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Reflections on Teaching the First Day of Contracts Class

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ABSTRACT

A veteran of the law school classroom offers his thoughts on why Contracts is the most significant course in the first-year curriculum, why the study of contract law should begin with the subject of remedies, and why the "hairy hand" case of The Paper Chase *fame makes an ideal starting point. The author also shares his first-day advice on how to succeed in law school. Along the way he explains why he prefers a problems-based casebook, opposes use of commercial briefs and outlines, and makes robust use of a course website.*

THE IMPORTANCE OF THE FIRST YEAR OF LAW SCHOOL

I began teaching Contracts in 1977, and it has been a joy to teach first-year students. I agree with the dean of Harvard Law School, who told 1L Scott Turow that "almost all attorneys regard the first year of law school as the most challenging year of their legal lives" (1977, 10). Turow went on to explain: "It is during the first year that you learn to read a case, to frame a legal argument, to distinguish between seemingly indistinguishable ideas; that you begin to absorb the mysterious language of the law . . . that you learn to think like a lawyer, to develop the habits of mind and world perspective that will stay with you throughout your career" (10). I enjoy guiding beginning students along that journey. And I enjoy the excitement of working with beginning students. What they may initially lack in focus (what Professor Kingsfield called their "skull full of mush") (I'll get to that), they more than make up for in enthusiasm.

THE SIGNIFICANCE OF THE CONTRACTS COURSE

During my career, law school curricula have undergone much revision. Although the number of credit hours needed to graduate has not changed, fewer courses are now required, and even courses that are still required have been allotted fewer credit hours. Courses in the all-important first year are not immune from this trend. The most recent national survey of law school curricula reported that at the typical law school today, Property, Torts, and Constitutional Law have been reduced to four-credit, one-semester courses.

Only Contracts, among substantive first-year courses, continues to be offered for five or six credits and, at a majority of law schools, over two semesters (Carpenter 2012). And with good reason. Contracts is the quintessential first-year course. One reason is that it presents an excellent introduction to the common law and legal reasoning.

What is meant by "common law?" The common law, which we inherited from England, is simply the accumulation of judicial precedent based on the inherent power of the courts to declare law where no statute or constitutional provision controls (which is most of the time).

The common law of a jurisdiction develops on a case-by-case basis, with legal issues decided as particular legal problems arise. The addition of the doctrine of *stare decisis* provides some predictability to the common law, although as Roscoe Pound famously declared: "The law must be stable and yet it cannot stand still" (1923, 1). U.S. District Court Judge Avern Cohn was right in saying, at a lecture at the University of Michigan law school, that "the vast majority of the law that governs us is the common law, judge-made law" (Stockmeyer 2000). And yet a significant portion of contract law – that dealing with the sale of goods (rather than the sale of land or services) – is governed by a comprehensive statutory scheme known as the Uniform Commercial Code. This introduction to the Uniform Commercial Code gives beginning students the opportunity to engage in statutory analysis, and to compare and contrast common-law and legislative solutions to legal problems.

Regardless of the current dispute concerning whether we have a "living" Constitution, there can be no doubt that the common law remains alive and evolutionary. And there is recognition that the law of contracts is the most important contribution to jurisprudence made by the common law (Harrell 2016). "Rule-of-law" candidates for appellate judgeships who maintain that the judicial branch should interpret the law and not make the law evidently slept through their Contracts course.

What is "legal reasoning?" As every beginning law student soon learns, what we call legal reasoning can be expressed in a formula known as IRAC. The law's version of the deductive syllogism, it stands for Issue, Rule, Application, and Conclusion. First, identify the Issue ("Is Socrates mortal?"). Then state the applicable Rule ("All men are mortal"). Then apply the rule to the relevant facts ("Socrates is a man"). Which leads inexorably to the Conclusion ("Therefore Socrates is mortal"). Some law students have the idea that IRAC is just a law school exam-writing trick. The reality is much different. IRAC is what "thinking like a lawyer" is all about. It is the format used by lawyers in preparing legal memoranda, and the structure that most judges use in drafting judicial opinions. (It's also the type

of analysis that bar examiners are looking for.) IRAC is as central to legal analysis as the formula $E=MC^2$ is to physics. It's all explained in Metzler (2003, 501): *"*IRAC is the key to success on law school exams, the bar exam, and a successful career in litigation.*"* I emphasize IRAC at several points in my Contracts course, and offer students weekly opportunities to practice it. But regrettably, year after year I find that many exam answers start out in an orderly IRAC fashion, only to dissolve into a stream-of-consciousness outline dump under the pressure of a high-stakes final exam.

Another reason that Contracts is the quintessential first-year course is that it is fundamental to several upper-division courses. This relationship to later courses may explain why an internal school study showed that a student's grade in Contracts is the best predictor of overall law school success. Further, in an American Bar Foundation survey, lawyers reported that they used Contracts in their practice almost twice as much as any other law school subject. When our law school newspaper polled students as to their favorite course some years back, Contracts was #1. This result would not surprise Georgetown law professor Randy Barnett (2010), who has written that *"*[M]any students find that Contracts is indeed the most intellectually challenging and engaging subject of their first year of law school*"* (xiii). Ohio Northern law professor Scott Gerber (2003) calls Contracts *"*the consummate law school course; rich in history, doctrine, and theory.*"* He quotes Yale professor Grant Gilmore as calling Arthur Corbin's multi-volume treatise on Contracts the *"*greatest law book ever written*"* (59). And Professor Gilmore (1974) regarded the *Restatement of Contracts* as "not only the best of the Restatements [but also] one of the great legal accomplishments of all time"(59). Thus, it should also come as no surprise that the notorious Professor Kingsfield, a central character in John J. Osborn, Jr.'s classic law school novel *The Paper Chase* taught Contracts. In a 2003 interview, Osborn (a Harvard-trained lawyer) denied patterning Kingsfield after any particular professor, but admitted contract law was by far his favorite course. And today he teaches Contracts as a part-time visiting professor at the University of San Francisco School of Law. So I regard myself as extremely fortunate to have been assigned to teach Contracts when I hired on 40 years ago.

THE QUESTION OF WHERE TO START

According to Professor Gerber (2003), no greater law school pedagogical disagreement exists than among Contracts teachers over where to begin: with formation or with remedies? Traditionalists like to begin with contract formation (offer & acceptance). It tracks the life cycle of a contract: formation > performance > breach > remedies. "It seems natural," a leading proponent is quoted as saying. "That's how the textbooks and

treatises run" (596). Contract formation is also relatively easy to master, offering a gentle introduction to the course for students just beginning law school. The first Contracts casebooks by the leading scholars (Christopher Columbus Langdell's in 1871, Samuel Williston's in 1903, and Arthur Corbin's in 1921) started with formation, and they didn't even include remedies (626).

The first casebook to start with remedies was Lon Fuller's, in 1947. A minority of other casebook editors soon adopted Fuller's "revolutionary" remedies-first approach. But ironically, the 1981 fourth edition (continued by his co-author after Fuller's death in 1978) and subsequent editions no longer start with remedies (626). Those who prefer to start with remedies give a number of reasons, from the pedagogical to the practical:

> "We have believed that contract law is best understood . . . if it is approached through a remedy-centered study" (Dawson, Harvey, and Henderson 1998, iii).
>
> "What promises will the law enforce? [I]n answering that question it is helpful to have an idea of how courts enforce promises" (Farnsworth and Young 1988, 1).
>
> "Remedies is hard to learn, so it should be approached when the students are willing to work and have a high energy level . . . . If you start with offer and acceptance, the students will float through the material, which they will not find all that challenging. They then get the idea that the course in Contracts is easy (or, worse, boring), and they develop bad habits" (Crandall and Whaley 2012, v).

I agree with all of those reasons. Having tried starting with offer & acceptance, and with consideration, I know that studying remedies is not easy going for beginning students, who tend to hate working with numbers. But once you have covered remedies, every subsequent case presents potential remedies hypotheticals that can help reinforce students' understanding. In that regard, I used to think that students would appreciate encountering a difficult topic toward the end of the semester, when it would still be fresh in their mind for the final exam. But students have told me, instead, that they would like difficult topics placed early in the semester so they have longer to process the material. Which brings me to my last reason to start with remedies: the opportunity to begin the first day's class with *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929), the "hairy hand" case made famous in the book and movie versions of *The Paper Chase*. "Indeed, the mere mention of the first-year experience likely brings to students' minds the imposing visage of John Houseman [portraying Professor Kingsfield]

calling on 'Mr. Hart,' in perhaps the most famous scene in the most famous movie ever made about law school" (Gerber 2003).

Barry University law professor Daniel O'Gorman (2011) provides a good summary of the case: "In *Hawkins*, Dr. Edward McGee promised George Hawkins that he would fix his burned hand and give him a one hundred percent perfect or good hand, but the operation left him with a hairy hand. The New Hampshire Supreme Court . . . held that any promise by McGee to Hawkins had to be interpreted objectively and not based on what McGee might have intended. The court further held that . . . the general rule of contract damages – protecting the so-called expectation interest – applies, just like any other breach of contract case. The effect of these two holdings was that Hawkins was entitled to damages that would put him in the position he would have been in had McGee kept his alleged promise."

MY TOP TEN REASONS TO BEGIN CONTRACTS WITH HAWKINS v. McGEE

10. The opinion immediately demonstrates to beginning law students the need for a law dictionary. The very first paragraph is largely meaningless without an understanding of such terms as *assumpsit* (the first word of the opinion), *writ*, *count*, *nonsuit*, and *exception*. Students need to know early on that the first-semester course offerings do not include Vocabulary 101. Rather, students must master the terminology on their own, by looking up every single word they don't understand. Nothing brings that home like directing the first question to the first student called on: "What does that word *assumpsit* mean?" Not one in ten will have an answer. But all will get the point. (Yes, I employ the Socratic method – law school's "signature pedagogy," according to the Carnegie Foundation's *Educating Lawyers: Preparation for the Profession of Law* (Sullivan 2007, 66) – of calling on students to recite. After all, a Contracts professor, Harvard's Dean Christopher Columbus Langdell, introduced it to legal education. And, yes, it can be stressful for beginning students. But one defender of the Socratic method maintains that to prepare students for the rigors of having their work challenged by supervising lawyers, courts, and opposing counsel, they need to be pre-stressed, like strengthened concrete.)

9. The opinion shows how judges sometimes load their opinions with empty overstatements, such as "*Clearly* this and other testimony would not justify . . . ." and "It seems *obvious* that proof would establish . . . ." A close examination of the facts leads students to the realization that the matters under review were perhaps not so clear or obvious after all. Legal writing guru Bryan Garner makes the point forcefully: "It has become an ironic joke among lawyers that when an opponent – or for that matter, frequently, a judge – uses one of these words [obviously; certainly; clearly; undeniably],

the statement that follows is likely to be false, unreasonable, or fraught with doubt" (2002, 129). It's never too early to bring the point home to future lawyers and judges.

8. The opinion articulates and demonstrates the process of analysis that courts employ when legal authority for a specific rule is lacking. The appellate court tests the correctness of the trial court's jury instructions by the use of general principles ("Nothing is so practical as a good theory," as the saying goes) and by analogy to other classes of cases. (But was the opinion's analogy to a product warranty an apt one?) This analytical process illustrates a good technique on exams when a student can't recall a specific rule. Take a step back and apply a general principle, or analogize to something similar the student can recall. Or just make up a rule and then apply it. It worked for Cardozo. See, among other examples, *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917) in Contracts I and *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921) in Contracts II.

7. The opinion allows an early exploration of some of the distinctions between tort (medical malpractice) **and contract** (promise of 100% success) in a context readily understood by beginning students. Indeed, students' first reaction is to wonder why their Contracts course starts with what appears to be a Torts case. Once they understand that Dr. McGee's assurance of 100% success could be understood as an enforceable promise, students grasp that Dr. McGee's malpractice insurer was off the hook. That's an important lesson for future lawyers: never promise success.

6. The issues in the opinion illustrate two of the central themes in contract law: the objective theory of assent (whose understanding controls?) and the expectation objective of contract remedies (in contrast to the tort objective of restoration). One law student recalls that his Contracts professor spent what seemed like the whole year using the facts of *Hawkins v. McGee* to explore the entire nature of the contracting process, from the initial offer to remedies for breach (Vache 1994).

5. The opinion is an excellent introduction to remedies, which for reasons I have already given is a good place to start the study of Contracts. It focuses attention on the difference between tort and contract damages. Essentially, the trial court's error was to give a perfectly good tort jury instruction in a breach-of-contract case. And it introduces the difference between the expectation and reliance measures of damages, which subsequent cases will explore in more detail.

4. The opinion offers an opportunity to illustrate that general principles are easier to state than to apply. The jury was supposed to award the difference between a 100% good hand and the resulting damaged hand. But how much is a perfect hand worth? And how much less is a scarred and hairy

hand worth? The law commonly asks juries to put a value on pain and suffering in tort cases, however, and they are even less capable of precise measurement.

3. The opinion has more poignancy than the commercial contract disputes that will follow, thus helping start Contracts off on an equal footing with first-semester Criminal Law and Torts in human-interest value. As we Contracts teachers recognize, few students come to law school thinking, "Contracts, now *that* will be interesting!" (Barnett 2010).

2. The case has a rich subsequent history that can be explored as time permits. See *McGee v. U.S. Fidelity & Guaranty*, 53 F.2d. 953 (1st Cir. 1931), in which Dr. McGee loses a suit against his malpractice insurer. And Roberts (1978) offers a revealing look at the sad later life of George Hawkins. Professor O'Gorman's article (2011) casts new light on the facts of the *Hawkins* case, based on his review of the trial transcript.

1. Three words: *The Paper Chase*. Many students will have read the book or rented the movie. They expect Contracts to begin with a study of the "hairy hand" case. Disappoint them the first day and they may question their choice of law schools.

Before calling on the first student, I play two clips from the *The Paper Chase* movie. The first is Professor Kingsfield's explanation of why law schools use the Socratic method. That needs to be addressed the first day. "The study of law is something new and unfamiliar to most of you – unlike any schooling you have ever been through before. We use the Socratic method here: I call on you, ask you a question, and you answer it. Why don't I just give you a lecture? Because through my questions you learn to teach yourselves. Through this method of questioning, answering, questioning, answering, we seek to develop in you the ability to analyze that vast complex of facts that constitute the relationships of members within a given society . . . . You teach yourselves the law, but I train your mind. You come in here with a skull full of mush, and you leave thinking like a lawyer." (This scene, a highlight of the movie, appears nowhere in the book. Kudos to Director James Bridges, who is credited with the screenplay, for adding it.)

The second film clip is Kingsfield's encounter with the first student he calls on, Mr. Hart (available on YouTube). I preface this by assuring the class that I fully understand that no one wants to be the very first student called on. So instead of cold-calling one of them, the first person to be called is . . . the hapless Mr. Hart, of whom Kingsfield asks: "Now, Mr. Hart, what sort of damages do you think the doctor should pay?" Hart responds, after some hesitation: "The doctor should pay . . . for the difference between what the boy had, a burned hand, and what the doctor gave him, a burned and hairy hand?" Then I call on someone and ask whether Mr. Hart gave the right answer (no, he didn't) and, the ice having been broken, off we go.

(Incidentally, Hart gave the correct answer in the book: "The difference between what he was promised, a new hand, and what he got, a worse hand."

I have students stand when reciting. They'll have to do it in the courtroom, and might well get used to it. And research has shown (Behrens 1990) that a person can process information 5 to 20 percent faster when standing. I use a casebook (Crandall and Whaley) that is traditional in its coverage and yet innovative in its use of problems. Medical schools and business schools have been using problem-based learning (PBL) for years. Studies suggest that "PBL develops more positive student attitudes, fosters a deeper approach to learning, and helps students retain knowledge better than traditional instruction" (Prince 2004).

SUGGESTIONS FOR SUCCESS

Also on the first day I offer several suggestions on how to do well in law school. All are based on empirical research I have conducted over the years. First, I tell students to never miss class. Using courses I have taught at three law schools, I compared class attendance and grades, and found a strong positive correlation. On average, almost half a grade level separated those students with perfect attendance from those who "maxed out" their allowed absences (Stockmeyer 2011). Next, I say to brief every case and not rely on commercial briefs. The wisdom of this advice was confirmed when I looked at a sampling of Casenote Legal Briefs for Contracts. They turned out to be inadequate, unreliable, and dead-bang wrong on occasion (Stockmeyer 2012). Some years ago I asked the first student to graduate with a perfect 4.0 grade-point average what she thought was the basis of her law school success. She replied without hesitation: "I never stopped briefing."

I express the same negative attitude toward commercial and shared course outlines. The value of an outline is in *making* it, not just having it. Using someone else's outline should engender the same sense of disgust as using someone else's toothbrush. I also encourage students to visit my TWEN course website often. In addition to postings like the course syllabus and class handouts, the site offers a discussion forum, links to computer-assisted lessons, multiple-choice review quizzes, and practice exam questions. On average, those students who received Honors-level grades (B or better) accessed my site with much greater frequency than those whose grades put them on academic probation (below C). The results are detailed in an article I wrote for a computer-law periodical (Stockmeyer 2003, 15).

Finally, I ask students to rejoice when called on. In researching the effect of class size, I found that as class size increases, overall student performance declines and the percentage of failing grades increases (Stockmeyer 1994). This effect is likely because smaller classes offer students more opportunities

to recite. Studies find that students who are questioned in class outperform those who are not (Vitiello 2005, 981).

Of course, students want to know about the final exam. I use both multiple-choice and essay questions in a combination that closely resembles the type of bar examination that is given in most states. The multiple-choice portion emphasizes subject-matter mastery, while the essay questions measure proficiency in analysis. My blog post on guidelines for drafting effective multiple-choice questions can be found online (Stockmeyer 2015).

CONCLUSION

Hawkins v. McGee entered the Contracts canon by way of Fuller's original casebook (1947), reputedly the first casebook to include the case (O'Gorman 2011, 349). Seventy years later it remains a fascinating introduction to the study of law, and a great teaching vehicle. If, as I believe, Contracts is the quintessential first-year law school course, and the study of Contracts should begin with the topic of remedies, then law students should be introduced to young George Hawkins and his legal dispute with Dr. McGee on the very first day.

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