2008

Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy

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When I tell people that I teach legal research and writing as well as law and feminism, they often seem a little bewildered. How unusual, they exclaim. The assumption is that lawyering and critical feminist theory are two widely different areas of law. Although lamentable, this view should not be a surprise. As legal educators, our pedagogical and curricular choices telegraph to our students what we think it means to be a lawyer. Right now, we mostly have courses that teach doctrine (largely by the case method), a few courses that teach skills (like legal research and writing and clinicals), and some courses in legal theory, with only modest overlap between them. Moreover, courses that teach skills and those that teach critical legal theory are marginalized. What this telegraphs is that learning to crunch cases is paramount; lawyering skills are somehow separate from this (and less important); and learning legal theory—especially critical legal theory—is a somewhat esoteric endeavor divorced from both doctrine and the practice of law.

Even Harvard's new first-year curriculum, which laudably requires a course that integrates legal theory with problem solving, to some extent maintains the segregation; the Problems and Theories course is separated from Legal Research and Writing, and both of these courses look like rogue outsiders when compared with the dominant curriculum of doctrinal courses. In my view, this separation is a mistake, even—especially—in the first year.

The separation is unnecessary, and it does not serve the purposes we want our pedagogy to serve. Although course names like Torts and Contracts indicate that we are teaching doctrine, it is widely agreed that the case method is supposed to teach a reasoning process, to teach students to "think like lawyers." This is a fine goal. The problem is that the focus on teaching doctrine via the case method defines "thinking like a lawyer" in a cramped and one-dimensional way. It is not even clear whether analyzing common law cases was wholly reflective of what "thinking like a lawyer" meant 100 years ago (Langdell had his critics even then), and it is certainly not an accurate reflection of what lawyering is, or should be, today. In my view, "thinking like a lawyer" means mastering doctrine and being skilled, but it

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also should mean having a strong sense of the theories related to the doctrine, as well as the criticisms of the doctrine. And, most importantly, "thinking like a lawyer" means knowing how to *use* not only doctrine, but legal theory and legal criticisms in a practical context.

There are a few related problems here. First is the separation of doctrine, theory and lawyering skills. This sends a distorted message to students about what excellent lawyering is and what lawyers need to know. A related problem is the over-emphasis on doctrine, particularly in the first year; again, this further distorts the message we send to students. Finally, the problematic message telegraphed to students by the segregation of courses and the over-emphasis on doctrine is exacerbated by two things. First, the (almost) exclusive use of the case method privileges case analysis over other skills. Second, the way we often name our doctrinal courses (Torts, Contracts) emphasizes doctrine as the primary thing being taught (which, if we take "thinking like a lawyer" as a serious goal, is misleading).

There is, potentially, a universe of solutions to these related problems. I have a few suggestions that might help push us in the right direction. The centerpiece of my suggestion is to increase the number of courses that integrate doctrine, theory and skills so that students learn to use both doctrine and legal theory, including critical theory, in a practical context.[1] A proper balance means that these courses will replace some of the courses that emphasize teaching doctrine by the case method, again particularly in the first year. And, we should name the courses accordingly, so they do not sound as if they are solely about doctrine. In short, if we want to teach "thinking like a lawyer," we should be explicit about doing it. Most importantly, we should define that "thinking" broadly, to include not only the basic skills (research, writing, negotiating, counseling, litigating), but also mastery of doctrine and legal theory, including critical theory.[2]

One suggestion would be to retool a number of courses so that legal skills, such as problem solving, advocacy, writing, and negotiation, are central to the course.[3] I suggest skills as the core because they are currently so neglected and because part of my point is that legal education should emphasize that doctrine and theory are essential to lawyering; they are all a part of

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[1] I am certainly not the first person to suggest integrating practice and theory. *See, e.g.*, Byron Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education*, 1 J. ASS'N LEGAL WRIT. DIR. 50 (2002). In this paper, I largely adopt Professor Cooper's definitions of doctrine, theory, and practice, though I use skills and practice interchangeably.

[2] I am also not the first person to suggest that critical legal theory is essential to the sophisticated and excellent practitioner. *See, e.g.*, Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER & L. 161 (2005).

[3] *See, e.g.*, Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1 (2002); Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997). *See also* Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907, 910 (1933). Among other things, Frank pushed law schools to think about legal cases as much more than opinions, but as "living processes." *Id.*

what it means to be an excellent lawyer. The courses also would not neglect doctrine; instead, like most legal research and writing and clinical courses, the courses I envision would expose students to fundamental doctrinal concepts but in a practical context that would show them the use of doctrine in realistic and diverse lawyering situations.

Most importantly, the retooled courses would convey the message that excellent lawyering, "thinking like a lawyer," is an expansive concept that covers not only doctrine and practical skills, but also theory. The courses would include subjects like law and economics, critical race theory, critical feminist theory, and class theory. I know many doctrinal teachers do this now, but an important link is missing: students must learn about these theories in a context that shows them how theory connects to practice and how to use the theory in practice. This would send a clear message to students that excellent lawyering means using both doctrine and theory. It would also send the clear message that knowing the critiques of law is not some fanciful exercise divorced from practice but is an essential part of being a good lawyer.

This type of course would give students a fuller, richer, and more accurate picture of what it means to "think like a lawyer." Mastery of legal theory and a deep knowledge of the criticisms of the law allow lawyers to approach and interact with cases, statutes, and regulations with greater sophistication. It allows a deeper understanding of the doctrine. It enables lawyers to bring new, cutting-edge insights to the legal problems of their clients. This more expansive view of lawyering moves us away from law as a science and toward law (and lawyering) as an art. It is also what can make lawyering (and learning about lawyering) interesting, and even fun.

An example might be a course called "Problems in Employment Discrimination." This course would give students a series of problems in employment discrimination. To solve the problems, students would research and read the relevant statutes and authorities; they would see the evolution of the doctrine. They would also, however, research and read some of the ground-breaking academic theories on race and sex discrimination law and work to incorporate these theories into their resolution of the problems. If their problem involves hostile work environment sexual harassment, they could read Catharine MacKinnon and Vicki Schultz, among others. If their problem involves affirmative action, the readings could include Charles Lawrence III and Kwame Anthony Appiah. The students should also learn how to incorporate these ideas into their practice—not just into thinking and speaking, but researching, negotiating, advocating, and writing. They should have to *use* the doctrine and the theories to solve the problems.

This model has an advantage over the traditional doctrinal model in terms of integrating critical theory. When the focus of the course, and its name, is doctrinal, it creates the misapprehension that students are supposed to be learning "the law." So, when theory, especially critical theory, is in-

jected into such a course, rebellion sometimes ensues.[4] If the course names make no pretense of teaching only doctrine, and in fact students know that they are learning a method, then injecting theory into the discussion makes sense to them, especially if the problem is designed in a way that calls for gaps in the law to be filled, or for new problems to be confronted (for example, as a case of first impression). In my experience teaching sex discrimination assignments in Legal Writing, students are willing to use whatever tools are available to represent their clients, including critical theory if that is what it takes, because they are immersed in their roles as advisors and advocates. It does not appear to them as if they are being force-fed some political agenda because they are not being forced.[5] Learning theory looks like a natural adjunct of excellent lawyering, which it is.[6]

In sum, I would like to see law school pedagogy project a model of law practice that both accurately reflects what lawyers do and that opens students' minds to a vision of lawyering as a creative endeavor that involves critical, outside-the-box thinking. I think the best way to do this is to have more integrated skills-oriented courses that expand the notion of what lawyering "skills" are. There should be a mix of requirements and a real attention to the first year, with the goal of expanding the concept of what is a well-rounded, excellent lawyer. Balance and integration: as mundane as it sounds, that would be radical.

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[4] *See, e.g.*, PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS, 25-32 (1991) (describing how students complained to the law school Dean when she injected class theory into Contracts because they felt they were not learning the "law").

[5] Of course, students are being forced to assimilate a political agenda when they learn traditional doctrine, too; it just does not *look* like a political agenda.

[6] I have had the same positive experience injecting the teaching of skills into my Law and Feminism class, where, among other things, students read and analyze briefs in which lawyers have used feminist theory to argue for a particular position.