CO-DIRECTORS’ CORNER

CHANGE

Some things stay the same. The Institute for Law Teaching and Learning hosted two conferences this past year, and we’re in the throes of planning two for 2018—a spring conference focusing on adjunct professors and our summer conference at lovely Gonzaga University School of Law. The experiential learning book that we have been working on is finally out. And ILTL directors and contributing faculty members remain committed to sharing valuable teaching ideas and resources on the ILTL blog.

But some things change, too. Sandra completed her time in the associate dean’s office and has returned to the teaching faculty. Emily is furiously putting together her tenure binder for review by her university. And Kelly and her colleagues are in the midst of a dean search given Michael Hunter Schwartz’s new position as Dean of McGeorge School of Law.

Things are changing for The Law Teacher itself; in fact, this will be the final issue of The Law Teacher. It has been an honor and a privilege over the years to solicit and edit pieces to share wonderful teaching ideas with you. But with the advent of and increased activity on our blog, those teaching ideas can have an online home that is easily accessible more frequently than just twice a year. Thus, if
Picture This: Tackling the Latest Trend in Digital Note Taking

By Dyane O’Leary

It’s somewhere every professor has been: paused during a lecture, glancing up at the questioning, blank student stares, wondering if all the scratches you created on the whiteboard behind you made any sense at all. But now, in 2017, instead of just blank faces and ever-so-slight nodding heads, you see a handful of students taking out their smartphones. They tap, zoom, snap, and sit back with satisfaction. Perhaps they did not follow the classroom discussion, but at least they’ll have a crystal-clear .jpg image to memorialize their confusion days, weeks, or months later. That counts for something, right?

Perhaps wrong. Millennial and post-Millennial Generation Z students are practicing a new digital note taking trend: snapping pictures of the whiteboard, blackboard, PowerPoint slides, handouts, samples, and just about anything and everything else. Absent a few lone wolfs, gone are the days of note taking with nothing more than your brain, a pen, and a notebook. A glance inside any law school classroom reveals that the majority of students type notes on a computer or you have a teaching idea you’d like to share, please feel free to draft a blog post (maximum 800 words) and send it to Sandra (simpsons@gonzaga.edu) for consideration on the blog.

In addition, the Institute is currently exploring the idea of starting a law review, tentatively called the Journal of Law Teaching and Learning, as another place for pedagogy scholarship. This venture, while a big undertaking that is still more than a little bit overwhelming, furthers the mission of the Institute and also supports scholars who research and write about teaching. We’re excited to explore this idea, and we will keep you posted on our progress.

Enjoy the constant, never-changing things in your life, and embrace the new and exciting changes you face.

Teach well,
Emily, Kelly, and Sandra
tablet (at least in those classrooms where laptops are not banned). Yet now some students skip the typing altogether, relying instead on digital pictures of something in the classroom or during an individual conference to “record” their understanding.

To be clear, it is foolish to outright reject the smartphone as an educational device for today’s students. They use them as “clickers” in class to engage in interactive assessment polling questions. They use them to calendar deadlines and set reminders for assignments. Indeed, at my institution, they will soon access their entire course platform on a mobile device through a new Blackboard course management system application. When it comes to picture note taking, however, the practice may be attractive in theory yet troublesome in execution as an effective learning tool.

If the purpose of note taking is to further one’s understanding, the question becomes does snapping a picture of a lecture slide or tax law whiteboard equation, for example, serve that purpose? At first blush, yes: it gives students an image to—hopefully—return to for review. It captures something exactly how the professor intended it to be seen. It is easy and quick and comfortable. It offers students another example to jog their memory, or include in a course outline, or have in front of them while drafting a legal memorandum. Maybe it is something visual learners can bring to their professor’s office as an aid for further discussion. Or share with a student who missed class. It is difficult to argue any one of these uses would not enhance learning.

On the other hand, however, lie at least two areas of concern. The first I’ll describe as “digital mess.” The second and more unsettling is what has been described as “photo-taking impairment effect.”

The “digital mess” is obvious to anyone with more than a few hundred personal pictures saved on their smartphone. The more pictures you save, the less attention you give each one. You intend to examine the image to crop it, improve it, study it, print it, share it on social media, or e-mail it to a friend. Then you take 200 more pictures, and the first (perhaps best) image becomes a fleeting memory. The same goes for students who embrace picture note taking, absent a purposeful organizational effort. Just as hundreds of PowerPoint slides could be overwhelming as a review tool for even a top law student, so too would hundreds of individual picture images—textbook pages, flowcharts, whiteboard notes, professor handwritten comments—especially when re-visited days or weeks or months later.

Beyond the potential for electronic clutter is a more nuanced question: could taking a picture interfere with or undermine a student’s retention and comprehension? Some research suggests yes. The basic idea is that snapping a picture of something does not
give the brain an opportunity to process the information and engage in the level of mental mapping necessary to store it for later recall. In essence, students could end up using their smartphone as a sort of “external” memory device, outsourcing the very type of mental gymnastics necessary to achieve the “think like a lawyer” goal. Of course, this hits home for every professor who encourages students to move beyond the lower levels of Bloom’s Taxonomy (i.e., rote memorization) toward more complex analysis and evaluation. Moreover, there is a good argument that these concerns are bolstered by research that compares note taking on a laptop to note taking by hand. In fact, if note taking on a laptop has been shown in one study to “impair[] learning” because of “shallower processing” by students, then picture note taking—even more mindless—would seem to suffer the same fate.

Like every issue where technology overlaps with learning, the questions are not easy and the answers not straightforward. In that spirit, I offer some food for thought:

• Do not ignore this if (when?!) you see it. If you choose to prohibit students taking pictures of material in the classroom or in your office, make that policy clear. If you choose to allow it, say so, and specify related restrictions. For example, you could make it permissible so long as it is done from a student’s seat with minimal disruption.

• Embrace it at appropriate times. If a spontaneous hypothetical spawns a terrific visual on the whiteboard from which all students might benefit, why not ask a student to take a picture (or do so yourself) before it is erased and then e-mail or post the image to the class course management page with your own annotation?

• Be mindful of potential distraction. If a handful of students are constantly snapping pictures, those who are not could be bothered by the activity. Perhaps it is advisable to pause at select times and invite students to capture certain images—although doing so could have an unintended suggestive effect insofar as it may imply taking pictures is necessary to comprehend the material. Law students face enough pressure; we should be cautious about adding more.

• Offer ideas for organization. Just as we help students organize rules and exceptions and case examples in their course outlines, we can provide ideas for organization of digital picture notes (or, at the very least, suggest they consult someone in the law school’s Academic Support program). For example, smartphone apps such as Photo Notes and Shot MeMo prompt a user to create notes and titles for digital pictures. Adding a brief explanation and title could increase the likelihood that the picture actually ends up aiding the student’s studying upon later review.

1.2 trillion. That’s one estimate of how many digital pictures will be taken in 2017. It’s not shocking that a handful or more will be taken in law school classrooms.

Maybe we should all just go ahead and smile and say cheese.
A METHODOLOGY FOR THE TEACHING OF LAW

By Constance Frisby Fain

On July 8, 2017, I had the honor to present an important element of my teaching methodology at the Institute for Law Teaching and Learning Summer 2017 Conference, University of Arkansas at Little Rock William H. Bowen School of Law. The presentation was entitled “Developing Critical Legal Reading and Analytical Skills Through the Use of Charts and Diagrams.” In addition to my remarks at the Conference on critical reading and analysis, and the creation and use of charts and diagrams to enhance students’ skills, the materials distributed included the following information.

Familiarity with the “learning modalities” and “learning styles” of my students helps me determine which teaching methodology will be the most effective and which approaches work best. The most effective teachers are “those who adapt their teaching styles and methods to their students.” Thus, the professor should be aware of a broad range of teaching methods and use those that are most beneficial and successful with his or her students.

A “learning modality” has been defined as “the way students prefer to receive sensory reception, called modality preference, or the actual way a student learns best, called modality adeptness or strength.” Four learning modalities that have been identified are visual modality, auditory modality, kinesthetic modality, and tactile modality. Visual modality means that a student prefers to learn “by seeing.” Auditory modality means that a student prefers to learn “through instructions from others or self.” Kinesthetic modality means that a student prefers to learn by “doing and being physically involved.” Finally, tactile modality means that a student prefers to learn “by touching objects.” Sometimes a student’s preference for a certain learning modality may not be his or her modality


2 Id. Of note is the fact that Henkel’s study did not examine what happens when photographs are reviewed at a later time, and her conclusion acknowledges past research showing that “reviewing photos can provide valuable retrieval cues that reactive and retain memories for the photographed experiences.”

strength. Furthermore, a student may have a mixture of modality strengths which may be altered as the person matures intellectually and has different experiences. I consider all four learning modalities in order to achieve optimal results, mastery of legal concepts, and enhanced performance on exams.

Learning style is closely related to learning modality in that learning style pertains to “the way a student learns best in a given situation” and “mentally process[es]... information once it has been received.” An example of a classification of learning styles (containing four categories of learners) includes the following:

1. **Concrete sequential learners**, who prefer direct, hands-on experiences presented in a logical sequence.
2. **Concrete random learners**, who prefer more wide-open exploratory kinds of activities, such as games, role playing, simulations, and independent study.
3. **Abstract sequential learners**, who are skilled in decoding verbal and symbolic messages, especially when presented in a logical sequence.
4. **Abstract random learners**, who can interpret meaning from nonverbal communications and consequently do well in discussions, debates, and media presentations.

In short, the learning modalities and learning styles of one’s students should be considered in deciding the most effective methodology to convey legal concepts and theories.

I employ a variety of techniques and approaches when teaching Torts and Constitutional Law. I use charts, diagrams, the case method, question-answer approach, problem-solving approach, lecture method, visual-aid approach, Socratic-questioning approach, and experiential learning exercises.

Normally, I require students to use a comprehensive briefing method at the beginning of a course to encourage a more thorough reading and dissection of the cases, and then I move to a more condensed briefing format later in the semester. Questions concerning the cases require students to exercise their knowledge, understanding, analysis, and synthesis skills with respect to the cases, principles, and issues. Being able to comprehend and analyze cases and legal principles and apply them to different problems is crucial.

The problem-solving approach requires issue spotting and resolution of those issues. With this approach, I ask students to analyze hypotheticals in the casebook, problems distributed in class, and real factual situations reported in the newspaper. Usually, I distribute copies of the problems on the same day or at least one or two days before the students discuss them in class. Individuals may volunteer to present informal oral arguments in front of the class with the rest of the students acting as members of the advocates’ law firms or as judges who ask questions at the end of the presentations.
In the Constitutional Law class, students are expected to use the Constitution and cases in the casebook as authorities to support their propositions. Sometimes the class is divided in half, placing students in two separate law firms for the purpose of having them argue opposite sides of the issues. I also use this approach with some of the cases in the text, which permits the students to present arguments from the majority, concurring and dissenting opinions, as well as arguments from related cases.

Discussing real and hypothetical problems in class and having students present oral arguments in front of the class enhances the student’s knowledge, comprehension, issue-spotting, problem-solving, judgment, and synthesis skills. I have found students enjoy the problem-solving approach, probably because it stimulates them, makes them think about the case law, and requires that they exercise their application skills.

The combination of the lecture method and the visual-aid approach has proven to be quite effective in communicating concepts and enhancing students’ intellectual development. When I begin a new subject, I give an overview of that area using examples, charts, and diagrams that I create and distribute in class. My charts and diagrams illustrate the concepts, principles, and cases in the casebook.

Students’ feedback validates that the utilization of charts and diagrams, in conjunction with the casebook and lectures, enhances their knowledge, understanding, and analytical skills. The reason for students’ positive responses to the lecture and visual-aid approaches may be due largely to the fact that many students prefer to learn by seeing and hearing, which is consistent with the “visual modality” (seeing) and the “abstract sequential learners” (hearing) style of learning.

Some Socratic questioning is done along with the case method, but the Socratic method is not a dominant technique in my class. In short, I have found my students learn best and perform better on exams as a result of my utilization of the case method, question-answer approach, problem-solving approach, lecture approach, visual-aid approach, review sessions, tutorials, and practice exams.

In addition to regularly-scheduled class meetings, I usually hold nonmandatory tutorial sessions to: (1) review concepts covered in the casebook and study materials;
(2) answer questions to clear up misunderstandings; (3) discuss selected practice exam questions; and (4) provide any other assistance related to the course. Thurgood Marshall School of Law also provides a tutorial program for all first-year and certain second-year courses, which is designed to assist students in their law studies. Each section of each course is assigned a second- or third-year student tutor to review substantive materials, discuss hypotheticals, administer and discuss practice exam questions, and provide other study assistance. On the whole, tutorial sessions have proven to be very beneficial.

Since I administer several practice exams and real exams during the semester, it is imperative that review sessions be scheduled prior to real exams to explain and reinforce all of the concepts covered in the course. These sessions are similar to bar review classes, except they provide a more thorough coverage of the concepts and the integration of case examples from the text. Review sessions are in great demand, and according to the feedback, have enhanced students’ performance on exams.

Uniform comprehensive multiple-choice examinations are administered at the end of the semesters or school year for first-year substantive law courses, constituting fifty percent of the students’ grades in each course. These comprehensive exams are similar to the bar exam, the purpose being to better prepare students for the real bar exam. A valuable tool I use to enhance the students’ ability to perform competently on the Torts comprehensive exam is the administration of many practice exams.

In sum, learning the law can be an exciting experience. Teachers may enhance this experience by considering learning modalities, learning styles, various teaching approaches, charts, diagrams, and tutorials, and by administering several real and practice exams.

Constance Frisby Fain is the Earl Carl Professor of Law at Thurgood Marshall School of Law, Texas Southern University. This article was developed by the author from her presentation at the Institute for Law Teaching and Learning Summer 2017 Conference and her article in 21 Seattle University Law Review 807 (1998). The original footnotes do not appear in this article. She can be reached at fainconstance@att.net.
SAVE THE DATE: JUNE 18-20, 2018

Gonzaga University School of Law and the Institute for Law Teaching and Learning are collaborating to present:

Exploring the Use of Technology in the Law School Classroom

Conference Theme:
During this conference, we will explore the many and varied uses of technology in the law school classroom to improve student learning. The conference will focus on how law schools and professors are incorporating technology across the curriculum to enhance students’ learning in many areas such as assessments, group work, peer feedback, professor feedback, self-evaluation, and other skills.

Conference Proposals:
The Institute will issue a Call for Proposals later this year inviting proposals for 60-minute workshop sessions addressing the conference theme. Proposals will be due by February 1, 2018.

Conference Structure:
The conference will consist of a series of concurrent workshops that will take place on Tuesday, June 19 and Wednesday, June 20. The conference will open with an informal reception on Monday evening, June 18. Details about the conference will be available on the websites of the Institute for Law Teaching and Learning and the Gonzaga University School of Law.

Who Should Attend:
This conference is for all law faculty, adjuncts, and administrators.

Registration Information:
The conference fee for participants is $400, which includes materials, meals during the conference (two breakfasts and two lunches), and the welcome reception Sunday, June 17. The conference fee for presenters is $300. Details regarding the registration process will be provided in future announcements.

Accommodations:
A block of hotel rooms for conference attendees will be announced in the next couple of months. These hotels will be within walking distance from the law school. There is easy transportation to and from the airport, so a rental car may not be necessary.

www.lawteaching.org/conferences
Avoiding the “Paper Research” v. “Computer Research” Trap

By Ben Fernandez

When I first started teaching legal research I divided the topic into “paper research” and “computer research.” I covered the digest, court reporters, statutes, and regulations, all in paper form at the library. Then I went online and showed the students how to use Westlaw and Lexis. A year later, I would see the students in the library and they would all be on their laptops, taking advantage of the free access they had to Westlaw and Lexis. Meanwhile, the books sat on the shelves, untouched. And some of the students I asked still didn’t know what a digest was. Either they forgot or they weren’t listening when I introduced it the year before.

Because of those experiences, I try very hard now not to fall into the paper research v. computer research trap. If you have grey hair, like I do, trying to convince young students of the virtues of paper research is futile. No matter what I say, they see me as an old man who is stuck in the past, doing things the old way. So I have given up on extolling the virtues of paper and books. Just about everything that is in print can also be accessed using the computer. The real difference is in the mechanisms available to search for information. You can do a word or phrase search, you can do a search using a table of contents, or you can look up a topic in an index. When you do a word search, it is a computer that is compiling the search results for you. When you use a table of contents or an index (which you do on paper or on a computer), the search results are compiled by a human being.

Every statute and regulation has a table of contents. And a case digest is really a giant annotated table of contents too. Most lawyers are familiar with the print version; the online version is referred to as West’s Key Number system. Both versions tell you what topics are covered in the case reporters, and the topics are organized by subject matter. What’s great about that is you see the topic in context. If you look up a slip and fall case, you will see that is part of the subject of premises liability, which is under tort law. Also, for each topic, there are headnotes of cases that have been read and quoted or paraphrased by a human being. The filing and sorting is not done by computer; it is done by a real person.

Every digest has an index; statutes and regulations have indexes too. An index also tells you what topics are included in a series of books or databases, but it is organized alphabetically instead of by topic. And there are usually cross-references to related or similar subjects. Again, the topics are filed and sorted by people not computers. A person can discern the meaning of language, not just identify a literal match. So you are
less likely to retrieve irrelevant and useless information using a table of contents or an index instead of doing a word search.

Every document in a computer can also be searched using a word or phrase search engine. Students may be more comfortable with this type of searching because it is the way internet search engines work. For most of the searching you do on line, search engines like Google and Yahoo work great. If you are doing legal research and you are looking for a “needle in a haystack,” there is nothing better than to do a word or phrase search on Westlaw or Lexis. But if you are searching in an unfamiliar area of law or you don’t know the terminology for the topic you are interested in, then a word search may not help you. Search engines have gotten better but they are still too literal. A computer can’t read a case, think about it, and tell you whether it deals with the topic you are interested in. It may give you what you want, but it will likely give you a lot of irrelevant information too.

For example, I once had an auto theft case that involved a juvenile. What was odd about the case was that, after the juvenile stole the car and drove around in it, he returned it to the place where he found it. Initially, I thought the fact that he returned the car would be relevant to intent, and I started looking for intent cases on Westlaw but I found nothing. Then I used the digest and found cases organized under a topic labelled “joyriding.” It turns out that is the term for this type of crime. Once I knew the terminology, it was easy to find something on point. But it was the digest that saved me, not a word search.

Another time I was researching the issue of whether the presence of second hand smoke could support a claim for breach of the implied warranty of habitability. I looked in the digest first and found lots of warranty of habitability cases, but no topic specifically involved second hand smoke. Then I did a word search on Westlaw using “smoke” or “smoking” and “warranty of habitability” as search terms, and all the state reporters for the entire country as a database. And bingo! I found what I was looking for.

Whether you do the work using a computer or pages in a book is not what matters. The real distinction is among the types of mechanisms that are available to assist you in finding what you want. There is computer assisted searching and human assisted searching. And it would be a senseless waste of human effort not to utilize human assisted searching simply because it was historically done on paper. Legal research is not divided into computer research and paper research; it is divided into research doing a word or phrase search, and research using a table to contents or index. The first type is appropriately called “computer” research; but the other two aren’t really “paper,” they are “human”!

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A Novel Tool for Teaching Property Law

By Tim Iglesias

First year law students regularly complain that Property Law is one of, if not the, most difficult subject. Many Property Law professors would agree. This essay argues that both professors and students would benefit from an approach that explicitly recognizes the questions that courts are regularly called upon to address in Property Law cases. It proposes a set of organizing questions as a coherent framework for teaching students Property Law doctrine while simultaneously opening them up to the profound and fascinating policy and theoretical debates in the field. This framework can be used with any casebook or teaching method.

THE PROBLEM
Teaching Property Law presents several distinct challenges, including a perceived lack of coherence at the doctrinal level. There are dozens of disparate rules and doctrines across many distinct topics. Many students feel that neither the topics nor the doctrines fit together. Unfortunately, there is very little Property Law literature that directly or comprehensively addresses this teaching challenge. This essay offers a solution to this problem.

THE SOLUTION
Despite all of the debates surrounding Property Law, there is an inherent and consistent structure that can be used to teach the course. The structure is found in the questions that courts are called upon to answer. Property Law rules and doctrines are answers to a limited and consistent set of questions that arose in the common law.

The questions are:

1. Is there a “property interest” at issue?
2. If it is property, what type of property interest is it?
3. How is this type of property interest created or acquired?
4. Who “owns” the property interest? How are competing ownership claims decided?
5. What “property rights” does ownership in this property entail, and with what limits/scope and duties?
6. What is required to make a valid transfer of this property interest?
7. How long does the property interest last? How can the property interest be terminated?
8. How are property rights in this kind of property enforced (e.g. liability rules and remedies)?
These questions express Property’s traditional core legal doctrinal issues. They will seem familiar to Property Law professors because we have been using them and teaching them without necessarily articulating all of them at the same time in one list.

Courts are consistently presented with these same legal questions under the rubric of a Property Law claim. The varied answers courts give to these questions create the evident pluralism in the substance of Property doctrine, feed the perception that Property Law is incoherent, and fuel theoretical disputes. When a case raises a particular property question, different courts interpret the question and answer it from diverse policy perspectives, leading to distinct rules and doctrines associated with the same question. Courts’ justifications for their answers inevitably reveal their conceptual and normative commitments.

There is a tight congruence between the framework of questions and the doctrines and topics presented in Property Law casebooks. The questions constitute a framework that provides analytical clarity and grips to help students cope with the multiplicity and apparent disunity of common law doctrines of Property.

The relationships among the questions can be complex. They are conceptually distinct, but in practice are often interrelated. There is not a one-to-one relationship between a question and a property doctrine. Some doctrines (e.g. servitudes) involve several questions; others (e.g. finding) only involve a few.

**HOW I USE THE FRAMEWORK OF QUESTIONS**

A few years ago, I started offering this framework as a regular reference point during the course. I found sharing these questions with my students enables them to grasp what is at issue in our cases more easily and to structure their understanding of Property Law topics, doctrines, and cases. The framework helps students identify the important issues and questions at the outset of their study of Property Law so that they are prepared to explore, discuss, and advocate for the varied answers that courts give.

As part of the first assignment in my Property course, I require the students to write brief answers to a version of the questions in the framework before they do any reading. I reassure them that this is not a “test” but rather a means to help them recognize what they already know about Property Law. Pedagogically, I am also attempting to “implant” these questions for their consideration during the course. Year after year, students’ answers demonstrate that these questions are familiar as “Property Law” questions even to non-lawyers. Even without any particular context they regularly mention the same Property Law doctrines and rules as answers to the question.

During the course, when we begin to consider a case I often ask: What property question(s) does this case address? This practice helps students orient themselves to the case, anchor a case in the framework, and relate the cases (doctrines and rules) across topics.
Periodically during the course, I provide students with a handout that tracks which questions we have studied for each topic or doctrine. At the end of the course, I invite students to revisit their first essays to take stock of what they have learned. And, I offer the framework of questions as a supplement to the traditional exam outline organized by doctrinal topics.

**BENEFITS OF THIS APPROACH FOR PROFESSORS AND STUDENTS**

This framework of questions articulates the primary legal issues that courts address in Property Law cases. All of the common law cases, doctrines, and rules in Property Law casebooks fit into this framework of questions. Therefore this framework of questions provides a relatively simple but comprehensive structure which encompasses all Property Law doctrines.

Most casebooks use some of these questions to organize part of the course, and use other means (primarily doctrines or topics) to organize the remainder. Laying out the questions all together in a list offers a conceptual container for Property doctrine. It demonstrates that there are not an unlimited number of issues (just as there are not an unlimited number of property interests). The framework of questions demonstrates that Property Law is not disparate by demonstrating its connectedness via the questions courts ask and answer. This reduces unnecessary anxiety, confusion, and distraction among students.

When students use the questions, they can read and understand cases more efficiently because the questions provide analytical clarity so they can follow the court’s reasoning because they understand what question the court is answering.

In addition, the framework provides an easy entry into policy and theory questions and encourages a critical perspective. Knowing the questions suggests points of comparison and contrast, instead of seeing rules and doctrines in isolation as unconnected. When students see that several rules are only different answers to the same questions in different contexts/topics, they instinctively inquire: why use rule A to answer Question #2 in that topic but rule B to answer the same question in another topic? Students see that the different rules are informed by different policies/theories/purposes and contexts, e.g. efficiency or fairness. And they see how they can change over time, so they appreciate the dynamism of property.

Finally, the framework advances the goal of contemporary legal education to help students integrate legal analysis and legal practice because starting with the questions—rather than the answers—is how lawyers actually operate to serve their clients. Clients ask questions about how to accomplish a task or solve a problem. For example, what do I need to do to transfer my house to my daughter? Does my neighbor have a right to let her tree grow over my property? Lawyers then frame the questions in the appropriate doctrines and can offer the client an answer.
CONCLUSION

Even though Property theory is thoroughly contested, law professors can offer students a coherent structure for learning the doctrines and rules of Property Law. Professors and students can use the framework of questions presented in this essay as a regular point of reference to link doctrines and topics together. The framework of questions creates a conceptual “tree” upon which to hang doctrines and rules and to explore controversies. Without such a framework students can get lost in the thicket of topics, doctrines and rules. Further, the framework enables professors to demonstrate how different policy perspectives would approach and answer a particular question in a given case, and explore deeper theoretical issues.

Tim Iglesias is a Professor of Law at the University of San Francisco School of Law. He can be reached at iglesias@usfca.edu.

1 For a full length treatment of this idea, see Tim Iglesias, A Novel Tool for Teaching Property: Starting With The Questions, 20 CHAPMAN LAW REVIEW 321 (2017).

Anti-Anxiety Jiu Jitsu: Turning the Terror of Public Speaking to Power

By Mark Perlmutter

I was a baby lawyer, first-chairing in only my second jury trial. I was awestruck by the opposing counsel, a true jury-whisperer. He seemed super-human. He had a resonant voice, looks that made women quiver, folksy relatability, a lightning-quick mind, and was an immaculate dresser. I took no comfort in my senior partner’s claim that he “put his pants on one leg at a time just like the rest of us”—after all, this was not a speed-dressing contest! Nor was the case itself a source of confidence, being one of those loser “dog” cases young associates get to cut their teeth on. This one was even nicknamed around the office “the falling doghouse case” because my injured client had somehow found herself under a doghouse she’d been helping to lift over a fence.

The evidence had closed—earlier than I’d expected. Surprisingly to me, the judge had already prepared the jury instructions and said he’d give us a few minutes to prepare for final argument. Having expected to have overnight, I was in shock. Within a couple of minutes, I felt an excruciating pain in my chest, shortness of breath, cold sweat. I told the judge I thought I was having a heart attack whereupon, thankfully, he had the bailiff call 911—and off to the hospital I went. Turned out what I’d thought was a heart attack was merely a panic attack brought on by uncontrollable anxiety. And so began my decades-long study of public speaking anxiety.
In addition to being able to overcome my own anxiety, I’ve worked with lawyers, law students, and others, and studied psychotherapy and other modalities. What follows are practices tried and true.

**COGNITIVE REFRAMES: CHANGE OUR THINKING**

Most of us misperceive the nature of anxiety, seeing it as “bad,” something to be avoided. In fact, it’s an arousal that occurs when our brain decides something coming our way merits our attention. If we then decide it’s a threat, our brain gets ready to flee, fight, or freeze. If our brain evaluates it as good, we gear up to approach it. It turns out that the arousal is the same either way; that is, our mid-brain structures move us to take action, but whether we see this process as “anxiety” or “excitement” simply depends on whether our cortex appraises the stimulus as “good” or “bad,” as “threat” or “opportunity.”

Thus, the stimulus (making a speech) and arousal that we initially associate with a threat can work for us if we instead view the stimulus as an opportunity—just like the force from a Jiu Jitsu opponent can be converted to our advantage. The power of this reframe has been demonstrated in experiments related to test-taking anxiety. One group of GRE test-takers, told any anxiety they experienced would actually help them do well, outperformed the control group by an average of 50 points in the lab—and by 65 points on the GRE itself. The lesson: view anxiety itself as an opportunity to help us focus our attention on the task.

In addition to the thoughts we have about the nature of anxiety, a second set of thoughts requiring a reframe are our audience mindreads and negative predictions. Here are some of the more common ones: the audience hates me; I’m going to be embarrassed; I’m going to fail; I’m going to lose.

The mindread that “the audience hates me” is belied simply by our own experience as audience members. Most of us don’t put ourselves in an audience in order to hate the speaker. On the contrary, we want to be enlightened or entertained or in some way gratified. So whether the audience ultimately hates us does not depend on its mindset; in fact, we, as audience members, generally start out feeling positively. Rather, it depends on how well we attune to our listeners wants and needs. For that reason, whether our fear of failure, losing, or embarrassment is ultimately realized will not be known until after we’ve spoken. Because we can’t know until then, it’s not only irrational to make these negative predictions, but it serves only to torture us by raising our anxiety. Therefore the only reasonable approach is to engage our curiosity, that is “let’s just see how this turns out,” and devote our energy to attuning our presentation to the audience’s wants and needs.

A corollary reframe is to view our presentation not as a potential realization of our worst fears, but rather as an opportunity to bring a gift to our listeners—the gift of entertainment, empowerment, edification, or other enrichment of their lives. Viewed in
this way, we’re actually performing an act of love that most anyone would find hard to reject.

STANDING NAKED.
Gerry Spence\(^2\) counsels us to stand emotionally “naked” when we rise to argue, to display emotional vulnerability at the outset. To me, this meant communicating my anxiety, using it to bring the jury into my camp, rooting for me. It generally went something like this:

> Ladies and gentlemen, as I rise in support of my client’s cause, I find myself feeling nervous, even a little shaky. And that’s because I know my client has placed in my hands a matter of critical importance to her. If I fail to accurately and clearly summarize the evidence for you, responsibility for her profound disappointment will rest squarely upon my shoulders and I can’t bear that thought. With that in mind, I’ll now endeavor to help you determine what actually happened in this case and how that impacts your duty under the court’s instructions.

As I confessed my nervousness and saw the looks of understanding on the jurors’ faces, I felt a connection and my butterflies invariably settled down. My own terror had truly become a source of persuasive power.

ATTUNEMENT: PREVENTING THE ROTTEN TOMATO BARRAGE.
One of my greatest fears was that I would say something so unacceptable that I’d lose the audience from the get-go. But I learned from jury selection a foolproof technique that solved the problem: simply ask the audience about their relevant attitudes and beliefs and tailor the presentation accordingly. For example, in an oral contract case to be tried in a venue where most people think it has to be in writing to be enforceable, I’d ask, “How many of you believe oral contracts in industries where they are customary and necessary to conduct commerce should be just as enforceable as written contracts?” All I had to do then was to prove this was an oral contract agreed to in an industry where such contracts were customary and necessary to conduct business.

A variation of this technique is to elicit evidence from the audience for the point we’re trying to make. For example, if I was trying to get a group of lawyers to accept the proposition that all of us need to be aware of our own vulnerability to behaving unethically, I’d ask the following questions and invariably get the following results:

- “How many of you think you should never lie in the course of representing your clients?” Almost all hands go up.
- “How many of you, in fact, have never lied in the course of representing your clients?” A smattering of hands. Nervous laughter.
- “How many of you actually believe those who just raised their hands?” Virtually no hands. More laughter.
The very process of a responsive interaction with the audience may well make them accept us at the outset and give us cues that we’ve disarmed them.

**TIPI: TEACHING THE BODY THERE’S NOTHING TO FEAR**

Some people suffer from really stubborn cases of speaking anxiety, particularly those people who have had one or more or habitual traumatic experiences in front of audiences. These folks require more than mere cognitive restructuring. Their bodies literally experience a range of uncomfortable sensations at the very thought of speaking before an audience. In law school, these students are terrified to speak in class, freeze up when called upon, and cope by hiding in class as much as they can. They may experience sensations such as dry mouth, rapid heart rate, chest tightness or pain, butterflies in their stomachs, sweating, clenching, and many others. Similar reactions follow them throughout their careers. Those of us who suffer in this way can benefit from a powerful process called TIPI, a French acronym for “Technique for The Sensory Identification of Unconscious Fears.” Through a highly structured reliving of difficult emotional experiences in the safety of a practitioner’s office, our bodies get the message at the deepest level that there’s truly nothing to fear. Following a TIPI experience, generally in three sessions or fewer, my clients typically report being subjected to formerly anxiety-provoking situations and realize only after the fact that the anxiety was nowhere to be found.

I hope these thoughts will enable you to approach every opportunity to address an audience with energy and excitement.

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1 [http://www.nytimes.com/2013/02/10/magazine/why-can-some-kids-handle-pressure-while-others-fall-apart.html?_r=0](http://www.nytimes.com/2013/02/10/magazine/why-can-some-kids-handle-pressure-while-others-fall-apart.html?_r=0)

2 Gerry Spence, How to Argue & Win Every Time (1996).

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**A Model for Teaching Value Creation in Law School**

By George J. Siedel

A 2013 study by the Center for the Study of the Legal Profession at Georgetown Law Center (in conjunction with The Association of Corporate Counsel) concluded that members of boards of directors and general counsel think that legal advice will become
increasingly important in the development of business strategy. As Lori Schechter, general counsel for McKesson Corporation, put it at a Directors Roundtable event in 2016, the way for corporate counsel to “get a seat at the table” is “a combination of not just being the naysayer or the person looking at the risk issues, but also being the person… helping to create the value.”

Incorporating strategic thinking, with its emphasis on value creation, into the law school curriculum is challenging because of the law’s traditional emphasis on risk management. The risk management role of attorneys has never been greater, as recent surveys indicate that legal risk is the most important category of business risk. Providing business leaders with independent advice about the legal risks associated with their value-creation business strategies is one of the most important roles of an attorney, a role that requires what the Georgetown study calls “managerial courage.” But as Schechter’s comment implies, an attorney’s risk management role is not necessarily at odds with providing value-creation advice.

THE REQUIRED HARVARD BUSINESS SCHOOL LEADERSHIP COURSE
MBA students at Harvard Business School are required to take a leadership course based on a model that, with one modification, can be used in law schools to integrate legal risk management and value creation strategies. The Harvard course focuses on the three key elements that form the basis for business decision making: economics, law, and strategy. The course guide for instructors calls the sweet spot at the intersection of these three elements the “zone of sustainability” and notes that actions beyond the zone can lead to business failure.

Expanding the economics component in the model to encompass strategic thinking enables use of the model beyond business decisions—for example, in political and non-profit decision making. Here is a depiction of this expanded model that illustrates the three pillars that are the foundation for all types of decision making: strategy, law, and ethics.

Given the inherent tension between the value-creation focus of strategy and the risk management orientation of law, how can the three pillar model be used in law school courses? Possibilities include adding the model to first year Torts and Contracts courses and using the model in a third year capstone course on “Lawyers and Leadership” or “Legal Strategy.”

USING THE THREE PILLAR MODEL IN FIRST YEAR TORTS AND CONTRACTS COURSES
Using the model in Torts and Contracts courses is largely unchartered territory, so the starting point is to simply raise the question: Does the doctrine or approach under discussion in the course create any value-creating opportunities?
Coverage of product liability in the Torts course provides an example that I have used many times in executive seminars for senior managers and corporate counsel. Management of product liability concerns requires managers and their lawyers to examine risks associated with foreseeable uses of a product. In addition to addressing these risks, if these managers and attorneys asked why their products are used for unintended purposes, they might discover that customers have few alternatives and need new products to meet their needs. So the product liability risk management process that requires consideration of foreseeable uses can double as an important resource for identifying new product development opportunities.

The core Contracts course has traditionally emphasized creation of a legally perfect contract—that is, one that will protect the client’s interests if a dispute ends up in court. But this laudable risk management goal often comes at a cost when legalistic contracts lose their value as business tools because managers do not understand them. To reduce this cost, the Contracts course could include recent developments, such as lean contracting and contract visualization, that increase the value-creating function of contracts by enabling managers to use them to achieve business goals.

**USING THE THREE PILLAR MODEL IN A THIRD YEAR CAPSTONE COURSE**

A third year capstone course on “Lawyers and Leadership” or “Legal Strategy,” much like a capstone Strategy course in business schools, could draw on material covered in other courses, but with an emphasis on value creation. Here are some examples of the types of issues, in addition to the Torts and Contracts examples mentioned earlier, that instructors could address in the capstone course:

- How can lawyers and clients use visualization techniques to improve the usefulness of legal documents?²
- How can employment law be used to attract and retain the best talent?
- How can government regulation be used to develop new business models through disruptive innovation and a regulatory gap strategy?
- How can an intellectual property management plan create shareholder value?
- How can the litigation process generate information unavailable elsewhere that companies can use to improve their systems?

Instructors can also use the three pillar model in the capstone course to encourage students to think about their ethical responsibilities beyond the rules governing professional conduct, just as MBA students in the Harvard MBA leadership course consider the ethical dimensions of their business decisions. For example, in order to attract and retain the best talent, companies should attempt to eliminate all forms of
discrimination, even when there is no legal mandate requiring them to do so. This strategy aligns with the ethical principle of respecting the dignity of all individuals.

CONCLUSION
As lawyers and company leaders recognize the increasing importance of law in value creation, law schools that incorporate strategy into the curriculum have an opportunity to play a leadership role in legal education. Through the three pillar model, they can encourage strategic thinking in existing courses, such as Contracts and Torts, and in a third year capstone course that covers an array of legal topics that have value creation potential.

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1 http://www.directorsroundtable.com/id=1182

2 For example, a small team of attorneys and designers redesigned Wikimedia’s trademark policy. We revised the densely-worded legal document to make it more clear and colorful. For further detail, see GEORGE J. SIEDEL, THE THREE PILLAR MODEL FOR BUSINESS DECISIONS: STRATEGY, LAW & ETHICS (2016), Chapter 6. The other issues in the bulleted list are covered elsewhere in the book.