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USE OF THE CONTRACTS COURSES AS A VEHICLE FOR TEACHING PROBLEM SOLVING

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When I started my law school studies shortly after my return to the United States after World War II, most of my law professors, particularly the ones teaching the first-year courses, taught their students not only the principles of law but also taught them how to use those principles to solve hypothetical cases. It was not enough, for example, for students to state that a promise could be inferred from the facts in a hypothetical; they had to give reasons from the facts that led them to that conclusion. Most of these professors used the Socratic method of teaching. By their questions, they forced the students to think through each issue raised, reach a conclusion on each issue, give reasons for those conclusions, and then, solve the hypothetical case by applying the legal principle involved, and again, giving reasons for their solution to the problem. These professors said that by these methods they were teaching us "how to think like lawyers." I would rather put it, they were teaching us "how to think," or better yet, they were teaching us "how to solve problems."

They used the same process in their examinations. Short answer questions were rare, and multiple-choice questions were almost non-existent. An examinee could not expect to get a good grade if the answer to a question simply stated a conclusion. A conclusion had to be reached, but the reasons given for having reached that conclusion, and not the conclusion itself, were the important parts of the answer. These professors had no patience with the examinees who merely stated the arguments that could be raised on each side of the question. There were few questions asked, or issues raised, that could be answered without identifying the problem, stating the applicable rule of law, reaching a conclusion concerning how it should be applied, and then giving reasons for the conclusions that were reached. Almost all of the questions required judgment calls, and the students were graded on how well they supported the conclusions they had reached. In short, their grades depended upon whether they knew the legal principles taught, but just as important, upon how well they used these principles to solve the legal problems.

My first assignment, when I began teaching law, was teaching the contracts courses. I determined to emulate those of my law school professors

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who I considered were my best teachers. I was already familiar with the Socratic method of teaching since I had some experience using it in the high school courses in American history and algebra, which I taught during my senior year in college in the "practice teaching" courses. I also used the Socratic method in the army when I was assigned to teach at the Field Artillery Replacement Training Center at Fort Sill, Oklahoma. There I taught everything from military courtesy through trigonometry. In both cases, I found that the Socratic method was effective, and that using it came naturally to me.

The casebook I selected for my first contracts course was Shepherd's *Cases and Materials on the Law of Contracts*.[1] The first chapter in that book was entitled *Formation of Simple Contracts*, and the first section, *Making and Interpretation of Promises*. That seemed to me to be an ideal place to start the course. Most of my students were as old as I, or a little older. Most of them, like I, had served in the armed forces for several years and had done their pre-law work, or part of it, before entering the military service. Some had done all of their pre-law work after getting out of the service.[2] Most of them already were, or should have been, experienced in solving personal problems. I was very surprised, therefore, to learn how ill-prepared they were to solve legal problems.

The first case with which we dealt was *Laux v. Bekins Van & Storage Co.*[3] In that case, the court concluded that promises, in order to become contracts, need not be express promises, and found that on the facts of the case, the parties had agreed upon an implied-in-fact promise.[4] My first step in discussing this case was to require the students to identify the promise for the breach of which this suit was being brought: "I promise to store your goods in a fireproof warehouse." After the promise had been identified, my next question was whether Bekins had made that promise, the students replied that the promise was made in the advertising. This was followed by my demanding that they show me any promissory language in the advertising. When they could not do that, they fell back on, "The promise was implied." My next inquiry was, "How do you know?" That question stunned them. I then required them to reread the facts of the case, and to identify those facts they could use in argumentation to persuade a jury that such a promise had been made. This was probably the first time that any of them had been required to perform such an exercise, and most of them had difficulty identifying the relevant facts to use in such argumentation.

1. HAROLD SHEPHERD, CASES AND MATERIALS ON THE LAW OF CONTRACTS (2d ed. 1946).

2. In those days, the American Bar Association's Section on Legal Education, and the school in which I was teaching, required only two years of pre-law work for admission to law school.

3. 169 P.2d 1012 (Cal. 1917).

4. *Id.* at 1013.

Then I reversed the task and made them assume that they were representing the defendant. I asked them to identify the facts from the case and from the surrounding circumstances they could use in trying to persuade the members of jury that they could not infer a promise to store the goods in a fireproof warehouse. When we finished that process, I asked how many students were persuaded by all of these arguments that such a promise was made. The majority of the class concluded that the promise was made, but there were some who were not persuaded. I then told the class that thereafter I would demand that they follow the process just demonstrated: (1) identify the promise being sued upon, and (2) if there is no express promise, explain why and how they would infer the promise from the facts. I stressed that thereafter a statement of a mere conclusion that a promise could be inferred from the facts would not be a sufficient answer. They must follow that conclusion with "because these facts (identifying them) require such a conclusion." I then told them that I would expect them to follow that process in handling the next case.

In the second case, *Silverman v. Imperial London Hotels, Inc.*, two brothers attended a boxing match in London and then went to the Imperial London Hotel to take a bath.[5] The hotel had its bath house and "cubicles" in an area outside the hotel. The cubicles were rented to the bathers for an overnight stay after they had taken their baths. The brothers were bitten by bed bugs during the night and they sued the hotel for breach of contract. The class seemed surprised when I started the discussion of the case with the same question I had used in the preceding case, "What promise is being sued upon?" After a long and tedious process of questions and answers, most students agreed that if the Silvermans were to succeed in their suit for "breach of contract," they would have to establish that the hotel promised that their cubicles would be free of bed bugs.

The students had more difficulty in inferring the promise in *Silverman* than they had finding it in *Laux*. In spite of the fact that the English court did a beautiful job in giving its rationale for inferring a promise, the students had difficulty in determining which of the facts were relevant in deciding that the promise was made.[6] Their difficulty was due in part to the general terms in which the court had stated the promise, and in part to the fact that the plaintiffs were suing on a count of negligence as well as on a count for breach of contract, and in its discussion the court did not separate the proof dealing with each of the counts. This had also been true in *Laux* where there were separate counts of breach of promise, negligence, and misrepresentation, but the

5. 137 L.T.R. 57 (K.B. 1927).

6. The court stated the promise in much more general terms than I would permit the students to use. The court talks in terms of a promise that the rooms were reasonably fit for overnight occupancy. *Id.* at 59.

students seemed to have more difficulty making the discrimination here than they did in *Laux*.

I concluded the discussion in *Silverman* with another warning to the students that they had to become familiar with the process we had used in these two cases because they would have to use the same process in almost every future case, and on the final examination. The facts would change, and the issues would be different, but in almost every case the students would have to solve a problem and would have to give reasons from the facts and surrounding circumstances to support their conclusion.

The next case, *Foley v. Classique Coaches, Ltd.*, introduced the problem of supplying terms that the parties had not expressly included in their purported agreement, but which were necessary to make the agreement definite enough to be enforced.[7] In *Foley*, the price term had not been expressly agreed upon.[8] After a discussion concerning the reasons a price term had to be agreed upon before a court could enforce a promise, we turned to the process the court used to decide that it would supply a "reasonable price" as the price term. I should not have been surprised that most of the students did not recognize that the process was the same one we had been using. Because the subject matter and the problem had changed, they failed to recognize the exceptionally good job this court had done in developing, step-by-step, the argument supporting its conclusion that a reasonable price would be supplied. Again we had to repeat the painful procedure of identifying from the facts of the case, and from the judge's decision, those facts that supported the conclusion to supply a reasonable price as a term of the agreement. And again a large number of the students had difficulty in distinguishing between the facts that were relevant and irrelevant to their proof.

After some discussion of *Foley*, in the years since the advent of the Uniform Commercial Code, I turn to the statutory treatment of the problem of the missing price term.[9] I point out the importance of the first sentence of section 2-305, "The parties *if they so intend* can conclude a contract for sale even though the price is not settled."[10] I emphasize that in every case, before they try to supply a reasonable price, the students must prove that the parties intended their agreement to be a contract. We then turn back to *Foley* and most of the students are surprised that the court in that case also started with the recognition that the parties had intended that there be a contract. Again, I point out the necessity of proving that the parties intended a contract and require the students to identify the arguments the *Foley* court made to prove that the parties intended that there be a contract. The relevance of many of the

7. 2 K.B.1, 2 (1934).
8. *Id.* at 2.
9. U.C.C. § 2-305 (2000).
10. U.C.C. § 2-305(1) (emphasis added).

facts that the students had misused in trying to establish that a reasonable price should be supplied, now became clear.

I could not leave this topic without looking at other kinds of indefinite terms such as time-of-performance, color and quality of paint to be used in painting a house and time-of-payment. I would demonstrate that even though it would be necessary to supply the missing terms, those missing terms need not be a "reasonable" time or a "reasonable" color. It was also necessary to demonstrate that the lawyer's task is not complete when he establishes that the price term is a reasonable price; he must also decide the monetary value of that "reasonable" price. The process used in establishing that monetary value was then explored.

One would think that by this time all of the students would have learned the process, and the necessity of using it in preparation for class. Not so. When we started the next case, *Wood v. Lucy, Lady Duff-Gordon*, many of the students still did not see the necessity of the process we had been using or could not use it.[11] This case involves a very detailed franchise agreement that contained no express promise on the part of the franchisee to do anything.[12] I explained to the class that the problem here was one of consideration, a topic that we would develop later, and that on the facts of the case, there was no consideration unless we could infer a promise on the part of the franchisee to do something. We then turned to the process the court used to determine that, by implication, Wood had promised to use reasonable efforts to market the franchisor's goods.[13] Many of the students did not recognize that the court's first step, just as it was in *Foley*, was to establish that the parties intended their agreement to be a contract, and that many of the reasons given for finding that intent were the same as in *Foley*. They also failed to recognize that the process used in finding "intent" was only a variation of the process we had been using in finding "implied promises," and supplying missing terms.

I again explained to them that we would be using the same process throughout the course. We would have to use the process to determine whether a contract was unconscionable, whether there had been an improper threat, whether a contract was contrary to public policy, and whether the promisor should have expected the promisee to rely on the promisor's promise. We would also use the process to distinguish between conditions and promises, and to use it whenever we have to apply such general terms as "reasonable," "material," "justice," etc. By this time, I realized that every time we came to a new application of the principle, we would have to start almost from scratch for some of the students.

11. 118 N.E. 214 (N.Y. 1917).
12. *Id.* at 214.
13. *Id.*

I remained convinced that in order to be a successful teacher of contracts, and other law courses, I had to indoctrinate the students in the process of problem solving and reaching conclusions. I was satisfied that *Laux*, *Silverman*, *Foley* and *Wood* were good examples of the process used by the courts, and I have continued to use them as the introductory cases to each of my contracts courses.[14]

Toward the end of the first term each year, I have always given a practice examination to my contracts class. The quiz consists of one question (a different one each year) in the style of the questions I use on the final examinations. Before giving the question to the students, I lecture for about an hour on "How to Take a Law School Examination." In the lecture, I emphasize that I do not want an "essay," that I do not want a regurgitation of the principles of law that we have covered during the term and that I do not want a mere statement of conclusions. Rather, I do want them to answer the question asked. In the answer, I expect them to identify the issues present, to apply the legal principles relevant to those issues, to solve the problem raised by each issue, and to give reasons from the facts and surrounding circumstances to support the conclusions reached. I then give examples of each step in the process. I explain that there will be no "right" answer to most of the issues, and that they will be graded not only upon their knowledge of the law, but also upon how well they support the conclusions they have reached.

I then grade the papers and write detailed comments on them. The most common comments are "Why?" "Where is your conclusion?" and "Where is your answer?" I return the graded questions to them before the end of the term so that they will have some time to try to correct their faulty techniques before the final examination. Usually about three fourths of the class will have received "D's" and "F's" on the practice examination. Obviously most of them are shocked. Many of them have never received anything lower than a "B" in all of their previous schooling. I try to console them by assuring them that I have kept no record of the practice quiz and that the grades they received on the quiz will not be counted for them or against them in determining their final grades. I emphasize that their three biggest failings were non-recognition of many of the issues, not reaching conclusions on each of the issues they did recognize, and not giving reasons for the conclusions they reached. Since the first year, I have also been able tell them from my past experience most of the class will have corrected many of these deficiencies by the time they take the final examination.

I think I have never been so despondent in my life as I was when I finished grading the examination papers at the end of that first term. I thought that I

14. Most of the casebooks I have used over the years no longer contain *Laux*, *Silverman* and *Foley*, and so I provide these cases to the students in handouts. The casebooks usually include *Wood*, but it appears in the section dealing with illusory promises, and so I take it out of turn.

had at least done a respectable job in my first quarter of teaching, and yet in spite of all the drilling we had done throughout the term on the process of problem solving, it was as if most of the class had never heard of such a thing. What saved me from complete depression was the fact that Dean William M. Prosser's article, *Light House No Good*, came out in the second issue of *The Journal of Legal Education* shortly after I had finished grading those papers. [15] I was shocked at how ineffective my teaching had been during that first quarter. I was ready to abandon a teaching career. What kept me from making that decision was my reading Dean Prosser's article, and the wise counsel of the dean of the school at which I was teaching. I persevered and continued to use the same process in my second quarter contracts course. While there was some improvement in the results on that quarter's examination, I was still very dissatisfied with the students' performance. There also seemed to be continued improvement in the courses I taught to the same students during their second and third years.

I have been following the same process in teaching my contracts courses during the fifty years since that time. In fact, I am still using the same four introductory cases I used that first year. I continue to believe that teaching problem-solving techniques is an essential function of the law-school teacher. Over the years I have been supported in that position by many of my former students in all areas of the practice of law, and by lawyers in some of the larger law firms who have beginning associates working for them. Their frequent complaint concerning the associates working with them is, "They refuse to come to any conclusions."

Over the years it has become harder and harder for me to get the students to realize the importance of problem solving. The last few years have been particularly difficult. I have to spend much more time in drills, and, as a result, I cannot cover as many of the topics in the law of contracts as formerly. Although I have no empirical evidence to support my conclusions concerning the reasons for this problem, my perceptions are that the causes can be attributed, at least in part, to the students' pre-legal education, formal and informal, and in part to the fact that too many of today's law school teachers are not concerned about requiring the students to give reasons for their conclusions in class or on the final examinations. They do not grade the students on how well they can solve problems. These have been my observations regardless of the school in which I have taught.

15. Dean William M. Prosser, *Light House No Good*, 1J.LEGAL EDUC.257 (1948). The article was the address Dean Prosser delivered at the Annual Banquet, Temple University Law School, Apr. 29, 1948. The article starts with a story of an Indian sitting on a rock on the coast of Oregon watching the fog come in, and saying "Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him flash light, him raise hell; but fog come in just the same." *Id.* Prosser explained that of the people to whom he has told this story, the group that has understood it best and appreciated it most, were law professors. *Id.* And so it was with me.

When I first started teaching, most of my students had many real-life experiences in which they had to reach conclusions in their work and in their personal lives. Some of my students today have never had to solve a personal problem; they have only wished things to be true and their wishes were always granted. When I first started teaching law, there was no Law School Admissions Test ("LSAT"), and so for the most part, law school admissions were based on the college grade point averages and a guess by the admissions committee concerning the analytical abilities of the applicants. Since that time, however, the LSAT has enabled the admissions committees to do a good job in weeding out most of those with inadequate analytical aptitudes. In other words, the lack of analytical ability should no longer be a reason for the students' inability to learn how to solve legal problems. Today, many of our students have gone through high school and college without ever having to solve a problem except in their mathematics courses. Most of their education has consisted of the transferal of factual knowledge to them from their teachers and from their textbooks. They have been examined on how well they can regurgitate these facts. Most of their examinations have been confined to "true-false" or "multiple-choice" questions. Some of the students have never had to take an "essay" examination or write an essay. It is no wonder that when they come to law school they rebel at having to use the facts in order to come up with their own solution to the problems posed both in class and on the examinations.

As I have said, when I first started teaching most law teachers used some form of the Socratic method. It was during this period, however, that criticism of its use grew. Its users were accused of "intimidating" their students and thus hindering the students' "learning." No doubt there were teachers who misused the method and were legitimately subject to criticism, and it probably is true that there is a little bit of "Kingsfield" in all of us who use the method. Nevertheless, the vast majority of my law school teachers used the method properly and effectively, and so had most of my colleagues. Most of us have used it to force our students to do their own thinking and to solve legal problems on their own. Of course, many students do not like the Socratic method because they have become accustomed to giving the "correct" answer when they are called upon, and to receiving the "correct" answer from their instructor when they ask a question. They feel intimidated when the instructor replies to their question with one of his own in order to force them to think through the question they have asked, and to solve their own problem. Because they believe that they are looking foolish, instead of playing the game, they tend to refuse to ask any more questions, thereby denying themselves practice in problem solving. That, of course, is a hazard of using the Socratic method. No doubt, problem solving can be taught by the use of methods other than the Socratic, but it is unlikely that the learning process can be made painless.

When they abandoned the Socratic method of teaching, all too frequently law teachers also abandoned requiring their students to solve problems either in class or on the examinations. In addition, the use of multiple-choice and other "objective" examination questions grew. Many teachers began using short-answer questions instead of the traditional "essay" questions. In both cases, the examination's emphasis has been to determine how much knowledge of the legal principles the student has retained. There has been little or no concern about whether the student can use this knowledge to solve problems. After almost thirty years experience in drafting contracts questions for the multi-state bar examination, I accept the fact that problem-solving ability can be tested by use of multiple-choice questions, but I know how difficult it is to draft such questions, and that hours of committee work are required to refine the questions so that they accomplish the task for which they are intended. Very few of the "objective" questions and short-answer questions that I have seen used on law-school examinations do anything more than test the students' knowledge of legal principles. The result is that many law teachers have also abandoned testing and evaluating the students' mastery of problem solving.

I have seen evidence of this phenomenon in the upper division courses I teach. Because of the amount of coverage required, I do not use the time-consuming Socratic method all of the time in those courses. Nor do I spend much time requiring the students to solve problems in class. I do, however, test them on their problem-solving abilities on the final examination. This is particularly true in the course in remedies where almost every question on the examination is, "You are retained to represent (the plaintiff). What do you propose to do?" I insist on their giving reasons for each step they are taking. I also require the students to explain to explain why they are selecting certain remedies, and certain courts, rather than others. In spite of the fact that I have told them in advance that this is what I was going to do, many of them fall back into the same bad habits they had during their first year of law school, such as stating only conclusions, giving no reasons for their conclusions, and, in general, writing essays on the legal principles involved in the case. In other words, they again are refusing to solve problems. I can only assume that they have been getting satisfactory and good grades by doing the same thing in most of their other courses.

In spite of the many frustrations, I still consider it my duty as a law professor to teach the students how to solve problems, and to evaluate them on how well they perform this task. I am still convinced that the contracts courses are the ideal courses in which to do this, and have resolved to continue doing it during the few teaching years I have left. As I have said before, I am supported in this decision by the advice of many former students in the judiciary and in all areas of the practice of law.