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Mike's Story

It was about ten weeks into the Contracts course. Mike raised his hand and asked a question on a doctrinal point related to the topic under discussion but not covered in the materials. I reacted like a law professor: Instead of answering his question, I responded, "You already know the answer to that question."

Mike was never very good at being a submissive law student. Immediately he shot back, "If I knew the answer, I wouldn't have asked the question."

"No, no," I explained. "Even though you may not know the answer, you know enough about contract law to intuit what the law is likely to be on that point. You should be able pretty much to predict what the courts' response would be to a case like that." (Karl Llewellyn called this hunching power.) Then I moved the discussion up one level. "In fact, one of the most important things you should be learning in the course is not what the rules are, but what the general approaches to contract law are, so that you can predict what the law is even when you don't know it. That kind of understanding is the most sophisticated understanding of the material, much more in depth than simple knowledge of the black letter." A final thought occurred to me. "The way we can see how well you have developed your contracts intuition is to give you an exam question on an area we haven't studied and see how you do in reasoning to the answer. That's such a good idea that I think I'll do it."

Groans, directed at me and at Mike for having started all this.

On the final exam I did just what I said I would. We had not really studied third party beneficiary doctrine. I wrote a question which summarized some of the basic principles in a few paragraphs and then asked students to suggest what the law was likely to be on the issue of the ability of the promisor and the promisee to cut off the third party's rights after the contract was made. The answers were pretty good, and I have added the technique to my repertoire.

Planning Contorts

A few years ago my comrade Marc Feldman and I taught a course

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called Contorts, a ten-credit extravaganza encompassing Contracts, Torts, and Legal Research and Writing. When we first proposed teaching the course, about nine months in advance, we had not so much a plan as an experimental agenda. We wanted to try to improve our teaching by employing a pastiche of modestly nontraditional pedagogical devices. We wanted to pursue a critical legal studies approach to the debate about the relationship of tort and contract and to the nature of legal reasoning. And that was about all. It really was an agenda—a shopping list, as we came to call it—rather than a well-developed, intellectually rigorous program for reform.

After our initial proposal was approved, we went through several stages of planning and replanning the course. We chatted about it more or less idly. We recruited teaching assistants, sat down with them for three intensive days and systematically planned the course. Over the summer before the semester in which we were to teach the course, we met occasionally with consultants, including an educational psychologist, and threw out much of what we had planned to do in favor of more extreme ideas. Ultimately we taught the course, shifting between pursuit of our program design and week-by-week, day-by-day ad hoc-ism. And for a year or so after the course we recreated it in our heads periodically as we attempted to write an article about it.

Today, what initially were some vague ideas about teaching technique have grown into a full-scale theory of learning which, not coincidentally, mirrors some of the major approaches in educational theory. On the other hand, what were some pretty firm ideas about contract and tort and about legal doctrine in general have become wonderfully more complicated, and I am only now attempting to come to grips with the issue again.

Teaching Assistants

One of the devices we used in Contorts was having upper-level students serve as teaching assistants in charge of small groups of students. It worked so well in so many ways that I wanted to bring the device into my regular courses. I wanted to have second- or third-year students be teaching assistants, each responsible for a group of not more than ten first-year students. Each small group would meet weekly to work on exercises and projects related to the course, including projects for which there would be collective as well as individual responsibility. The group also would be a basic element of the master learning strategy emloyed in the course.

When I thought about using teaching assistants in Contracts last year (I would need about ten teaching assistants), all the reasons not to do so quickly came to mind. It would be a lot of extra work for me, compared

to simply teaching the course I had taught a half dozen times before. I couldn't offer prospective TAs adequate compensation in either cash or academic credit. Second-year students wouldn't know enough to teach first-year students. Most of the "better" students would be too busy with law journal. And so on.

I went ahead anyway, using ten TAs. Their grade average ranged from very good to very mediocre. (Some had even done only marginally well in my Contracts course the year before.) They were a diverse lot in other ways as well. I made matters worse by not adequately training them for their task.

It worked out wonderfully. None of the reasons to not use TAs came to pass. It was a little more work for me, but insignificant compared to the rewards (for me, as well as for the students). Compensation didn't matter to the TAs. They knew enough about Contracts to do fine (sometimes with refresher sessions). They knew much more about being law students, and being people, which were much more important in the scheme of things. Their collective performance was impressive, and their individual performances didn't correlate with prior academic performance or anything else.

Since the end of the semester, I have had about twenty or twenty-five of my first-year Contracts students volunteer to be teaching assistants in next year's course.

COMMENTARY

These three stories are not "about" anything; they're just stories. I like telling stories, much as Karl Johnson and Ann Scales like singing. However, just as they sing particular songs in particular settings for particular reasons, so I tell stories to advance my teaching and scholarship. Here I have told these three stories in order to make some comments about processes of institutional change in law school, in partial response to the Johnson and Scales article. What moves some law teachers to institute changes in the way things are done in law schools? Johnson and Scales met the challenge of teaching an introductory course in a strikingly innovative manner. Some other teachers given the same assignment would prefer instead to follow well-trod ground. Why the difference in people's willingness to seize opportunities for change, indeed, to create opportunities for change?

Johnson and Scales' story, like the Contorts story, shows that people's reasons for wanting to change law schools are at the same time systematic and intellectual *and* unsystematic and instinctual. The same can be said about people's reasons for wanting to keep things the way they are.

Johnson and Scales' study of philosophy and social theory provided

them with some rigorous views about the importance to law students of philosophical approaches. Those views suggested the content and method of an introductory philosophy of law course. But equally important in shaping their desire to teach this kind of nontraditional course were their intense personal reactions to their own experiences as students, practitioners, and teachers.

The Contorts story is like that, too. We had some fairly well developed ideas at the beginning, but to a large extent the course was a reaction to the frustrations we felt about the inadequacies of our own teaching.

This mix of systematic thinking and affective response is hardly unique to the process of curricular innovation. It is, in fact, the way we spend our lives. Law schools pride themselves on being rationalistic environments, characterized by rigorous analysis and thoughtful deliberation. It doesn't require a detailed deconstruction of linguistic indeterminacy, though, to show that rationalism is at best limited and at worst a facade. In deciding what kind of law teachers to be, as in evaluating a rule of market share liability or in choosing a spouse, feelings and instinct play a role along with ratiocination.

One key to change in law schools lies in attitudes of engagement, reflectiveness, and openness about what we do. All of us who teach spend a significant amount of time and energy in the enterprise. Although we do not all have the same experiences (and the differentness of our experiences is partly constituted by the degree to which we have the attitudes I mentioned), we are all presented with ample opportunities to make modest or radical changes in what we do. Whether or not we take advantage of those opportunities depends on whether we are sufficiently engaged in the process to be reflective and open about our limits and weaknesses and possibilities.

In part that is what Mike's story is about. I could have just given Mike a direct answer or brushed him off. In the past I probably had faced the same situation and handled it in one of those ways. But at the time he asked the question, one of the things that was important to me was paying more attention to what my students were learning, how they were learning it, and how that matched what I wanted them to be doing. That is, I wanted to be more reflectively engaged in the process of teaching. Therefore, I was more sensitive than I might have been previously to what Mike's question told me about the content and process of the class's learning and how that matched my goals for them.

Johnson and Scales' experience resonates the same way. A first-year perspectives course like that to which they were assigned is a frequent feature of reform proposals in legal education. Often, I suspect, the proposal arises from what purports to be systematic reflection about the curriculum: lawyers are not hammerers, so they need more philosophy

and history. The results can be quite impressive, but also quite mundane—students learning about jurisprudence much the same way they might learn about the parol evidence rule. What is distinctive about Johnson and Scales' account is their attitude about the project: committed yet tentative, systematic yet intensely personal. They are reflective about their own experiences and open to their own limits. They keep their eyes on the ball, but they know that getting there is half the fun. Generally lacking from this account is a sense of formula, a sense that they know the answers before they start, the kind of attitude that lets teachers teach the same course from the same casebook in the same way year after year, when the results are consistently unsatisfactory.

In describing this kind of engagement with legal education and suggesting that it may be unusual, I do not demean the efforts of most law teachers. Most professors seem to be serious and hard-working. The issue I raise is why that seriousness and effort so seldom produce anything that is strikingly new or tremendously effective. My suggestion is that, for all our work and good intentions, too often we fall into routines about our teaching. Over time, the sameness of the routines and their similarity to the routines of others reassures us that what we are doing is the right way to do things, so that significant change need not be considered. When pressed, we develop intellectual justifications for our routines, but the attitude of repose is more important than the after-the-fact rationalization of it.

What the sense of engagement is about, then, is being less sure of ourselves.

The idea of a sense of engagement also suggests what kinds of changes in law school one ought to be concerned with. My stories and Johnson and Scales' story present a range of possibilities. Using a new exam format which has implications for course design, as in Mike's story, is a small change. Revamping an Introduction to Law course as Johnson and Scales did is a larger change. Putting together an integrated course such as Contorts is larger still. None of them is as ambitious as redesigning a whole curriculum.

Each of these changes proceeded from an engagement in what we were doing as law teachers. In considering where to change, we cannot expect to make an evaluation of the move that will have the greatest impact on the students or the curriculum at a particular law school or on the world of legal education as a whole. There is no scale of breadth or importance that will let us predict effects with a high degree of confidence. Instead, the changes we institute ought to be the ones that develop out of our engagement with what we are doing. To the extent that our engagement is intensive, the moves are likely to be significant ones.

Most law schools periodically undergo reform movements, in which

major changes are proposed and implemented in instruction in legal research and writing, the first year program, advanced seminars, or whatever. Often the degree of change in the life of the institution or in the real learning of its students is not as great as the glorious language of the documents promoting change would suggest. Innovation, like sameness, can have a routine quality that suggests detachment and formula rather than engagement.

Reforms like these will be most successful when they embody the intense personal involvement of the participants in the change. That personal involvement takes the form of a sincere willingness to speculate, to analyze, to criticize, and to dream, even when the results may show our own inadequacies as students and teachers. One of the lessons of the teaching assistants story is that I could not be as good as a teacher in some ways as my students could. My image of myself as a good law teacher could only be fulfilled by depending on others and by giving up the traditional image of a good law teacher as master of the classroom. Personal involvement also requires a willingness to invest oneself in the results, or, as Johnson and Scales put it, to collapse the professional and the personal and to dissolve all the other distinctions that define the role of law professor.

My concept of engagement should not be taken as a call for instinct over intellect, however. My three stories and the Johnson and Scales story point out the need for integration of theory and experimentation in educational innovation. A quick and unfair reading of Johnson and Scales would denigrate their effort as late-1960s, touchy-feely, tell-me-what-you-think-about-law teaching. That is completely wrong. Lying underneath their effort is very serious, very thoughtful application of theory—Marx, feminism, critical legal studies, Wittgenstein—in an attempt to add dimension to the professional training of law students. At the end of their syllabus they quote Napoleon: "You commit yourself—and then you see." Commitment there must mean something like my notion of reflective engagement, in that the commitment, though emotional and personal, is grounded in study, reading, thought, reflection, and dialogue about the nature of law, the roles of lawyers, and the process of learning.

Integrating theory and practice or reason and instinct like this can be difficult. My own experience is that it is very hard work to try seriously to bring educational theory and legal theory to bear on a law school course. Theory seems much more attractive when you don't have to make it work, and teaching methods seem more reasonable when you don't have to justify them on principled grounds. As Johnson and Scales point out, it requires a certain amount of nerve to proceed with the necessary mix of conviction about the unconventional and uncertainty about everything. The risks are that theory and practice will never quite mesh and

the attempt to use them will be fabulously unsuccessful. How much of a risk that really is depends on the baseline. Johnson and Scales and I seem to agree that the risk is made less great because the baseline is so low; given what we feel we ought to be doing, our standard teaching simply doesn't adequately serve our students.

Because this process is difficult it also is time-consuming. That is a problem with innovation. We ought never be satisfied with what we have, but there are limits to how much time we can invest in the process, especially over a long period of years. One or two years of focusing intense energy on educational reform is a trip; trying to do it at that level over ten years or a career would be self-destructive. Probably there have been a lot of courses at least as unusual as Johnson and Scales' Introduction to Law, some of them even reported in the literature. I suspect that most of them have disappeared, in many cases because of the lack of continuing energy of the participants.

Thus it is important to institutionalize changes. Institutionalizing changes is what the teaching assistants story is about. I had a different teaching technology which had been used several times. Then the question was how I could continue to use it year after year without knocking myself out. Despite my fears, it turned out to be easy. At that level of change, within a single course and with modest outside resources required, all I had to do was focus on the system of using teaching assistants, rather than on the teaching assistants themselves. Without scaling down my objectives very much, I could design a mechanism that required limited investment of my time year to year relative to the benefits achieved. The key was deciding to do it; thereafter, it was a relatively simple queston of fitting available resources to the objectives. In my case, as in many cases, the most important resource was also the most plentiful: student interest and energy.

Certainly other types of innovations will depend more on continuing faculty effort. But part of the problem in failing to institutionalize changes is hubris. We law professors have a high opinion of ourselves. In trying something new, too often we think its success is wholly dependent on our talent and effort. Part of the openness of the engagement with law teaching is the recognition of our limits and of the value of others' work.

Change is hard because of the law of inertia. Once things have been done one way, it reguires energy to get them going in a different direction. Institutionalizing changes, though, is made easier because inertia is a property of a body in motion as well as of a body at rest. Once a change has been instituted and repeated once or twice it acquires momentum. Expectations are raised, systems are refined, and, to extend the physical metaphor, the velocity of change accelerates.

When some changes have been institutionalized in a law school, the

crucial next step is to institutionalize the process of change. I suspect that as Johnson and Scales' experiment is repeated, their law school will become a more interesting place. Innovations such as theirs serve as inspiration and as model. Thus, educational change can be both the product and the producer of engagement with legal education.