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NONLEGAL ANALOGIES IN THE LRW CLASSROOM

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Because they are frequently unfamiliar with the specific law at issue in their assigned memoranda and briefs, first-year students may become frustrated even when applying analytical processes that are similar to what they have already learned. In successive memorandum assignments, many of my students found it difficult to generalize from analysis of one legal problem to analysis of a different type of legal problem, as if they were unable to distinguish between content (which differed between the assignments) and analytical process (which should have been similar for both assignments). In response, I began to use analogies to familiar situations outside the legal context to explain processes of legal analysis; a little later, I used the same method to illustrate legal argument. The familiar content allowed my students to recognize more easily the steps involved in analysis and argument.² In this article I present some of the analogies that have worked well in my classes.

Grouping Stars into a Constellation (To Illustrate Rule Synthesis)

I assigned a set of four cases dealing with the First Amendment free speech rights of high school students, which we used as a base to discuss synthesizing a legal rule.³ After this class, a student told me that she still was not confident of

her ability to synthesize a rule from several sources, and asked for more explanation. At the beginning of our next class session, I summarized orally, as well as on the chalkboard,⁴ students' observations about each of the four cases and their suggestions for legal rules that would incorporate the holdings of all of those cases. I then asserted that “the law” that applies to a particular problem is often not something found in any one source, and that the applicable law is often more like a constellation. At that moment, I turned to the student who had requested clarification of rule synthesis, and asked, “What is a constellation?” She immediately saw the point and explained that a constellation is a group of stars that the viewer connects into a coherent pattern.

I then illustrated her explanation by drawing a few dots on the chalkboard and showing different patterns into which they could be connected, saying to my class, “Your job is to show why a particular pattern is the one that applies to your situation.” Drawing an additional dot on the board, I also explained that when a landmark case is decided, an additional star is added to the constellation, and the viewer must reconnect the lines into a new pattern, in effect

³ The cases are *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Guzik v. Drebus*, 431 F.2d 594 (6th Cir. 1970); *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972); and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

As a device to teach part of the basic research and citation skills, I also used the assignment to illustrate that cases often can be found even if information is incomplete, and that certain parts of the case citations are essential for the reader to be able to find the cases. On the assignment I listed the last three cases as: ___, 431 F.2d 594 (__ Cir. 19 __); *Melton v. ___*, 465 F.2d __ (__ Cir. 19 __); and *Bethel School District v. ___*, __ U.S. __ (1986) (full opinion, not just an order granting certiorari).

After we discussed the cases in class, I distributed a few pages of facts regarding a high school student who alleged that the school administration had impermissibly infringed upon his free speech rights, and gave my students an assignment to write a short analysis (five pages or fewer), which I marked but did not grade. This gave me a chance to diagnose and address major analytical problems before students wrote their first graded memorandum.

⁴ That particular class session was observed by Professor David Naylor of the University of Cincinnati School of Education, who later pointed out to me that if I wrote the case summaries on a poster-sized sheet of paper, then I could tape it to the wall for all of my sections rather than have to rewrite the summaries in different rooms at the beginning of classes when dealing with different sections. (I previously considered doing something similar with overhead projector transparencies, but the layout of one of the classrooms did not permit simultaneous use of the overhead screen and the chalkboard.)

¹ This article is based on my classroom experiences as a legal research and writing (LRW) instructor for two years at the University of Cincinnati College of Law.

² I tried to set the stage for this early in the semester. After we covered a topic, I asked students how they would explain the same topic to someone who was not a law student or a lawyer. After a couple of minutes of being prodded to simplify their statements and to fill in background assumptions, they explained things at a level that was appropriate for attentive laypersons. However, I suspect that some students never understood why I asked for such explanations. This year I asked students to explain why I asked such questions. Collectively, they correctly noted that they would have to explain things in nonlegal terms to clients, juries, and themselves.

finding a new legal rule. Erasing another dot, I stated that sometimes a court decision overturns a previous rule, in effect simultaneously adding one star to the pattern while deleting another.

In reading students' subsequent memos, I noticed that they did not over-rely on any one source of law, and did well in synthesizing legal sources to address the full scope of the issue that they were assigned.

Teen Drivers (To Illustrate Precedent Distinctions, Equity and Policy Arguments, and Mandatory and Persuasive Authority)

When I was a first-year law student, the LRW class used an advocacy exercise in which some students role-played a teenage driver trying to persuade her parents to let her use the family car, while others role-played the parents responding to the teen's arguments.⁵ As a new LRW teacher, I remembered that although the exercise worked well in reminding students that the goal of argument is persuasion, it tended to elicit only policy arguments. I decided to appropriate the exercise and expand on it. I listed on the chalkboard the types of bases used in legal argument: "facts," "law" (divided into "enacted law" and "case law," and "mandatory" and "persuasive"), "equity," and "policy." Gesturing across the board, I said, "We've previously talked about these; now let's see how they work together."

I first wanted to emphasize the importance of working with facts, and decided that having students make factual distinctions would be a good way to do it: "I'm going to have you regress back to when you were teenagers and you wanted to borrow the family car. Unfortunately, your older brother wrecked the car a few months ago. The car has been repaired, but your brother's experience is adverse precedent. What facts, if you had them, would you use to distinguish your situation from his?"

A student suggested pointing out that his grades were better than those of his brother. I wrote "grades" on the chalkboard and asked, "Why does that matter?" The student said that his better grades showed that he was more attentive and more responsible. Other students suggested that facts such as weather conditions, times of day

or night, and absence of alcohol use would also make a difference. Writing each response on the board, I had to prod the first few students to explain why the factual differences should be persuasive, but the last few spontaneously gave both a factual difference and the reason that it should distinguish the student's case from that of his or her brother. In summarizing, I noted that when they distinguished cases, they would have to both present factual differences and explain why the factual differences should (or should not) result in different outcomes.

I moved to the section of the chalkboard titled "law," and asked for an example of enacted "law" in our hypothetical. A student suggested "No use of the car without permission." "OK, if the parents sit down with the kids and announce it ahead of time, then it's enacted law," I replied. I also suggested that individual rulings on the use of the car in particular circumstances would be "case law," and that these "cases" would have a stare decisis effect on future "cases."

Moving to "equity" on the chalkboard, I called on another student to remind us about equity types of arguments. After eliciting an answer that centered around the idea of fairness, I asked for equity arguments in the teenage driver hypothetical. Students volunteered answers along the lines of "It's not fair to penalize me for my brother's mistake." Again, I wrote each answer on the board.

Walking to the section of the chalkboard titled "policy," I called on another student to explain policy types of arguments to us; the answer involved effects on future parties' conduct. When I asked for policy arguments for our teen driver situation, students responded that by being entrusted with responsibility, they would learn to be responsible, and that their being able to drive would relieve parents of the burden of having to drive them around. The answers were recorded on the board.

Moving back to the heading of "law," I said that we had previously discussed the distinction between mandatory authority and persuasive authority. I then reversed the students' role in the

⁵ The exercise was introduced to our class by Mary White, who at that time directed the LRW program at the University of Michigan. No specific factual background was given beyond that of a teenager trying to persuade her parents to let her use the car.

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teen driver hypothetical to illustrate the difference between mandatory and persuasive authorities: “OK, now you’re the parents of the teenager who wants to borrow the car. As parents, what sort of persuasive authority do you *know your child* will cite to show that you should let him or her drive the car?” The class erupted with answers along the lines of, “The *other kids* are allowed to drive by *their* parents.” “And as parents, what is your response?” I asked. Students gave answers of “So what,” “You’re not their child,” and so on. “Right,” I said, and restated their answers as “You don’t live in *that* jurisdiction; you live in *this* jurisdiction. And as long as you live in this jurisdiction, you’ll follow the law of this jurisdiction.” In summary, I reminded my students that they should always begin their analysis with mandatory authority, and that they must always justify any use of persuasive authority.

This exercise has worked well when used a couple of weeks before memos or briefs are due. When used earlier than two weeks before the assignments were due, however, some students forgot large parts of the point of the exercise. For my future classes, I intend to experiment with referring back to the points of the exercise along with representative answers that the students had given during the exercise, about a week before each major writing assignment is due.

Paired Policies (To Illustrate Insufficiency of Relying on a Single Policy Argument)

While coaching oral arguments, I noticed that a number of my students would invoke one policy argument in support of their position but were unprepared to address questions invoking a countervailing policy. In our next class session, I reminded students that they needed to address both favorable and unfavorable precedents, analogizing to favorable cases and distinguishing unfavorable ones. Then I suggested that something similar might have to be done with policy arguments, because there are often contradictory policies on the same topic.

To help them understand what I meant, I again sought familiar examples outside the legal context. I first wrote on the chalkboard, “Absence makes the heart grow fonder,” and asked for an opposite and equally well known statement regarding absence. “Absence makes the heart go

wander,” said a couple of renegade students; “Something more widely known,” I responded. “Out of sight, out of mind,” said one of my students, and I wrote it on the board.

Next, I announced a shift to tax policy, then stated aloud and wrote on the chalkboard two competing policies: “People want more money, so government should reduce taxes,” and “People want more public services, so government should raise taxes to fund more services.”⁶

Finally I went back to the teenage driver hypothetical and asked students to name a policy that the teenager would cite in support of the argument for using the car. “By driving the car I’ll learn to be responsible,” said one student. I asked for a policy that parents would cite against the teen’s use of the car. “We don’t want to take too many chances with the car,” said another student. I prodded a little more, and elicited the addition of “We don’t want you to die.” I wrote the policies on the board.

Then we reexamined each pair of policies. For “Absence makes the heart grow fonder” and “Out of sight, out of mind,” I suggested that both could not be true at the same time, and that the students’ job in such a situation was to explain to the judge why one policy applied rather than the other. Next, I turned to “People want more money, so government should reduce taxes,” and “People want more public services, so government should raise taxes to fund more services.” I stated that although the underlying policies of people wanting more money and people wanting more public services could both be true, the *implementation* of those policies could not occur simultaneously because the net level of taxes could not be raised *and* lowered at the same time.⁷ I then suggested

⁶ I acknowledge that the topic borders on law, coming close to contradicting the topic of this article. Nevertheless, first-year students are familiar enough with taxes to allow productive “general”—i.e., not specifically “legal”—discussion.

⁷ In one section, I got into trouble by asking whether the net amount of taxes could simultaneously be raised and lowered. A couple of students thought that I was using the term “amount” to refer to both tax rates and net amounts of revenue, and after a minute of discussion clarified that they believed lower tax rates could result in increased government revenue. Notwithstanding my skepticism about the argument, I later decided that it was easiest to present my point as an assertion rather than as a question, so in my other section I explained that by “amount” I really did mean amount. I also realized that I had relearned the perils of words carrying double meanings for some speakers.

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that in such a situation, my students' job was to explain to the judge why one policy outweighed the other. Finally, comparing "By driving the car I'll learn to be responsible" with "We don't want to take too many chances with the car, or with your life," I suggested that this was a situation in which a proposed course of action could accommodate both policies. I used an overhead transparency of the parent-teen "Contract for Life,"⁸ drafted by the group Students Against Destructive Decisions,⁹ to illustrate an attempt at such an accommodation. I further suggested that my students' job under such circumstances was to explain how a ruling in favor of their client would satisfy the objectives of both policies.

Empirically, I do not have enough information to know how well this presentation "stuck" with my classes. But several of my students incorporated the distinctions of the exercise into their practice and graded oral arguments.

Conclusion

The use of analogies to nonlegal situations seems to remove one layer of difficulty in students' learning the processes of legal analysis and argument. Mindful that the audience of *Perspectives* includes teachers who are much more experienced than I, I offer this description of analogies used in my classroom in the spirit of another analogy I heard in my study of the martial arts: "I throw down my brick to entice others to reveal their jade."

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⁸ See Students Against Destructive Decisions!, *Contract for Life* (visited Sept. 19, 1999) <<http://www.nat-sadd.org/contract.htm>>.

⁹ Formerly known as Students Against Driving Drunk. See Students Against Destructive Decisions!, *Why We Changed Our Name* (visited Sept. 19, 1999) <<http://www.nat-sadd.org/main-about.htm#whywechangedourname>>.