

## LAW SCHOOL TEACHING

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When I was a beginning teacher I heard Grant Gilmore<sup>1</sup> speak at a meeting of law school teachers. He had just received the accolade of the teaching profession, and in his acceptance speech he made some remarks about teaching.

“Teaching,” he said, in his low, unassertive voice, “is the loneliest profession there is. You never know if you’re doing it right or not.”

I don’t know about other professions, but I do know he hit the nail on the head about the difficulty of law school teaching.

In the first place, teachers are torn between what they think they should be teaching, and what students think they should be teaching. Students come to law school with a pretty firm set of convictions about what law is all about. It is a set of rules which you have to learn if you ever expect to pass a law exam, or the bar exam. Later, as students grow more sophisticated, they come to believe that law is a set of rules of the game. You have to learn how to play the game.

The old socratic method (made famous in the film and television series *The Paper Chase*) fools no one these days—unless you happen to be the timid, faint-of-heart who should never have come to law school in the first place. Anybody knows that she who asks the questions—particularly if she has superior knowledge—controls the answer. And if there is no right answer, then why bother with the rather futile exercise of asking? Everyone knows that Socrates was joking when he said the Delphic oracle thought him the wisest man in the world since he alone knew that he knew nothing.<sup>2</sup>

I once asked Grant Gilmore how he handled two irreconcilable cases. The students would say there is a division of authority. But what about the clash of reasoning; which opinion was the better reasoned opinion?

Professor Gilmore thought long and carefully before he answered. Then he said something to the effect that it’s oftentimes well-nigh impossible to make the correct choice between right and wrong. But in the end you have to

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2. See JOHN MILTON, *PARADISE REGAINED* 16 (Scolar Press Ltd. 1968).

make that decision, he said, however close the choice may be. He seemed to take it for granted that I understood why you have to make that decision.

I recently read an outstanding article by Alex B. Long on tortious interference.<sup>3</sup> There, Professor Long explores the recent rise in popularity of the tort of interference with prospective economic advantage. He carefully notes how this tort undermines the employee-at-will doctrine, and how the distinction between principal and agent has become blurred in the decisions. He concludes by examining the defense of truth and the pervasive implications of that defense for communicative torts. One comes away from reading the article with something of a world view of the law of torts.

I am told that Jan Deutsch<sup>4</sup> does the same kind of synthesis in the classroom at Yale. He relates one aspect of corporations to another aspect, and then to another, and another, and often he leaps the bounds of corporations into other fields of law and non-law. In his classes you get the sense of the law being a seamless whole.

The greatest drawback to present-day law teaching is that students do not expect to have to prepare diligently for class. They come to class to be told what the law is, and to be told clearly and entertainingly. They are the consumer, and they expect to receive fair value for their money. But in the process they sell themselves short.

I think learning the law is a lot like learning to play the piano. You must prepare with the utmost diligence. You must learn the scales, the chords, the timing, the phrasing—without fault, insofar as it is humanly possible to do so.

Then you come to your lesson, or to class, to learn interpretation—how to lean on the notes, when and where, and how to prick them; how to play lightly, and how to play darkly; how to walk, and how to fly; how to figure out what the composer was trying to say, and how to add your own interpretation to the composer's meaning.

How do you know your own interpretation is right? You don't, says Grant Gilmore; you never know for sure. But making that informed decision is what Lon Fuller, in his little book entitled *Legal Fictions*,<sup>5</sup> calls the exercise of judgment—the highest of human arts.

In my own classes, I try to steer away from the holistic approach because it very quickly becomes confusing. I prefer to work with elasticizing judicial concepts. I used to think that concepts were rather mechanical, and that policy was where the real action was. But of late I find it difficult to distinguish concepts (rules, if you will) from policy (morality, if you will).

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3. See generally Alex B. Long, *Tortious Interference with Business Relations: "The Other White Meat" of Employment Law*, 84 MINN. L. REV. 863 (2000).

4. Walter Hale Hamilton Professor of Law, Yale Law School.

5. LON FULLER, *LEGAL FICTIONS* 136-37 (1967).

A favorite case is *Palsgraf v. Long Island Railroad*.<sup>6</sup> Why does Cardozo confuse generations of law students by talking about duty instead of foreseeability? Is it because New York was stuck with the direct-cause rule of proximate causation, and he wanted to avoid applying that rule? Then why not change the rule, from direct cause (*Polemis*)<sup>7</sup> to foreseeability (*Wagon Mound*)<sup>8</sup>, instead of talking about duty? Of course Cardozo was not the first to confuse duty with proximate cause.

Why didn't Mrs. Palsgraf attack the railroad, or the scale maker, for having weighing scales that were top-heavy, or improperly anchored? Was this legal malpractice on the part of her attorney?

Suppose our boarding passenger carried an invaluable vase, rather than fireworks, wrapped in newspaper. Could he recover for the value of the vase that the conductor knocked from his arm?

Suppose the trainman struck the vase intentionally. Transferred intent to Mrs. Palsgraf, from trespass to battery (or perhaps from battery to battery, since the vase was intimately associated with the passenger)?

A problem in conversion concerns the employee whose employer gave him thirty-four dollars with which to purchase a page of one hundred stamps. The employee had no money of his own. When he got to the post office and received the page of stamps, as a stamp collector he immediately recognized the page to be very valuable because of an idiosyncrasy in the printing. He took the page to a stamp dealer, sold it for \$34,000, and bought another page of stamps which he returned to his employer. Did the employee convert the original thirty-four dollars, which were quickly replaced with a like amount of money? If he converted the thirty-four dollars, then why not the \$34,000 as well, as fruits of the poisonous tree? The students have a hard time believing he must surrender the \$34,000 to his employer, should the ruse be discovered.

Another favorite is the products case of *Flippo v. Mode O' Day Frock Shops*.<sup>9</sup> There Ms. Flippo, while trying on a new pair of stretch pants at Mode O' Day's clothing shop, was bitten in the thigh by a brown recluse spider allegedly concealed in the pants.<sup>10</sup> She sued the shop but could not prove negligence.<sup>11</sup> The court directed a verdict against her on her strict liability count on the grounds that nothing was wrong with the pants.<sup>12</sup> But surely there was! Was the court really concerned about breaking down the distinction

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6. See generally 162 N.E. 99 (N.Y. 1928).

7. *In re An Arbitration between Polemis and Another and Furness, Withy and Co.*, 3 K.B. 560 (C.A. 1921).

8. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound)*, [1961] A.C. 388 (1961).

9. See generally 449 S.W.2d 692 (Ark. 1970).

10. *Id.*

11. *Id.* at 695.

12. *Id.*

between business premises liability and products liability if it allowed Ms. Flippo to recover, and if so, why not say so and then justify the distinction?

There is the problem of the runaway bus, careening down a mountainside road with twenty elderly passengers aboard. Both the brakes and the horn have failed, through no fault of the driver. On the right side of the road was a steep bluff, and on the left a deep ravine, with nowhere to pull off. The bus came in sight of a subdivision entrance, where five children were standing oblivious to the oncoming bus. Should the driver enter the subdivision to save her twenty passengers, although she would probably kill or maim the five children in the process? Or should she continue on, with the high probability that she and the twenty passengers would all be killed or maimed? If she hits the five children, she would be liable, would she not? Public necessity does not apply to the taking of human life, and surely self-defense does not apply here. If she sacrificed the twenty passengers, will that act be an involuntary one for which she is not liable? Some students think that twenty elderly people are worth more than five children, but I caution that I don't think the risk-benefit balancing test works here.

One of my very favorite cases is *Marbury v. Madison*<sup>13</sup>—not so much because of the way Justice Marshall pulled judicial supremacy out of the constitutional hat, but because of the way in which he found Section 13 of the 1789 Judiciary Act unconstitutional, thereby preventing him from issuing a mandamus to require the Secretary of State to deliver Marbury his rightful J.P. commission.<sup>14</sup> Section 13 more or less tracked Article III of the U.S. Constitution, in first conferring original jurisdiction on the Supreme Court, followed by a conferral of appellate jurisdiction. At the end of the appellate conferral, separated from the remainder of the section by a semicolon, was a conferral on the Court of the power to issue writs of mandamus and prohibition. Marbury filed his suit as one of original jurisdiction in the Supreme Court, seeking a writ of mandamus against Secretary of State Madison.<sup>15</sup>

After reviewing the allegedly incontestable right of Marbury to have his commission, and to have it by order of mandamus to the Secretary of State, the Court mysteriously concluded that it lacked the power to issue the writ in this case directly to a non-judicial government officer, since such a writ could only be issued in the exercise of the Court's original jurisdiction.<sup>16</sup> And this was not a case of Article III original jurisdiction, said the Court—which most assuredly it was not.<sup>17</sup>

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13. *See generally* 5 U.S. (1 Cranch) 137 (1803).

14. *Id.* at 153-54.

15. *Id.* at 173-74.

16. *Id.* at 176.

17. *Id.*

Mr. Lee, Marbury's attorney, gamely argued that although the issue before the Court looked like one of appellate jurisdiction, it really was original since, by attaching the power of the writ to the appellate jurisdiction of the Court, Congress had converted the appellate jurisdiction to original.<sup>18</sup> Bosh! said the Court, *ipse dixit*: Congress lacks the constitutional power to do that. Therefore, Congress's attempt to confer appellate jurisdiction on the Court under the guise of original jurisdiction, by means of the writ of mandamus, was unconstitutional and the case must be dismissed for lack of original jurisdiction.<sup>19</sup>

The question in this whole argument—a point that has never been explained by anyone, so far as I can tell—is why the issuance of a writ of mandamus to a non-judicial officer can only be done as an exercise of Article III original jurisdiction? Nothing in Article III implies such a limitation. Nothing in the common law, either of America or England, implies such a limitation. And Marshall cites no authority whatsoever in support of such a limitation.

One is left with the curious suspicion that Marshall may have made the whole thing up about the ability of the Court to issue such a mandamus only in the exercise of its original jurisdiction. He could have simply said this was not a case of original jurisdiction, and dismissed, without ever getting to the whole brouhaha of the power of Congress to convert appellate to original by means of the alchemic writ.

Did Marshall make the whole thing up? Who can say, since there is no authority one way or the other. But when a question is one of first impression, should the Court not at least announce a reason for its decision, rather than issuing an *ipse dixit*? Perhaps, if you have no reason, *ipse dixit* is the only way to reach a desired result. Nevertheless, the process seems peculiarly Machiavellian.

Even if the reason for finding Section 13 unconstitutional is based on a dubious proposition about the nature of the writ of mandamus, that fact has no effect on the soundness of the basic proposition about judicial supremacy. Or does it?

Law is a many-faceted subject, and there is no one way to teach it any more than there is any one way to practice it. As a friend of mine once said, "I've forgotten more law than most people ever knew." I remember very little law that I learned in law school, and next to nothing of what I learned for the bar exam.

But one thing I do remember. I remember the zest with which Grant Gilmore and others taught the law. I remember the excitement of examining

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18. *Marbury*, 5 U.S. at 174.

19. *Id.*

the underpinnings of the law. And I have always remembered never to take any answer as final. As Grant Gilmore so succinctly put it:

Like the blind men dealing with the elephant, we must erect hypotheses on the basis of inadequate evidence. That does no harm—at all events it is the human condition from which we will not escape—so long as we do not delude ourselves into thinking that we have finally seen our elephant whole.<sup>20</sup>

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20. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977). Professor Gilmore was apparently referring to an Indian folk tale about six blind, allegedly wise men who came upon an elephant and touched various parts of it. Based on their limited experience with the elephant, they disputed loud and long with each other over what the elephant was really like. See *SIX BLIND MEN AND AN ELEPHANT* (Hamlyn Pub. Co. Ltd. 1986).