

Developmental Learning Theory in the First Year: From Regression to Progression

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Introduction

Our incoming students enter law school by and large with little knowledge of the law or how to “think like a lawyer.” Our typical American first year curriculum is therefore quite sensibly tailored to deliver them the law and to develop their legal thinking in as efficient and effective a way possible. Thus the typical curriculum is characterized by heavily edited appellate court opinions to extract unnecessary and meddling facts, allowing students to focus more narrowly on the law. The typical curriculum includes large classes conducted through intense question-and-answer format with an expert in the field, allowing students to develop their legal minds and to learn from an authority. And the typical first-year class includes a final exam based on a hypothetical fact scenario, allowing students to demonstrate their new-found knowledge by applying concrete law and principles to static, predetermined facts in a carefully controlled exercise. It seems, in short, that the typical first year curriculum is precisely tailored to help those with little knowledge of the law quickly learn the law.

But while the central premise—that our incoming students by and large have little knowledge of the law—is true, our students increasingly come to us with mature intellectual and moral reasoning capabilities in other areas of their lives. In other words, even if they have not yet learned how to reason about the law, they have likely learned how to reason about other complex subjects, including moral subjects. Even if they have not yet learned that the law and case facts are indeterminate, they likely understand indeterminacies in other areas of their lives. And even if they have not yet seen how law is made—with lawyers as active agents, not passive recipients, of the law—they certainly have seen how knowledge in other subjects is so often created, not merely given.

Our incoming students might apply these more mature reasoning capabilities to the law, but we do not let them: in focusing first on our students’ lack of knowledge of the law, the typical first year curriculum neglects their more mature reasoning abilities in areas outside the law. This is not merely an opportunity cost of failing to build upon what our students bring to law school. It is a real cost of regressing our students’ intellectual and moral development, before helping them re-progress later in law school.

In this paper, I first review some of the intellectual and moral developmental theories as they relate to legal pedagogy. Then I examine the typical first-year curriculum and attempt to place it in the context of those theories. I argue here that the typical first-year curriculum moves students backward before it moves them forward in the intellectual and moral development progression—that it regresses them before it progresses them. Finally, I offer an alternative or complementary approach to the typical first-year curriculum—actual legal work in the first year—that is designed to progress, not regress, students as intellectual and moral thinkers.

I. Moral and Intellectual Development

Perhaps the best known developmental theorists are Jean Piaget and Lawrence Kohlberg.¹ Both use a “stages of growth” model to describe the intellectual and moral development of individuals: just as our physical bodies develop in stages, so too our intellectual capabilities and moral reasoning develop in stages.²

Piaget traced cognitive growth from concrete thinking to abstract thinking in four stages. He claimed that the two earliest stages—the sensory-motor and pre-operational stages—occur early in life and move quickly. The later two stages run longer and are more complex. Thus the third stage—concrete-operational—runs from about age six to middle adolescence; and the fourth stage—operational—takes hold thereafter.

Like Piaget, Kohlberg described intellectual growth in stages, but Kohlberg focused specifically on the development of moral reasoning. Kohlberg argued that we develop in roughly three stages. Kohlberg’s first stage—the pre-conventional stage—reflects a crude moral reasoning that focuses only on the immediate, short-term consequences of one’s behavior. Pre-conventional moral reasoning, then, is concerned only with immediate punishments and rewards. The second stage—the conventional stage—reflects broader concern for one’s family, one’s community, and even one’s nation. The broader values in these groups are the driving forces behind one’s moral decision-making. The final stage—post-conventional—reflects more abstract values that transcend any particular community. Moral values in this final stage move toward the universal.

In the spirit of Piaget and Kohlberg—and roughly correlating to their stages—William Perry has identified roughly three stages of development.³ Perry’s system is particularly attractive to college curriculum planners, because it describes the growth of college students. It is useful here, because it also closely describes the development of first-year law students. Perry’s first stage—dualism—is characterized by a student’s desire to learn definitive and concrete right and wrong answers from an authority. The second stage—relativism—follows after the student learns that knowledge is not always determinate, that there is not always a concrete right and wrong answer, and that opinions on a question offer differ even (or especially) among experts. Relativism is characterized by an acceptance of all views and complete deference to none. The final stage—reflective thinking—is characterized by an understanding

¹ Piaget’s and Kohlberg’s (and other developmental theorists’) work has been described in a variety of secondary sources, many of which I rely upon in my brief overview here. *See, e.g.*, Paul T. Wangerin, Objective, Multiplistic, and Relative Truth in Development Psychology and Legal Education, 62 Tul. L. Rev. 1237 (1988); Walter H. Bennett, Making Moral Lawyers: A Modest Proposal, 36 Cath. U. L. Rev. 45 (1986); Steven Hartwell, Promoting Moral Development Through Experiential Teaching, 1 Clinical L. Rev. 505 (1995); Susan Daicoff, Ethical Decisionmaking by Attorneys: An Empirical Study, 48 Fla. L. Rev. 197 (1996); Joseph M. Williams, On the Maturing of Legal Writers: Two Models of Growth and Development, 1 J. Legal Writing Inst. 1 (1991).

Different authors describe and categorize the stages in each theory in slightly different ways. I describe them here at only their most rough and abstract level.

² Neither Piaget nor Kohlberg is uncontroversial. Particularly, Kohlberg’s methodology has been subject to scrutiny because his studies included only boys, not girls.

³ This very brief description collapses Perry’s much richer system for the purpose of brevity and in order to highlight the salient features of Perry’s system for my purposes here. William G. Perry, *Forms of Intellectual and Ethical Development in the College Years* (1970); Paul T. Wangerin, Objective, Multiplistic, and Relative Truth in Development Psychology and Legal Education, 62 Tul. L. Rev. 1237, 1244-51 (1988); Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. Legal Writing Inst. 1, 4-6 (1991).

that views are diverse and often diverge; but it is also characterized by a considered commitment to a particular view.

These developmental theories, especially Perry's system, well describes the development of our first-year law students, as described more thoroughly in the following section.

II. The First-Year Curriculum and Our Students

The traditional first-year curriculum is precisely tailored to take our incoming students from Perry's dualistic stage to a relativistic stage, tracking the first two steps in this sequence exactly.

We start by training them to be dualists. Thus for example the early emphasis on the Socratic method suggests to our incoming students that knowledge of the law and legal reasoning is objective—that right and wrong answers exist, and that it is the student's job to find them. Similarly, the focus on sanitized appellate opinions—where facts are fixed, and where determined law applies rotely and deductively—suggests that learning and practicing the law are merely exercises in syllogistic reasoning. These defining features of the traditional first-year curriculum are classically dualistic: They teach our students that the law is about right and wrong in an objective, determinable world.

Moreover, the traditional Socratic form teaches our students that the law is outside of themselves. The Socratic form thus suggests to students that the instructor, the casebook, the commercial materials—the experts, and not the students themselves—hold the keys to understanding the law. In the language of critical and progressive educator Paulo Freire, students are merely passive and empty vessels to be filled with knowledge of the law by experts. And the law itself is fixed and pre-existing in relation to our incoming students: while it was created, to be sure, by someone, it cannot be changed by our students. These features of the traditional Socratic method buttress the dualistic nature of the early first semester by reinforcing the idea of a given, fixed, and external law that is knowable in an objective way.

As our students progress through the first semester, we teach them to be relativists. We teach them legal argumentation and advocacy, and we show them how to manipulate arguments to favor either side of a dispute. In doctrinal courses, we teach them modes of legal and policy arguments, the corresponding counter-arguments, and critiques of both. In moot court competitions and legal writing courses, we often arbitrarily assign students a party and instruct them to argue zealously, without respect to their moral commitments about the case. We sometimes even require them to change sides mid-course. In short, we teach them to be relativist practitioners, or even “hired guns.”

All too often, even first-semester legal method and legal writing courses—where we have a singular opportunity to transcend this development sequence, because of the small size, practice orientation, and in some schools the practicing adjunct faculty—sustain this trend. The central feature of these courses is nearly always a well vetted simulation—a problem that the professor designed to meet particular educational objectives. But in designing the problem, the professor by necessity traces every possible path between the facts and the law, defining every argument and mode of analysis to ensure that the problem meets the objectives without a hitch. We even have a term for such a well vetted problem: it “works.” In these classes, where the subject itself is legal analysis and communication, a simulation—or a problem for which the professor by necessity already defined the modes of legal analysis—sends the same dualistic message to the students: the subject is fixed and external, and the students' job is to learn it.

Later, when these courses move into persuasion and argumentation, they reinforce the traditional curriculum's relativism.

Our traditional curriculum works: our students' movement from dualism to relativism in the first semester is palpable. We see this in our students' language, in their questions, and in their analysis. Early on, they seek "rules" and "holdings"; they often ask about the "black-letter law." As a second-semester student recently asked me in the hopelessly indeterminate first few weeks of my Constitutional Law class, "What are we supposed to be getting out of this? I mean: what are we supposed to be *memorizing*?" Later, we hear our students experiment with different arguments, taking opposing positions, poking holes in others' arguments, and relishing the role of devil's advocate—often not out of any driving moral or even legal principle, but for its own sake. Thus our transformation is complete: we have succeeded in moving our students from dualism to relativism.

There is only one problem: our students started in law school further along the curve.

Our students increasingly come to us with a vast array of significant life experiences. All have a college degree; more and more have completed graduate or professional school; many have worked full-time and travelled before enrolling; and some have had fully successful careers before coming to law school. Many have families, own homes, and have taken on significant financial responsibilities (like law school loans). Our entering students may be novices in the law, but they are by and large more mature thinkers in other areas of their lives. Using the developmental terms, they are more often advanced relativists and reflective thinkers than they are dualists. And they are capable of applying their more mature traits to their study of the law.⁴

The traditional first-semester curriculum, with its emphasis on the move from dualism to relativism, thus regresses our students before it re-progresses them. This is not merely duplicative or a waste of time; it is affirmatively harmful. In regressing our students first, we alienate some, we fail to present an accurate picture of the practice of law to all, and we lose an opportunity to develop reflective thinkers and to generate good legal work with our students right out of the gate.

III. Actual Legal Work in the First Year

Actual legal work in the first year based on a live case or problem may help avoid this regression and allow us to build upon students' intellectual and moral reasoning capabilities. Actual legal work, unlike the typical case studies in the first year, involves the necessarily indeterminate facts of a live client or actual problem. It involves evolving law (by its nature, because nearly any case or problem helps evolve the law). And it involves faculty and other authorities that, while more experienced than the students in the law, are no more experts in the actual case or problem than the students themselves. Actual legal work in the first year thus resituates students in relation to the law and to the faculty: students become partners in their own education and in the case, not mere empty receptacles for information. It thus empowers students, not alienates them.

⁴ The few available empirical studies seem to bear these conclusions out. Researchers seem to agree that law students "rely on formal rules and societal conventions more than other groups and may have exhibited a more homogeneous stage of moral development within the group than other groups." Moreover, law students do not seem to develop—and some claim that law students actually decline—from this conventional stage (in Kohlberg's system). Susan Daicoff, *Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 Fla. L. Rev. 197, 207-208 (1996) (summarizing some of the conclusions based on empirical studies of law students' moral development).

I have experimented with actual legal work in the first year in a variety of contexts. Below I briefly describe some representative examples, with some thoughts on the results.

A. First Year Legal Theory and Practice

My most comprehensive experience with actual legal work in the first year was based upon a second-semester course I taught (and co-taught) at the University of Maryland School of Law involving state constitutional issues, torts, and civil procedure. This six-credit course encompassed the required elective and the elective legal research and writing courses that students took in the second semester. The classes were small—no more than 18 students enrolled—and students selected the option and were accepted based on a lottery.

Each student worked on two problems: an actual police brutality claim; and a separate law reform project. Students worked in three- and four-person teams on their police brutality cases, engaging in all aspects from informal fact investigation to trial, depending on the case. Through weekly case rounds and frequent work with cooperating outside counsel, students also learned vicariously from their colleagues' cases. These cases involved often complicated and always indeterminate facts and complex political and legal considerations that are not reflected in edited appellate decisions or even in classroom simulations.

We worked as a class on our law reform project. Two of the three years the classes worked on the procedural and legal aspects of a state constitutional civil right to counsel (or “Civil Gideon”); and one year the class worked on state official immunities in the context of state constitutional tort claims. These issues were all in their nascent stages, and the students themselves worked up the legal theories. The law in these areas was indeterminate by definition: the students were developing new legal theories and test cases in these areas. And faculty and cooperating counsel were truly partners, not authorities, as we were developing theories of our own even as we supervised our students' work.

Students in these courses consistently commented on the value of actual legal work in the first year—and the difference between this class and their other first-year courses. Students reported a heightened level of engagement in class, a sense of partnership with the faculty and cooperating attorneys, and an empowering sense that they were making a difference in the law and in their cases. They also reported that they felt respected, or “treated like an adult,” in contrast to many of their other first-year courses. (Students reported these effects even on the law reform projects, where students never even met a client. The immediacy and the practicality of the work seem to have counter-balanced the lack of any factual context in these projects.) Although they did not speak in terms of developmental learning theory, much of their feedback suggested that they felt as though the courses offered them an opportunity to grow, not regress, as both people and as students of the law.

B. First Year Constitutional Law and Appellate Advocacy

This package combined Constitutional Law II—the individual rights component of Constitutional Law—with the required appellate advocacy course during the summer between the first and second years at the University of Maryland School of Law. My students were required to enroll in these courses concurrently in order to explore theory (through the Constitutional Law course) along with practice (in the Appellate Advocacy course).

Like the courses described above, this course was relatively small—only 24 students enrolled—and students self-selected (but without first knowing the case on which we would work). I divided students into four teams of about six to eight students each and assigned each

group a legal issue in the same-sex marriage case then at the Maryland Court of Appeals. I allowed students to develop arguments for either the plaintiffs or the state, because several students expressed a moral discomfort with same-sex marriage, and because anticipating state-side arguments would serve our project every bit as well as generating plaintiff-side arguments. Our work would later support and feed into the faculty amicus brief that faculty at the University of Maryland and at the University of Baltimore would file in the case.

The legal issues here, too, were by definition undetermined: the case—and, derivatively, our work on it—existed only because the state constitutional issues were unsettled. And students worked side-by-side with me as we developed theories and arguments together in the case. Importantly, we devoted much class time to moral and policy discussions about same-sex marriage.

Students universally reported effects very much like my students in my courses described above. Notably, even those students who wrote briefs for the state—knowing that their work would ultimately be used to support arguments for same-sex marriage—reported the same high level of engagement as other students in the class. Again: while students did not speak in terms of developmental learning theory, their comments on the course suggested that they appreciated it precisely because they progressed, not regressed, as intellectual and moral thinkers.

C. First Semester Case Work

My most recent experiment with actual legal work in the first year involved my first-semester legal writing course at the John Marshall Law School in Chicago. This was a three-credit course with 23 pre-assigned students in the Fall Semester 2007. Our legal work was in support of a pro bono client of mine who applied one week late for trade adjustment assistance with the U.S. Department of Labor. The Department rejected her application as untimely, and a previous clinic of mine appealed to the U.S. Court of International Trade using an equitable tolling argument. The U.S. Court of International Trade rejected our argument and dismissed the case, and I asked my first-semester students to write a series of memos advising me and our client on the merits of an appeal to the Federal Circuit.

This case had none of the factual or legal indeterminacies of the classes described above. My students never met our client (who resides in Michigan), they never engaged in any fact investigation (because the record was set), and they were not seeking to reform the law in any major way, outside of shoehorning our client's case into an equitable tolling claim. Moreover, neither the factual nor legal issues raised the kind of broad ethical questions or deep policy issues as the cases described above. Yet nevertheless students seem to have moved forward developmentally in very similar ways. Moreover, their work as a class was quite good and turned out to have a major impact in the direction of the case. Perhaps most surprisingly given the facially dry nature of the case, students engaged in serious moral discussions about the case by the end of the semester.

Although I am still deconstructing the semester, I tentatively attribute this relative success to two characteristics of the course. First, like the other courses, I worked alongside the students in developing our case: I tried to offering guidance, but not directives; and my students very quickly became nearly as expert in the case as I was. In our collaborative classroom, I learned as much from them about the case as they learned from me. Second, like the other courses, this case involved a live legal issue, with real and important implications for our client and for other displaced workers who might apply for trade adjustment assistance. The immediacy of the case seems to have impacted the students' engagement with it. Thus

tentatively I conclude that this course, too, helped move students along developmentally, even if in somewhat more modestly than the other courses described above.

Conclusion

The typical first-year curriculum seems designed to meet our incoming students where they are with regard to their knowledge of the law. It thus seeks to teach them the law using the most efficient and effective means. But in doing so, it ignores the mature reasoning capabilities that our incoming students bring to law school, even if not in the law. Ignoring these capabilities results not only in lost opportunities; it also results in regression: we regress our students along the developmental continuum before we re-progress them. Actual legal work in the first year may provide at least a partial solution to this problem.