



GONZAGA UNIVERSITY

THE LAW TEACHER

Institute for Law School Teaching – *Promoting the science and art of teaching* – Fall 2005

Is God on Your Seating Chart? *Discussing Religious Beliefs in Class*

by Robert L. Palmer

Visit any law school class and one thing will quickly become apparent. Logic rules. Arguments are raised and dissected, weaknesses laid bare under the cool, white light of legal analysis. “What is a penumbra, and what does it have to do with the U.S. Constitution? How do we find these penumbras? Are they visible only during a full moon?” This sort of tongue-in-cheek questioning always brings a knowing chuckle from the students. Reasoning this way – the banter of linguistic logic – is comfortable, fun.

On top of logic (or perhaps underneath it), there is experience. We owe this to the legal realists who taught us to pay attention to the goings-on of the real world, where the rubber meets the road, so to speak. “Today in class we’ll discuss the death penalty. Let’s start with a few studies from the social sciences, check out what sociologists say about the racial imbalance on death row, or how social psychologists score the deterrent effect of the death penalty.” Hopefully experience and logic will align, and the students will leave class with a beginner’s level of understanding of the area of law covered.

But what about belief? What about God?

Belief is generally not subject to logical scrutiny. At its simplest, belief merely exists in the mind of the person holding that belief. Anyone who has taught in a law school for a year or two will have come across a student who, when pressed to back up an argument with logic, will reply with a frustrated, “I’m sorry, that’s just the way I feel!” That is belief. (Of course, I am drawing a false bright line here between logic and belief, but that line will serve for purposes of this discussion.) When confronted with a statement of belief, most of us law teachers will give a figurative shrug by saying little or nothing. We turn the page, starting a new volley with another student.

Belief comes from many sources—bias, ignorance, personal experience, parental teachings. Belief also comes from religion. This is a special category of belief, deserving special attention. Legally and culturally, religious expression has been highly protected in America, given its own safe haven. Most law students come to school fully aware of that safe haven (but not knowing how it might fit in with their education). Furthermore, most religions are based on

complex philosophical systems. A religious belief usually isn’t a knee-jerk, “that’s just the way I feel” belief, but is more sophisticated, part of a whole-world view of how to decide right and wrong and, more broadly, how to live life. And finally, numbers count. The student who says, “that’s just the way I feel,” probably stands alone in a classroom in his or her belief. A student who speaks from religious principle may well speak for others in the class.

A colleague of mine who teaches professional responsibility asks students each year to analyze a moral problem based on (1) the Golden Rule, (2) Rule Utilitarianism, or (3) some other value system with which the given student feels comfortable. The responses are written out and handed in. In each class, at least ten percent of the students base their answers on religious beliefs. I expect the actual percentage of students with deeply held religious values is greater than that, but some students feel constrained to use Rule Utilitarianism or the Golden Rule because they seem more lawyerly. The point is, like it or not, our students bring God to class.

Despite the fact that many of our students are religious, their beliefs often stay far below the surface, in part because religious concepts are not readily applicable to much of the law school curriculum. Contracts, property, tax courses, business organizations, and civil procedure fall into this category. The substance of these courses seems so far removed from religious doctrine that religion is rarely an issue. At the other end of the spectrum, religion is at the heart of some courses – first amendment, international human rights, and legal history, to name a few. In these courses, religion is usually treated as an abstraction, a “right.” This takes much of the edge off the conversation.

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Discussing Religious Beliefs in Class

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Religious and nonreligious students alike can speak freely, using the logic of “rights talk.”

The trickier courses are those that demand subtle, comparative moral/policy judgments from the students. To make these judgments, many students rely on beliefs as well as logic and experience. I have observed this firsthand when teaching courses such as Feminist Jurisprudence, Wealth Redistribution, and, currently, Law & Anthropology. The difference is profound. Whereas logic is a cool white light, belief, especially religious belief, can be red hot. Emotions run high. Voices rise and quake. Tempers flare. At its worst, religion can become oddly profane in a class, a taboo subject. To avoid this, I have tried a number of things over the years and have settled on a few rules of thumb.

Suppose in the middle of a discussion of gay marriage (or some other racy subject) a student says, “I’m a

Lutheran, and we believe

...” My first rule of thumb is that such a comment is not inappropriate. Still, it will probably land with a thud. The other students are simply not equipped to handle it. But handle it we will. I let the student finish, and then, with as little fanfare as possible, I point out that

this is a religious belief. I might say something like, “So this comes from your church?” After the student assents (usually with a tight nod), I will say, “Okay. Not everyone here is Lutheran. What can those people learn from this?” Often—usually, in fact—the student will compare the Lutheran view with some other aspect of our course, something with which the others feel more comfortable. Students begin to nod, or shake their heads, and the conversation moves on. We have succeeded in drawing the religious belief into the fold of the day’s discussion.

If the above doesn’t work, if our putative Lutheran cannot tell us how non-Lutherans can learn from his or her comment, I will ask one further question: “If we hold with the doctrine of separation of church and state, how can your belief properly inform the law?” Many religiously inclined students will take a stab at this by pointing out, for example, that voters carry their religious beliefs into the voting booth, and so we need to understand their beliefs if we are fully to understand the way the law is shaped. If no one else has a comment, I will let the subject drop there, passing on to the next argument, the next student. Meanwhile, our Lutheran likely is satisfied, having had his or her day before the court of classroom opinion. Keep in mind that this is belief we are discussing. It cannot be challenged with logic: to do so would be illogical. All we can do with

belief is know it for what it is and add it to our repository of experience.

That is my positive spin on religious belief in the classroom. I also have two negative rules, two never-everes. I never let a demeaning comment about a religion or a religious group pass without comment from me. I usually keep it low key, such as, “That’s a pretty sweeping generalization.” Or, “I’d want to see some proof before I went further with that line of reasoning.” The students learn quickly that religious put-downs are not going to win any converts.

My second negative rule is that I never give any indication of my own religious views. To do so would be distracting and overreaching, and would cause concern even for those students who hold the same beliefs as I. This does present a neat post-modernist quandary. My beliefs

inevitably will shape my classroom conduct, so why hide them? To maintain my power position vis-a-vis the class, goes the post-modernist argument. To this I plead not guilty. My goal as a law teacher is to convey the material in any given course, including policy, philosophy, black-letter

rules, background facts, and all else that is reasonably relevant. Expressing my beliefs would only get in the way of that goal. On the other hand, student beliefs, particularly religious beliefs, can be informative and bring us all to a deeper level of understanding.

“Keep in mind that this is belief we are discussing. It cannot be challenged with logic: to do so would be illogical. All we can do with belief is know it for what it is and add it to our repository of experience.”

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Learning Outside the Classroom: *Civil and Family Law*

by Marina Pogudina

It is a good idea if the teacher varies the students' work as much as possible, not only in the classroom, but, as well, their work outside the classroom.

In our Police Institute of Law, our schedule includes periods for this preparation of the students.

The task of the teacher is to encourage the students' out-of-class preparation, and rather than being given reading material, students are led to discover the main notions and categories in Civil and Family Law. Students are asked to think about differences in their meaning by taking positions and expressing opinions in the form of debate.

The students can learn from each other. They can check whether their ideas are correct by looking at charts and tables given in specialized booklets.

To activate the material learned, the students are also asked to make such charts and tables on their own. This form of out-of-class preparation stimulates the students and activates their learning outside the classroom. It helps students to study the material more deeply and in more detail than is possible to cover in seminars and colloquia without falling behind the syllabus or curriculum.

This discovery process is an important part of the methodology of the Civil and Family Law courses. The material learned in this way is absorbed much more deeply and memorably.

Visual aids are also of great help. In Russia we have a TV program that demonstrates how the Justice of the Peace tries Civil and Family disputes. We videotape these programs and use them in our out-of-class preparation with the students. The students are shown the plot only and asked to formulate their own decision on the case. Then they are

shown the Justice's decision. Do the students think the decision is correct or incorrect?

If necessary, the teacher points out the students' mistakes or faults and gives comments. The teacher is like the conductor of the orchestra who makes the orchestra play.

A legal clinic could provide another form of out-of-class learning, in which students get supervised practice and legal experience. Next year we are planning to organize a legal clinic in our Police Institute of Law. The legal clinic will be a small agency where students could give legal advice free of charge to any person who turns to them for legal help. In this way students get practice when they are learning law, including Civil and Family Law, and are prepared to put what they have learned into practice.

On the one hand, students could realize how Civil and Family Law really work. On the other hand, students

become aware of the areas they are weak in, and do further work on them.

Organizing out-of-class learning in this way will help students to apply the theory they have studied to their future work. In our opinion,

these forms of outside-the-classroom work are effective. They successfully complete lectures and seminars in the process of education to foster healthy lawyers.

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Submit articles to *The Law Teacher*

The *Law Teacher* encourages readers to submit brief articles explaining interesting and practical ideas to help law teachers become more effective teachers.

Articles should be 500 to 1,500 words long. Footnotes are neither necessary nor desired. The deadline for articles to be considered for the next issue is December 1, 2005. Send your article via e-mail, if possible. After

review, all accepted manuscripts will become the property of the Institute for Law School Teaching.

The Institute's address is: Institute for Law School Teaching, Gonzaga University School of Law, P.O. Box 3528, Spokane, WA 99220-3528; e-mail: ilst@lawschool.gonzaga.edu.

For more information, call (509) 323-3738.

Teaching Statutory Construction Through Reverse Problems and “Why” Problems

by Stephen L. Sepinuck

Like many teachers of statutory subjects, I like to use the problem method in class. By this I mean that most of class time is consumed by discussing fictitious factual scenarios and how the statute under study applies to them. I like this approach because focusing on cases would belie the fact that the primary authority is the statute itself and using problems compels students to confront the statutory text. It also gives me the opportunity to help them develop their statutory interpretation skills.

Many students struggle with statutory interpretation and most find statutes more difficult to analyze than judicial opinions. This is not surprising. After all, in many law schools the bulk of the first-year curriculum consists of common-law subjects, and thus students tend to have more experience with cases than with statutes. Beyond that, cases provide more information than statutes do. Most cases contain three basic components: a story (the facts); a moral or conclusion (the holding); and the reason therefor (the analysis). In other words, they give you a factual context and then tell you what the court is doing and why. Statutes, in contrast, give students only one third of that: the what. They typically do not either illustrate the facts to which they apply or expressly indicate the reasons underlying their provisions. Yet students do not and cannot fully understand a statutory provision until they supply the other two components for themselves. Reverse problems and “why” problems compel them to do this, and thus help demonstrate to them what they should be doing whenever they must analyze a statute.

In reverse problems, students are not provided with a factual pattern and asked to determine how the statute applies. Instead, they simply have the statutory text and are asked to provide an example of the facts to which it might apply. In other words, reverse problems ask students to come up with one of the missing components to understanding: the factual context.

Let me illustrate with some examples. Section 2-719 of the Uniform Commercial Code provides that parties are free to alter the normal remedies provided for in the Code, but that if the parties limit remedies and then circumstances cause the limited remedy to “fail of its essential purpose,” the Code’s normal remedies become available. When we get to this provision, I ask the students to come up with an illustration of when a limited remedy would fail of its essential purpose. Sometimes I do this as part of the assignment for class, sometimes I do it in class, giving students a few minutes either to think about it or to discuss

it with a classmate. Sometimes they flounder but most of the time they work hard at it and even have a bit of fun.

Here are some more examples, all involving the Uniform Commercial Code.

1. Section 2-719(3) provides that an exclusion of consequential damages is presumptively, but not conclusively, unconscionable with respect to personal injury from consumer goods. I ask them to come up with an illustration of when such an exclusion would not be unconscionable.
2. Section 2-312 provides that all sales of goods include a warranty

of title, unless “specific language or circumstances” give the buyer reason to know that the seller does not claim to have title. I ask them to illustrate circumstances that satisfy this standard.

3. Section 2-316(3) permits the warranty of merchantability to be disclaimed by language which “in common understanding . . . makes plain that there is no implied warranty.” I ask for examples of language which would commonly be so understood.

4. The definition of “inventory” in § 9-102(a)(48) includes “materials used or consumed in a business.” I give them a traditional problem involving a bank’s supply of stationery, toner cartridges, and deposit slips. After they realize that this is inventory despite the fact that it is not held for sale, I ask them for an example of inventory not held for sale that would be far more valuable.

5. Article 9 deals with a variety of situations in which tangible collateral can be transformed. Some generate “proceeds,” some involve “commingled goods,” and some involve “accessions.” All of these terms are defined in the Code. I like to identify for students a hypothetical debtor’s business and the collateral the debtor has offered, then ask the students for an example of each of these types of property.

6. On a slightly more difficult level, Article 9 applies to any transaction, regardless of form, which creates a security interest in personal property. See § 9-109(a)(1). After talking about when a transaction that purports to be a lease is

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Teaching Statutory Construction

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actually a sale, I talk about a sale of goods with an option to repurchase and ask them to isolate facts that would warrant recharacterizing the transaction as a security device.

Reverse problems help students decipher the text of a statute for themselves. In doing this, reverse problems show students one of the things they should routinely do when first confronting a statute. They thus help students learn to deal with statutes and become more comfortable with them.

“Why” problems work similarly. They ask students to identify the reason or reasons underlying a provision. In other words, they ask why a statute does or does not do something or why it distinguishes between two different situations. As with reverse problems, “why” problems compel students to supply one of the critical missing pieces of information they need to truly understand a provision.

I tend not to use “why” problems when the answer is obvious. I thus would not inquire why environmental laws prohibit dumping hazardous waste or why criminal codes treat murder differently from manslaughter. When I do use them, therefore, they can be very difficult.

For example, Article 9 of the Uniform Commercial Code has many rules on how to perfect a security interest and how to maintain perfection once it is established. One of those rules, § 9-315(d)(2), treats second-generation proceeds differently from first-generation proceeds. To illustrate, if Bank has a perfected security interest in Debtor’s forklift and Debtor trades the forklift for an elephant, Bank’s interest will attach to the elephant and will be perfected. If, however, Debtor had sold the forklift for cash and used the cash to buy an elephant, Bank’s interest would attach to the elephant but would likely become unperfected 20 days after Debtor received it. I ask students why the Code creates this dichotomy. The Code itself of course does not give the reason and neither do the official comments. However, the answer is discernable if the students take the time to think through the issue from the perspective of the relevant party (in this case, that’s not either Bank or Debtor, it’s someone seeking to acquire rights in the elephant from Debtor).

Here are some more examples, again all from the UCC (hey, I love the subject):

7. Section 9-615(a) provides that junior lienors can be paid out of the proceeds of a foreclosure sale but makes no provision for payment of senior liens. I ask students whether this is an oversight.

8. I ask why Article 9 does not indicate that junior liens are discharged when a senior secured party collects on the collateral (such as when the collateral is accounts receivable), as opposed to

when the senior sells the collateral.

9. At the same time as Question 8, I ask why Article 9 provides that a junior secured party who disposes of collateral takes cash proceeds of the disposition free of any claim of a senior secured party, see UCC § 9-615(g), but does not provide a similar rule for when a junior secured party collects on the collateral.

“Why” problems work well only if the students already understand both what the statute does and to what it applies. They therefore should be used last in statutory analysis. They do not provide the last word, however. I always follow them up by reminding students that the specific answer is less important than the process we used to obtain it. They should routinely take the time to identify the reasons that underlie statutory rules because only after they have isolated the rationale will they truly understand the rule. As a bonus, knowing the why makes it easier to remember the rule itself.

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CHANGE OF PERSPECTIVE: *Reflections of a first-year academic support professor*

by Janet W. Fisher

I worked in undergraduate education for eighteen years before seeking the career change that led to my current position as an academic support professor at a large urban law school. I served at various times as a full-time faculty member, a division head, faculty development coordinator, and associate dean for academic affairs. Even though one of my closest friends at the college was the head of the academic support program, I must admit that during all those years, I actually had a very imperfect understanding of academic support. While I readily referred students to the program and frequently saw the benefits of their involvement, I did not fully recognize the academic support program as part of the academic world. In many respects I considered it part of that other world of student services, providing necessary but not particularly noteworthy support to students.

Having just completed my first year in this new position, I suspect that law school academic support programs may be similarly misunderstood or undervalued. The purpose of this article is to increase faculty understanding of law school academic support programs by sharing some of the surprises and insights of my first year. I will address the following questions: Who comes to the academic support program? How do students get involved with the academic support program? How does the academic support program help students? How can doctrinal faculty support the work of the academic support faculty?

Who comes to the academic support program?

Perhaps the biggest surprise of my new position has been the number of very bright and very hard-working students who end up in my office. Students need assistance for myriad reasons. They may be struggling with personal problems, medical or psychological conditions, or learning disabilities. They may have been socially isolated at the start of law school and not have accessed the commonly shared body of information that helps first-year students acclimate to law school culture. English may not be their first language. Some are very bright but are accustomed to getting by with disorganized thinking and writing. Others find themselves overwhelmed by performance anxiety when confronted with exams. First-year students are often reluctant to abandon undergraduate study techniques that are not particularly productive in law school or they may have seriously underestimated the level of rule mastery and analytical skills necessary to excel on law school examinations. Some are already quite accomplished in other fields but don't immediately discover that a different set of skills is necessary to succeed equally well in law school. Many of these students have worked tremendously hard and are devastated by their failure to achieve more positive results.

How do students get involved with the academic support program?

Contrary to my original expectations, only about one-third of the students with whom I work come to the program because they are on academic warning or probation. While institutional policies vary, there are typical routes students take to the academic support program. Some may have been invited to the program because they had lower LSAT scores than most of the entering class. Other students may be referred during the first semester by their legal writing instructors. At the beginning of the second semester, first-year students who received unsatisfactory grades may be directed by the dean's office to work with the academic support program. Second-year students usually come as a condition of academic probation or warning status. Some institutions run "closed" academic support programs that are available only to a limited number of pre-selected students. My institution welcomes walk-ins because we are committed to helping any student who strives to learn more effectively and because an open-door policy reduces the stigma that can attach to an academic support program.

How does the academic support program help students?

One of the most insightful observations about how the program helps students came from a first-year student who said that she liked working with the program because "it gave her hope." Encouraging students may be one of the most significant things academic support programs accomplish because it is difficult to overstate the uncertainty, stress and—in some cases—actual depression experienced by law students, particularly those in their first year. The academic support program serves a valuable role by providing supportive attention at strategic moments. The program also can make referrals to mental health counseling or to the dean of students' office in serious situations.

Academic support programs also play a significant role helping first-year students acclimate to law school teaching methodology. Programs provide written materials and supplemental classes that teach academic skills. At the beginning of the second semester we see many first-year students who are very worried and discouraged by their grades. Work with these students involves helping them to understand their learning styles and to assess their study strategies.

The academic support program also helps students to adapt to law school testing methodology. For most first-year students there is nothing intuitively obvious about how they will be evaluated. Many do not apprehend that the hypotheticals developed in class by faculty provide valuable insights into the material that will appear on the examina-

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Change of Perspective

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tions. Even students who have been shown sample questions and answers often do not adequately assess the knowledge and skills they will need to perform well under exam conditions. The academic support program provides sample exam questions and constructive feedback on practice answers written by students. We also work with students on exam-taking strategies. Many students mistakenly believe that they should approach law school multiple choice questions exactly as they approached the LSAT. The program helps students recognize and prepare for the level of rule mastery required to do well on law school multiple choice questions.

Second-year students who are on academic warning or probation typically are offered the same range of services described above because in most cases they failed to develop the necessary insights and skills during their first year. In addition, some academic support programs offer specific programs for minority students and bar examination preparation.

While many programs provide all their academic support in a classroom setting, at my institution most work is done individually with students. Face-to-face meetings serve to personalize our very large law school and to increase our ability to determine the factors that may be keeping the student from performing up to capability.

How can doctrinal faculty support the work of the academic support faculty?

In my new position I quickly discovered the dilemma all faculty face with regard to first-year students. Law schools need to keep their bar exam pass rates high and should not continue to enroll those students who have demonstrated that they have no reasonable likelihood of passing the bar exam. [At the same time, law schools shouldn't admit students who don't have the potential to succeed, and, once admitted, those students deserve a reasonable chance to succeed.] At what point is it fair to make the determination that the student who was admitted on the basis of demonstrated potential has since demonstrated that he or she is unlikely to pass the bar examination? Clearly, some students won't be returning for a second year, but references to who isn't going to "make it" are often painfully audible early in the first year. Too often

first-year students feel that their law school careers are over almost before they've begun and believe that certain members of the class are almost predestined to succeed while others are marked very early on for failure.

Doctrinal faculty can support the work of the academic support faculty by not contributing to this "survival of the fittest" culture. If first-year students venture to your office for advice, don't ask what their LSAT score was. Many students will perform consistently with their scores but some students will perform well below them, while others will significantly outperform their scores. It's not helpful for first-year students to believe that their LSAT score is their destiny.

Try to be reasonably optimistic with students who earned poor first semester grades. The conclusion of the first semester is far too early for students to believe that all is lost. Students will be devastated if they come away from your office with the impression that you don't think they can make it. That may be what you think, and ultimately you may be proven correct, but the scores on those December exams are not always accurate predictors. Some students are slower to adjust to the culture and academic methodology of law school but eventually will outperform those who showed early promise.

Avoid telling students who seek your assistance that their only problem is that they need to study harder. Most students would benefit from studying harder, but that is not usually their only problem. Send them to us, and we'll try to assess the student's situation.

Doctrinal faculty and academic support faculty may approach their work from different perspectives, but we share the responsibility for creating an effective learning environment. Academic support faculty are eager to explore common ground with doctrinal faculty. Engage us in conversations about teaching and learning. We can learn from your experiences in the classroom, and you may find that our experiences can provide you with new insights on how to more effectively reach all of the students in your classroom.

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Recommended Law Review Articles

Lawrence S. Krieger, *The Law School Experience: Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002).

Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F.L. REV. 839 (1997).

Cathaleen A. Roach, *A River Runs Through It: Tapping into the Information Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667 (1994).

Ellen Yankiver Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?* 73 UMKC L. REV. 497 (2004).



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INSTITUTE FOR LAW
SCHOOL TEACHING

— Promoting the science and art of teaching —

Twelfth Summer Conference

June 2-3, 2006

**Chicago-Kent College
of Law
Chicago, IL**

Inspiring Students and Facilitating Learning

The Institute for Law School Teaching is pleased to announce that its 2006 summer conference will be hosted and co-sponsored by Chicago-Kent College of Law. The conference will be held on June 2-3, 2006, and will provide registrants with strategies and techniques for directing and facilitating the learning that occurs both inside and outside the classroom.

For more information and advance registration, please go to the Institute's website at: www.law.gonzaga.edu/ilst. We hope to see you in Chicago.

Structure of the Conference

During each session, three or four workshops will run simultaneously. Participants will be able to tailor the conference to fit their individual interests by choosing which workshop to attend during each session. The workshops will address many aspects of learning in legal education, and discuss how law teachers can facilitate this process.

Benefits to Participants

The workshops will present innovative materials, alternative teaching methods, new technology, tools to enhance student learning, and ways of restructuring legal education to foster healthy lawyers. Each workshop will include materials that participants can use during the workshop and when they return to their campuses. In addition, the conference will facilitate informal interaction among creative teachers who love their work with students. Participants should leave the conference with the inspiration and information to apply the new ideas in the courses they teach next fall. In short, the ultimate goal of the conference is to help the participants improve their teaching and their students' learning.

Spring is a wonderful time of year in Chicago, and we encourage you to combine some vacationing with your work at the conference. We will provide more details regarding websites and information links as we get closer to the conference.

Registration and Deadlines

Attendance will be limited to 100 participants to facilitate small-group experiences. The roster will be filled in the order that the Institute receives the registration form and conference fee. We are offering an early registration discount of \$375.00 for those who sign up before December 1, 2005. Registration received after December 1, 2005 will be at the regular rate of \$450.00.

Lodging and Transportation

Participants are responsible for their own travel arrangements. For more information and advance registration, please go to the Institute's web site at: www.law.gonzaga.edu/ilst.

Using E-mail to Reinforce Learning

by Ron Brown

Here is a scenario that I suspect almost every law teacher has experienced. A puzzled student rushes up at the end of class, intercepts you while you are walking to your office, or comes to your office. The student propounds the question that seemed unsolvable. Patiently you explain, perhaps even involving the student in a little Socratic dialogue. Some time later, you again encounter the student. Perhaps it is in a classroom setting. The very same point comes up. You, and the student, anticipate a wonderful moment because the student really knows this, but what comes out is wrong. Somehow the right answer has been lost or garbled. You know it was brilliantly presented and the student had it at that point. What happened? What else could you have done? I have a simple suggestion that has an additional benefit of modeling good lawyer behavior for the student.

I ask the student to send me an e-mail confirming our conversation and the points covered. In other words, shortly after our conversation, the student should sit down before a keyboard and put into his or her own words the question posed and the solution. It is good lawyer behavior because lawyers often need to confirm points they've worked out with others. It is also a good learning experience because the writing forces them to think through what they heard, rephrase it, and type it out. This is a different type of learning experience than merely listening or even taking part in a discussion. Moreover, I get the chance to read what they've written to make sure they've gotten it right

and, if not, to correct them immediately. If necessary, we can exchange a few e-mails to be sure they understand. They can add these e-mails to their notes for review when its time to study for exams. This simple approach adds immeasurably to their long-term learning. It is also efficient because they won't need to ask the question a second time and they may even share the e-mail with their friends and study partners.

E-mailing is also something that they are likely to do. Most students are going to be sending e-mails within the day following your meeting (although hopefully not during your class). Sending out one more e-mail isn't that big a deal to them. And it can have the added benefit of breaking down any reticence a student, particularly a 1L, might have had toward interacting with the professor. Moreover, a private e-mail is much less intimidating than posting on a discussion board. As for the professor, asking for confirming memos does not create too big a burden. The number of e-mails is unlikely to get too large and the e-mails can be read and commented on quickly. The time and effort required is justified by the positive results.

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Colloquia Instead of Seminars?

by Thomas G. Field, Jr.

Aside from limited enrollment's tendency to spark more class discussion, and the need to grade papers instead of exams, seminars differ little from other law school classes. "Colloquia," however, commonly defined as "seminars led by different lecturers," are truly distinct.

More than a decade of experience has convinced me that student lectures, as the term signifies, yield better papers. Colloquia also, of course, offer enhanced opportunities for students to polish oral communication skills.

With respect to substance, students who know what all their classmates are doing can better share useful information. That occurs even when topics lack strong substantive relationships. Benefits only increase when each participant makes two presentations—something possible when the first is based on a preliminary outline and the second is based on a rough draft.

Substance aside, student presentations typically spark harder work and livelier discussions. Indeed, students disinclined to excel may work harder for peer approval than

for grades. Most also enjoy learning from, as well as teaching, classmates. I have found, perhaps because they are motivated at least in part by mutual respect, that students evidence genuine interest in each others' work.

Only two difficulties seem likely.

First, the need to coordinate and schedule presentations isn't trivial. I'd be happy to discuss strategies for addressing that with anyone interested. The syllabus for the colloquium I offered most recently is online at <http://www.piercelaw.edu/tfield/IPCLSyl.htm>.

Possibly the largest challenge, as when teaching someone to ride a bicycle, is to know how and when to let go. Most problems can be spotted by requiring students to submit outlines and drafts in advance. Once a class begins, however, faculty must be prepared to tolerate a sometimes painfully large amount of floundering to avoid taking over the class.

Thomas G. Field, Jr. teaches at Franklin Pierce Law Center. He can be reached at tfield@piercelaw.edu

[From] The Learned Hand

Has something ever occurred in your classroom that left you uncomfortable or unsure whether you handled it well? Has a student's request for advice left you wondering how to respond? Perhaps you want suggestions on how to deal with student ambivalence about, or hostility to, a particular active teaching technique or active learning exercise. In this column the Institute's co-directors and advisory board respond to requests for suggestions from law teachers. If you wish to submit a question please send it to ilst@lawschool.gonzaga.edu.

How can I provide a more intimate, meaningful class for my large classes (average 100 students)?

Master the names and faces of everyone in the class. Then make frequent cross-references to important points made earlier by other students in the class, and include the name of the student who made the point. Try to call on more than just a few students each class, and make sure that you are calling on students from all different parts of the classroom. Consider the creation of "law firms" consisting of three or four students who are sitting next to each other, and let them handle your questions as a team.

*Daniel Keating
Washington University at St. Louis*

Pair and share is one easy tool of a larger arsenal. If I ask a question to a class of 100 students and am met with silence, I ask them to take a minute to discuss it among themselves. The classroom is immediately bursting with 50 conversations (sometimes not directed at the problem, but I influence that by walking among them and listening to their conversations). Having rehearsed and shared their ideas in friendly, intimate small groups, they emerge energized and a little more confident about sharing an idea with the larger group.

*Charles Calleros
Arizona State University*

The best technique I know for "shrinking" a large group is the "think, pair, share" approach (most of you are familiar I think), wherein the teacher takes about 5 minutes in class to have students who have already considered a question/issue pair up in their seats with a neighbor and speak for one minute (max 2) to the partner about what they really think about the issue/situation. The teacher then calls time, and the roles switch, with the original listeners now speaking to their partner about what they think, for roughly the same amount of time. Teacher calls time again, and then asks people to contribute thoughts from the sharings to the class, perhaps writing them on the board if it's an issue to which you want to devote more time to. The pairing gives a welcome break from the large class format, creates an opportunity for EVERYONE to say what she thinks without editing, and totally changes the energy in the room (from constrained to unrestrained). I use this in large groups of

lawyers in CLEs as well, really lights up the room.

*Larry Kreiger
Florida State University*

1. Divide up the class into judge and advocate groups in a moot court exercise and, with guest professors or attorneys, supervise smaller segments of the class concerning their potential arguments. Then have the class engage in the exercise.

2. Ask a question and have everyone in the class write down a response. Then have the students either discuss or read the responses to a neighbor in a "pair/share."

3. In classes that are longer than one hour, stop halfway and give the students a "note-taking break"—an opportunity to catch up on and to organize their notes in small groups. Facilitate by asking what were the important points of the class up to that time or how the students would address a problem arising from the first part of the class.

4. Hold periodic "extra optional" review sessions of 15 to 20 minutes in length for smaller groups during the semester. Divide up the class based on a random, objective method (e.g., in alphabetical order). Go to a classroom where everyone can sit in a circle, if possible. Emphasize that the classes are entirely optional and will consist of problems and questions from the students. (If helpful, tape the sessions so everyone in the class can have access to the information.)

*Steve Friedland
Nova Southeastern University*

Even in a big class with fixed seating one can occasionally use small groups as a learning device. Prepare an exercise that would involve small group brainstorming and outlining some particular area of law. Have them turn their chairs and face each other in groups of six or eight. Each group appoints a member as the reporter for the group. When they have completed their short exercise, have the reporters report and get the material on the board in the form of an outline of what would have been the subject of your lecture. This is an active and participatory learning method that can be used to develop most anything that is normally the subject of lecture.

Another solution is for faculty to quit teaching students in classes of 100. Our faculty developed teaching load standards that allow credit for teaching a second section of a class in the amount of 50% of that for teaching the first section. The same standard also allows a teaching load bonus if a faculty member uses substantial assessment and feedback in the class as opposed to a single exam at the end of the semester. Consequently, faculty have real incentives to teach in smaller classes allowing more assessed exercises.

*Greg Munro
University of Montana*

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The Learned Hand

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How can I effectively and gracefully respond when a student gives a wrong or misdirected answer to a question to let other students know the responding student is off track without embarrassing the student?

The number one thing is to not make the student feel stupid. If as a teacher you say or do anything that makes the student feel foolish, you've not only lost the trust of that student, but of much of the rest of the class. If you make it clear that you understand why the student might think what they did before steering the student on the right course, the student will feel that you are on their side and will continue to work hard in your class.

*Daniel Keating
Washington University at St. Lewis*

Often (usually!) the misdirected student is not the only one in the classroom who doesn't understand a particular point. I sometimes ask for a show of hands as to (1) how many students agree with the initial answer, (2) how many students disagree with the students' response, and (3) how many students aren't sure. Assuming that there are significant groups of students in all of the above categories, the professor then can engender a dialogue between the different groups ("Why do you disagree?" "Are you still sure about your original answer?"). This often helps the student with the incorrect answer feel less isolated and also may encourage the students to continue this discussion among themselves outside of class. This only works, though, if the student is not really off base all by himself, although even then the professor might be able to honestly note the fact that this is an answer that has been given before (or that some judges have gotten wrong as well).

*R. Lawrence Dessem
University of Missouri-Columbia*

One solution is to respond to the student by saying "So you think. . ." and then repeat what they said followed by a silence to let them think. Often, they will realize there is a problem with what they have said and may think out loud to correct it. If not, say "Let's examine that" and use the Socratic method to guide them through the shoals. It is never necessary to say the student is wrong. However, if what the student said is wrong and you suspect the class buys into the erroneous information, a good option is to say "I'll bet most of the class would agree with you, and (with humor) you are all wrong." That will draw a laugh and anticipation of the correct information which you can provide.

*Greg Munro
University of Montana*

When we can make this point honestly, we can really put confused student minds at ease by admitting that we suffered from the same confusion ourselves when encountering a case or issue the first time around: "You know, that's how I interpreted this language when I first read it. The court is not making its point as clearly as it could. But other parts of the reasoning suggest a much narrower holding. Why do I say that?" After all, if the professor took a few wrong turns when he or she first encountered the case, the student has nothing to be ashamed of, but the professor has made it clear that further analysis will take the class in a different direction. Sometimes I even prepare the students ahead of time for some predictable miscues on their part by revealing that I was capable of the same thing: "How many of you had to read this case about six times to make any sense of it? When I started teaching this case years ago, I realized that it was perhaps the most difficult page and a half in the casebook, so I looked back at my student notes to see how I briefed this case for class back in law school . . . and it turns out that my brief was hopelessly confused. But I overcame my confusion during class discussion and outlining, and I hope we can start to make sense of it together today, even if we have to struggle a little and take a few wrong turns along the way."

*Charles Calleros
Arizona State University*

1. In body language and response, make it no big deal.
2. Say, "That is not quite right, but let's examine why...."
3. Tell the student that the answer is incorrect, but then explain why, with the same student's help.
4. Say, "That is not correct." Then ask the same student follow-up questions, giving the student an opportunity to offer a correct answer and save face (if applicable).
5. If there are repeated incorrect responses, follow up through a subsequent e-mail message to the student, inviting the student to discuss why he or she seems to be having some difficulty.

*Steve Friedland
Nova Southeastern University*

Sometimes the error results from an ambiguous or unclear question. When that is plausibly why the responding student is on the wrong track, then the teacher can take responsibility for it by saying something like: "Interesting point, but I am sorry, I must not have been clear in what I was asking. Let me rephrase." This takes the heat off the student and simultaneously humanizes the instructor. However, this approach will not work—and will seem disingenuous—if the question was clear and the student was just plain wrong.

*Stephen L. Sepinuck
Gonzaga University*

A Force Field Approach to Policy

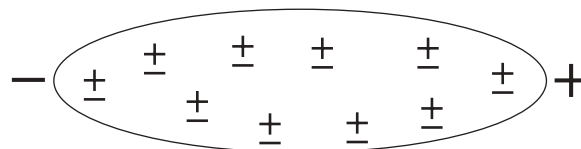
by Curtis Nyquist

I hold a “conflicting considerations” understanding of policy which views law as an attempt to balance or mediate policies perennially in conflict. In U.S. law over the past fifty years, conflicting considerations has undermined an earlier view of policy that saw legal rules as derived from policy choices in a one-on-one way, but didn’t see policies as conflicting. While conflicting considerations may be controversial for some (e.g., Kantians), it is important that our students understand the conflicting considerations idea whether we as faculty are persuaded by it or inclined to rail against it. For better or worse, it is part of contemporary legal consciousness.

As an illustration of conflicting considerations, consider the rights of a holder in due course (HIDC) of a negotiable instrument suing the issuer of a promissory note when the issuer raises a defense. HIDC status prevails over most defenses, but certain defenses, the so-called real defenses, are good against all parties, even a HIDC. For example, if the issuer has a mere failure of consideration defense (the widgets were defective) the HIDC wins, but if the issuer has been tricked into signing the note by “essential” fraud (the issuer reasonably believed she was signing a receipt when in fact she was signing a \$50,000 promissory note) the HIDC loses. A conflicting considerations analysis says that in every case where the plaintiff claims HIDC status and the defendant raises a defense, policies are in conflict.

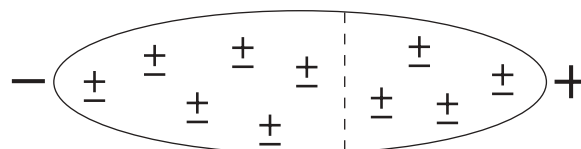
On the one hand, the policies supporting the HIDC affirm the importance of supporting markets in negotiable instruments by encouraging purchasers to pay a relatively high price as compared with the price paid for the assignment of a simple contract right. On the other hand, the policies underlying the defenses are as myriad as the defenses (protecting buyers of shoddy goods, protecting victims of fraudulent misrepresentation, etc.).

In the classroom I teach conflicting considerations through a force field approach which pictures the conflict for students. To introduce force field analysis I ask students to recall the grade school magnetism experiment where iron filings are scattered on a sheet of paper and two magnets are placed under the paper with the opposite poles facing each other. The iron filings form a football shape. I then tell the students to forget magnetism but to remember the shape of the field and to think of the poles as creating conflicting forces within a field:



Applying a force field analysis to conflicting considerations shows us that policy (+) is in conflict with policy (-) throughout the field. In the defective widgets case, for example, if the policies supporting the HIDC are represented by “+”, then “-” represents the policies underlying the defense. The Uniform Commercial Code rule regarding personal defenses (i.e., a HIDC takes free of personal defenses while a non-HIDC takes subject to them) draws a line in the field:

Force Field A



In cases positioned to the left of the line, the plaintiff has failed to establish HIDC status and therefore the defense prevails, while in cases to the right the plaintiff has established HIDC status and therefore cuts off the defense. A force field analysis emphasizes that the two forces conflict throughout the field and as a general matter courts have no choice but to inflict harm on one of the parties. If the court decides the plaintiff qualifies as a HIDC, then the defendant must pay for the

defective widgets. If the plaintiff fails to qualify (many of these cases involve good faith purchasers tripped up by the technicalities of HIDC status) then the defense is effective. Furthermore, I point out to students that the line in the force field is drawn by courts and cases are positioned in the field by courts. Even when a statute applies (the examples in this essay involve U.C.C. Article 3) the statute is interpreted and applied by courts.

Judicial opinions typically discuss the policies supporting the outcome in the particular case but seldom mention the conflicting policies. In the defective widgets case, for example, if the court decides the plaintiff qualifies as a HIDC it will discuss the importance of the HIDC policies but the policies supporting the defense often go unmentioned. And in our teaching, I suspect, we tend to empha-

“A force field analysis emphasizes that the two forces conflict throughout the field and as a general matter courts have no choice but to inflict harm on one of the parties.”

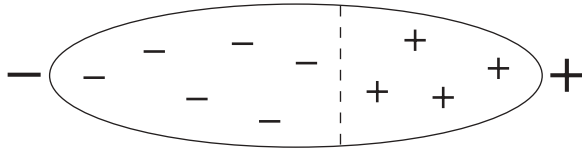
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A Force Field Approach

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size prevailing policies and neglect conflicting policies. It is hardly surprising that our students tend to think of adjudication like this:

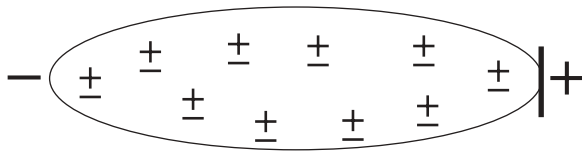
Force Field B



In my view, Force Field B is incorrect. Policies are not negated by conflicting policies; they do not “retreat from the field” but are merely deemed less persuasive in the particular case. If our teaching discusses policies in isolation, but never displays the conflicting policies, then we mask the complexity of law and discourage our students from exploring the law’s gaps, conflicts, and ambiguities.

When a court decides that a defense in a negotiable instruments case is a real defense, the defense captures the entire field:

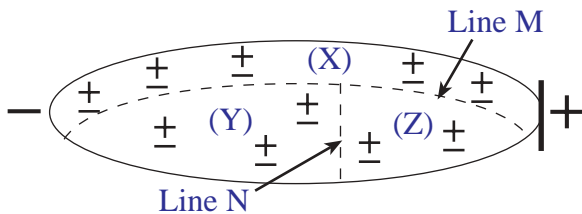
Force Field C



Since a HIDC takes subject to real defenses, all cases are positioned to the left of the point at the right end of the field. There are no cases to the right of the point. The policies supporting real defenses outweigh the HIDC policies, but even here there is conflict throughout the field.

Force Fields A and C can be combined to provide a picture of the rules on personal and real defenses and HIDC status:

Force Field D



Line M divides real and personal defenses; real defenses are above the line and personal defenses are below. In cases involving personal defenses (below line M) line N divides cases where the plaintiff qualifies as a HIDC (area Z) from cases where the plaintiff fails to qualify (area Y). In cases within areas X and Y the defense

prevails; either because it is a real defense (area X) or because it is a personal defense and the plaintiff was unable to establish HIDC status (area Y). In cases within area Z the HIDC prevails.

Among the various techniques for presentation of graphics in the classroom (PowerPoint, ELMO, overhead projector, whiteboard, chalkboard) I prefer whiteboard or chalkboard because they easily allow construction of the force field, erasure, repositioning of cases, and reworking the lines within the field. For students the experience of watching a force field being constructed reinforces the point that law is contingent and mutable; made and not found.

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How I Compete with “the Donald” and Teach Them to Write: *the Forensic IRAC*

by Suzanne Darrow-Kleinhaus

As a law teacher armed solely with books and blackboard, how can I compete with Donald Trump, who televises weekly the personal riches and power to be gained by boosting the company’s bottom line, all without so much as writing a post card? Still, I have no choice but to compete with “the Donald” for my students’ time and attention, even though what I offer seems so ordinary in comparison.

It’s no secret that good writing is little valued. A recent study by the National Commission on Writing concluded that a third of the employees in American companies write poorly and acknowledged that an employee could move up the ladder to C.E.O. despite an inability to compose a comprehensible letter. While a lack of writing skills may be acceptable in the business community, it is not acceptable in the legal profession.

Without minimizing the need to find long-term solutions to our students’ general writing problems, my job is to develop students’ writing and analytical skills in the shortest possible time to improve law school performance and bar passage. Working with students to achieve these goals, I have found the shortest distance to improved writing skills is improved reading skills.

Students need to see results to be motivated and they do when I initially shift the focus to reading rather than writing. Since students are far more willing to read than to write, this approach alleviates some of the pressure. Reading allows them to model their writing by following the examples of what they read. Each case is a paradigm for IRAC and another example of the process to be emulated. However, since most students are not trained to be careful, thoughtful readers who question the content and meaning of what they read, I show them how to do so by modeling my own reading strategies. In class, I think aloud about a case and share my questions and thought processes. Similarly, I point out the structure of the court’s analysis and how it follows the IRAC structure. After we’ve worked on reading skills, we are ready to move on to the writing process.

Here, too, the focus is performance-based: I provide practical applications in the context of substantive law. For several of the topics covered in class, I prepare a short hypothetical and require students to write a response. This has been particularly effective with students in my Contracts sections, where, in addition to covering the substance of Contracts II, I incorporate skills training. Over the course of

the semester, I require four writing assignments; the first assignment is for diagnostic purposes only, but the subsequent three assignments are graded and count toward the final course grade. For each of the questions, I provide sample answers. Typically, I’ll write two answers myself and distribute them in addition to one of the top student responses. This way students can see a variety of approaches to the same question and see that there is room for variation even while following the basic IRAC structure.

In addition to providing sample answers, I evaluate each paper according to a grading sheet which shows the precise point allocation. I make the grading sheet as detailed as possible in terms of the breakdown of the rule and the facts the students should have used in their analysis. This way, when they review their work they can see exactly where they gained or lost points.

When providing individual feedback on papers, I evaluate the student’s essay for substance and structure, and focus on the precise use of language, especially the use of

specific signal language in writing issues, statements of the rule, and analysis of the facts. Still, it is difficult to improve a student’s written analysis. Writing is an excursion inward and teaching writing requires nothing less than a trip inside the head of another. Teaching writing requires finding a way into students’ thought processes because the

problems they have in writing about the law are mirror images of the problems they have in thinking about the law. Further, a way is needed to “objectify” the process so that both student and teacher can identify what the student is thinking and correct flaws in the process without stigma.

Initially, I developed “forensic IRAC” to assist re-takers prepare for the bar exam. It uses the familiar “Issue, Rule, Application, Conclusion” structure of legal analysis to work with the student’s written product to see the internal thought process. Forensic IRAC works by examining each sentence the student has written in terms of its place in the IRAC structure of legal analysis. Now please don’t laugh or think I’ve been watching too many television crime dramas (even though I have), but I call the process forensic IRAC because the techniques I use are similar to those employed by crime scene investigators, accountants, medical examiners, and any of the forensic experts who go back over the trail of evidence to determine how that evidence led to a particular result.

Teaching writing requires finding a way into students’ thought processes because the problems they have in writing about the law are mirror images of the problems they have in thinking about the law.

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The Forensic IRAC

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While forensic experts rely on fingerprints, ledger books, and DNA, I use IRAC. I work with the student's written essay to figure out what the student was thinking that led to that particular response. By applying the mechanics of legal analysis to what the student has written, I can see where the student's thinking has gone astray. And if I can see it, the student can learn to see it as well.

While it is outside the scope of this essay to show exactly how a self-diagnostic using forensic IRAC would work with a student's paper, the process unfolds very much like the troubleshooting section of a technical manual that identifies system faults and provides possible solutions. The other part of forensic IRAC, and one which can be discussed here, involves sentence diagramming. Years ago, when students were taught grammar, they were shown how to diagram the parts of a sentence. While this technique has fallen into disuse, the principle of mapping the parts of the sentence to show how they work together is just as useful for showing how the parts of a legal argument are structured. It is insufficient to tell a student to organize an answer around IRAC without showing how it is done. In this way the process is objectified and the sting of writing a poor answer is somewhat ameliorated. It is very hard for anyone (this author included) to go back over what they have written and be critical of it. But it is essential in any endeavor, especially law school exams, and this process allows it to be a lot less painful and a lot more practical.

The process works sentence by sentence, where each is labeled appropriately. A sentence is either issue, rule (rule can break down to general statement, element, factor, definition of element or factor), fact analysis (fact analysis can break down into argument pro or con), or conclusion. This approach works particularly well when multiple issues are tested in an exam and the student has an almost impossible time learning to organize a response. Diagramming allows me to show the student how and where the issues have been mixed together.

For example, let's say I am working with my student Ben and we are reviewing his exam answers to a Contracts mid-term. We review each sentence he has written and identify whether that sentence was a statement of the issue, one discussing the applicable rule of law, or a sentence applying the rules to the facts of the particular case. In fact, we label each sentence with an "I", an "R" or an "A". The sentence must "fit" somewhere. This is useful for several

reasons. First, it "physically" identifies organization problems. If Ben has discussed the "facts" of the particular problem before he has recited the relevant "rule," then we find "A" sentences before there are any "R" sentences. Second, when we work sentence by sentence, we see what function each sentence serves in the IRAC equation. Ben

can see whether a sentence is repetitive, for which he will lose time and not gain any points, whether a statement is an analysis of facts because it connects law to relevant facts by means of such language as "because," or whether it is merely a recitation of the facts contained in the hypothetical, serving no purpose at all. By breaking down and labeling the sentences, Ben can "see" what he has written. But even more important, we can begin to see by examining exactly what Ben has

written whether he understands the rules and how to use them. By examining each sentence in the essay, problems can be identified at the appropriate step in the student's thought process. And once identified, problems can be corrected.

I have been using this approach for several years with much success both in preparing students for the bar exam and in improving law school grades. While this requires a considerable amount of work on my part, the benefits to the students make it well worth the effort. When they relate their excitement in finally connecting with the process of learning the law and share news of improved grades, I know that I have competed with "the Donald" and won.

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Why do you teach?

We are interested in knowing why you teach. Please tell us your story in 450 words or less. Send your story to the Institute at ilst@lawschool.gonzaga.edu.

Why I Teach

by Faith J. Jackson

My journey to teaching in the academy began as a law school administrator. I served multiple years as an assistant dean. But even during my administrative years, I was able to nurture my pre-law career interest in teaching. Years after teaching second-graders, I found myself providing instruction and direction to law students. The students were bigger, but the need to learn and to improve—on both of our parts—was still present. I continued this dual role as teacher and administrator for two years, but I ultimately returned to my full-time administrative position.

A few more years passed, but I felt more was needed from me. I felt that more could be given by me. In my decision to take a different route, I found that I stayed in education, and completed a White House Presidential Appointment with the Department of Education in Washington, D.C. Upon returning, I again found myself in the classroom. Perhaps there was a pattern developing. There was still a fit, but the teaching garment was now in need of adjustment. Some areas were now too snug, whereas other areas of my teaching needed tightening. I looked for answers in student evaluations, discussions with colleagues, and most of all, within myself. I can say with enthusiasm, that I have made adjustments. And if I am true to myself, as well as to my students, I will continue to make these necessary adjustments.

So, why do I teach? I teach because I know it is what I am supposed to do. Whether I was in the law school setting or not, I would be teaching. I enjoy teaching and most of all, what it provides. It allows me to be creative and innovative. Each week I bring new information to my students, and they present me with new information and ideas. We all continue to learn that viewing the same legal concept at a different angle will allow us to think, process, and analyze material differently.

I have come to learn that teaching, like life, is not utopian. Evaluations have been great, bad, and everything in between; very similar to life itself. Nevertheless, the overall experience of teaching has been rewarding. I enjoy it. I am good at it. I enjoy the interaction between me and my soon-to-be counselors. I embrace the remarks and responses of my students as we relate legal concepts to everyday life experiences. I observe and evaluate how they process and analyze my teachings and the teachings of their other professors. Instead of posing the question “If I stop, would it make a difference?” I rather answer the question “If I continue, would it make a difference?” My answer is yes.

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