever she allows students to engage in collaborative learning or less-structured writing or discussion, the professor becomes less able to deliver a unified or a coherent message. If they study law as a liberal art, students will pick independent subjects of study, outside the normal range of the professor's knowledge or outside the easy range of grading practices. If they teach law as a liberal art, professors will spend more time preparing problems and providing feedback.

As for the argument that the development of individual imagination or expression is misguided because law schools are supposed to initiate students into a new professional community, allowing students to pursue other intellectual interests and build on other knowledge and experience should reduce some of the alienation and frustration they experience.[18]

Finally, even though there may be little empirical evidence supporting the claim that writing helps learning, writing certainly helps reflection, and reflection is essential to the development of critical thinking. Thus, one judge writes:

> A remarkably effective device for detecting fissures in accuracy and logic is the reduction to writing of the results of one's thought processes. The custom of American courts of embodying decision in a written opinion setting forth facts, law, logic, and policy is not the least of their strengths. Somehow, a decision mulled over in one's head or talked about in conference looks different when dressed up in written words and sent out into sunlight. Sometimes the passage of time or a new way of looking at the issues makes us realize that an opinion will simply not do, and back we go to the drawing board. Or we may be in the very middle of an opinion struggling to reflect the reasoning all judges have agreed on, only to realize that it simply "won't write." The act of writing tells us what was wrong with the act of thinking.[19]

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17. The best research on academic support programs supports that conclusion through its finding that the most successful programs are those that build overall learning skills in the immediate context of contemporaneous doctrinal classes in small groups led by professionals, and where students receive plenty of practice and feedback. Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. Leg. Educ. 157 (1995).

18. *See e.g.* Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. Leg. Educ. 402 (1988).

19. Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench* 57 (Houghton Mifflin 1980).

Recommendations

Grouping them into categories, the following recommendations emerged from the group discussion:

1. Make the familiar strange. Law schools should examine their unspoken assumptions about the appropriate settings for law study, both physical and pedagogical. Noting that the chairs in the presentation classroom were bolted down, precluding small-group discussion, moderator Linda Edwards quoted Sir Winston Churchill: "First, we shape our buildings and then they shape us." The unspoken assumption revealed by the design of law schools with large arena-like classrooms is that they are places best suited for lecture and for sporting events rather than places that house the active work of learning through reading, writing, and discussing. Rather than the familiar virtues of studying law through Socratic dialogue about doctrine, law schools should explore the "estranging" virtues of contrasting the past and the present, comparing the poem and the judicial opinion, and gaining the insights of the psychologist and the litigator.[20]

2. Make the strange familiar. The study of law as a liberal art will be an unfamiliar concept to some law school professors. Writing teachers can help by showing other teachers why and how these practices are valuable. For example, many teachers know that until they ask their students to perform in writing, both the student and the teacher can indulge in the comfortable game of "pretending" that everybody understands. Teaching techniques reflecting compositional models can provide feedback not only to the student but also to the teacher: What are my students really hearing and thinking and understanding? Specific suggestions growing out of this discussion included compiling a sourcebook to provide examples of appropriate teaching techniques and working with other professors to develop and use such techniques in the classroom. These techniques should, the group suggested, include examples of the different kinds of writing exercises that might be used for different purposes in the classroom to spur reflection, engagement, and understanding, as well as to inform, record, and persuade. The sourcebook might also describe how to match up particular purposes with different intensities, levels, and durations of writing—from the thirty-second freewrite to the fourteen-week academic paper.

   By suggesting that more writing be incorporated to make law more of

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20. Comparing the poem and the opinion is central to the interpretative practices described by Professor White. Making the familiar strange is a central theme of *Minding the Law*, which was co-authored by a civil rights lawyer/law professor and a cultural psychologist. *See e.g.* Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 1-6 (Harv. U. Press 2000).

a liberal arts education, participants emphasized that they were not suggesting that every professor become a writing teacher or take on an unbearable workload.[21] Instead, professors should take advantage of techniques, such as critical writing, that help students more fully understand the material they are studying by grappling with the same kinds of problems that lawyers grapple with.[22]

3. Add "liberality" one class at a time. Professor Parker outlined specific suggestions for courses that would engage students in the study of law as a liberal art over the course of a full semester. But her final suggestion would incorporate this proposal into every law school course. Thus, she suggested the goal of incorporating some research and writing into every doctrinal class. Such assignments might require no more than to find and report in writing what an actual statute of frauds provides, or to discover and write to a client about any conflicts in the ethics rules and opinions concerning when attorney-client disputes should be arbitrated.

Combined with practices that encourage students to be reflective about themselves and their learning, Professor Parker's proposal encourages law schools to provide learning experiences that can improve students' understanding of the uses of legal doctrine and legal reasoning; help them see relationships between theory, practice, and the cultures in which they are located; and strengthen their motivation to continue with the "free, open and generous"[23] study and practice of law.

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21. *See e.g.* Phillip C. Kissam, *Law School Examination*, 43 Vand. L. Rev. 433, 494 (1989) (suggesting short ungraded essays or essay outlines with feedback including class discussion, written self-critiques by students, written peer critiques, reviews by teaching assistants, and cursory review of some essays by faculty members to assure general standards); Terri LeClercq, *Good Practice Gives Prompt Feedback*, 49 J. Leg. Educ. 418 (1999) (suggesting methods, including daily notecards, debriefing sessions, peer critiques, self-graded practice exams, student-initiated class discussions).

22. Ideas for using writing exercises before, in, or after class writing to improve thinking and to aid in the transfer from oral to written analysis in doctrinal classes can be found in Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561 (1997); Kissam, *supra* n. 9; Kathleen S. Bean, *Writing Assignments in Law School Classes*, 37 J. Leg. Educ. 276 (1987).

23. Hamburger, *supra* n. 3, at 1227.