

# AN "INDUCTIVE" APPROACH TO LEGAL INSTRUCTION

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This is a time of extensive pedagogical experimentation in American law schools. Dissatisfaction with conventional methods, which has been noticeable for some time, seems to have heightened since the war, owing in part, no doubt, to the inclination of veterans to draw comparisons between streamlined Army educational methods and traditional law-school techniques. Committees of the Association of American Law Schools, particularly those on teaching methods and curriculum, are currently attempting to search out and make available to the profession generally the innovations and developments which are being worked out by individuals and colleges in all parts of the country as a result of this almost universal feeling that legal teaching methods are not as efficient as they ought to be.

A great part of this experimentation has been aimed at the problem of presenting rather advanced subjects, whose contemporary or complex character unfits them for the case method. Such devices as the problem method, the use of client contacts, and the introduction of (so-called) non-legal materials have usually been employed in the later stages of the law-school course.

This paper is an account of an experiment, begun in 1939, which has been concerned not so much with novel subject matter or skills, but primarily with the problem, in an ordinary course, of what really happens inside the student's head during the all-important hours when he is studying, and secondarily with the problem of what happens in the same place during the classroom period. After all, while courses in economic geography and excursions to the county clerk's office are extremely valuable, these more dramatic innovations should not make us lose sight of the predominant challenge: that of making the routine, day-to-day study of routine courses as efficient as it is possible to make it. This "inductive approach" was designed chiefly for the more elementary common-law courses, but, with adaptations, may perhaps be of value in other areas.

## I

### DESCRIPTION OF THE METHOD

The method, in briefest outline, is as follows:

First, before any case is read, the student is given the facts of some actual case which passed upon an important, controversial, and (at the time) quite novel point in the law. He is asked to read nothing on the subject, but rather to think it over as if he were the first judge who ever had to decide the point, unassisted by controlling precedents. Let him talk it over with his family and friends, and then make up his mind on the basis of his common sense and his conscience.

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Second, he is instructed to prepare a careful written opinion developing the reasons for his conclusion.

Next, in the classroom, several opinions representing holdings both ways are read, and a general discussion is held, based on the conflicting views developed. In the course of the discussion, the student may make such alterations in his written opinion as he thinks fit, on the basis of the arguments brought out.

After this discussion, and before the next classroom period, the student reads the actual decision which dealt with the identical point. He scrutinizes the opinion with the principal object of finding out, if the court reached a result different from his own, precisely why the court came to a conclusion varying from that dictated by his own best concepts of right and wrong, and he should note the exact nature of the cleavage in reasoning beside his own written opinion. On the other hand, if the court's conclusion coincides with his own, the student will read the opinion with satisfaction and triumph, and will be able to say to himself, "There is nothing esoteric about the law on this point; I figured it out for myself."

Finally, at the next classroom hour, the discussion can crystallize the reasons why the actual judicial decision varied from some of the common-sense opinions, and fit the topic into the general scheme of the course. Of course, in some cases the net result of this process may be a consensus that the court was wrong, since such an occurrence is by no means impossible.

Thus, each classroom hour falls into two parts: the first devoted to reaching conclusions on points left open at the previous hour's argument, and the second devoted to reading opinions on a new topic and opening up a series of fresh controversies. Similarly, the student's preparation is in two parts, one of which involves reading and the other writing: he reads the case which decided the point involved in his previous written opinion, and he writes a new opinion on a new set of facts.

The whole method is based on the conviction that the great bulk of law is not in the least occult or complex, and that, given the facts in the average casebook case in one of the common-law subjects, a bright seventh-grader or your aged grandmother can produce the right decision in a high percentage of instances. If, then, the student can assure himself that his native sense of right and wrong can be trusted to provide a reliable answer in the great mass of cases, he can turn his energies more efficiently to the task of isolating and identifying those parts of the law which, for some reason, do not satisfy his sense of justice. He will soon find that he can, under classroom guidance, begin to categorize the specific reasons which have occasioned these departures from simple justice and common sense—historical reasons, conceptual reasons, economic reasons, the social necessity of providing a defendant who can pay a judgment, the necessity of categorizing instead of proceeding by imperceptible degrees, the effect of fictions and maxims, the limitations imposed by the nature of judicial machinery and the process of proof, and so on. The final result will be that he will feel that he can trust his own sense of justice unless the case falls within one of the exceptional considerations that he has discovered, identified, and classified.

## II

## ADVANTAGES OF THE METHOD

## A. Better Understanding of the Relation of "Fairness" to Law

The original impetus to the devising of this approach was a classroom incident in the course of a discussion of the liability of the master for the torts of his servant. We had been discussing for some time the master's liability, and, toward the close of the subject, the writer asked a student whether, in a typical fact situation involving misconduct by a servant in the course of his employment, the servant shouldn't also be liable to the plaintiff. Definitely not, said the student. Why not? Because—came the amazing reply—it would be "unjust and unfair."

The writer returned to his office to brood over the question: What kind of process has a lad been subjected to whose immediate and unhesitating reaction is that the innocent person (the master) should clearly be liable and that the sole wrongdoer (the servant) should clearly not be liable—and all on the ground of "fairness"?

The student, when he came to law school, had a sensitive and belligerent sense of right and wrong, and a supply of native common sense. What had happened to it?

One of the first things that may happen to a student is that he may be handed a casebook, on reading which he is soon astonished to learn that the case he has just finished accepting is apt to be immediately cancelled out by a succeeding case, or at least a note, holding the flat contrary. Some casebooks pursue this self-cancelling process until there is almost nothing left at the end. While this may induce a salutary diffidence, it also may, and usually does, produce a chaotic impression on one who has visualized law as a systematic structure of rights and wrongs, bearing some relation to his own sense of justice. True, it is a wholesome lesson, which some students never learn, that law, unlike some other sciences, is not a series of settled rules that can be learned and applied mechanically; and yet it is just as unfortunate that students get the false impression that law is a hodge-podge of mutually destructive holdings, in which plain justice seems to be only occasionally relevant.

Another thing that happens to the student is that, with the best of intentions, he will attempt to resolve legal questions by saying, "Well, I just don't think it would be fair," only to be pulled up sharply at that point with a reminder that we are not interested in what he thinks is fair, but in what the law is. Having survived the disillusionment that comes with discovering that law and fairness are not necessarily expected to coincide, the student will perhaps swing violently to the other extreme, and begin to take secret pride and pleasure in the law's occasional apparent perversities.<sup>1</sup> That is, he will

<sup>1</sup> Baty's beautifully phrased observation about historians of law could well be applied to the student at this stage: "Historians, like travellers, are fond of the marvellous. If they find traces of any institution which seems to contradict all the moral tendencies of human nature, they are loth to part with it . . . and they tell the sceptical to be modest, and to remember that he cannot apply his standards to a bygone age of mystery." THOMAS BATY, VICARIOUS LIABILITY 149 (1916).

begin to believe that the study of law is the mastery of such anomalous apparent departures from simple justice as he finds in the casebooks. Almost any lawyer, if he looks back to the early months of his law-school career, can probably recall how he used to require his family or lay friends to attempt an answer to some legal problem selected on the basis of the unpredictable surface injustice of its result. (What layman would suspect, for example, that the person who sees a drowning man and walks away when he could have thrown him a life-preserver is innocent legally, while the person who tries to help by throwing the life-preserver, if he does it negligently and hits the man on the head, is liable?) When the victim has made his naive answer, you confound him by showing him how far he has missed the answer provided by case law. Does not the whole process give genuine delight—the pleasure that goes with being a member of an inner circle possessed of mysteries and secrets denied to common folk? This pleasure, however, is not worth enough to justify the possible permanent damage which is done to the student's deepest conceptions of law.

This observation, then, on what had happened to the place of unspoiled conscience in solving legal questions suggested the central feature of the inductive approach: proceeding always on the assumption that you can answer legal problems on the basis of common sense and conscience until the opposite is proved; and, where some deviation occurs, identifying the reason for its deviation in unmistakable fashion, rather than leaving it merely to add generally to the cumulative impression that fairness is irrelevant to legal doctrine.

#### B. Facilitating Intelligent Analysis of Facts and Cases

It seems indisputable that of all the techniques which a law school ought to develop the most valuable is that of analysis. The great advantage of the case method was supposed to lie in compelling students to analyze cases, the basic law material of law. Admittedly, this brought law study a step nearer the realities of law practice. But in practice, or in any kind of legal activity, long before you get around to analyzing cases there is another and more important kind of analysis that confronts you: analyzing fact situations and the attendant legal issues. Virtually all legal work begins with facts; why should not legal instruction do the same?

The first criticism of the case method here is that it gives the student no opportunity for reflection about the facts or legal issues at all. As he reads his cases, he is given, in the same breath, so to speak, both the facts and the authoritative decision on those facts. There is no intervening moment in which he is compelled or even allowed to ask himself, "What would I do in this situation?" for, hard on the heels of the fact statement, or perhaps commingled with it, is the court's opinion. Occasionally he may adopt a critical attitude toward the opinion, but the normal reaction is to accept it and duly incorporate it in the notebook in the form of a "brief." The all-important job of analyzing the facts is performed for him; his job is a sort of second-hand analysis: analyzing the opinion of the judge who originally analyzed the legal problem itself.

In the inductive approach, this problem solves itself, for there is a space of at least a day or two in which the student is turning over in his mind noth-

ing but the bare facts, and finding out for himself what the possible legal issues are even before attempting to answer them. In short, he begins exactly as a lawyer or judge must begin when first encountering a legal problem: forming his own opinion on the issues.

The second criticism of the case method is that, even in the process of analyzing court opinions, it calls upon the student to do something that, again, the practicing lawyer and judge are never expected to do: that is, to analyze cases without knowing what they are looking for. The lawyer who goes into his library to read cases knows exactly what he is looking for. He has a legal problem to brief, and he reads each case to see what its bearing is on his own particular question. Under the case method, the student who is told to take the next thirty pages is being given a much more difficult task; he is expected to analyze in a vacuum. In his mind is no problem, no unanswered question, no compelling curiosity. Is it any wonder, then, that law teachers are constantly discovering, to their incredulous exasperation, that students can read an assignment and miss completely the most obvious and simple propositions, which may even have been repeated several times in plain language in the opinions? Why should the student have remembered those passages? How was he to know that they represented the most important part of the entire matter read for that day? Later on, when the class discussion is in progress, the reasons no doubt become clear—but then it is too late, and the preparation period has been wasted. The following illustration is extreme but not unusual: In collaborating in the preparation of a Corporations casebook, the writer decided to leave out the leading case of *Handley v. Stutz*,<sup>2</sup> which held that in some circumstances par stock may be issued by a going concern for less than par, and to include instead a very recent case which, in the course of its opinion, contained two pages of quotation from *Handley v. Stutz* giving the entire facts and holding in very clear form. In the classroom discussion based on this assignment, the writer asked the simple question: Can a going corporation ever issue par stock for less than par? No one could answer the question. Perhaps if *Handley v. Stutz* had been set forth as one of the principal cases, the holding would have been duly noted and the question would have been answered. But no one was on the lookout for that question; no one had approached the reading of that assignment with any curiosity about when par stock could be issued below par—or about anything else, for that matter.

With the inductive approach, the discipline of case-reading and case-analysis remains, but with this difference: the student knows exactly what he is looking for. Not only that: he has a sort of emotional incentive—he has himself taken a position and defended it in arguments with his classmates; he wants now to prove to them that he was right and they were wrong. He combs the opinion for everything that will support his stand. But if it holds contrary to his view, his fervor in analyzing the opinion is doubled, for he now wants to tear it apart, expose its fallacies, run down its authorities, and show that he is still right.

<sup>2</sup> 139 U.S. 417, 11 Sup.Ct. 530, 35 L.Ed. 227 (1891).

### C. . Incorporating Historical, Sociological, and Economic Considerations

In the choice of cases to be used, it is best, if possible, to dig out the earliest case that had to grapple with the particular issue. This is in line with the fundamental idea of the method, which is to put the student, so far as possible, in the shoes of the first man who had to make this decision.

This cannot always be done, of course, for various reasons. Often it simply is not possible to trace a doctrine to any such clear-cut origin. And sometimes, even if it is possible, the facts of the early case are dull or the opinion valueless. But in many cases it can profitably be done, and when it is done it has the effect of sinking the roots of the student's knowledge firmly into the past and of giving him an invaluable sense of the great depths that lie beneath our current legal doctrines.

In the process of isolating the specific factors which have produced judicial departures from the student's common-sense conclusions, one of the most important and most frequently met will, of course, be the historical factor. There is no need, under the inductive method, to remind oneself to bring in historical background; it comes in of itself. It cannot be kept out, for it is the only possible explanation of many of the rules for which the student will demand an account after comparing it with his own rules.

The same is true of considerations of social policy as they have varied from one period to the next; you don't have to drag them in—they are of the essence of the discussion, for they alone hold the key to many otherwise inexplicable judicial holdings.

And if you want to illustrate the dependence of the course of legal development upon individual personalities on the bench, there is ample opportunity for that too, since sometimes the personal characteristics and background of a Holt or a Mansfield seem to be the best explanation of certain cases.

There is, of course, nothing novel about the idea of including such material; the point is simply that the inductive method works it in as a necessary and integral part of the process of learning, and, by its nature, demonstrates every day that all these elements are part of law itself.

One of the first things that the student will discover, when comparing a court's conflicting decision with his own, is that the court may have no better reason to give than that it considers itself bound by an earlier case. This is the cue to give the student a balanced idea of *stare decisis*; for, while weighing all the factors which influence judicial decisions, one will find it natural, as do most modern courts, to let *stare decisis* take its place, along with these other factors, as one of the weights in the scales of justice.

It might be mentioned here that, in writing each successive opinion, the student is entitled to build upon previous opinions and conclusions, which he may use as he sees fit either as precedents or analogies. Thus, over the length of the course, he works out the entire subject for himself, checking it at every point, of course, against the law as it actually stands. It is this process which suggested the term "inductive" as a description of the method.

#### D. Promoting Facility in Writing and Oral Expression

The opinions to be prepared each day should be carefully written papers; they must not be random jottings. Much of the incidental benefit of this approach lies in the regular discipline in legal writing which it entails. The student should gradually form the habit of casting his thoughts into acceptable legal style; precise legal terms must be substituted for ambiguous lay expressions. When the opinions are read, it is for the instructor to step in and say, "Now, what you have just said would be put this way in law . . ." and so on. Again, when the court's opinion is being read, it will be natural for the student to observe and make a note of the court's way of saying a thing which the student himself has said in less precise language. An instructor with large energy and a small class might even collect papers occasionally and correct and polish them; but with today's large classes this will seldom be feasible, and it is by no means necessary.

Many students writing opinions under the inductive method have said that they get a peculiar enjoyment out of being allowed to assume the Olympian position of judge and to have an opportunity to give free rein to their own views on how a particular problem should be resolved. It might be thought that this amount of writing would become burdensome, but this has not been borne out by experience, partly, of course, because, while there is more writing to do, there is somewhat less reading.

Oral expression and argument are also encouraged. Of course, it has never been very difficult to produce an argument among law students. The trouble is that the discussion is usually confined to three classes of students: the brilliant, the garrulous, and the unprepared. But when a student, however diffident or taciturn, has prepared an argument on paper, and especially when he has read it to the group, he is in the argument whether he wants to be or not. He will leap to the defense of the position to which he has publicly committed himself, even though he is the sort of student who would not have entered an argument if left to himself. The fact that the discussion is backed by written preparation has the further advantages that the discussion will have direction, and that everyone will have some solid thought behind his views.

### III

#### DIFFICULTIES AND LIMITATIONS

The greatest single hazard threatening the effectiveness of this method is that some students may be tempted to read the actual cases before writing their opinions. While ordinarily such avidity to be the first to read a case would elicit nothing but praise, under this method it must be vigorously discouraged, since such a practice would rob the method of any distinctive advantages it might have. Usually it is not too difficult to convince the students that to read the cases before the discussion is just as idiotic as to read the last chapter of a mystery novel first. No grades are given on the current opinions; the most the student can hope for is to dazzle his fellows by the brilliance of his discussion, and at the same time undoubtedly to convince the instructor that he has been grazing in the forbidden pasture, since a second-hand and prematurely wise opinion is quite easy to detect.

Another hazard is premature legal sophistication in the student. It is astonishing how difficult it is, once a student has assumed the role of legal scholar, to preserve the virgin purity of his reason against the stain of legal formulas and catch-phrases. For example, in one of the first Agency opinions written for me, a beginning student, who was also taking Contracts, waved aside all the justice and reason of the situation and decided the case on the sole ground that no agency could exist, because agency was a contract, and all contracts had to be in writing, and this one wasn't. It is hard to imagine where he picked up such a grandiose piece of misinformation—certainly not in law school, since it was far too early in the year for the appearance of the question of what contracts must be in writing.

It may be asked whether this system will work in large classes. The writer has used it with classes of as many as 150, although admittedly, in common with any method except perhaps the straight lecture, its effectiveness increases in proportion to the smallness of the class. The largeness of the class simply diminishes the opportunity for individual participation in discussion; it does not diminish the more important benefit—the effect on the student's preparation outside the classroom.

To what subjects does it lend itself? The writer's application of it has been confined to Agency and Torts, but it should be possible to employ it in most common-law subjects. The presence of considerable statutory content need not necessarily rule it out; one can posit the statute as a given quantity and proceed from there. Workmen's Compensation has been treated in great detail in this way in the Agency course.

Even where the nature of the course does not seem to favor the use of the entire method as described, it may be possible to adapt some features of it or use it for some portions of the course. For example, in a course in Corporations, after the painful fiasco of the case of *Handley v. Stutz* mentioned above, the writer adopted the practice of devoting the last portion of each classroom period to a brief discussion (without benefit of any preparation by the students) of the topics about to be studied for the next assignment, with a view to providing a background and arousing curiosity, concluding by listing a set of definite problems to be borne in mind while the cases and materials were being read. The improvement in preparation as a result was very noticeable.

#### IV

##### MATERIALS

Of course, it is desirable to have a special set of materials expressly designed for this method, but it is not absolutely essential. The writer has used three different devices: First, mimeographing and distributing the fact problems, and sending the students to the library for the judicial opinions—a device which obviously is limited to small classes; second, mimeographing fact situations drawn from a regular casebook, and then assigning the reading of the judicial opinion in the casebook—the principal objection here being the difficulty of getting exactly the right assortment of cases in any one casebook to fit into the peculiar requirements of this method; and third, the provision of a special book arranged particularly for this method. This has been done, with materials in mimeographed form, for the course in Agency and Workmen's Compensation. The problems are in the first part of



the book, with no subject headings or other clues as to the issues involved; the opinions and other materials are in a separate second half of the book.

The provision of a specially designed book has made it possible to adopt another very useful device—the short problem. After the principal problem, in most instances, a set of short problems is added, consisting of abbreviated fact situations presenting variants of the principal problem in order to bridge the gap between the principal cases. There may be anywhere from five to thirty, and the student is asked merely to think them over and jot down a yes or no answer, together with a brief notation of his reason for assistance in the discussion. After the class discussion has been concluded, and these variants have been woven into the main thread of thought provided by the principal case, the student is allowed to consult the answers and citations given in the second section of the book. The effect is, in proportion, much the same as that produced by the principal case; and it has been surprising and gratifying to note how frequently the student who finds himself disappointed by the final outcome of the short problem will dash into the library and attempt to tear the opinion apart with the same enthusiasm as if it were the principal case. Of course, it is important not to create the impression that these holdings have any absolute validity in themselves; they are presented simply as samples of what courts have held, and provide a skeleton for the structure of the discussion.

Even if the student does no more than write “yes” or “no” to a series of fifteen or twenty related problem questions, he cannot avoid constructing some kind of set of principles in the process; and he should be encouraged to note down such generalizations as he finds emerging from his answers to the individual problems.

It may be pointed out, in passing, that this little device successfully gets round one of the stickiest of the questions that plague the editors of modern casebooks: the question of how to fill in between the principal cases. If you put in syllabi, text, explanatory footnotes, and the like, you are to that extent spoonfeeding the student and depriving him of any chance to think about the matter; on the other hand, if you adopt the practice of stating brief sets of facts, following them with the exasperating phrase “What result?,” you indeed give the student a chance to think about the question, but, if the class is at all large, you probably give him no real opportunity to find out the answer (even if he has the inclination to follow up such leads in the library, which experience shows is seldom true). The short-problem technique permits both benefits: the stimulation of thought and discussion, and, in good time, the provision of the answer in a convenient place.

Finally—although perhaps this consideration is out of place in connection with a matter of such dignity as a discussion of educational method—it may be observed that the short-problem device seems to appeal to the same weird mania for answering questions that produces the intolerable rash of quiz programs on the air. You never have to urge a student to answer the questions, much less to look up the answers.

In a set of specially prepared materials, it is also possible to inject at appropriate points historical materials, statutes, and other non-case materials which aid in showing the development of the law in a particular area.

## V

## CONCLUSION

Perhaps the most important question of all is: How has this idea actually worked out in practice? The writer, aware of the difficulty of appraising anything as intangible as the impact of a single course on a class, borrowed a technique from the medical profession and tried conducting half of a course by this method and half by the traditional method. The difference in student interest and participation was marked; and in the final examination the showing on the portion taught by conventional methods was about average, while in the portion taught by the inductive method, almost nothing seemed to have been forgotten or missed. Probably the real explanation lies in another quirk of human nature: if we learn something in order to use it as ammunition in an argument, especially when we seek it out to prove that we were right in yesterday's argument, the information usually sticks.

It is hoped that this account will induce others to consider similar experiments, extensions of the idea to other fields, and any variations or adaptations that seem appropriate. The writer would like nothing better than to compare notes with anyone interested in the further exploitation of the general ideas and methods dealt with in this paper.