

Changing Legal Pedagogy

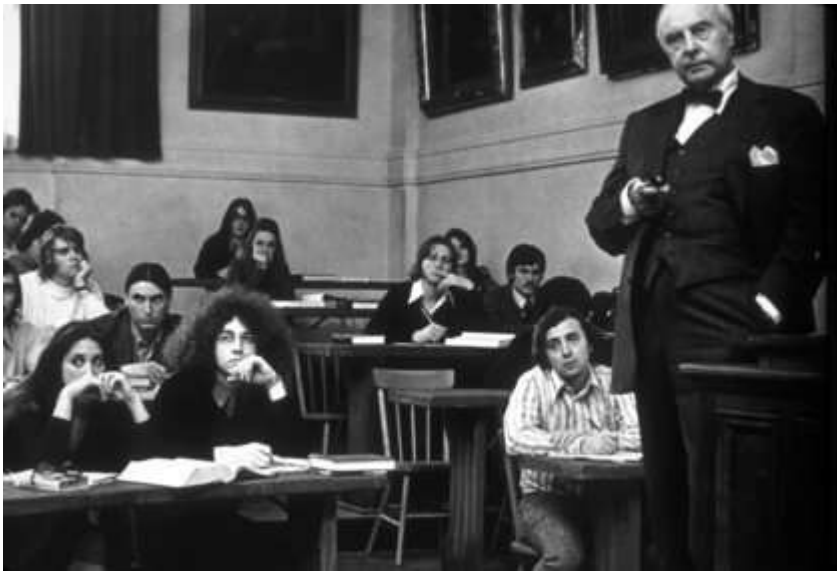
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The current style of legal pedagogy was introduced in 1870 when Harvard Law School Dean Christopher Columbus Langdell initiated the use of the casebook method and the Socratic method, practices which were eventually institutionalized in American legal education, along with the use of the curve model of grading. Unlike many other higher education programs, the teaching and grading practices of law school are often deliberately confusing and intimidating. While the actual material is not always difficult to understand, the methods by which professors present information and assign grades produces anxiety and stress among students, as shown in the section on the [psychological effects of law school](#). Furthermore, the teaching methods, grading system, and curriculum of legal education have evolved to promote and reinforce the desires of the elite, or what Nikki Demetria Thanos calls “the pedagogy of the oppressor.”¹

In this section, we discuss the most common attributes of American legal pedagogy—the Socratic method, the casebook method, and the grading system—and offer suggestions for reforms in legal education that are more conducive to critical thinking, skills developments, and accurate assessment of student progress and understanding of material. The next section takes on the issue of curriculum, with suggestions for incorporating the insights of critical legal studies into law school programs.

Legal Pedagogy

American law school classes are generally structured to rely on a combination of the Socratic method—the form of teaching based on asking and answering questions—and the casebook method—reading illustrative examples of judicial principles. Law professors’ use of the Socratic method, portrayed in popular culture in movies such as *The Paper Chase*, is notorious for putting students on the spot and causing frustration and embarrassment. In a series of interviews conducted at UC Hastings Law, students described this teaching method as alienating, boring, and silencing. The professor’s strategy of asking questions often felt like “fishing” for the right answer, which students described as a waste of time. The Socratic method also produces classroom situations in which students ignore the insights of other students, instead waiting for the professor to point out the “correct” answers. Furthermore, trying to answer Socratic questions tends to make people feel like failures, as if they are being judged by the class.² While this method can give students practice thinking on their feet and with public speaking, it can take time away from actually teaching the material.



Scene from the Paper Chase (1973)

The casebook method also causes confusion and frustration in students. The reading materials are dry, repetitive, and often contradictory. In other countries, law professors are more likely to use summaries or overviews of legal rules. However, in the United States law students are expected to form a broader understanding of the law through their analysis of specific cases. This method of teaching requires assigning an enormous amount of reading, which is nearly impossible for students to absorb. Students must teach themselves to look for common themes and topics, a skill that takes time to develop as they become more immersed in the language of legal education. However, when scholarships are based on receiving good grades in the first year of law school, the stress of trying to understand how to read and study for exams is daunting.

The combination of these two methods produces a classroom environment that does not facilitate critical thinking, and causes difficulty for social justice-oriented students who want to question the assumptions that shape legal analysis. There is little space in the current classroom environment to question the version of the law presented, including the racist, sexist, classist, and homophobic underpinnings of the law itself. Students who choose to speak out and challenge the unjust nature of the legal system or the social effects of law are often silenced by the professor—who will tell them they need to learn the law as it exists—and by other students—who complain that the time spent discussing these issues will distract from material on which they will be tested.

Much of the anxiety and stress experienced in law school is directly related to the competitive and ambiguous nature of the grading system. One major reason grades do not reflect student understanding or effort is because exams fail to measure it. Exam-taking is a skill that is not used in legal practice and that is essentially useless to students outside of law school and the bar exam. Systems of grading should qualitatively tell a student what they are doing right and what they need to do to improve. The current grading system leaves students guessing at how to improve, and frustratingly ignorant of what they are doing correctly. This lack of relevant feedback causes speculation, and increases the sense of isolation and hyper-competition that are toxic for community-building.

Grades should not be based solely on end of the semester exams; they are not useful to students. The curve, which creates a general atmosphere of competition, exacerbates this frustration

by constantly ranking students based on a vague and unexplained system of evaluation and grade assignment. As Duncan Kennedy writes in his famous critique of legal education: “Law schools teach these rather rudimentary, essentially instrumental skills in a way that almost completely mystifies them for almost all law students...students don’t know when they are learning and when they aren’t, and have no way of improving or even understanding their own learning process.”³

Ideas for Action

It may be hard to imagine a different way, but alternatives do exist. There are certainly less confusing ways to teach critical thinking and analysis. To take a page from Martin Luther King, a good process is: 1) Investigation into the situation at your school, 2) Build support, 3) Develop a strategy and concrete objective, 4) Dialogue with opponents, 5) Direct action if dialogue breaks down, 6) Reconciliation and change implementation, 7) Repeat.

You could form a teaching/grading reform task force at your law school to petition the administration to explore other options and methods. Find allies among other student groups to join you and be sure to articulate specific critiques and alternative models. Learn what your opponents are thinking and what their objectives are and adapt. Talking to faculty members could also be helpful in rethinking the methods of legal education; many will be key allies. Here are some suggestions for objectives to get you started imagining how to move forward:

1) **Expand on the typical Socratic/case method approach to include other pedagogical strategies.**

Other graduate programs combine analysis of primary materials with overviews to provide context and an understanding of how individual readings are linked to a broader literature. Graduate seminars on related topics such as political science and sociology are more likely to use the call method and reading of primary texts in conjunction with professor-led lectures and group discussions in the classroom. Other graduate programs are also more invested in teaching their students excellent writing skills; law schools should integrate legal research and writing into every course. These methods can easily be adapted to legal education and provide an opportunity for more critical analysis and productive teaching styles.

2) **Reform the grading system to improve feedback and understanding of materials.**

Perhaps the most impactful change would be to reform the grading system to provide useful feedback in order to reduce competition and isolation and increase understanding. The current grading system and feedback structures focus on student weaknesses and barely touch on student strengths. This severely undermines many students’ self-esteem and causes a sense of failure and a loss of confidence. This harms the greater professional community, as well as causing alienation within the law school community.

To approach this difficult discussion, reach out to students to generate suggestions for the type of feedback they would find useful and less stressful. Reach out to faculty to figure out what they have time to do and what kind of training would be needed for them to embrace a new feedback system. Reach out to employers, who often use GPAs as an applicant screening tool, and ask what kind of information they would

like to know about their applicants and in what ways this can be effectively summarized. The understanding you get from this process should hopefully point to a method that would be workable for all involved parties at your school.

3) **Replace the curve model with a more accurate and objective grading system.**

Ending the curve would go a long way toward offering more accurate feedback to students. The curve method of grading as currently practiced increases student stress, anxiety, conformity, isolation, and fear of risk. What motivation it does provide tends to take the form of unhealthy hyper-competitiveness. The curve also adds to the creation of a situation where effort and understanding are not tied to grades. One student's success depends on the failure of other students. The curve skews everything and essentially negates any useful feedback that could possibly be garnered from a grade. If grades are to be useful, they should tell students if they understand something correctly and how to understand it better, not where they fall in an arbitrary ranking system.⁴

Offering classes with pass/fail credit is one way to take the pressure off of students, especially in their first year. This allows students to take risks in classes they might otherwise avoid for fear of a bad grade. Making the first year all pass/fail would be a useful reform, since it would immensely lower people's stress levels and substantially improve the school environment.⁵

4) **Include more clinics and apprenticeship opportunities.**

One of the major problems with legal education as currently practiced is that legal doctrine is separated from the actual practice of law and the acquisition of practical skills. Improving this situation can be accomplished through the use of legal clinics, apprenticeships, and skills-based coursework in addition to theoretical pedagogy. Recently, there have been renewed suggestions that law school should follow the model of medical school, with residencies that provide on the job training during the third year.⁶ If your law school does not offer enough clinical opportunities or skills-building coursework, petition the administration to create clinics that address the interests and needs of the student body.

5) **Change the culture of conformity and hierarchy that is produced by legal education.**

Finally, an important part of what needs to change is the sense of entitlement instilled in students who have gone through this kind of pedagogy and managed to "succeed" in the stereotypical sense. As Nikki Demetria Thanos writes in *A Handbook for Social Justice Activists Thinking about Law School*, "Artificial stressors are woven into the pedagogy of legal education, reinforced by students, and effectively convert an unearned privilege into something you think you deserve because 'you have worked so hard.'" Instead of insisting that other students go through the same high-stress, obfuscating learning environment, students should organize to challenge these practices and replace them with models that can facilitate social justice work in law schools.

Challenging the culture of law school means building new norms, such as emphasizing pride in maintaining one's purpose and identity during and after law school. Building support groups is a good method, as well as coordinating with each other to voice dissent. Make pacts with other students to support each other in class discussions and write for student newspapers. And most of all, talk with many other students about these issues. Culture change takes communication; people need to know they are not alone in their reaction to law school. We have a large base of untapped support among student populations; we just need to reach out. You can make significant progress toward changing your school's culture as well as winning better methods of teaching as well as clear feedback and grading criteria.

Conclusion

Implementing these changes will go against the grain of legal education as it has been practiced for over a century. You will meet resistance from other students who are afraid to go against the flow, and from administrators who worry that changes might hurt their *U.S. News and World Report* rankings. However, at a time when tuition and levels of debt are higher than ever, when the legal education industry is in flux, and when popular and scholarly commentators are suggesting the need for law school reforms, these ideas for a new kind of legal pedagogy could be received more willingly than in the past. The effort to radically transform legal education could have enormous implications. Duncan Kennedy's advice to law students, professors, and administrators in 1981 still applies today:

If law schools invested some of the time and money they now put into Socratic classes into developing systematic skills training, and committed themselves to giving constant, detailed feedback on student progress in learning those skills, they could graduate the vast majority of all the law students in the country at the level of technical proficiency now achieved by a small minority in each institution.⁷

Further Resources

Michael Hunter Schwartz, "Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching," 38 *San Diego L. Rev.* 347, 354. (2009).

Deborah L. Rhode, "Kicking the Socratic Method and Other Reforms of Law Schools," *Chron. Higher Educ.*, Jan. 26, 2001.

Jennifer L. Rosato, "The Socratic Method and Women Law Students: Humanize, Don't Feminize," 7 *S. Cal. Rev. L. & Women's Stud.* 37, 40 (1997).

Jennifer Jaff, "Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning," 36 *J. Legal Educ.* 249, 260 (1986).

Paul F. Teich, "Research On American Law Teaching: Is There a Case Against the Case System?," 36 *J. Legal Educ.* 167 (1986).

Duncan Kennedy, "Legal Education as Training for Hierarchy."

¹ *A Handbook for Social Justice Activists Thinking about Law School* by Nikki Demetria Thanos

² These interviews were conducted by Will Pasley in late September and October 2011 among students at the University of California, Hastings College of Law.

³ Duncan Kennedy, "Legal Education as Training for Hierarchy," in *The Politics of Law*, page 59.

⁴ One counter-argument is that employers expect the curve and that we would hurt our students by putting them outside the norm. This is a valid concern and something that we would have to figure out a way around. There should be a way of designing a grading system that summarizes the quality of an applicant to employers which does not have this level of negative impact on students.

⁵ Many people will suggest that students will lose motivation if they do not have the bad-grade cudgel hanging over their head. I think this view fails to see that Hastings students are internally motivated to learn the law and that focusing all of our attention on the external motivator of grades actually hurts us. This view also ignores the fact that grades do not reflect how well students know the subject or how much work they have put into it.

⁶ Samuel Estreicher, "The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School," *New York University Journal of Legislation and Public Policy*, Vol. 15, issue 3 NYU School of Law, Public Law Research Paper No. 12-39.

⁷ Kennedy, "Legal Education as Training for Hierarchy," page 63.