Teaching to Every Student

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Explicitly Integrating Skills and Theory into the Contracts Class

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Introduction

Overview and Structure of the Book

> *[E]ven when [a] skill is intended to be a central value of a course, the skill … will be absorbed by the bulk of the students only if the skill is made explicitly, sustainedly, insistently the focus of organization and of class treatment.*[1]

Law professors often lament the quality of the work their students produce on exams. This seems especially true of faculty who teach first-year students. They express disappointment — and surprise — at their students' final exams. In discussions among law professors, the most common complaints concerning students' final exams are as expected: students miss issues, state the applicable doctrine incorrectly or incompletely, misapply the rule even when they set it out accurately, ignore relevant facts or rely on unwarranted factual assumptions, write in a disorganized or inefficient style, fail to identify and analyze arguments on both sides, either omit or abuse policy, and make unsupported legal conclusions.

What happens between the class and the exam, and why are our expectations routinely disappointed? And why the surprise? Legal education in this country is, after all, on the graduate level, and faculty understandably expect their students to arrive at law school academically prepared to start to do law school work. The actual level of academic preparation of the students is our starting point. By "academic preparation," we mean having skills such as reading comprehension, writing, study skills, the ability to take effective notes in class, outlining, and time management. In other words, the skills that determine, ultimately, who will be successful in law school. This is distinguished from the "lawyering skills" that have recently become the focus of much attention in legal education. It seems clear that many students do not arrive at law schools with academic skills at a level that faculty expect or that effectively serve them. One result of this is lower-than-expected performance on exams.

Perhaps at least one reasonable response is to look more closely at the relationship between the goals and methods of legal education. When the professors who complain about missed issues, incomplete or inaccurate rules, and poor use of facts are asked to list, from their own course syllabi, the topics that the course covers, these results are for the most part predictable. Torts classes nationwide cover intentional torts, negligence, products liability, etc. A typical Contracts syllabus usually starts with contract formation (some start with damages) and goes on to include defenses, parol evidence, and third-party beneficiaries. Civil procedure courses cover personal and subject-matter jurisdiction, the Erie Doctrine, venue, and other procedural devices. There is something wrong with this picture. We want our students to develop the legal reasoning skills (including issue spotting, fact identification and analysis, rule identification, and application of rules to facts) and other skills necessary for crafting sound legal argument, yet the message we

1. Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. Legal Educ. 211, 213 (1948–49).

send them, at least on paper, is that today we are studying the mailbox rule, tomorrow consideration, next week and for the rest of the semester, doctrine of some other name. The disconnect is obvious — we are assuming either that our students arrive in our classes with academic and reasoning skills sufficient to efficiently apply to the doctrine we are teaching, or by teaching doctrine in a certain way (whatever way we teach it), students will develop those skills. Our final exams, sadly, tell a different story.

Admittedly, in doctrinal classes, professors employ and demonstrate both academic and legal reasoning skills as they analyze cases and other materials; they develop legal reasoning skills when they use hypotheticals, and refine the skills during Socratic dialogue (whether "hard" or "soft"). But it seems as if they hardly ever explicitly name any skills as part of the subject matter for the day. And while it is true that some first-year doctrinal casebooks have a lawyering skills orientation in the form of practice exercises and problems, they typically fail to advise students of any academic or legal reasoning skills purpose underlying the cases or notes. Rather, the introduction, table of contents, and chapter headings of typical casebooks describe only, or primarily, the doctrine to be covered in the book. So too do typical doctrinal syllabi list substantive units rather than academic or legal reasoning skills to be covered. Of course, legal reasoning skills are taught explicitly at most law schools in separate legal research and writing and "lawyering" courses. However, legal writing or lawyering courses are sometimes still marginalized, and send a message to students that such skills work is of secondary importance. And, while some academic skills may be taught explicitly in "skills" classes, usually as part of a developed academic support program, they should also be taught across the curriculum, incorporated directly into doctrinal classes.

Current, well-publicized efforts to reform legal education focus more on the integration of practice-oriented skills than legal reasoning and academic skills, and the attention now being paid to law school pedagogy centers on clinical and so-called "problem solving" methodologies, rather than techniques that will support and improve students' development of academic and legal reasoning skills. This, we think, is a critical failing of legal education. Students in the first year should learn academic and legal reasoning skills explicitly, rather than by intuition, so that they are better prepared in their second and third years to focus on the denser doctrines and more practice-oriented skills.

In addition, though not necessarily an academic or legal reasoning skill, we believe students should also learn theoretical perspective explicitly. We use that term to refer to the role of the law in a larger historical, political, and social context. We include theoretical perspective because, first, it is important on its own and should be included explicitly in the syllabi of doctrinal courses. But also, theoretical perspective adds to students' critical thinking and reasoning skills, requiring — or at least encouraging — them to develop the ability to move between specific doctrinal concepts and the overarching theories that they are related to. Students also gain practice in manipulating theory, in a context that is relevant to effective legal reasoning, and, to many students, extremely engaging.

This book identifies and discusses three different types of skills: academic (including case briefing, close case reading, note taking, outlining, and exam preparation); legal reasoning (including issue spotting, working with facts, and working with rules); and theoretical perspective (including identifying theoretical perspective, critiquing its role in the outcome of legal disputes, and integrating it into advocacy). Although there are significant overlaps, we believe it is useful to separate them out so as to understand them and recognize the opportunities our syllabi present us for helping students improve.

The idea to make the role of academic and legal reasoning skills, and theoretical perspective explicit in the study of doctrine is based, in part, on the concept of metacognition. Briefly, as we use the term in the book, metacognition refers to the ability of a learner to be aware of his or her own thinking or learning process, to develop the ability to control it, and to adjust it to meet the specific demands of the different learning tasks he or she will be faced with in law school and in law practice. The process of learning is too-often left to intuition and happenstance. In other words, at least in this country, students are not taught how to learn — those who figure it out for themselves, by nature, intuition, or exposure to a unique teacher, rise to the top. We believe deeply, however, that many more students can succeed at greater levels of competence if the process of learning itself becomes the subject under discussion.

There are myriad ways in which real legal reasoning and academic skills and theoretical perspective can be directly incorporated into a traditional first-year syllabus.[2] The idea underlying this series of books, first set forth in David's essay, *Teaching Legal Reasoning Skills in Substantive Courses: A Practical View*,[3] is to identify particular cases and readings throughout the syllabi of first-year courses that would lend themselves to explicit teaching of one or more of the skills we think law students need to succeed. Those skills are then incorporated into the syllabus, either by name only or with a short notation.[4] Students are directed to pay particular attention to a case for its illustration of the skills we expect them to learn for the final exam. Just as the author of a casebook searches out cases that set out a rule of law in a certain way, and just as a professor constructs the syllabus to particular sections of the casebook in a particular order, some of those choices can be matched up with academic or legal reasoning skills or theoretical perspective instruction, without too much intrusion on the established design of the course.

The idea is also based on our commitment to integrating outcome goals and objectives (represented by our exams) into the design of our course content and delivery. It has long been a notion in education circles that course design should start with writing (or at least thinking about) the final exam. Although the notion of "teaching to the test" is widely criticized, the recognition that our exams test skills that we can be teaching in a more explicit manner is at the heart of good teaching.

The goal of this book is to suggest practical ways that faculty can help students acquire the skills necessary to succeed in law school through enriching both content and methods of teaching. One chapter is included on each of the skills mentioned above, with specific examples of where and how to include explicit teaching of those skills into a Contracts syllabus. We identify doctrinal units and the assigned cases that lend themselves, or present particular challenges, to the teaching of a specific skill. In other words, each chapter's skill is illustrated by specific Contracts cases. Each chapter provides background on that skill, including the role the skill plays in legal analysis and its importance for law school exam writing, the bar examination, and practice. The chapter then suggests concrete ways

2. Although the ideas and methods discussed in this book are applicable throughout all three years of law school, they are most relevant and powerful in the first-year curriculum.

3. David Nadvorney, *Teaching Legal Reasoning Skills in Substantive Courses: A Practical View*, 5 N.Y. City L. Rev. 109 (2002).

4. Note that our sample syllabus, found in Appendix 1, also includes notations and exercises surrounding professional identity and lawyering skills, though those skills are not the direct focus of this book and there are no chapters devoted exclusively to those skills. We include them on the syllabus simply to show one possible model of a complete syllabus.

in which the highlighted case or cases can be used to teach that skill, with classroom exercises and teaching notes for each exercise. Ideally these exercises can be done with minimal intrusion into course coverage. Students can be asked to prepare answers to the questions in advance of class in preparation for the discussion of the case, or the exercises can be used as in-class or take-home writing assignments or posted on TWEN site discussion forums. These issues can also be examined through the use of break-out groups during class time, as time permits, or during coordinated academic support sessions. Appendix 1 includes a sample syllabus (using Kastely, Post & Ota, Contracting Law) that sets out the skills to be taught in specific class periods using specific cases that are part of the reading. The sample syllabus is developed with annotations that describe specific teaching methods and lesson plans.

This book works in two dimensions. First, it provides a practical addition to typical Contracts pedagogy that will, we think, enhance that course and improve students' overall first-year law school learning. Second, our intent is for this book to speak to the profession's current concern, as discussed at length in the 2007 Carnegie Report, with modernizing the curriculum and bringing it into a better relationship with the lawyering skills (which include legal reasoning) that professionals need for practice. There is currently a national movement in the academic support community for integrating learning theory-based principles and methodologies across the law school curriculum. This Book seeks to sharpen the debate about enhancing the curriculum by demonstrating ways to respond to the calls for overhauling law school pedagogy in the context of a conventional course that is likely to remain at the center of required curricula for the foreseeable future. To that end, the book is aimed at both new and experienced teachers who are interested in suggestions about techniques that will enhance the learning of all students in their classes.

The order of the chapters in the book does not necessarily correspond to the order that the skills should be taught. (For that, see the sample syllabus in Appendix 1.) For example, the chapter on exam-taking appears before the chapters on the legal reasoning skills that are the basis of good performance on exams. The chapter is placed where it is because we've grouped it with the "academic" rather than the "legal reasoning" skills.

The techniques in this book can be adapted for use in any first-year class. Of course, different doctrines taught at different points in the curriculum will present different challenges and opportunities for the kinds of skills integration we are suggesting. For example, constitutional law teachers might focus on the unique type of reasoning that constitutional jurisprudence reflects and that law students struggle with. Additionally, constitutional law courses are taught at various points in the three-year sequence, unlike Contracts, which is universally a first-year course. Similarly, criminal law represents a code-based doctrine, so statutory interpretation should figure significantly in that class. But differences notwithstanding, the underlying theory of the book is applicable across doctrines: success in each course, regardless of doctrine, requires that law students acquire and become expert at applying a set of legal reasoning and academic skills and theoretical perspective that can, and should, be taught explicitly throughout the course. This reflects our deep belief that this pedagogical approach can help more students succeed and lead to increased access and diversity in both law school and the profession.