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TEACHING REASONING

VINCENT BLASI*

Reasoning skills of a certain sort are taught well in the traditional law school curriculum. No matter how good her previous education, the typical law student surely acquires an improved facility at testing propositions by considering hypothetical applications. Many students learn a lot about linguistic indeterminacy, unintended consequences, the allocation of decision-making responsibility, and how much turns on which questions are asked and how they are framed. It is a rare, indeed obtuse, person who completes a legal education still temperamentally inclined to refute unwelcome ideas when distinguishing them will do.

Where legal education falls short, I think, is with respect to reasoning skills that require patience, attention to detail, selectivity, and a sense of argumentative architecture. Surprisingly, law graduates are not noticeably better than persons trained in other disciplines at constructing or criticizing complex arguments. Even the brightest of fledgling lawyers seldom produces a well formulated appellate brief in her initial efforts. Tenure articles written by young law professors are notorious for their distended proportions, reflecting the determination of the untrained writer to leave none of his thoughts or research findings unreported.¹ Law schools teach many skills effectively but *sustained* analysis and argumentation are not among them.

If this observation is accurate, some features of the law school experience help to explain the phenomenon. Most teaching is done in classes of fifty or more students, not infrequently as many as one hundred fifty. Such reasoning in the large does not preclude attention to counter-arguments and analytic precision, but it does discourage any kind of patient, extended, step-by-step critique—the larger the audience, the shorter the collective attention span. Apart from class

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1. See, e.g., Vincent Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481 (1970).

size, courses and casebooks typically attempt to cover so many different issues that there is little time to explore implications or develop criticisms beyond the first level. Endemic coverage pressure also causes teaching materials to be edited in a certain way, with almost no opinions reproduced in full and the secondary literature presented only in snippets. The result is that students are rarely asked to track a judge's or commentator's argument from start to finish. And, because the reading of appellate briefs is even rarer than the study of unedited opinions and articles, students hardly ever learn how the masters of that genre construct their arguments. Such ambitious writing as occurs in a legal education is seldom supervised by seasoned scholars who have a craft to impart and demanding intellectual standards to instill. Typically, inexperienced writing instructors and student journal editors provide most of the feedback. The traditional examination system tests the student's ability, under severe time pressure, to spot arguments (not simply issues, as critics often maintain) but not the ability to unpack or evaluate those arguments to any great degree.

Seminars, of course, offer opportunities to engage in close reading and the unhurried processing of arguments. My impression, however, is that most seminars are not designed to serve that purpose. Seminars also present opportunities for in-depth research, as well as the transmission of specialized knowledge in a small group setting. The seminars I took as a student and taught as a young faculty member rarely involved the systematic assessment of arguments that all members of the class had read with care. Instead, the norm was a ton of reading, much of it included largely for informational purposes, and great disparities in student engagement depending on how the day's topic meshed with the individual research projects in progress. No doubt the most conscientious seminar teachers use such research papers to conduct intensive one-on-one instruction in reasoning, sometimes by requiring preliminary drafts that receive detailed critical comments and suggestions for rewriting. That form of teaching is invaluable, but in truth, how many students actually experience it?

Those teachers who believe, as I do, that advanced instruction in reasoning skills constitutes an important part of a good legal education ought to be looking for ways to provide such instruction on a larger scale, and with an effort less heroic than is represented by the model of seminar teaching just described. In recent years, the desire to do so has led me to tinker with my classes quite a bit. This

symposium seems an appropriate occasion to recount what I have stumbled upon in the pedagogic wilderness.

I teach three types of offerings: a course on contemporary First Amendment doctrine, usually on speech alone, sometimes on religion alone, occasionally on both; a course on the history of ideas relating to religious and political liberty; and a seminar on First Amendment theory. The one teaching technique that I employ in all of these offerings is the requirement that students write a ten-page (3500-word) critique of one substantial argument (judicial opinion, philosophic essay, law review article) from a short list of choices identified at the beginning of the course. I specify exactly what I mean by a critique and enforce the word limit strictly. I make this single paper, designedly neither long nor wide-ranging nor heavily researched but hopefully the product of many weeks of re-reading and focused critical reflection, the major component of each student's grade. In other respects the different courses I teach vary considerably, but they all have in common the centrality of the ten-page critique. In none of my courses do I give an in-class examination based on hypothetical fact situations. No longer do I read bluebooks for a living!

In courses on contemporary doctrine, my principal objective is to induce students to treat the individual case as the basic unit of reference. That may seem elementary but I fear that the coverage and editing trends described above have caused too many students to embrace a "connect-the-dots" approach to the study of doctrine, placing far too much emphasis on "tests" and patterns of results. These phenomena are not unimportant but attention to them must not be allowed to displace or dwarf the inquiry into whether a particular dispute has been resolved in a convincing fashion.

To that end, I avoid using casebooks with extensive notes, no matter how well done. My experience is that students use such notes as a crutch. Deprived of the passive pleasure of amassing more information about the subject under consideration, the diligent student is more likely to engage the reasoning of the featured case. Teaching materials that present unedited or lightly edited versions of the opinions work best in this regard. Especially important is a relatively full treatment of dissents. I have been impressed by how much a well-reasoned dissent contributes to the willingness of students to take apart a majority opinion. When teaching the religion clauses—the most luxurious of my courses in terms of the relative absence of coverage pressures—I use exclusively unedited opinions.

Further to encourage a focus on the individual case, I require each student, four times during the semester, to write a short paper (two to three pages) devising a hypothetical case that tests either the validity or the implications of one of the principal judicial opinions to be studied during the week the paper is due. The paper not only describes the testing fact situation but also explains in what ways the challenge of that fact situation puts pressure on the reasoning in the principal case. Often I introduce these student-generated hypothetical cases into the class discussion.

The most important way that I direct attention to the individual case is by requiring, in lieu of a final examination, a ten-page critique of just one opinion, usually a majority opinion but occasionally a dissent. Students select their opinion to critique from a list of about ten that I provide the first day of the course. I urge them to make this selection as early as possible, arbitrarily if necessary, and to engage in a probing re-reading of the opinion, taking detailed notes, at least once a week throughout the semester. I preach how much they will gain from their seventh re-reading over what they understood on their sixth. Persons working on the same case are encouraged to seek out each other to exchange ideas, though collaboration at the writing stage is prohibited. To excel in an exercise of this sort, in which everyone has the time and incentive to do careful and cogent work, students realize that they will have to push themselves to do their absolute best in terms of both rigor and creativity. Or so I tell them more often than they want to hear. (Shameless nagging is underrated as a teaching technique, I have come to believe.) I stress to students the importance of fine tuning their arguments and not overreaching. No reasoning skill do I emphasize so much as that of identifying, imaginatively not grudgingly, the strongest points that might be made against one's thesis and responding forthrightly to those objections.

To ensure that this absorption in one case does not lead enterprising students to ignore the rest of the course, I give a multiple choice examination that is designedly easy for those who have done the work; ordinarily, half the class gets all forty questions correct. This exercise also employs the individual case as the unit of reference. The questions are about who won a particular dispute and on what rationale, not which general test governs an area.

The course I teach on the history of ideas relating to free speech and religious liberty uses very different readings but many of the same procedures. Each week of the course is devoted to the study of one classic writing in the tradition beginning with Milton's

*Areopagitica*² through the essays of Locke,³ Madison (a week each on his *Memorial and Remonstrance*⁴ on religion and his *Virginia Report*⁵ on free speech), and Mill,⁶ then the breakthrough free speech opinions of Hand,⁷ Holmes,⁸ and Brandeis,⁹ and finally Alexander Meiklejohn's essay on self-government¹⁰ and the Supreme Court's opinion in *New York Times v. Sullivan*.¹¹ I emphasize the need to appreciate these writings in historical context, so the class materials include biographical sketches and quite a bit of background information concerning the political and intellectual struggles within which each author wrote. Nevertheless, the focus of class discussion and student inquiry remains on the detailed argumentation of each essay or judicial opinion.

As with the courses on doctrine, I employ short papers to foster critical engagement. Four times during the semester each student is required to write a two-to-three-page answer to one of about ten specific questions that appear in the course materials after each principal essay or judicial opinion. The questions address the most fundamental and problematic dimensions of the principal work. Class discussion tends to focus on these questions. Frequently I solicit the class's reaction to ideas contained in the written answers I have received.

The ten-page critique plays the same role as in the courses on doctrine, with one alteration. I include in the class materials after each principal essay or opinion one of the best critiques of that work that I have received in the past. These high-quality student critiques add much to the course. They provide a valuable focus for class discussion. They also give students numerous, tangible examples of what makes for excellence in the very endeavor they are undertaking.

2. JOHN MILTON, *AREOPAGITICA* (Edward Arber ed., A. Saifer 1972) (1644).

3. See JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), reprinted in JOHN LOCKE: A LETTER CONCERNING TOLERATION IN FOCUS 12 (John Horton & Susan Mendus eds., 1991).

4. JAMES MADISON, FREEDOM OF CONSCIENCE: A MEMORIAL AND REMONSTRANCE (1785), reprinted in THE MIND OF THE FOUNDER 5 (Marvin Meyers ed., Bobbs-Merrill 1973).

5. JAMES MADISON, REPUBLICAN MANIFESTO: THE VIRGINIA REPORT (1799-1800), reprinted in THE MIND OF THE FOUNDER, *supra* note 4, at 229.

6. See JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (1859).

7. See *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

8. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

9. See *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

10. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1948).

11. 376 U.S. 254 (1964).

They set a high standard that challenges students to do their best. Sometimes a student will use the critique in the class materials as a foil for his own critique. Perhaps most important, these critiques prove to students that they have as much to learn from their peers as from their professor.

Again, I employ a relatively easy multiple choice examination to ensure that the intensive writing experience does not cause students to ignore the full range of the course.

Only during the last seven years have I built my large courses around the ten-page critique. My experience is far more extensive regarding seminar teaching. For about twenty years I have devoted each seminar session to a thorough examination of just one law review article. One student is required each week to produce a ten-page critique, identifying as precisely as possible what aspects of the article she finds less than fully convincing. This critique is due ten days before the session at which the article is discussed so that the rest of the seminar can read the critique in conjunction with their reading of the article. Another student is given the assignment of defending the article during the seminar discussion against both the critique and any other objections that might surface. This "author's advocate" produces no writing but is required to stay in role and ordinarily is taxed to the intellectual hilt. When the article under scrutiny is by a local author, I encourage the author's advocate to collaborate with the actual author to figure out how to answer the critique.

The first time I taught a seminar using this format I was truly surprised by the intensity, quality, and spontaneity of student participation. After a few weeks of breaking the ice, members of the seminar began talking directly to each other about complicated ideas. Every year since, I have watched much the same scenario unfold. Surely part of this is due to the role-playing feature. But the major cause of student engagement, I surmise, is the narrow focus of the discussion. All of us are inhibited from jumping into substantive discussions by guilt regarding what we have not read or cannot remember. Students feel liberated and capable when all they must do is come to class with a good command of one medium-length article—seldom do I assign works longer than fifty pages, and members of the seminar pledge to read each article at least twice—and the discussion is designed to stay within the four corners of the author's argument. Some years I say nothing at all in the last weeks; I just listen and learn.

The opportunity costs of choosing such a seminar format are no doubt considerable. Students do not experience the organizational demands, temptations to wallow, dead ends, and occasional exhilaration of original research. Writing a closely reasoned, prescriptively structured ten-page critique is a demanding undertaking, but it can be done without learning much about how to identify a promising line of inquiry or how to formulate an interesting thesis. Students in my seminars acquire no specialized knowledge.

Despite all that does *not* happen in this format, I am now wedded to it. For I am convinced that the typical student learns something educationally distinctive from the experience of intensive, bounded grappling with a series of first-rate articles. Not the least of what she learns is how very difficult it is, even for the best of scholars, to produce an argument that cannot be improved or discredited by a genuinely engaged group of students. Demonstrating that week after week is not a bad way to teach reasoning.

Whether about a landmark judicial opinion, a classic essay, or a recent law review article, the ten-page critique can be an effective teaching device. One reason is that it is hard to write a good ten-page critique without first writing a good twenty-page critique. Among the most difficult of reasoning skills to impart is prioritization. An exercise that forces students to leave good material on the cutting room floor has considerable educational value on that count alone.

Prioritization, in fact, is what we teachers most need to learn. Law schools have never flagged in their desire to provide high-quality instruction in reasoning. Postmodernist skepticism regarding the value of reason has made only a mild ripple in this corner of the university. But there just isn't time enough, at least after the first year, to teach reasoning the right way: patiently, line-by-line and step-by-step, with a narrow focus, attention to detail, and a great deal of re-reading. To do that in the classroom, we protest, would require us to leave other worthy pedagogic projects on the cutting room floor. Exactly.