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CHAPTER 9

The First-year Courses: What's There and What's Not

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At the great majority of American law schools, students begin with a set of required courses that bear the titles of the next six chapters: Procedure, Contracts, Criminal Law, Property, Torts, and Constitutional Law. The six are likely to be taught in ways that resemble each other on the surface. Each will have a “casebook” slightly heavier than a Chicago phone book. Each casebook will devote more pages to the decisions of courts of appeals than any other form of material, and assignments will come almost entirely from the casebook. In class, the professors will have an arched eyebrow for every confident assertion a student makes. They will lecture in varying degrees, but nearly all will call on students who have not volunteered, asking questions about the assigned cases and the issues they raise.

In a year, if you choose to go to law school, you may conceivably look back and find the following chapters like the ads for Happy Valley Estates in sunny Arizona: Lured by the promise of bracing experiences in the land of Property and Torts, you will have arrived on the site and found nothing but sand, mesquite, and a drainage ditch. I hope not. When, as he does, one of our authors exults about his subject, “At times, highly technical! At times, even arcane! But mostly, enormously stimulating!” I hope you can forgive his enthusiasm or, better yet, come to share it. For many

people, the first year of law school is an intellectual sunrise, the most exciting year of their life as a thinking individual. Unlike the huckster from Happy Valley, most of us in teaching believe in what we have to sell.

Variety and Similarity Among the First-year Courses

I can be somewhat more specific about the varieties and similarities of courses and what your teachers are likely to be trying to achieve by discussing the varieties of approaching one course, Criminal Law, as an example. In a later chapter, Lloyd Weinreb describes some of the issues that lie in wait for you in criminal law. Here I wish merely to skip across the surface, comparing approaches of teachers. I have chosen Criminal Law in part because it involves many matters you've probably thought about before law school. You've probably even committed a crime or two—stolen an apple from a farmer's orchard, drank beer before you turned twenty-one, or littered.

To provide you with some rough sense of the similarities and differences among courses, I sent a questionnaire to forty teachers of Criminal Law randomly selected from the principal available list of law teachers.¹ Twenty-five were returned completed. The sample, though random, is not large enough to permit me to speak with confidence about the exact portion of teachers that teach one way or another at schools across the nation, but such precise information would not be particularly useful to you anyway. Moreover, even though the survey was conducted at the time of an earlier edition of this book, I believe, on the basis of a more recent study of criminal law courses,² that essentially the same similarities and differences continue among criminal law courses today.

At all but two of the respondents' schools, Criminal Law was a required course, typically taught for three credit hours in either the first or second semester of the first year. In a few schools, but only a few, the course was given as a four-, five-, or six-hour course. (Several of the other first-year courses, particularly Contracts,

Civil Procedure, and Property, are allotted four, five, or six hours' credit at most schools.) Two-thirds of the courses were taught in classes of sixty to ninety students. Only one responder typically taught a class with fewer than fifty students; three typically taught a class of more than one hundred and ten.

For all responding teachers, the grade in the course was based primarily on a single examination given at the end of the course. A few teachers assigned a paper in addition to the final exam, a few others gave one or more quizzes or a midterm, and a few more took into account class participation, but most relied on the exam alone. (The reliance on a single exam by most law teachers is, in itself, a source of anxiety for many students because they have few clear signals about how they are doing week by week during the term.)

At my request, many of the teachers sent me copies of a recent final examination. By far the most common sort of question on these examinations was a request to discuss a hypothetical and slightly unreal situation that was both somewhat like and different from the situations in cases discussed in class. ("During a heated verbal argument between D and X, D pushed X and a fist-fight ensued. Knowing himself to be a hemophiliac, D told X . . ." or "Abercrombie coveted Basil's Terraplane Roadster . . . (H)e persuaded Basil to lend the car to him . . ." Dire events follow. But were they crimes?) You can anticipate much the same sort of questions on the examinations in most of your other first-year courses.

So much for the package. What's inside? For example, what sorts of crimes or other issues are discussed in the basic Criminal Law Course?

All who answered the questionnaire indicated that they spent time on the law of homicide, that is, the law of murder and manslaughter, most spending more than four class sessions. This intense attention to homicide is reflected in most criminal-law casebooks. No other crime received such universal approbation. On sex offenses, by contrast, most spent far less time. Similarly, although you might suspect or hope that sentencing matters—the use of the death penalty or fixed terms of imprisonment, for example—would be given substantial attention, only one teacher devoted more than four classes, and well more than half spent none whatever or only one class on all sentencing issues.

About most other subjects there was more diversity in the extent of coverage. For example, about half the respondents indicated that they spent a few class sessions on the insanity defense and half spent a few classes on the law of conspiracy, but the remaining half (not necessarily the same persons as to each subject) were about evenly split between spending no time at all and spending more than four sessions. Similarly, although about half the teachers spent a few class sessions on property offenses, such as larceny and obtaining false pretenses, which were developed in the common-law courts, six teachers spent no time on them, whereas eight spent more than four classes.³

Comparable variations can be expected in other first-year courses. Beyond a few matters, there is no common agreement among law teachers about the specific subject matters that must be covered in any of the courses. As a student, I had a course in Torts that never covered the law of libel and slander, and I still can't remember the difference between them or whether the difference makes any difference. Most Torts professors across the nation probably spend a fair amount of time on libel and slander under the heading of defamation. Civil Procedure courses are similarly likely to differ widely in the extent of their coverage of the problem of whether the judge in a federal court should apply federal or state law in certain suits, Property courses in their degree of emphasis on the law relating to gifts. And so on.

The variations in coverage derive in substantial part from the fact that most instructors will be using discussions of particular crimes or torts or issues in the law of contracts only in part as ends in themselves, and to an equal or larger extent as a vehicle for serving other functions. In this regard, my list of crimes discussed in first-year courses is misleading. Two professors at the same school can each discuss "homicide" for weeks but approach it in such different ways that students with the different teachers who talk to each other will hardly believe they are taking courses with the same title, let alone discussing the same sort of human misbehavior. Conversely, two courses that never deal with the same particular crime may seem quite alike to students who talk to each other because of the identical themes the teacher will have stressed.

In the questionnaire, I tried to learn about the different approaches of courses in a couple of ways. First, there was a checklist

of possible areas of emphasis. Second, there was a more open-ended question, "If you had to reduce to one or two the most important functions you intend your course to serve, what would you mention?"

Most teachers, in responding to the checklist, said they placed a "great deal of emphasis" on "the general state of the law in the United States today." In the sample examinations, this emphasis was evident in the frequency of questions that called for a recollection and application of specific doctrines. On the other hand, in answering the question about the "one or two . . . most important functions" teachers hoped their courses to serve, far fewer than half stated that their central purpose was to convey an "understanding of substantive criminal law" or "the elements of common law crimes." One, but only one, saw his purpose quite bluntly as the "coverage of substantive criminal law needed for the bar exam" and only three placed substantial emphasis on the state of the law in the state in which their school was located. Doctrine it would thus appear has a secure but limited place in most teachers' views of their course. More than half the professors gave as their two most central themes concerns broader than the teaching of specific doctrines. It is these broader themes that explain the haphazard coverage of specific crimes among courses.

The first broader theme encompassed issues distinctively raised by the criminal law but larger than the concerns raised by any single offense. Professors used the course to explore "concepts of blameworthiness" or "the moral, social and ethical implications of the criminal law." For such an approach, materials about almost any criminal offense can suffice. If a teacher is interested, for example, in inducing students to think carefully about the proper role of retribution in framing rules defining criminal offenses, it may make little difference whether she chooses as her example for discussion the different degrees of homicide or the different forms of sexual assault. (On the other hand, those who are greatly concerned about sexually assaultive behavior as a critical social problem in itself may find unacceptable a course that omits materials on rape.)

Second, several respondents said they stressed issues that underlie almost all government regulation of human activity, not simply activities regulated as criminal. One stated that his central goal was

“to establish the limits and limitations of law as a mode of social control” and two others used almost identical language. Another named only a slightly different emphasis, “the inherent limitations on court-made rules as problem-resolving mechanisms.” A third stressed the theme of “approaching the study of law from the legislative point of view” and another “the role of statutory law in a legal system.” The criminal law is, to be sure, a particularly apt subject for examining the appropriate limits of the law and the roles of courts and legislatures, but it is simply one of many subjects that could serve. For example, the same themes will probably be raised in your course in Torts in considering whether the wisest way to meet the needs of persons injured in automobile accidents is to depend on lawsuits in court in which the injured person proves the other driver at fault, or instead on a scheme of insurance that provides compensation without requiring proof of fault.

A third more general function professed by the responding teachers was the training of students in the analytic skills lawyers need. In responding to a long list of possible themes, two were checked more frequently than any others as receiving “a great deal” of emphasis and a third was not far behind: training in perceiving the functions lying behind various doctrines, training in the careful reading of appellate decisions, and training in the reading of statutes. In the boot camp of the first year, most of your five or six teachers will probably spend large blocks of time simply working on developing your capacity to read and analyze legal materials carefully, much more difficult skills to master than might be guessed in advance. Training students to try to perceive the functions lying behind rules may be regarded as similarly indispensable. Without attention to the functions rules are to serve, it is often impossible to determine how a statute should be construed in a novel situation. It is even less possible to decide wisely how common-law rules, those developed through the courts alone, should be applied in novel situations.

We have thus seen that the first-year instructors will be emphasizing concerns other than the mastery of specific doctrines or rules. It is equally important to understand that these other concerns will vary among your teachers. Although several respondents, as I've indicated, placed great emphasis on training in statutory interpre-

tation, several others said they gave it little or no emphasis at all. Similarly, although a majority of instructors said they gave a “moderate amount” of emphasis to “the historical development of doctrine,” or to “the tactical problems of attorneys,” or to the “ethical problems of attorneys,” several said they gave one or more of these a great deal of attention, and as many or more said that they accorded these concerns no attention whatever. All your other first-year courses are susceptible as well to such widely varying approaches.

I believe many first-year students are confused or irritated by the fact that their teachers and the writers of casebooks are only partly concerned about conveying the “law” of crimes or contracts. Some of the irritation is just. Often the teacher will fail to make clear what his or her purposes are. Criminal Law seems simply a “bait-and-switch” gimmick to snare you into learning about the close reading of cases or statutes.

Indeed, despite their titles, nearly all the first-year courses may turn out to be the same course—how to think about legal problems as American lawyers tend to think about them. Although you may come to regard this subject as the most important of all, the courses may be frustrating not so much because they are redundant but rather because you will find it more difficult to know when you have grasped a process or a way of looking at the world than when you have correctly memorized a rule. You may also feel cheated if your teacher in the service of these other goals fails to reach large areas of a subject clearly within the scope of the course’s title. In fact, she may never reach the last fifteen dollars of your forty-dollar casebook.

The heavy reliance on appellate-court decisions in all your courses may also prove a slight disservice to you. Most teachers of first-year courses would probably say, if asked, that they use the opinions of appellate courts not because the holdings of the courts are so important in themselves, but rather because they are vehicles for learning to read closely, they are repositories of interesting fact situations that generate discussion, and they include one person’s (the judge’s) reasoning for reaching a given result, thus providing a foil for debate about the issues. Although it is probable that after the first year you will have developed a just skepticism of the wisdom of appellate judges in general, it is also probable that at

some level you will have absorbed a sense that law nonetheless emanates primarily from appellate judges or, put another way, that matters with which appellate judges do not become concerned are really not law.

What You Will Have Derived from the First Year and What You Won't

If you arrive at law school overweight and unable to play the cello, you are likely to finish law school overweight and unable to play the cello. There's only so much we can do.

On the other hand, you will be different and your friends who are not law students may now find you slightly offensive.

You will know a lot you didn't know before. You will have learned the concepts of "offer" and "acceptance" in contracts and "negligence" and "contributory negligence" in torts. You will be familiar with some of the current content of the Uniform Commercial Code and your own state's or the federal court's rules of judicial procedure. You are likely to have acquired valuable ways of approaching legal issues beyond the few approaches you may have previously considered. Among your acquisitions will likely be a knowledge of some of the common sources of the law; an alertness to the need to understand the arguments on both sides of an issue; a budding capacity to frame arguments to the maximum advantage of one side of a dispute; some special language to wrap around some commonplace notions; and a developing sense of the procedures through which problems can be addressed and resolved.

These are valuable skills. Your head will never be quite the same again. As one cynical critic of law schools has commented, "Each year 100,000 students are taught to think like lawyers. Teaching someone who for twenty-one years has thought like a person to think like a lawyer is no mean achievement."⁴

For whatever you have learned, however, there is a great deal you will not have learned. There are both forms of law and skills of practitioners you are likely to have heard little about during the first year. For example, in your first-year courses, most of the

appellate cases you read will have begun in a trial court as a suit between private individuals or entities or, in the case of criminal law, a suit by the state against an individual. In the United States today, however, lawyers appear daily in forums other than courts and have to impress officials other than judges. Decisions as small as whether Jones's Shoe Store should be permitted to expand its parking lot or as large as whether a public utility should be permitted to operate a new nuclear power plant are made by administrative officials or agencies, not by judges. So are decisions about electrical and natural-gas utility rates, the granting of TV and radio broadcasting licenses, the permission to mine on public lands, and decisions about an individual's eligibility for Medicaid or Social Security disability benefits. The officials and agencies charged with making these decisions use procedures for developing general rules and rendering individual decisions that are in many ways different from the approach of courts. By the same token, appellate courts reviewing the decisions of officials and agencies typically approach the process of review quite differently than they approach review of a trial judge's decision in a contract dispute between two private citizens.

Despite this, despite the enormous growth of governmental agencies within the last half century and their impact on the lives of all citizens, and despite the fact that many lawyers today devote almost their entire practice to working with such agencies and officials, few law schools introduce law students to this kind of "public law" during the first year. In nearly all law schools, this gap is addressed in the second and third years by a course in administrative law and, in most schools, by specialized courses in such matters as environmental law, energy law, or public-utility law. In most schools, however, these courses are optional. More important, the "private law" cast of the courses in the first year—Mrs. Smith sues Pop's grocery—helps imprint on students that "real law" is the sort of law they learned in those first required courses, and that the administrative law of agencies and executive officials is somehow secondary in godliness and effete in character. During your first year, you should struggle to retain perspective about the narrow vision of the sources of law to which you are being exposed. During your second and third year, you should be certain to take some courses that provide the wider focus.

An even more fundamental gap exists in most first-year curricula. The capacity to analyze legal issues, the major focus of the first year, is only one of the many skills a fine lawyer needs. Let us consider a few of the many other skills lawyers need about which you may hear rather little during your first year.

Lawyers are fact-assemblers. When they receive a new matter, they must often pull together a complex story from jumbled bits of information scattered out to the horizons of their client's vision. The facts do not come dehydrated and prepackaged as they do in the opening paragraphs of the opinion of a court of appeals. Lawyers will typically need to consider ways of looking at a situation that are very different from the way it is initially described by a client. Not many schools give students early exposure to the art of investigating and organizing factual material.

Lawyers are interviewers. They interview people who, embarrassed, devious, or blinded, reveal only part of a story. Corporate clients are often said by their attorneys to be no more likely to tell their attorneys the whole truth about a disputed financial deal than the defendant in a murder case about his whereabouts on the night the victim was shot. Lawyers need to develop a second sense, a skill at learning how to ask or ferret out what they want to know. They need to learn how to develop relationships with varied clients. They need to learn to keep alert to detecting a client's legal problems that are very different from the ones about which the client initially thought she needed advice. Few schools give early training in interviewing.

Lawyers counsel people about much more than the law. The practitioner retained by a corporation finds her advice sought on purely business matters almost unrelated to issues of law and may find it increasingly difficult to separate her role as attorney from a developing role as entrepreneur. In family matters, it is often a matter of chance whether a client has been directed initially to a lawyer, minister, or family doctor. A parent considering divorce may simply want wise counsel—not about whether he and his spouse can legally agree to joint custody, but about whether joint custody is sensible in their circumstances. To help a client reach an answer, a lawyer may well need to draw upon information from disciplines other than law. Lawyers must also learn to define their roles as counselors—when do they refer clients to others with

special skills, how ardently do they try to “persuade” a client to do what the lawyer thinks best? Few law schools give early training in counseling.

Lawyers are negotiators. Most real-estate lawyers and securities lawyers rarely appear in court. Many spend the bulk of their time fashioning deals for the development of shopping centers or the merger of companies. Even lawyers who file lawsuits spend much of their time negotiating. A dispute between two large corporations or two next-door neighbors that has led to a lawsuit is far more likely to be resolved by a settlement than by a judicial ruling or a jury’s award. Criminal charges are far more likely to be resolved by a plea of guilty than they are to be resolved at trial. Few schools give early training in the art of negotiation.

All this and much more are likely to be missing from your first year. But there are, after all, three years of law school. Will the gaps in the first year be addressed in the next two? Maybe yes. Maybe no. At many schools it’s up to you. The vast bulk of courses offered in your remaining years of law school will provide training in substantive or procedural doctrine and the analysis of problems not covered in the first year. You will find courses in the law of corporations, taxation, conflicts of law, trust and estates, criminal procedure, and so forth. In some schools, particularly ones with small faculties, many of these courses will be required. At the same time, in most schools, it is possible to slide through three years without ever taking courses that provide useful training in many of the other lawyer skills. There is a grave danger that you will graduate from law school believing that, apart from a few mechanical matters such as how to get to the courthouse, all you need to know to be a good lawyer is doctrine and how to think about doctrine.

Many students and law teachers share an unjustified expectation that students will develop such skills in interviewing, counseling, and negotiating adequately in the first years of practice. Faculty members at many schools envision a model career pattern in which the student steps from law school into a large or middle-sized law firm, where the older lawyers nurture him or her in the practical skills of practice. The fact is, however, that large numbers of young lawyers start out immediately on their own or in Legal Aid offices or in prosecutors’ offices with no elbow to work at the side

of. They are immediately given substantial responsibility for matters that affect the lives of large numbers of people. Even the young practitioners who do start in a well-supervised law office are likely to serve as apprentices to lawyers who developed their own skills in an unreflective, haphazard way. It is not simply a recent development that law schools offer little such training. The senior partners didn't get any either.

What should you do about these possible gaps in your education? Here are a couple of pieces of advice.

First, don't let the prospect of incomplete training stand in the way of your absorbing as much as possible from the courses of your first year. Although it is true that many things will probably be missing, much of what is there—for example, training in careful reasoning and training in the close reading of legal materials—will be of great value to you in practice and probably cannot be mastered later if you do not master it in law school. Throw yourself into it. Get up your courage and participate in class discussions. Form a study group with others who are not quite like you and haggle over the issues raised in your course materials.

Second, give serious consideration to taking whatever courses you can after the first year that provide training in skills or exposure to the nature and structure of the legal profession. One particular sort of offering deserves mention: courses in what is commonly referred to as “clinical law.” These are courses in which law students handle cases for actual clients under the supervision of instructors or private practitioners. In Chapter 19, Gary Bellow describes the sorts of clinics commonly found at law schools. Apart from recommending clinical offerings, I'd also urge you to involve yourself in extracurricular activities that permit you to work with people on their legal problems under the tutelage of those with experience.

One danger of taking only courses that operate in the realm of ideas or doctrine and shield you from real people with problems is that you are likely, while a student, to fail to see yourself as a lawyer. Throughout law school, students can refer cynically to lawyers as “they.” Such detachment permits the student confidently to deny to himself that he would engage in shady practices that an extremely high portion of lawyers engage in; then later, in

practice, when the opportunity for misbehavior occurs, the student will have no reservoir of pain about the issue to guide him.

I believe the law student's lack of a sense of identity as a lawyer—a sense that apparently develops much earlier for medical students who, in about their second year, start having patients who look up to them—partly accounts for the nearly universally reported restlessness of third-year law students. Especially itchy are law students who come directly to law school after college. By the last term of law school they are typically in their nineteenth consecutive year of sitting in classrooms. Students not only become bored; they become anxious as they head untested into practice. I once spoke to a young law school graduate, highly regarded by her teachers, who described her reaction to the graduation gift of a briefcase. "I felt," she said, "that I was still a child about to play dress-up."

Of course, I do not contend that you will get little from law school, even if yours is the most traditional of educations. The chapters that follow amply demonstrate the excitement which awaits you. These years may well be the most exciting time in your life as an intellectual, a Fourth of July picnic of ideas. They were just that for me. Maybe I should be a little more tempered. Actress Elizabeth Ashley, asked by a reporter how she enjoyed her return to New York City after a time away, replied, "Well, it's not as good as homemade chocolate mousse, but it's a whole lot better than grape juice." May you have more mousse than juice.