

Introducing Students to Legislative Process and Statutory Analysis Through Experiential Learning in a Familiar Context

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I. INTRODUCTION – TEACHING LEGAL METHOD WITHOUT LETTING LAW GET IN THE WAY

Legal academics are fond of saying that they teach doctrinal courses only partly to introduce students to fundamental principles of law.¹ Particularly in the first year curriculum, they purport to use the legal subject matter largely

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1. I use the example of “doctrinal courses,” such as contracts, property, torts, and criminal law, because it may not be obvious to all readers—and certainly not to all students—that teaching doctrine in such courses is only one pedagogic goal and, indeed, in some cases may be a secondary goal. In the case of legal writing courses, it is probably more obvious that teaching doctrine is more nearly incidental to the primary goal of teaching legal method and skills of expression.

as a vehicle for teaching various skills of analysis, for helping students gain familiarity with important legal institutions and their methods of legislation or adjudication, and for developing in students a sense of judgment about viable arguments, ethics, and the role of an attorney. Most students, on the other hand, are distracted from this larger enterprise by a need to identify and assimilate legal rules that can be committed to memory.²

A fellow academic recently remarked that he persuaded his law school to permit him to teach labor law as a required first year course. The labor law course provided him with an opportunity to introduce students to an administrative agency, the National Labor Relations Board, and to show the interplay between the legislative, judicial, and executive branches in creating, interpreting, and administering a legislative scheme. He and his colleagues hoped that this first year experience would improve the students' performance in upper-division courses requiring an understanding of the role of administrative agencies. He was never certain, however, that his students shared his goals; they appeared absorbed in the task of identifying and memorizing rules governing labor relations, which diverted their attention from broader themes of legal institutions and their roles in the making and administration of law.

True, we sometimes teach legal doctrine not because it is a means to some other end, but simply because the doctrine contains important principles that every lawyer should know or helps form an intellectual foundation for further legal study. When an instructor introduces students to new legal rules as a means to teach analytic skills or other facets of legal method, however, the rules have a tendency to get in the way and capture an inordinate share of the students' attention and concern. Consequently, to keep our students' attention squarely riveted on lessons of legal method, I advocate an occasional resort to exercises set in familiar nonlegal contexts that help students develop the same kinds of analytical skills they might apply to a legal problem.³

In a series of exercises named *Rules for Monica*, I use the familiar, nonlegal context of parental rule-making to provide novice students with an

2. Instructors may encourage this mind-set by giving examinations that place a premium on the memorization and description of relevant legal rules, at least as a critical part of the analysis that forms a prerequisite to relevant fact analysis. If we really were interested in teaching and examining skills of legal analysis, we might more often give examinations that, for example, provide students with two brief judicial opinions and ask students to synthesize them, derive a rule from them, and apply the rule to new facts. Then, perhaps, the students could also discuss the extent to which each precedent is analogous to or is distinguishable from the new set of facts.

3. See Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 LEGAL WRITING 37, 49 (2001).

overview of skills they should master in the first semester: analyzing cases, synthesizing cases, outlining course material, and answering an essay exam question. The incremental parental decision-making in the exercises mimics common law development, and students perform the same kinds of analyses they might when working with common law developed by courts. Because the parental rules in the exercise are familiar to students, they tend to focus their attention on the methods by which the parent creates the rules. In doing so, the students derive the rules after interpreting and synthesizing the cases. The simplicity and familiarity of the rules allow the students to see the forest of the entire semester (case analysis and synthesis, outlining, and exam-taking) in a single class period without getting lost among the trees.

Rules for Monica originally consisted of four cases in which a mother incrementally developed rules for her daughter's social outings by expressing approval or disapproval of her daughter's actions. Each case invites students to identify critical facts, interpret ambiguous language, or synthesize the case with one or more previous cases, leading ultimately to exercises in outlining and exam-taking. The *Rules for Monica* exercises presented in my textbook on legal method and writing⁴ are analyzed in detail in the teacher's manual⁵ and in a separate article.⁶ To bring the exercise to life, I secured a grant from the Institute for Law School Teaching to produce a videotape. There, a mother and her teenage daughter acted out the four cases.

Interest in *Rules for Monica* is healthy, especially among legal method and writing faculty. In fact, more than 100 requests for the videotape were made in its first two years. Moreover, many of the students who have viewed the video and its exercises—ranging from pre-law students and orientation attendees to nervous first-year students seeking guidance and reassurance before exams—have found that *Rules for Monica* finally clarified legal synthesis or answered urgent questions about the essay examination process.

During my presentation of *Rules for Monica* at the Institute for Law School Teaching Conference in Spokane, Washington, in July 2001, one participant asked whether the exercise could be adapted to statutory analysis. That inquiry led to further grants from the Institute, as well as the addition of two scenes to the *Rules for Monica* video. While one scene introduced students to legislative process through role play, the other invited them to engage in statutory interpretation.

4. CHARLES R. CALLEROS, LEGAL METHOD AND WRITING, 133-34, 145, 167 (4th ed. 2002) [hereinafter CALLEROS, LEGAL METHOD].

5. CHARLES R. CALLEROS, LEGAL METHOD AND WRITING: TEACHER'S MANUAL 23-27, 28-30, 34 (4th ed. 2002) [hereinafter CALLEROS, TEACHER'S MANUAL].

6. Calleros, *supra* note 3, at 49-62.

Because I wrote this essay shortly after adding statutory analysis to the *Rules for Monica* videotape,⁷ and shortly before the beginning of the new fall semester, it is too early to tell whether the new legislative component of this workshop will be as well-received as the common law component. Nonetheless, readers may be able to gauge its classroom potential by reviewing the following discussion of the pedagogic objectives and techniques of both the common law and legislative components.

II. THE COMMON LAW COMPONENT

A. *Pedagogic Objectives*

As discussed in the other texts,⁸ the common law exercises in *Rules for Monica* are designed to introduce students to several concepts and skills critical to success in law school:

- the development of the common law through the resolution of disputes defined by specific facts;
- the uncertainty or ambiguity left by a judicial opinion, and the increased certainty that results from synthesizing two or more opinions addressing similar issues on different facts;
- the use of precedent and the flexible application of *stare decisis*;
- the process of summarizing and reorganizing case briefs and syntheses into a useful course outline; and
- the application of general rules, gleaned from precedent, to new facts, requiring an appreciation of the reasoning and policies underlying the rules and the judicial decisions from which the rules were derived, often inviting analogy or distinction between a precedent and a new set of facts.

Because the typical law school curriculum—particularly the first-year curriculum—is skewed toward common law case analysis, the skills and concepts addressed in the common law component of *Rules for Monica* reinforces lessons to which students are exposed daily in law school. These common-law exercises can be performed in a single class period of sixty to ninety minutes, allowing students to gain a quick overview of the intellectual challenges that will confront them throughout the first semester.

7. To obtain a copy of the newly expanded videotape, send an e-mail request to the author at charles.calleros@asu.edu.

8. See *supra* notes 3-5 and accompanying text.

B. *Technique – Content of the Common Law Exercises*

The common law exercises in *Rules for Monica* are described in detail in other texts.⁹ A summary of its common law component will place the legislative component in context.

In the first case (“Case #1”), a high school student, Monica, returns home at 11:15 p.m. after attending a high school football game, which was followed by eating and socializing at a pizza parlor with friends.¹⁰ Her mother, Carmen, disapproves of Monica’s actions, but Carmen’s expression of anger leaves ambiguities about the precise reasons for her disapproval.¹¹ Is she upset because Monica did not return immediately after the football game? Is she upset because Monica went to the pizza parlor after the football game? Is she upset because Monica “hung out” at the pizza parlor after eating her pizza? Is she upset because Monica returned home after eleven o’clock? Is she upset because Monica failed to inform her mother that she was going to the pizza parlor after the game? Is she upset due to some combination of these acts and omissions? Any of these interpretations of Carmen’s admonishments are reasonable.

The second case (“Case #2”), resolves the ambiguity and uncertainty of the disapproval by showing that Carmen expressed approval when Monica engaged in the same activities the following week, but returned home before 11 p.m.¹² By comparing the facts and results of the examples, thus synthesizing them, students are able to understand the holding of the first case more clearly and are better able to derive a general curfew rule.

Early in the exercise, students should be sensitive to the policy considerations that motivate Carmen to promulgate rules about Monica’s evening activities. Carmen’s pronouncements indicate that she places limitations based on concern for Monica’s health and studies. Carmen apparently wants to ensure that Monica has adequate time for sleep and homework.¹³ Quite reasonably, however, many students “read between the

9. See *supra* notes 3-5 and accompanying text.

10. CALLEROS, *LEGAL METHOD*, *supra* note 4, at 133.

11. *Id.*

12. *Id.*

13. Some students argue that Monica’s pronouncements about sleep and homework are not policy considerations but form the content of Carmen’s rules. In other words, Carmen would allow Monica to stay out later than 11 p.m. or to go out more than three times in any week, so long as Monica is caught up on her sleep and homework. This is a defensible interpretation of some of the cases, although it is not stated as a factor in the second case. In any event, to show a parallel to more formal legal doctrines, I try to steer students toward viewing the need for sleep and homework as general policy considerations that motivate

lines” of Carmen’s pronouncements and infer that she is largely motivated by her concern for Monica’s physical safety.

The third case (“Case #3”) adds a new wrinkle to Carmen’s rules: an apparent frequency limitation on Monica’s outings. Even though Monica returned home by 11 p.m. after two previous outings that week, Carmen does not permit her to go out, even for an early evening outing a third evening that week.¹⁴

In the fourth case (“Case #4”), Carmen not only permits Monica to go out for a third evening, but she *requires* Monica to attend the 50th birthday party of Monica’s uncle.¹⁵ Students are invited to interpret this holding as an exception to the frequency limitation—one based on the overriding interests of attending a significant family event.

By synthesizing the four cases, students can derive a two-part rule. One branch of the rule sets forth an 11 p.m. curfew, while the other branch generally prohibits more than two evening outings per week, subject to an exception for important family events. Other interpretations are possible, and Carmen’s rules are obviously in a state of continuous development, leaving room for speculation about how they will continue to grow and apply to different situations.

After analyzing and synthesizing the cases, students are ready to prepare an outline. The outlining exercise asks them to organize their outlines around Carmen’s rules, or around two or more elements of a single rule, and to use one-sentence summaries of the cases as illustrations of the rules. They can use their own outlines—or one that I have prepared for them if time does not allow them to complete their own—to apply the rules to facts of a new case in an essay examination. The examination facts raise issues about the first branch of Carmen’s rule and about the exception to the second branch:

- In the first part of the examination question, Monica returns from a date before 11 p.m. on Friday night. However, she chats with her date in the car, within Carmen’s view, until 11:15 p.m. Students should spot the issue of whether Monica satisfied the curfew rule by returning to the driveway of her home by 11 p.m. or violated it by failing to enter the house until 11:15 p.m. Students can argue this issue either way; their ultimate conclusion may depend on whether they credit Carmen’s stated policy rationale. If Carmen is truly concerned about adequate time for

Carmen to develop specific rules, relating to time and frequency, limiting Monica’s social activities.

14. CALLEROS, *LEGAL METHOD*, *supra* note 4, at 133.

15. *Id.* at 134.

Monica to sleep and complete homework, she will disapprove of Monica's actions; until she actually enters the home, Monica cannot get ready for bed so that she can get adequate sleep before rising early to do homework. If, on the other hand, Carmen's true concern is Monica's physical safety, Carmen may relax when Monica reaches the relative safety of the driveway, within Carmen's view and potential control. I welcome either conclusion, so long as students argue both sides of the question.

- The examination question continues with events that take place the next day, Saturday. Monica seeks permission to watch her brother compete in the first basketball game of the season. However, Monica has already attended two evening activities that week. Students should ask whether Carmen will view the basketball game as an important family event justifying an exception to the frequency rule. Of course, Monica's brother is a close family relative, and he probably views his first game of the season as a significant event. Unlike the unique event of an uncle's 50th birthday party, however, this is only the first game of many in the season. Most interestingly, Carmen announces that she does not plan to attend the game, a fact that students can use to argue both sides of the question. Perhaps Carmen does not see any special significance to the first game of the season and is unlikely to view the game as an important family event that justifies an exception to the rules that apply to Monica. On the other hand, if Carmen does not plan to attend, perhaps Carmen will view attendance by some other family member, such as Monica, as critically important to show family support for Monica's brother. Once again, I find either conclusion perfectly sensible. I am most concerned with students' ability to argue both sides.

When students complete this workshop, I hope they have a more complete understanding of the way in which the pieces of their daily academic exercises fit together to form a larger picture. I also hope I have fulfilled my obligations to give them fair notice of the general kind of examination that will form the basis of their grade and have instructed them in one method of preparing for the examination.

III. THE NEWLY-ADDED LEGISLATIVE COMPONENT

A. *Pedagogic Goals and Objectives*

1. Place in the Curriculum

If the curriculum exposes first-year students to statutory interpretation, the legislative component of *Rules for Monica* can reinforce the statutory analysis that takes place in doctrinal and legal writing courses. However, because statutory interpretation and legislative process are not emphasized in the typical first-year curriculum, the legislative component of the video may *complement* the broader curriculum as much as it supplements or reinforces existing study of legislation.

Indeed, the legislative component of *Rules for Monica*, particularly if presented early in the first year, provides an opportunity to comment on the limitations of the curriculum. The explicit or implicit message to students could be something like the following:

Our common law tradition was inherited from England. It is the single most distinguishing feature separating our legal system from code systems, such as those found in Europe, in which the legislature sets forth the law comprehensively in legislative codes.¹⁶ Common law decisions from previous centuries provide a historical record of the development of fundamental American legal principles, as well as a backdrop against which legislation has recently proliferated. For all these reasons, we will spend most of our time in the first year of law school studying case law that develops and applies common law, and somewhat less time on constitutional and statutory law. Although we have justified this early emphasis on common law, we should also give early notice that legal rights and obligations are defined to an increasing extent by legislation and by administrative rules and regulations authorized by legislation. To underscore this point, we will now complete the two-part workshop we began earlier when we conducted the exercises in common law analysis in the family setting. This time, we will immerse ourselves in the processes of making and interpreting a statute.

16. For an excellent comparison of the common law tradition of England and the development of code systems in France and Germany, see JOHN P. DAWSON, *THE ORACLES OF THE LAW* xi-xvii (Univ. of Mich. Law Sch. 1968).

2. Pedagogic Objectives for the Exercise in Legislative Process

An exercise in which students play the role of parents who act as legislators, codifying rules for their teenage children will not—and need not—acquaint students with the more arcane procedural details of a bill's passage. Such detail can be left to an upper-division course on legislative process or to a legislative externship. Nonetheless, an introductory exercise can expose students to fundamental differences between legislative and judicial lawmaking, the more complex political pressures that often influence the final content of legislation, and the effect that these pressures may have on the validity of later searches for legislative intent.

At a minimum, the exercise in legislative lawmaking should illustrate a fundamental distinction between legislation on one hand and judicial case law that develops common law and interprets enacted law on the other. In the common law component of *Rules for Monica*, Carmen plays the role of judge and develops common law rules incrementally by resolving a series of disputes about whether Monica violated a general standard of conduct. Similarly, in the statutory interpretation exercise, students, assuming the role of judges, add a gloss to statutory law by resolving a narrow dispute about the proper interpretation and application of a statutory provision to specific facts. In these exercises, the judicial resolutions incrementally add to the content of the law, but the judicial actions are circumscribed by partial deference to the court's precedent¹⁷ or to legislative authority.¹⁸ In the legislative process exercise, on

17. Early in the first semester, students should have at least an acquaintance with the doctrine of stare decisis, both from their doctrinal course work and especially from their work in a legal method and writing course. See, e.g., CALLEROS, *LEGAL METHOD*, *supra* note 4, at 51-52 (discussing the court system and stare decisis). Interestingly, the common law component of *Rules for Monica* serves mostly to show the flexibility of stare decisis. See *id.* at 55-64. It invites students to distinguish case #3 from case #4 and to develop an exception to what had seemed to be a fairly clear and straightforward limitation on the frequency of outings.

18. For discussions of the judiciary's responsibility to defer to the will of the legislature, subject to judicial review of legislation for constitutionality, see KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS* 21-23 (1999) (explaining that democratic principles generally require judges to treat the enactments of elected legislators as mandatory, rather than advisory, but leaving unresolved the question whether courts can refuse to enforce highly unjust or undemocratic laws in the absence of constitutional infirmity); see also WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION* 9-10 (3d ed. 2001) (arguing and demonstrating that modern conceptions of legislative authority in the United States and England developed gradually over several centuries as the doctrine of separation of powers solidified and the dominance of the common law gradually gave way to legislative primacy). Compare CALLEROS, *LEGAL METHOD*, *supra* note 4, at 44-47 (describing the interplay between common law and legislation, including a suggestion by the Navajo

the other hand, students study and evaluate the merits of proposed legislation designed to influence future behavior by addressing a sociological problem in a single, sweeping enactment.

As a second pedagogic objective, the legislative process exercise should expose students to political pressures and compromises. Students should feel the freedom to legislate in a manner that vindicates policy objectives; however, they should feel the political pressures of constituents and interest groups who influence the outcome of elections and should recognize that other legislators will pursue different policy objectives by compromising and trading votes as a prerequisite to consensus.

This exposure to the realities of legislative process will inform students of the appropriate role of courts in interpreting statutory language when they debate the merits of competing views. Instructors may even want to present the exercise in a way that sparks discussion about public choice theory, which proposes that the legislative process can be dominated by a minority who will be disproportionately affected by legislation and who has relatively great incentives and means to influence elected representatives, even if broader policy concerns might lead to a different legislative result.¹⁹ Individual instructions to legislators about the desires of important constituents, coupled with pressure from an appointed lobbyist, may simulate some conditions of public choice theory.

A third pedagogic objective of the legislative process exercise relates to the subsequent exercise in statutory interpretation. The exercise should induce students to engage in debate and bargaining. It should require them to record their committee and plenary proceedings in sufficient detail to create a useful record of legislative history. These experiences will help the students appreciate the benefits and limitations of legislative history.

As a final and overarching objective, the legislative process exercise should teach law students to avoid becoming so comfortable with common law analysis alone that they later avoid upper-division courses involving statutory analysis and administrative law. As one author put it:

Supreme Court that it might give Navajo customary law primacy over Navajo codes that did not reflect Navajo values if the tribal council did not act to modify the codes) with DAWSON, *supra* note 16, at 316-18, 374-79 (describing French revolutionary backlash that replaced a complex system of customary and Roman law, overseen by a powerful high court exercising legislative as well as adjudicative powers, with a comprehensive code system and a high court that is expressly forbidden by code from exercising legislative powers).

19. See, e.g., POPKIN, *supra* note 18, at 135-36 (discussing public choice theory as the “[l]aw and [e]conomics critique” of legislative process); see also WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 28, 85-90 (2000) (indicating that even direct democracy through ballot initiatives “will be shaped to a large extent by well-funded and passionate interest groups” and summarizing explanations and critiques of public choice theory).

Today, [in practice] the boundaries of most legal inquiry are structured by statutes and administrative regulations. . . .

For many law students, however, this realization can be frightening. Leaving the comfortable methods of the common law—burned into every American law student's brain by the standard first-year law school curriculum—and turning to the legislative process and the interpretation of statutes can be a daunting and frustrating task.²⁰

An early immersion in legislative process and statutory interpretation, particularly one that will produce enjoyable experiential learning through role-playing, may help students place their common law studies in context and pique their interest in statutory analysis.

The legislative process exercise cannot feasibly simulate all of the procedural complexities of legislating in a bicameral system,²¹ where the process can create numerous obstacles prior to enactment.²² That limitation may be a blessing because most instructors want to encourage and facilitate legislative action, so students can benefit from subsequent exercise in statutory interpretation. Even with facilitation, strong-willed committee members and participants in the plenary voting session, particularly if they are provided competing incentives, should provide an opportunity for some bills to fail in committee, and for those surviving committee proposals to inspire consensus only through debate and compromise.

3. Pedagogic Objectives for the Exercise in Statutory Interpretation

Instructors should exclude some issues by informing students that the legislation is not subject to constitutional challenge or procedural objection. Instructors should also announce that the interpretation issue is one of first impression. Even then, no single exercise in statutory interpretation can expose

20. ESKRIDGE ET AL., *supra* note 19, at 2.

21. The legislative process exercise contemplates that students will gather in a single plenary legislative body to debate and vote on one or more proposals issued by one or more committees. Greater complexity and realism could be achieved by dividing the class into two legislative houses and requiring one to address a bill that has passed through the other house, ironing out any differences in a conference committee appointed by both houses. Time constraints, however, may induce many instructors to simplify the process by positing that any bill that passes through the class sitting as a single legislative body will be passed by the other legislative body and signed into law by the chief executive. See discussion *infra* Part III.B.1.

22. See ESKRIDGE ET AL., *supra* note 19, at 68-78 (describing the legislature as an "[o]bstacle path" filled with "vetogates," providing support for those who favor making legislation difficult and infrequent).

students to a comprehensive list of issues regarding judicial review and statutory interpretation.²³

Some issues will be clearly excluded by the facts of the exercise. For example, because the exercise described in Part III.B.2. does not posit any significant passage of time or change in attitudes between the time of enactment and interpretation, no question will be raised about whether original intent or contemporary understandings should control.²⁴

The exercise may present opportunities to apply the canons of statutory construction. For example, if the statute includes penalties for violations,²⁵ a student favoring narrow interpretation might argue that ambiguities in criminal statutes "should be resolved in favor of lenity."²⁶ Because the exercise presents parents deciding whether to grant their daughter's petition to engage in an activity, however, analogy to a criminal prosecution is somewhat strained.²⁷ Moreover, because general rules of construction should take a back seat to evidence of more specific legislative intent²⁸ governed by rules of interpretation,²⁹ the exercise should encourage students to focus primarily on issues of statutory interpretation that the problem raises or that the instructor brings to the forefront.

23. In his guide to statutory interpretation, for example, Kent Greenawalt raises twenty questions about statutory interpretation, which in turn induces him to discuss a much greater number of issues. *See generally* GREENAWALT, *supra* note 18, at xviii-xx. Professor Greenawalt proposes "multiple standards for interpretation," some of which might take precedent over others in particular cases, depending "on a complex assessment that cannot be reduced to formulaic terms." *Id.* at 281 (citing to the "polycentric" approach described in WILLIAM ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 55-56, 112 (1994)). Greenawalt ultimately concludes that "statutory interpretation is complex" and that the choice among available methods of interpretation is a subject of considerable controversy: "Many questions about statutory interpretation raise deep issues about our form of government and the respective roles of legislatures, courts, and administrative agencies It is genuine disagreements over these issues that trigger contending approaches to statutory meaning." *Id.* at 284.

24. *See, e.g., id.* at 83-89 (reviewing counter-arguments on this issue). Professor Greenawalt concludes, "If there is a difference in the understanding of people at the time of enactment and at the time of interpretation, both understandings should be relevant. Just how much each understanding should count is debatable and will depend on the particular legal issue involved." *Id.* at 89.

25. *See, e.g., infra* Appendix § 5.

26. *Bell v. United States*, 349 U.S. 81, 83-84 (1955).

27. *See* discussion *infra* Part III.B.2.

28. *See* CALLEROS, *LEGAL METHOD*, *supra* note 4, at 35.

29. *See id.* at 32 (defining the process of statutory interpretation as one of determining legislative intent regarding a particular statute or statutory provision, contrasted with statutory construction, which is designed to give "statutory language a meaning that is consistent with general legislative and public policies, in the absence of conclusive evidence of legislative intent").

At a minimum, an instructor may want to encourage thought and discussion about at least one method of statutory interpretation on which the legal community is in agreement and another about which the legal community is divided. Background readings, class lecture, and role-playing in the exercise, for example, should reveal little debate or doubt about the proposition that the inquiry of student judges must begin with the legislative text in question.³⁰ The student judges should also recognize that they are not free to ignore legislative text and replace it with a form of common law simply because they disagree with the legislation.³¹ Conversely, the exercise should lead students to encounter more controversial questions about the extent to which their inquiry should be limited to the objective meaning of the text, if that meaning seems plain to them,³² or whether inquiry into general legislative purpose should supplement their textual analysis to aid in comprehending legislative intent on more specific questions.³³ Moreover, the students' experience with the previous legislative process exercise will help them debate the extent to which legislative history provides reliable evidence of purpose or of specific legislative intent regarding the meaning of a particular provision.³⁴

30. See, e.g., Laurence H. Tribe, *Judicial Interpretation of Statutes: Three Axioms*, 11 HARV. J.L. & PUB. POL'Y 51 (1988) ("Axiom one is: *Language first.*"); see also ESKRIDGE, ET AL., *supra* note 19, at 249 (explaining that most theories of statutory interpretation give priority to textual reasoning and rules, and to prior judicial interpretation of the statute, coupled with rules governing the precedential effect of such interpretations). In this exercise, students should assume that the statutory language has not been previously interpreted by a court. Cf. GREENAWALT, *supra* note 18, at 35, 37 (indicating that although some circumstances may justify interpreting text contrary to its apparent meaning, "interpretation of statutes turns largely" on the meaning of text, which has "a powerful claim to attention and priority").

31. See GREENAWALT, *supra* note 18, at 21-23; Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 383 (1907) (criticizing, and predicting the decline of, judicial interpretations that essentially modify statutes as "an anachronism in an age of legislation").

32. See, e.g., *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (giving priority to the plain language of statute over legislative history and canons of construction); *Maine v. Thiboutot*, 448 U.S. 1, 4-10 (1980) (giving effect to plain statutory language and rejecting dissenters' arguments based on legislative history).

33. See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457, 458-65, 472 (1892) (giving effect to legislative purpose of statute to apply only to manual laborers, even though statutory language more broadly applied to "labor or service of any kind"); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995) (explaining that the plain meaning of a statute does not control if it clearly conflicts with the legislative purpose); ESKRIDGE ET AL., *supra* note 19, at 220-22 (discussing strengths and weaknesses of "purposivism" in statutory interpretation); GREENAWALT, *supra* note 18, at 49-53, 57 (discussing arguments for and against giving precedence to legislative purpose over literal meaning of statutory text).

34. See GREENAWALT, *supra* note 18, at 171-76 (discussing the controversy surrounding use of legislative history in statutory interpretation). Compare *Unification Church*

First-year students who hunger for answers to questions of law or legal process may ask which of several approaches to statutory interpretation is “correct.” The best answer is that no single method of statutory interpretation is widely viewed as legitimate to the exclusion of others. Courts variously emphasize one approach or another, or use several in combination, as dictated in each case by the nature of the issue or the ideological leanings of the judges.³⁵ This uncertainty or flexibility in statutory interpretation may be unsettling to law students, but it provides rich opportunities for imaginative advocacy³⁶ and permits the statutory interpretation exercise to supplement the common law exercise as an introduction to legal indeterminacy.³⁷

B. *Technique – Content of the Exercises*

1. Content of the Exercise in Legislative Process

In the first exercise, Addie, one of Monica’s friends, complains that Addie’s parents’ rules are stricter than those of Carmen. Addie’s parents decide to get together with the parents of Addie’s friends to arrive at a consensus about sensible rules for their children’s social activities. If they can agree, they can draft a comprehensive set of “statutory rules” that will apply to all of the children. This plan is conveyed by the following dialogue from the video:

Addie (complaining): But Mom, Monica’s parents allow her to stay out until 11 p.m., even on school nights.

Mom: That doesn’t make sense to me. 11 o’clock or even later might work on a weekend, but 9 p.m. sounds more reasonable on a school night, if you

v. INS, 762 F.2d 1077, 1083-90 (D.C. Cir. 1985) (engaging in an exhaustive analysis of legislative history and legislative purpose to interpret the statutory term “or” to mean “and”) with *United States v. Estate of Romani*, 523 U.S. 517, 536-37 (1998) (Scalia, J., concurring) (citing to Justice Scalia’s previous opinions in which he has criticized the Court’s use of legislative history), and *ESKRIDGE ET AL.*, *supra* note 19, at 74-76 (discussing a portion of legislative history that arguably misled a federal appeals court and may have been designed to do so).

35. See generally *ESKRIDGE ET AL.*, *supra* note 19, at 9.

36. See *id.* Indeed, Judge Posner argues, “The most important thing that law school imparts to its students is a feel for the outer bounds of permissible legal argumentation at the time when the education is being imparted.” RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 100 (1990).

37. See discussion *supra* Part II (explaining how the content and pedagogic goals of the common law exercise include introducing students to uncertainty and ambiguity in common law holdings and their application to new facts in future cases); see also Calleros, *supra* note 3, at 37-49 (describing the need to increase students’ comfort with uncertainty early in the first semester and presenting an exercise that focuses more narrowly on this pedagogic objective).

could go out at all.

Addie (*impatiently*): Nine o'clock?! But what if I'm in a debate competition at another school on a Thursday night, and our bus doesn't get back until after nine?

Younger sibling (*helpfully*): Yeah, or when I'm in high school, what if I'm at a friend's house doing homework until 11:00?

Dad (*sarcastically*): Yeah, right.

Mom: You know, this could get pretty complicated. I have an idea. We're getting together with your closest friends and their parents at the reception this weekend. Your father and I will try to hammer out some sensible rules and get the other parents' ideas on them.

Dad: Great idea. Who knows, maybe all the parents will reach some consensus, and we'll all decide to apply the same rules. Then you won't be comparing yourself with other kids so much.

Addie: Well, can the kids help write the rules?

Dad (*after glancing skeptically at other parent*): No, but you guys can give us your ideas and opinions, and we'll consider them.³⁸

Successive screens of text then ask students to engage in the following activities:

Divide the class into small groups, with an odd number of students playing the roles of parent-legislators in a legislative committee. One or more additional members of the group may play the role of lobbyist, representing some interested group, such as students in high school, and consulting briefly with legislators in individual or group meetings. The "legislators" should act as legislative committee members in proposing and debating rules governing the evening activities of their children in high school, rules that could codify, clarify, modify, or replace the "common law" rules developed by Carmen for Monica. Each committee should appoint one or more reporters to record proposals, votes, and a summary of the arguments for opposing or supporting proposals.

Acting through majority vote, the "legislators" are free to reach a broad consensus, to resolve differences through compromise if necessary to achieve majority support, or to decline to propose any legislation. They should assign the task of drafting any proposed legislation to a subcommittee of one or more members, subject to review, revision, and final action by the entire committee. If time permits, the entire class may debate and take action on one or more bills submitted by committees. The class should appoint one or more reporters to record proposals, votes, and a

38. See *supra* note 7.

summary of arguments supporting and opposing debated bills.³⁹

If the instructor provided no further direction, the exercise should produce interesting results. Students should emerge from this exercise with greater curiosity about the political pressures in the legislative process. In addition, instructors should be curious about the policy arguments students advance for retaining, supplementing, or abandoning common law rules, the influence of student lobbyists, and the outcome of committee negotiations. One might predict that some committees will reach a consensus to modify the common law rules. Moreover, some proposals approved in committees are likely to be the product of vote trading, whereby a legislator secures support for statutory provisions in exchange for her support of a provision important to a fellow legislator. If so, it will be interesting to see whether such trading results in a coherent statutory proposal or a mixed bag that is less elegant than the common law it replaces. Of course, all these questions can arise a second time when the entire class acts as a single legislative body, debating and voting on the final bill.⁴⁰ Finally, a record of the proposals, arguments, and votes at both the committee and plenary level can lay the groundwork for later debates regarding the appropriate role of legislative history in statutory interpretation.

For a more controlled experiment, the instructor may provide individual legislators with written instructions and supplemental guidance in response to student questions during deliberations. For example, two-thirds of the legislators in a committee might receive the following instructions:

Your committee held hearings in which educators and experts in adolescent health testified that high school students will not perform optimally in school unless they are home in bed, or getting ready for bed, well before 11 p.m. on school nights. The largest percentage of your constituents are mature adults, some of whom are parents of teenagers, and all of whom are interested in a curfew rule that requires teenagers to be home no later than 10 p.m. on school nights. These constituents realize that such a curfew may be an unrealistic legislative goal, and they would settle for a statutory provision that gave parents the authority to designate certain unsafe places as off limits for high school students. Because most of your constituents are not parents of teenagers, they are not passionate about these issues. Parents of high school students care about these issues but are too busy with work to devote attention to them. A small group of high school students forms an exceedingly vocal minority within your

39. *Id.*

40. *See supra* note 21 (describing a more complex exercise in bicameral legislative process, but not recommending it under normal time constraints).

constituency. They have an effective lobby and are willing and able to launch highly visible protests during your next election campaign if they conclude you do not take their wishes seriously. Although they might draw lines differently, all interested constituents generally agree that any frequency limitations on the evening activities of high school students should apply only to social activities and not to students' attendance in classes or participation in class assignments. Not surprisingly, the high school students within your electorate want any frequency limitation to apply as narrowly as possible. Parents, on the other hand, are a bit wary about students evading a frequency limitation by dressing up social activities in thin academic garb.

The other one-third of the legislators in a committee could receive instructions such as the following:

Your committee held hearings in which educators and experts in adolescent health testified that high school students will not perform optimally in school unless they are home in bed, or getting ready for bed, well before 11 p.m. on school nights. Most of your constituents are members of the student body of a local high school. They strongly oppose any legislative movement to replace the common law curfew of 11 p.m. with an earlier curfew for week nights. They are very keen to retain both the 11 p.m. curfew and the ability to go out at least two evenings per week. Your surveys show that these vocal constituents would be willing to sacrifice a third night out when one outing is an important family event, and to make other reasonable concessions if any proposed legislation retained limitations no more restrictive than a curfew of 11 p.m. and a limitation on two outings per week. Their wishes are backed by a well organized lobby. Although they might draw lines differently, all interested constituents generally agree that any frequency limitations should apply only to social activities and not to students' attendance in classes or participation in class assignments. Not surprisingly, the high school students within your electorate want any frequency limitation to apply as narrowly as possible.

Instructions to the lobbyist for high school students could convey the same values as expressed in the second set of instructions above. These instructions are obviously designed to invite legislative deal-making resulting in a proposed bill similar to that in the Appendix. The sample bill retains the common law curfew of 11 p.m. along with permission to engage in two outings per week, in exchange for elimination of the family-event exception and for the inclusion of parental authority to prohibit children from certain locations that the parents

deem to be unsafe. The ability of a relatively small group of passionate, well-organized high school students to force a compromise that does not respond to testimony in legislative hearings calling for an earlier curfew—or to spark the defeat of any reform package—will demonstrate public choice theory in a fashion that likely will be memorable and concrete for the student participants.

2. Content of the Exercise in Statutory Interpretation

The second exercise assumes the parents successfully reached consensus on a set of rules such as those reflected in the Appendix. As an introductory exercise, the instructor can distribute either this statute or one voted into law by the class, asking students to analyze the ways in which it either codifies or departs from Carmen's common law rules. For example, the statute in the Appendix retains Carmen's curfew of 11 p.m. and her frequency limitation of two outings per week, but it does not contain an exception for important family events. Thus, if a child knows that she is required to attend an important family event on Friday night, she can also expect to be limited to one other evening activity during that week.⁴¹

However, just as Carmen's ambiguous pronouncements in Case #1 created uncertainty, the general language of the statute will inevitably leave uncertainty in its application. The dialogue below, taken from the final scene in the video, raises a question about the distinction between "social activities . . . engaged in primarily for entertainment or to fulfill family or other social obligations," and "mandatory attendance at meetings or events related to school or academic clubs"⁴²

Mom: Good morning Beth. You're up pretty early for a Saturday morning.

Beth: I'm excited about the pizza party tonight for the drama club. It's gonna be so fun.

Dad: Party? You seem to forget that—against my better judgment—you went out twice this week already. Remember? You went to the mall on Tuesday evening with your friends and did some serious shopping and socializing at the coffee house.

Mom: Yes, and then you just *had* to go to the movies last night on the opening night of Spiderwoman or whatever that was. So, that's twice in one week. It was your choice. You know the rules. I'll bet you have some

41. A child might argue that she should be excused from the family event rather than sacrifice one of her own evening activities, perhaps raising an interesting question of statutory interpretation. The statute, however, does not seem to limit parents' ability to mandate attendance at a family event that would take up one of the two evening activities in a week.

42. *Infra*, APPENDIX.

homework to catch up on tonight.

Younger Sibling (*grinning mischievously*): Yeah, I'll bet you have *lots* of homework.

Beth: Yes, I always have homework. But our rules limit only my "social activities" to two evenings per week. This is not a social activity; it's an academic activity—it's part of my drama class.

Dad: Pizza party on a Saturday night? Sounds pretty social and non-academic to me. I mean, your teacher is not going to take attendance and mark you down if you're absent, is she?

Beth: Well, I don't think she would mark us down . . . but she's going to give out these funny "class awards," so she said that she really hopes everyone can show up. Besides, it's part of the bonding process that will help us work together next semester.

Mom: In other circumstances, I might apply these rules loosely, but remember—we joined with the parents of all your friends to adopt the same rules about social activities so that you kids wouldn't complain about one family being more lenient than another. It's not going to look good to the others if they see you at a pizza party after you went out twice already this week.

Beth: Are you saying I can't go?

Dad: Well look, this is a close case. Your mother and I should look at the rules and refresh our memory about them, and then we'll think and talk about it a bit more.⁴³

Successive screens of text on the video then ask students to engage in the following activities:

Divide into groups of five students to play the roles of three judges and two advocates. Each panel of judges will hear brief arguments from an advocate for Beth, who desires to attend the party, and from an advocate for a parent from another family, who we assume has standing to argue against Beth's attendance and in favor of a broad interpretation of the statutory language "social activities." The panel must then confer and decide the dispute by majority vote, and each judge should be prepared to explain his or her reasoning.

Advocates and judges should address the methods that are appropriately used to interpret statutory language. Should the judges pay attention only to an objective interpretation of the text of the statute? Should they inform their interpretation with legislative history or other evidence of legislative purpose? What other questions about interpretive method might arise?⁴⁴

43. *See supra* note 7.

44. *Id.*

The video dialogue assumes that Beth's activities are regulated by a statute that applies to "social activities" and draws a distinction between "social activities" and academic events. Of course, the relevant statutory language in dispute may vary, depending on what bill the class ultimately enacts.⁴⁵ Instructions to legislators, such as those suggested in Part III.B.1, can lead to legislation that draws such a distinction and encourages sufficient debate and interesting legislative history.

This role-playing exercise in statutory interpretation provides students with an introduction to advocacy and a taste of the deliberative process involved in a judicial panel decision. It will be interesting to see whether panels view the question as a close one that generates debate among the judges and whether differences between judges result in concurring or dissenting opinions. This introduction to statutory interpretation will not explore theories of interpretation in any great depth. However, as a matter of course, students—whether acting as advocates or judges—should raise questions about the benefits or limitations of focusing on the objective meaning of legislative text, the benefits of interpreting a provision in the context of the whole statute rather than in isolation, the propriety and efficacy of consulting the legislative history of a statute that is the product of legislative compromise, and the practicality of trying to determine the intent of a divided legislature on a specific issue that almost certainly was not debated or contemplated by the legislators.⁴⁶ If this exercise provides the students with a memorable basis on which to frame questions and arguments about methods of statutory interpretation, it will have performed its desired task.

The family setting in the skit or video set-up indulges in poetic license by placing the parents in the multiple roles of legislators, interested constituents, and judges. Any awkwardness in that set-up is outweighed by the benefits of the simplicity and universality of the family context. Nonetheless, the multiplicity of roles need not carry over to the experiential learning. If the

45. If the specific statutory language drawing the distinction varies from the model statute provided in the Appendix and the dialogue in the video, the video can still provide inspiration and a general framework to launch an exercise in statutory interpretation related to the particular statute.

In some cases, instructors may wish to create a different dispute entirely, calling for interpretation of interesting statutory language that students have debated and enacted. Alternatively, an instructor might take legislation passed by the class in plenary session during the legislative process exercise, alter it to present issues of statutory interpretation and then present the modified version to students in the statutory interpretation exercise. If this approach is used, the instructor should explain that the changes were made when the second legislative body in the bicameral system addressed the bill, made changes, and resolved differences in conference committee.

46. ESKRIDGE ET AL., *supra* note 19, at 6 (arguing that such questions make "the notion of 'legislative intent' . . . inherently problematic").

entire class participates in both the legislative process exercise and the exercise in statutory interpretation, for example, students may have difficulty separating their roles as creators and interpreters of the same legislation.⁴⁷ A judge who consults written evidence of legislative intent may be biased or distracted by memories of his own intentions when participating in the legislative process. To control this factor, an instructor might divide the class in two, assigning the legislative process to one half and the judicial interpretation to the other half. By doing this, the instructor retains the challenge of divining legislative intent for judges. Of course, this means of controlling multiple-role confusion sacrifices half of the experiential learning for each student. This factor should be weighed in the administration of the exercises.

3. Agency Rulemaking and Other Opportunities

Section 4 of the sample statute in the Appendix provides a basis for an exercise in administrative rule-making. It authorizes parents to issue regulations that designate certain locations as unsafe. Section 4 allows parents to exercise this authority only if they have a "rational basis" for doing so. It further requires parents to provide a reasonable opportunity for discussion and debate.

These provisions create possibilities for a number of classroom exercises. For example, if parents propose to designate a pizza parlor as an unsafe location, but allow only other parents (now wearing the hats of fellow administrative officials) to participate in discussion and debate, the excluded high school students might ask a court to interpret the "discussion and debate" requirement of Section 4 more expansively and more in line with "notions of 'fundamental fairness'"⁴⁸ and due process. If, on the other hand, parents hold administrative hearings that provide high school students with an opportunity to protest a proposed designation, law students playing the roles of administrative officials and representatives of an affected community can gain insight into the ways critical comment on agency regulations differs from advocacy before a court charged with resolving a particular dispute.

Still other pedagogic opportunities are bound to arise from student statutes and instructors' imaginations. The *Rules for Monica* video ends with the

47. In actual law-making, dual judicial and legislative roles are possible, though potentially problematic, in the modern legal environment. See POPKIN, *supra* note 18, at 13-14 (discussing cases in which judges interpreted statutes with first-hand knowledge of legislative intent because the judges had earlier participated in enacting the statutes as legislators).

48. See *TXO Prod. Corp. v. Alliance Res. Corp.* 509 U.S. 443, 455 (1993); *California v. Trombetta*, 467 U.S. 479, 485 (1984).

statutory interpretation exercise discussed above in Part III.B. 2. Detailed discussion of other exercises must await other essays, perhaps written by other users of the *Rules for Monica* workshop.

IV. CONCLUSION

Both the common law component of *Rules for Monica* and the newer legislative component have strengths and weaknesses. The case-by-case parental rule-making is a nearly perfect analog to common law case law. Videotaped enactments of the cases bring them to life in a way that encourages student engagement and participation.

The analogy between the community curfew code and legislative lawmaking, on the other hand, is a bit more strained. The videotaped scenes introducing the legislative exercises, although fun and engaging, are not as critical to the exercises. However, the legislative exercises trigger role-playing that surpasses the common law component in their promotion of experiential learning. Such a memorable experience—one that contrasts the usual law school routine in so many ways—likely will compensate for the relatively modest exposure of first-year law students to legislative process and statutory interpretation.

APPENDIX

High School Rest, Homework, and Security Protection Act**Section 1 - Definitions:**

- A. "School" includes regular school, optional high school summer programs, or any other academic enterprise in which a child is enrolled at the high school level.
- B. A school is "in session" when it meets for at least three hours each day for four days in the week in question.
- C. "Social activities" are activities engaged in primarily for entertainment or to fulfill family or other social obligations. They include activities in which a child is accompanied or supervised by a parent. They do not include mandatory attendance at meetings or events related to school or academic clubs, organized sports, church, or similar organizations.
- D. "Week" means the period beginning at 7 p.m. each Sunday and ending at 7 p.m. the following Sunday.
- E. "Child" means a student enrolled in high school and under the age of 18.

Section 2 - Excessive Nocturnal Social Activities Prohibited

In weeks in which school is in session, a child may engage in social activities away from home between the hours of 7 p.m. and 7 a.m. no more frequently than twice in one week.

Section 3 - Curfew

In weeks in which school is in session, a child must return from social activities by 11 p.m. unless he or she is accompanied by a parent or has advance written permission from a parent.

Section 4 - Unsafe Places

Parents of children in high school are authorized to issue regulations from time to time to identify particular locations as unsafe, at all times or at certain times, for social activities. A child is prohibited from visiting any such designated places at the times in which the parent deems them unsafe. Before designating a location as unsafe, the parent must provide reasonable opportunity for discussion and debate, and the parent's final decision must

have a rational basis.

Section 5 - Penalties

A child in violation of any of the above provisions may be grounded by a custodial parent for a period of up to three weeks.