

Shifting Legal Education's Paradigm

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Main Entry: par-a-digm

Pronunciation: 'per-&-"dIm, 'pa-r&- also -"dim

Function: noun

Shared theoretical beliefs, values, instruments and techniques; *broadly* : a philosophical or theoretical framework of any kind.

Main Entry: anom-a-ly

Pronunciation: &- 'nā-m&-lE

Function: *noun*

An observed fact that is inconsistent with the dominant paradigm.

Goethe, I have read, posed these questions: "What is the artist trying to achieve? Did he or she achieve it? Was it worth achieving?" What is legal education's dominant paradigm? The paradigm should be deduced from what law professors are doing in fact, not what they might say they are doing. This pretty well describes it:

Legal education is the transmission of information about legal doctrines and observations about those doctrines from a professor and a case book to students. Students organize and memorize the doctrine for use on an examination.

Evidence that this is the dominant paradigm comes from three sources: student outlines, commercial study aids, and case books.

THE DOCTRINAL CLASSROOM

How students prepare for class.

I opened the Farnsworth case book at random and found myself at Chapter 7, Performance and Breach, Conditions, Effects of Conditions. This subsection has eight pages. Time to explore.

The subsection has two cases. In *Luttinger v. Rosen*, the parties contracted for the sale of a residence, conditioned on the buyers' obtaining a mortgage at terms specified in the sales agreement. Buyers failed to find a qualifying mortgage and the parties litigated whether buyers had tried hard enough.

In the second case, *Intenatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc.*, a processor of rice contracted to sell a quantity of rice to an exporter. The contract specified that buyer would give two weeks notice before taking delivery and that delivery would occur by the end of December. When notice was late, seller seized on this fact to get out of the deal. The issue was whether the notice term was a condition precedent that could be satisfied by substantial performance.

In the case book, *Luttinger* is followed by a page captioned "Notes". The Notes contain 14 questions, all short, and pretty much nothing else. Here are examples:

How long did the Luttings have to try to get a mortgage with the specified terms? How hard did they have to try to get one?

Internatio-Rotterdam is also followed by "Notes", this time about half a page. It contains 8 questions and 2 brief descriptions of doctrine. Here are the first 5 questions.

What was the event that was the condition in *Internatio-Rotterdam*? Was the event also the subject of a promise? What did *Internatio-Rotterdam* argue? What did River Brand argue? What did the court conclude?

What should a perceptive student conclude? Try this:

The writers of this book must have low regard for students if they have to ask "What did plaintiff argue? What did defendant argue? Who won? Why?" I am 670 pages into this course. I don't need to be told that I should figure out who won and what they argued.

But, what is my professor going to do with this material--she might call on me? I can't tell from the readings. I think I will pull out the doctrine---what is the effect of having a condition instead of (or in addition to) a promise etc.---, put it in my outline and move on to something else.

My point is not that this is a bad case book. My argument is that case books encourage students to prepare for class by pulling doctrinal rules from cases. There is nothing else for them to do.

What students take away from class.

Students take away doctrine from class, and perhaps little else. There are two pieces of evidence.

The first is the student outline. I have looked at many of them. A typical student-prepared outline is relentlessly doctrinal, with only very occasionally an indication of what the professor thought about a case or a rule. This is what the students think that they are supposed to take away from class.

The second is the commercial study aid. Our bookstore stocks about 30 study aids in Contracts. Some are printed, some are on flash cards, and some are on audio tape. With but 3 exceptions,¹ they, too, are doctrinal to a fault, often with little "identify the correct answer" hypotheticals.

To illustrate how a commercial study aid presents doctrinal material, here is the treatment of the *Luttinger* case by a best-selling study aid (Emanuel):

“Example 1: A contract for the sale of residential real estate provides that the contract is “subject to and conditional upon the buyer’s obtaining first mortgage financing...from a bank or other lending institution in an amount of \$45,000 for a term of not less than twenty (20) years and at an interest rate which does not exceed 8 ½ percent per annum.” The only bank in the area that will lend as much as \$45,000 charges a minimum of 8 ¾ percent.

Held, strict compliance with the condition is required, and such compliance has not occurred. This is true even though the seller has offered to subsidize the interest payments so

¹ Chirlstein; Farnsworth-at 3 lbs. and \$46; and White & Summers on UCC-\$52, weight not given.

that the net cost to the buyer will be 8 ½ percent. Therefore, buyer is discharged from his duty to close the sale. *Luttinger v. Rosen*, 316 A.2d. 757 (Conn. 1972).”

No analysis here. This is what the commercial publishers, with millions of dollars at stake, think the students are taking away from class.

Now the professor may object that he or she is substantially enriching the materials, it just doesn't make it into the outlines. I hope so. My point is that from the students' perspective, it seems to be subsidiary to the acquisition of doctrine.

Anomaly 1.

Doctrinal knowledge learned in a law school class has no intrinsic usefulness.

Doctrinal knowledge could be useful to students in later law school courses, in preparing for the bar examination, or in the practice of law. None is the case.

By the end of the first quarter of the second semester of law school, a student has forgotten the doctrine that he or she painstakingly memorized the first semester. A student may recall that there was a case about a pregnant cow, but none can distinguish between the Statute of Frauds and the parol evidence rule. You don't believe it? Try a few questions on a second-semester student. Then try the same questions on a second-year and then a third-year student.

The students do not remember doctrine in law school and even less as when studying for the bar or practicing law. But, you may object, having once learned the rules of the Statute of Frauds, revisiting them in the bar review lectures will be much easier.

To this I say, look at the bar review outlines and the bar examination questions posted on the internet. The level of doctrinal knowledge needed to pass the bar is not high. To those faculty and administrators striving to increase the bar pass rate of their students, goes my sympathy. The fault, if that be the word, is not with the failure of the student to be drilled in the doctrinal rules.

Finally, we can give short shrift to the notion that students take doctrinal knowledge from law school to the practice of law. I once asked the managing partner of the bankruptcy department of one of the nation's largest business law firms how many lawyers in his department had taken a bankruptcy course. He thought for a moment, and replied that he thought none had.

Lawyers need doctrinal information, sometimes at their fingertips. But they pick up the information incrementally, as they practice law. They don't bring it with them from law school.

HOW PROFESSORS TEACH.

Walk down the hallways of a law school and if there are windows in the classroom doors, look in. You will see rows of students typing on their laptop computers or watching their professor. The professor will be talking, sometimes while writing on the chalkboard or moving through PowerPoint slides. In some rooms, if you wait long enough, the professor will ask a question of a student, and the two of them will have an exchange lasting a few seconds. Then the professor will begin talking again.

This is the dominant paradigm of law school teaching: the transfer of information from the (active) professor to the (passive) student. It takes two forms. The first is the lecture. It needs no description. Lectures can be witty or dull, thoughtful or superficial, provocative or descriptive. These traits drive student evaluations.

The second form is the "lecture-plus." The professor alternates between talking and asking questions of a student. The student can be warned in advance (the "on-call list") or not (the "cold call"). After many observations of the lecture-plus, I have concluded that the purpose of calling on students is to add a bit of variety in a way allows the professor to use the student response as a way of slipping seamlessly back into the lecture.

Anomaly 2.

If the goal is the transfer of information to students the live lecture and lecture- plus are not the best way to reach the goal. The DVD is.

My colleague Bill Stuntz left Virginia for Harvard. He was a rigorous and thoughtful classroom teacher here, and I am sure he continues to be there. He teaches Criminal Law and Criminal Procedure, using a lecture-plus approach. Let us assume that he is one of the top three teaching professors in the country in those subjects.

Harvard should record Stuntz's classes and put them on DVDs. Virginia should buy those DVDs and show them in a classroom in lieu of a live teacher. The old days of small TV screens and inferior video tapes are gone. Stuntz can literally be bigger than life and clear as a bell, thanks to the overhead projector. Virginia saves the price of a Criminal Law professor and gains classes from one of the 3 best in the country in his field.

But, you may ask, what about the occasional back-and-forth between Stuntz and a student? Easy, put it on the DVD. Virginia students don't care whether the student called on by Stuntz is sitting in Cambridge or Charlottesville. Perhaps Virginia will have a Virginia professor who will come in at the end of every Stuntz DVD and field questions from Virginia students. This will reduce the financial gain of substituting Stuntz for a Virginia professor, but it won't eliminate it (the Virginia professor could easily field questions in more than one section of Virginia students). And the Virginia students get Criminal Law delivered by one of the greats.

A NEW PARADIGM

Thinking like a lawyer.

If not doctrinal rules, what should we be teaching students in law school? We should teach students how to think like lawyers.

Here is what a lawyer does. A client comes in with a problem. The lawyer finds out the facts and figures out what area of law is involved—Contracts, Bankruptcy, and so forth. If she practices in the field, she may know where to find the doctrine. If not, she will do some research, probably using an ALI-ABA outline or the like. She then finds the cases that are relevant to her client's problem and extracts the doctrine. Comparing the doctrine to the client's problem will yield a set of issues. The lawyer then thinks up the arguments on both sides of the issues and makes a judgment about their relative strengths. She advises her client as to the issues and the probability of success. This serves as the basis for settlement or litigation.

Is important to be able to read cases so as to extract doctrine, but it is not very difficult. The part of what the lawyer does that entails “thinking like a lawyer” is the imagining of arguments on both sides of a legal issue and evaluating their strengths. Learning how to think like a lawyer starts in law school and extends throughout the able lawyer’s entire career.

How to teach thinking like a lawyer.

We learn best by doing, with an instructor. The optimal way is to approximate what a lawyer does. But students do not need, and do not have the time for, client problems based on actual cases. A workable alternative is a “made-up” client case, designed to present a carefully crafted problem in a manageable form. The problem should have a set of facts and a group of cases from which the student extracts the doctrine and identifies the issues.

The problem should be presented to the students before the class meets. Springing an extended hypothetical on the students in the class simply makes them feel inferior. They should be encouraged to think about the problem in advance. This is one reason that case book notes with numerous questions and short hypotheticals work poorly.

How to produce discussion in the classroom.

Focus the discussion in advance by giving the students a single problem, albeit with several issues. Students want to be prepared for class. This will let them be prepared.

Ask for a volunteer to begin the analysis. If no hand goes up immediately, cold call. This is not the place for an on-call list or going down the row if you want spontaneity. If spontaneity is not important to you, use one of the other techniques.

Eliminate note-taking. The focus of the course is learning to think, not recording and memorizing doctrine. Note-taking interferes with discussion. Get rid of it. You get rid of it by not testing for it at the end of the semester. Tell students that the exam at the end of the semester will ask them to prepare an essay on a problem just like the ones that they have done all semester. The doctrine will be presented to them in the problem. If the students know that you will test doctrine at the end of the semester, all is lost and you might as well return to lecture or lecture-plus.