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Criminal Law and Procedure--Bringing It Home

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The inability of some student counsel to properly present proof of damages was surprising. Counsel who were well able to present testimony on all other matters did seem to falter when it came to persuading juries as to the amount of money that should be awarded. It seems likely that a demonstration of technique in this area will be necessary for future classes.

On the positive side, I have been and remain hesitant about printing favorable evaluations by students. I publish the one which follows only at the urging of my colleagues and with knowledge that its generosity will be appropriately discounted.

> "Your trial practice course was a unique and immensely valuable learning experience for me. It provided a dramatic contrast to other law school classes and offered more stimulation, rewards, and frustrations than any other. The realism of competitive pressures and a taste of courtroom battles were the most dramatic moments, but the best learning took place in the preparation of briefs, papers, and organization for trial.
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> Your ability to stimulate students to produce to their utmost continues to amaze me. It was the key to the success of the course and its central feature. I know just how long and hard my partner and I toiled; others worked with equal fervor.
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> The sessions in your office reviewing our work were a good teaching technique and I hope that you will be able to continue to use this method with larger classes. The closer in time to the submission of work, written or oral, the more helpful the session."

In conclusion, as an educational tool the course allows, indeed requires, the student to use the ability, knowledge, experience, judgment and much of the course material which we seek to develop in all of the courses we teach in the classroom and offer in the clinics. These combined skills are, after all, what we are all about.

CRIMINAL LAW AND PROCEDURE— BRINGING IT HOME

FERNAND N. DUTILE *

When I first began teaching six years ago at the Catholic University Law School, one of the two sections of Criminal Law and Procedure assigned to me was approximately 33% larger than the other. I remember feeling a considerable difference in atmosphere in the two sections, due to the numbers involved. In the smaller section, discussion seemed more intimate, more coherent, more shared by all the students. I felt able to know students better and more quickly. It is stunning now to realize that the *larger* section in that 1966–67 school year numbered 32 students!

When I left Catholic University in 1971, the Criminal Law and Procedure sections there had grown to the sixties and seventies. Those at the Notre Dame

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Law School, my new address, were scheduled to be at least as large. Spurred on by the Dean's own strong concerns for injecting a new dose of personalism into the first year, the two of us assigned to teach Criminal Law and Procedure at Notre Dame decided to experiment with "subsection" discussion groups.

During the first semester—the substantive part of the six credit, two semester course—each of our first semester sections was divided into three smaller sections of about twenty-five students each. The idea was that the full section would meet during the regular thrice-weekly periods and that each subsection would go through a four-class cycle, meeting once a week for four consecutive weeks. Thus, among my students, one subsection of twenty-five met for one hour each of the first four Wednesdays of the semester. A second subsection met for one hour each Wednesday from the fifth week of the semester through the eighth, and the third met on four consecutive Wednesdays from the ninth week through the twelfth.[1]

It was most difficult to select the material for discussion by the subsection. While we had considered discussing regular casebook material, but in greater depth than in class, that approach presented problems. For one thing, little choice would be presented for the meetings of the first cycle, since they would have had at that point just a few introductory regular class sessions. It seemed to us that great diversity was essential to maintain interest in this type of project, yet would be impossible if choice was limited to the first few weeks' material. Also, if the material was to be essentially uniform for the subsections, cycles 2 and 3 would be relegated to the same narrow choice of material obtaining for cycle 1. One possibility would have been to stagger the meetings so that *each* subsection would meet every three weeks. Under this plan, each would have its first meeting before any had its second. This would have provided a broader source of regular class material for all subsections. But this consideration was thought to be outweighed by the continuity provided by *consecutive* meetings of each subsection.

Of course, use of different classroom material for discussion in the various subsections could later yield the charge that one group or another had gained a distinct advantage depending upon what material would ultimately be emphasized (or thought to be emphasized) on the written course examination.

[1] An implication of this schedule was that the third subsection, before its first meeting, would have been in Law School about two months, and therefore would know one another and presumably feel more comfortable with one another much more than those in the earlier two cycles. Also, they would already have been exposed to a substantial amount of Criminal Law through their regular full section meetings. As a result, one might have expected the third cycle group to have more vivid and enthusiastic discussion than the first. As far as I could tell, that was not the case. If anything, the discussions in the first cycle were more personal and enthusiastic. I am not sure of the reason for this. It is possible that by the ninth week of class, a student was so accustomed to being $\frac{1}{75}$ of the group (his situation in each of his first year courses) that he did not quickly adjust to being expected to carry on at least $\frac{1}{25}$ of the discussion. It may be that his fascination with Criminal Law, relatively high at orientation time, had dimmed. It is possible that the relative imminence of examinations affected the participation of subsection members. While the discussion of certain issues varied greatly from cycle to cycle, the fundamental topics covered were the same, so it is possible that my own energy and perception were dulled during the third cycle.

Also, uniformity of material would improve the chances that students would pursue the discussions with their classmates on their own whether or not they were assigned to the same subsection. But, despite uniformity, if the material discussed in the subsection concerned matters already touched upon in class, the subsection discussion, though providing for more depth and new insights, could appear to be mere belaboring of a point whose novelty had already been spent.

It appeared to us that the objective of providing a small class experience allowing heavy doses of participation required selection of issues that were broad, controversial and pervasive, involving relatively little "dogma" and relatively large aspects of intuition, judgment and ideology—in whatever order—thus providing subject matter concerning which first year students would feel competent and anxious to offer observations and which would provide a spectrum of reaction from them. We decided to use selections from CRIME, LAW and SOCIETY (Goldstein and Goldstein eds. 1971) as *take-off* points for discussion.[2]

The assigned readings were:

Sir James Fitzjames Stephen, *Of Crime in General and of Punishments*

Oliver Wendell Holmes, Jr., *Theories of Punishment and the External Standard*

Morris Raphael Cohen, *Moral Aspects of the Criminal Law*

Henry M. Hart, Jr., *The Aims of the Criminal Law*

William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era*

Kai Erikson, *On the Sociology of Deviance*

Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*

H.L.A. Hart, *The Use and Abuse of the Criminal Law*

Johannes Andenaes, *The General Preventive Effects of Punishment*

Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*

It is important to emphasize that the sessions were not to be mere recitations of what each of these illustrious authors had said in that day's assigned excerpts. The idea was to use the readings as background material hopefully to enlighten the discussion of related issues. We did try to launch the discussion by use of provocative questions.

In session one, we discussed the purpose of the criminal law in the context of the prison revolt at Attica, which had just occurred. The allegations of the prisoners regarding prison conditions and the violent response of officialdom led us easily into the rehabilitation, retribution and deterrence theories of punishment and into attempts at assessing governmental reaction to the situation.

[2] In order to promote reading of the assignments and attendance at the discussion meetings, the students were told that the readings and the discussion were subject matter for the final examination.

In the second session we began by inquiring about when (and why) the law might penalize one act more harshly than another even though there was no essential difference between the two with respect to blameworthiness (*e. g.*, attempted murder and murder) or penalize an act irrespective of blameworthiness (*e. g.*, some regulatory offenses). We also explored whether Kai Erikson's theory that deviance serves the purpose of defining a society's standards was reflected in the Chicago conspiracy trial or in the trials growing out of the My Lai massacre: was the issue in those trials whether the defendants had done what they were charged with doing (the situation in, say, a typical murder trial, since there would be a consensus about the charged act being a desirable thing to outlaw and punish) or whether, even if they had, it was a good or bad thing to outlaw and punish? Or was it perhaps both?

At the third meeting, we sat as a legislature to consider six pieces of legislation. The objective was to explore the relationship between morality and law—more specifically, when is it appropriate for the law to prohibit conduct under threat of criminal penalty?

The proposed legislation was taken up one piece at a time to preclude students from specifically gearing their responses to fit all proposals, which perhaps would have inhibited the discussion. In each case, the basic question was: in a society thought to treasure individual choice, what justified the state in prohibiting the conduct sought to be outlawed by the legislation, specifically:

1. Possession of Heroin (sub-question: If I am wealthy enough to buy heroin, what business does the state have trying to protect me from myself?)
2. Bigamy
3. Gambling
4. Obscenity
5. Adultery
6. Cruelty to animals committed privately

The animal cruelty prohibition was most provocative since on the first five proposals most students seemed prepared to adopt a principle justifying governmental intrusion whenever (and only when) the prescribed conduct directly interfered with another person's freedom. It was not clear that cruelty to animals, which our gut reactions seem to want outlawed, could be prohibited on the basis of the same principle. This required us to consider whether the State could restrict one's conduct in private in order to protect another's sensibilities or whether we should posit rights in the animals themselves.

The discussion also focused upon the costs of enforcing the law—for example, even if it would otherwise be good to outlaw X, if enforcement means the use of electronic eavesdropping, is it worth it?

In the fourth session, we discussed whether the criminal law was in general disrepute, and, if so, why.

In all of these sessions, of course, many other issues, more or less related, were discussed. The main ones are listed here to suggest the flow of the meetings.

What were the goals and were they met? The first was to provide a more personal experience than that provided by regular classes. I feel we were

modestly successful in that respect. We did get to know many of our students much better through the seminars and the students undoubtedly got to know many of their classmates and their instructor more quickly and better than otherwise would have been the case. Surely many students felt a personal interaction among them, their fellow students and the instructor for the first time or at least to a greater extent than in the regular class. Perhaps this was helped by the fact that the discussion session was not one of the three "regular" class hours—giving it somewhat more of an extra-curricular, quasi-social atmosphere.

The second goal was to provide a relatively unstructured discussion, with a consequent decrease in the domination the instructor normally would exercise in the classroom. While there were assigned readings and while the instructor did throw out lead-off questions or assertions, the discussions were unstructured insofar as little conscious attempt was made to steer the conversation toward one point or another. We were prepared to—and did—allow and indeed encourage the discussion to stray to unanticipated issues or occurrences. A considerable amount of time might, for example, be devoted to discussion of an event or issue presented by that day's newspaper.

While the sessions were of course the best when the students were discussing the issues with one another, it is inevitable in such sessions that at some points the discussion begins to die; and it becomes incumbent upon the instructor to revive it by throwing out further questions or probing prior statements from students. Sometimes, an extensive amount of "pumping" becomes necessary to preserve the discussion. The atmosphere then becomes much like that of the regular class session.

Interestingly enough, some students thought the lack of structure was the discussion group's strength while others at least equally strongly felt it to be its chief weakness. Some students, perhaps for a complex of reasons, seemed to resist listening to other students discuss issues, preferring to listen to an instructor spell out dogma.

Evaluation of such a project cannot be done through simple "averaging out" of reactions. With some students firmly backing the idea and others solidly against it, it was not easy to decide what, if anything, in this direction one should *require* of students the following year. The issue boils down to whether a non-structured small group format should be provided precisely because some students feel a need or desire for it—and recognize it—or whether it is something all students should be "compelled" to experience, even if they do not recognize the need or indeed even have it. Fortunately, the second semester helped in the resolution of the problem.

In the second semester—the Criminal Procedure part of the course—I adopted a different approach. I announced in class that I was interested in organizing a small *voluntary* group for the discussion of current term United States Supreme Court decisions dealing with Criminal Procedure problems. I stressed that the group would involve additional work and that those who were interested should so indicate in writing. The purpose of this was to get a fairly definite commitment, *i. e.*, to exclude those who might have raised their hands if asked about interest in such a project but who would not have followed through. (The device was only fairly successful—a couple of students who actually signed up failed to show for any meetings beyond the first

organizational one; conversely, a few students—one not even in my course—showed up for the organizational meeting not having signed up earlier).

In advance of each meeting, each of four or five of the students in the group was assigned a recent United States Supreme Court case to report on to the group. I left it up to the student to decide just how much research for his case he would do beyond the opinion itself. As it turned out, most did a substantial amount of background research. At the group meeting, the student would state what the factual basis of the case was, what errors had been asserted by counsel and what resolution the Court had effected. Derivative and long term effects of the case were explored. Attempts were made to relate the case to matters talked about in the classroom. During the first few presentations, the student leader tended to "recite", with all questions from others coming after the recitation. As the group got more comfortable, questions, comments and digressions began early and the entire thing became more a discussion than a presentation, the leader using his information to guide and enlighten the discussion.

I mention digressions not at all disparagingly. As in the first semester, the discussion was allowed and encouraged to stray to other areas. Consistent with this philosophy, we stayed with each case as long as the discussion seemed to flow naturally, even if it required other assigned cases to be postponed until the following meeting. This was especially likely whenever the case led us into discussion of current news events.

Usually only the person assigned the particular case (and the instructor) had read the case before the meeting. While this was rather accidental at the start, I decided at the very first meeting that this had advantages. First, had I assigned the cases to the others to read, the discussion group would have seemed more like a regular class, and the additional work for each student might have discouraged his participation.[3] Second, lack of familiarity with both the facts and the law of the case seemed to provide the students with good practice in listening closely. The smallness of the group impressed on each member a feeling of responsibility to participate and this required awareness of what others had said. Third, the student, not having been expected to read the scheduled cases, could, without inhibition, explore the facts and principles of the case. It gave him good experience in framing questions articulately and relevantly and in probing hidden areas of importance.

The meetings, held bi-weekly unless some other Law School function conflicted, took place during the evening, giving them less of the air of a regular class. Also, no meeting was held at the Law School. We rotated among the home of the instructor and those of the students who felt able to make theirs available.[4]

The formal plan called for a two hour discussion period followed by a purely social segment. Oftentimes the plan was adhered to, but on more than one occasion the legal discussion itself continued for the entire evening—three

[3] This is especially true in the second semester of the first year at Notre Dame where, in addition to the basic course load the student is assigned a moot court case to brief and argue, which assignment traditionally has involved countless hours of preparation.

[4] So that no student would feel unable to host the meeting due to his financial situation, each person brought his own beverage (usually beer, occasionally wine) to the meetings held at the home of a student.

or four hours or more. Of course, even on those occasions when legal discussion was called to a halt after two hours, some members of the group continued to discuss the legal matters during the social part of the evening.

My impression is that this device was immensely successful. If any student who participated had any reservation at all about the discussion group, I never learned of it. Many students told me they found it to be a genuine learning experience and that they *enjoyed* learning through that device. A participant in the discussion group, urging an entering law student to take part, cited it as the educational "highlight of the year." It clearly met the objective of being personal, participatory and unstructured. Indeed, because of its success, I have decided this year not only to repeat it for the Procedural part of the course but to adopt the same device for the Substantive part of the course.