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Narrative Arcs and Simulations

Michael P. Malloy*

I. INTRODUCTION

The idea of the socio-economics of law school pedagogy¹ carries with it a variety of possible connotations. On the one hand, one can conceive of an intensive interdisciplinary course in law and socio-economics.² On the other hand, one can conceive of a critical study of an area of law and policy informed by a socio-economics perspective, leading to “an . . . appreciation of the usefulness and importance of the schools of heterodox economics in understanding the structure and consequences of law and law based societal interventions.”³ From yet another view, however, one can imagine an assimilation of socio-economic principles and practices *into* a traditional law school course such as *Business Associations*, *Banking Law*, and the like,⁴ to enhance the student’s understanding of the subject area. It is this last approach that is of particular interest to me as a law teacher and researcher. It is not enough for “law professors [to] devote considerable classroom time to critiquing students’ case reading and case evaluation skills.”⁵ Law school should bring

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1. The pedants among us would insist that we should use the term “andragogy,” rather than “pedagogy,” because law school is education for *adults*. See, e.g., Linda Morton et al., *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 CLINICAL L. REV. 469, 474–75 (1999). There are problems with both the denotation and connotation of this term. Andragogy was defined by Knowles to mean the “art and science of helping adults learn.” MALCOLM KNOWLES, *THE ADULT LEARNER: A NEGLECTED SPECIES* 54 (4th ed. 1998). Taken literally, however, this neologism is about guiding males, and to that extent it is a clumsy term to apply to professional, post-graduate education. While the term was meant to be an alternative to “pedagogy,” even Knowles acknowledged that most educators use the latter term in the broad sense of “teaching.” *Id.* Connotatively, the term andragogy is confusing in U.S. educational theory and practice, since “adult education” strongly signals remediative education. See, e.g., *Adult Education*, CA DEP’T OF EDUC., available at <http://www.cde.ca.gov/sp/ae/> (on file with *The University of the Pacific Law Review*) (“Adult schools offer free to low-cost classes for adults 18 and older. Students can get a high school diploma, general education diploma (GED), learn about jobs, learn to speak English, and learn how to become a U.S. citizen.”)

2. See LYNNE L. DALLAS, *LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH* (2005) (displaying classic work exploring interrelationships between law and economic and social processes). See also Lynne L. Dallas, *Teaching Law and Socioeconomics*, 41 SAN DIEGO L. REV. 11 (2004) (providing, in effect, a blueprint of a “law and socio-economics” course).

3. Charles R.P. Pouncy, *Applying Heterodox Economic Theory to the Teaching of Business Law: The Road Not Taken*, 41 SAN DIEGO L. REV. 211, 215 (2004).

4. See, e.g., *id.* (providing aspirational discussion of application of alternative economic approaches to business law courses; describing institutional hostility encountered by author in attempting to make such application).

5. Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 352 (2001).

praxis to the students, not simply theory, and those students need to be exposed to an effective real-world framework within which human interactions take place.

What socio-economics offers to basic legal education is a set of principles that give a useful perspective on the core issues of law and policy.⁶ The key insight is that that economic behavior is not exclusively governed by one analytical school, but instead is contextualized in society and in life generally. As Jeffrey Harrison noted almost two decades ago, “socioeconomics is not a closed system, as law and economics tends to be.”⁷ As an intellectual discipline, socio-economics draws on the discipline of economics, and social and natural sciences, as well as other disciplines, including law.⁸ Understanding competitive behavior is the obvious goal, but as a component of human behavior. Socio-economics is explicitly interdisciplinary, and to that extent it can serve as an impetus for our performance of the task of legal education.

II. RECONCILING THEORY AND PRACTICE

In thirty-five years of teaching, I have always relied upon the compatibility of pragmatic needs and intellectual demands in professional education. Hence, I have emphasized a “Socratic” method wedded to and modified by a problem-oriented, simulation approach. Law teaching is not merely a conceptual enterprise, but also professional education, in which the themes of professional responsibility and practical competence are as essential as intellectual subtlety. The success of these undertakings is, I believe, a direct result of a teacher’s ability to balance professional education with conceptually challenging material, and to encourage both the highest technical proficiency and the deepest humanist concerns of our profession.

This balance is the objective of my use of an extended narrative arc that builds a continuous simulation in my courses. Several basic rules apply. First, students are not expected to “recite” or “present” cases during class. The

6. For a basic introduction to socio-economic principles, see Stefan J. Padfield, *Socio-Economics: Challenging Mainstream Economic Models and Policies*, 49 AKRON L. REV. 539 (2016). The seminal works in this regard are Paul C. Stern, *The Socio-Economic Perspective and Its Institutional Prospects*, 22 J. SOCIO-ECONOMICS 1 (1993); Robert Ashford, *Socio-Economics: What Is Its Place In Law Practice?*, 1997 WIS. L. REV. 611 (1997) [hereinafter *Socio-Economics*].

7. Jeffrey L. Harrison, *Law and Socioeconomics*, 49 J. LEGAL EDUC. 224, 224 (1999).

8. See Thomas S. Ulen, *A Crowded House: Socioeconomics (and Other) Additions to the Law School and Law and Economics Curricula*, 41 SAN DIEGO L. REV. 35 (2004). As the socio-economics scholar Robert H. Ashford has explained,

Socio-economics begins with the assumption that an adequate understanding of economic behavior cannot be achieved by the assumptions of autonomy, rationality, and efficiency that stand at the epistemological foundation of neoclassical economics and rational choice theory Drawing upon “core disciplines” (including economics, sociology, political science, psychology, biology, anthropology, philosophy, history, law, and management) socio-economists hope to develop a more rigorous and helpful understanding of economic behavior.

Socio-Economics, *supra* note 6, at 612.

operating assumption is that they have read the cases, analyzed, and prepared them for their encounters with their simulated clients and other characters. The objective is to learn and practice counseling skills as well as case analysis.

Second, while the class might be called “Socratic,” in that there is dialogue between professor and students, it may be more accurately described as an improvised private universe, filled with continuing events and conflicts. The students are the lawyers, and I provide the simulated cast of characters, typically the client. The objective is to learn planning and structuring, based on client objectives.

Third, there is narrative continuity, from the first day of class until the last. The arc of the story *by some strange quirk of this private universe* seems to track the events and issues in the readings that the students are assigned. In addition to proving the existence of an intelligent design in this universe, the objective is to teach the students to build perspective and balance in terms of responding to immediate problems and the longer-term interests of the client. As Jeffrey Harrison observed with respect to the challenges of socio-economics, “assisting clients in defining and refining their goals and understanding the process requires the attorney to go beyond simplistic assumptions about choicemaking.”⁹

Fourth, there are structural limits to the narrative arc that require extrinsic orientation for the students at the beginning of each class—e.g., “Last time in *Business Associations . . .*”—and extrinsic summation at the end of each class. The objective here is to give the students an opportunity to regroup and assess whether they are sufficiently on task.

How, then, does this narrative arc work in the classroom? (*See* Figure 1, *infra.*) I ask student A at the beginning of the first class in *Business Associations* to close the classroom door. The student, naturally, complies. The class warms up as we proceed through the various administrative tasks that soulless administrators require us to perform at the start of a course, up to that moment when the students expect class discussion to begin. At that point, I turn to student B and ask, “When Ms. A closed the door, was she acting as my agent?”¹⁰

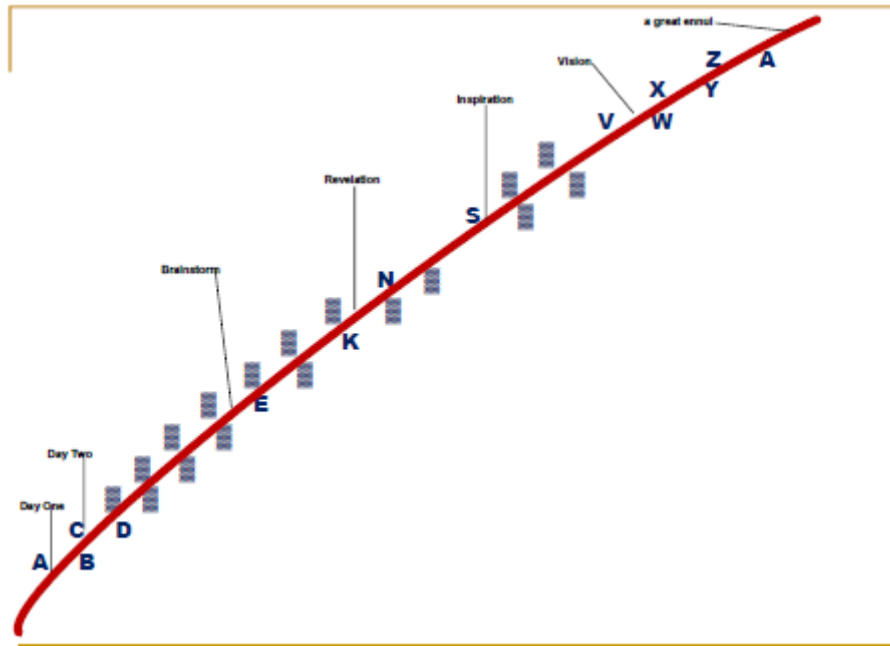
Mr. B begins to realize that he must apply the assigned reading material to this prosaic situation, and he proceeds to do so. Others join in, perhaps disputing his interpretation or application of the material. Surely, they must wonder why I want to know—is this just one of those Socratic hypothetical questions? “If I ask Ms. A to close the door . . .”—but I *did* ask Ms. A to close the door; it *wasn't* hypothetical at all. And then they discover that I have had an idea. Why couldn't I employ students to close doors in the facilities of large institutions like our law school and charge the institution a fee for providing this service? Would this work? Would a school want such a service, and if so, why? If we did this, what

9. Jeffrey L. Harrison, *Socioeconomics: Choice and Challenges*, 41 SAN DIEGO L. REV. 257, 262 (2004).

10. *Cf.* A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981) (considering circumstances under which a contractual relationship might involve agency as a matter of law).

obligations would the students owe me, and I them? Is this just a matter of contract, or are there other rights and duties at stake?

Figure 1. Continuous Narrative Arc



Mr. C, one of my door-closing students, injures the Dean by shutting the door on him. I consult Ms. D, “Will I be responsible for the resulting damages to the Dean?”¹¹ What if C shut the door on the Dean over and over again? What if I am telling C to stop as he is doing this? What if I am not even there? What should I do for the future, after this unfortunate incident is but a bad memory?

A brainstorm sweeps over me in a subsequent class—I want to expand this business and offer it to other institutions. My brother writes me a check for \$50,000, and I use that to pay for some of the expenses of the expanded business. Do I owe him a cut of the profits? Is my brother my partner?¹² What if we agreed that he wasn’t? Is my brother at risk if Ms. E shuts the door on the new Dean?

A revelation comes to me three weeks later—I want to incorporate my door-closing business, but I want to get rid of my brother first (figuratively, not

11. Cf. *Butler v. McDonald’s Corporation*, 110 F.Supp.2d 62 (D.R.I. 2000) (examining whether franchisor is liable under stated circumstances for injury to customer of franchisee).

12. Cf. *Martin v. Peyton*, 158 N.E. 77 (N.Y. 1927) (considering whether financial contract created partnership relationship).

literally).¹³ Can I do this? What do my attorneys advise? No, I don't want him to share in the profits of the new business. Why can't I just start the new corporate business separately?¹⁴

What if I sign a lease for our corporate headquarters before my attorneys have filed the corporate papers?¹⁵ What if the building management company sues me *and my brother*?¹⁶

An inspiration infuses me a week later—what if we offer stock in Door Closers Inc. (DCI) to all the professors at the law school? I still run the business, right?¹⁷ How about I just not tell them what service contracts DCI plans to sign for door closing at other institutions? What do you mean there's a federal statute—didn't we incorporate under state law?¹⁸

A vision comes to me two weeks later—we have a plan to expand DCI and go national within the next five years. I am thinking about buying up all the shares of a door-opening business that services law schools in New York State.¹⁹ That's just a contract matter, right? What merger statute?²⁰ What Williams Act?²¹

A great ennui descends upon me—I have had enough of this workaday world. I want to cash out of this business. I would like to sell all my DCI shares to Bill Gates.²² Bill—I *call him Bill*—doesn't want my brother's shares. He does, however, want me to act as a consultant for the new Microsoft™ project, MS Doors.²³ (See Figure 2, *infra*.) My attorneys seem nervous. My students will never be the same.²⁴

13. Cf. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928) (examining that “punctilio of an honor the most sensitive” that governs the fiduciary relationship between co-venturers and, by extension, partners).

14. Cf. *Page v. Page*, 359 P.2d 41 (Cal. 1961) (considering requirements for dissolution and dissociation in partnership).

15. Cf. *O'Rorke v. Geary*, 56 A. 541 (Pa. 1903) (analyzing promoter's liability).

16. Cf., e.g., *Cranson v. International Business Machines Corp.*, 200 A.2d 33 (Md. 1964) (discussing defective incorporation).

17. Cf. *Lacos Land Co. v. Arden Group, Inc.*, 517 A.2d 271 (Del. Ch. 1986) (considering implications of varying shareholder rights).

18. See, e.g., *State ex rel Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406 (Minn. 1971) (considering shareholder rights under federal securities law).

19. Cf., e.g., *Zetlin v. Hanson Holdings, Inc.*, 397 N.E.2d 387 (N.Y. 1979) (examining duties arising in sale-of-control transactions).

20. See, e.g., *Knapp v. North American Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974) (discussing possible implications of de facto merger doctrine in stated circumstances).

21. Cf., e.g., *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945 (9th Cir. 1985) (considering whether particular corporate transaction constitutes tender offer subject to federal regulation).

22. Cf. *Essex Universal Corporation v. Yates*, 305 F.2d 572 (2d Cir. 1962) (considering legal implications of sale-of-control transaction).

23. See, e.g., *Jones v. H. F. Ahmanson & Company*, 460 P.2d 464 (Cal. 1969) (discussing fiduciary duties of controlling shareholder).

24. *Safety Warning*: This pedagogy has had reality-altering effects on some students. At the start of a Spring Semester after a Fall Semester offering of *Business Associations*, a student asked me how I spent my Winter Break. I explained that we were visiting with my brother on the Right Coast. The student, visibly confused, blurted out, “Oh, you're talking to him again?” I didn't explain to the student that I have *two* brothers.

III. DEVELOPMENT OF MATERIALS

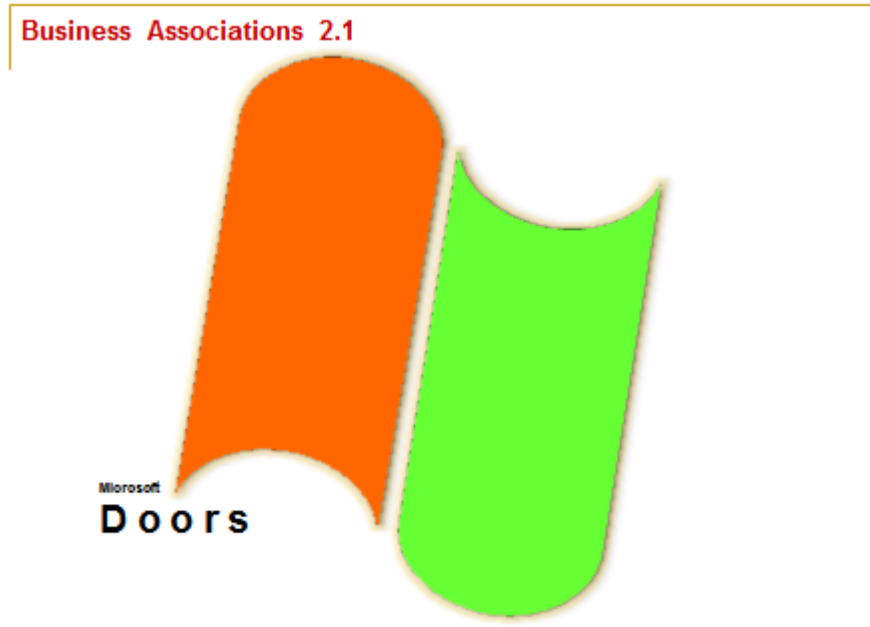
I have tried to support the expansion of intensified and extended simulation components in my courses by developing appropriate materials. For example, the casebook that I authored for the course in *Banking Law*²⁵ contains over 460 detailed problems and notes that offer accessible yet challenging simulations, interlinked and organized around a narrative arc that spans the length of the course. The narrative tracks the birth, operation, and death of Quarter National Bank. I am continuing to refine a similar approach for *Business Associations*, a course that significantly benefits from the simulation component and the narrative arc, enhancing the students' facility with the counseling, planning, and structuring responsibilities that are so typical of a business practice. For *Contracts*, I was able to develop materials that match doctrinal instruction intimately with simulations. These are included in *Contracts Simulations*, which I co-authored with Prof. Deborah Gerhardt of UNC Law.²⁶

Towards the end of a semester of Business Associations a few years later, a student stopped, in the middle of a class discussion, to clarify that McGeorge School of Law did have a service contract with DCI. "Wait, what . . ." the student asked, "that really happened, right?" A cluster of students waited anxiously for the answer.

25. MICHAEL P. MALLOY, *BANKING AND FINANCIAL SERVICES LAW: CASES, MATERIALS, AND PROBLEMS* (3d ed. 2011).

26. MICHAEL P. MALLOY & DEBORAH R. GERHARDT, *CONTRACTS SIMULATIONS: BRIDGE TO PRACTICE SERIES* (2015).

Figure 2. “Microsoft Doors”



IV. ACTIVE AND CONTINUOUS ASSESSMENT

I have also continued to develop a more intensive approach to teaching and assessment in *Business Associations* to deal with several interrelated problems.

(i) Despite the shifting demographics of law student cohorts, there remains a significant degree of unfamiliarity with the business environment (and attendant discomfiture) among typical law students. They need to be actively placed in that environment, and they should be kept there until fully marinated.

(ii) Business law, and particularly corporate law, is typified by the cumulative nature of many of its complex concepts and themes. Consider, for example, how themes and concepts like the fiduciary duty persist in the course. This persistence requires continuing and developing exposure to a variety of concepts, which is supported both by the continuous narrative arc used in instruction and by continuous assessment.

(iii) Many students find that they have been poorly prepared in their first year for the heightened demands of an area of law melding case authority, statutes, regulations, and private socio-economic arrangements. Hence, there is often a marked need for inculcation of more rigorous habits of study, preparation, and analysis.

(iv) As the MacCrate Report demonstrated,²⁷ there is serious concern among the practicing bar as to whether law students are sufficiently prepared for practice.²⁸ Hence, at a very practical level, to be competitive after law school, a rigorous and practical exposure to business law is often essential. In certain states, like California, that include Business Associations as a test subject on the bar exam, the need for rigorous, practical study is underscored by the need for preparation for eventual bar exams.

Accordingly, during the four months of my one-semester *Business Associations* course, students are required to take monthly baseline quizzes, each worth a maximum of 5 percentage points of the final grade, on foundational concepts as our study of each of these concepts is completed. Each baseline quiz consists of 10 multiple choice questions.

Students are also required to take an essay question exam during each of the last three months of the course. These exam questions are cumulative in scope and are worth a maximum of 5, 10, and 15 percentage points of the final grade respectively. All of this is delivered through the course webpage maintained on TWEN (“The West Education Network”) and can be returned to the students the same way.²⁹ Students receive a detailed memorandum from me for each essay question exam, discussing the issues raised by the question and critiquing the overall strengths and weaknesses of the responses. The final exam, administered during the regular exam period, is cumulative and worth a maximum of 50 percentage points of the final grade. Once the final exams are graded, the students receive a detailed memorandum from me, discussing the issues raised by

27. AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT--AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS & PROFESSION: NARROWING THE GAP (1992) (known as the “MacCrate Report,” in reference to the Task Force Chair). *See generally* Schwartz, *supra* note 5, at 350, 385 (discussing MacCrate Report).

28. In the interest of full disclosure, the author explains that he testified before the Task Force on Law Schools and the Profession on behalf of Fordham University School of Law, while he was Director of Graduate Studies, and advocated the adoption of a “medical school model” for legal education that would have required direct and rigorous practical training for all law students in law schools organized as “teaching law firms.” The Task Force members were very polite and had no questions. There are apparently limits to how prepared the ABA expects graduating law students to be.

29. On the active use of TWEN and similar sites for student assessment, see Joan MacLeod Heminway, *Caught in (or on) the Web: A Review of Course Management Systems for Legal Education*, 16 ALB. L.J. SCI. & TECH. 265, 268, 291, 293 (2006) (offering observations on use of web-based course management systems designed for use in legal education).

the final exam and critiquing the overall strengths and weaknesses of the responses. Anecdotal evidence suggests that this more intensive approach undertaken during the semester has had positive effects, but I am hoping to prepare a more rigorous analysis of this experience once a fourth year of this procedure is completed.

V. CONCLUSION

One salutary feature of law school pedagogy today is the variety of approaches that are available and actively in use. Not all are optimal under all circumstances, and some may seem inefficient or ineffective to observers. The availability of novel perspectives offers promise for continued growth and innovation in legal education.