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Of Moots, Legal Process, and Learning to Learn the Law

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Of Moots, Legal Process, and Learning to Learn the Law

JOHN T. GAUBATZ*

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I. INTRODUCTION

Of the many contributions that Dean Soia Mentschikoff made to the educational process at the University of Miami School of Law, one of the most significant was the introduction of the course *Elements of the Law* into the required curriculum. This course, originally structured at the University of Chicago by her late husband and noted legal scholar Karl Llewellyn, and later taught at that institution by then-Professor Mentschikoff, provides the intellectual framework for legal education at the University of Miami. *Elements* guides the first semester law student through the basics of legal reasoning by exploring the legal system—in particular, the relationship of rights, remedies and procedure, the development of law by decision, and the role of the courts and of counsel.

Each professor who teaches *Elements* develops his own technique for teaching course materials, although each uses Socratic dialogue almost exclusively. My own method adapts the familiar moot court problem to the large class setting, with good effect. I was invited to share this technique as a part of a *festschrift* for Soia Mentschikoff, and I am honored to accept the invitation.

This article begins with a description of *Elements*, and follows

* The author wishes to thank his colleagues, Patrick O. Gudridge and Irwin P. Stotzky, for their contributions to this article.

with a discussion of its place within the history and goals of legal education. I conclude by sharing my moot-court variation of the Elements course and by discussing how this method better leads students to a basic understanding of the legal system, the structure of legal analysis, and the craft of lawyering than does mere Socratic dialogue.

II. THE COURSE ENTITLED *Elements of the Law*

A first year student's introduction to Elements at Miami begins with a brief entry in the course bulletin:

Elements of the Law

Three credits

*The functions and problems of tribunals, and the theory of legal rules and of the law crafts. The theory and practice of American case law, especially in regard to principle, precedent, statute and justice, are developed with intensive study of selected case materials.*¹

I suspect that this introduction does not make much of an impression; the entering student lacks the wherewithal to understand the significance of the words, such as "law crafts" and "precedent," used to describe the course.

Students receive their first concrete hint of what lies ahead when they read *The Bramble Bush*,² by Karl Llewellyn, as part of a summer assignment before matriculation.³ Llewellyn explains "the law"—what it is and how it is learned—as only a great master of legal education can, administering a heavy dose of legal realism before the student faces the reality of law school. He presents four assumptions which embody the basic principles of law study, and which must become ingrained in each student's mind:

- (1) *The court must decide the dispute that is before it. . . .*
- (2) *The court can decide only the particular dispute which is before it. . . .*
- (3) *The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes. . . .*
- (4) *Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.*⁴

1. 56 UNIVERSITY OF MIAMI SCHOOL OF LAW BULLETIN 17 (11th ed. Sept. 1982).

2. K. LLEWELLYN, *THE BRAMBLE BUSH* (1960).

3. A second required book is E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949).

4. K. LLEWELLYN, *supra* note 2, at 42-43 (emphasis in original), quoted in S. MENT-

This quote from *The Bramble Bush* succinctly describes the thrust of the course called Elements of the Law—a course designed to force the student to be suspicious (if not cynical) of statements of law presented without accompanying facts, and to lead the student to appreciate the importance of the political, economic, and social setting to the validity of a legal opinion. Finally, Elements trains the student to present both litigated and background facts to enable a court to understand its role in controlling the litigants' affairs.

The primary course materials are divided into four sections, the organization of which reflects their use in the course.⁵ Part I, *Who is Suing Whom for What on What Theory?*, begins the legal education process. It exposes students to the relationship between procedural and substantive law through the process of legal reasoning, and it allows them to explore the reasons for bringing lawsuits. Part II, *Legal Argument: Indefiniteness in New York*, illustrates the use and misuse of precedent by counsel and the courts as they developed a solution to the problem of indefinite contract terms. (Students often learn more from the blunders of inept counsel than from the brilliance of a skilled lawyer or judge.) Part III, *The Concept at Work*, examines the theory and doctrine underlying warranty and products liability law, exposing students to the collision between the common law and legislative enactments. Part IV, *Foreign Remittances: The Court in Search of a Concept*, shows students how the pressures of fact and the skill of counsel combine to inform the court of the situation sense, enabling it to apply the legal analysis of one transaction to totally disparate concepts. This part also demonstrates how the legal process determines which party will bear certain risks in a commercial context.⁶

These materials and techniques, then, work toward a dual goal: Teaching the art of legal reasoning and the craft of lawyering,

SCHIKOFF & I. STOTZKY, *THE THEORY AND CRAFT OF AMERICAN LAW* at xxxiv-xxxv (1981) [hereinafter cited as *THEORY AND CRAFT*]. *THEORY AND CRAFT* is the casebook for the Elements course, authored by Dean Mentschikoff and Professor Stotzky. While Professor Llewellyn's name does not appear on the cover of the casebook, the basic choice of cases was his. *Id.* at xvi. Dean Mentschikoff modified Llewellyn's reading list over the years, and Professor Stotzky added substantial notes, note cases, and questions after the cases. For reviews of *THEORY AND CRAFT*, see Gerwin & Shupack, *Karl Llewellyn's Legal Method Course: Elements of Law and Its Teaching Materials*, 33 J. LEGAL EDUC. 64 (1983); Jones, Book Review, 37 UNIV. MIAMI L. REV. 867 (1982).

5. The cases from Part I, which present interesting legal analysis as well as story lines filled with human interest, are also in J. MICHAEL, *THE ELEMENTS OF LEGAL CONTROVERSY* (1948). See Stansbury, Book Review, 1 J. LEGAL EDUC. 607 (1949).

6. *THEORY AND CRAFT*, *supra* note 4, at xvii-xviii.

so that a student may develop as a legal advocate, critic, and theoretician.⁷

The structure and substance of *Elements of the Law* is vital to a contemporary legal education because it provides the student with the analytic and jurisprudential skills needed to understand the law as it exists and is practiced. Most importantly, it teaches that legal reasoning is part of the craft of lawyering, and thus accentuates its importance, while bringing the law to life.

Too often, contemporary law school courses ignore the question of how to "read, dissect and analyze cases" within the context of each other.⁸ They do not force the student to investigate the interrelationships between substantive fields of law, between substantive and adjective law, and between case and statutory law. Rarely do courses address, in any recognizable way, the manner in which cases are decided and statutes created, or the importance of the skilled attorney in that process. In these respects, contemporary legal education often fails where other forms of education, now rejected, succeeded. *Elements*, especially when supplemented with a moot court problem, fills this void, establishing its importance in the development of legal education.

III. A BRIEF HISTORY OF LEGAL EDUCATION

To appreciate the importance of *Elements* in a curriculum, one must understand its role relative to the history of legal education, because that history reflects many of the structural aspects vital to quality legal education. That history divides itself into periods during which one of four forms of teaching predominated: the apprenticeship periods, the reign of the Inns of Court, the treatise period, and the modern—or case method—period. Each period spawned its own method of teaching, with strengths, which *Elements* attempts to tap, and weaknesses, which *Elements* seeks to avoid.

A. *The Apprenticeship Periods*

Apprenticeship training is characterized by a pupil (apprentice) learning his profession by working with an experienced practitioner. He learns the skills and knowledge required for the pro-

7. *Id.* at xxii. Since its inception, the *Elements* course also has emphasized the importance of briefing cases in learning to compare and distinguish facts and concepts. The briefing exercise promotes the creative use of case law to support an argument.

8. *Id.*

fession through oral and visual instruction, and by mimicking his master's activities. There is evidence that apprenticeship training existed as early as the thirteenth century in England;⁹ before the proliferation of law books,¹⁰ it was the dominant form of legal education there. Similarly, because of the scarcity of law books in the colonies, it was the primary means of educating lawyers in this country during the colonial period.¹¹ Further, it experienced a resurgence in England during the latter period,¹² fueled by dissatisfaction with the formal burdens of the theretofore dominant Inns of Court, and the availability of legal treatises as a means of learning substantive law.¹³ As the Inns of Court declined, apprenticeship training experienced a renewed popularity.

B. *The Inns of Court*

Oddly enough, the English Inns of Court arose out of the very system of apprenticeship that ultimately caused their demise. In 1292, Edward I required judges to take apprentices.¹⁴ These apprentices began to congregate in the inns near the courts because many of them shared quarters with the senior practitioners who were directing their studies.¹⁵ Eventually, several inns became devoted wholly to the study of law, housing only senior practitioners and their apprentices. Thus began the "Inns of Court," which dominated legal education from the fourteenth to the seventeenth century.¹⁶

Life for the students at the Inns of Court was highly structured. Those who lived and studied at the Inns belonged to one of three groups: The senior group, or "benchers," who controlled the Inn; the "outer barristers;" and finally, the freshman students, or "inner barristers."¹⁷ Students advanced to senior groups, and

9. 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 314-15 (1923).

10. GLANVILL, *TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIE*, is the oldest treatise on Teutonic law; written between 1180 and 1189, it is confined to proceedings in the King's Court. BRACON, *TREATISE ON THE LAWS OF ENGLAND* covered the entire law of England as it existed during the Reign of Henry III, which covered the years 1256-1259. J. AMES, *LECTURES ON LEGAL HISTORY* 31 (1913).

11. L. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 19 (1953); Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 *CHI.[-]KENT L. REV.* 429, 439-40 (1981).

12. 6 W. HOLDSWORTH, *supra* note 9, at 481 (1927).

13. W. RICHARDSON, *A HISTORY OF THE INNS OF COURT* 209 (1975).

14. Stein, *supra* note 11, at 430.

15. W. RICHARDSON, *supra* note 13, at 2.

16. *Id.* at 3.

17. *Id.* at 16-17. Stein describes the three categories of students:

thereby assured themselves of more perquisites, by demonstrating competence in legal argument.¹⁸

There were three methods of instruction used to sharpen a student's skills in legal argument: attendance in court, participation in readings, and instructional exercises. Little is known about student attendance in court and little need be said. During the approximately one hundred days per year when court convened, students had to attend, take notes, and discuss the arguments with the senior practitioners at the Inn.¹⁹ In all likelihood, actual attendance was spotty,²⁰ probably approximating that of modern law students at an unpopular afternoon class; students probably benefited more from the readings and the instructional exercises.

Readings involved a formal process of argument, concentrating upon the interpretation of parliamentary acts or statutes. Six months before a scheduled reading period, the benchers would appoint the eldest outer barrister to select and prepare an act for the reading.²¹ On the appointed date, he would read the act to the assembled residents of the Inn, discussing its weaknesses and raising questions about its application to specific facts. A junior barrister would then refute the reader's interpretation of the statute and law; he, in turn, would be followed by other barristers attempting to refute the reader's other arguments. This discussion usually continued for weeks.²²

The instructional legal argument exercises, unlike the "more spectacular" readings,²³ required student, rather than outer barrister, involvement. The students propounded and then argued cases of varying levels of legal difficulty.²⁴ Depending upon whether the

Experienced students, known as readers, were employed in instruction in somewhat the same manner as contemporary law school teaching assistants. The second category of student, the outer barristers, was perhaps the equivalent of today's second year law school class; their studies were dominated by participation in the moots. New students, whose course of instruction was largely lecture and observation, were denominated inner barristers.

Stein, *supra* note 11, at 430-31. The benchers, who governed the Inns, had studied and gained practical experience for twelve to fifteen years before they received the honor of bench membership. W. RICHARDSON, *supra* note 13, at 18-19.

18. See W. RICHARDSON, *supra* note 13, at 17: "The inner barristers were considered immature until they were competent in the art of legal argument, and able to hold their own with senior members in house debates."

19. *Id.* at 98-99.

20. *Id.* at 100.

21. *Id.* at 101.

22. *Id.* at 101-03.

23. *Id.* at 131.

24. *Id.* at 131-37.

argument also involved readers and benchers, the exercise was called a moot, a bolt, or putting the case.²⁵

Because of the formality of readings and argument exercises, legal education in the Inns of Court was more effective than apprenticeship training. The readings provided a systematic exposure to the substance of the law, and the instructional exercises provided systematic training to improve legal analysis and advocacy skills. The exercises

familiarize[d] students with the rules of pleading practiced in the national courts at which they were daily auditors, and . . . train[ed] them in the technicalities of legal disputation. The frequency of these exercises and the repetitiousness of their arguments, continued over many years, guaranteed a facility in language and rapid rebuttal that could then have been acquired in no other way.²⁶

The inculcation of these skills is no less vital to the education of the modern law student and, as will be shown, is furthered by using a moot court problem in the context of an Elements course.

C. *The Treatise Period*

Although some scholars referred to the Inns of Court as England's third university,²⁷ the common law was not a proper educational topic at Oxford or Cambridge until Blackstone's appointment as a lecturer at Oxford in 1753.²⁸ He thereupon tried to create a system of legal education within the English university setting. In the initial lecture contained in his *Commentaries*, Blackstone decried the then-prevailing method of legal education by apprenticeship, and proposed university study of the law under an authority who

should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its

25. It is impossible to spell out, in detail, the differences among these legal debates because there is nothing in the records of the Inns describing their precise nature. They probably differed in their degree of sophistication rather than in form or procedure. *Id.* at 131. There was also an argument known as an "imparlance," which questioned a special aspect of medieval procedure. *Id.* at 136.

26. *Id.* at 132-33.

27. *Id.* at 92.

28. Stein, *supra* note 11, at 435. Instead, Oxford and Cambridge universities taught both canon and civil law. "The robed dons of the ancient colleges did not seem to distinguish between theory and profession and saw the common law as a trade unworthy of serious academic consideration." *Id.*

greater divisions and principal cities; it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. . . . These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shown how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.²⁹

Although Blackstone's attempts were unsuccessful in England, his efforts did succeed in changing the nature of legal education in America. His *Commentaries* was the first major attempt since Coke's *Institutes*³⁰ to reduce the law to treatise form; because of this, it became one of the few books read by Americans training for the law. It is not surprising, therefore, that American educators, as well as American institutions, responded to his call to introduce legal education into the institutional setting: In 1779, William and Mary College established a chair of law, inviting George Wythe to fill the position; Columbia appointed James Kent to a professorship in 1793 and again in 1823; Harvard appointed Chief Justice Isaac Parker of Massachusetts as Royall Professor of Law in 1815; and the Litchfield Law School was established sometime between 1774 and 1784.³¹ Thus, legal education planted its roots in American institutions of higher education albeit weakly, in that apprenticeship education prevailed as the predominant means of legal preparation³² until the post-revolution era,³³ when a rise in American nationalism and events such as Harvard's 1829 appointment of Justice Joseph Story as Dane Professor of Law³⁴ made university legal education more popular.³⁵

Legal education in American law schools generally followed the Blackstone model. From Judge Parker's time until Christopher Langdell became the dean at Harvard in 1870, professors lectured

29. 1 W. BLACKSTONE, COMMENTARIES *35-36.

30. 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND.

31. Stein, *supra* note 11, at 443.

32. *Id.* at 439.

33. *Id.* at 440-41.

34. *Id.* at 446. The impact of Justice Story on Harvard Law School is similar to Dean Mentschikoff's influence at the University of Miami School of Law in that the reputation of each improved his or her school's standing in the academic and professional community.

35. *Id.* at 440.

in conjunction with assigned readings, while students took notes. The Blackstone model emphasized knowledgeable exposition of the law, rather than skillful discourse.

The treatise and lecture method, which dominated legal education during the nineteenth century, conveyed substance, theory, and jurisprudence to the students. In these tasks it was superior to apprenticeships and the Inns of Court. Unfortunately, the treatise method also suffered from a neglect of analytical or craft skills. These missing links, especially the lack of training in legal analysis, brought about the development of a new approach to legal education: the case method.

D. *Langdell and the Case Method*

In the preface to his first contracts casebook, Langdell explained that he believed the law to be a science, with books as the experimental record:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.³⁶

Langdell employed this philosophy when he compiled his first casebook—a series of cases in chronological order—which traced the development of the law of contracts. In the classroom, Langdell questioned students directly on assigned cases and the law that those cases expressed or defined.³⁷ His students, familiar with the treatise method, fled in droves.³⁸ A few remained, intrigued by the intellectual challenge. These became proponents who eventually brought the Langdell method to the forefront of American legal

36. *Id.* at 449 (quoting C. LANGDELL, *CONTRACTS* (1871)).

37. Implicit in the case method was the belief that "we understand most thoroughly, and remember longest that which we have acquired as a result of labor on our own part." Keener, *The Inductive Method in Legal Education*, 28 AM. L. REV. 709, 715 (1894).

38. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 499-503 (1920).

education.³⁹

The case method has been the dominant form of American legal education for the last hundred years. During that time, law professors have published a variety of casebooks structured to follow the case method. Casebooks are no longer devoid, however, of textual summations of the law in the area studied. Indeed, Langdell included a textual summary in the second edition of his casebook on contracts. Most casebooks, however, have eroded his method even further, limiting the number of cases on a specific point, and ignoring the historical background implicit in Langdell's technique. Other casebook authors continue to depart from the traditional case method by editing the facts of cases, replacing them with a summary, or leaving them out altogether; Langdell required a close reading of the full case.

Dialogue within the classroom also has changed. Few professors have retained their fidelity to the Socratic method, often sacrificing Socratic dialogue for lectures on particularly difficult points. Short hypothetical problems often form the basis for discussion, and some professors have retreated to the strict lecture method, using the cases only as a backdrop to illustrate the concepts presented.⁴⁰

The case method, in its original form, and to a lesser extent, in its current form, excels as a means of training students in legal analysis. And while it can be used to convey legal theory and an understanding of current substantive law, it is less effective at doing so than is the lecture method. Further, both fail to develop the craft skills cultivated by the apprenticeship and the Inns of Court techniques, and no legal education is complete until a student has mastered the sum of these skills. In contrast, *Elements*, especially when combined with a moot court problem, recognizes the utility of these past techniques and taps the best from each of them to produce an unequalled educational experience.

39. For a more complete history of Langdell and the introduction of his method into American legal education, see Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980). An interesting analysis and defense of the case method as compared to other techniques is found in Dente, *A Century of Case Method: An Apologia*, 50 WASH. L. REV. 93 (1974). But for an overview of the first century of American legal education, see McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U.L.Q. 597 (1981).

40. Professor Beale, a former pupil of Langdell, recalled how Langdell, in his later years, and as a result of failing sight, "never used the Socratic method in his teaching. He simply talked, slowly and quietly, stating, explaining, enforcing and reinforcing the principles which he found in the case under discussion." J. AMES, *LECTURES ON LEGAL HISTORY* 480 (1913).

IV. THE PLACE OF ELEMENTS OF THE LAW IN THE HISTORY AND FUTURE OF LEGAL EDUCATION

Elements of the Law is but a logical step in this evolutionary development of legal education. Its function is not to teach substantive law; most law school courses already accomplish that. Rather, it seeks to illustrate what law is and how it is formed and to develop the analytic and professional skills a first-year student needs to make the most of his legal education. It does so by contrasting the articulated structure of the law with the unarticulated, and by showing that life situations and social settings structure the law through the intellectual efforts of attorneys, legislators, and judges—all of whom play a role in determining the law's content.

Within this general purpose, a number of subsidiary themes are important to the overall design of the Elements course:

a. *Law is a seamless web of related laws and concepts.* The Elements materials, particularly those in Part I,⁴¹ provide an overview of the legal system. The statutes and decisions weave a matrix of interrelated rules and concepts, forcing the student to conclude that no rule of law exists separate and apart from other, similar rules, and that differences in rules result from a variety of sources. In this aspect, Elements has much in common with other legal process courses.

b. *Law is the product of development over time.* The unique selection and ordering of the Elements materials also exposes the student to the historical nature of the development of law. The presentation of Elements materials parallels Langdell's original casebook. Elements students study cases in chronological order, so that they see the development of doctrine within the field as the natural result of the case sequencing.⁴² Since modern casebooks rarely follow the Langdell pattern, the development over time of a doctrine is no longer so obvious to the student, requiring its treatment in a separate course.

c. *The study of law is an acquired skill.* Elements seeks to influence the way students study law. It articulates a method of studying and using law which emphasizes analysis. It is designed to supplement the case method—which, although it was designed on the premise that the student, investigating the law under the watchful eye of an able guide, will develop the analyt-

41. Other purposes for Part I include teaching the student how to read a case—how to determine the issues and holdings, how to judge the strength of the holding in a case—why law suits are brought, and the common-law tradition.

42. Langdell emphasized the importance of grasping the historical development of the law. See *supra* text accompanying note 36.

ical skill of the lawyer and thus gain a familiarity with the substantive law, rarely fulfills that premise. Elements fills a void left by law school courses which convey substantive law and promote general intellectual skills, but neglect the analytical skills so essential to the lawyer's art.

d. *The lawyering craft is an important component in the growth of the law.* Elements also strives to develop the skills honed by attorneys as they participate in that determination of the law—skills barely acknowledged in most law school courses. The sequence of opinions written by Justice Cardozo shows students the influence one man can exercise in the legal community,⁴³ and inclusion of counsel's arguments in the Elements materials further illustrates the attorney's effect on the outcome of cases. The professor can supplement this illustration by discussing the quality of the attorney's advocacy and posing the question: How could that attorney have improved his argument?

The course begins with cases selected to provide the student with an overview of the legal system, and the professor with a medium for teaching the basics of reading an appellate decision. The first case is *Butler v. Wolf Sussman, Inc.*,⁴⁴ an action for replevin of a ring wrongfully pledged by the owner's husband to the defendant pawnbroker. The defendant pleaded in general denial, the case was tried, and judgment rendered for the defendant. On appeal, the defendant argued that there was no evidence that the plaintiff had made a demand for return of the ring before bringing the action (an element of replevin), and that the defendant's right to possession was secure under a statute protecting the lien of pawnbrokers "except where the pledging or possession [of the pledged item] by the pledger constituted larceny at common law."⁴⁵ Plaintiff responded that defendant's active defense of the

43. Until Justice Cardozo joined the New York Court of Appeals, that court took a rigid approach towards indefinite contract terms: "It is elementary in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty." *United Press v. New York Press Co.*, 164 N.Y. 406, 410, 58 N.E. 527, 528 (1900). Cardozo persuaded the court to read commercial contracts with a more realistic eye, and interpret a contract in its commercial setting. "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917). Thus, Cardozo's ideas played a key role in developing the law.

44. 221 Ind. 47, 46 N.E.2d 243 (1943).

45. IND. CODE ANN. § 32 (Burns 1935) (current version at IND. CODE ANN. § 28-7-5-33 (West 1980)).

case waived the demand requirement and that under these facts, the statute was either inapplicable or alternatively, unconstitutional.

During a series of classes, the professor leads the students through the case using a standard case-brief format. When forced to articulate the procedure in the trial court below, students begin to grasp the importance of procedure in reading a case. Stating the appellate procedure and result subtly compels the student to concentrate on what the court *does* rather than on what it says. When students state the facts of the case, they recognize that the court does not necessarily organize the facts for the reader, and that not all the given facts are relevant to the decision. What the student might have perceived as a relatively straightforward case takes on added dimensions.

Finally, discussion of *Butler v. Wolf Sussman, Inc.* turns to the substantive issues of the case. Analysis usually lasts for several class periods and serves as a springboard for consideration of the practical and philosophical aspects of law. The students usually find three substantive issues. There are, in fact, only two: Whether the defendant waived a required pre-complaint demand, and whether the local pawnbrokers act protected the defendant's possession. With a little guidance, students usually state these issues accurately. The opinion contains a substantial discussion of the defendant's inadequate general denial, however, and its conclusion that the plaintiff waived the right to a judgment on the pleadings by proceeding tends to confuse the students. They usually want to include the adequacy of the general denial as an issue, even though neither party nor the court below raised the point. This seemingly minor point allows the professor to distinguish dictum from holding, and to begin a discussion of trial tactics—why did the defendant choose a general denial, and why did the plaintiff consider moving for a judgment on the pleadings to be unproductive? It also encourages discussion of the supervisory nature of an appellate court decision.

The first actual issue, the possible demand waiver, generates discussion of how courts decide what proof is needed before they grant the requested relief and consideration of the elements of a cause of action. Since the only cited authorities supporting the possibility of waiver were intermediate Indiana decisions, out-of-state appellate decisions, and a reference to *Corpus Juris*, the professor has a tailormade opportunity to introduce the process of determining the weight of authority. The court's holding—that the

active defense waived the pre-complaint demand requirement introduces students to the notion that a court can eviscerate a rule without overruling it.

The second actual issue produces thoughtful instruction in reading cases and practical illustrations of how the law is formed. The statutory derivation of the defense at issue exposes the student to the relationship between case law and statutes. In addition, the express exception in the 1935 statute protecting pawnbrokers from liability for common-law larceny introduces the student to the concept of common-law crimes and the unitary nature of marriage at common law. The court's reference to the 1881 Indiana Married Women's Property Act coupled with an inconclusive discussion of its effect on the interpretation of the language of the 1935 statute leads to classroom discussion of the intricacies of statutory construction. Finally, the court's one-paragraph discussion of the constitutionality of the statute generates three more areas for student consideration: first, the relation of federal and state constitutions to the validity of statutes; second, the distinction between a statute unconstitutional on its face and one unconstitutional as applied; and third, the unclear nature of the court's reasoning: Was the statute unconstitutional or was the pawnbroker liable because of the express exception? The court's blurred rationale adds to the student's understanding of the leeways of precedent.

The use of *Butler v. Wolf Sussman, Inc.* thus accomplishes at least four goals in the classroom: (1) development of case reading skills, such as determining the case's facts, issues, and holdings, and recognition of how the procedural or factual posture of the case limits the holding and its precedential value; (2) understanding of the structure of the legal system; (3) exploration of why attorneys and judges act the way they do; and (4) exposure to the leeways of precedent.

The cases following *Butler* continue to add depth to the student's knowledge of the legal system and its structure. For example, *Duke of Somerset v. Cookson*⁴⁶ explores the elements of equity jurisdiction. Subsequent cases trace the elements of ejectment, compensatory damages, proximate cause in tort, and other areas that illustrate the limits of a court's power (or willingness) to grant relief for particular types of alleged wrongs. This is followed by a series of cases raising questions of justiciability. By the time students complete the first part of the materials, they have a general

46. 3 P. Wms. 390, 24 Eng. Rep. 1114 (Ch. 1735).

notion of how courts operate and the limits of judicial powers.

Students spend the balance of the course learning how appellate courts decide cases, why they articulate their decisions in a particular manner, and what the attorney's role is in that process. Traditionally, this progression through the three sequences of cases forming Parts II, III, and IV of the materials is steeped in the Socratic method. In Part II students investigate the development of legal concepts outside the framework of a statute. In Part III class discussion focuses on the interaction between a court-created legal concept and a subsequent statute. The materials in Part IV emphasize the attorney's role in educating the court about situations in which the legal concepts arise. For each situation, discussion centers on practical analysis: What the parties want, the reasoning they use, the authority they rely on, the court's decision, whether the court articulates the law differently than statutes or prior cases, and the court's *ratio decidendi* supporting the result and the rule of law adopted. This type of analysis promotes understanding of a court's decision-making process. Of equal import, students perceive the attorney's dual role in presenting the facts and law most effectively for his case, and helping the court to understand the legislative facts to guide its formulation of the law in that particular case.

V. THE MODERN MOOT AND ELEMENTS OF THE LAW

When I was a student at the University of Chicago School of Law, the thought struck me that moot court embodied the practical application of theories I learned in then-Professor Menschikoff's course, *Elements of the Law*. Few of my professors, however, attempted to demonstrate the relevance of their classroom exercises to the practice of law. This attitude has always troubled me because students seem to learn and remember what they do in moot court far better than what they do in most classes. Therefore, when my turn came to teach *Elements*, it naturally occurred to me to supplement the standard materials with a moot court record.⁴⁷

47. That I would think in terms of moot court is not surprising. My experience as a student instructor in the University of Chicago moot court program led me to a serious consideration of legal education as a career, and to an active involvement in moot court programs at both of the law schools in which I have taught. See J. GAUBATZ, *THE MOOT COURT BOOK* (1979); Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC. 87 (1981).

A. *A Description of the Method*

The way I merge moot court with the Elements materials is simple: When the class is ready to begin discussion of Part II of the Elements materials, students receive a twenty-page record raising the issues faced by the New York courts in the indefiniteness cases contained in that Part. They receive a complete record, containing a complaint, an answer, motion papers, a trial court order, and notice of appeal. The appeal is set in the appellate division that decided a few of the cases in Part II. Since the New York Court of Appeals decided the remaining cases in the materials, all of the cases in Part II provide authority for student argument. Furthermore, argument before the appellate division requires the students to recognize that they must use the New York Court of Appeals' decisions differently than they do those of the court presently considering the students' appeal.

I divide the class into two groups of "law firms" with four to six students in each "firm"; half of the firms represent the appellant in the hypothetical case, and the other half represent the appellee. These law firms meet and prepare arguments for their client, using only the first case in Part II as their authority. This is usually an easy task for one side, since the first case strongly supports one position; in fact, the case appears almost hopeless for the other side. In class, I select students at random to develop their positions. As students begin to argue, I stress the importance of knowing the record and the authority upon which they rely. They must also be able to articulate the holding of that authority in a way most favorable to their position. This exercise often demonstrates that the court that decided the case may have inaccurately articulated the rule of law; it also suggests how the facts of a case limit its authoritative value. The exercises, in turn, suggest arguments the students can employ in subsequent classes.

For the subsequent class session, the students prepare arguments using only the first two cases in Part II for authority. This requires them to synthesize the decisions in order to develop a rule of law. One side again appears to have an edge. Successive assignments continue in the same way, with one or more new cases added to the permissible list of authorities for each class.

Normally, by the fifth class, the weaker of the two sides begins to find some support for its position in the added authorities. By the seventh class, students can make a strong argument that the court has changed its basic approach to the decision of cases in that area of law. Finally, in the last few class periods, each side of

the case appears to have substantial support in the articulated law, encouraging students to develop arguments founded in legal policy.

B. *The Advantages of Using a Moot Court Problem to Teach Elements*

There are several advantages to using a moot court problem in Part II⁴⁸ of the Elements materials. Most importantly, this method develops student enthusiasm for the task at hand. Much like the members of the Inns of Court, students focus upon the importance of learning professional skills. By acting as lawyers in the hypothetical case, they develop an almost instinctive ability to read cases with accuracy and creativity, and to articulate the law most advantageously for their position. Students pursue these goals with vigor because they understand *why* the skills are important and how they will apply to the practice of law.⁴⁹

48. I apply the moot court method to Parts II and III of the materials. Although it could be used with Part IV, I vary my approach to maintain student interest and to maximize student appreciation of the application of Elements to legal practice. In that Part, *Foreign Remittances*, I emphasize the use of appellate cases as a source of law for client counseling purposes. As part of their preparation for those classes, students draft letters of advice to three hypothetical business clients, each of whom has an interest that will be affected by the case law on foreign remittances in a different way.

49. Although there is no evidence that Professor Llewellyn ever used a moot court exercise in Elements, he suggested the technique as early as 1948:

And be it observed that the teaching methods required [for teaching craft skills] are essentially those offered by case-teaching itself, when rightly understood in contrast to prevailing misunderstanding. For . . . it is not the judicial decision which is the essence of the "case"; it is instead the concrete *problem-raising situation*—so that, as I see it, any introduction of the so-called "problem method" into law teaching is really but an expansion of the essential merits of *case-teaching*, an expansion obscured only by a current mis-emphasis upon the idea of a "case" as being at best the official report of a judicially decided cause. Certainly it has been demonstrated that appellate records can become good "cases"—that appellate advocacy, for instance, can be effectively taught in fairly large groups with, for example, a set of teams, of four each, at work preparing the arguments on each side of the issue. There I speak from personal experience. . . . [T]he fact that there are four, or six, or even eight teams at work on a given side does not at all detract from the effectiveness of discussion and criticism before and by the whole class of one or two briefs taken as samples, using them as a basis for developing the relevant craft-principles and for testing and applying them.

Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 217 (1948) (emphasis in original).

In the same article, Llewellyn distinguished the typical case method of instruction from his own problem-solving method. He preferred to treat a case "as a problem *for* solution, not as a problem already solved." *Id.* at 213 (emphasis in original). Llewellyn's use of an appellate problem to teach craft-skills in an appellate advocacy class is readily adaptable to teach craft-skills in a legal process class.

The moot court method also emphasizes the importance of the law to the client, recreating a lesson inherent in apprenticeship training. When students represent an automobile parts retailer, they understand why the client might want a supply contract phrased in terms of his "requirements" to be enforceable. In the clientless classroom, this association is more difficult. The ability to relate to the client leads to an understanding of the business needs that created the conflict underlying the case. Once students recognize these needs, they can appreciate why a court must develop rules ensuring orderly maintenance of the marketplace, along with resolving the particular conflict. This, in turn, introduces students to legal realism and the attorney's role in educating the courts to the realities underlying the legal problem. And, as students work with a complete set of pleadings, they gain a comprehensive understanding of the limitations inherent in working with a record.⁵⁰

Finally, the moot court method, much like Langdell's case method, accentuates changes in the law by forcing the students to restructure their arguments from class period to class period. The cases in Part II reveal a shift, both in the judicial approach to deciding cases and in the structure of the law itself. As a result, the relative strengths of each side of the hypothetical case fluctuate as cases are added. This movement teaches students the fact and the nature of change, as well as how to use that change to their advantage.

VI. CONCLUSION

Learning-by-doing has been a part of legal education since its very beginning. Yet, today's legal education is often sorely lacking in this area. Use of a moot court problem in conjunction with Elements of the Law fills this gap and renews the learning-by-doing tradition. In early England the goal of the moot was to improve craft-skills and develop an ability to engage in legal reasoning. Modern moot court combines the advantages of apprenticeship training and education at the Inns of Court.⁵¹ By applying these

50. A Harvard law professor has suggested that trial experience would be even better in this regard. See Shreve, *Classroom Litigation in the First Semester of Law School—An Approach to Teaching Legal Method at Harvard*, 29 J. LEGAL EDUC. 95 (1977). The appellate approach is preferable in the first semester, however, because it allows students to concentrate on analytical skills, without being distracted by litigation's emphasis on interpersonal skills.

51. Langdell's early students formed a club, where the activities included regular per-

advantages to *Elements*, a classic case-method course, a student is offered an unsurpassed opportunity to maximize his education and develop his practical and analytical skills.⁵² This unique combination contributes to the formal first year process a practical education in reading and applying appellate cases—an art which will follow the student for the rest of his professional life.

formance in moots, to supplement their studies under him. Fessenden, *supra* note 38, at 504-05.

52. See J. GAUBATZ, *supra* note 47, at 1-2.