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TWO CHEERS FOR THE CASE METHOD*

GENE R. SHREVE**

I want to thank the New York Law School Law Review for inviting me to participate today. I am especially honored to participate on this panel with Doctor Redmount, Professor Johnstone and Professor Meltzner, all of whose works on legal education I have read and profited from. I am going to devote most of my comments to topics explored in earlier remarks by Professor Meltzner, and I want to begin by agreeing with him in his praise for an article that was written by former Dean Erwin Griswold, entitled Law Schools and Human Relations.1

There is a special kind of professional travail that goes along with deciding to spend any amount of time writing on the subject of legal education. For those of you who have done this, and may be tempted to do it again, I thought you might find comfort in a few observations that Dean Griswold made about his article in a letter that he wrote to me; a letter he has given me permission to read today.2 He said of the article: “I have long thought that this was the best piece of writing I ever did.” Those of you familiar with Dean Griswold’s scholarship in the tax, federal courts, or conflicts fields, know that this observation covers a lot of ground. He goes on: “It is occasionally cited but not as often as I would like.” Here is a kindred spirit, certainly. He closes by saying: “I am afraid it was almost completely ignored by my colleagues at Harvard.”3 If misery loves company, we have some company.

I want to begin my remarks by turning to a subject that seems to attract us all today, the subject of the case method. I want to offer a qualified defense of the case method. With apologies to President Stevens, I might call it “Two Cheers for the Case Method.”4 In order to establish common ground for discussion, by the case method I mean the approach that depends largely on appellate cases for teaching material and is taught, at least supposedly, in a socratic fashion. That is

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* A comment on the remarks of Dr. Redmount and Professor Meltzner, delivered at the New York Law School Symposium on Legal Education, held on April 12, 1985.
2. Letter from Erwin Griswold to Gene R. Shreve (July 22, 1980).
3. Id.
to say, we engage the entire class in continual conversation. Some people talk, some people listen, but those who listen are said to be participating vicariously in the discussion. There has long been a suspicion—confirmed by recent studies—that much of what goes on in law school classrooms really cannot be functionally described as the Socratic method; a good deal of class time is taken up by the professor's lectures. However, I think there remains enough reality to the case method and Socratic method for us to assume it as a model for purposes of our work today.

Those who criticize the case method have done so on at least two different levels. Let me note the first level, although I am not going to fully explore it. The case method is criticized at a socio-political level by people who are themselves in disagreement. Some—and I think Doctor Redmount’s presentation today is a good example of this—say that the case method is insufficiently sensitive to contemporary problems, that it is really too insular. I do not know if the term “apolitical” is an exaggeration, but it is that sort of criticism. The case method is also the target of socio-political criticism of a very different kind, the kind offered by the Critical Legal Studies movement. It sees the traditional case method curriculum as politically partisan, but representing the wrong kind of politics. That is a fascinating subject, but I must leave it behind. I would like to discuss criticisms of the case method at the pedagogical level.

The case method definitely has shortcomings. Case method classes tend to be large and, even if they are not very large, the approach of the case method does not tend to exploit effectively the smaller class size. Even when classroom acoustics permit, it is hard for students to sustain their involvement on a vicarious basis. Thus, the case method lacks a kind of congruence important in learning. It can be exceedingly difficult for those attending case method classes to develop a clear sense of what their own points of confusion—hence their particular learning needs—are. This lack of congruence is a problem. The size of the class is a problem. The intimidating nature of case method classes can also be a problem.


6. Redmount, The Future of Legal Education: Perspective and Prescription, 30 N.Y.L. Sch. L. REV. 561 (1985) (The author proposes changes in the legal academic program of second and third year students, focusing on an inquiry of complex legal issues. Study centers, consisting of legal and non-legal factual resources developed around actual problems and issues would be at the core of the new curriculum.). Dr. Redmount’s article appears in this issue.

All of this was made very clear to me quite early in my student career during a Civil Procedure class. I studied Civil Procedure with Professor Benjamin Kaplan, one of the luminaries in the field. The class had been meeting for some time and finally Professor Kaplan reached my name on his seating chart. He looked in my direction: “Well, Mr. Shreve, what is the difference between substance and procedure?” Trying to buy some time I said: “Professor Kaplan, it seems to me to be a really difficult question.” To that, Professor Kaplan replied: “Well, that may be. Mr. Smith, what is the difference?” The discussion went on with Mr. Smith and two or three other students and never came back to me.

Since then I have had a lot of time to think about that question. As my life took certain turns and I eventually became a teacher of Civil Procedure, it became clear to me that Professor Kaplan had given me the opportunity to answer one of the most wonderful questions that could be asked in a Civil Procedure course. I thought of successive answers to that question, each one better than the one before. In my recent fantasies, my answers to the question have become so good that Professor Kaplan stops the class, comes up, and shakes my hand. But, of course, one cannot go back. It is the nature of the case method that people are sometimes lost in the shuffle. That is a problem and a shortcoming.

There are several responses to the deficiencies of the case method. Professor Meltsner spoke about some of them this morning when he discussed clinical education. I take Professor Meltsner to mean clinical education in the broadest term, which would be not only field work (where you work with actual clients), but also work involving simulation in the classroom. There are obvious alternatives to the case method calculated to address some of its deficiencies. Tutorials, seminars and other approaches can also be valuable in this regard.

Though many of these approaches have been utilized, the case method approach continues to dominate our system. I think this is likely to remain true for several reasons. One reason is economic. With the exception of nonstop lecturing (a modern anathema), the alternatives to the case method are labor-intensive and expensive. Most involve allocation of much more of the professor's time for a given group of students than that needed to work with the same group through the case method. Unfortunately, economic realities get in the way of establishing the best possible system for teaching law students. Unless the economics of legal education change radically—which they give no in-

dication of doing—the more expensive alternatives to the case method will never wholly replace it.

I think there is a further, more uplifting reason why the case method will not be replaced. It does very valuable things that cannot be done by the alternatives. Some nice things have already been said in this symposium about the case method. Let me take a moment to say some more, and let me invoke Holmes to do that. The "Holmes" I have in mind is Sherlock Holmes. In one of the Sherlock Holmes stories, The Sign of the Four, Holmes and Watson are having a conversation that they frequently have. Watson wonders how Holmes could have performed some wonderful feat of deduction and Holmes replies, "it's elementary," or something to that effect. But Holmes takes the trouble here, perhaps for the only time in the chronicles, to explain his technique. He explains to Watson that he is exercising three kinds of skills: the power of observation, the utilization of knowledge, and the employment of logic.

It seems to me that the most extraordinary quality of the case method is that it simultaneously engages students at these three levels. If we merely lectured, then we would only distribute knowledge. Knowledge is important. However, by giving students the cases, asking them to read the cases, and then discussing the cases in class, students have to use their powers of observation. Granted, appellate opinions are not always great repositories of fact, but there are at least some facts in appellate opinions, and students must ferret them out. They also have to take the factual situations of different cases and use logic, or some kind of reasoning process, to compare cases and make judgments and predictions about the law. Perhaps the genius of the case method is that it produces results only when students use all of these skills.

The case method also permits us to cover ground quickly, not as quickly as the lecture method, but more quickly than any of the substitutes. For instance, those of us who have taught by simulation know that the strengths of that approach can lie in the time taken to step back and examine integrated analytic, transactional, and ethical dimensions of the lawyering process. When we do that, we do not cover legal subjects quickly. If one wishes to teach a few rules of civil procedure or a few basic concepts of constitutional law or property law through simulation one can teach them vividly. I agree with Professor

10. Id. at 613-15. Sherlock Holmes, to the consternation and amazement of Doctor Watson, demonstrates his method by discerning the sordid past of Watson's father merely by observing his old, damaged watch. Id.
Meltsner that more courses of this kind should be offered. However, there is not enough time to teach even half the basic topics of property or of constitutional law if these subjects are taught entirely by simulation. While it may be fair to ask how much scope we really need in a course, we do need some. Teachers believe this and, by the way, so do students. The greater scope possible in case method teaching is probably enough to justify its continued dominance. The case method approach is no longer the monolith that it once was. Because of its deficiencies, it is and should be supplemented by many other approaches. At the same time, it is not necessarily cause for despair that the case method will remain with us and probably continue to carry the main weight.

There are probably those who find this appraisal too sanguine, who feel that the case method casts a kind of shadow over the future of legal education. Let me respond by examining one problem that the case method is sometimes said to cause. This problem has been alluded to by several speakers and by members of the audience: the rapid decline of student interest during their law school careers. The case method is said to be one of the primary reasons why students become disinterested in law school. I suppose implicit in this criticism is the suggestion that the case method is one of the primary reasons why law students are so very interested in the beginning. I do not think either of those suggestions is entirely accurate.

Students certainly are interested in law school in the very beginning. We have their attention because this is a new experience, because there are some questions that they would like to answer, and because they will only answer them by doing everything they can to succeed. One question is: “Will I survive?” Despite what we say, there is much anxiety about the possibility of academic failure. Beyond that, there are questions of choice validation. Many people do not know why they came to law school, and they try to find out through their experiences when they get there. But after a semester, or at least after a year, these questions usually have been answered. They belong in law school and they will survive the experience.

Learning may be pleasurable at times, but it is also hard work. It is uncomfortable and disorienting. When the questions have been answered and the drama is over, students are shrewd, sensible, and healthy enough to look at their environment again and say: “All right, I've been going through a very taxing period; must it continue? If I can withdraw and still survive, if I can withdraw and still be a law student, then why should I remain in close proximity to all that is happening? Why should I continue to be accepting and cooperative; to participate,

11. Meltsner, supra note 8, at 587-89.
read the material, come to class, talk, listen when I'm not talking, and revise my thoughts about the law after class is over?" In other words, why should students continue to do all the things that we as law teachers want them to do? These are perfectly fair questions. In many cases, students do not come up with answers sufficient to keep them actively involved.

Part of the responsibility for this problem rests with us, but not because we employ the case method. Our contribution to the problem comes from the fact that it is difficult to be the kind of teacher with whom students want to have a transactional relationship when fear and anxiety no longer force them into it. Let me offer an example that has nothing to do with legal education. What if we found ourselves working with someone who loved to talk to us, but was not interested in listening to what we had to say—loved to tell us what to do, but was not interested in entertaining our suggestions about how they might behave? Trying to interact with such a person is at best tedious and at worst degrading. I doubt that we would continue a close working relationship with him or her any longer than absolutely necessary. Students too often feel that they are treated this way by their professors, so they withdraw.

What is the price of that withdrawal? I think it is terribly high. Students withdraw at the price of their self-esteem. They may not feel good about being C students, but that is of no great concern, because grading can be quite artificial. More frightening is the possibility that people might leave law school thinking of themselves as C attorneys. Law graduates will have enormous independence and influence over the lives of others. Issues of law practice and professional responsibility are so often issues of conscience and self-esteem. Graduates need to think of themselves as capable of good work—very good work. We need to do something while they are here to help them gain that self-esteem—to give them a foundation enabling them to think so well of themselves, and to be so certain of their capacity for growth, that they will not be content unless they both excel and continue to improve over a professional lifetime.

The difficult question of how we can facilitate this kind of learning experience remains. In attempting an answer, I have been thinking about the qualities I saw in good teachers that I have known—good teachers in the sense that their students seemed to enjoy their class, to study hard and attend, to be animated, and to feel that they learned. I concluded that each teacher delivered a three-part message to his or her students during the course. If that message was conveyed, whether by a regular member of the faculty or an adjunct, whether by a brand new teacher or an experienced teacher, the class appeared to be successful, and there appeared to be reciprocal teaching and learning. The three parts of the message were: first, that the material is worth learn-
ing; second, that the students are capable of learning the material; and third, that the students will learn the material.

Teachers who are reasonably knowledgeable in their fields and who have the enthusiasm and involvement necessary to convey that message seem to succeed. In courses that do not succeed, one rarely reads a student evaluation saying: “I didn’t like my class because I don’t think the teacher thought very much of me.” Instead, one finds statements indicating that the teacher simply was not very good (i.e., was disorganized, unprepared, etc.). Yet, there is an element of “you can’t fire me, I quit” in such comments. Students are saying: “If I don’t have a high opinion of you, then it won’t matter that you don’t have a high opinion of me.” We know that students take professorial bullying and ridicule personally; they take professorial indifference personally as well. We must work very hard to convey respect for and support of our students in the classroom. How one does this, of course, is an element of style. At the same time, I think that we find what we are looking for. If we are looking for ability, promise, and a desire to learn in our students, we will find these qualities.

This kind of rededication becomes particularly important after one has been teaching for awhile. In the first few years of teaching, my primary concern was whether I would be found out. Day after day, I felt scarcely prepared and that there were terrible gaps in my knowledge of the material. I grappled with my notes—you depend on your notes a great deal in the very beginning. Some days your notes work, and some days you look at your notes and your notes look back at you and make faces and are no help at all. Many of us reach the end of this phase thinking that despite all the hard work we are not very good, that this is a hellish way to live, and that if this is all we have to look forward to we will leave academe. We are surprised, therefore, to discover that some of our best teaching is done in this early period. Perhaps that was because students were impressed with our enthusiasm and the immediacy of our approach. Of course, one reason for this immediacy was that we did not have anywhere to hide. Later, when we develop a greater expertise in the course material, we do have some place to go; we have protective foliage. If the students do not seem attentive, or the class failed to coalesce on a given day, we can say to ourselves that we knew the material, so it must be their fault.

It is possible to see a convergence of our intellectual commitment to the fields we teach (the rigor, the depth, the levels of analysis to which we love to descend) and the humanistic component of what we do. I think we can make these two dimensions converge. For our own well-being, as people who will be in this profession for a long time and who hope to be happy in it, we are probably better off if they do.