THE SOCRATIC METHOD AND THE DEVELOPMENT OF THE MORAL IMAGINATION*

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A lawyer's professional life begins the day that he or she starts law school. This has not always been the case, of course, but today the first phase of almost every lawyer's career consists of a period of time spent studying law in a formal academic program under the supervision of university professors. However diverse their professional experiences may be in other respects, therefore, lawyers still share at least one thing in common: they have all been law students at one time or another, and it is as students that their professional habits first take shape.

The single most prominent feature of twentieth-century American legal education is its heavy reliance on the so-called case method of instruction. By the case method I mean two things: first, the study of law through the medium of judicial opinions, mainly appellate opinions, that have been rendered in actual disputes; and second, the examination of these opinions in a spirit that has often, and aptly, been described as "Socratic." Though this latter term is sometimes used to denote a distinctive style of law teaching—one marked by an extreme of bullying and intimidation—it is the term's wider meaning that I have in mind. By Socratic I mean both an unwillingness to take the soundness of any judicial opinion for granted, no matter how elevated the tribunal or how popular the result, and a commitment to place the conflicting positions that each lawsuit presents in their most attractive light, regardless of how well they have been treated in the opinion itself. Most American law teachers today employ the case method of instruction in the broad sense just defined.

It would be possible, of course, to teach the law by studying its operation at the trial and pretrial levels rather than concentrating as exclusively as American law teachers do on the decisions of appellate courts. But appellate opinions have the great advantage of bringing out the legal issues in a case with an economy and a precision that trial transcripts, for example, rarely do. To be sure, appellate opinions also have a characteristic deficiency that most law teachers recognize: they are typically mere distillates that leave out much of a dispute's original complexity and present its facts in an incomplete and stylized way. But the usefulness of appellate opinions as a vehicle for teaching the broad structure of the law outweighs this deficiency and explains why they are used instead of transcripts and briefs as the chief means for introducing students to the doctrine in most fields.

This explanation for the heavy reliance on appellate opinions in American law teaching immediately raises the question why most American law teachers do not

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teach from treatises and textbooks instead? If the aim is to familiarize students with the doctrine in a certain field, why isn't a textbook that sets out the relevant rules in a clear and systematic way the best vehicle for doing so? What advantage is there in making students study these rules obliquely, by means of judicial opinions rendered in specific cases, rather than giving them the rules directly? There are three familiar answers to this question.

First, since class time is scarce, it seems reasonable to concentrate on those problems likely to give students the greatest difficulty when they enter practice, and these will by definition be the problems that arise at the unsettled boundaries of a field, not those more routine ones that can be decided by already well-established principles. Boundary problems of this sort necessarily involve a clash of principles in which as much, or nearly as much, may be said on one side as on the other. The evenness of such contests means that at the margin of a field there are, in fact, no controlling principles at all, but only cases—controversies in which principles of roughly equal weight compete for precedence. The case method is certainly the most economical and perhaps the only way of giving students a feel for these controversies, for the boundary conflicts that define, at any given moment, the margins of a field. And from these conflicts it is easier for a student to construct an understanding of the field's settled interior than the other way around.

Second, in addition to a knowledge of legal rules, practicing lawyers obviously also need skill in applying these rules to problems of a concrete kind. A lawyer must be able to apply the law to the complex, real-life dilemmas of clients. And the case method of instruction, which buffets students with a steady stream of such dilemmas, seems better adapted to the cultivation of this skill than textbook expositions do.

A third justification for the case method is that it promotes rhetorical abilities needed in law practice. Lawyers are regularly called upon to defend their clients' interests before strangers in a public setting, often with little opportunity for advance preparation. To be effective a lawyer must therefore be skilled at spontaneous public speaking, and the case method of instruction—in which students are given no advance notice of the positions they will be required to defend before their classmates and under Socratic interrogation—seems the one best suited to teach this skill: better suited, in any case, than an abstract discussion of rules or principles that presents only familiar considerations of a general sort and no new facts that students must incorporate into their extemporaneous arguments.

Each of these three justifications has merit, but each is also incomplete. The first justification, for example, tells us nothing about the way that boundary contests in the law should be resolved. A knowledge of general principles is clearly insufficient by itself to settle such disputes, for by definition they present dilemmas that existing principles do not straightforwardly decide. Is their decision therefore arbitrary? If not, what else must one know, what other skills must one possess, to decide them? And how does the case method teach these skills or convey the required sort of knowledge?

The second justification is incomplete as well. No one will deny that the practice of law involves the application of general rules to specific cases. But the same may also be said of other disciplines, like medicine. The cases that doctors study differ, however, from those that constitute the subject matter of the lawyer's art. A law

case is a fight or a contest; to say what it is, is necessarily to describe a disagreement. By contrast, to state a medical case—a patient's presenting symptoms—is not in the same way to report a controversy, though doctors may of course disagree in their diagnosis of a patient's problem. We might express this idea by saying that the problems with which lawyers deal are *constitutively* argumentative, at least in comparison with those of medicine. How is this distinctive feature of the cases they confront reflected in the method that is used to teach lawyers their craft? The claim that the case method teaches law students how to apply general rules to particular problems raises this question and brings it into focus, but by itself provides no answer.

The third justification misses something too. A good lawyer must of course be an effective advocate, and it is reasonable to assume that this requires some skill at public speaking. But effective advocacy demands more than the ability to speak extemporaneously in front of strangers. It also requires that one be able to distinguish persuasive arguments from unpersuasive ones, and the third justification for the case method of laws teaching has nothing to say about the meaning of this distinction or the way in which the study of cases helps student to discern it. And it ignores a basic feature of the method itself. For while it is true that the case method forces students to practice the art of advocacy by making arguments on behalf of imaginary clients, it also compels them to reflect on the soundness of these same arguments from a judicial point of view and thus, some of the time at least, to adopt an attitude more neutral and inclusive than that of a committed advocate. These three justifications for the case method all lack one thing: an appreciation of the way in which it functions as an instrument for the development of moral imagination. It is this aspect of the method I now want to examine.

The case method of law teaching presents students with a series of concrete disputes and compels them to reenact these disputes by playing the roles of the original contestants or their lawyers. It thus forces them to see things from a range of different points of view and to entertain the claims associated with each, broadening their capacity for sympathy by taxing it in unexpected ways. But it also works in the opposite direction. For the student who has been assigned a partisan position and required to defend it is likely to be asked a moment later for his views regarding the wisdom of the judge's decision in the case. To answer, he must disengage himself from the sympathetic attachments he may have formed as a committed, if imaginary, participant and reexamine the case from a disinterested judicial point of view. The case method thus works simultaneously to strengthen both the student's powers of sympathetic understanding and his ability to suppress all sympathies in favor of a judge's scrupulous neutrality. Most important, it increases his tolerance for the disorientation that movement back and forth between these different attitudes occasions. In this way he case method serves as a forcing ground for the moral imagination by cultivating that peculiar bifocality that I earlier described as its most essential property.

One aim of this complex exercise in advocacy and detachment is the cultivation of those perceptual habits that lawyers need in practice. Forcing students to defend positions they do not believe in or that they consider morally offensive may seem arbitrary and insensitive, but it serves an important goal. The student who is put in this position must strain to see the claim he has been given to defend in its most

attractive light. He must work to discover its strengths and to articulate them, and this he cannot do unless he temporarily puts his earlier convictions to one side. In this way students get used to looking with a friendly eye even at those positions they personally reject, and before long they acquire some skill at identifying the strengths and weaknesses of whatever claim is presented to them, those that are unfamiliar or morally distasteful as well as those they recognize and endorse. Gradually, much of this becomes habitual. One comes to see that the arguments for and against most positions fall into certain stylized patterns, and to recognize which argument forms are most appropriate to which causes. Over time these insights come to shape the increasingly instinctive scheme within which law students view the cases they are given. The gradual acceptance of this scheme marks a change in perception, in the way one sees legal conflict as well as thinks about it. Or more precisely, since this distinction is to some extent an artificial one, the way a law student learns to think about cases comes eventually to affect how he perceives them, below the level of reflective thought. This perceptual adjustment forms the core of the student's nascent professional persona, and is reflected in the habits and reflexes that increasingly distinguish his approach to legal problems from that of a layperson uneducated in the law.

Along with this perceptual adjustment, the case method tends to promote a second change as well, a change in temperament or disposition. The role-playing and Socratic interrogation that are its central features force students to make the most of the conflicting claims presented by the cases. It forces them to entertain these claims from a sympathetic internal point of view. This means more than granting that their proponents have the right to assert them and accepting that they are not irrational to do so. To entertain a claim, one must make an effort to see its sense or value from the point of view of those who actually endorse it: to sympathize with their perspective and not simply tolerate it. The effort to entertain unfamiliar and disagreeable positions may at first cause some awkwardness and pain. But in time it increases a person's powers of emphatic understanding and relaxes the boundaries that initially restrict his sympathies to what he knows and likes.

Some students find this experience disturbing and complain that the case method, which makes every position respectable, undermines their sense of integrity and personal self-worth. It is easy to understand why. For the discovery in oneself of a developing capacity to see the point of positions that previously seemed thoughtless or unfair is often accompanied by a corresponding sense of more critical detachment from one's earlier commitments, and this can lead to the feeling of being unmoored with no secure convictions and hence no identity at all.

This experience, which law students sometimes describe, not inappropriately, as the experience of losing one's soul, strongly suggests that the process of legal education does more than impart knowledge and promote new perceptual habits. In addition it works—is meant to work—upon the students' dispositions by strengthening their capacity for sympathetic understanding. The strengthening of this capacity often brings with it the dulling or displacement of earlier convictions and a growing appreciation of the incommensurability of values, changes of attitude that many experience as personally transforming. It is this unsettling experience that underlies the law student's concern that his professional education threatens to

rob him of his soul—an anxiety no mere increment in knowledge or refinement of perception can explain.

It may seem implausible that the reading of appellate opinions can bring such a transformation about. Appellate opinions, after all, are typically rather dry documents that contain only an abbreviated statement of the facts; that commonly avoid decision on the merits but focus on the jurisdiction and procedure of lower courts instead; and that frequently fail to present the losing side in its most attractive light (for the obvious reason that doing so makes it easier for the court to justify its decision in the case). These characteristics might appear to make appellate opinions a poor vehicle for stimulating the moral imagination of law students by forcing them to sympathize with a diversity of points of view and to confront the impossibility of framing a comprehensive scheme of values within which all conflicting claims may be compared. If that is our goal, would it not be better to focus, say, on the parties' briefs and closing arguments at trial, where the facts are likely to be presented more fully and the positions of the contestants stated with maximum force?

The answer is no, for several reasons. First, however incomplete the statement of facts in an appellate opinion, it almost always contains some details embarrassing to the winning party. These, so to speak, peep through the opinion and remind readers that the losing party had some facts on its side too. Second, the law teacher who teaches Socratically does not simply say, "On the facts as reported the court held thus and such," and let it go at that. Rather, using the court's selective but manageable statement of facts as a starting point, he invites his students to replay the case by considering whether the losing party might have put its position in a more compelling form and then imaging what could have been said in response. Often this means teaching against the grain of the court's opinion—by taking seriously facts it downplays and arguments it rejects. But many American law teachers teach this way, and since the appellate opinions that are selected for inclusion in student casebooks are often chosen precisely because they invite contrapuntal treatment of this sort, there is even a bias in favor of such teaching. Third, if it is objected that this can all be accomplished more easily by using other materials (a dubious claim in any case, given the length and disorderliness of most trial transcripts and the poor quality of many briefs), the response must be that this objection misses the point. For the students' imaginative powers are most likely to be strengthened if they are forced to work at reconstructing positions only partially visible to them rather than being presented with these positions in already finished form. The moral-educative function of law training requires that this work be strenuous; that it be possible but challenging. And the appellate opinion seems a particularly good instrument for this because it is rich enough in facts to give students something concrete to work with, but sufficiently schematic to make them struggle to reimagine fully the parties' conflicting claims.

These considerations help explain why appellate opinions are more likely than treatises and textbooks, on the one hand, or briefs and transcripts, on the other, to encourage the growth of deliberative imagination, as well as being uniquely well adapted to conveying an understanding of legal doctrine. But there is another element to the moral education law students receive that is also linked to the study of judicial opinions and that would be missing if their reading consisted of

academic synopses or partisan statements instead. Once we take this other element into account, moreover, reasons emerge for viewing the negative, belief- and commitment-threatening side of the case method in a more positive light.

The task of an appellate judge is twofold: first, to decide the controversy before him, and second, to provide a set of supporting reasons for the decision that he gives. Both his decision and the rationale for it are set forth in the opinion the judge issues at the conclusion of the case. Of course, the parties to a legal dispute also often prepare documents of their own stating their version of the case. But it is the judge who has the final word, and his opinion enjoys priority over theirs. It establishes the point of view from which every other viewpoint must be assessed. Thus while it may in one sense be correct to describe the judge merely as another actor in the drama of the case, within the structure of this drama his perspective occupies a dominant place.

In the case method of instruction, the priority of the judge's point of view is reflected in the disproportionate amount of class time typically devoted to questioning whether the case at hand was rightly decided, a question that must by definition be approached from the perspective of a judge whether one agrees with the decision or not. The case method is largely an exercise in forced role-playing. But it is important to remember that among the roles students are invited to play is that of a judge, and to recognize that the priority of this role over others is embedded in the method itself.

If the effort to entertain the claims of the parties to a lawsuit demands enlarged powers of sympathy and leads to a loss of ideological conviction, to a blurring of the distinction between right and wrong, and to a diminished faith in the commensurability of values generally, the case method's emphasis on the priority of the judicial point of view underscores the need to conclude the dispute despite these certainties and to do so not by *fiat* but in a reasoned and publicly justifiable manner instead. In this way the case method provides its own counterweight to the student's growing acceptance of complexity and pluralism in the realm of values, and blocks the slide to what might otherwise become the cynical celebration of arbitrariness. It does this by habituating students to the need for reasoned judgment under conditions of maximum moral ambiguity, and by giving them practice at rendering such judgments themselves. The result is a combination of attitudes in tension with one another: an expanded capacity for sympathetic understanding coupled with the ability to see every claim with the coldest and most distant, most judicial, eye; a broad familiarity with diverse and irreconcilable human goods coupled with an indefatigable willingness to enter the fray, hear the arguments, render judgment, and articulate the reasons that support it, even when all hope of moral certainty is gone. At war with itself, this complex set of attitudes nonetheless describes a recognizable moral ideal, an ideal closest, perhaps, to the public-spirited stoicism implied by the Roman term *gravitas*, but in any event distinguishable from the indifferent cynicism that some believe the case method of instruction tends inevitably to produce. No doubt it sometimes does, and the fear that a person may lose his soul in the process is to that extent justified. But the aim of the case method is otherwise. For what it seeks to produce, ideally at least, are stoics rather than cynics, a distinction that becomes clear only when the priority of the judicial

point of view and its function as a counterweight to relativism are recognized to be essential features of the method itself.

The privileged position that the case method assigns the judicial point of view has another important consequence. Judges are expected to decide cases in a disinterested manner, meaning without concern for their own personal advantage. This does not mean, however, that a judge approaches his task without interests of any kind at all. There is one interest that all judges are allowed and whose absence in a judge is indeed considered a deficiency. That is the judge's interest in the administration of justice, in the integrity or well-being of the legal system as a whole. The judge's interest in the well-being of the law encompasses a variety of concerns—the concern for doctrinal coherence, for example, and for the responsiveness of doctrine to social and economic circumstances. It also includes a concern for the bonds of fellowship that legal conflict strains but that must be preserved to avoid other, more destructive conflicts. The judge's interest in all these things—which, far from compromising his authority, helps to constitute it—might be characterized, in general terms, as an interest in the good of the community represented by the laws. The judge's interest is thus broader or more inclusive than the interests of the parties. They are interested in their own separate welfare. He, by contrast, is concerned with the well-being of the larger community of which they are members, the community constituted by the laws the parties have invoked to settle their dispute. The judge's attitude is in this sense more public-spirited than theirs and his point of view more communitarian.

When law students play-act at being judges, as the case method requires them to do, it is this public-spirited attitude they must assume. To begin with, the attitude is likely to be one most students merely "put-on," in the way an actor puts on a mask. It is too disinterested, too remote from most students' own partisan convictions, to be an attitude they experience as their own. But the built-in priority the case method gives the roles of judge and constant practice at playing it tend in time to blur the line between what a student puts on and what belongs to him in his own right. By a process of transference that the case method deliberately exploits, the judicial attitude that a student begins by mimicking becomes to some degree his own, and the student himself takes on a measure of the public-spiritedness that distinguishes the judge's view of legal conflict. The student to whom this has happened tends instinctively to look at the law and to argue about its meaning in the same way that a judge would, and even more important, to care with new intensity about the good of the legal system and the community it represents.

One could of course devise a system of legal education in which the judicial point of view did not play the central organizing role it now does. Law students might be made, for example to consider problems from the point of view of a legislator rather than a judge. But a program of this sort would be less well-suited to the cultivation of civic-mindedness. No one doubts that legislators sometimes act for the sake of the public good, the good of the whole community whose laws they are empowered to enact, repeal, and adjust. But the actions of legislators are also often directed toward private ends, toward the advancement of the partisan interests of their constituents, the small groups of citizens that elect them and whose frequently parochial points of view they have pledged to represent. Public-spiritedness and partisanship are thus tangled up in legislation. In adjudication, by contrast, the

civic-minded attitude appears in purer form. Unlike legislators, judges are expected to attend to the public good alone, and any deviation from this attitude, though acceptable in the sphere of legislation, is generally considered a failing in a judge. Without denying that civic-mindedness plays some part in the work of legislation, we may therefore say that it *defines* the judge's point of view in a more exclusive way. The priority that the case method gives to this point of view reflects the belief that it is part of what lawyers must be taught. It confirms that one purpose of their professional education is to acquaint lawyers with the attitude of civic-mindedness most perfectly exemplified in the work of judging and through repeated mimicry to inculcate this attitude in them as a dispositional trait.

It is worth observing that this same purpose cannot be ascribed to every scheme of professional education that employs some form of case method as the vehicle for studying human conflict. Many business school programs, for example, use a version of the case method to study problems of entrepreneurship and management. The business school "case" resembles its law school counterpart in several respects. It, too, presents a concrete situation involving different actors with partly conflicting and partly cooperative interests, and challenges the student to discover or invent an appropriate solution to the problem. But the case that business school students study is simply a set of facts and not, as in law school, a judicial opinion. The business school case is not a problem conceived and articulated from the point of view of one who is expected by virtue of his office to be single-mindedly concerned with the promotion of the common good. Though it also involves considerable role-playing, the business school case thus lacks the one role to which the case method as it is practiced in law schools gives the greatest emphasis, the role of the judge, and hence it cannot be said to teach, as directly or insistently, the attitude that distinguishes this role form others. The dominant perspective in business school cases is that of a manager, not of a judge, and while a manager may more than others be concerned with the overall well-being of his firm, because the firm is situated in a competitive environment populated by other firms, managers must also be partisans in a way that judges are not. The managerial perspective mixes communitarian and self-interested attitudes, and to that extent encourages less forcefully than the judicial point of view the spirit of civic-mindedness that the latter exemplifies in an unmixed form.