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Developmental Learning Theory and the American Law School Curriculum, 3 J. Marshall (Atlanta) L.J. 33 (2009)

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DEVELOPMENTAL LEARNING THEORY AND THE AMERICAN LAW SCHOOL CURRICULUM

STEVEN D. SCHWINN*

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I. INTRODUCTION

Incoming students enter American law schools by and large with little knowledge of the law or how to “think like a lawyer.” Our typical American first-year curriculum is therefore quite sensibly tailored to deliver them the law and to develop their legal thinking in as efficient and effective a way possible. Thus, the typical curriculum is characterized by heavily edited appellate court opinions, scrubbed of unnecessary and meddling facts, to allow students to focus more narrowly on the law. It also includes large classes conducted through the Socratic

* Associate Professor of Law, The John Marshall Law School in Chicago. I would like to thank the editorial staff of the John Marshall Law Journal from Atlanta’s John Marshall Law School for their outstanding editorial work on this piece. All errors, of course, are my own. I presented an earlier version of this article at the International Future of Legal Education Conference in February 2008 at the Georgia State University College of Law.

Method, an intense dialogue between a student and professor that allows the professor to push the student to a deeper level of understanding. The first year concludes with a final exam based on a hypothetical fact scenario that allows students to demonstrate their new-found knowledge and analytical skills by applying concrete law and principles to static, predetermined facts in a carefully controlled exercise. In short, the typical first-year curriculum is precisely tailored to help those with little knowledge of the law quickly learn the law.

While the central premise—that our incoming students by and large have little knowledge of the law—is true, it is also true that our students increasingly come to us with mature intellectual and moral reasoning capabilities in other areas of their lives. For example, more and more students come to law school with professional experience, graduate degrees, significant life experiences, and families and other responsibilities in which they have honed more advanced reasoning skills. Even students who come to law school right out of college have relatively mature reasoning capabilities. In other words, even if our first-year students have not yet learned how to reason about the law, they have learned how to reason about other complex subjects, including those requiring a moral aptitude. Even if they have not yet learned that the law is full of ambiguities and indeterminacies, they have dealt with ambiguities and indeterminacies in other areas of their lives. And even if they have not yet seen how law is made—with lawyers as active agents in the law, not passive recipients of the law—they certainly have seen how knowledge in other subjects is so often created, not merely given.

Our incoming students might apply these more mature reasoning capabilities to the law, but we do not let them. By focusing first on our students' lack of knowledge of the law, the typical first-year curriculum neglects their more mature reasoning capabilities in areas outside the law. This neglect comes with an opportunity cost—the cost of failing to build upon what our students bring to law school. But worse, it also yields tangible harm by regressing our students' intellectual and moral development before helping them re-progress later in law school.

This essay begins with a review of some of the intellectual and moral developmental theories as they relate to legal pedagogy. The essay then examines the typical first-year

curriculum and attempts to place it in the context of those theories. I argue here that the typical first-year curriculum moves students backward before it moves them forward in the intellectual and moral development progression—that it regresses them before it progresses them and that this is not just a waste of time but also positively destructive. Finally, I offer an alternative or complementary approach to the typical first-year curriculum—actual legal work in the first year—that is designed to progress, not regress, students as intellectual and moral thinkers.

II. MORAL AND INTELLECTUAL DEVELOPMENT

Perhaps the best known developmental theorists are Jean Piaget and Lawrence Kohlberg.¹ Both use a “stages of growth” model to describe the intellectual and moral development of individuals: just as our physical bodies develop in stages, so too our intellectual capabilities and moral reasoning develop in stages.²

Piaget traced cognitive growth from concrete thinking to abstract thinking in four stages.³ He claimed that the two

1. Piaget's and Kohlberg's (and other developmental theorists') work has been described in a variety of secondary sources, many of which I rely upon in my brief overview here. See, e.g., Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237 (1988); Walter H. Bennett, *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45 (1986); Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995); Susan Daicoff, (*Oxymoron?*) *Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 FLA. L. REV. 197 (1996); Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1 (1991).

Different authors describe and categorize the stages in each theory in slightly different ways. I describe them here at only their most rough and abstract level.

2. Neither Piaget nor Kohlberg is uncontroversial. Particularly, Kohlberg's methodology has been subject to scrutiny because his studies included only boys, not girls. See generally Hartwell, *supra* note 1, at 512-22 (summarizing the strains of criticism of Kohlberg's theory and methodology).

3. Williams, *supra* note 1, at 3-4; see also Wangerin, *supra* note 1, at 1243-44, 1274-81.

earliest stages, the sensory-motor and pre-operational stages, occur early in life and move quickly.⁴ The sensor-motor phase is characterized by “think[ing] in a sensorimotor fashion, that is . . . thinking is directly linked to immediate sensory experience.”⁵ The pre-operational stage “principally involves increasing ability to use and to form symbols,” including, most importantly, language.⁶ The later two stages run longer and are more complex.⁷ Thus, the third stage, concrete-operational, runs from about age six to middle adolescence, and the fourth stage, operational, takes hold thereafter.⁸ Professor Williams summarizes these stages in this way:

[T]he difference between concrete and formal operational thinking turns on the ability to manipulate abstractions derived from concrete experience. Most of Piaget’s research involved scientific concepts, but he argued that the general principles held for all kinds of thinking: Can the person juggle multiple hypothetical variables and then combine and recombine them to predict different outcomes? Can the person project probabilities? Can the person reason from the intersection of logical sets and from empty sets?⁹

The broader point is that Piaget described intellectual growth in universal, predictable stages. “All children, Piaget concluded, go through each of these stages. More importantly, they all go through them in the same sequence.”¹⁰

Like Piaget, Kohlberg described intellectual growth in stages, but Kohlberg focused specifically on the development of moral reasoning.¹¹ Kohlberg argued that we develop in roughly three stages.¹² Kohlberg’s first stage, the pre-conventional stage, reflects a crude moral reasoning that focuses only on the immediate, short-term consequences of one’s behavior.¹³ Pre-

4. Williams, *supra* note 1, at 3-4.

5. Wangerin, *supra* note 1, at 1243.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Wangerin, *supra* note 1, at 1244.

11. Williams, *supra* note 1, at 5-6; *see also* Wangerin, *supra* note 1, at 1274-81.

12. Williams, *supra* note 1, at 5-6.

13. *Id.*

conventional moral reasoning, then, is concerned only with immediate punishments and rewards.¹⁴ The second stage, the conventional stage, reflects broader concern for one's family, one's community and even one's nation.¹⁵ The broader values in these groups are the driving forces behind one's moral decision-making.¹⁶ The final stage, post-conventional, reflects more abstract values that transcend any particular community.¹⁷ Moral values in this final stage move toward the universal.¹⁸

In the spirit of Piaget and Kohlberg—and roughly correlating to their stages—William Perry has identified nine stages of development, which for our broader purpose, we can collapse into three.¹⁹ Perry's system is particularly attractive to college curriculum planners because it focuses on the growth of college students. It is useful here because it also closely describes the development of first-year law students.

Perry's first stage, dualism, is characterized by a student's desire to learn definitive, objective and concrete right and wrong answers from an authority.²⁰ Dualism helps explain, for example, why so many first-year students rely on commercial outlines (because they provide concrete, definitive statements of the law). It also helps explain why many of them unduly focus on niceties and form over substance and analysis in their writing (because form often has an objectively correct approach, where analysis is often indeterminate). And it helps explain why they often become so frustrated with the professors' mantra "it depends" (because it represents indeterminacy). In short, the dualist aims to get his or her arms around a subject so as to rest comfortably in the belief that he or she "knows" it. But in fact,

14. *Id.*

15. *Id.*

16. *Id.*

17. Williams, *supra* note 1, at 5-6.

18. *Id.*

19. Perry described his nine-stage scheme in WILLIAM G. PERRY, FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS (1970). This very brief description collapses Perry's much richer system for the purpose of brevity and in order to highlight the features of Perry's system that are most relevant for my purposes here. This three-stage summary of Perry's nine-stage scheme follows Paul Wangerin's summary. Wangerin, *supra* note 1, at 1244-51; see also Williams, *supra* note 1, at 4-6.

20. Wangerin, *supra* note 1, at 1246-47.

the dualist knows only form, formulae and formalism. By focusing primarily on the determinate, the dualist misses the bigger picture.

The second stage, relativism or multiplicity, follows after the student learns that knowledge is not determinate, that there is not always a concrete right and wrong answer and that opinions on a question often differ even (or especially) among experts.²¹ At its highest stage, relativism is characterized by an acceptance of all views and complete deference to none:

[The relativist] assumes that an answer can be called "right" only in the light of its context, and that contexts or "frames of reference" differ. He assumes that several interpretations of a poem, explanations of a historical development, or even theories of a class of events in physics may be legitimate "depending on how you look at it." . . . [H]e . . . supposes that the [teacher] may be about to present three legitimate theories which can be examined for their internal coherence, their scope, their fit with various data, their predictive power, etc.²²

Relativism helps explain why students near the end of the first semester often relish opportunities to argue any side (or even both sides) of any debate, no matter how inconsequential. It may also help explain why some students who enroll in law school with firm moral commitments later become alienated: some of these students may feel that in their new-found relativism, they have lost their purpose in studying the law, while others who have successfully resisted relativism may find themselves sad and alone among relativists.

Perry's final stage, reflective thinking or commitment, is characterized by an understanding that views are diverse and often diverge, but it is also characterized by a considered commitment to a particular view.²³ We sometimes see reflective thinking and commitment in thoughtful and balanced student papers in upper-level seminars or in good student law review notes, where students consider various positions and

21. *Id.* at 1248-50.

22. *Id.* at 1250 (PERRY, *supra* note 19, at 2 (describing sub-stages of relativism)).

23. *Id.* at 1259-73 (describing sub-stages of commitment); *see also* Williams, *supra* note 1, at 4.

then commit, for principled reasons, to one. We also often see commitment in well supervised student clinical work, where students elect a particular clinic because of their reflective commitments to the work of the clinic and where their own clinical work and further reflection often reinforce their initial commitment. Finally, we sometimes see commitment in students' post-graduate choices, when students are able to make reflective and principled decisions about their careers.

III. THE FIRST-YEAR CURRICULUM AND OUR STUDENTS

The traditional first-year curriculum is precisely tailored to take our incoming students from Perry's dualistic stage to a relativistic stage, tracking the first two steps in this sequence exactly.²⁴ Against the backdrop of our students' stages of development, the first-year curriculum seems specifically designed to meet our students exactly where they are and to push them gently along in their development. We start by training students as dualists. For example, our early and exclusive focus on sanitized appellate opinions—where facts are fixed and determined law applies rotely and deductively—reaches our dualists by suggesting that learning and practicing the law are merely exercises in syllogistic reasoning. Similarly, traditional essay exams reach our dualists by suggesting that there are objectively right and wrong ways of understanding and analyzing the law. (Multiple choice exams suggest this even more strongly.) Finally, in order to study first-year courses, we make available any number of study aides, most of which are designed to deliver the clear, objective law to our students in the most efficient manner possible. These defining features of the traditional first-year curriculum are classically dualistic: they teach our students that the law is about right and wrong in an objective, determinate world.

Moreover, the traditional Socratic Method teaches our students that the law is outside of themselves—that it is created by others and given to them. The Socratic form thus suggests to students that the instructor, the casebook, the commercial materials—the experts, and not the students themselves—hold the keys to understanding the law. In the language of critical

24. See chart *infra* p. 41.

and progressive educator Paulo Freire, students are merely passive and empty “containers” or “receptacles” to be ‘filled’ by the teacher”—the expert law professor.²⁵ The law itself is fixed and pre-existing in relation to our incoming students: while it was created, to be sure, by someone, it cannot be changed by our students. These features of the traditional Socratic Method buttress the dualistic nature of the early first semester by reinforcing the idea of a given, fixed and external law that is knowable in an objective way.

First-year legal writing courses reinforce these other features of the curriculum in nurturing our students’ dualism. The central feature of these courses is nearly always a well vetted simulation—a problem that the professor designed to meet particular educational objectives. However, in designing the problem, the professor by necessity traces every possible path between the facts and the law, defining every argument and mode of analysis to ensure that the problem meets the objectives without a hitch. We even have a term for such a well vetted problem: it “works.” In these classes, where the subject itself is legal analysis and communication, a simulation—or a problem for which the professor by necessity already defined the modes of legal analysis—meets our dualists’ needs by showing them that the subject is objective and determined and outside of themselves.

But even as we nurture our students’ dualism, we also nudge them along. As our students progress through the first semester, we teach them as relativists. We teach them legal argumentation and advocacy, and we show them how to manipulate arguments to favor either side of a dispute. In doctrinal courses, we teach them modes of legal and policy arguments, the corresponding counter-arguments and critiques of both. Through the Socratic Method, we often teach them that there is no single right answer for the professor (the students’ primary authority on the law) and that each of the multiple potential answers is equally valid.²⁶ In moot court competitions and legal writing courses, we often arbitrarily assign students a party and instruct them to argue zealously, without respect to

25. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 52-53 (Continuum 1995).

26. Thanks to student editor Greg Frayser for this insight.

their moral commitments about the case. We sometimes even require them to change sides mid-course and urge them to abandon their moral commitments in favor of arguing zealously on behalf of their clients. In short, we nurture our relativists by teaching them to argue anything, to be “hired guns.”

The following chart summarizes this cognitive development of students in traditional first-year law courses:

Moral and Cognitive Development in Law School:

Stage of Development	Student Characteristics	What We Do in Law School
Dualist	<ul style="list-style-type: none"> - Desire for “Black-Letter” Law - Focus on Authority - Focus on Details, Format, & Citation Timid 	<ul style="list-style-type: none"> - Focus on Determinate Law and Facts - Focus on Authority - Focus on Details Intimidate
Relativist	<ul style="list-style-type: none"> - Enthusiasm for Arguing Either Side of a Case: “Hired Gun” - Enthusiasm for Zealous Advocacy 	<ul style="list-style-type: none"> - Focus on Hypotheticals - Teach Students to Argue Both Sides
Reflective	<ul style="list-style-type: none"> - Thoughtful, Mature - Act as “Agents” Able to Deal with Indeterminacy 	<ul style="list-style-type: none"> - Seminars and Clinics - Introduce Indeterminacies in Law, Policy and Practice

Our traditional first-year curriculum works: our students' movement from dualism to relativism in the first semester is palpable. We see this in our students' language, in their questions and in their analysis. Early on, they seek "rules" and "holdings;" they often ask about the "black-letter law." As a second-semester student recently asked me in the hopelessly indeterminate first few weeks of my Constitutional Law class, "What are we supposed to be getting out of this? I mean: what are we supposed to be *memorizing*?" Later, we hear our students experiment with different arguments, taking opposing positions, poking holes in others' arguments and relishing the role of devil's advocate—often not out of any driving moral or even legal principle, but for its own sake. Thus, our transformation is complete: we have succeeded in moving our students from dualism to relativism.

There is only one problem: our students started in law school further along the curve.

Our students increasingly come to us with a vast array of significant life experiences. All have a college degree. More and more have completed graduate or professional school. Many have worked full-time and traveled before enrolling. Some even had fully successful careers before coming to law school. Many have families, own homes and have taken on significant financial responsibilities (like law school loans). Our entering students may be novices in the law, but they are by and large more mature thinkers in other areas of their lives. Using the developmental terms, they are more often advanced relativists and reflective thinkers than they are dualists. And they are capable of applying their more mature traits to their study of the law.²⁷

27. The few available empirical studies seem to bear these conclusions out. Researchers seem to agree that law students "rely on formal rules and societal conventions more than other groups and may have exhibited a more homogeneous stage of moral development within the group than other groups." Moreover, law students do not seem to develop—and some claim that law students actually decline—from this conventional stage (in Kohlberg's system). Daicoff, *supra* note 1, at 207-08 (summarizing some of the conclusions based on empirical studies of law students' moral development, and concluding that they have resulted in "conflicting findings"); see also Hartwell, *supra* note 1, at 522-31 (describing Professor

The traditional first-semester curriculum, with its emphasis on the move from dualism to relativism, thus regresses our students before it re-progresses them, or in other words, it breaks them down before it builds them back up. This is not merely duplicative and a waste of time; it is affirmatively harmful. By regressing our students and teaching them to be dualists, we alienate them from the law itself. By teaching them that the law is objective and determinate and that facts are fixed, we disempower them. We show them that they are passive recipients of the law and facts, not active agents in creating and developing the law and facts.

In regressing our students, we also fail to paint an accurate picture of the practice of law and ill prepare them to be good attorneys. As practicing attorneys well know, the law is often indeterminate. It contains gaps and holes, and attorneys, clients, judges and others play an active role every day in constructing the law. They play an even more active role in construing the facts. But we teach our dualists that these concepts are fixed and that their job is merely to apply the law robotically to the facts and produce a conclusion. This regresses our students intellectually, presents an inaccurate picture of the practice of law and alienates students from the real business of attorneys: actively making their cases and thus making the law.

Nudging our students on to a relativistic stage does nothing to temper these harms; instead, it amplifies them. Relativism leads to further alienation. We alienate a good number of those students who came to law school for principled reasons and with reflective moral commitments. These students either lose their reflective commitments (and thus forget why they came to law school in the first place) or find themselves alone among dualists and disenchanting with the experience. Relativism also reinforces the static view of law and facts that we give our dualistic students.

Perhaps worst of all, this process of regression and reprogramming misses a significant opportunity to capitalize on our students' reflective capabilities in other areas of their lives and thus significantly enhance their education. Incoming

Hartwell's conclusion that students improved on the Kohlberg-based Defining Issues Test (the "DIT") after participating in "experientially taught professional responsibility courses").

students know how to resolve competing interests, solve complicated problems and arrive at thoughtful, balanced and considered conclusions in important areas of their lives. We can and should build on these reflective capabilities (rather than crushing them) by showing our incoming students how to apply them in the law. If we can do this, our students can produce better quality work, more useful work and work that better reflects actual practice as early as their first semester (not the third year, or beyond). Moreover, if we can do this, we can begin to treat our adult, professional students with the dignity and respect that they deserve.

The best way to achieve these complicated goals is to introduce actual legal work into the first-year curriculum.

IV. ACTUAL LEGAL WORK IN THE FIRST YEAR

Actual legal work in the first year based on a live case or problem may help avoid this regression and allow us to build upon students' intellectual and moral reasoning capabilities. Actual legal work, unlike the typical case studies in the first year, involves the necessarily indeterminate facts of a live client or actual problem. It involves evolving law (by its nature, because nearly any case or problem helps evolve the law). In addition, it involves faculty and other authorities that, while more experienced than the students in the law, are no more experts in the actual case or problem than the students themselves. Actual legal work in the first year thus re-situates students in relation to the law and to the faculty. Students become partners in their own education and in the case, not mere empty receptacles for information. It thus empowers students, rather than alienates them.

Moreover, actual legal work in the first year demands that students draw upon their reflective capabilities. Students are faced with complicated and often indeterminate law drawn from a variety of sources. They must deal with difficult and inconsistent facts, and they must reflect upon and balance competing considerations to help their clients commit to a position, strategy or course of action. Actual legal work uniquely requires students to use their reflective capabilities; it naturally capitalizes upon them.

The following is a discussion of three different ways I have tried to achieve these goals.

A. First-Year Legal Theory and Practice

My most comprehensive experience with actual legal work in the first year was based upon a second-semester course I taught (and co-taught) at the University of Maryland School of Law involving state constitutional issues, torts and civil procedure.²⁸ This six-credit course encompassed the required elective and the required legal research and writing courses. The classes were small, limited to 18 students. Students indicated a preference for the class in enrollment, and students were accepted based on a lottery.

Each student worked on two problems: an actual police brutality claim and a separate law reform project. On the police brutality cases, students worked in three and four-person teams, engaging in anything from informal fact investigation to trial, depending on the case. Their work on various aspects of the cases showed them first-hand that law and facts are often indeterminate; client stories are rarely straightforward and nearly always complemented, supplemented or contradicted by others' stories, and the law rarely applies in a clear, straightforward way. The cases' inherent and broader legal and political contexts often complicated their work, adding factors beyond the mere facts and law that students had to consider in designing a case strategy. Finally, the students' collaborative work and their close work with supervising faculty and attorneys showed them how law is often constructed, not given, thus reinforcing the indeterminacy of the law. The features—and the immediacy and importance of actual legal work—simply cannot be replicated in the study of edited appellate decisions or even in classroom simulations.

On the law reform project, we worked collaboratively as a class in developing strategies and sharing research, but students submitted their own individual written work. Two of the three years the classes worked on the procedural and legal aspects of a state constitutional civil right to counsel (or “Civil Gideon”),

28. I am deeply indebted to my co-teacher, mentor, and inspiration for this work, Professor Michael Millemann of the University of Maryland School of Law. Our work on yet a different model, not described in this article, is detailed in Michael A. Millemann and Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 CLINICAL L. REV. 441 (2006).

and one year the class worked on state official immunities in the context of state constitutional tort claims. These issues were all in their nascent stages, and the students themselves worked up the legal theories. The law in these areas was indeterminate by definition, so the students were developing new legal theories and test cases in these areas. Thus the cases reinforced the indeterminate nature of law and required students to endeavor to make the law, not merely to apply it rotely. The faculty and cooperating counsel were truly partners, not authorities, as we were developing theories of our own even as we supervised our students' work. As a result, we valued students' participation and drew regularly on their ideas. Class discussions were an exercise in group reflective thinking: we shared ideas, balanced interests and committed to an approach. We, the faculty, dictated nothing but the barest outlines of the process—and only to ensure that we satisfied the basic learning objectives and lessons of the underlying course.

Students in these courses consistently commented on the value of actual legal work in the first year—and the differences between this class and their other first-year courses. Students reported a heightened level of engagement in class, a sense of partnership with the faculty and cooperating attorneys and an empowering sense that they were making a difference in the law and in their cases. They also reported that they felt respected, or “treated like an adult,” in contrast to many of their other first-year courses, where they often felt intimidated, confused, alienated or helpless.²⁹ Although they did not speak in terms of developmental learning theory, much of their feedback suggested that they felt as though the courses offered them an opportunity to grow, not regress, as both people and as students of the law.

B. First-Year Constitutional Law and Appellate Advocacy

My second experiment involved a two-course package in the summer session between the first and second years that combined Constitutional Law II—the individual rights

29. Students reported these effects even on the law reform projects, where students never even met a traditional client. The immediacy and the practicality of the work seems to have counter-balanced the missing client in these projects.

component of Constitutional Law—with the required appellate advocacy course at the University of Maryland School of Law. My students were required to enroll in these courses concurrently in order to explore theory (through the Constitutional Law course) along with practice (in the Appellate Advocacy course).

Like the courses described above, this course was relatively small—only 24 students enrolled—and students voluntarily enrolled in these concurrent courses (but without first knowing the case on which we would work). I divided students into four teams of between six to eight students each and assigned each group a legal issue involved in the same-sex marriage case then before the Maryland Court of Appeals. I asked students to write an appellate brief on their assigned issue; I would later consolidate their work and help to incorporate it into an amicus brief that the faculty at the University of Maryland submitted for the case. But, I allowed students to develop arguments for either the plaintiffs or the state for two reasons. First, some students expressed a moral discomfort with same-sex marriage, and arguing for the state would avoid forcing them to argue as “hired guns.” Second, I anticipated that state-side arguments would serve our project every bit as well as generating plaintiff-side arguments.

The legal issues here, too, were by definition indeterminate: the case and, derivatively, our work on it, existed only because the state constitutional issues were unsettled. The case thus highlighted the indeterminate nature of the law, not the settled nature of the law. The students worked side-by-side with me as we developed theories and arguments together in the case, thus reinforcing their roles as agents of law reform, not passive receptacles of the law. Importantly, we devoted much class time to moral and policy discussions about same-sex marriage, placing the case in larger moral and political contexts and allowing students to explore and reflect upon broader considerations of morals and politics in crafting their approaches. Many of these discussions were predictably contentious, just as discussions among the attorneys in the case were predictably contentious. But our conscious efforts and our focus on the larger project—the case, and our pedagogical goals in using the experiential model—helped avoid marginalization of dissenting voices.

Students universally reported effects very much like those described above in sub-part A. Notably, even those students who wrote briefs for the state—knowing that their work would ultimately be used to support arguments for same-sex marriage—reported the same high level of engagement as other students in the class. One student who wrote for the state was unusually engaged throughout the semester: I suspect he saw the case as a challenge to his moral commitment against same-sex marriage. After a semester of thought and reflection on his moral commitment, and constitutional research on the issue, he told me that his moral commitment against same-sex marriage had not changed. (In some ways, his moral commitment strengthened, because the case pushed him to respond to counter-arguments.) But he nevertheless said he had a hard time making any constitutional case against same-sex marriage.

As with the law reform projects described above in sub-part A, the immediacy and importance of the case seemed to outweigh the lack of an actual client in motivating the students to engage and perform. Again, while students did not speak in terms of developmental learning theory, their comments on the course suggested that they appreciated it precisely because they progressed, not regressed, as intellectual and moral thinkers.

C. First-Semester Case Work

In my third effort to build upon students' reflective capabilities, I experimented with actual legal work in my first-semester legal writing course at The John Marshall Law School in Chicago. This was a three-credit course with 23 pre-assigned students in the Fall Semester 2007. Our legal work was in support of a pro bono client of mine, a displaced worker who lost her appeal of a denial of trade adjustment assistance at the U.S. Court of International Trade. I asked my first-semester students to write a series of memos advising me and our client on the merits of an appeal to the Federal Circuit.

This case had none of the factual or legal indeterminacies of the classes described above. My students never met our client, they never engaged in any fact investigation (because the record was set) and they were not seeking to reform the law in any major way. Moreover, neither the factual nor legal issues raised the kind of broad ethical questions or deep policy issues as the cases described above. In many ways, this case was exactly like

a simulated problem that a professor might use in any first-semester legal writing course; the biggest difference was that it was real.

Nevertheless, students moved forward developmentally in significant ways. Most importantly, students saw themselves as active agents in the development of a case, not passive recipients of lessons from a case long-ago decided or actors in a simulation that I had previously worked out. Students were actually developing the case, not merely retracing steps that I had already taken. Moreover, their work as a class was quite good and turned out to have a major impact in the direction of the case. Perhaps most surprisingly, given the facially dry nature of the case, as a class we engaged in serious moral discussions about the case by the end of the semester.

Like the other courses described above, I worked alongside the students in developing our case. I tried to offer guidance, but not directives, and my students very quickly became nearly as expert in the case as me. (And they knew it.) As in the courses described in sub-parts A and B, the immediacy of this case directly impacted the students' engagement with it.

Given that the immediacy was the only feature of this experiment that differed from a traditional, hypothetical simulation in a first-semester writing course, this course suggests that even actual legal work alone—without indeterminacies, without broad legal and political implications and without obvious moral issues—can yield important results.

V. CONCLUSION

The typical first-year curriculum seems designed to meet our incoming students where they are with regard to their development and knowledge of the law. It thus seeks to teach them the law using the most efficient and effective means. However, in doing so, it ignores the mature reasoning capabilities that our incoming students bring to law school, even if not in the law. Ignoring these capabilities results not only in lost opportunities; it also results in regression: we regress our students along the developmental continuum before we re-progress them. Actual legal work in the first year is a better way to capitalize on students' capabilities and nudge them forward as developing attorneys.

