FEATURE

The Case Method after Formalism: A Reflection on Legal Education and the Strangeness of Law

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Abstract: This reflection considers the persistence of the case method in legal education, even as the legal philosophy animating its inception (legal formalism) has lost much of its hold on the instructors employing the method. I propose that the case method has a number of important benefits that explain its prevalence, but that, alongside these benefits, the case method carries the risk of creating an environment in which the language and culture of common law lawyering are treated as better than other languages and cultures relied upon to structure collective relationships and resolve disputes. The risks posed by this kind of learning environment are clear and interconnected: it degrades and diminishes those students whose languages and cultures of collective life are furthest from those commonly found within the judiciary, and it leaves students ill-equipped to understand and participate in many important forms of legal critique and client communication. To assuage these risks, I advocate here an approach to legal education that strives to keep in view the strangeness of law. The aim of the approach and techniques sketched here is to create a learning environment anchored in the shared project of learning a language and culture that is distinct from but not unrelated to other ways of thinking and knowing: to acknowledge that students must continue to respect their own knowledges and values—and those of others—even as they develop a deeper relationship with the knowledges and values that animate judicial reasoning.

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Introduction

The case method continues to dominate legal education in Canada, at least in the first-year curriculum.[1] It has persisted even as the legal philosophy animating its inception (legal formalism) has lost much of its hold on the instructors employing the method. For some law professors, this has meant that our teaching practices and our scholarly analyses have felt discordant, with some professors feeling "embarrassed" or "apologetic" about the persistence of case-based doctrinal teaching in their classrooms.[2] How can we explain the persistence of the case method in legal education given the waning influence of formalism in the scholarship produced by law professors? Should we, as

1 *Cf* David Garner, "The Continuing Vitality of the Case Method in the Twenty-First Century" (2000) 2000:2 BYU Educ & LJ 307. The case method sees students taught, across doctrinal areas, to learn the law by reading a series of leading cases. Their instructors guide them in their reading of these cases to develop an appreciation of the interplay between fact and principle in order to, ultimately, predict how a court would likely use existing case law to resolve novel, often hypothetical, fact scenarios.

2 Dan Priel, "The Myth of Legal Realist Skepticism" (2022) Osgoode Hall Law School, Working Paper, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1351&context=all_papers> at 76-77 [Priel, "Legal Realist Skepticism"].

law professors, continue using the case method even if we don't accept a formalist account of law (or if we don't intend to impose a formalist vision on our students)? Why and how?

In this reflection, I propose that the case method has a number of important benefits that explain its prevalence, and I offer a decidedly non-formalist defence of its continued use in first-year law school: that it offers a foundation for crucial professional skills, and that it helps students to understand the language and culture of lawyering. I then go on to suggest that, alongside these benefits, the case method also poses risks that are particularly heightened when paired with a formalist view of law: the creation of an environment in which these skills, and the language and culture of common law lawyering, are treated as *better than* other languages and cultures that people rely upon to structure their collective relationships and resolve disputes. The risks posed by this kind of learning environment are clear and interconnected: it degrades and diminishes those students whose languages and cultures of collective life are furthest from those commonly found within the judiciary, and it leaves students ill-equipped to understand and participate in many important forms of legal critique and client communication. Together, these risks have materialized into a significant corpus of legal writing (including by now-celebrated legal scholars) describing the law school experience as isolating, alienating, and undermining.[3]

To assuage these risks associated with the case method, I advocate here an approach to legal education that strives, always, to keep in view the *strangeness of law*. This approach seeks to help students understand the skills of reading cases, presenting legal arguments grounded in precedent, and analyzing novel scenarios in predictive fashion *without* creating an environment that treats this skill set as the best or only way of approaching relationships and conflicts, including those emerging as legal cases. The aim is to create a learning environment anchored in a shared project of learning a language and culture that is *distinct* but not *unrelated* to other ways of thinking and knowing: to acknowledge that students must continue to respect their own knowledges and values—and those of others—even as they develop a deeper relationship with the knowledges and values that animate judicial reasoning.[4]

On this view, law does have its own internal logics and interpretive resources (as formalists have long insisted)—and it is indeed an important skill of a legal professional to work competently with these. But this view also insists that legal professionals can and should bring to this work an understanding that these logics and resources are strange: they are particular, sometimes unsettling, and can be quite distant from other ways of thinking and knowing. In other words, to retain the value of the case method while blunting its alienating effects, students must be encouraged to perpetually move between an "internal" and an "external" view of law—to use legal tools expertly without losing sight of them as tools designed to work best within a particular type of machine. This commentary offers some proposals and strategies toward this end.

3 See Part V, *below*, for examples and discussion of some of this work.

4 For a thoughtful exploration of a specific pedagogical exercise with similar aims, see Joy Twemlow, "Let me Introduce my Friend, Law: A Pedagogical Tool for Supporting Diversity and Critical Thinking in the Legal Classroom" (2023) 57:3 The Law Teacher 239.

I. Feminism and the Case of the Flying Cricket Balls

During my first weeks as a law student, I was assigned to read the classic torts case, *Miller v Jackson*.[5] The case concerned a number of homes built alongside a cricket pitch. The residents of these homes complained of cricket balls smashing through their windows, damaging their homes, and threatening injury.[6] Lord Justices Geoffrey Lane and Cumming-Bruce concluded that the cricket club was liable for the damage caused. In dissent, Denning LJ emphasized that the cricket pitch had been established before the homes were built, and concluded that the residents must therefore either bear with the cricket or move.

I did not (and still do not) have a strong intuition as to which party ought to have prevailed in this case, legally or morally. But I do vividly recall my experience of reading Denning LJ's dissenting reasons, which seemed to me to be positively dripping with sexism.[7] His allegiance with the cricket players was proclaimed in the case's opening sentence: "In summertime village cricket is the delight of everyone."[8] The next sentence revealed a narrow conception of who this "everyone" included: "Nearly every village has its own cricket field where the young men play and the old men watch."[9] The threat to the delight of "everyone" (composed, apparently, of men both young and old[10]) was cast as coming from those who threaten the "public interest", as Denning LJ saw it.[11] Among this group of selfish spoilsports, particular disdain was expressed for Mrs. Miller, "a very sensitive lady who has worked herself up into such a state" that she expressed fears of death or injury from flying cricket balls.[12] Were the cricket field to move, Denning LJ averred, the village would be "much the poorer" and "the young men will turn to other things instead of cricket."[13] (Was there a hint of threat there, I wondered, that these young men must be kept happy or otherwise not be responsible for their actions?)

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5 *Miller v Jackson*, [1977] EWCA Civ 6.

6 Lord Denning does note that there were no individuals who had sustained injuries, but the presence of smashed windows and cricket balls damaging homes is suggestive of a threat of serious injury (*ibid* at 25). See also Reuters' rundown of deaths and injuries from stray cricket balls: Reuters, "FACTBOX – Cricket – Deaths caused from on-field incidents" (27 November 2014), online: <reuters.com/article/cricket-australia-hughes-deaths-idUKL3N0TH1XW20141127/>).

7 It turns out that I was not the only reader to have this reaction. See e.g. Denise G Réaume, "What's Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law" (1996) 2:4 Leg Theory 265 at 286.

8 *Miller v Jackson*, *supra* note 5.

9 *Ibid*.

10 On this point, see also Greig Henderson, *Creating Legal Worlds: Story and Style in a Culture of Argument* (Toronto: University of Toronto Press, 2018) at 54; David Fraser, *Cricket and the Law: The Man in White is Always Right* (London: Routledge, 2005) at 21.

11 *Miller v Jackson*, *supra* note 5.

12 Again, this does not seem to be a baseless fear. See Reuters, *supra* note 6. For a discussion of Denning LJ's characterization of Mrs. Miller as reliant on "traditional female stereotypes of hysteria and irrationality," see Réaume, *supra* note 7 at 286.

13 *Miller v Jackson*, *supra* note 5.

I came to class eager and excited to engage with this (I thought) fascinating case of judicial gender bias. When our discussion turned to this case, I raised my hand and shared my observations. The professor, a renowned torts scholar, looked at me quite blankly as though I had raised my hand to share what I'd eaten for breakfast that morning, then drew the conversation back to what he viewed as the question of the day (probably foreseeability, though I confess, with apologies to my renowned professor, that I don't really remember). The professor was not cruel or unkind, but it was clear to me that my comments were received as a digression, not as a helpful engagement in our shared enterprise of case analysis. I quickly came to the realization that any reflections I may have on the social biases underlying judicial decision-making would not be seen as useful or important.[14]

Only years later did I come to understand that I had naively offered this analysis to one of the legal academy's most celebrated formalists: Ernest Weinrib. It was not that my remarks were inapt as feminist theory, or even as an entry point to determining a socially desirable result or mode of adjudication. It was, rather, that feminist or other "desirable" social outcomes were entirely beside the point of legal reasoning in my professor's view.[15] Unbeknownst to me, my professor held a well-considered and well-defended commitment *not* to view the issues I was raising as part of the work of legal reasoning. My concern with the status of women, in society and before Denning LJ, was just another instance of a doubtlessly tiring-to-the-formalist invocation of "some goal that is independent of the conceptual structure of the legal arrangement in question."[16] For Weinrib and other formalists, "law" and "politics" are separable and separate.[17] And "political" or "instrumental" approaches are not only "imperfect," but "superfluous".[18] My effort to identify gender bias in judicial reasoning was a mere "means to some ulterior end"[19] (the ulterior and superfluous end being the achievement of greater gender equality in society). My sophomoric efforts were "excluded", in Weinrib's view, because they were unrelated to the more "fundamental" project of legal analysis: to understand "juridical relations ... in terms of themselves".[20]

Weinrib's formalist view of law as distinct from politics, I came to learn, was no longer pervasively held in the legal academy. At the time of this classroom exchange, Weinrib was already

14 Interestingly, this very example is raised (in hypothetical form) in Geoffrey Samuel's discussion of the limits of doctrinal analysis of law: "If [a law student] discusses carefully, and on the basis of a solid feminist academic literature, the misogyny in play in the judgments in the case of *Miller v Jackson* (1977) ... she might well fail. This is not 'legal science', she might be told": Geoffrey Samuel, "What is the Role of a Legal Academic? A Response to Lord Burrows" (2022) 3:2 Amicus Curiae 305 at 312–13.

15 Ernest J Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97:6 Yale LJ 949 at 949 [Weinrib, "Legal Formalism"].

16 *Ibid* at 965.

17 *Ibid*.

18 *Ibid* at 966.

19 *Ibid* at 965.

20 *Ibid*.

well known (except, apparently, by me) for his impassioned defence of a particular brand of Kantian legal formalism, and he had encountered and responded to his critics many times over.[21] Weinrib understood and situated his defence of formalism as quite against-the-grain in a world of legal scholarship that increasingly advocated social and political understandings of law.[22] And yet, despite Weinrib's arguably iconoclastic legal theoretical views, his mode of legal instruction was quite in line with those of his colleagues.

Across the first-year curriculum, a mode of teaching inspired by legal formalism prevailed: the case method. Even those professors who I would later learn shared a more social view of law took the same basic approach: read the cases, identify rules shaped by analogies and disanalogies between the cases, and learn to argue from precedent. While some professors were more welcoming of political or "instrumental" analysis in the classroom, the course of instruction and the form of examination (i.e., issue spotter exams)[23] were decidedly focused on what has been described as an "internal" view of law:[24] one that presupposes and seeks to discern a logically coherent and (generally) apolitical explanation for decided cases, which can then be applied predictively to foresee outcomes in future or hypothetical cases or, critically, to determine whether past cases were "wrongly decided".

I now find myself as a law professor whose scholarship falls within Weinrib's identified "mainstream" of legal academics who view law as reflective of social and political forces rather than as expressive of a logical or apolitical schema.[25] And yet, I too teach with the case method, as do many of my

21 See e.g. Allan C Hutchinson's cheekily named "The Importance of Not Being Ernest" (1989) 34:2 McGill LJ 233; and Weinrib's also cheekily named "Professor Brudner's Crisis" (1990) 11:3 Cardozo L Rev 549, in reply to Alan Brudner, "Hegel and the Crisis of Private Law" 10:5-6 Cardozo L Rev 949. For influential critiques of legal formalism, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986); Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L Rev 1685; Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22:2 Harv CR-CLL Rev 401. Weinrib has continued to defend and develop his view of legal formalism in, e.g. *The Idea of Private Law*, revised ed (Oxford, UK: Oxford University Press, 2012). But see Alan Brudner's argument that Weinrib's more recent work seems, "without acknowledging" the shift, to accept aspects of "the functionalist's orientation of private law towards welfare goals specified as valuable external to private law." Alan Brudner, "The Rise and Fall of Private Law", Book Review of *Reciprocal Freedom: Private Law and Public Right* by Ernest J Weinrib, (2023) 37:1 Can JL & Juris 323 at 336-338. See also Stéphane Sérafin, Book Review of *Reciprocal Freedom: Private Law and Public Right* (2024) 49:2 Queen's LJ 127 at 138.

22 See e.g. Weinrib, "Legal Formalism", *supra* note 15 at 952 (contrasting his position against that of "mainstream scholarship" that "allows itself to see the law as a plurality of competing or unintegrated purposes").

23 See Barry Friedman & John CP Goldberg, *Open Book: The Inside Track to Law School Success*, 2nd ed (New York: Wolters Kluwer, 2016).

24 On the "internal" and "external" views of law, and their relation to realism and formalism, see e.g., Hamish Stewart, "Contingency and Coherence: The Interdependence of Realism and Formalism in Legal Theory" (1995) 30:1 Val U L Rev 1 at 3–4.

25 See *supra* note 22.

non-formalist colleagues.[26] Given the widespread ascendance of social conceptions of law amongst law teachers, how can we explain our continued allegiance to the case method? How can and should we be using the case method if we hope to impart an understanding of law that is attentive to its social and ethical dimensions? The remainder of this reflection examines these questions and offers some proposals for infusing the case method with non-formalist views of law.

II. The Case Method and the "Science" of Law

Christopher Columbus Langdell, widely credited with developing the case method,[27] was an avowed formalist. Law was not, in his view, a product of an imperfect battlefield of messy human priorities, political arrangements, or aesthetics.[28] Instead, Langdell famously cast law as a "science, consist[ing] of certain principles or doctrines" that law students should aspire to "master[]" such that they might be applied "with constant facility and certainty to the ever-tangled skein of human affairs."[29] Over a century later, Richard Posner observed the formalists' continued self-understanding as engaging in scientific or mathematical inquiry: "[f]ormalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect."[30] To this day, the highest academic degree in law is often termed the "Doctor of Juridical Sciences."[31]

The data from which these scientific and mathematical exercises are to proceed, according to legal formalists, is to be found in existing case law. And so the case method of legal education was developed and popularized by Langdell and others who saw the primary skill of lawyering to lie

26 See Priel, "Legal Realist Skepticism", *supra* note 2 at 76.

27 See generally Bruce A Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826–1906* (Chapel Hill, NC: University of North Carolina Press, 2009).

28 See Juan Javier del Granado & MC Mirow, "The Future of Economic Analysis in Latin America: A Proposal for Model Codes" (2008) 83:1 Chicago-Kent L Rev 293 at 296 (observing a North-American tendency, prior to the ascendance of the Langdellian case method, to view law as "an art" rather than a "science").

29 CC Langdell, *A Selection of Cases on the Law of Contracts: With References and Citations* (Boston, MA: Little, Brown & Co, 1871) at vi.

30 Richard A Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution" (1986) 37:2 Case W Res L Rev 179 at 181. Posner distinguishes his own definition of formalism from that of Langdell and other early formalists, on the basis that Posner understands formalism to require some underlying policy choices (giving rise to legal principles), while classical formalists "liked to give the impression that the premises were self-evident": *ibid* at 182. But *cf* Stewart, *supra* note 24 at 4 (identifying Posner as "an exemplary realist", in contrast to Weinrib, the "exemplary formalist").

31 See e.g. Harvard Law School, "S.J.D. Program" (last visited 30 August 2024), online: <hls.harvard.edu/graduate-program/sjd-program/>.

in working with this raw data set (cases) to arrive at logically determined results in future cases. To help his students develop the skills of legal science, Langdell developed a mode of instruction requiring students to prepare for class not by reading treatises or commentaries, but by reading judicial decisions to the exclusion of all other materials.[32] The use of case law as the core instructional material was, and often remains, associated with large class sizes and a Socratic teaching method by which instructors guide students to a deeper understanding of legal doctrine through "dialogue" with students.[33] (Dialogue is, perhaps, too kind a word for this teaching practice, which is often experienced by students as more inquisitorial and humiliating than dialogic.[34])

Even as class sizes may now vary, and even as the Socratic method has evolved and receded,[35] the case method continues to call the tune in first-year law school classrooms in Canada and the United States. Despite the occasional "sprinkling of non-legal sources",[36] and the increasing presence of applied or clinical learning,[37] the Langdellian case method continues to shape the first-year law school experience: students prepare for class by reading primarily (if not exclusively) case law, then work with their instructors to derive patterns and principles that will help them predict how courts would likely approach a future, novel case. The primary mode of assessment, the "issue spotter" exam, tests precisely this skill: it presents students with a set of (usually hypothetical) facts, then asks them to predict, based on precedent, how a court might react.[38] Landgell's flagship teaching method has thus reigned in the classroom long after its intellectual progenitor, legal formalism, lost its hold on the majority of law professors.

32 See Steve Sheppard, "Casebooks, Commentaries and Curmudgeons: An Introductory History of Law in the Lecture Hall" (1997) 82:2 Iowa L Rev 547 at 596.

33 Jamie R Abrams, "Reframing the Socratic Method" (2015) 64:4 J Leg Educ 562 at 565.

34 David D Garner, "Socratic Misogyny? – Analyzing Feminist Criticisms of Socratic Teaching in Legal Education" (2000) 2000:4 BYU L Rev 1597 at 1597–98.

35 See generally Orin S Kerr, "The Decline of the Socratic Method at Harvard" (1999) 78:1 Neb L Rev 113.

36 Jack M Balkin & Sanford Levinson, "Law and the Humanities: An Uneasy Relationship" (2006) 18:2 Yale JL & Human 155 at 159–60. See also Gary D Finley, "Langdell and the Leviathan: Improving the First-Year Law School Curriculum by Incorporating *Moby-Dick*" (2011) 97:1 Cornell L Rev 159.

37 See Richard Jochelson, James Gacek & David Ireland, "Reconsidering Legal Pedagogy: Assessing Trigger Warnings, Evaluative Instruments, and Articling Integration in Canada's Modern Law School Curricula" (2021) 44:2 MLJ 87 at 95-96 (identifying a "clinical shift" in Canadian legal education, while accepting as "persuasive[]" that "legal education and law" generally "remain pedagogically conservative," including through its continued fealty to the case method).

38 See generally Friedman & Goldberg, *supra* note 23.

III. We Are All Realists Now ...

The ascendance and persistence of the case method in legal education sharply contrasts with the decline and near disappearance of Langdellian formalism in legal theory. The legal realists of the 1920s and thereafter have, so the common narrative goes, won the hearts and minds of legal academics. For realists, law is not best defined as an expression of immanent, coherent principles, but rather as "a vehicle for achieving purposes external to the law."[39] The influence of sexism or xenophobia (or, more commonly for classical legal realists, classism[40]), or other socially "variable" forces on judicial reasoning, have come to be seen as "not just permissible" but "central" to understanding law following the rise of legal realism.[41]

This view of law as deeply and invariably bound up in social dynamics marks realism, on many accounts, as the intellectual forerunner to several strands of contemporary jurisprudence, including critical legal studies, feminist legal theory, critical race theory, critical disability studies, economic analysis of law, and others.[42] While these approaches differ in emphasis, political valence, and method, they share an anti-formalist emphasis on the social inputs and outcomes of law. This is perhaps why it has become the definitive jurisprudential cliché to observe that "[w]e are all legal realists now."[43] As Jack Balkin and Sanford Levinson report, "only the most foolhardy academic today would describe doctrinal analysis as 'scientific.'"[44] Most of us (i.e., legal scholars and professionals)

39 Stewart, *supra* note 24 at 3.

40 See e.g. Karl Llewellyn's discussion of the role that laissez-faire economic policy preference and anxieties about socialism may have played in the Due Process jurisprudence of the Supreme Court of the US: KN Llewellyn, "On the Good, the True, the Beautiful, in Law" (1942) 9:2 U Chi L Rev 224 at 240. But see also Dan Priel's argument that commentators frequently overstate the centrality of economic and class critiques to realist legal theory: Dan Priel, "The Legal Realists on Political Economy" (2024) L & Soc Inquiry 1 [Priel, "Political Economy"]. See also Priel's observation that the writings of classical realists are nearly silent on questions of racial or gender oppression: "Legal Realist Skepticism", *supra* note 2 at 11.

41 Stewart, *supra* note 24 at 3.

42 See *ibid* at 5 (remarking that "[e]conomic analysis of law is perhaps the most influential modern form of realism"); Gregory Scott Parks, "Toward a Critical Race Realism" (2008) 17 Cornell JL & Pub Pol'y 683 at 704 ("Just as Realism was the precursor to the Law and Society movement, itself a precursor to Critical Legal Studies, Critical Legal Studies was a precursor to Critical Race Theory"); Carrie Menkel-Meadow, "Feminist Legal Theory, Critical Legal Studies, and Legal Education or 'The Fem-Crits Go to Law School'" (1988) 38:1 J Leg Educ 61; Derrick Bell, "Racial Realism" (1992) 24:2 Conn L Rev 363. For a critique that the standard story of the realists' impact improperly emphasizes "bloodlines running to the male-only traditional account," see Mae C Quinn, "Feminist Legal Realism" (2012) 35:1 Harv JL & Gender 1 at 18.

43 See e.g. Joseph William Singer, "Legal Realism Now" (1988) 76:2 Cal L Rev 465 at 467; Michael Steven Green, "Legal Realism as Theory of Law" (2005) 46:6 Wm & Mary L Rev 1915 at 1917 (describing the phrase as "cliché").

44 Balkin & Levinson, *supra* note 36 at 160, but *cf* Priel, "Political Economy", *supra* note 40 at 67–68 (identifying some renowned realist legal scholars as "scientific" in their inspiration and methodological approach).

have accepted to some degree that law is a social enterprise and that legal and social processes are often interconnected if not co-constituted.

Shifting cultural representations of legal education suggest that this social conception of law has left a wider cultural imprint as well (including, it is fair to assume, on incoming first-year law students). The classic cinematic representation of first-year law school—*The Paper Chase*[45]—presents an increasingly outdated view of the function and focus of legal education. The film famously depicts the fictional Professor Charles W Kingsfield, Jr, telling a room full of ambitious first-year law students: "You come in here with a skull full of mush; you leave thinking like a lawyer." But this binaristic view of thinking (as either lawyer-like or mush-like) has been increasingly displaced by pop cultural portraits of legal learning that emphasize the intermingling of legal expertise with other ways of knowing. *Legally Blonde*,[46] the heir apparent to *The Paper Chase* as the definitive fictionalization of first-year law school, features a young woman whose success at every turn is tied to her ability to master legal concepts and marry them to her knowledge of such would-be mush as hair care, aerobics stardom, and gay men's supposed awareness of shoe designers (a stereotype that, in the world of the film, is represented as a reliable form of street smarts).[47] Moving to the small screen, we see even more pronounced versions of this shift away from "law in books" as the sole relevant feature of legal education.[48] In *How to Get Away with Murder*,[49] the law school's most acclaimed professor is a practicing lawyer who deploys the Socratic method to interrogate her students on questions of strategy and persuasion, not doctrine or case law.[50] This shift in representation of extra-doctrinal competencies—from "mush" to the 'secret sauce' of exceptional law students—suggests that public perception has moved away from a formalist understanding of law and legal education as a field of unspoiled and apolitical logic.

IV. ... Yet the Case Method Lives On

Despite the shift away from formalism on the part of both professors and publics, the case method maintains its centrality in legal education. As law teachers, whatever we may believe about the social construction of law, we generally share a sense that we are doing a disservice to our students if we do not teach them "legal reasoning" as it has been constructed within the formalist tradition. In order to engage as legal professionals, our students must be able to read cases, draw conclusions as to how these cases cohere into a body of law, offer informed predictions as to how new cases may be decided, and argue by analogy to decided cases. Some of us may also emphasize that doctrinal analysis is not all that matters: that access to justice considerations shape who gets to court in the

45 *The Paper Chase* (Los Angeles: 20th Century Fox, 1973).

46 *Legally Blonde* (Beverly Hills: MGM, 2001).

47 *Ibid*.

48 Roscoe Pound, "Law in Books and Law in Action" (1910) 44:1 Am L Rev 12.

49 *How to Get Away with Murder* (Burbank: ABC Studios, 2014).

50 See also *Suits* (Universal City, California: Universal Content Productions, 2011), in which attendance at law school is generally represented as a formality (one with which the protagonist has dispensed), with excellence in lawyering attributed primarily to moxie, swagger, and ability to bluff.

first place; that unstated biases may shape legal actors' actions and decisions; that the legal system predictably serves the interests of well-resourced parties; that emotional appeals are key to success as a litigator; or any other number of non-formalist insights relevant to legal practice and analysis. But we generally share a sense that without a focus on doctrine in the first-year law school curriculum, we risk leaving our students without the distinctive tools of legal analysis: the ability to interpret, apply, and assess legal doctrine as expressed through judicial decisions.[51] Even if, for example, I want my students to understand that the Constitution of Canada expresses political compromises, power relationships, and imperfect and shifting social agreements, I also feel that I will not have done my job if they leave my first-year Constitutional Law course without an understanding that the federal government has authority over general trade affecting the country as a whole, that the provinces have authority over local matters of contract, and how to use a particular body of cases to assess the difference.[52] The less-and-less formalist pop cultural representations of legal education seem to share this view. Even Elle Woods of *Legally Blonde* needed to hit the books and learn the case law in order to succeed in law school.[53]

51 See Priel, "Legal Realist Skepticism", *supra* note 2 at 76: "A century after the realists ... legal doctrine is still very much alive. Walk into most first-year classrooms and what you will observe is students learning legal concepts like "due care," "expectation damages," "adverse possession," along with numerous multiple-prong tests. Learning to think like a lawyer is, apparently, still learning legal doctrine and legal reasoning."

52 See e.g. *Labatt Breweries of Canada Ltd v Attorney General of Canada* (1979), 1979 CanLII 190 (SCC); *General Motors of Canada Ltd v City National Leasing*, 1989 CanLII 133 (SCC).

53 *Supra* note 46 (see especially her early eviction from class after failing to prepare a brief of *Gordon v Steele*, 376 F Supp 575 (WD Pa 1974), and subsequent study montage featuring Elle immersing herself in casebooks before emerging as a star student and advocate); see also *Suits*, *supra* note 50, in which the protagonist's lack of formal legal training is offset through the plot device of a photographic memory, which allows him to meet and surpass other lawyers' knowledge of statutes and case law. *How to Get Away with Murder*, *supra* note 49, seems to be the exception, with case law being completely irrelevant to the legal training depicted, and the star professor specifically telling her students that she "will not be teaching [them] how to analyze the law or theorize about it". But this aspect of the show has been identified by commentators as something the show "gets wrong" about legal education—a classic Shondaland "laugh in the face of reality". See Clover Hope, "Objection: A Real Lawyer Fact Checks *How to Get Away with Murder*", *Jezebel* (10 October 2014), online: <jezebel.com/objection-a-real-lawyer-fact-checks-how-to-get-away-wi-1644750449>.

The formalists, then, were onto something that remains important to legal education: law does have a force, a language, an internal logic, even if, *contra* some formalists, that force, that language, that internal logic, exists in contingent relation to social factors.[54] It is the ability to work with and within this force, this language, and this logic that constitutes, in substantial part, the professional training of lawyers. This remains true even as many of the best legal professionals also learn to deploy this training in relation to other competencies: as trauma-informed lawyers, as negotiators, as advocates, as legislators, as scholars, as journalists, and more.

The case method seems to have survived formalism because it works as a way to learn legal language and culture *even if* legal language and culture are understood in non-formalist terms as specific sites of social engagement, not as products of "immanent rationality".[55] Learning specific cases, how they fit together, and how to argue from precedent can be taught not as matters of pure logic, but as a cultural and linguistic practice in which our students can strive to achieve fluency.[56] It need not be, as Langdell supposed, that there are determinate scientific outcomes to the infinite legal problems that might arise from the "ever-tangled skein of human affairs."[57] Instead, our students may be taught that there is a grammar and vocabulary that they must learn to make themselves and their causes legible in the specific and contingent cultural spaces of law. Indeed, even the work of expanding or revising the language and culture of lawyering can be served by fluency in doctrinal law.[58] Law does not need to be presented as *better* than other modes of social engagement; it can rather be presented as *distinctive* in ways that can be better appreciated through legal professional training.

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54 Note that some formalists are attentive to local and temporal context. See e.g. Paul Troop, "Why Legal Formalism Is Not a Stupid Thing" (2018) 31:4 Ratio Juris 428 at 429-430, 434 (identifying "doctrinal formalism" as a strand of formalist thinking responsive to particularities of time and place and "rule formalism" as a strand that "sits uncomfortably with...the changing nature of the doctrine"). In Troop's view, realism and formalism are supplemented by a third category of "natural lawyers" who "believ[e] that values are always consistent through time and regardless of society." For Troop, natural lawyers sit at the extreme end of a "spectrum" of objectivist thinking, followed by formalists, then realists (who reject objectivist accounts of law, and are highly attentive to local and even individual variation): *ibid* at 437. It seems to me that it is quite possible to view law as both scientific (per the formalist) and grounded in an objective account of natural law that resists attention to local conditions. *Cf* George Brencher, IV, "Formalism, Positivism, and Natural Law in Ernest Weinrib's Tort Theory: Will the Real Earnest Weinrib Please Come Forward" (1992) 42:3 UTLJ 318 (identifying both formalist and natural law commitments in Weinrib's work, but proposing that there is a tension between them).

55 Weinrib, "Legal Formalism", *supra* note 15.

56 See Elizabeth Mertz, *The Language of Law School: Learning to 'Think Like a Lawyer'* (2007) at 3–4: "[s]ome would associate thinking like a lawyer with superior analytic skills in a neutral sense; I would instead characterize the acquisition of 'lawyerly thinking' as an initiation into a particular linguistic and textual tradition found in our society."

57 Langdell, *supra* note 29 at vi.

58 Consider, for example, the role that legal professionals have played in expanding the courts' ability to receive and understand law and evidence relied upon by Indigenous litigants. See e.g. Val Napoleon, "*Delgamuukw*: A Legal Straightjacket for Oral Histories" (2005) 20:2 Can JL & Soc 123.

V. Haunted by the Ghost of Law's Supposed Neutrality

The trouble is that this presentation of law—as distinctive but not better—can be very difficult to achieve in the law school classroom. It is not always easy to convey to students that a primary aim of the course is to learn a particular mode of thinking and a particular body of knowledge without also imparting the sense that this is the best or only meaningful way of thinking and knowing. The suggestion, even obliquely made, that an observation is irrelevant *to doctrinal analysis* often feels to students like a suggestion that the observation is irrelevant *tout court*. Professor Kingsfield's implication that non-doctrinal thinking is "mush" thus continues to haunt our classrooms, even when expressed in the only slightly less value-laden terms of the formalist: that such thinking is "superfluous" to legal analysis.[59]

The consequences of this haunting are well-documented, especially in the scholarship of "outsider" scholars reflecting on the law school experience.[60] Perhaps the definitive account was offered by Mari Matsuda in a 1987 speech delivered at the Yale Law School Conference on Women of Color and the Law, subsequently reprinted as a four-page article that has become iconic despite its brevity.[61] In vivid detail, Matsuda portrays the experience of a first-year law student with "women-of-color consciousness", sitting in a classroom listening to a professor who "sees his job—and I use the male pronoun deliberately—as training the students out of the muddleheaded world where everything is relevant and into the lawyer's world where the few critical facts prevail."[62] Matsuda describes the student's experience in class, learning about a *Miranda* warning issue in a sexual assault case,[63] thinking about myriad questions deemed "extraneous to standard legal discourse": questions about the race of the victim, the accused, and the arresting officer; about police violence in the city where the events unfolded; about how this moment in class feels to those in the room who had experienced sexual violence themselves.[64] The student, Matsuda explains, develops a "multiple consciousness", able to view the law from within and from without, "tapping...a consciousness from beyond and bringing it back to the place where most people stand."[65] Matsuda observes that any skilled legal advocate must be able to "detach law and to see it as a system that makes sense only from a particular viewpoint"—to "operate within that view, and then shift out of it for purposes of critique, analysis, and strategy."[66] But outsider perspectives, Matsuda insists, offer something more.

59 Weinrib, "Legal Formalism", *supra* note 15 at 965.

60 The term "outsider" in reference to legal education, scholarship, and practice, is developed by Mari J Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22:2 Harv CR-CLL Rev 323; Mari J Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87:8 Mich L Rev 2320.

61 Mari J Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11:1 Women's Rts L Rep 7 [Matsuda, "When the First Quail Calls"].

62 *Ibid* at 7.

63 *Miranda v Arizona*, 384 US 436 (1966).

64 Matsuda, "When the First Quail Calls", *supra* note 61 at 7–8.

65 *Ibid* at 8.

66 *Ibid* at 9.

They can not only move in and out of law's internal perspective, but bring to bear insights that stand to "assist in the fundamental inquiries of jurisprudence: what is justice and what does law have to do with it?"[67]

The process is not easy on the outsider in Matsuda's telling. Students engaged in this kind of "constant shifting of consciousness" risk feeling "mad" or "crazy", finding stability through engagement with supportive communities who see the world as they do.[68] While Matsuda's discussion draws on a hypothetical or composite student perspective, the agonized experience she attributes to students with multiple consciousness is a recurrent theme in the first-person accounts of law students who might fit Matsuda's "outsider" label. Accounts of such students persistently describe feelings of alienation—a sense that who they are and what they experience had no place in their law school classrooms. Leading critical race theorist Patricia Williams, for example, describes her experience as a law student as characterized by "a sense of being invisible", adding that "[t]he school created a dense atmosphere that muted my voice to inaudibility."[69] Kim Brooks and Debra Parkes explain that queer law students often feel compelled "to hang their personal skins on hooks outside the door of the law school to be collected (if remembered at all) on the way out."[70] And Aaron Mills reports that, as an Anishinaabe law student, he felt that "my legal education presumed a common, foundational set of understandings between it and I that proved absent"—in part because Canadian liberal legalism was conveyed by his teachers as universal and presumed rather than as particular and contested.[71] Mills' insight dovetails with a recurrent theme in outsider scholarship: that representations of law as neutral, universal, or valueless often serve to alienate students—particularly those students whose value orientations diverge from those of the courts.[72] The risk posed by the case method, when presented as universal or based on uncontested values, is that many students will feel "abandoned or forgotten" in our classrooms.[73]

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67 *Ibid* at 8.

68 *Ibid.*

69 Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991) at 55.

70 Kim Brooks & Debra Parkes, "Queering Legal Education: A Project of Theoretical Discovery" (2004) 27 Harv Women's LJ 89 at 90.

71 Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 853: "Across all my first-year courses there was a disconnect in context never breached, and that couldn't have been breached, for I wasn't taught 'this is the law *within Canada's liberal constitutional context*.' I was taught 'this is the law in Canada.' I didn't even understand that the Canadian law I was learning *had* a world beneath it, much less a liberal world." [emphasis in original]

72 See e.g. Kimberlé Williams Crenshaw, "Toward a Race-Conscious Pedagogy in Legal Education" (1988) 11:1 Nat'l Black LJ 1 at 2–3; Brooks & Parkes, *supra* note 70 at 108–9 (under heading "Rejecting the Myth of Neutrality"); see also Mertz, *supra* note 56 at 6.

73 Brooks & Parkes, *supra* note 70 at 133.

VI. Teaching the Strangeness of Law

Almost all law students enter law school with a sense that there is something *strange* about law—that they have somehow landed in a new place, in which they are not yet fluent in the local dialect or customs. (Of course, this sense of law's strangeness varies dramatically among students depending on their personal, familial, and educational experiences.) As first year progresses, however, and the pressure to learn and inhabit the logic of legal doctrine grows, students often come to feel that this sense of law's strangeness is a sign of their own inadequacy, or the incompleteness of their transformation into "legal professionals". Instead of viewing their sense of law's strangeness as an *additional competency*, they come to perceive it as a *failure to become* what law schools want them to be.

A key challenge for law professors is, I think, to teach the internal aspects of law (case law and precedential reasoning) as a distinct skill set, without dismissing our students' other skills and competencies as "mush". The challenge is to teach law fully, completely, and immersively, while maintaining our students' initial understanding that there is, in fact, something strange about it – and that awareness of this strangeness is not something to be stamped out. Teaching law as strange gives students the space to be engaged without being consumed, to ask questions about foundational assumptions, and to hold on to their own lives and experiences as relevant parts of the legal professionals they might become.[74]

I propose here a handful of techniques that I believe can be used to help students feel that they are learning to *do* something new in law school, not to kill off other parts of themselves or the ways they see the world. To accomplish this, I suggest that instructors can employ educational techniques that help students develop fluency in legal doctrine and culture while maintaining the sense that, when they do so, they inhabit a specific, limited, and idiosyncratic world. My focus here is on pedagogy in the first year where, I suggest, these lessons sit in uneasy relationship with the imperative to help our students gain fluency in legal language and culture through the case method. In short: the tension is to ensure that they absorb it, but that it does not threaten to absorb *them*.

1. Teach with Ambitious Intervener Factums

One way to impress upon students the contingent and debated nature of legal principles is to include ambitious intervener factums alongside the leading cases for which they were submitted.[75] By "ambitious", I mean factums that seek to bridge the form and content of existing doctrine to objectives, communicative modes, and value orientations that lie far from those prevailing in the

74 I developed this framework for teaching "law as strange" while serving as an interview subject for Audrey Fried in connection with her own research on legal pedagogy. My thanks to Audrey for the thoughtful questions that prompted my thinking on this point. See Audrey Fried, "Shifting Perspectives: The Potential of Rich, Ill-Structured Problems in Legal Education" (2024) The Law Teacher 1.

75 This particular strategy may be best suited to constitutional law, where intervenors are more common. My thanks to Angela Lee for raising this point.

Supreme Court of Canada (SCC). Engaging with these materials can help students to view existing legal doctrine as a particular discursive site that can be expanded and reoriented using its own internal grammar.

For example, I begin my Constitutional Law course with both the classically-assigned introductory case, *Reference re Secession of Quebec*,[76] and the less-often assigned intervention of the Grand Council of the Crees (Eeyou Estchee).[77] The *Secession Reference* is generally assigned early in the Constitutional Law course curriculum because it includes a brief account of the enactment histories of key Canadian constitutional texts and an overview of the SCC's understanding of the values and principles animating Canada's constitutional order.[78] Assigned on its own, students might easily be left with the impression that the SCC's articulation of the values animating the constitutional order is definitive and that critiques of the SCC's self-image are unwelcome. To be sure, the decision acknowledges that the reference question gave rise to different views as to what result these constitutional values and histories might demand; but the SCC's portrait of the legal order as founded on a widely agreed canon of good and just principles might appear uncontested to students assigned the Court's reasons alone.[79]

Assigning this reference case together with the intervention of the Grand Council of the Crees disrupts this value narrative, identifying deeply rooted disagreements as to the nature of the Canadian state, the meaning of its underlying principles, and the history giving rise to the *Secession Reference*. For example, the intervention contests the Court's implication that Indigenous peoples are objects of Canada's commitment to "protection of minorities"[80] rather than jurisdictional partners for whom federalism is the appropriate lens through which to understand constitutional

76 1998 CanLII 793 (SCC) [*Secession Reference*].

77 *Ibid* (Factum, Grand Council of the Crees (Eeyou Estchee) – Reply to Factum of *Amicus Curiae*) [Grand Council of the Crees Factum].

78 This case also represents a major moment of constitutional crisis and redefinition within the living memory of many constitutional law professors. See Ronalda Murphy, "Same-Sex Marriage and the Same Old Constitution" (2005) 14:3 Const Forum Const 21 at 26 (discussing her reasons for starting her Constitutional Law course with the *Secession Reference*, describing the case as "evocative and stirring" and "the Court at its most passionate, elegant, and elaborate", as demonstrating the impact of good lawyering, and as furnishing helpful metaphors upon which students can build their understanding of key concepts).

79 For an extended argument that the Canadian constitution includes "ignominious" unwritten constitutional principles, see Jessica Eisen, "Unwritten Constitutional Principles and the More-Than-Human World", Review of Constitutional Studies [forthcoming in 2025].

80 *Secession Reference*, *supra* note 76 at paras 79–82.

relationships.[81] Moreover, the intervener factum provides a contrast to the SCC's historical narrative of the Canadian state as a fundamentally good and just enterprise, working itself ever-purer over time.[82] For the Grand Council of the Crees, the history of Quebec's place in confederation is one of unjust disregard for and dispossession of Indigenous peoples and governance.[83] Instead of viewing Canada's constitutional history as furnishing a glorious tradition of hallowed principles that might guide the Court in the current moment, the Grand Council of the Crees presents Canada's history as evincing a "colonial approach" that "must not be repeated" in the instant case.[84]

Notably, these arguments are not offered "outside the courtroom door",[85] but in the form of a legal submission, adopting the form, language, and principles valued by the Court itself. Reading this submission, students can appreciate at the beginning of their legal studies that an understanding of the Court's own language and narrative can support even deep critique and engagement from perspectives that view the Court's approach as strange, alien, or misguided. This particular example of an ambitious factum has an additional benefit in conveying the flexibility and social contingency of law: the Grand Council of the Crees' view of Indigenous peoples as partners in federalism has gained significant traction within Canadian state law.[86] This reality means that instructors may present this

81 Grand Council of the Crees Factum, *supra* note 77 at paras 39–40: "Aboriginal peoples are constituent elements of the 'federal principle' which the Constitution of Canada enshrines.... Consequently, any act of unilateral secession by Quebec authorities ... would be a clear contravention of the federal principle. In particular, the balance of powers among federal, provincial and Aboriginal governments and peoples would be significantly upended without authority or consent." For a criticism that the SCC's reasons in the *Secession Reference* "present [Indigenous peoples] ... as a minority without explanation," see Robert Hamilton & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ottawa L Rev 403 at 433.

82 On the more general trope that law "works itself pure", see Christoph Bezemek, "'The Law Works Itself Pure': Reflections on a Cherished Trope" in Nicoletta Bersier, Christoph Bezemek & Frederick Schauer, eds, *Common Law – Civil Law: The Great Divide?* (Cham, Switzerland: Springer, 2022) 17.

83 See e.g. Grand Council of the Crees Factum, *supra* note 77 at para 31: "The northern two-thirds of the province of Quebec were added through the 1898 and 1912 boundaries extension acts, without the knowledge or consent of the Crees, Inuit and other Aboriginal peoples in these territories ..."

84 *Ibid*.

85 See Matsuda, "When the First Quail Calls", *supra* note 61 at 8: "There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.' There are times to stand inside the courtroom and say 'this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.' Sometimes, as Angela Davis did, there is a need to make both speeches in one day."

86 See e.g. *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 262 (affirming that "Indigenous governments...are a foundational piece of Canada's constitutional fabric"); Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Ottawa: Department of Justice, 2018) at 9, online: <justice.gc.ca/eng/csj-sjc/principles.pdf> ("Recognition of the inherent jurisdiction and legal orders of Indigenous nations is...the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws"). See also recent literature on Treaty Federalism, e.g. Michael Asch, "*UNDRIP*, Treaty Federalism, and Self-Determination" (2019) 24:1 Rev Const Stud 1.

material not merely as an irredeemably "off-the-wall" interpretation of Canadian law, but as a creative and ambitious use of legal language and principle that has, over time, materially impacted the Court's own understanding of the contexts and principles with which it is working.[87]

When presenting the Grand Council of the Crees intervention alongside the SCC's decision in the *Secession Reference*, this dynamic can be flagged for students. In teaching this material at the beginning of my Constitutional Law course, I note for students that the *Secession Reference* was decided in 1998, and that the divergent views expressed by the Court and the Grand Council of the Crees have continued to be sites of engagement and transformation in Canadian state law. I then explain that by the end of the course the students should be in a position to assess these divergent views in legal terms—first by deepening our understanding of federalism (unit 1), then by deepening our understanding of rights protections (unit 2), and finally by deepening our understanding of the place of Indigenous peoples in Canadian constitutionalism (unit 3). We return to this question throughout the year as we progress through the course material, with students encouraged at the end of the course to reflect on the extent to which the Court today would still describe the constitutional place of Indigenous peoples the way they did in the 1998 *Secession Reference*, and whether and how any changes since then might matter for meaningful exercise of Indigenous peoples' jurisdiction. The inclusion of this ambitious intervener factum at the beginning of the course, and its use as a touchstone throughout the year, allows students to read and understand the SCC's description of Canada's legal order as merely one angle of vision on the polity described. To be sure, it is an important and complex angle of vision that the class will spend the year trying to understand and predict, but not at the expense of attention to its partiality.

2. Acknowledge and Name Diverse Reactions to Materials

As instructors, it is crucial to keep in mind that the materials we are working with will hit our students in many different ways. It is also important for us to help our students to locate their own reactions and to have some sense of the ways that others may be reacting as well. This skill set – rendering both one's own reactions and those of others recognizable and articulable – is supported by teaching approaches that underscore the strangeness of law.

By locating doctrinal law as a way of thinking and knowing that can be experienced as strange, instructors authorize a wide array of reactions to the cases studied. Sometimes, the students' different experiences with the assigned cases will come out organically through class discussion. Other times, it is incumbent upon us as teachers to identify for the class moments in which materials discussed are likely to give rise to a range of reactions in the classroom. This can dovetail with "trigger warnings" or "content warnings" when material is expected to be painful or traumatic for some students.[88] In order to maintain an eye on the strangeness of law, though, these warnings should not

87 For a discussion of how "off-the-wall" legal interpretations may come to be "on-the-wall" with changing social and political conditions, see Jack M Balkin, "Agreements with Hell and Other Objects of Our Faith" (1997) 65 Fordham L Rev 1703.

88 See e.g. Kim D Chanbonpin, "Crisis and Trigger Warnings: Reflections on Legal Education and the Social Value of the Law" (2015) 90 Chi-Kent L Rev 615 at 627 (arguing that "[t]rigger warnings … directly challenge myths of neutrality and objectivity").

only serve to warn students who might find the material challenging, but also to help *all* students to maintain an awareness of the many ways in which legal materials are perceived. The aim should be to suggest that it is the law that is strange and particular: a contrast to the Kingsfieldian implication that it is the impacted students who are unusual or out-of-place or still-too-mush-like when their intuitions, affective responses, or intellectual instincts differ from those expressed in the case law.[89]

Cases concerning sex work, sexual violence, and reproductive rights are paradigmatic examples of legal materials that risk making our students feel alienated from their learning environment in law school.[90] In teaching these cases, instructors can take time in class to acknowledge the breadth of reactions students may have had reading the assigned materials. When teaching *Bedford*,[91] for example, an instructor might take a moment to note that, for some students, this case will provoke thinking about when and why courts may depart from *stare decisis*, while others will find that it feels alienating to hear discussion of such doctrinal questions in a case that, to them, can only be understood as concerning sex and violence. When teaching *Morgentaler*, an instructor might draw their students into a discussion about the strangeness of a majority decision on the issue of abortion restrictions that sidesteps discussions of either sex equality or fetal rights—terms which seem to dominate popular understandings of the issues raised by such restrictions.[92] In both cases, the instructor might add that some students will approach these materials from the perspective that the criminal law tends to make activities safer, while others perceive the presence of law enforcement as dangerous or frightening.[93]

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89 The inclusion of materials that might feel threatening to some, and the acknowledgment of that threat, arguably resonates with calls to build classrooms that are "brave spaces" rather than "safe spaces". See e.g. Brian Arao & Kristi Clemens, "From Safe Spaces to Brave Spaces: A New Way to Frame Dialogue Around Diversity and Social Justice" in Lisa M Landreman, ed, *The Art of Effective Facilitation* (Sterling, VA: Stylus Publishing, 2013) 135. My thanks to Angela Lee for raising this connection.

90 See e.g. *supra* notes 60–68 and accompanying text. See also Chanbonpin, *supra* note 88 at 628–29.

91 *Canada (Attorney General) v Bedford*, 2013 SCC 72.

92 See *R v Morgentaler*, [1988] 1 SCR 30 at 74-76, Dickson CJ, observing that the impugned abortion restriction had the constitutionally relevant effect of requiring women to carry pregnancies to term irrespective of their own "priorities and aspirations", but not linking this observation to histories or conditions of sex inequality, and offering only glancing references to the interests of fetuses while "expressly refrain[ing] from any assessment of "foetal rights". Notably, the concurring reasons of Wilson J focus squarely on questions of sex equality: "women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being." *Ibid* per Wilson J at 172. See also Sheilah L Martin, "Morgentaler v. The Queen in the Supreme Court of Canada" (1987) 2:2 Can J Women & L 422 at 428.

93 I have observed my colleague Hadley Friedland deploying an excellent technique in this vein. In a large class setting, she has asked students, without raising their hands or identifying themselves, to reflect on whether they grew up thinking that police were safe and trusted, or whether they were raised to see police as dangerous and threatening. Even without students raising their hands, all are made aware of a deep division in visceral reaction to law enforcement that likely shapes diverse understandings of policing in the cases studied.

The key to centering the strangeness of law is to emphasize that each of these perspectives might be articulable in doctrinal terms, or alternatively that doctrine may be criticized for its structural omission of these kinds of knowledges and perspectives. Mastery of legal doctrine does not foreclose these points of view, but gives students the skills needed to make their perspectives legible within a particular discursive space. After identifying some anticipated reactions to the material, the instructor might put to the students: "As you encounter the Supreme Court of Canada's treatment of this case, think about what *you* think is important in this context, and whether the Court's framework is making room (or making enough room) for what you think needs to be included in this conversation. This will help you not only to think through whether you approve of the Court's approach, but will also help you test your understanding of the structure of the governing doctrine, where its points of flexibility might be, and what it excludes or minimizes." For students able to take up this invitation, their doctrinal competence will deepen. For those whose facility with doctrine is not yet at a level to fully engage the inquiry, the message may still be received that doctrine should not be taken as an exhaustive expression of the values and interests relevant to questions raised within legal proceedings. For all students, the prompt conveys that doctrinal learning can ultimately be linked to other forms of knowledge to generate critical insights about the law.

3. Brief Comparative Interludes

First-year law students are often eager to focus on the rules and cases that will be tested on their issue spotter exams. They often view discussion of any other topic as a distraction or a waste of time.[94] And yet, brief comparative interludes can not only support student recall of the materials in the jurisdiction of instruction, but can also help to affirm that law is, at least in part, driven by local social and political dynamics. Some law school programs include comparative, multijural, or transsystemic approaches as part of their core curriculum. Where a course's core aims include building basic fluency in the methods of both common law and civil law,[95] or both Canadian state and Anishinaabe constitutional law,[96] the risk of students absorbing a monolithic or hegemonic view of law are considerably lessened. For those of us teaching in most Canadian common law schools, however, this risk remains, and comparative interludes can help to remind our students that they can aspire to fluency in Canadian law without presuming its contours to be a universal or logical inevitability.

These comparative notes will likely be kept necessarily brief in a first-year course, or otherwise risk losing student attention and focus on the lesson. But it does not take long to note, when introducing federalism, that there are such things as "unitary" states where all final authority is held in the central government, and that both the United Kingdom and France (home to Canada's most widely-recognized

94 On the time pressures facing law students, see *below* note 112.

95 See Julie Bédard, "Transsystemic Teaching of Law at McGill: 'Radical Changes, Old and New Hats'" (2001) 27:1 Queen's LJ 237.

96 University of Victoria, "JD/JID Joint Degree Program Admissions FAQ" (last visited 30 August 2024), online: <uvic.ca/law/admissions/jidadmissions/jidadmissionfaqs/index.php>; see also University of Victoria, "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID)" (last visited 4 November 2024), online: <uvic.ca/law/admissions/jidadmissions/index.php>.

successor constitutions) are constitutionally unitary states where all devolution of power to regional authorities has taken place further to formal direction from the central government.[97] Similarly, when introducing the Canadian federal government's authority over the criminal law, instructors may briefly observe that this is not a necessary arrangement and that in the US (another influential jurisdiction in Canadian law and politics), a different choice was made to put most criminal law in the hands of the states.[98] When teaching the Rights of the Aboriginal Peoples of Canada under section 35 of the *Constitution Act, 1982*[99] and when teaching the structure of the Canadian court system, we can tell our students that Bolivia has chosen to explicitly recognize Indigenous justice systems operative alongside state courts.[100] And in the context of teaching Canada's equality protection, we might mention that section 15(2) of the *Canadian Charter of Rights and Freedoms*[101] was included specifically to exclude an interpretation of equality rights that prevails in the US, whereby affirmative action programs are subject to strict judicial scrutiny.[102]

Studied comparativists may bristle at this suggestion of using scattered and unconnected references as points of interjurisdictional comparison. As a research methodology, or even as an approach to legal argument, this type of comparative "cherry-picking" has been roundly criticized.[103] Professors of Canadian law have spent years developing the expertise necessary to speak authoritatively about their own legal context, and few of us have any similar claim to expertise in even one other jurisdiction.[104] Moreover, simple comparisons risk omitting key aspects of the structure,

97 European Committee of the Regions, "Division of Powers - United Kingdom" (last visited 30 August 2024), online: <portal.cor.europa.eu/divisionpowers/Pages/UK-intro.aspx>; European Committee of the Regions, "Division of Powers - France" (last visited 30 August 2024), online: <portal.cor.europa.eu/divisionpowers/Pages/France-Introduction.aspx>.

98 US Const amend X.

99 *Constitution Act, 1982*, being Schedule B to *the Canada Act 1982* (UK), 1982, c 11.

100 *Constitution of the Plurinational State of Bolivia*, Art 192(III). See also Benjamen Franklen Gussen, "A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples" (2017) 40:3 Melbourne U L Rev 867 at 898.

101 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

102 See David Lepofsky & Jerome Bickenbach, "Equality Rights and the Physically Handicapped" in Anne F Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt, ON: Carswell, 1985) 323 at 354. For a contemporary example of the US jurisprudence on this point (further restricting possibilities for affirmative action even beyond those emerging in the US jurisprudence at the time of the enactment of the Canadian *Charter*), see *Students for Fair Admissions v Harvard*, 600 US 181 (2023).

103 For an extended discussion of comparative methods, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford, UK: Oxford University Press, 2014) at ch 6.

104 A related concern is the fact that available constitutional materials tend to come from a handful of "prestigious" and/or English-speaking jurisdictions. See generally Philipp Dann, Michael Riegner & Maxim Bönnemann, "The Southern Turn in Comparative Constitutional Law: An Introduction" in Philipp Dann, Michael Riegner & Maxim Bönnemann, eds, *The Global South and Comparative Constitutional Law* (Oxford, UK: Oxford University Press, 2020) 1. Instructors employing comparative fragments should be mindful to ensure that they do not reproduce the bias of inattention to most Global South jurisdictions in comparative constitutional literature.

values, and history of other jurisdictions that might be necessary to fully understand or evaluate the comparison suggested.[105] In this case, however, the suggested use of comparative fragments is "non-normative," in the sense that it does not aim to use other jurisdictions' (partial, selective) experience as precedent or exemplar of what Canadian courts ought to do.[106] Instead, the objective is to keep in students' view the reality that the legal doctrines they are learning are chosen, provisional, and particular.[107] Provided that the instructor notes the limitations of superficial comparisons, this kind of brief comparative interlude can help stave off the sense that legal doctrine is universal or determinate in a way that makes it somehow "better" than other intellectual processes.

4. "Teaching to the Test": Working with Practice Problems

Another way to affirm that doctrinal law represents a strange or distinct way of thinking through problems is to explicitly describe the examination as a skills-assessment, focus student learning on the development of the particular set of skills to be tested, and provide opportunities for practice. Some readers will find these suggestions so obvious that they are not worth stating, let alone reframing as an aspect of teaching law as strange: conveying course objectives to students, aligning course assessment with those objectives, and providing opportunities for formative assessment are basic pedagogical mainstays.[108] And yet, law school classrooms are still too-often characterized by "sage on the stage" (or "transmittal model")[109] approaches, with instructors focusing class time on conveying content to students rather than engaging students in active skills development.[110]

The phrase "teaching to the test" has earned a strong negative connotation, particularly insofar as it has been deployed in American K-12 education in respect of standardized tests over which

105 See Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37:1 Mod L Rev 1.

106 Han-Ru Zhou, "A Contextual Defence of 'Comparative Constitutional Common Law'" (2014) 12:4 ICON 1034 at 1038.

107 See e.g. Günther Frankenberg's proposed use of "distancing/differencing" in comparative work in order to "decenter" one's own "worldview and to consciously establish subjectivity and context" and take into account "the observer's perspective": Günther Frankenberg, *Comparative Law as Critique* (Cheltenham, UK: Edward Elgar Publishing, 2016) at 42.

108 See e.g. Queen's University Centre for Teaching and Learning, "Essential Principles of Assessment" in "Assignments and Exams" (last visited 21 November 2024), online: <queensu.ca/ctl/resources/graduate-student-post-doctoral-and-ta/teaching-assistant-toolkit/assignments-and-exams#TA-Toolkit-Essential-Principles-of-Assessment> ("Assessments should, above all, be designed with intended learning outcomes in mind, and should be linked with clear guidance and communication to students about learning and expectations.")

109 Alison King, "From Sage on the Stage to Guide on the Side" (1993) 41:1 College Teaching 30.

110 See Debra Moss Vollweiler, "Return of the Sage (on the Stage)?" Southwestern U L Rev [forthcoming], online <ssrn.com/abstract=4541855> at 3 (observing that "[t]here is no question that traditionally, the sage has been the focus point in legal education for a long time, particularly in doctrinal classes" and arguing that this traditional orientation may be shifting in view of the COVID-19 pandemic and attendant temporary shift to all-online learning.)

teachers have little or no control.[111] In the law school context, however, instructors generally author their own exam materials. Given that our students are under tremendous pressure to use their time efficiently while in law school,[112] it is reasonable that they will focus their attention on materials that they see as necessary to successful performance on their assignments and exams. Many law teachers express frustration when their students ask, "will this be on the test?", or ask granular questions about how they will be examined on the materials in class. I do not think it is fair to our students to be annoyed by these questions. Instead, we should craft examinations that *actually test the skills we want our students to acquire*, and *then teach to the test* that we will be employing.

In my first few years as a law teacher, I included an "essay" question on my constitutional law examinations, requiring students to reflect on course themes. I included this question precisely because I did not want my students to believe that the sorts of doctrinal questions that arise on issue-spotter examinations are all that matters.[113] I wanted my students to reflect more deeply on the assumptions and implications of the legal doctrine. Ultimately, however, I came to view this exam question as somewhat unfair. Given the breadth of doctrinal content covered in the course, I did not believe that I was actually teaching my students how to write a thoughtful essay answer. In the result, students succeeded or struggled in their essay answers based on skills in essay-writing that they had when entering the course.

My first-year Constitutional Law course now only examines students on issue-spotter questions. This approach to law school examination has been criticized as giving undue attention to doctrine, failing to reward students who have strong non-doctrinal analyses to offer, and generally falling into the formalist trap of dividing the world of thinking into *doctrinal vs mush*.[114] But I have come to the view that, properly framed, doctrinal examinations paired with "teaching to the test" can create a "growth mindset" in the classroom without falling into this formalist trap.[115] Conveying a "growth mindset", as distinguished from a "fixed" mindset, encourages students to view skills as developed through work and practice, rather than as "innate gifts".[116] Where legal thinking is presented as a

111 See e.g. "What Do School Tests Measure?", *The New York Times* (3 August 2009), online: <archive.nytimes.com/roomfordebate.blogs.nytimes.com/2009/08/03/what-do-school-tests-measure/>.

112 The time pressures faced by first-year law students are well documented and often identified as serious obstacles to both learning and wellbeing. Daniel N McIntosh et al, "Stress and Health in First-Year Law Students: Women Fare Worse" (1994) 24:16 J Applied Social Psychology 1474; Leslie G Espinoza, "Constructing a Professional Ethic: Law School Lessons and Lesions" (1989) 4:2 Berkeley Women's LJ 215 at 218; Stephen C Halpern, "On the Politics and Pathology of Legal Education (Or Whatever Happened to That Blindfolded Lady with the Scales)" (1982) 32:3 J Leg Educ 383 at 388. These time pressures and their associated impacts deserve attention and reform. In addition, they presently constitute a reality which instructors must keep in mind as they make pedagogical choices.

113 Friedman & Goldberg, *supra* note 23.

114 See Philip C Kissam, "Law School Examinations" (1989) 42:2 Van L Rev 433.

115 Carol S Dweck, *Mindset: The New Psychology of Success* (New York: Ballantine Books, 2007).

116 Carol Dweck, "What Having a 'Growth Mindset' Actually Means", *Harvard Business Review* (13 January 2016), online: <hbr.org/2016/01/what-having-a-growth-mindset-actually-means>.

"strange" and distinct form of thinking, students can interpret their own distance from the Court's language and values as a separate matter from the skills development that they must undertake as law students.

To instill this growth mindset, it is critical that students encounter practice problems and exam-style issue spotter questions *before* they are tested on the material for credit.[117] Transparent discussion of the issue spotter format, the type of questions students may encounter, and the elements of a successful answer provide opportunities for instructors to reinforce that what students are learning together in class is a specific and discrete skill set. Rather than conveying a formalist vision of legal rules as logical or universal—with some students understanding their distance from this logic or universality as a durable failing—work with practice problems can help students to see these questions as representing a particular and partial skill set.

5. Be Ready to Resituate "Off-Track" Questions and Comments

To return to Professor Weinrib's torts class and my unsolicited classroom remarks on *Miller v Jackson*: what, as professors committed to nourishing our students' doctrinal competency, are we to do with remarks like these from our students? Professor Weinrib had entered the classroom that day ready to help his students understand a particular line of cases in tort law, and to help us inch toward the particular competencies of internal legal analysis: how to read cases, understand their internal logic in relation to each other, and project how they might be used in future cases. And here I was, not understanding his aims for the class, certainly not yet having the legal analytic skills in question, and offering a remark that didn't really serve these ends. I believe as instructors we have all had moments like this—where a comment offered in class feels 'off-track' with respect to our lesson plans, even if the comment expresses insights that are useful or important in some broader sense.

I call these comments off-track not because they are confused or uninteresting, but because they merely call the listener down a different path than that which might have been set by a lesson plan aimed at doctrinal instruction. One reaction might be to suggest that any instruction in case law should make room for social analysis of the law: that this should be part of the lesson's track, and it is the instructor's failure if they have neglected to create space for—and reward—student inquiry along these lines. I think that this is persuasive as a way of thinking about the course and its instructional aims *as a whole*. However, I think that even a socially engaged and critical approach to 1L instruction must also have some (lots) of time dedicated to doctrinal work: reading cases, connecting them to each other, and developing the skills of applying them to a future case. It is in the context of this doctrinal instruction, and its associated lesson plans, that a reflection on the social or political questions germane to a case might (depending on their framing) appear off-track. This is not a failing of the student, who is still learning the contours of doctrinal thinking; nor is it a failing of the instructor, who can and should include substantial, dedicated instructional time to doctrinal learning. And yet, these moments carry a serious risk of students experiencing them through the mind-of-mush framework—a risk that our efforts to redirect to doctrinal lessons will land on their

117 See Jamie R Abrams, *Inclusive Socratic Teaching: Why Law Schools Need It and How to Achieve It* (Oakland: University of California Press, 2024) at 117.

ears as a signal that they must "hang their personal skins on hooks outside the door of the law school to be collected (if remembered at all) on the way out."[118]

How we deal with off-track questions makes a huge difference to the way students experience the classroom under the case method: as a space in which only one way of thinking and knowing matters, or as a space in which doctrinal skills are developed in necessary relation to other skills. I suggest a three-step technique for resituating off-track questions or remarks that can assist instructors in many such cases: 1) connect the students' observations to existing scholarship (affirming that they are valid and important ways of thinking about law); 2) explain how the doctrinal skills being developed in class can help to deepen the analysis offered; and 3) encourage students to make a specific plan for how they are going to bridge their doctrinal learning with deeper insights, for example, by keeping notes on paper topics they might pursue in upper-year courses. Drawing on my own classroom experience with *Miller v Jackson*, I sketch an example of how this might be executed. The brief "scripts" offered for these steps are to be taken as guidance and inspiration, not as a definitive approach.[119]

1) Connect remarks to existing scholarship:

This insight is an example of "critical" or "feminist" legal theory.[120] *The concern expressed is that the judge's reasons show gender bias—that the judge's analysis is informed by the identities of the parties, or by stereotypes. Some of you will have training and experience in identifying bias of this kind from your previous degrees or life experience. For others, this analysis might feel new, or even inaccurate. Whatever your instincts on this point, it is incredibly helpful, as you develop your skills in doctrinal approaches to law, to remember that many scholars and others interacting with legal reasoning detect these kinds of forces operating within and alongside doctrinal rules.*

118 Brooks & Parkes, *supra* note 70 at 90.

119 My use of scripts here is, no doubt, influenced by the prevalent use of scripts in contemporary parenting advice, on which I sometimes rely in the course of my other main "teaching role" as the mother of a three-year old. This reliance on scripts has been recently popularized (and criticized) in the work of Dr Becky Kennedy, but is also evident in earlier celebrated parenting texts. See e.g. Becky Kennedy, *Good Inside: A Guide to Becoming the Parent You Want to Be* (New York: Harper Wave, 2022); Adele Faber & Elaine Mazlish, *How to Talk So Kids Will Listen & Listen So Kids Will Talk*, revised ed (New York: Scribner, 2012). In both teaching and parenting contexts, scripts can be helpful in concretizing advice and providing fodder for reflection, but should not be taken as prescribing the best or only words for navigating a situation. See Kate Shannon Jenkins, "You Don't Need a Script to Speak to Your Child", *The Nation* (9 May 2023), online: <thenation.com/article/culture/you-dont-need-a-script/>.

120 If the instructor happens to be familiar with specific scholarly arguments analogous or connected to those suggested by the student, naming them can be particularly helpful. In this case, Denise Réaume's work might be a helpful reference to share with students. See Réaume, *supra* note 7.

2) Discuss the relationship between doctrinal learning and further development of the student's analysis:

In the first year of law school, we often focus in class and on exams on the mechanics of legal doctrine. Once fluent in doctrinal skills, there are many things you can do with them besides using them to serve clients as a lawyer. One thing you can do is to take insights and reactions, like the one you have offered about gender bias, and develop an analysis of whether and how these biases find their ways into legal rules and their implementation. Insights along these lines have had meaningful impacts on the development of the law, as we'll continue to see in our course. As you build your skills in legal analysis (reading cases, discovering the connections between them, and using them to predict future outcomes), keep your eyes on these questions.

3) Flag potential upper-year paper topics:

In fact, this kind of insight can make for a terrific paper topic in your upper-year seminar courses. As soon as next year you'll be asked to write essays that bridge doctrinal skills with the kinds of analysis suggested here. I recommend that each of you keep a running list of insights about the values and impacts of judicial decisions you encounter in your first year and use this as a starting point for developing paper topics in your upper years.

Notice that the approach sketched here does not require going far down the track suggested by the student before returning to the planned lesson. But nor does it merely dismiss the student's proposed track as irrelevant to the doctrinal learning pursued in class. Instead, the technique aims to map the student's track in relation to the doctrinal track set for the lesson, thus serving doctrinal pedagogical goals while affirming the value of the alternative track not fully taken in class.

Conclusion

First-year law school can be an incredibly challenging experience. Students are comprehensively immersed in a new vocabulary, mode of reasoning, and academic assessment that is unlike what most have encountered in their previous education. The case method remains a helpful (and in any case dominant) mode of conveying these skills and competencies. But the case method always carries within it a risk arising from its formalist forebearers: that students will believe that other ways of thinking and knowing are useless or worse in the law school environment. This risk can be mitigated by approaches to law teaching that help students to see development of their own skills in the language and logic of doctrinal law as a distinct competency that might sit in tension with other valuable forms of knowledge and conflict resolution: that doctrinal law can be strange, but still available for mastery even to those who experience its commitments and self-image as alien or even threatening.

In one way, this emphasis on the strangeness of law is simply the flip-side of a common refrain in writing on outsider legal pedagogy: that law *not* be treated as neutral, and that the impact and experiences of diverse communities of meaning should be represented in the law school

classroom.[121] But I think that this affirmation of law as *strange*, rather than merely *not-neutral*, invites a particular curiosity in our students that is supportive of a less alienating form of doctrinal learning. This reflection has offered some gestures toward this goal, in the hopes of maintaining the value of the case method even for those who do not share a formalist view of law.

Doctrinal learning need not descend on our students like a vampire, sucking all other life out of a student once bitten. Legal doctrine can, instead, be like a place you learn to visit, feel comfortable (at least enough to find your way around), and then return home to tell the tale. There are, of course, power relationships that can make the journey dangerous, and a certainty that many of the locals will not understand or respect where you have come from. (Many locals of doctrinal law believe, after all, that their own approach is the best and only way of thinking—that other ways are "mush" or worse.) But students can and should be encouraged to hold on to themselves and their values while they learn to speak fluently in the local language of law.[122] As I have frequently put it to my incoming students: the challenge is to find out how you are going to be yourself *and* be a legal professional—not how to replace the former with the latter.

121 See e.g. Brooks & Parkes, *supra* note 70 at 132 (Brooks and Parkes's identification of "Uncovering Perspectives" as a key principle of queer legal pedagogy).

122 See also Angela Lee & Nayha Acharya, "Telling Tales About School: Reflections on Care, Holism, and Marginality in Law Teaching" (2022) 2:2 Holistic Education Review 1.