



# THE LAW TEACHER

Institute for Law School Teaching

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## Poetry in commotion

### *Katko v. Briney* and the bards of first-year Torts

By Andrew J. McClurg

During a classroom discussion of *Katko v. Briney*, the infamous Iowa spring gun case, a first-year Torts student unknowingly taught me an important lesson about the stultifying effect of the Socratic method on creative thinking.

In *Katko*, Marvin Katko sued Edward and Bertha Briney after he broke into their unoccupied farmhouse intent on stealing their property and ended up losing a portion of his leg to a shotgun wired to the bedroom door. The jury awarded Katko substantial compensatory and punitive damages. The Brineys had to auction 80 acres of their farm to pay the judgment. The reason Katko won? The law values life over property.

Or at least I always thought that was the reason until a student named Fufa Fullerton set me straight. It happened three years ago on a sweltering September afternoon during the last dog days of Arkansas' interminable summer. Ms. Fullerton, a mature woman who attended Smith College back in the '50s, was three weeks into her law school career. I called on her and asked her to explain how Marvin Katko — *a felon!* — could possibly have prevailed over the poor Brineys. She pointed resolutely to the photographs of the parties that are included in the Prosser casebook and said in her native Arkansas accent, "I think the plaintiff won because he's a hunk."

Straining to be heard above the laughter of her classmates, I commented that her perspective on the case was "interesting" and "novel," then moved with warp speed to another student who, mercifully, gave me the *right* answer: "Defending property never justifies the use of deadly force." Good boy.

However, back in my office preparing for the next day's class I came across Marvin Katko's photograph and studied it closely for the first time. There he was: penetrating blue eyes, dimpled chin, great head of hair, full lips hinting of a seductive smile. Good Lord! Fufa Fullerton was right. Katko was the spitting image of a young Paul Newman. My eyes

drifted to the opposite page where the Brineys stood in front of their tragic farmhouse: grim, unforgiving, winter parkas drawn tightly around their unattractive faces.

Who was I to say that Marvin Katko's good looks did not help him win the case? The more I thought about it, the more plausible it seemed. Investigation disclosed a large body of

research demonstrating that physically attractive people enjoy many advantages over their less beautiful counterparts. Learned Hand said, "Juries are not leaves swayed by every breath," but perhaps a wink from

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Katko's limpid eyes was enough to do the trick.

My rumination about *Katko v. Briney* started me thinking more generally about the suffocating environment the Socratic method imposes on original expression. Episodes like the one I experienced with *Katko* are not uncommon. Many of us like to believe we foster a vibrant classroom learning environment, but mostly we fool ourselves. It is easy to confuse a successful bag of teaching tricks with vibrance. True vibrance would require an open mind, risk taking, spontaneity, inconsistency in presentation, and a relaxed freedom to speak openly, but these ingredients are missing from most law school classes.

On the surface, a Socratic teaching regime would appear to be an excellent way to stimulate creative thinking. After all, questions require answers and answers require thought. The problem is that most of the questions law professors ask

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# Bards

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have prefabricated answers attached to them — answers that the professor long ago accepted as *correct*, often with enough moral certainty to formalize them in his or her class notes. The result? When we enter the classroom we are not on a mission of discovery or exploration, but on a search for preordained correct solutions. It is somewhat like going on a treasure hunt with the jewels in your back pocket.

The losers in this process are the creative thinkers. “New” ideas frequently are considered “wrong” ideas. The most successful students usually are not those who are able to think for themselves, but students who are talented at mimicking the way others, principally their professors, think. Danger lurks for students courageous or foolish enough to misunderstand this regimen. Just ask Fufa Fullerton. Her reward for advancing an “appearancist” perspective on *Katko v. Briney* was laughter from her classmates and barely disguised scorn from her professor.

Identifying problems is easier than fashioning solutions to them. Stung by my narrow-mindedness, I set my laggard brain to the task of developing a new way to address *Katko v. Briney*. When the case came up the following year, I assigned my students to write poems about it. The purpose of the exercise was to grant my students permission to think creatively about a controversial legal issue in a completely nonjudgmental context, a free-form luxury which, lamentably, they may never again enjoy as law students. The results were a fascinating mix of old and new insights about the case and commentary on the state of the law, delivered in every form imaginable, from serious poetry to silly songs to dark *haiku*.

On the right are just a couple of the many fine efforts submitted by my students. The rewards of this minuscule contribution to stimulating creativity in legal education (no more than a footnote to a brainstorm) exceeded my modest expectations for it. My students had fun, they explored the case more carefully than they would have otherwise, and they introduced me to new perspectives on the law. (To my surprise, one student echoed Fufa Fullerton’s realist view of the case with a stanza that began: “*Good looks can mean a lot, especially when you’re shot . . .*”)

More importantly, the poetry assignment symbolized a new awareness on my part of the need to encourage creative expression in the classroom. Where before I thought only I knew all the answers, I now try harder to force my students to give me *their* ideas (not just the ones they think I am looking for). Just as importantly, I try to listen better and react less judgmentally to those ideas. Though I do not always succeed, I believe these efforts have made me a better teacher.

Effective legal education requires structure and a tremendous amount of judging. Substance does count and there are many wrong answers that need correcting. However, in between all of that, there should be some opportunity for unrestrained, unevaluated creative expression. Otherwise, too many good players and good ideas never get into the game. Currently, there are virtually no such opportunities, other than a little poetry exercise about the day good-looking Marvin Katko got his leg shot off at the Briney farm.

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## Katko v. Briney

By Gary Austin

*It was a morning in June on an Iowa farm,  
Briney set a shotgun trap, but said he meant no  
harm.*

*He aimed his gun high, to shoot intruders in the  
gut,*

*Never again would they break into his  
unoccupied hut.*

*At his wife’s suggestion, he lowered the barrel a  
taste,*

*It would be better to blow off a body part below  
the waist.*

*Katko broke in, wanting something for free,  
What’s behind the bedroom door? He wanted to  
see.*

*He opened the door quietly, not making a sound,  
Lead filled his leg, his ass hit the ground.*

*Katko sued the Brineys, and in response to his  
pleas,*

*A judgment came back for thirty Gs.*

*Briney appealed:*

*I was protecting my property, if this isn’t a switch,  
He broke into my house, that sonofabitch!*

*The court said:*

*Although you felt there was no other recourse  
The use of that shotgun was unreasonable force.  
Since you consciously chose to injure life and  
limb,*

*You’ll have to sell your farm, and give the money  
to him.*

*Katko left limping, but smiling like a Cheshire  
cat,*

*A piece of his leg was gone but his wallet was fat.  
The moral of this story should smack you right in  
the face,*

*If they had shot him in the belly he couldn’t have  
brought the case.*

## Reasonable and Necessary Force

By Melanie McClure

*The farmer called to his wife with a proud smile,  
“My dear, come here. See this contraption I’ve  
styled.”*

*“Sweet Briney, what is it that’s kept you all  
morning?”*

*“Why, this spring-triggered shotgun that fires  
without warning.”*

*She looked over her husband’s creation,  
admiring the spring,*

*But the farm wife had to remind him of one  
important thing.*

*“Cupcake, you know Iowa farm boys are hearty  
young things,*

*A shot to the belly may only make them sting.  
Lower the shotgun and put up a tin curtain,*

*It’s the only way we’ll be substantially certain  
That when those trespassers break in night or  
day,*

*There will be at least one who won’t walk  
away.”*

# Non-legal materials foster critical thinking

By Gregory Sergienko

Most first-year students are ready to learn “the law,” but overestimate the certainty of the law and underestimate the importance of critical thinking.

My principal goals as a law teacher are to instill this critical-thinking ability and to teach some of the substantive law necessary as a foundation. Beginning a course with non-legal materials encourages critical thinking and counteracts students’ initial emphasis on legal jargon. Because these materials do not involve legal language, they curb the students’ rush to embrace the use of technical terms as a substitute for thinking. Moreover, the non-legal materials provide a bridge from everyday experience to the study of law.

I begin my Civil Procedure course with Solomon’s Judgment and the problem of cake division. You are probably familiar with one or both of these; certainly most of my students are. In Solomon’s Judgment, Solomon is asked to decide which of two women is the real mother of the baby. In the cake division problem, parents have to decide how to divide a cake between two children.

I start by presenting Solomon as a conventional case by getting the students to go through the statements of both parties. I then ask them to decide the case on the basis of the information they think they have.

The usual approach is to give the baby to the woman who has physical control. That leads to a discussion of the burden of proof, which I follow up by asking what advice they would give, were that the rule to be anticipated, to the woman who claims her child is kidnapped. In that case, I suggest that they advise the woman who *doesn’t* have the baby. Eventually we work around to the idea of counter-kidnapping. Others suggest joint custody, but when we start to talk about how the two mothers will deal with one another, no one thinks that is likely to work.

Then we address Solomon’s stated reason for decision and ask them to describe Solomon’s reasoning. Eventually, we develop the idea that his major premise is that the real mother wouldn’t let her child be cut in two. At this point, the students are generally satisfied.

Then I ask the students to present the case for the second woman. This took some work last year, but when we staged a re-enactment, the students realized that the first woman’s testimony implied that she saw the second woman’s baby die, and this is almost certainly false: If they were in different rooms, she would not have seen it, and even if the two women were in the same room, she would not have let the other woman crush her own baby.

At this point I say, “So it looks like Solomon awarded the baby to a perjurer. How many think he was right?” The split was about fifty-fifty, with many now wondering if guilt, rather than love for the baby, influenced the woman to be willing to give her up. This brings out the importance of procedural rights; even with a judge as wise as Solomon, cross-examination could alter the result.

Then we talk about Solomon’s result: Even if you think he awarded the baby to someone who wasn’t the true mother, is there anything to be said for the result? Many say Solomon was right to give the baby to someone who wasn’t the true mother, because she was the best mother. At this point, I ask them if that was what Solomon said he was doing. They realize it wasn’t, and then I ask them why he might have followed a rule

different from the one he said he was following.

The students quickly realize that a rule awarding custody on the basis of being the “best” parents would unsettle society by opening up litigation for any case in which someone wanted a child and claimed to be the better

## The Judgment of Solomon

- <sup>16</sup>Now two prostitutes came to the king and stood before him.
- <sup>17</sup>One of them said, “My lord, this woman and I live in the same house. I had a baby while she was there with me.
- <sup>18</sup>“The third day after my child was born, this woman also had a baby. We were alone; there was no one in the house but the two of us.
- <sup>19</sup>“During the night this woman’s son died because she lay on him.
- <sup>20</sup>“So she got up in the middle of the night and took my son from my side while I your servant was asleep. She put him by her breast and put her dead son by my breast.
- <sup>21</sup>“The next morning, I got up to nurse my son — and he was dead! But when I looked at him closely in the morning light, I saw that it wasn’t the son I had borne.”
- <sup>22</sup>The other woman said, “No! The living one is my son; the dead one is yours.”  
But the first one insisted, “No! The dead one is yours, the living one is mine.” And so they argued before the king.
- <sup>23</sup>The king said, “This one says, ‘My son is alive and your son is dead,’ while that one says, ‘No! Your son is dead and mine is alive.’”
- <sup>24</sup>Then the king said, “Bring me a sword.” So they brought a sword for the king.
- <sup>25</sup>He then gave an order: “Cut the living child in two and give half to one and half to the other.”
- <sup>26</sup>The woman whose son was alive was filled with compassion for her son and said to the king, “Please my lord, give her the living baby! Don’t kill him!”  
But the other said, “Neither I nor you shall have him. Cut him in two!”
- <sup>27</sup>Then the king gave his ruling: “Give the living baby to the first woman. Do not kill him; she is his mother.”
- <sup>28</sup>When all Israel heard the verdict the king had given, they held the king in awe, because they saw that he had wisdom from God to administer justice.

1 Kings 3:16-26 (NIV)

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parent. I then follow up by asking the students how they feel about Solomon's following a "rule" different from the one that he said he was following. This provides a reference point for examining legal fictions and judicial insincerity later in the course.

Finally, we discuss the case of woman three and woman four, who come before Solomon with the same problem. This brings up the ethics of witness coaching. I ask whether the students would tell their client what to say when she gets in front of Solomon, and what they would say if their client asked them to tell everything they know about what will happen in front of Solomon. Once we get past that, we have to ask what Solomon will do when the two women before him each say, "Let her have the baby!"

Then we get to the cake-splitting problem. Invariably the class suggests a rule in which one child cuts and the other chooses. This seems so simple that it takes a bit of work to get to the underpinnings of that rule: reliance on the child's ability to protect herself, so we might not allow this between a three-year-old and a fifteen-year-old; reliance on the child's judgment, so that we might not allow a child to consume so much cake that she got sick; and reliance on a background allocation of entitlements or expectations so that we know the children will not fight to the death over the cake. We then discuss how procedural justice, particularly in the form of settlement, fits within the American judicial system.

We then look at other possible rules: having the parents award portions according to the arguments advanced (which leads nicely to a Lon-Fuller-like discussion of adjudication in terms of the presentation of reasoned proofs and arguments); or, simply having the parents decide, to avoid the burden of their having to listen to arguments.

Examination of these non-legal materials usually takes two or three 50-minute class sessions. The students are amazed at how much they got out of a brief problem, and

that encourages them to read carefully in the future. In addition, deciding or nearly deciding that Solomon was wrong or not completely straightforward makes them much more willing to challenge the reasoning of judges. I hope also that they have learned something about lawyering skills: scrutinizing facts critically and thinking about how to ask questions and present arguments.

At this point, we are ready to go on to the rest of the course. The first standard case in the textbook I use involves

an activist judge investigating municipal corruption in New Jersey, who is reversed for becoming too closely involved in the proceedings. The question I ask the students before getting to the New Jersey case is, "Would the New

Jersey court of appeals reverse Solomon? If so, who is right?" I also ask them to compare the judge to the parent of the three-year-old: Why can't the municipality protect itself?

When we get to discussing the case, we talk about the importance of legal rules in producing settled results, and the difference between Solomon's society and New Jersey society in their view of the judge and of the need for predictable rules. Excerpts from Max Weber on the various types of legal decision-making place this in context. The whole exercise allows the students to see procedural rules as answering the procedural needs of the society in which they are used. They also see how our system has different characteristics in different places, so that juries function much like Solomon, rendering decisions without concern for precedent, while judges must provide reasons consistent with precedent. The discussion of judges and juries prepares them for the Seventh Amendment later in the course.

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## Cake Division

*Mom and Dad have brought home two pastries. One they propose to share themselves, and the other they want to divide among their two children. The children, 10 and 12, are reasonably well behaved, but perfectly capable of arguing at hideous length over the division of the pastry. How should Mom and Dad handle the problem?*

## How to submit your article for *The Law Teacher*

**T**he *Law Teacher* encourages readers to submit brief articles explaining interesting and practical ideas to help law teachers become better classroom teachers.

Articles should be 500 to 1,500 words long. The author should describe the idea and tell readers where they can get more information on the topic of the article (from a book, another article, or the author). Footnotes are neither necessary nor desired.

The deadline for articles to be considered for the spring edition of *The Law Teacher* is February 15, 1997.

You may submit articles on paper. If you have composed your manuscript on a word processor, please

also include a copy of your article on floppy disk.

Submissions through electronic mail also are welcome.

The editors will review all manuscripts; those that are accepted will become the property of the Institute for Law School Teaching.

Manuscripts, comments, and letters should be sent to:

The Institute for Law School Teaching  
Gonzaga University School of Law  
P.O. Box 3528  
Spokane, WA 99220-3528

The e-mail address is: [ilst@lawschool.gonzaga.edu](mailto:ilst@lawschool.gonzaga.edu).  
For more information, call (509) 328-4220 (ext. 3740).

# Canon and currency in jurisprudence courses

By Steve Sheppard

There are differences of both role and pedagogy among law school courses in jurisprudence: the first-year course like Dale Nance's Law and Justice, the traditional upper-class course like George Fletcher's Jurisprudence, the specialized topical course like Robin West's Feminist Legal Theory, and the courses like Contracts that are not necessarily jurisprudential but in which we hope to find it lurking at the margins.

I speak for the lately maligned traditional course even if, from time to time, we don't know exactly where the edge of the tradition is. It will surprise no one that, as a traditionalist, I make a strong and weak case of traditionalism. Of course, I defend only the weak case, which makes more sense.

The strong case of traditionalism is that we have a canon.

Its books hold the great ideas

of the law by Aristotle, Hobbes, Burtham, Hart, Dworkin, and Rawls. We use lots of long words that no one else knows. That's what we must teach, and it has no need

to have anything to do with the student's world. It is a series of ideas that must be refined and understood with reference only unto themselves. This is, in many people's minds, what traditional jurisprudence is. It is a bad vocabulary of ideas that are very smug.

And then there is what I do, which is the weak traditional school. The primary difference is that in this school the ideas are not as important in themselves. They are more important for what the student can *do* with them. And what the student must do is use them in the practice of law and relate them to the judicial and legislative enterprise. In short, the weak case for jurisprudence is built not on the purity of the ideas of law but on the love of success in law. The lawyer who knows more of what the judge might do than does the judge will succeed before that judge. Now the question remains, are these ideas so consistent you can teach them? And from that, do these ideas reflect writings that can form a canon? Indeed, is there a canon?

I think there is a canon. I think the canon revolves around enduring questions of the roles of law and norms and the writings of those who have dealt with these questions.

My course is an upper-class elective survey course for people who, more than likely, have had no deliberate exposure to philosophical questions or reasoning before they come into the class. And it is for lawyers who are going to go into the courtroom and who, I hope, will be able to see the relationship between these ideas and their work.

My course is based on my continually reassessed views of what seems to be canonical in the writings of the day. Coke, Blackstone, Spencer, and Gray have all fallen from the canon, but some older folks, like Aquinas, have survived (although maybe with Finnis as his modern interpreter), and these things are open to change. In today's canon, I think it is important to include with the hoary writers of the strong traditionalist course contemporary writers such as West, Becker, and other voices that represent new answers to the

eternal questions. From this list, students get good doses of positivism, realism, natural law, and utilitarianism. They get material on republicanism and perfectionism as well as race critical theory, feminist legal studies, and critical legal studies.

I do my best to give students a good ecumenical grounding in the ideas, as well as the nouns and verbs, of these schools. I try to present each school as an advocate for it, not to condemn any school but to allow the students to do their best to find the way for themselves.

I then give them some exposure to three substantive areas of the law, such as constitutional law, property, and crimes.

There are some reasons for selecting those as representative of different forms of the problems attending each field of law.

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The magic, I think, in my course is that I also make students write within each school. I let them pick one of two judicial opinions I assign on the first day of

class, for which they must write Fullerian opinions. They must emulate Lon Fuller's Spelunkean Explorers opinions for every theory in deciding the set case. I often set *Bowers v. Hardwick* as one of the two cases. They then have to draft an opinion for the Supreme Court in *Bowers* as if they were a feminist, as if they were a crit., as if they were a formalist, as if they were a pure positivist, as if they were writing in the tradition of Aquinas and four others. And they have to present each one of these opinions with the internal perspective of someone who accepts those reasons.

The first time I did this I found it was very hard for students to write judicial prose neutrally and also reflect the ideas of the school. Now, I have them write 18 opinions. I have them write two for each school, the first one in the jargon of the school and the second one stripped of that jargon to represent the ideas in neutral judicial prose. This exercise helps them to take these ideas and use them not only to see and find these ideas lurking in the opinions of the courts but also to mount arguments for their clients based on these ideas. I want students to use these tools to persuade others to agree with an argument of law because that, I believe, is what I'm training people to do: To leave my institution, to go out and represent people in the world bounded by legal officials and to persuade those legal officials to act in a way that reflects their clients' needs. In teaching my course, I want to find as many ideas, as many ways, and as many tools as I can to enhance my students' ability to persuade.

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## Writing exams? Institute has answers (and questions)

Teachers who use or are considering using objective exams as a means of student assessment can make use of the Institute's multiple-choice question bank.

We have exam questions in the following areas:

*Administrative Law; Antitrust Law; Civil Procedure; Community Property; Conflicts of Law; Constitutional Law; Consumer Protection; Contracts; Corporations/Business Associations/Agency & Partnership; Criminal Law; Criminal Procedure; Environmental Law; Estates, Wills, and Trusts; Evidence; Federal Estate and Gift Tax; Federal Income Tax; Insurance; Labor Law; Product Liability; Professional Responsibility; Property; Remedies; Torts; U.C.C. Articles 2 and 9.*

Any law teacher may request copies of questions. To do so, write to the Institute on your law school's stationery, identify the subjects for which you want to receive questions, and indicate your willingness to comply with contributors' restrictions on distribution of their questions. As new contributors send questions to the bank, the Institute will mail the new questions to teachers who have requested questions in the subject area during the preceding two years.

We have unfilled requests for exam questions in the following areas:

*Employment Law, Estate Planning, Family Law, Health Care Law, Immigration Law, Intellectual Property, International Trade Law, Law Practice Management, Legislation, Mediation, Partnership/S Corporation Tax, Refugee Law, Securities Regulation, and U.C.C. Articles 3 and 4.*

In order to expand the variety of questions, the Institute encourages all law teachers to contribute to the bank. Send us your questions (with the correct answers indicated) in either hard-copy or electronic form (on a diskette or via e-mail). We can accept ASCII or ANSI text files, Ami Pro 1.2-3.0, MS Word for Windows 1.0-6.0, WordPerfect 4.2-6.1, DisplayWrite 4.0-5.0, and Rich Text Format (RTF). If you e-mail your questions, be sure your e-mail program is MIME-compliant or is capable of sending a binary file.

The Institute's e-mail address is:

ilst@lawschool.gonzaga.edu

With your questions, please include a cover memo that specifies your restrictions on the use or distribution of your questions.

## Institute has resources to aid law teachers

Looking for ideas on how to improve the quality of legal education? The Institute has available a number of resources:

- THE SCIENCE AND ART OF LAW TEACHING (Materials from the 1995 and 1996 conferences): Each summer the Institute holds a two-day conference offering six workshops for experienced law teachers.

Participants leave each workshop with ideas that they can immediately incorporate into their courses. The teaching tools developed for each of the workshops — as well as the innovative teaching tips presented by the participants — are collected into a complete set of written materials for use as a resource by teachers who did not attend the conference.

### New! 1996 Conference materials

Workshops at last summer's annual conference covered (1) principles of adult learning (by Martha Peters, University of Florida College of Law), (2) constructing and using graphics in the classroom (by Stephen Sepinuck, Gonzaga University Law School), (3) assessment of learning and programs (by Greg Munro, University of Montana Law School), (4) diversity in the classroom (by Okianer Christian Dark, University of Richmond Law School), (5) technology to assist learning (by William Andersen, University of Washington Law School), and (6) student moral development (by Steve Hartwell, University of San Diego Law School).

Cost: \$60.

### 1995 Conference materials

The workshops at the 1995 conference presented information on (1) the "why" and "how" of multiple-choice exams (by Steven Friedland, Nova Southeastern Law School), (2) effective discussion techniques (by Lynn Daggett, Gonzaga University Schools of Education and Law), (3) ways in which lawyering skills can be introduced or taught in the classroom (by Lawrence Grosberg, New York Law School), (4) cooperative learning techniques to improve higher-order thinking skills (by Jim Cooper, Director of the Network for Cooperative Learning in Higher Education), (5) a model for effective course planning (by Vernellia Randall, University of Dayton Law School), and (6) the use of verbal and nonverbal communication in the classroom (by Kathryn Landreth, U.S. Attorney for the District of Nevada).

Cost: \$60.

- GETTING GRAPHIC 2® by Corinne Cooper: Discusses the "why" and "how" of using graphics; describes functions and types of graphics; and provides examples of graphics used in various law school courses.

Cost: \$20.

- *A Day In The Life Of Law School Teaching*, produced by Larry Dubin: Video program (35 minutes) designed to stimulate faculty discussion about law teaching methods.

Cost: \$20.

- *Bibliography*: Annotates articles about law school teaching methods and techniques and describes higher education publications that focus on teaching. No cost.

Contact the Institute for more information or to order any of these resources.

# Electronic exam can spot hidden differences

By Brett Amdur

Electronic essay exams can make it easier for law teachers to recognize differences among students who completely miss issues, but who may understand the topic.

My project at Villanova began with a colleague's complaint that traditional law school exams don't allow teachers to make these distinctions. My colleague, Villanova law professor Frederick Rothman, pointed out that in a typical exam, all students who completely fail to address an issue get no "points" for that issue, even though it is possible, and perhaps even likely, that some students would get differing amounts of credit if they had spotted the issue and addressed it.

Professor Rothman came up with the concept of a "layered" exam. The idea was that for each fact pattern, the first question would be very broad, such as: "What are the rights of the parties?" Each question that followed would focus on a narrower issue, such as: "Did you address issue X in your answer to question 1? If not, address it now." Students who addressed issue X in question 1, of course, got more credit than students who addressed it only after prompting.

To administer this exam, we needed a system that: 1) precluded students from seeing a question until they had answered all of the questions that preceded it, and 2) precluded students from changing their answer to a question after they had seen a subsequent question. That's where the computer came in. I designed an exam, using the Toolbook authoring software, that met these requirements. Students typed responses into a box, and then clicked on a "Submit" button, which saved their

answer to a file on our network. Students couldn't see a question until they had "submitted" all previous answers. While they could return to previous questions to see their answers, they couldn't modify answers that they already had submitted.

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Two other features are worth noting. First, the course used a Folio Views electronic casebook. Throughout the semester, Professor Rothman encouraged students to take detailed notes in their shadow files, because they

would be permitted to cut and paste from the shadow files, and from the book itself, into their exam answers. Second, the exam had a timer on it. The computer automatically saved the students' answers when time expired.

The exam worked just fine. Students seemed to overcome their initial fear of the computer (we had given them a practice computer exam earlier in the semester), and gave generally positive feedback. We intend to try it again this semester in two more classes.

If there's interest, I hope to create a program that will allow other teachers to easily build their own electronic exams similar to the one we've developed at Villanova.

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## Journals help students explore their *Wild Minds*

By Mark Weisberg

I teach a course I call Legal(?) Ethics and Professional Responsibility? I use the punctuation to suggest that rather than take for granted a separate branch of ethics called legal ethics, and rather than take for granted a separate branch of responsibility called professional responsibility, we ought to inquire what it might mean to have legal ethics, and what it might mean to have professional responsibility.

The course invites participants to examine professionalism by exploring relationships between personal and professional lives. I ask students to record their responses to this and other questions in a course journal. I ask them to write regularly in their journals and to submit them to me at the end of the term for me to grade. Acknowledging the contradiction in this instruction, I also encourage each person to write for himself or herself, not for me.

Most students need time to adjust to the freedom a journal offers. They aren't used to setting their own educational agendas; they aren't used to getting credit for attending to their personal opinions and for wondering how to integrate them into

their professional lives. Most aren't used to writing without looking over their shoulders at an (imagined) teacher. They don't trust themselves (to do it), and they don't trust me (to mean it).

It usually takes most students several weeks and at least one tutorial with me before they begin to become comfortable with their journals. Some never do adjust to the form.

I also teach writing courses — creative and expository writing courses. I'm always looking for material for these courses. Last semester, right after I'd finished my first round of Ethics tutorials, I was reading a book about writing a friend had recommended. The book was written by Natalie Goldberg, a poet and novelist, and it was called *Wild Mind*.

*Wild Mind* is a book about locking up your editor when you write and releasing your creator. Goldberg calls the

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creative spirit a person's Wild Mind, and in her book offers dozens of exercises for getting in touch with your Wild Mind. These she calls writing practice.

*Wild Mind* is a wonderful book: clear-headed, funny, full of great stories and terrific advice for writers. Although it wasn't explicitly about journals — in fact, Goldberg contrasts journal writing with writing practice, claiming the former asks writers to think, the latter demands they don't think — I brought it to Ethics class the next day, intending to let students know about it, thinking it might offer a few suggestions to someone who felt stuck in her or his journal.

I like to read to people, so when I got to class, I decided to read the part at the beginning of the book that compares the rules of writing practice to sex. Here's what I read:

*For fifteen years now, at the beginning of every writing workshop, I have repeated the rules for writing practice. So, I will repeat them again here. And I want to say why I repeat them: Because they are the bottom line, the beginning of all writing, the foundation of learning to trust your own mind. Trusting your own mind is essential for writing. Words come out of the mind. And I believe in these rules. Perhaps I'm a little fanatical about them. A friend, teasing me, said, "You act as if they are the rules to live by, as though they apply to everything." I smiled. "Okay, let's try it. Do they apply to sex?"*

*I stuck up my thumb for rule number one. "Keep your hand moving." I nodded yes.*

*Index finger, rule number two. "Be specific." I let out a yelp of glee. It was working.*

*Finger number three. "Lose control." It was clear that sex and writing were the same thing.*

*Then, number four. "Don't think," I said. Yes, for sex, too. I nodded.*

*I proved my point. My friend and I laughed.*

*Go ahead, try these rules for tennis, hang gliding, driving a car, making a grilled cheese sandwich, disciplining a dog or a snake. Okay. They might not always work. They work for writing. Try them.*

**1. Keep your hand moving.** *When you sit down to write, whether it's for ten minutes or an hour, once you begin, don't stop. If an atom bomb drops at your feet eight minutes after you have begun and you were going to write for ten minutes, don't budge. You'll go out writing.*

*What is the purpose of this? Most of the time when we write, we mix up the editor and creator. Imagine your writing hand as the creator and the other hand as the editor. Now bring your two hands together and lock your fingers. This is what happens when we write. The writing hand wants to write about what she did Saturday night: "I drank whisky straight all night and stared at a man's back across the bar. He was wearing a red T-shirt. I imagined him to have the face of Harry Belafonte. At three A.M., he finally turned my way and I spit into the ashtray when I saw him. He had the*

*face of a wet mongrel who had lost his teeth." The writing hand is three words into writing this first sentence — "I drank whisky ..." — when the other hand clenches her fingers tighter and the writing hand can't budge. The editor says to the creator, "Now, that's not nice, the whisky and stuff. Don't let people know that. I have a better idea: 'Last night, I had a nice cup of warmed milk and then went to bed at nine o'clock.' Write that. Go ahead. I'll loosen my grip so you can."*

*If you keep your creator hand moving, the editor can't catch up with it and lick it. It gets to write out what it wants. ...*

**2. Lose control.** *Say what you want to say. Don't worry if it's correct, polite, appropriate. Just let it rip ...*

*(I)t is remarkable how I can tell students, "Okay, say what you want, go for it," and their writing takes a substantial turn toward authenticity.*

**3. Be specific.** *Not car, but Cadillac. Not fruit, but apple. Not bird, but wren. Not a codependent, neurotic man, but Harry, who runs to open the refrigerator for his wife, thinking she wants an apple, when she is headed to the gas stove to light her cigarette ...*

**4. Don't think.** *We usually live in the realm of second or third thoughts, thoughts on thoughts, rather than in the realm of first thoughts, the real way we flash on something. Stay with the first flash. . . .*

The next day I was walking past the secretarial office and saw one of my students sitting in a chair in the hall, waiting for another class and reading *Wild Mind*. When I came to class next week, I saw several more copies of the book. Since I hadn't assigned this book, and since these were law students, you can imagine my surprise.

Even more surprising and pleasing was how often *Wild Mind* appeared in student journals. People responded to Goldberg, took her to heart, and trusting one's mind became a theme in their journals. Several students wrote stories in their journals, some fictional, some real. All reported that they had decided to write the stories after having read *Wild Mind*, and that in writing those stories they discovered important information about themselves and about their ethics, information they had forgotten or repressed. They discovered what they cared about and accepted responsibility for caring about it. They connected ethical events in their personal lives with ethical problems in their professional lives. They discovered that trusting their minds left them feeling empowered, enriched, able to be responsible for their own meanings.

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# Slides worth thousands of words in Environmental Law

By Richard J. Fink

As Professor David Getches of the University of Colorado School of Law accurately observed several years ago, “[L]aw, lawyers, law schools, and law students seem to have so little to do with the environment . . . .”

Professor Getches was referring primarily to the piecemeal nature of Environmental Law — and hence the work of environmental lawyers and law students — in comparison to the interrelated and global nature of environmental problems. But I think the essence of his remark applies more broadly. We law teachers and our students tend to lose touch with the environment

beyond the classroom walls. Naturally we focus on the law, but because our time is limited and Environmental Law so vast and detailed, the law tends to crowd out other perspectives on environmental issues and even the environment itself. The law becomes the end, not the means to one or more ends, and the consequences of Environmental Law in the world are too often neglected.

To address this problem in a small way, I show slides to students in my Environmental Law course. The slides are pictures I have taken in places that were the subject of some of the opinions we study, locations affected by statutes we

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# Films, TV scenes can help to teach ‘hard law,’ too

By Stephen G. Coughlan

Other authors have discussed the use of scenes from television and movies to raise significant policy issues. I think we can use these materials to teach “hard law,” too.

Students’ interest begins to flag toward the end of the year, and they may have less enthusiasm to enter into class discussions when they are busy preparing for final exams.

One way to encourage participation is to show short clips from movies as hypotheticals and use them as the focus for discussion.

The technique seems well-suited to teaching criminal defenses. My first-year Criminal Law students learned the law of self-defense after

watching a scene from *Raiders of the Lost Ark* in which

Indiana Jones first uses his fists and whip to fight off a number of attackers in the marketplace, but draws his gun to shoot a

dangerous-looking swordsman. The scene raises most of the relevant issues in the Canadian defense: Has he been unlawfully assaulted? Is he acting under reasonable apprehension of death or grievous bodily harm? Can he otherwise preserve himself? Could he, and must he, retreat? Must he measure force to a nicety?

In a later week, the scene in which Dr. Jones first destroys an archaeological site to escape from it, and then steals a horse to ride off to recover the Ark, sets the stage for a discussion of the defense of necessity. Can it be used as a justification (stealing the horse) or only as an excuse (vandalizing the site), and if so what are the requirements?

I divide the students into groups (Crown and defense) and have them confer for about 20 minutes before we discuss the case as a whole. Small-group discussion about whether the defense can apply is usually quite active; students unwilling to speak up in a large group seem more willing to enter into the small debate among themselves. When we present the arguments on either side, there is

lots of participation. All the students have had a chance to think through their arguments fully, and students often raise particular points from the cases in support of their views. My impression is that students are more likely to raise key issues in this context than in a specific discussion of the cases themselves.

When we encounter the defense of provocation, the Zeffirelli film of *Romeo and Juliet* provides a good introduction. Romeo kills Thibault after Thibault has killed Mercutio. The facts make the legal issues seem far more vivid than any oral or written hypothetical could. It is obvious that Romeo tries very hard not to be provoked, and does not seek a quarrel. It is also obvious that he is in a rage when he sets off after Thibault. Had Romeo lost control? Would anyone have lost control? Did he act before

his passions had had time to cool (he had to run a long way before he caught Thibault)? Even several side issues arise: Romeo is only 15 years old; is that relevant? Can we take his cultural background into account (attacking each other with

swords appears to be quite normal behavior in his society)? What about those obscure insults — meaningless to us (what is drybeating an ape, anyway?), but apparently very provocative to a 15th-century Veronan?

I have several times urged one of my colleagues to show part of *Body Heat*, a thriller whose plot turns around the Rule Against Perpetuities, to her first-year Property students. She has declined, probably wisely. Nonetheless, this year I will try to find films that I can use to teach some aspects of the elements of crimes. It is possible to overuse these visual hypotheticals, but used occasionally they can provide a nice counterpoint to the usual discussion and make the issues more real.

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*A scene from Raiders of the Lost Ark raises most of the issues of the Canadian law of self-defense.*

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# Slides

Continued from page 9

read, and areas that generated a few of the controversies we are examining. One purpose is to begin to reconnect students to the real-world environment. But some slides do more, I think. They illustrate both significant environmental values and instances of environmental degradation, so students can see graphically both the successes and the failings of our laws.

After a few years of seeking out locations related to my course, I can illustrate for my students, for example, the restoration of wildlife habitat in New Mexico and areas at the center of the current debate over wilderness designation in Utah. A leading case on national forest planning arose in Colorado, and we can view areas of that forest devoted to recreation, mining, and current and past timber harvesting. Our understanding of an interstate water rights dispute resolved by Congressional act is enhanced by slides taken along the length of the river and of the Indian reservation in Nevada that asserted federal reserved water rights. When my students study the National Environmental Policy Act or read excerpts from an environmental impact statement, we “visit” a project that was the subject of litigation under that statute or the site covered by the impact statement.

Showing slides in class may seem a step back to an old technology, but the medium has several advantages over videotape. First, the images are more impressive in the classroom. A typical video monitor is small by comparison to a projection screen. A slide may be static, but it commands the audience’s attention for the short time it appears.

Second, you can take the slides yourself. Many people find it difficult to make a quality video with a video camera outdoors, and editing presents questions about who can do it and with what equipment. By contrast, taking slides does not require you be an expert photographer. Modern and fairly inexpensive “point and shoot” 35-mm cameras make good images. Editing your presentation is simple: Just select the slides you want and put them in whatever order suits you.

Not only *can* you take the slides yourself, but it is best if you do. Slides are available from commercial distributors and in stores such as gift shops in national parks, but those images are largely of beautiful or dramatic scenery, which fulfill the law teacher’s purposes only slightly. For example, in my course we study the Mono Lake public trust decision. I could have purchased some nice slides showing the lake at sunset and the unusual tufa formations along its shore, and these would have given the students a limited sense of the resources at stake in the controversy over the City of Los Angeles’ diversions of water from the Mono Basin. Instead, I was able to take slides showing the lake’s tributaries from which the water is actually taken, and the brim-full Los Angeles Aqueduct alongside the virtually dry Owens River bed.

Taking the slides yourself is also desirable because the images should be integrated into the course and not seem to be just an accessory. This means you should approach slide presentations with the same degree of planning and preparation you devote to other aspects of the course. Slides

of an area taken for other purposes on last year’s vacation will likely appear in your classroom to be an afterthought (although I admit I have made travel plans with the purpose of taking slides for my course well in mind). You need to know in advance of taking them just what you want to convey with your slides.

When you visit your site, pick up any pamphlets and brochures that may provide interesting facts not readily available elsewhere, get maps of the area so you know precisely what you’re photographing, and talk to people there. Take notes. I try to make a record of each shot in a notebook so that my commentary in the classroom while presenting the slides can be completely accurate. Take pictures of signs, which can help orient the students and sometimes provide useful information (such as a sign

requiring protective clothing to enter the Summitville Mine in Colorado, which is now a Superfund hazardous waste site).

Take many, many slides.

In this respect, follow the example of professional photographers. Even if you are a relative novice as a photographer, you will then be able to select from two or three slides of the same subject the one that has the best lighting and composition. And allow plenty of time to get off the road, walk, and get to know your subject.

An inexpensive slide sorter will allow you to quickly select and organize your slides. The logistics of the presentation will depend to some extent on the audio-visual facilities built into your classroom and the support available from the university or law school audio-visual department. However, consider the advantages of a projector with a wireless remote that controls not only the direction of the slide carousel but focus as well. Also, identifying for your audience particular aspects of the image on the screen is best accomplished with a hand-held pointer using a laser beam.

My use of slides in the classroom has been very well-received by students. Since it takes very little time to show a good number of slides, and because they are directly related to the law we study, students do not consider them filler. Since they are taken by the teacher, the slides seem to demonstrate a greater involvement by the instructor in the subject, which students seem to appreciate. Many of my students in the natural resources law course also enroll in my seminar on local environmental issues, and quite a few make their own visits to nearby sites and take slides to use in their presentations. For these students, their connection with the real-world environment has been strengthened, and I believe for others the distance between the law we study and the environment it affects is shorter.

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*Showing slides in class may seem a step back to an old technology, but the medium has several advantages over videotape.*

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# Peer editing benefits you and your students

By Kathleen Magone

Peer editing can improve your life and increase your students' learning. You know that students learn more when they personally apply principles, rather than just take notes on them. But you're a busy person. Do you want to take the time to read a set of assignments, knowing that commenting on them will take you many hours? Or should you just rely on your final exam? Or maybe you already have the students do an assignment, but you're disappointed with the work they turn in.

The common writing project without peer editing goes something like this: You outline the relevant law, explain the assignment, perhaps give students a model, and set a deadline. Each student prepares a document. You evaluate the final product. It takes a lot of time, and many of the papers are only mediocre or embarrassingly poor.

When you add peer editing to the process, you and the students both will benefit. The process is simple: Students give each other structured, detailed feedback before an assignment reaches you for evaluation.

One benefit for the teacher is obvious: The paper you evaluate is nearly always much improved, so it takes you less time to read it, and you can write more positive comments. And you make progress toward your goal of encouraging your students to learn.

The students benefit, too. They learn how to give and receive constructive criticism. (I discuss this specifically in class, giving examples of comments attorneys may use in practice.) They also benefit from hearing other students' viewpoints and questions on issues they might not have considered or thoroughly understood.

Students improve their organizational skills with feedback, and they begin to recognize the importance of process: outlining, drafting, and redrafting, rather than cranking everything out at once.

Comments from students about peer editing are almost uniformly very positive, assuming you take the time to structure it well and prepare students for the process. Their work product is indeed improved, and their understanding of the legal issues greater.

Fine. You think this sounds like an okay idea. But how do you get your students to succeed at peer editing?

Students' initial complaints are the same every year: How can I edit something when I don't know anything about it? Why don't *you* read the first draft and the final draft? Can't I just do it myself? (Implication: I don't trust anyone else and don't want anyone else to have the benefit of my work.)

My answers are consistent each year: I will give you the tools with which to edit. I don't read both drafts because I don't have time to evaluate the assignment twice; instead, I will be available to answer your questions as you peer edit. Everyone must participate; I don't want to see any new

concepts in the final product that you haven't discussed when peer editing (in other words, no holding out). My goal is to have everyone learn to do this particular thing well, and if everyone succeeds, I am happy to give everyone good grades.

For peer editing to succeed you must put in some advance effort. Presenting it as a part of your course by listing it in your syllabus gives the students notice of its value. I list the specific dates on which peer editing will occur in class, and include a statement of exactly what the students must bring to class for editing.

The particulars of the process you decide to use are variable, but should include at least the following details:

- The size of the student groups. I have tried pairs, triads, and groups of four and

five; my best experience is with triads.

- Whether you will assign the students to groups or let them self-select. Allowing students to arrange their own groups may result in disparity in abilities among the groups, but provides potentially greater comfort. I prefer to group students to include a mix of men and women, a variety of ages, a range of abilities, and a blend of other characteristics, but am aware of the potential concerns of isolating any person by making him or her the "token X" in the group.

- Whether students will work within the same group the entire semester or change for each assignment.
- The tools you give your students, whether written or oral.
- The format of the peer editing process. One option is to have everyone trade papers, so that A reads B's, while B reads C's, and C reads A's; A then discusses with B what she thought of B's paper. This seems to be less efficient, as A won't hear B's comments about C's paper and learn from them. A better alternative is to have everyone read A's paper and talk about it together, then move on to B's and C's papers.

Students' first inclination in peer editing is to look only for grammar and spelling errors, rather than confronting larger issues of organization, development, and substance. To prepare students to be effective peer editors, I provide a formal checklist for each assignment and go over it in detail. I explain that this checklist is closely correlated with the evaluation of the product. The checklist breaks down what I want to see in each part of the document, and the students use it to go over their peers' work.

As I circulate around the room during the editing process, I find that nearly everyone stays on task the entire time, and everyone contributes comments in writing and orally.

After the editing process, students then must work alone on the final product without help from others. This limitation provides an incentive to use the editing time wisely.

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*Comments from students about peer editing are almost uniformly very positive, assuming you take the time to structure it well and prepare students for the process.*

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# Institute plans new format for 1997 conference

For the past three years, the Institute has hosted conferences for law teachers, *The Science and Art of Law Teaching*. Each conference featured six workshops presented by excellent teachers. Small groups, in-depth examination of issues, and exchange of innovative teaching tips formed the basis of these conferences.

Perhaps the greatest benefits of the conferences were unplanned. Dedicated law teachers connected with kindred spirits from other law schools around the world. The stimulating environment at the conference and the beauty of the Pacific Northwest helped participants to develop ongoing professional relationships and friendships.

The participants at the Institute's conferences came from across the United States and Canada as well as from Puerto Rico, England, and Australia. They were classroom teachers, clinicians, librarians, and deans. Although a few characterized themselves as "beginners," all had numerous years of experience as teachers. (One participant was present at the dawn of legal education and helped invent the Socratic method; Gonzaga's Dean Lew Orland, who began teaching before the invention of rock and roll, has attended every conference.)

Reviews have been overwhelmingly positive. Here's what a few participants told us:

- "This workshop was excellent. The level of presentation and discussion was stimulating. I've gained an insight to students that will improve my teaching."
- "The small-group sessions were excellent interchanges."
- "At the risk of too much discussion, I wanted more time in virtually all the sessions. Yet, I also appreciated the variety through the course of each day."
- "Great, thought-provoking, revolutionary even."
- "Good concrete suggestions. She modeled many, if not all, of the types of methods for inclusion that she discussed."
- "Very interesting and helpful. I love having the collection of tips to take home with me."
- "One of the best conferences that I have attended in legal education. *Thanks!*"
- "Provocative but excellent."

We're flattered that the participants enjoyed the conferences and that they gained valuable insights about teaching. For the 1997 conference, we'll continue to do those things that worked so well: We'll continue our commitment to small, interactive groups, limiting enrollment to 50; we'll continue to ask participants to bring teaching ideas to the conference to share with their colleagues; and

## *One participant's experience:*

*By Deborah Young*

I am delighted to report the recent success of one of the techniques I learned at the Institute's 1996 conference. I assigned my Criminal Law students the task of graphically depicting the levels of homicide.

One student made a poster with parodies of cartoons, each depicting a different case we studied. Another made a leaflet (similar to those at the student health service), with the title, "Everything You Ever Wanted to Know About Homicide but Were Afraid to Ask." Another student drew beautiful illustrations in pen and ink; my favorite shows a man lying in wait with a knife behind the corner of the building, and is correctly labeled "Murder 1."

The students were allowed to work in groups or alone on this ungraded project. The class will vote on which illustration wins the prize.

The assignment accomplished three

important things. First, the students became excited about this 8:30 a.m. class in which they have been a bit sleepy. Second, the students assimilated the material in a way that they otherwise might have postponed until the end of the semester. Third, I can look at each illustration and tell exactly what the students do not understand. I had not anticipated how useful this third benefit would be.

My colleagues are astonished at the high level of work. As one of them said, "For no credit?"

Thanks again for such a good program.

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we'll continue to examine — in depth — issues related to teaching and learning.

But it's time to change the emphasis. The 1997 conference will focus on teaching practice and feedback. Each participant will teach a micro-lesson to a small group of colleagues-turned-students who will provide positive, constructive feedback. Consequently, each participant will receive direct feedback about his or her own teaching and will see other teachers demonstrate alternative teaching strategies.

Look for details in the spring edition of *The Law Teacher* and on the LAWPROF discussion list.

## ***The Law Teacher***

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