

### TEACHABLE MOMENTS FOR TEACHERS ..

DEMONSTRATIONS AND BILINGUAL TEACHING TECHNIQUES AT THE UNIVERSITY OF PARIS: INTRODUCING CIVIL LAW STUDENTS TO COMMON LAW LEGAL METHOD

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Teachable Moments for Teachers ... is a regular feature of Perspectives designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the Teachable Moments for Students column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own "teachable moments for teachers" to the editor of the column: Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071, fax: (610) 519-6282, e-mail: sirico@law.vill.edu.

In April and October 2002, I had the pleasure of visiting the school of law at the University of Paris V, each time to teach a two-week course in common law legal method and selected issues of United States contract law. In each semester, I taught a group of upper-division law students who spoke English in varying degrees of fluency and were interested in exploring the common law legal system as part of a broader course of study in international law. Despite those helpful qualities in

the students, my teaching assignment presented some interesting pedagogic challenges, both because the students spoke English only as a second or third language and because they were primarily acquainted with the French civil law system.

## I. Contrasting Systems

The French civil law system is based largely on the Napoleonic codes of 1804. As with legislation in the United States, much of the language of the French codes is necessarily general, raising difficult issues about the application of the code to disputes not specifically addressed by the text or even contemplated by the drafters. To resolve such disputes, the French judiciary must interpret imprecise text and fill gaps in the code. The French legal culture, however, restricts the creative law-making role of courts in interpreting imprecise code provisions, or at least it partially conceals the extent to which such law-making in fact takes place.

The restrictions stem from a popular reaction against perceived abuses of judicial power in the decades prior to the French Revolution. Enacted in 1804, article 5 of the French Civil Code prohibits the French high court in civil matters, the Cour de Cassation, from announcing law of general applicability. Through a published opinion whose explicit reasoning is limited to a terse syllogism, a chamber of the Cour de Cassation either will affirm the decision of the lower court or will vacate that decision on the ground that the lower court failed to follow applicable code provisions. The authoring chamber, however, will not purport to generalize from its interpretation by announcing a rule that would apply to a broad class of cases.

Indeed, French judicial decisions are not even formally a source of law, because they do not create binding precedent on questions of interpretation of code provisions. At least in theory, each case presents a new opportunity to discover the true meaning of a code provision,

without formal deference to previous and possibly mistaken judicial interpretations.

Admittedly, behind the scenes and largely outside of the published pronouncements, French courts regularly consider precedent for its persuasive value,1 lending weight to the view that the courts have created at least a weak and informal species of case law that supplements the codes. It remains true, however, that previous decisions of even the highest French courts are not binding on them or even on lower courts and thus are not formally treated as sources of law applicable to subsequent disputes. Moreover, a reflexive utterance by one of my French student research assistants suggests that French law students have thoroughly assimilated this legal culture of restricting—or at least understating the law-making role of the judiciary. When I asked the student whether a legal proposition that she was discussing could be found in the text of the civil code, she looked a bit surprised and responded, "Yes, all the law is in the code."

In our common law system, on the other hand, principles of stare decisis ensure that published judicial decisions form a body of case law, a primary source of law, regardless whether the decisions develop common law rules or interpret constitutions, statutes, or regulations. Our courts are most transparently engaged in an act of creative law-making when they act outside the boundaries of legislation to develop or refine common law principles in the context of particular disputes. Moreover, even when our courts interpret and apply legislation, their published interpretations add a judicial gloss to the legislation, a gloss that may control the outcome of subsequent disputes over application of the legislation.

Our system of deferring to precedent, in turn, helps to define the elements of legal method that we explore with our students. Students soon learn, for example, that a court must carefully justify a decision to overrule its own case law, and that the potential applicability of arguably binding

## **II. Pedagogic Challenges**

My students at the University of Paris V had several years of legal study under their belts, and some of them had taken other common law courses. Still, one can imagine that principles of common law legal method might appear at least as peculiar and challenging to many of them, in light of their contrasting civil law tradition, as they would to a typical American first-semester student.

Moreover, as a substantive vehicle for exploring principles of common law legal method, I chose to cover elements of the doctrine of consideration, which is a notoriously slippery concept at the margins. Consideration doctrine recommended itself for coverage both because it is a foundational principle of Anglo-American common law of contracts, and because it compares and contrasts nicely with the broader French contract requirement of cause, which permits enforcement of even promises to make a gift.

Finally, because our common law system has absorbed some code system qualities with the explosion of state and federal legislation in the past century, I undertook as well to introduce the students to selected provisions of Article 2 of the Uniform Commercial Code (UCC) and of the United Nations Convention on International Sales of Goods (CISG), the latter of which has been adopted by the United States and is codified as federal law. This legislative component of our course provided opportunities for exploring additional elements of legal method, such as the primacy of legislation over common law in our system, empowering the legislature to nullify, replace, modify, or codify common law rules, and the partly contrasting notion that—even when we organize legislation into a code system such as the UCC—statutory schemes in the United States are not necessarily comprehensive, and the common

authority from a higher court typically raises interesting questions of analogizing or distinguishing the precedent.

<sup>&</sup>lt;sup>1</sup> See Mitchel Lasser, Judicial (Self-)Portraits: Judicial Discourse in the French Legal System, 104 Yale L.J. 1325 (1995).

law remains as a backdrop, ready to apply to issues not addressed by the legislation.<sup>2</sup>

## III. Pedagogic Strategies

In preparing to cover this material in a handful of class meetings over two weeks, I recognized that two factors worked in my favor. First, although the University of Paris V required me to administer a graded final exam, it did not expect me to assign a written brief or memo and to provide individual written feedback to each of 30 students, a task that would have been daunting for both students and for me within the short time we had together. Although I addressed outlining and essay examtaking, I limited that instruction to in-class writing exercises and group feedback. Second, I was only one in a series of short-term visiting professors from common law countries, most whom were emphasizing doctrine, so I could afford to use sources of law primarily as vehicles for exploring legal method, without pretending to achieve comprehensive coverage of any doctrinal topic.

Indeed, such was my emphasis on legal method that I devoted significant classroom time to an exercise and to a longer workshop set in nonlegal contexts, which allowed students to focus exclusively on analytic method without the distraction of simultaneously learning new and complicated doctrinal matters. This technique of isolating questions of method had worked well with first-semester students in the United States, and I guessed that it would be similarly effective with students approaching common law method from a different legal tradition. At the University of Paris V, however, I added a bilingual twist to the exercise and the workshop set in nonlegal contexts, and I created a new exercise that invited exploration of both method and legal doctrine, again with a bilingual element.

## A. The Grocer's Rule—Thinking About Precedent in Two Languages

After assigning some general background reading on our system of precedent, I performed the classroom demonstration that I sometimes call "The Grocer's Rule," which I adapted from a simpler problem created by other legal writing faculty and which has been further expanded by still others.3 It uses a problem set in a universally familiar nonlegal context to explore (i) the role of precedent, (ii) arguments based on analogy and distinction, and (iii) the inherent uncertainty or indeterminacy in legal questions that lie in the "gray areas" of the law. For students of any legal culture, the demonstration is effective and memorable because it builds on foundations of common knowledge, and its questions are raised in the vivid and accessible form of a brief skit, using real or artificial fruit as props.

In performing the demonstration for French students, I added a bilingual element. True, one goal of the course was to improve the students' abilities to analyze the law in the English language in their reading, their writing, and our oral classroom discussions. And the course provided many such opportunities because nearly all of the reading assignments and all of the class discussions were communicated exclusively in the English language. On a few occasions, however, I added a French-language component to my class presentations, both to ensure that students understood critical facts in hypothetical cases and to help them evaluate their own translations of the written English.

In presenting The Grocer's Rule to the French students, my French research assistant acted the part of the grocer, while I played the role of the grocer's employee. In the skit, the grocer announces as a general standard that produce will be placed in the store's window display case only if it will tend to attract passing pedestrians who had not otherwise intended to enter the store. The employee observes the grocer applying the general standard in two "cases." In the first case, the grocer

<sup>&</sup>lt;sup>2</sup> See UCC § 1-103(b) (rev. 2001) (calling for application of common law principles to issues not addressed by provisions of the UCC); CISG art. 7 (effective 1988) (calling for application of the domestic law, which might consist of common law, selected by the forum's conflicts rules, to issues not addressed by the articles of the CISG or by the principles of international law on which they are based).

<sup>&</sup>lt;sup>3</sup> See Charles R. Calleros, Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis (hereafter, "Classroom Demonstrations"), 7 J. Leg. Writing Inst. 37, 41 nn. 6–12 (2001).

places large, ripe, red, shiny apples in the window display case. In the second case, the grocer places rough, unwashed, unpeeled carrots in the appropriate section in the interior of the store. I then ask the class how the employee should treat a new case—literally a case of large red tomatoes—that arrives while the grocer is away for the afternoon. Because the employee desires to please the boss, the employee seeks to predict how the grocer would apply the general standard to the case of tomatoes.

It soon becomes clear to students that they could better predict how the grocer would react if they understood the rationale for each of the two previous applications of the grocer's standard. If they understood why the grocer thought that the apples would attract impulse shoppers but the carrots would not, they could employ the same reasoning in their application of the grocer's standard to the tomatoes. Unfortunately, the grocer offered no explicit rationale for either of the two previous cases, so students must speculate. If students can develop a rationale that explains the application of the general standard to both of the previous cases, and if they apply that rationale to reach a decision in the new case, they can at least develop an argument with which the employee can justify his or her actions to the grocer.

Interestingly, class discussion of the problem reveals that the two previous decisions can be explained on the basis of a number of different, equally plausible rationales that point to different results in the new case. For example, if the previous two decisions were based on the visual appeal of the apples and the relatively unattractive appearance of the carrots, a student might reason that shiny, red, round tomatoes in the window display case, like apples, would catch the eye of passing pedestrians. On the other hand, if the previous two decisions were based on the appeal of an apple as an immediately edible and portable snack and the undesirability of snacking on a soiled carrot, another student might equally plausibly reason that the tomato—which typically

is not as sweet as an apple and is messier when eaten on the run—belongs with the carrots in the interior of the store, convenient to shoppers who had planned to visit the store to purchase ingredients for a salad. I hope that students leave this demonstration with a new understanding of indeterminacy in the law and with a sense of security that they are making progress if they can develop and express sound arguments, even if neither they nor I can identify a certain answer to many legal questions (until an "answer" is supplied, for example, by a 5—4 decision of the Supreme Court).

In the renditions of this skit with French research assistants, I spoke my lines in English, and the assistant spoke his or her lines in French. Although the students needed every opportunity to practice their skills in reading and using English, I reasoned that an analytically rich discussion in English would depend on the students' comprehending every detail of the hypothetical case. They had previously read an English-language version of the problem included in their materials, but I wanted to provide them with a French-language supplement to help them confirm or refine their understanding. Because the facts and issue of this case were not difficult, and because I am not fluent in French, I decided to provide only partial French-language clues, so that the students would continue to think of the problem simultaneously in both English and French. Each pair of alternating English and French lines in the dialogue between the grocer and the employee addressed the same topic and overlapped in content to some extent. I hoped that these relationships between the English and French lines might enable a student whose understanding of an English line was hazy or incomplete to gain a clearer picture with content supplied by the preceding or succeeding line expressed in French.

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## B. The Promise—Hypothetical Cases in a Legal Context Presented in Written English and Oral French

In the limited time available to me to teach consideration, I decided to focus on the concept of reciprocal inducement, partly because it helps students to distinguish enforceable bargained-for exchanges from promises to make gifts. At the margin, some gratuitous promises appear at first glance to be exchanges, because the recipient agrees to perform some act to collect the gift; however, the promise remains gratuitous and thus generally unenforceable if that act is not an inducement to the promisor for his or her promise but instead is simply a convenient means to transfer the promised gift. One early case presenting such a puzzle is Kirksey v. Kirksey, 8 Ala. 131 (1845). A majority of the court finds no consideration on stipulated facts, announcing its split decision in a cryptic bench ruling devoid of reasoning.

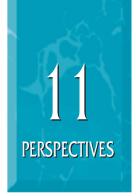
With some faculty assistance, *Kirksey* can help students become accustomed to uncertainty in the application of law to facts in close cases and develop their skills in developing factual arguments when certain answers are not to be found. The distinction between a bargained-for exchange and a gratuitous promise that lacks reciprocal inducement, however, is a subtle one that warrants exploration in follow-up hypothetical cases that students can synthesize with *Kirksey*. To that end, and to help students briefly explore the doctrine of promissory estoppel, which I summarize for them in writing, I drafted three hypothetical cases with the following characteristics:

Case 1: Although a number of facts appear at first glance to support an argument for consideration, a promise by a couple to transfer \$10,000 to a friend to help her realize her dream of opening a bakery is almost certainly gratuitous.

Case 2: To the facts of Case 1, I added elements of reliance by the recipient of the promise, inviting arguments on the question whether the promise is enforceable on a claim of promissory estoppel in the absence of consideration.

Case 3: Although the facts are analogous to those of Case 1 on the surface, the requirement of reciprocal inducement is more likely satisfied in this case by the promisor's keen desire to meet the promisee for lunch, arguably not merely as a convenient means to transfer promised money for a café, but also as a genuine inducement to the promisor, who wants the opportunity to meet with the promisee to attempt to heal a rift between them.

I assumed that the significance of the additional facts in Case 2 would be fairly obvious to the students, but the distinction between Case 1 and Case 3 was subtler and required a more sophisticated synthesis. How could I bring these hypotheticals to life, so that the English text did not sit on the page in a haze, failing to create vivid images in the minds of the French readers? I decided to present these hypothetical cases again in the form of skits, with real people making promises and explaining circumstances. Additionally, because the students' abilities to recognize and discuss relatively subtle distinctions would depend on their understanding the nuances of the facts of the hypothetical cases, particularly those of Cases 1 and 3, I decided to present the skits entirely in the French language. Finally, because I could not guarantee that I could stage these skits with several characters in the French language in class, I obtained a small grant from the Institute for Law School Teaching to create a videotaped version of the skits. My neighbors next door hail from France, and they graciously agreed to translate my script and to act out the skits in French.



My presenting the skits in the French language did not spare my students the necessity of analyzing the problem in English. I assigned the written problem in English before class without informing students that I would supply a Frenchlanguage version in class. As a surprise, I then screened the video in class so that students could confirm their understanding of the English text, fill any gaps in their translations, and see the cases come to life. We then returned to the English language for an oral class discussion of our analyses and syntheses of the cases.

## C. Rules for Monica—Bilingual Parental Pronouncements

I ended the common law component of my short course with a workshop that I had developed long before the hypothetical cases on reciprocal inducement: a series of four cases set—like The Grocer's Rule—in a nonlegal context so that students could focus their attention exclusively on techniques of legal method. In each of the four cases, a mother, Carmen, reacts to an evening social outing of her daughter, Monica, expressing approval or disapproval with statements that provide some insight into her reasoning. As the cases proceed, they form an analogy to incremental law-making by courts developing common law.

After each case, the workshop facilitator leads class discussion, inviting both an interpretation of the latest holding and a synthesis of each succeeding case with the case or cases that preceded it. The outcome of the first case is not in doubt: Carmen expresses disapproval when Monica returns after 11 p.m. on a Friday night after first attending a football game and then going to a pizza parlor with three friends. But which facts or combination of facts caused Carmen to disapprove? Carmen's comments to Monica are ambiguous and may support a number of interpretations: Carmen may be forbidding Monica from going to the pizza parlor after the football game; she may be requiring Monica to come home as soon as she has eaten her pizza rather than "hanging out" to socialize; she may be

applying a bright-line curfew rule of 11 p.m.; or she may simply be demanding that Monica call home on future occasions to notify Carmen where she is going after the football game. Indeed, the general policy consideration that motivates Carmen to craft rules for evening social outings is not entirely clear; Carmen says that she wants Monica to reserve adequate time for sleep and homework, but many students read between the lines to infer that Carmen is most concerned about Monica's safety.

Because all of the interpretations of Carmen's holding are reasonable when the first case is analyzed in isolation, students should be anxious to see a second case, on slightly different facts, to help clarify Carmen's first ruling. The second case, taking place the following week, presents facts identical to the first one, except that Monica returns home before 11 p.m. Carmen expresses no disapproval. By synthesizing the two cases, comparing their facts and outcomes, students can gain a clearer idea of their holdings and can generalize a curfew rule for application to future cases. Of course, the third and fourth cases add new twists that provide further opportunities for synthesis. By the time students have completed analyzing and synthesizing all four cases, they see that Monica's social outings are also limited to two evenings each week, except that this frequency limitation is subject to an exception for important family outings.

After analyzing and synthesizing all four cases, the facilitator

- invites the students to spend a few minutes beginning an outline of the material covered;
- distributes and discusses a sample completed outline; and
- invites students to take an essay exam in which they must apply the parental rules to new facts on two issues with uncertain resolutions.<sup>4</sup>

I hope that my students—whether in France or the United States—will have a clearer idea of the processes of synthesis, outlining, and essay examtaking after this hour-long workshop. The

<sup>&</sup>lt;sup>4</sup> Sample outlines and the exam question and sample answer are provided in Calleros, *Classroom Demonstrations, supra* n. 3, at 49–62. Those materials also appear, and the workshop is described in even greater detail, in Charles R. Calleros, *Teacher's Manual for Legal Method and Writing* 23–30, 34 (4th ed., Aspen L. & Bus. 2002).

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workshop can cover that substantial ground precisely because it isolates concepts of legal method without distracting students with the burden of simultaneously learning new and difficult legal doctrine.

For the French students, however, I experimented with a minor bilingual element. Even before I produced the French-language videotape of the reciprocal inducement cases, I had created an English-language videotape of the parental rule-making cases, also supported by a grant from the Institute for Law School Teaching. I dubbed this videotape "Rules for Monica" and used it to bring the cases to life for pre-law and first-semester law students in the United States. In France, I assigned English-language written versions of the cases before class, and I presented the cases in the vivid form of the English-language videotape in class. These written and oral presentations provided students with ample opportunity to test their English skills in interpreting the parent's statements in each case.

When I paused the videotape to discuss each case, however, I additionally used an overhead projector to display my research assistant's Frenchlanguage version of critical excerpts of Carmen's statements, so that all students could confirm their understanding of the mother's words and could better appreciate the different ways in which those words might reasonably be interpreted. As always, we conducted our class discussion in English, so that the French-language element of the instruction merely supplemented, and did not supplant, students' experiential learning of English expression.

## IV. Reflections and Assessment

Judging from anonymous student responses to questionnaires that I distributed in October 2002, my presenting hypothetical cases in live skit or video form helped to make the cases more interesting, fun, and memorable for nearly all of the students. The extent to which these teaching techniques actually helped students achieve a deeper understanding of the material than would otherwise be the case is more difficult to measure.

Nonetheless, if the presentations fully engaged the students' attention, put them in a receptive mood for learning, and made the facts of the hypothetical cases less abstract, one can speculate that they enhanced learning for most students, undoubtedly to varying degrees.

The questionnaires revealed greater controversy regarding the bilingual components. A few students admitted that they needed help clarifying the English versions, and they appreciated the bilingual elements. Most students, however, were confident of their English skills and believed that they would have understood the factual nuances of the exercises equally well, or nearly so, without the limited French translations. Two of these students recommended complete immersion in English as the best way to teach students to work in English.

I might agree with the total immersion approach if my sole or primary educational goal was to improve the students' facility with English. At least as important to me, however, was the goal of improving the students' facility with common law legal method and with the doctrine of reciprocal inducement, both of which required them to understand the facts of hypothetical cases with some precision. Confirming that level of understanding with some bilingual elements represented a modest compromise in a course that otherwise employed total immersion in the English language, because students had the opportunity to fully analyze the problems in English before hearing or reading French versions in class. Indeed, providing the French version in class must have furthered the goal of language instruction for some students, because it offered them a chance to compare and refine their own translations of the English text.

In the final analysis, I have decided to repeat these teaching strategies in my next visit to Paris V, while continuing to gather reactions from students. I also welcome your advice, which you can e-mail to me at charles.calleros@asu.edu.

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