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Expanding Educational Objectives Through the Undergraduate Business Law Course

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by

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INTRODUCTION

The business law course has the potential to be a rich, valuable educational experience for the college student. But to be so, the course must transcend the mere conveyance of legal information in a format where the instructor's view of the law is set forth in an organized, comprehensive and rote fashion. The law is more than a set of rules to be memorized. A professor should strive to develop students' cognitive skills and present the law as a subject demanding reflection and involving societal values and intellectual practices.[1] The best means to promote such objectives is to provide a classroom environment where the professor and students engage in a dialogue about assigned cases and hypothetical problems.[2] The professor then requires students to ar-

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[1]*See* Fuller, *On Teaching Law*, 3 STAN. L. REV. 35 (1950) [hereinafter cited as Fuller]. "There is, for example, an almost universal agreement that our primary objectiveis not to impart information. Whatever it is we want the student to get it is something more durable, more versatile and muscular, than a mere knowledge of rules of law." Id. at 36. *See also* MIENTSCHIKOFF & STOTZKY, THE THEORY AND CRAFT OF AMERICAN LAW 17-19 (1981) [hereinafter cited as MIENTSCHIKOFF & STOTZKY]; Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11, 46 (1982) [hereinafter cited as Elkins]; Martineau, *Review Essay: Legal Education and Training Artists of the Law. The Theory and Craft of American Law*, 57 N.Y.U.L. REV. 346, 347 (1982) [hereinafter cited as Martineau]; Mudd, *Thinking Critically About "Thinking Like a Lawyer,"* 33 J. LEGAL EDUC. 704 (1983) [hereinafter cited as Mudd]; Patterson, *The Case Method In American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 21 (1951) [hereinafter cited as Patterson]; Redmont, *A Conceptual View of the Legal Education Process*, 24 J. LEGAL EDUC. 129 (1972) [hereinafter cited as Redmont], Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 170 (1984) [hereinafter cited as Sandalow]; White, *The Study of Law As An Intellectual Activity*, 32 J. LEGAL EDUC. 1 (1982) [hereinafter cited as White]. A number of business law professors have concluded likewise. *See, e.g.*, Allan, *Organization Theory, Sociology of Law and Business Law: Divided Parts of the Same Field?* 4 AM. BUS. L. BULL. 39 (1966) [hereinafter cited as Allan]; Anderson, *Collegiate Law, The Citizen and Business*, 5 AM. BUS. L. BULL. 9 (1961); Anderson, *Social Forces and the Teaching of Business Law*, 6 AM. BUS. L. BULL. 8 (1962) [hereinafter cited as Anderson]; Berman, *The Future of Legal Education of American Businessmen*, 5 AM. BUS. L. BULL. 3 (1961); Carter, *The Objectives of a Course in Business Law*, 5 AM. BUS. L. BULL. 26 (1961) [hereinafter cited as Carter]; Dunfee and Decker, *Need and Proposal: Specific Integration of Business Law into the Business School Curriculum*, 7 AM. BUS. L.J. 277 (1970) [hereinafter cited as Dunfee and Decker]; Gillam, *Business Law Faces the Future*, 3 AM. BUS. L. BULL. 31 (1958); Hewitz, *Research, The Key to Upgrading Our Profession*, 3 AM. BUS. L.J. 77, 81 (1965) [hereinafter cited as Hewitz], Joyce, *Business Law in Higher Education, A Plea for Reform*, 6 AM. BUS. L.J. 575 (1968); Kirkpatrick, *Law and the Liberal Education*, 3 AM. BUS. L.J. 363 (1965); Pearson, *Education for Business and Its Legal Environment*, 6 AM. BUS. L. BULL. 1 (1962) [hereinafter cited as Pearson]; Raphael, *The Plight of Business Law — And a Recommendation*, 3 AM. BUS. L. BULL. 13 (1958); Zelermeyer, *A New Approach to Business Law*, 3 AM. BUS. L.J. 352 (1965) [hereinafter cited as Zelermeyer].

[2]Several authors have argued that the study of law where the pedagogical emphasis is on appellate cases and the Socratic method breeds, in itself, a cognitive skill that is valuable to university students. Dillavou, *Business Law and Training for Business*, 3 AM. BUS. L.J. 17 (1958); Donohue, *The Case for Teaching Law to Undergraduate Business Students*, 4 AM. BUS. L.J. 162 (1966) [hereinafter cited as Donohue]; Fox, *Nurturing Systematic Analysis*, 3 AM. BUS. L.J. 235 (1965); Lader, *Experiments in Undergraduate Legal Education: The Teaching of Law in the Liberal Arts Curriculum of American Colleges and Universities*, 25 J. LEGAL

rive at a solution and to formulate for themselves the legal principles and rationales behind each decision.[3]

OBJECTIVES OF THE BUSINESS LAW COURSE

A sound undergraduate education should impart knowledge that can enrich students' perception of human affairs; develop intellectual modes of thought and expression that will encourage learning beyond the temporary academic environment; and provide individuals with measuring devices to appraise values, perceive problems, and choose solutions.[4] An ideal education enables one to expand and direct his creative energies into a constructive set of values and beliefs which form the basis for a philosophy of living. The study of law is especially well suited to stimulate the type of reflection and investigation that is necessary to achieve these educational goals.[5] As a subject concerned with creating a practical system of living, the law is a central feature in our existence. A knowledge of the law is a valuable end in itself, can lead to a fuller understanding of the larger world of which it is a part, and is beneficial for intelligent, purposeful, and moral action.[6]

EDUC. 124, 147 (1973) [hereinafter cited as Lader]; Lees, *Increased Motivation: By The Case Method*, 2 AM. BUS. L.J. 77 (1964) [hereinafter cited as Lees]; Reitzel, *The Direct Use of Legal Research in Business Law Instruction*, 15 AM. BUS. L.J. 123 (1977) [hereinafter cited as Reitzel]; Wolfe, *Beyond the Laws: Undergraduate Legal Instruction and the Development of Cognitive Behavior*, 13 AM. BUS. L.J. 239 (1975) [hereinafter cited as Wolfe]. *See also* Peden, *Goals for Legal Education*, 24 J. LEGAL EDUC. 379 (1972) [hereinafter cited as Peden]; Swisher, *Teaching Legal Reasoning in Law School: The University of Richmond Experience*, 74 LAW LIBR. J. 534 (1981) [hereinafter cited as Swisher]. *See also infra* notes 12 and 67.

[3]*See* Allen, *The New Anti-Intellectualism in American Legal Education*, 28 MERCER L. REV. 447, 448-49, 452 (1977) [hereinafter cited as Allen]; Brown, *Honing the Legal Mind: The Classroom Experience*, 12 STETSON L. REV. 653, 658-60 (1983) [hereinafter cited as Brown]; Fuller, *supra* note 1, at 5-10; Heffernan, *Not Socrates, But Protagoras, The Sophistic Basis of Legal Education*, 29 BUFFALO L. REV. 399 (1930) [hereinafter cited as Heffernan]; Martineau, *supra* note 1, at 347; Patterson, *supra* note 1, at 5-10; Rath, *A Model for Business Case Analysis*, 57 J. BUS. EDUC. 107 (1981) [hereinafter cited as Rath]; Smith, *The Case Method in Teaching Law*, 1 (no. 2) J.A. L. TCHRS., 17, 17-18 (1967) [hereinafter cited as Smith]; Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 406 (1971) [hereinafter cited as Stone]; Vagts, *The "Other" Case Method: Education for Counting and Court House Compared*, 28 J. LEGAL EDUC. 403, 411-413 (1977). *See also supra* notes 12 and 72.

[4]Lader, *supra* note 2, at 146. *See also* Carter, *supra* note 1, at 28; Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 263 (1978) [hereinafter cited as Cramton]; Fuller, *supra* note 1, at 38; Frascona, *Business Law In Business Education*, 3 AM. BUS. L.A. BULL. 1, 6; Scaletta, *The Pressing Need for the Expansion of the Business Law Program In Our Schools and Colleges*, 5 AM. BUS. L.J. 215, 216 (1967) [hereinafter cited as Scaletta]; Wolfe, *Expressing the Educational Objective of Business Law: A Proposed Method and Framework*, 12 AM. BUS. L.J. 1 (1974) [hereinafter cited as *Proposed Method*]; Reitzel, *supra* note 2, at 126; Zelermeyer, *supra* note 1, at 353.

[5]*See generally* Bonsignore, *Law School Involvement in Undergraduate Legal Studies*, 32 J. LEGAL EDUC. 53, 59 (1982) [hereinafter cited as Bonsignore]; Eron and Redmount, *The Effects of Legal Education on Attitudes*, 9 J. LEGAL EDUC. 431 (1957) [hereinafter cited as Eron and Redmount]; Mudd, *supra* note 1, at 705; Peden, *supra* note 2, at 379-84; Redmount, *Humanistic Law Through Legal Education*, 1 CONN. L. REV. 201 (1968); Sandalow, *supra* note 1, at 173; Weinstien, *The Integration of Intellect and Feeling in the Study of Law*, 32 J. LEGAL EDUC. 87 (1982).

[6]Allen, *The Law As A Path to the World*, 77 MICH. L. REV. 157, 157 (1978). Sandalow, *supra* note 1, at 172-73.

The Acquisition of Information

A business law course should fulfill the utilitarian function of acquainting college students with the role of law in business endeavors, as well as impart knowledge valuable to the layman's perspective of everyday life.[7] It is of practical value to understand the distinction between the federal and state court systems and the manner in which civil and criminal law often overlap. Business law students should gain an understanding of the nature of the legal process, that is, how basic individual rights and duties come into existence and what values are inherent in their establishment. For example, a system of negligence incorporates a view of an individual's responsibility to others very different from a system of strict liability.[8] The process through which a duty to others is created in tort law is essential in understanding the objectives of the system as a whole.

Most of the business of law occurs as a component of a transaction between parties.[9] It is relevant to an individual's daily life to understand when he has the legal responsibility to keep a promise or what actions can be taken against one who has broken an enforceable promise. A student should also know the consequences when her signature is forged on a check, the proper procedures in dealing with a landlord who refuses to make major repairs to an apartment unit, or what action to take against a cleaner that has ruined a piece of clothing. As an informed citizen, one should be able to discuss the legal issues in the news — the procedures involved in a takeover bid of one corporation by another or the issues involved in a defamation suit by a public figure against a media defendant. Any business law course will touch upon many, if not all, of these critical areas of concern.

The business law course also establishes a foundation on which to incorporate the more complex legal perspectives of the professional. A legal background is necessary in order to develop the business person's awareness of the interrelationship between government and business, to integrate legal considerations into managerial decisions, and to evaluate the costs and benefits of particular business alternatives.[10]

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[7]Allan, *Law As a Liberal Art Versus Law As a Professional Discipline: A False Dichotomy*, 15 AM. BUS. L.J. 61, 67-69 (1977) [hereinafter cited as *False Dichotomy*]; Allan, *supra* note 1; Anderson, *supra note 1; Carter, supra* note 1; Mersker, *What Marketing Professors Expect from Business Law*, 8 AM. BUS. L.J. 65, 67 (1970); Lavine, *Major Functions of Business Law*, 2 AM. BUS. L.J. 313 (1964); Pearson, *supra* note 1; Scaletta, *supra* note 4, at 219; Story and Ward, *The Law and Citizen Education*, 15 AM. BUS. L.J. 22 (1977).

[8]Under a system of strict liability, "he who breaks must pay." In other words, the system is not concerned with the moral responsibility or "fault" of the wrongdoer, but with making good the damage inflicted. PROSSER, THE LAW OF TORTS 492 (1971) [hereinafter cited as PROSSER]. Under a system of negligence, on the other hand, "defendants are responsible for the damage done only if they have been at fault." "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." *Id.* at 142, 150.

[9]Redmount, supra note 1, at 143.

[10]Dunfee and Decker, *supra* note 1, at 278. *See generally False Dichotomy, supra* note 7; Allison, Book Review, 11 AM. BUS. L.J. 207 (1973); Collins, *Law in the Business Curriculum*, 15 AM. BUS. L.J. 46, 47, 52

The Development of Cognitive Skills

There are two basic approaches to teaching a business law course: as a transfer by the instructor to the student of legal rules and their practical effect or as a Socratic[11] dialogue between teacher and student about hypothetical problems or assigned cases. A business law course consisting solely of the mere conveyance of legal information, however, is operating on a level far below its potential. Authors Dressel and Mayhew identify five critical thinking skills and recommend these as organizing principles of curriculum design: 1) the ability to define a problem; 2) the ability to select pertinent information for the solution of the problem; 3) the ability to recognize stated and unstated assumptions; 4) the ability to formulate and select relevant and promising hypotheses; 5) the ability to draw conclusions validly and to judge the validity of inferences.[12] The strength of a case method, combined with Socratic teaching, is that it enables the professor to convey substantive law to students while also developing critical thinking skills.

(1977); Donohue, *supra* note 2, at 163-64; Frascona, *Business Law is Business Law*, 15 AM. BUS. L.J. 7, 9-10 (1977); Klayman and Nesser, *Eliminating the Disparity Between the Business Persons Needs and What is Taught in The Basic Business Law*, 22 AM. BUS. L.J. 41 (1984). For a study that indicates what employers think business graduates should know, see Donell, *The Businessman and the Business Law Curriculum*, 6 AM. BUS. L.J. 451 (1968).

[11]The core of the Socratic method, as used in this article, is a dialogue among students and between the professor and students, initiated by the professor's questions, and an open, critical classroom inquiry into cases, hypothetical problems, legal principles, laws, and values. This Socratic process is the key component of the case or problem method or instruction which the author advocates. For a sampling of references to the Socratic method, see CHASE, LEGAL EDUCATION AND PROFESSION: THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT 35 (1982); KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 44 (1983) [hereinafter cited as KENNEDY] (This book is based on two prior articles: *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 519 (1982) and *How The Law School Fails: A Polemic*, 1 YALE REV. LAW SOC. ACT. 71 (1970)); MIENTSCHIKOFF & STOTSKY, *supra* note 1; REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 12, 25, 29, 30, 51, 69 (1914); STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1950'S 53 (1983); Childress, *The Baby and the Bathwater: Salvaging a Positive Socratic Method*, 18 LAW TCHR. 95 (1984) [hereinafter cited as Childress]; Cole, *The Socratic Method in Legal Education: Moral Discourse and Accommodation*, 35 MERCER L. REV. 867 (1984) [hereinafter cited as Cole]; Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 328 (1982); Epstein, *The Classic Tradition of Dialetics and American Legal Education*, 31 J. LEGAL EDUC. 399 (1981) [hereinafter cited as Epstein]; Fuller, *supra* note 1; Gilmore, *The Assignee of Contract Rights and His Precarious Security*, 74 YALE L.J. 217 (1964); Heffernan, *supra* note 3; Keeton, *Warren Abner Seavey — Teacher*, 79 HARV. L. REV. 1333, 1335 (1966); Kelso, *Teaching Teachers: A Reminiscence of the 1971 AALS Law Teachers Clinic and a Tribute to Harry W. Jones*, 24 J. LEGAL EDUC. 606, 607 (1972); Kober, *The Socratic Method on Trial: Are Law Schools a Failure?* 85 CASE & COM. 26 (1980); Ladd, *Edmund M. Morgan*, 79 HARV. L. REV. 1546, 1548 (1966); Meltsner & Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581, 582 (1976); Patterson, *supra* note 1; Patton, *The Student, the Situation and Performance During the First Year of Law School*, 21 J. LEGAL EDUC. 10, 38 (1968); Prosser, *Warren Seavey*, 79 HARV. L. REV. 1338, 1339 (1966); Richardson, *Does Anyone Care for More Hemlock)*, 25 J. LEGAL EDUC. 427, 434-41 (1973); Savoy, *Towards a New Politics of Legal Education*, 79 YALE L.J. 444, 457 (1970) [hereinafter cited as Savoy]; Scott, *Samuel Williston*, 76 HARV. L. REV. 1330, 1331-32 (1963); Shaffer and Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190 (1976); Stone, *supra* note 3; Taylor, *Law School Stress and the "Deformation Professionelle,"* 27 J. LEGAL EDUC. 251, 254 (1975) [hereinafter cited as Stone]; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93, 119-37 (1968); Comment, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201, 1203.

[12]DRESSEL & MAYHEW, GENERAL EDUCATION: EXPLORATIONS IN EVALUATION 179-80 (1954).

The development of problem-solving techniques is an important aspect in acquiring an appreciation of the law because they constitute the heart of the intellectual method and process used to sustain the system itself. The student should realize the manner in which courts reach decisions and the factors that lead a court to apply one rule rather than another.[13] Merely memorizing rules is not enough since abstract rules of law do not exist independently of the specific facts of a case.[14] Decisions are often reached by concluding that a new set of facts has more in common with one established case than with another. The ability to distinguish similar cases involves a certain type of cognitive behavior (application and analysis) whose acquisition is worthwhile as an end in itself. For the student the study of law then has an added bonus which distinguishes it from many other fields because the learner acquires strategies of thinking that are beneficial in and beyond academic life.[15]

Benjamin S. Bloom of the University of Chicago has described a taxonomy of learning activities which describe intellectual skills, ranging from lowest to highest in complexity: knowledge, comprehension, application, analysis, synthesis, and evaluation.[16] Knowledge describes behavior consisting merely of memorizing facts and recalling them in the form in which they were memorized.[17] Unfortunately, much undergraduate business education focuses on encouraging and rewarding this type of passive behavior[18] rather than on devel-

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[13]*See* Rostow, *The Study of Economics in Relation to Education in Law*, 2 J. LEGAL EDUC. 335, 336 (1950), where the author notes, "(L)aw must be studied and taught as part of the social process, with fully informed appreciation of the factors which should influence judgment in the choice between one rule . . . and another." *See also* Raskind, *A Proposal for Teaching Administrative Law in the Business Law Curriculum*, 2 AM. BUS. L.J. 79 (1964). For an interesting discussion of the role of policy in rule application and judicial decision making see KENNEDY, *supra* note 11, at 19-21; HOLMES, THE COMMON LAW (1881) [hereinafter cited as HOLMES); Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 J. LEGAL EDUC. 373 (1969); Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303, 308 (1927); McDougal, *Fuller vs. The American Legal Realists*, 50 YALE L.J. 827, 833 (1941).

[14]MIENTSCHIKOFF & STOTSKY, *supra* note 1, at 21; Brown, *supra* note 3, at 657; Martineau, *supra* note 1, at 351.

[15]*See generally* Childress, *supra* note 11, at 102; Fuller, *supra* note 1, at 36-39; Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 265, 308 (1973) [hereinafter cited as Gross]; Mudd, *supra* note 1; Sandalow, *supra* note 1, at 170; Vagts, *supra* note 3, at 405; White, *supra* note 1.

[16]Learning may be classified into the following categories (or domains): cognitive, affective, and psychomotor. The cognitive describes types of intellectual behavior; the affective describes primarily emotional or value-oriented behavior that the learner places on what is being learned; the psychomotor describes behavior requiring muscular or motor movements. For a more detailed analysis and discussion of student behavior in regard to these domains see B. BLOOM & B. MASIA TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS, HANDBOOK 1: COGNITIVE DOMAIN (1956) [hereinafter cited as COGNITIVE DOMAIN]; D. KRATHWOHL, B. BLOOM & B. MASIA, TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS, HANDBOOK 2: AFFECTIVE DOMAIN (1964) [hereinafter cited as AFFECTIVE DOMAIN]; E. POPHAM, A. SCHRAG & W. BLOCHUS, A TEACHING-LEARNING SYSTEM FOR BUSINESS EDUCATION 39-61 (1975) [hereinafter cited as POPHAM]. Two excellent articles by Wolfe, *supra* note 2 and note 4, relate student learning behaviors to the instructional process in business law. For a bibliography of sources which discuss behavioral objectives *see* Wolfe, *supra* note 2, at 239-40.

[17]COGNITIVE DOMAIN, *supra* note 16, at 62; POPHAM, *supra* note 16, at 57; Wolfe, *supra* note 2, at 241.

[18]Brown, *supra* note 3, at 654; AFFECTIVE DOMAIN, *supra* note 16, at 57. *See also Proposed Method*, *supra* note 4, at 8.

oping creative abilities.[19] Although a certain amount of information must be memorized in order to make possible more complex types of thinking, memorization is only a first step and should not be viewed as an end in itself.[20] Memorization alone does little for intellectual growth. In fact, more than three-fourths of what is memorized by college students is forgotten within one year.[21]

Comprehension, the second level of cognitive behavior, is marked by the ability of a student to grasp ideas and explain them in his own words without either quoting from texts or parroting definitions learned from the instructor.[22] This form of comprehension is referred to as "translating."[23] Interpretation, a second form of comprehension, occurs when students are able to compare and contrast two particular principles taught by the professor.[24] In each instance it is important to realize a key aspect of comprehension: the student is given the particular concept; he does not create it, nor does he relate the material to other data.[25]

The remaining categories of cognitive behavior — application, analysis, synthesis, and evaluation — involve more complex intellectual skills. They often overlap, but each has as its cornerstone the ability to think in an orderly, logical way. Application involves the ability to transfer and relate principles learned from a previous context to new fact situations.[26] Application occurs when a proposition or rule of law is derived from one case and then transferred to resolve a problem in a different case.[27] It is distinguished from comprehen-

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[19]Savoy utilizes the following definition of creativity drawn from Rogers: "'Have I created something satisfying to *me?* Does it express a part of me — my feeling or my thought, my pain or my ecstacy?' These are the only questions, Rogers insisted, that really matter to the creative person." Savoy, *supra* note 11, at 476.

Creativity has also been described in terms of "(T)he extent to which one or more of the following conditions are satisfied: 1. The product of the thinking has novelty and value (either for the thinker or for his culture). 2. The thinking is unconventional, in a sense that it requires modification or rejection of previously accepted ideas. 3. The thinking requires high motivation and persistence, taking place either over a considerable span of time (continuously or intermittently) or at high intensity. 4. The problem as initially posed was vague and undefined, so that part of the task was to formulate the problem itself." Torrance, *Scientific Views of Creativity and Factors Affecting its Growth,* 1965 DAEDALUS 663, 666, *quoting* Newell, Shaw & Simon, *The Process of Creative Thinking,* in CONTEMPORARY APPROACHES TO CREATIVE THINKING 65-66 (1962).

For a discussion of the relationship between legal education and creativity see Stone, *supra* note 3, at 419-21; Yeamans, *Creativity and Legal Education,* 23 J. LEGAL EDUC. 381 (1971).

[20]POPHAM, *supra* note 16, at 57; Wolfe, *supra* note 2, at 242.

[21]2 THE ENCYCLOPEDIA OF EDUCATION 198 (L. Deighton ed. 1971), where it is noted that more than three-quarters of the information memorized by college students is forgotten within one year. Erickson, *A Communications Teacher Looks at Business Law,* 6 AM. BUS. L. BULL. 14 (1962). Here the author noted that six months after the end of the business law course, students remember only ten to twenty-five percent of the information memorized. *See also* Donohue, *supra* note 2, at 165.

[22]COGNITIVE DOMAIN, *supra* note 16, at 89; Wolfe, *supra* note 2, at 244.

[23]COGNITIVE DOMAIN, *supra* note 16, at 91-93; Wolfe, *supra* note 2, at 245.

[24]COGNITIVE DOMAIN, *supra* note 16, at 93-94; Wolfe, *supra* note 2, at 245.

[25]COGNITIVE DOMAIN, *supra* note 16, at 89, 120; POPHAM, *supra* note 16, at 57.

[26]COGNITIVE DOMAIN, *supra* note 16, at 120-125; POPHAM, *supra* note 16, at 57.

[27]LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949) [hereinafter cited as LEVI]. *See also,* Bodenheimer, *A Neglected Theory of Legal Reasoning,* 21 J. LEGAL EDUC. 373, 373 (1969) [hereinafter cited as Bodenheimer].

sion in that the student is not told which principle applies to the given situation. Rather, she decides this on her own and then applies the principle to solve the new situation.[28]

Analysis involves the comparison of various problems or cases in order to recognize similarities and differences.[29] Trying to demonstrate that different things are governed by the same general principle or explaining the similarity between things that are otherwise unlike are two examples of analysis.[30] Pointing out the essential differences between sets of problems is another form of analysis, as is sorting out relevant from irrelevant data in a problem.[31] Each of these activities requires breaking down each component part of something into simpler parts so as to discover important inner relationships.[32]

Synthesis is a creative process that involves combining diverse elements, not before presented as a unit, to form a coherent whole.[33] A student is synthesizing when he integrates his knowledge of principles of economics, corporations, marketing, and business policy in order to reach a logical conclusion to a problem relating to antitrust law. One further demonstrates this skill when he analyzes a number of judicial opinions in the antitrust area and combines them in such a way as to construct a statement of the law.[34]

Evaluation involves making a judgment based on certain provided criteria about the appropriateness of a resolution.[35] For example, whether or not a conclusion follows logically from the arguments presented in the case or whether a particular result will promote or retard the attainment of desired ends are criteria by which to evaluate the worth of a particular rule of law.

Application and analysis are the key factors in the legal process since finding the similarities and differences between fact situations is important in judicial decision making.[36] The skill involves selecting a rationale for the decision in a case, transforming the rationale into a precedent or rule of law, and then applying the rule to a new set of similar facts. Through an analysis of the similarities and differences between the two situations, a decision is made as to whether the rule from the first case can be applied to the second.[37] This sort of

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[28]COGNITIVE DOMAIN, *supra* note 16, at 120; Wolfe, *supra* note 2, at 245.

[29]Wolfe, *supra* note 2, at 249.

[30]Swisher, *supra* note 2, at 537-38. *See generally* Hewitz, *supra* note 1.

[31]Wolfe, *supra* note 2, at 250.

[32]Swisher, *supra* note 2, at 539 n. 17.

[33]COGNITIVE DOMAIN, *supra* note 16, at 162; Swisher, *supra* note 2, at 539 n. 14; Wolfe, *supra* note 2, at 251.

[34]Wolfe, *supra* note 2, at 252.

[35]COGNITIVE DOMAIN, *supra* note 16, at 185.

[36]Swisher, *supra* note 2, at 527.

[37]Levi, *supra* note 27, at 2. *See* Bodenheimer, *supra* note 27, at 373; Hermann, *A Structural Approach to Legal Reasoning*, 48 S. CAL. L. REV. 1131, 1136 (1975) [hereinafter cited as Hermann]; Sinclair, *Legal Reasoning: In Search of An Adequate Theory of Argument*, 59 CALIF. L. REV. 821, 828-33 (1971) [hereinafter cited as Sinclair]; Swisher, *supra* note 2, at 538.

logical analysis is the most durable aspect of legal training.

Each level of cognitive thinking can be developed in the business law course. Students must be able to remember rules and how they are organized into categorical systems, spot the issues involved in particular fact situations, and argue for a broad or narrow holding of a case. These particular abilities, among others, are often referred to as legal reasoning skills. However, the ability to "think like a lawyer" is not unique to a lawyer's intellect, but simply reflects a mastery of each of the categories of cognitive thinking.[38]

Learning these skills has an inherent value of its own, for students develop "a habit of mind" that encourages logical, disciplined and organized responses to complex problems and situations.[39] Although unfamiliar to many undergraduates, the ability to apply, analyze, and synthesize is a teachable skill that should not be relegated to professional training. The business law professor is in an ideal position to release undergraduates from their previous habits of memorization by training students to weigh alternatives carefully and to express conclusions in a clear, precise fashion. The problem-solving skills learned in a business law course are retained by the student long after the memorized legal rules and regulations are forgotten and are crucial to the business person who must constantly create practical solutions in the everyday practice of his profession.[40]

Personal Development

The law, in contrast to the many quantitative-oriented courses in the business school curriculum, involves numerous questions of morality and policy. It must be studied as a social process, not "as if it contained only the axioms and corollaries of a book of math."[41] The study of law must examine the philosophical issues behind the rules in an effort to develop a student's critical thought processes and internal value systems. The opportunity exists in law for a student to make inquiries into the justice and fairness of outcomes and to internal-

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[38] Auerbach, *Legal Education and Some of Its Discontents*, 34 J. LEGAL EDUC. 43, 58 (1984) [hereinafter cited as Auerbach]; KENNEDY, *supra* note 11, at 15; Mudd, *supra* note 1, at 705-06; see Swisher, *supra* note 2, at 534 nn. 1-2, Hermann, *supra* note 37, and Sinclair, *supra* note 37, for a discussion of what exactly constitutes legal reasoning. *See* also Calhoun, *Thinking Like a Lawyer*, 34 J. LEGAL EDUC. 507 (1984).

[39] Lader, *supra* note 2, at 152. *See* Brown, *supra* note 3, at 654-55; Childress, *supra* note 11, at 103; Gray, *Methods of Legal Education*, 1 YALE L.J. 159, 160 (1892) [hereinafter cited as Gray]; White, *supra* note 1, at 1.

[40] *See* Henkel, *The Uniform CPA Exam — Factors in Achieving Success on the Business Law Section*, 14 AM. BUS. L.J. 377, where the author indicates that CPA's felt that analyzing legal fact situations in the form or problems or cases was strongly helpful on both the CPA exam and in their current employment, since it developed logical reasoning skills. *See also* Anderson, *supra* note 1; Patterson, *supra* note 1, at 7; Vogts, *supra* note 3, at 405.

[41] HOLMES, *supra* note 13, at 1. Compare Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466, 478 (1925), where the famous jurist notes "(T)he law is not a system of inexorable rules; in its most interesting aspect it concerns, if we must seek analogies, rather the behavior of a living organism than the absolutes or rigid formulas. You are dealing with a social group." *See* LLEWELLYN, THE BRAMBLE BUSH 3-4 (1930).

ize or reject the rationale for a court's decision.[42] Such an investigation demands that the student reflect on and evaluate his own values and relate them to the ideals of a coherent moral position. In this regard, moral virtue, too, depends on clarity of though. Students must be aware of the hazards of "self-interest, provincialism of time and place, overdependence on familiar categories of thought, the inability to tolerate uncertainty, and sentimentality."[43]

As important as the substantive knowledge of whether a state requires vehicle occupants to wear seat belts or motorcyclists to wear helmets is an understanding of the policy arguments inherent in the decision-making process. Should the state decide for the individual (paternalism, regulation), or should the state permit the individual to decide for himself (self-determination, facilitation)?[44]

A discussion about the moral legitimacy of the state's intervention or non-intervention will elicit a number of different perspectives and value judgments. At some point, the student must "draw the line" where the government has, in fact, gone too far and invaded certain personal liberties and then give a justification for his line-drawing process. How this point in fact compares to the legal rights of the government is an issue for yet further discussion. This sort of interchange can be developed with reference to a number of topics, ranging from abortion to government involvement in airline fares.

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[42]Historically, graduate legal education rests on a fundamental belief in the separation of laws and morality and often overlooks inquiries of justice and fairness in the process of training students to become advocates. This is unfortunate and the focus of teaching of law on the undergraduate level should go beyond practical and legalistic concerns and evaluate the rightness of results. Elkins, *supra* note 1, at 11-12, 32-33, 46-47. E'rrico, Arons, and Rifkin, *Humanistic Legal Studies at the University of Massachusetts at Amherst*, 28 J. LEGAL EDUC. 18, 18-19 (1976), comment that, "The paradigm of professional law training seems almost to require that the student stop asking basic questions which have no answers, and adopt a systematic world view which at bottom is basically a set of rationalized economic strategems and devices for manipulating people and power. Since what one is being asked to give up in this process is one's soul, it is not surprising to find in the law school experience a replay of the temptation of Christ: the seats of earthly power are held out to the law student as the price for relinquishing the pursuit of knowledge and justice." *See also* Auerbach, *What Has the Teaching of Law To Do With Justice?*, 53 N.Y.U. L. REV. 457 (1978); Auerbach, *supra* note 38, at 58-60; Bonsignore, *supra* note 5; Childress, *supra* note 11, at 349-50; Christenson, *Studying Law As the Possibility of Principaled Action*, 50 DEN. L.J. 413, 431 (1973); Cramton, *supra* note 4, at 253; Fuller, *supra* note 1, at 45-46; Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanist Educational Psychology To The Teaching of Law*, 53 N.Y.U. L. REV. 514-60 (1978); Hellman, *Considering the Future of Legal Education: Law Schools and Social Justice*, 29 J. LEGAL EDUC. 170 (1978); Holt, *Why American Law Schools Cannot Teach Justice*, 3 AM. LEGAL STUD. F. 5 (1978); Kronman, *Foreward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 959-67 (1981) [hereinafter cited as Kronman]; Lesnick, *Preface to Symposium on Legal Education*, 53 N.Y.U. L. REV. 293, 295 (1978); Pattison, *Atavism Relevancy, and the Hermit: The Law School Today*, 29 J. LEGAL EDUC. 62 (1977) [hereinafter cited as Pattison]; Wofford, *On the Teaching of Law and Justice*, 53 N.Y.U. L. REV. 612, 614 (1978) [hereinafter cited as Wofford].

[43]Sandalow, *supra* note 1, at 171.

[44]*See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1731-37 (1976). There are certain standard dichotomies which arise in resolution of conflicts. One view holds "(T)hat parties themselves are the best and only legitimate judges of their own interests, subject to a limited number of exceptions . . ." "The response is that paternalist rules (which are more likely to outlaw transactions or police agreements) are note exceptions, but the representatives of a developed counterpolicy of forcing people to look to the 'real' interests of those they deal with." *Id.* at 1737.

Realization that the selection of a negligence system of liability is not a value-neutral decision comes to light when students consider examples of plaintiffs who are unable to receive compensation from a party who has caused them injury.[45] If the student feels that the plaintiff should prevail, he must give a logical argument for why it is fair to penalize the defendant when he has acted reasonably under the circumstances or when it was unforeseeable that the plaintiff would be injured by his conduct. Evaluating his own opinions and appreciating the values of his peers are helpful to the student in the construction of his own philosophy of life. He will also realize the difficulty in balancing competing arguments in order to solve a dispute or reach a "fair" end result when the contradictory positions each have their own merit and validity.[46]

METHOD

Once the objectives of an undergraduate business law course have been defined, it is possible to discuss the techniques to be used to achieve these goals. An orientation that produces a conflict of ideas provides a greater intellectual challenge to students and a more stimulating learning environment than a situation that requires principally recall and rote note-taking from a student.[47] The case or problem method[48] type of instruction is ideal. Each is

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[45]"If the defendant could not reasonably foresee any injury as the result of his act, or if his conduct was reasonable in the light of what he could anticipate, there is no negligence, and no liability." PROSSER, *supra* note 8, at 250. For a discussion of situations where defendants have "caused" harm, but have not been liable *see id.* at 250-270.

[46]*See* Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 641-43 (1983). See also Brown, *supra* note 3, at 657, where the author notes, "(T)he reality is that there is no single rule or answer for every problem. The law is often uncertain and confused. Thus, there is not one truth, but only the results of an adversarial system of many truths. There are, moreover, multiple rules, often in conflict . . . ; See Eron and Redmount, *supra* note 5, at 433, where the authors note that "(I)ntensive dialectical workouts at first all but shatter the expectation that law is a utopian and nearly infallible index to the solution of problems. Disillusion comes from the realization that law is not so much magic, based on unquestioned power and authority, as it is reason, often based on a difficult choice of arguments and values. See KENNEDY, *supra* note 11, at 20-21, where the author denies that there can be any neutral, non-ideological legal process nor a "correct legal solution" distinct from a "correct ethical and political solution." *See also* Cole, *supra* note 11, at 333-35; Fuller, *supra* note 1, at 45.

[47]Redmount, supra note 1, at 136. Smith reports that a large majority of students exposed to the case method found it more interesting than traditional lecture classes. Smith, *supra* note 3, at 21-23. Welty notes that "active participation leads students to believe that they are of more value to the class and gives them more feel for the subject." Welty, *Student Involvement in the Teaching of Law*, 7 AM. BUS. L.J. 293 (1969); Oleck, *Adversary Method of Law Teaching*, 27 J. LEGAL EDUC. 86 (1975). *See generally supra* notes 2 and 3.

[48]Both methods are operationally problem oriented and strive to develop intellectual skills. In the problem method students are given the problem prior to the class period in which it is to be discussed. "They are required to solve problems, a task different from studying a case as the solution to a past problem or for its contribution to a body or doctrine. Students are required to wrestle with uncertainty in ways different from case method study . . . The experience it exacts of the student . . . is different from his experience in looking at those materials with no new problem to solve but merely to see how a court or legislature has solved a problem that had confronted it . . . Students must find their own answers rather than read someone else's answers." Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 655 (1984) [hereinafter cited as Ogden]. The case method features the "learning of the law by reading appellate court cases," so that the law can be seen in action. The method is extremely useful for teaching legal reasoning, analysis of opinions and synthesis of fields of law, and for introducing students to legal jargon and procedures. The methods are often interdependent. In order to solve problems, students must master case analysis skills so that they can use case materials to find solutions. A professor can easily change a "case" into a "problem" by changing

designed to produce independent and creative thinking by having students constantly practice the intellectual skills of application, analysis, synthesis, and evaluation. In this kind of learning process, students are active participants as they formulate, discuss, and apply rules in order to work out for themselves solutions to problems. There are three essential components to case method instruction: the cases themselves, student participation in a classroom discussion of cases, and the problem-solving type of examination.[49]

The Case

In the business school case method originally developed and popularized by the Harvard Business School, the student is presented with a complex, real-life business problem and is asked to solve it. He must sift through a vast amount of information, discern what is useful, propose various solutions, and finally select the best alternative from the various proposals.[50] The case method in law is different in that students read appellate decisions which contain the judges' resolution of a legal problem. The objective behind each method is similar: to develop techniques of analysis and application in order to cultivate the student's competence in solving problems.[51]

Having students read a case on the first day of class is an ideal means to acquaint them immediately with the legal environment: the role of judge and jury, the types of controversies that require judicial resolution, jurisdictional issues, and legal terminology.[52] Classroom discussion of the Supreme Court

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the facts of the case and presenting a hypothetical which tests the applicability of the rule from the prior case to the new problem. Perhaps the use of a combination of cases and problems is the most useful technique for the student becoming acquainted with the law. Whatever the method, the discussion which follows from the cases or problems, prompted by inquiries from the professor, is the most crucial component. The discussion hereinafter will focus on the use of the cases, with an understanding that problems can be substituted for cases, that both methods develop cognitive skills, and that they often overlap. For other more detailed discussion of the problem method see ASSOCIATION OF AMERICAN LAW SCHOOL REPORTS: A.A.L.S. REP., METHODS OF "COVERING GROUND," 1948 HANDBOOK 203; A.A.L.S. SURVEY AND APPRAISAL, A REPORT, 1966 PROCEEDINGS, PART ONE, REPORT OF COMMITTEES AND PROJECTS 198 (1966); Ballantine, *Teaching Contracts with the Aid of Problems*, 4 AM. L. SCH. REV. 115 (1916); Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449 (1943) [hereinafter cited as Cavers]; Charles, *What Is the Problem Method?*, 40 CAN. B. REV. 200 (1962); Crombag, *On Solving Legal Problems*, 27 J. LEGAL EDUC. 168 (1975); Freidman and Macaulay, *Contract Law and Contract Teaching: Past, Present and Future*, 1967 WIS. L. REV. 805 (1967); Landman, *The Problem Method of Studying Law*, 5 J. LEGAL EDUC. 500 (1953); Miller, *A Report of Modest Success with a Variation of the Problem Method*, 23 J. LEGAL EDUC. 344 (1970); Volz, *The Legal Problems Courses at the University of Kansas City*, 7 J. LEGAL EDUC. 91 (1954); Ward, *The Problem Method at Notre Dame*, 11 J. LEGAL EDUC. 100 (1958); Whelan, *Experiments with "Problems,"* 9 J. LEGAL EDUC. 245 (1956); Whinery, *The Problem Methods in Legal Education*, 58 W. VA. L. REV. 144 (1956). Note, *Modern Trends in Legal Education*, 64 COLUM. L. REV. 710, 718-19 (1964).

[49]Patterson, supra *note* 1, at 10. *See also* Brown, *supra* note 3, at 654-59; Martineau, *supra* note 1, at 349; Vogts, *supra* note 3, at 411-15. "The problem method has three parts to it: 1) assignment of problem statements for solution; 2) use of course or other materials to solve problems; and 3) discussion of solutions in class." Ogden, *supra* note 48, at 655.

[50]Teeven, *The Business Case Method and the Business Law Professor*, 56 J. BUS. EDUC. 280 (1981) [hereinafter cited as Teeven]; Vagts, *supra* note 3, at 412.

[51]*See supra* notes 2, 3, and 47, and *infra* note 67.

[52]See Childress, *supra* note 11, at 101; Keener, *The Inductive Method in Legal Education*, 28 AM. L. REV. 709, 719 (1894) [hereinafter cied as Keener]; Patterson, *supra* note 1, at 21; Zarr, *Learning Criminal Law Through the Whole Case Method*, 34 J. LEGAL EDUC. 697 (1984).

case, *Lochner v. New York*,[53] illustrates this process. In that case the Court struck down, as a violation of the fourteenth amendment, a New York labor law which prevented bakers from working in excess of sixty hours per week. The instructional process begins with a discussion of judicial procedure, that is, what types of cases go to what particular court systems and, specifically, how *Lochner* went from the state to the federal system. The discussion then progresses to the relationship between the Supreme Court and the Constitution and how, in *Lochner*, the Court made an interpretation of the meaning of the fourteenth amendment. Next, the students must determine the rationale or legal justification for the decision. In *Lochner*, the majority felt that the legislature had invaded the "private sphere" of property and contract rights. Since this legislative invasion was not related to health, safety, or morals (the purported sphere of the legislature's ability to legislate for the "general welfare" under late nineteenth century and early twentieth century judicial conceptions), the legislature had exceeded its valid police power.[54]

The majority also contended that bakers did not need the state's intervention to aid them in deciding how many hours they could work.[55] The decision has a very individualistic, laissez-faire tone. Finally, after considering the points presented in Justice Holmes' dissent,[56] students evaluate the decision according to their own sense of justice and fairness. The discussion demonstrates that the great majority support the baker's right to work over sixty hours and the decision that the state law preventing him from doing so abridges his basic constitutional rights.

When the students learn that *Lochner* was overruled almost thirty years later, they are forced to examine more closely the competing sets of values in the controversy and the political and economic factors which influenced each decision. The set of cases which overruled *Lochner* reflect a concern for the community after the plight of the Depression and point to the interdependence of the private and public sectors.[57] The laissez-faire economic system can no longer be a rationale for the Court's decision. The professor may inquire, "How can the judges' interpretation of the Constitution yield such conflicting results?" The discussion can then focus on the stability of the present Supreme Court interpretations of the Constitution and the importance of the role of the chief executive in selecting federal court justices. A comparison of *Lochner v. New York* and its progeny with the subsequent cases which overruled them demonstrates the elasticity of the law, historical time periods of judicial thought, and the practical consequences of judicial decisions.

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[53] 198 U.S. 45 (1905).

[54] *Id.* at 56-57.

[55] *Id.* at 57.

[56] *Id.* at 74.

[57] *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934); Phelps Dodge v. NLRB, 313 U.S. 177 (1941).

The classroom discussion of the case is not complete, however, if the student can recall only the facts of the case and the court's decision. The student must separate the factual circumstances from the legal principle they generated.[58] Otherwise, the principle will be of no further use to him. The professor must emphasize that after the student has extracted a rule of law from the case, he must learn to apply it to new factual circumstances. This skill is developed through a question from the professor: "How would the decision in *Lochner* affect the establishment of minimum wage legislation?" Through the processes of application and analysis, the student must transfer the rule from *Lochner* to test its validity with a new fact situation.

A conclusion that a case striking down maximum hour legislation would not affect minimum wage legislation because they are independent issues would demonstrate a lack of understanding by the student of the role of application and analysis in judicial decision making. The student must realize the similarities between the two: both are restrictions on the employer-employee freedom of contract, and neither affect health, safety, or morals. Through this analogy, the student could conclude that minimum wage legislation, like maximum hour legislation, invades the "private sphere" of property and contract rights, and, in addition, would be unconstitutional. (This was the Court's interpretation at that time.)

However, if a student could point out some essential differences between the examples that would lead to a different conclusion, he would be correctly using the intellectual skill of analysis. The ability to construct an argument for a narrow or broad application of *Lochner* in relationship to a factual situation regarding minimum wage legislation is the type of creative cognitive reasoning skills that the professor should seek to maximize through the use of cases.

Preparing or briefing cases for class also gives the student practice in developing complex intellectual skills.[59] The student must separate pertinent facts from the extraneous, spot the issue involved in the case, and then state the legal principle in his own words. As he studies the court's legal justification for the decision, he will discern how the court has applied principles from prior cases to construct a rationale for the present decision. At times the court will assert similarities with previous cases to find a like result; at other times the court will make distinctions between cases to rationalize a different conclusion. Through careful case analysis, the student sees how judges make decisions with the same sources and through the same intellectual processes that he is learning.

Cases have a number of other inherent values. Especially in tort law, an interesting set of facts can create dramatic interest for the student and produce

[58] Wolfe, *supra* note 2, at 250-51.

[59] *See* Childress, *supra* note 11, at 102; Gross, *supra* note 15, at 271-75; Teeven, *supra* note 50, at 280; Vagts, *supra* note 3, at 412; Wolfe, *supra* note 2, at 249.

a spirited, educational discussion about civil liability.[60] *Palsgraf v. Long Island R.R.*[61] continues to divide classes on the fairness of the rule that limits recovery to those the defendant should have foreseen would be injured by his conduct. Students are forced to use their creative powers if they are presented only with the facts of the case and asked to construct their own arguments for either the plaintiff or the defendant. By reading Cardozo's majority opinion and Andrews' dissent,[62] students are able to compare their own analysis to that presented by these judges. This and other "older" cases also illustrate the habits of a different era and raise qeustions as to the continued validity of their doctrine in light of the many social and cultural changes which have occurred over the years. "Bad" cases have the value of giving students the opportunity to evaluate why a court's reasoning appears illogical in light of present day knowledge and mores.

In the study of contract law, the critical powers of the student are developed when he must analyze the distinction between cases which have similar sets of facts but which result in different decisions. An example is *Peevyhouse v. Garland Coal and Mining Co.*[63] and *Emery v. Caledonia Sand and Gravel Co.*[64] In the former, a corporation succeeds in breaking its promise to restore a farm family's stripmined land, but in the latter, the farm family wins on almost an identical set of facts.[65] An analysis of conflicting cases invites the student to weigh the competing values and relative merits of each.

Student Participation in the Classroom Discussion

The classroom serves as a laboratory where students sharpen their critical skills through discussion.[66] By analyzing and solving problems raised by the professor and their peers, they learn more thoroughly than if they were allowed passively to receive a rule or doctrine from the instructor.[67]

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[60]Cases are far more appealing to students than a text or a lecture, and also give the professor an opportunity to increase interest by adding dramatic technique to the case presentation. *See* Gray, *supra* note 39, at 159; Patterson, *supra* note 1, at 7; Redmount, supra note 1, at 164; Smith, *The Study of Law By Cases: A Student's Point of View,* 3 AM. L. SCH. REV. 253, 254 (1913) ("The rights and wrongs of men are interesting to students"); Teeven, *supra* note 50, at 280; Woodward, in *Symposium, Papers and Discussion Concerning the Redlich Report,* 4 AM. L. SCH. REV. 91, 99 (1916) ("dramatic struggle . . . makes to the beginning student and irresistible appeal"). *See also supra* note 47.

[61]248 N.Y. 339, 162 N.E. 99 (1928).

[62]248 N.Y. 347, 162 N.E. 101.

[63]382 P.2d 109 (Okla. 1963).

[64]117 N.H. 441, 374 A.2d 929 (1977).

[65]See D. VERNON, CONTRACTS: THEORY AND PRACTICE 6-73 to 6-90 (1980), juxtaposing the two. The facts of these cases are similar: a coal company rented a farm family's land for strip mining, with a promise to restore it to its original condition once the coal had been extracted, and then reneged on the promise. The result is different.

[66]Rath, *supra* note 3, at 107. *See* Allen, *supra* note 3, at 455; Brown, *supra* note 3, at 656; Chidress, *supra* note 11, at 104-105; Heffernan, *supra* note 3, at 402.

[67]"Learning proceeds more effectively when the learner is an active participant in the learning process." According to Popham, *supra* note 16, at 109, this principle of learning applies to the acquisition of cognitive competencies. Keener, *supra* note 53, at 715, concludes, "We understand most thoroughly and remember

Students usually discuss the general content of the assigned cases for that day. The instructor can formulate new problems by slightly changing the relevant facts of the decided cases or by raising new hypothetical situations that test the transferability of ideas from decided cases.[68] The method of discussion varies. The instructor can accept volunteers, call on students, or partition the class into groups. The success of the discussion lies in the professor's evaluation of students' initial responses and conclusions, and his ability to direct and adjust the levels of the discussion.[69] Although the professor has an objective of what to cover, the ultimate path will often be determined by the responses of students.

The classroom discussion should consist of a number of penetrating, sequential questions by the professor which require the student to apply his knowledge to new fact situations.[70] Analyzing the responses of students provides the class with immediate feedback on the legitimacy of their reasoning processes and the correctness of the solutions they have developed. A correct position becomes even more worthwhile when the student can explain the process of logical thinking to his peers. Illogical responses can be beneficial in that they give the instructor or a student the opportunity to correct basic mistakes in analysis. It is useful to know when reasoning is circular or when facts are misinterpreted.[71] In fact, correct responses might often be bypassed in order to

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the longest that which we have acquired by labor on our own part." Redmount, supra note 1, at 135, states that "The teaching-learning process begins not with the subject matter but with the student. If earning is to be relevant and effective it must be formed around the discrete capacities and dispositions of the learner. Cramton notes, "Education should ideally engage the whole person of the learner," *supra* note 11, at 323. These concepts are basic pedagogical assumptions of the case method. *See* Allen, *supra* note 3, at 449; Childress, *supra* note 11, at 347-49; Cole, *supra* note 11, at 868; Kober, *supra* note 11; Lees, *supra* note 2, at 77; Patterson, *supra* note 1, at 5; Rader, *supra* note 3, at 108, Vogts, *supra* note 4, at 412. Studies have demonstrated the superiority of the case method over the lecture method in developing problem solving abilities. *See* Dry, *A Study to Determine the Relative Effectiveness of Three Teaching Methods for a Beginning Course in Business Law at the College Level,* 1 AM. BUS. L.J. 121 (1963). *See* Smith, *supra* note 3, at 22-23, who credits the case method with improving analytical capacity, since it calls for "a greater intellectual effort on the part of the student and is likely to result in a more lasting benefit to him." Smith also observed that students in Socratic classes tended to spend less time in rote note-taking: "Generally, the whole class was concentrating on the problem and trying to follow the discussion, if not participating in it." He also reports that Socratically trained students spend less time on exams in regurgitating class notes, and more time producing solutions that reflect their own thought. *Id.* at 22. *See also* Watson, *The Socratic Method and Levels of Questioning,* 36 C. STUDENT J. 130 (1979), who determined that Socratic instruction significantly increased the number of higher level questions being asked by students. But see Henszey and Meyers, *Evaluation of New Teaching Methods for the Business Law Course,* 15 AM. BUS. L.J. 132 (1977) and Blackburn and Neidzwiedz, *Do Teaching Methods Matter?,* 18 AM. BUS. L.J. 525 (1981), for a conclusion that the type of teaching method does not have a significant effect on student performance as evaluated by true-false questions, but instead it is the student that matters.

[68]Brown, *supra* note 3, at 659. Cavers, *supra* note 48; Patterson, *supra* note 1, at 17. For an interesting discussion on hypotheticals see Gewirtz, *The Jurisprudence of Hypotheticals,* 32 J. LEGAL EDUC. 120 (1982).

[69]Brown, *supra* note 3, at 659; Lader, *supra* note 2, at 133; Lees, *supra* note 2, at 78; Newell, *Ten Survival Suggestions for Rookie Law Teachers,* 33 J. LEGAL EDUC. 693, 696-70 (1983) [hereinafter cited as Newell]; Patterson, *supra* note 1, at 17; Stone, *supra* note 3, at 411.

[70]Brown, *supra* note 3, at 659; Cole, *supra* note 11, at 868; Heffernan, *supra* note 3, at 401; Rath, *supra* note 3, at 108. For actual examples of the use of the Socratic method *see* Childress, *supra* note 11, at 97; Epstein, *supra* note 11.

[71]Childress, *supra* note 11, at 102; Fuller, *supra* note 1, at 40.

consider and discuss mistakes in reasoning. A certain number of incorrect responses will also lessen the student's reluctance to contribute because he fears giving the wrong answer.

The professor also gains insight from the discussion. When students are not successful at applying learned principles to new situations, the instructor should review the material to insure that the class can first recall and comprehend the concepts which need to be applied.[72] Students also make comments, give examples, and ask questions from which the instructor can learn or which he can find beneficial enough to develop into hypotheses for future discussion. It is also interesting for an instructor to learn the knowledge, values, and misconceptions about law that students bring to class and then to present hypothetical situations which challenge them to distinguish between previously held beliefs and newly acquired information. When information and ideas are discussed and exchanged, the student can better grasp the principles of business law, and the instructor has a sharper perception of the effectiveness of his teaching as well as the values and thought processes of his students.

Classroom discussion also promotes communication skills. Students are required to think on their feet, to argue and to support their positions, and to speak in public in an articulate, lucid, and diplomatic fashion.[73] They quickly learn the importance of correct word usage and of proper enunciation. Also, since students are not always certain when they will be selected by the professor to comment on their classmates' responses, they must be attentive to others and attempt to understand their positions. In the ideal classroom discussion, students are eager to participate, challenging one another's assertions and making their own insightful inquiries.

Since the law involves questions of morality and is a means through which to settle disputes that have defied informal resolution, the discussion will naturally transcend the legal realm and focus on the legitimacy or fairness of a particular result. Through the interpersonal exchange of values, students will learn that theirs is not the only assailable position, but only one of many, each developed though a different world view and life philosophy. This sort of moral education is an important step in the development and examination of one's internal value system.

The form of classroom discussion suggested here is Socratic in nature. The Socratic method, as practiced in the law school classroom, has been sharply criticized by both students and faculty. The criticisms, however, are directed not at the educational benefits of Socratic teaching, but at the manner in

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[72] *See* Wolfe, *supra* note 2, at 248.

[73] Brown, *supra* note 3, at 656, 661-62; Childress, *supra* note 11, at 342; Donohue, *supra* note 2, at 163; Lader, *supra* note 2, at 152-53; Nussel and Villemain, *The Dual Socratic Method in College Education*, 17 J. TCHR. EDUC. 452, 454 (1966).

which the professor conducts the inquiry.[74] There is no need in undergraduate education, where students are not being trained as professional advocates, for the terror, humiliation, and intimidation often found in the law school classroom. There is a need, however, for the self-development and intellectual growth which the approach can develop more successfully than other educational methods. The professor has the responsibility to create a classroom atmosphere in which students are treated with respect and sensitivity, and where their participation is encouraged and treated as worthwhile.[75] An important first step for any business law professor is to make clear the objectives, strategies, and limitations of the Socratic method as he seeks to preserve its educational benefits while avoiding its pitfalls.[76]

The Hypothetical Case Type of Examination

The examination format must be one where the student is given the opportunity to demonstrate his knowledge of substantive law and his mastery of the problem-solving skills that have been developed through case analysis and class discussion. The test questions, like the hypotheses presented in class, are composed of new fact situations in which the student must analyze the facts, see the legal issues involved, then apply and transfer acquired legal knowledge in order to construct a reasoned argument and conclusion. The mere result is less important than the process of analysis and the quality of the essay.[77]

The problem-solving examination also develops written communication skills. The ability to think, organize, and write within a prescribed period of time is a valuable and transferable skill that should be encouraged by the business law professor, especially in light of the criticism of the writing abilities of business school graduates.

An examination requiring written analysis is not only a greater challenge to the student since it eliminates guessing and requires him to express his knowledge and understanding, but it is also a reinforcement of the skills in-

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[74]For a sampling of references discussing the problems of the Socratic method in law school see Kennedy, Kober, Patton, Richardson, Savoy, Shaffer, and Redmount, Taylor, Watson, Comment, *supra* note 11. *See also* Bonsignore, *supra* note 5; Eron and Redmount, *supra* note 5, at 431-43; Heins, Fahey, and Henderson, *Law Students and Medical Students: A Comparison of Perceived Stress*, 33 J. LEGAL EDUC. 511 (1983); Kronman, *supra* note 42; Pattison, *supra* note 42; Silver, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201, 1203; Stone, *supra* note 3, at 406-407; Wooford, *supra* note 42.

[75]See Sandalow, *supra* note 1, at 170, where the author notes, "Among the opportunities that legal education affords for developing character are the occasions it provides for exemplary conduct by faculty members. The faculty member who, in response to a student answer that is wrong or foolish, demonstrates patience in working the student toward a better answer teaches more than an intellectual lesson. So too does the faculty member who ridicules students or reveals a lack of concern for them by inattention to their performance in class. Ideas about patience, courage, and duty and about the ways in which men and women ought to treat one another take on meaning in our lives as we observe the behavior of those around us, especially those who occupy positions that might reasonably lead us to suppose that they are socially approved models for our own behavior." *See also* Newell, *supra* note 69, at 697.

[76]*See* Childress, *supra* note 11, at 96; Savoy, *supra* note 11.

[77]Patterson, *supra* note 1, at 19.

volved in the more complex thinking which has been practiced throughout the course. Although a carefully prepared multiple-choice examination using hypothetical situations can test most of the qualities the case method intends to develop, it does not promote the development of the writing skills involved in the construction of a well-reasoned argument about a given set of facts.[78] For example, many students may be able to recall and comprehend the concept of the pre-existing duty rule,[79] as demonstrated by their competency on a true-false question or multiple choice question that requires the student to select a definition of a term. However, a significantly smaller number will be able to sift through the information supplied in a hypothetical case, separate out essential facts, recognize where the pre-existing duty rule is an issue that must be considered, and then properly analyze whether the rule or an exception is more relevant to the specific factual pattern. It is these students who have demonstrated the higher cognitive abilities which the professor has attempted to develop throughout the course.

When students feel they have been graded unfairly on the hypothetical case type of examination, they must challenge the professor with a logical argument that they themselves have created and not merely refer to the text for the definition of a legal term or validity of a certain statement.

CONCLUSION

The study of law has both important practical value and substantial intellectual worth. Undergraduate legal education should provide the student with an opportunity to learn substantive rules but, more importantly, should develop in the student critical thinking capacities which are fundamental to a sound education and of persuasive importance in life.

A case or problem method, combined with a Socratic dialogue, is a participatory educational process aimed at developing students' ability to think. A student learns to approach situations in a logical manner, to consider alternatives critically, to draw distinctions, and apply knowledge creatively to new

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[78] *See* Breitenstein, *Selection of Bar Examination Questions*, 23 ROCKY MTN. L. REV. 107 (1950); Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411 (1977); Patterson, *supra* note 1, at 20; Peck, *The Case Against the Objective Multistate Bar Exam*, 25 J. LEGAL EDUC. 66 (1973); Reitzel, *Business Law — Construction Guides for the Essay Test*, J. BUS. ED. (Part I, at 157, 1/71; Part II, at 206, 2/71).

[79] "As a general rule, if two parties (A and B) have a contract under which A is contractually obliged to perform an act, neither A's new promise to perform that same act, nor A's actual performance of that act, will constitute consideration for a promise to pay a greater amount for the performance than was set by the original contract." Lingfentelder v. Wainwright Brewery, 15 S.W. 844 (Mo. 1890). For example, A and B have a contract to construct a driveway for $5,000 and when B is three-quarters finished he threatens to quit unless A pays another $1,000. A agress to B's demands. B finishes the driveway, but A refuses to pay the extra $1,000. If B brings an action for the additional $1,000, he will lose, since his agreement to finish the driveway did not constitute consideration for A's promise to pay the additional sum, since B was already obligated to finish.

When students are asked to recite the "pre-existing duty rule" or recognize it in definitional form, they can often do so. It is a much more complex process to recognize when a situation has developed that requires the rule to be examined.

situations. This type of cognitive development is unlikely to occur in a lecture format, where students passively receive "hand-delivered" answers from the instructor, and tend to memorize lecture notes. A classroom discussion format also enhances communication skills and encourages students to share their perspectives on the legal and moral issues raised in class.

Thinking and writing in a clear, precise fashion are skills that can be developed in the business law course which will endure far beyond the collegiate experience. The success of the undergraduate legal educational experience should be determined to a large extent by how successful students are in developing those intellectual skills which will advance their development as creative ethical human beings and contribute to their success as business persons.