Compositional Practice

A Comment on "A Liberal Education in Law"

Bryn Vaaler[1]

I support Professor Parker's primary thesis enthusiastically. I think few practicing lawyers would disagree with it. From the practitioner's perspective, a compositional approach to learning the law replicates the way lawyers really work and develop from novices to experts. Here are some random thoughts drawn from my twenty-two years in big-firm practice and my eleven years as a law professor teaching traditional doctrinal courses (as well as teaching legal writing at one time).

1. Writing Is the Number One Lawyer Skill

As the token practitioner on the panel, I am guessing that it is the practice perspective that will most interest the audience.

Without a doubt, writing is the Number One lawyer activity, and writing ability is the Number One lawyer skill. Lawyers almost always read, analyze, discuss, negotiate, create, and carry on other lawyer activities in the context of producing a written text (e.g., memorandum, brief, contract, prospectus, private placement memorandum, letter, opinion). These other activities are all part of the compositional process. Most texts that lawyers produce are what I would call "negotiated" texts—texts in which one person not only has primary drafting responsibility, but is also responding to comments and criticisms of others in a process of writing and re-writing. Negotiation may occur between lawyer and colleague, lawyer and opposing lawyer, lawyer and client, lawyer and other parties, and lawyer and himself or herself (inner editorial dialog). I believe that this process of compositional synthesis becomes the way in which practicing lawyers think, create, analyze, learn and apply doctrine, and develop understanding of the "big picture." Real lawyers

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rarely, if ever, operate in an environment of the Socratic lecture and dialog emulated in most law school doctrinal classrooms—divorced from the production of a concrete work product.

Lawyers in practice are generally judged by the final product they produce: the written, negotiated text. Clearly, in my firm, the first thing new lawyers will be judged upon is their writing. The fastest way to get ahead as a new lawyer is to be an able writer. The fastest way to fail is to be a poor writer.

I am *somewhat* sympathetic to law teachers' arguments that their primary responsibility in doctrinal courses is "coverage" of material out of the casebook. But only *somewhat.*

I believe the value of doctrinal inculcation in law school is vastly exaggerated. Law students do not pass the bar because they remember anything from their doctrinal courses. They pass the bar because they engage in the short-term memory cram of a bar review course. And anyway, who says the goal of our law schools is to ensure that students pass the bar?

The goal of our law schools should be to provide a base upon which our graduates may build to complete their formation as competent and ethical legal professionals over the course of a career. If this is true, we need to advance this goal by teaching students composition skills (how to fish) rather than teaching doctrine (giving them a fish).

At my firm, we hire the best and brightest from the leading law schools in the country. Through my experience in working with these elite graduates in their early years, I have learned that they have retained very little doctrinal knowledge from law school. From Contracts, they remember *Hadley v. Baxendale*[2] and dribs and drabs of Article 2 of the Uniform Commercial Code. From Torts, they remember the phrase *res ipsa loquitur*, but they do not remember what it means; they remember the fireworks in *Palsgraf*,[3] but they do not remember why they were important. Most of the doctrinal knowledge imparted in the classroom is washed away by the second pitcher of beer following their exams.

Standard doctrinal teaching in law school is pedagogically unsound and divorced from how real lawyers (and real people for that matter) think, reason, create, and act. The only thing standard doctrinal teaching has going for it is that it is conducive to the faculty-student ratios that make law schools the economic engines that can pull the French department (I was a French literature major) and other economic dead weight in the university community.

I do not think any of us will see this economic reality change in law schools in our lifetimes. I do not believe that skills-based training is ever going to replace the current system. I do not, however, believe that this means that we should just conclude that Professor Parker's suggestions or those of the MacCrate commission are hopeless. I think we should strive to

2. 156 Eng. Rep. 145 (Ex. 1854).
3. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

include as much compositional learning and other skills-based pedagogy as possible in an imperfect system.

2. How People Learn

I read Professor Parker's paper two weeks ago while participating in a workshop on distance learning in law at Cornell University Law School. The workshop's organizer, Professor Peter Martin (founder of Cornell's LII web site and a pioneer of online law teaching), asked me to speak because of my experience (both good and bad) in overseeing and disseminating professional development and legal training within a 700-lawyer firm spread over twenty-two offices worldwide. I was the only participant from the world of law practice (although my function in that world is primarily one of an educator).[4] The other attendees were professors, deans, dinicians, legal writing directors, and assorted legal technology experts.

We had just spent a half-day at the workshop discussing key findings from the Bransford study.[5] It seems to me that any "best practices" in legal education should be informed by pedagogical theory. Nevertheless, most law school instruction continues to celebrate pig-headed ignorance regarding the ways in which people really learn. Professor Parker makes an excellent case that a compositional mode of study is far more in line with current theory of how people learn and how novices become experts than the exercise in professorial narcissism that we call the "Socratic" casebook method.

3. Case in Point

At night, after the Cornell workshop sessions, I was crashing out an advice letter to our corporate clientele on the recent and much publicized decision of the Delaware Court of Chancery in *IBP, Inc. v. Tyson Foods, Inc.*[6] The goal of this communication was to synthesize in a brief, punchy letter (intended for non-lawyers) the essential facts, law, and advice necessary for corporate clients to benefit from the 150-page opinion by Vice Chancellor Leo Strine. The full opinion went into excruciating detail regarding the inner-workings of merger agreements, including, most importantly, so-called Material Adverse Change clauses. It was an exegesis of a brief text out of a lengthy contract embodying a $4.7 billion corporate acquisition.

As I wrote and re-wrote (based in part on negotiation of critical comments received from three or four of my partners who were reviewing drafts), it was evident to me once again that the compositional process itself—

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4. If you would like to know more about what I do as Director of Professional Development at Dorsey & Whitney, you can listen to my description of it at the Cornell workshop. *See* Legal Information Institute, *LII Distance Learning Workshop, June 2002* <http://www.law.cornell.edu/background/distance/workshop/> (accessed May 10, 2002).

5. National Research Council, *How Experts Differ from Novices*, in *How People Learn: Brain, Mind, Experience, and School* (John D. Bransford et al. eds., Natl. Acad. Press 1999).

6. 789 A.2d 14 (Del. Ch. 2001).

the process of organizing and re-organizing facts and ideas in a conceptual framework and with a concrete purpose—was what enabled me to create an expert work product, which included the valuable legal advice in the last paragraph of each section.[7] It was also this process that enabled my partners and me to reach consensus on that advice. If the discussion among my partners had *not* been in connection with producing a text, there is no telling whether we could have arrived at a meaningful consensus as quickly (or at all). I stress that this process entailed not only writing but also *re*-writing: a "negotiated" text.

4. Teaching Doctrine through Skills Training

When I was teaching at the University of Mississippi Law School from 1989-2000, I tried to develop courses or course segments that used lawyer-skills as the vehicle for doctrinal education. For instance:

- I taught Business Planning (a capstone course synthesizing corporate, securities, and tax doctrine) through a semester-long skills exercise in which students studied about, negotiated, and drafted a third-party legal opinion in the context of an initial public offering of stock. They also put together the related opinion back-up memorandum.[8]

- I developed a joint case study for law and MBA students involving skills training in negotiation, composition, and collaboration with other professionals as a means of teaching the business valuation material and corporate legal doctrine of dissenter's rights of appraisal in Corporate Finance Law.[9]

- I developed an Internet scavenger hunt exercise for my Corporations class that taught about SEC disclosure obligations on U.S. public companies.

- I developed and oversaw a two-week contract negotiation competition each year in which all of our first-year Contracts students were trained in negotiation and contract drafting (in collaboration with our legal writing program), and they negotiated and drafted a relatively short, but realistically complex, contract.

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7. The client-advice memorandum that I produced is available on my firm's web site, Dorsey & Whitney LLP, *Firm News* <http://www.dorseylaw.com/firm_news.asp> (accessed Aug. 14, 2002). I believe this particular form of writing (advice memorandum on a complex topic for a non-lawyer audience) could be a very good addition to the usual types of texts that students are required to produce in legal writing programs.

8. *See* Bryn Vaaler, *Bridging the Gap: Legal Opinions as an Introduction to Business Lawyering*, 61 UMKC L. Rev. 23, 23-65 (1992).

9. *See* Bryn Vaaler & Mark Walker, *Negotiating Value/Valuing Negotiation: A Joint Case Study for Business and Law Students*, 22 J. Fin. Educ. 101 (Spring 1996).

- Most recently (spring 2000), I incorporated a compositional element in the first semester of my Contracts class to prod first-year students to think about basic philosophy of law using a compositional technique drawn directly from the French liberal arts tradition. I called the segment "LEXplication de Text." Students competed in producing analytical texts in the French "explication" tradition with respect to a particular literary work concerning the law (in this case, W. H. Auden's poem, "Law Like Love"). My strong feeling was that the study and analysis of poetry and the study and analysis of contractual language were very much related.

I based these curricular "innovations" not on the study of pedagogy, but on an untutored intuition that students would learn material more effectively if they did so in the process of acting like a lawyer and engaging in lawyer activity.

I offer these up as examples of what ordinary doctrinal teachers can accomplish—in a system in which the deck is stacked against skills-based teaching—if they are motivated, somewhat creative, somewhat knowledgeable about what lawyers really do, and undeterred by the economic realities of our current legal education system.