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James E. Moliterno

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The Secret of Success: The Small-Section First-Year Skills Offering and Its Relationship to Independent Thinking

by James E. Moliterno*

Many of the chief benefits to first year law students of small-section skills teaching¹ are well recognized: the students acquire writing and analytical skills; the teaching presents opportunities for critique of law practice;² the students' competence in their eventual practice is enhanced. But among the most valuable benefits of such teaching, both to students and to legal education, is one that is all too often overlooked: such teaching provides crucial opportunities for students to experience meaningful success early in

*Assistant Professor of Law and Director of the Legal Skills Program at the College of William and Mary. I would like to thank Professor Paul A. LeBel, Professor John M. Levy, and Allen Black for their comments on drafts of this essay.

1. Although I discuss the need to experience success in the context of a skills development program, these same needs could certainly be fulfilled in any small section first year course in which individual attention could be provided and early student work could be generated, critiqued, and returned.

2. See Conklin, "Taste's Great, Less Filling:" *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45 (1986). Professor Kenney Hegland reminds us to attend as well to the university law school's purpose of preserving and expanding the current state of knowledge. See Heglund, *Conklin's Critique of Conventional Clinics: The Case of the Missing Case*, 36 J. LEGAL EDUC. 427, 427 n.2 (1986). Although both Conklin and Hegland are discussing the purposes of law school clinical programs, many of the same opportunities for critique of the profession and expansion of the current state of lawyer skills knowledge attend the well-constructed first year skills development program. It is in such a program that students receive their first look at the work and life of a lawyer.

their legal education. Without small section classes in which timely response to early student-work can be provided, first year law students have unacceptably few opportunities to experience meaningful success, and as a result have a much diminished chance of developing into the independent, critical thinkers we all hope that they will become.³

Every teacher knows the good feeling of seeing a student's "light go on;" this observation is so gratifying because as teachers we enjoy seeing our students succeed and we recognize the growth in the student with each success. The most gratifying and valuable of these experiences, for both student and teacher, are those in which the student has solved a problem in a creative way and has now realized that such creativity and independence of thought are central to successful legal thinking. Unfortunately, law teachers know not only the good feeling of seeing a student succeed, but also know that this experience is all too infrequent in a one hundred person class. After all, in the large class, how many students participate, let alone succeed, per day? How clear can the reaction of the teacher be to an individual student's success? How much effort can be expended to lead a single student to that success in the middle of a one hundred person, fifty minute class? How much benefit do non-participating students receive from the occasional success of another?

Law learning differs from the students' prior educational experiences. Nearly every entering law student leaves an educational environment in which acquisition of information was the paramount goal of learning. They enter the very different educational environment of the law school in which acquisition of information is a preliminary step toward the goal of developing abilities of analytical, critical thinking.⁴ Entering students know that, while all their new classmates were successful elsewhere, not all will succeed in law school. We tell them and popular literature tells them that they will be learning a new way of thinking. As exhilarating as this prospect might be, it remains a rather frightening notion to most first year students. As a result, for all their former successes, entering law students tend to be an insecure bunch. Even among the most talented of beginning students, insecurity is the dominant feeling in the first months of law school. Among my most able students in my eight years of teaching first year students is a highly intelligent, self-confident, commander of Coast Guard ships who confesses, "The frustration in the first year was in never knowing what was right. I was not so much concerned with being 'right' in class as with knowing whether I was 'getting it': whether my

3. For an interesting treatment of the kinds of teaching that are more likely than others to produce this kind of thinker, see D'Amato, *The Decline and Fall of Law Teaching in an Age of Student Consumerism*, 37 J. LEGAL EDUC. 461 (1987).

4. For an indictment of university teaching and its disastrous effect on students' perspective on what "learning" means, see *id.* at 464-65.

understanding of the law, beyond the black letter law in our course-work, would equate to success or failure on exams."

Some would argue, I suspect, that this insecurity is desirable: it makes the students work hard and it generates the first year student's zeal. It also may be true that the tension that beginning students feel and that some teachers so successfully nurture results in an initial imbalance on the part of the students that allows the adept teacher to challenge their settled ways of thinking. Standing alone, however, this phenomenon is unlikely (especially in the modern, highly competitive law school environment) to get a group of insecure students successfully through a semester without sending many or most of them retreating to the safety of looking exclusively to courts and professors and commercial outlines to discover what the student himself or herself "thinks." Opportunities in addition to those few provided by the large section classes are needed for students to see that thinking critically and independently is "right." Without such opportunities, too many of the students for whom the imbalance may have initially created a positive learning environment will never have realized the benefits of their critical, independent moments, and their ability and willingness to "go out on a limb" intellectually will be greatly inhibited.

Professor Anthony D'Amato has argued convincingly that the best law teaching is that which challenges the students' established ways of thinking, provides no clear "answer" to student questions, and expects students to complete the learning process upon later, probably private, reflection.⁵ (D'Amato's "Professor Smith" teaches in this way while his "Professor Jones" is quick to give positive re-enforcement by way of summarizing the black letter response given by students in the class.)⁶ Although I agree with many of Professor D'Amato's premises and much of his reasoning, I reach the conclusion that Marvin Minsky's work,⁷ upon which much of Professor D'Amato's argument is based,⁸ leads more clearly to the conclusion that the best law learning happens when a student successfully solves a problem by creative thinking, articulates the process by which this positive result was achieved, *and* a teacher responds that the student's independent thoughts have value. Professor D'Amato emphasizes the first two of these three conditions and, in giving little attention to the third, seems to assume that the student will know when the student has done it right. In Minsky's terms:

Whenever you "get a good idea," solve a problem, or have a memorable experience, you activate a K[knowledge]-line to "represent" it. A K-line is

5. *Id.* at 476-77.

6. *Id.* at 467-83.

7. M. MINSKY, THE SOCIETY OF THE MIND (1986).

8. D'Amato, *supra* note 3, at 461.

a wire-like structure that attaches itself to whichever mental agents are active when you solve a problem or have a good idea. When you activate that K-line later, the agents attached to it are aroused, putting you in a "mental state" much like the one you were in when you solved that problem or got that idea. This should make it relatively easy for you to solve new, similar problems!⁹

I agree with Professor D'Amato that if forced to choose between his "Professor Smith and Professor Jones," Smith is the one more likely to activate a K-line and whose teaching in the context of the traditional first year substantive law courses should be preferred. But the choice is not exclusively between Smiths and Joneses. The difficulty of allowing Smith's technique to stand alone is that too many students will never realize that this freedom to think independently is a good thing and will return to the comfort of information worship without the real benefit of Smith's technique taking hold. In his indictment of undergraduate teaching, Professor D'Amato says that unlike study in other disciplines, "[s]tudying mathematics by problem-solving is . . . the very best model for studying law."¹⁰ I agree. Smith's students solve problems on their own as do mathematics students and gain value from that activity. But the analogy between mathematics teaching and Smith's teaching breaks down in a significant way: Smith's students are unlikely to receive any response from Smith to their tentative ventures into creative problem-solving while a key feature of mathematics teaching is the review in class of the methods used by various students to solve the problem in question, with the best mathematics teachers responding favorably to the student's creativity. This sort of response is a necessary element of law learning, as well.

Anyone who has taught a first year skills course (and probably anyone who has taught substantive law) has taught the student who has come to the office while working on some writing project to ask, "Is it alright for me to say that the court in X v. Y is wrong?" or "Can I argue such-and-such if I can't find a case that says it?" In addition to the substantive response to the point the student proposes making, a paraphrase of the appropriate teacher response to such a student is "I like the way you're thinking." This same student, while perhaps hearing the Professor Smith (though probably not Jones) in the substantive law course say that courts are sometimes wrong, will not articulate such an independent thought without some sort of explicit authorization. Without articulating the thought and receiving a positive response to it, something that would probably not happen but for the assignment and receptive atmosphere of the small section class, that student

9. MINSKY, *supra* note 7, at 82, *quoted in* D'Amato, *supra* note 3, at 463.

10. D'Amato *supra* note 3, at 465 n.8.

would not have had the new K-line created because to the student's mind, no problem would have been solved, no good idea would have been had. The moment of creativity would have been for naught. None of the benefits described by Minsky and hoped-for by Professor D'Amato would have accrued. As a result, students need the opportunity to experience problem-solving in the contexts common to the lawyer's work, to articulate the mental processes they use to solve the problem, *and* to be told which aspects of their problem-solving process were successful.¹¹ Indeed, these opportunities to experience success will likely make the students both more receptive to Smith's teaching style and more able to achieve the valuable learning that Smith hopes the students will achieve upon reflection outside of his classroom. They will be more receptive to Smith's teaching because now that their independent thought processes have been granted imprimatur, they will more likely see that Smith is not "hiding the ball," but is providing valuable opportunities for students to exercise their new independence. Smith needs the success the students experience in the skills course, and the skills course needs Smith to challenge the students' mental pathways, initially freeing them from their mental straightjackets and providing the opportunity to engage in independent thinking that can be validated by the small-section skills teacher.¹²

Without these opportunities to experience success, students exhibit all the behaviors that law teachers (especially Smiths) moan about in faculty lounges: "they worship and can't question judicial opinion;" "they are unwilling to challenge me no matter how outrageous a statement I make." These are highly predictable behaviors for insecure individuals who have no idea of how to succeed in this new environment nor of whether they are worthy of thinking independent thoughts about these somewhat mysterious topics. The initial pressure the students feel just to figure out what a "tort" *is* militates against their having any creative thoughts about the subject. These behaviors should not be at all unexpected; education researchers have concluded that creative thinking is enhanced by successful thinking experiences and is inhibited by

11. As is true for many of us, I suspect, I emulate in my teaching, to the extent I am able, a favorite teacher of mine. My model was a faculty member who was my clinic supervisor. In his critique of my work, he was always able to lead me to new ways of thinking about a client's problem in such a manner that, after the critique session, I was sure that I had generated the new ways of thinking myself. (Had I?) In any event, although my mathematics training prepared me well, I cut my creative thinking teeth by dint of this teacher's efforts.

12. In fact, I am not convinced that any substantive distinction warrants the general use of the term skills teacher. See Moliterno, *Goodness and Humanness: Distinguishing Traits?*, 19 N.M.L. REV. 203 (1989).

fear of failure and pressure to conform to peers for the sake of educational survival.¹³

The need to think creatively is more critical in the case of legal thinking than it is in many other fields. The essence of the legal thought process is the challenge of the expected response.¹⁴ I use the word "challenge" here not to mean unnecessarily aggressive, adversarial, quibbling behavior,¹⁵ but to refer to the students' need when questioned to be willing to consider and reflect on possible answers that lack intuitive appeal. The latter sort of challenge requires a bit of courage on the part of the student-thinker: a courage that is least likely to come if the first and only opportunity for the student's thinking to be evaluated will be a single, end-of-course, winner-take-all written examination.¹⁶ Fear of failure will be a most powerful inhibitor of creativity in such a system. How many risk-takers will be found in the group of one hundred under such a regime? For a student to be willing to take risk, to challenge the standard course of things, the student must be emboldened at some time and by some means before tackling the examination. Barring a revolution in legal education that would see a five-fold reduction in the average first year class size, the most likely opportunity for such an effect to be had on students' willingness to think independently, indeed the only such opportunity that is currently in place at most law schools, is to be found in the first-year skills development offering.

Faculty involved in designing such an offering should be sensitive to the need to structure incremental assignments, not only to allow students to

13. See B.S. BLOOM AND L. BRODER, *PROBLEM-SOLVING PROCESSES OF COLLEGE STUDENTS*, (1950); A. Goor and R. Summerfield, *A Comparison of Problem-Solving Processes of Creative Students and Non-Creative Students*, 67 *J. EDUC. PSYCHOLOGY* 495 (1975), cited in Nickerson, *On Improving Thinking Through Instruction*, 15 *REV. RES. EDUC.* 3, 25 (1988-89). Nickerson says that students "must get the kind of feedback from instructors and peers that will reward effort and good thinking, including good questioning, at least as much as right answers." Nickerson, *supra* at 39. See also T. AMABILE, *THE SOCIAL PSYCHOLOGY OF CREATIVITY* 74-75, 160 (1983), for a summary of research regarding the detrimental effects fear of failure has on creativity.

14. D'Amato, *supra* note 3, at 462.

15. For a fascinating proposal that would make such behavior unethical when unsupported by the policies underlying the relied upon legal rule, see Hegland, *Quibbles*, 67 *TEX. L. REV.* 1491 (1989).

16. "If legal education is to retain its vitality . . . we must do everything in our power to remove the incubus of the examination . . ." The mind that "is oriented toward examinations is not" that of the creative, independent thinking student, but "is a mind that has to ask itself anxiously at every turn that most inhibitive of questions, 'What will other people think?'" L. Fuller, *On Teaching Law*, 3 *STAN. L. REV.* 35, 43 (1950).

succeed but to be challenged by successive projects. For example, if an initial writing assignment asks the students to explain a known legal rule based on a limited set of resource materials, a second might ask the students to apply a known rule to a set of problem facts, a third might ask them to predict the outcome of the rule's application to a more problematic set of facts, and a fourth might ask the students to *derive* rather than merely apply a legal rule from a set of resource materials. Success is empty without challenge; no one grows by accomplishing simple tasks effortlessly.

Further, such teachers need to be sensitive to the fact that "experiencing success" does not simply mean the receipt of undue praise by students who have reached the legally correct conclusion in writing a memorandum of law, for example, nor encouragement of the smugness that sometimes attends the "beating" of an opponent in a trial or negotiation exercise. Instead, the success to be most rewarded and encouraged is the student's expression of an independent thought; the teacher must be sensitive to praising student expression of such a thought, encouraging such thinking by their comments, and creating a non-threatening environment in which the expression of such a thought is more likely. Faculty not active in courses offering these opportunities should appreciate the benefits of such opportunities that inure to their students and their classes, and even their exam grading. Students in large section classes who have realized success from their more creative moments are more likely to try creativity again and in different settings; the large class will be less likely to restrict its expression to "safe" statements; and their exam-writing is more likely to evidence some independence of thought.

Without sufficient opportunities to experience success and teachers sensitive enough to take advantage of them, we can fairly expect that the students who do best on our final examinations will be those who listened carefully, studied hard, and returned to us in their examination answers what we gave them by way of information.¹⁷ With such opportunities, we can expect that the students who do best on our examinations will not merely return what we gave them, but will also return the product of an active, critical mind, fresh to the fray with the law and its intricacies that the faculty wages in its scholarship and the practicing bar and bench wage in times of great moment.

17. D'Amato's Professor Jones would delight at reading such a paper. Professor Smith would be unfulfilled. D'Amato, *supra* note 3, at 479.