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INTEGRATING PROBLEM SOLVING EXERCISES INTO FEDERAL CRIMINAL LAW

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Integrating Problem Solving Exercises Into Federal Criminal Law

Susan R. Klein**

I. INTRODUCTION

Since the landmark *Best Practices for Legal Education* Reports was published in 2007,¹ law schools have struggled with the issue of integrating problem-solving exercises, real-world lawyering, ethics, and clinical opportunities into their curricula to supplement traditional lectures and Socratic dialogue. In this short essay, I describe how I have utilized mock exercises and projects in my upper-level Federal Criminal Law class, creating new projects every year to cover the greatest number of skills using the most current legal problems and issues.

II. MOCK EXERCISES IN A FEDERAL CRIMINAL LAW COURSE

Federal Criminal Law is a three-unit course that enrolls between twenty-five and fifty students. I assign Abrams, Beale, & Klein, *Federal Criminal Law and Its Enforcement* (5th ed. 2009) and the 2012 Supplement.² My course details the prosecution and defense of federal criminal offenses and related actions, covering the basis of federal jurisdiction, fraud, white-collar offenses, public corruption, interference with the administration of justice, civil and criminal forfeiture, and complex compound offenses.³ I pay particular attention to federal criminal sanctions employed against lawyers, corporate officers, and entities. I sometimes review the Controlled Substances Act, illegal re-entry after deportation, firearms regulation,⁴ and anti-terrorism enforcement. The types of projects I describe below

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¹ ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* (2007).

² I may publish the projects as a yearly electronic option for my casebook. In the meanwhile, I will happily share these projects with any professor who expresses an interest to me at sklein@law.utexas.edu.

³ I no longer cover the critical topics of federal sentencing and plea bargaining because I discuss those at length in my seminar: Advanced Federal Criminal Prosecution. I teach the seminar in conjunction with an internship program I supervise at the United States Attorney's Office for the Western District of Texas.

⁴ Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 6 (2012) (the Controlled Substances Act and immigration cases comprise over 50% of the federal criminal caseload, and if you add fraud and Triggerlock cases it reaches three-quarters).

would be equally effective for a white-collar crime course, criminal procedure, a National Security course, or could even be modified for a first year substantive criminal law course.

My latest syllabus contained nine projects. Each student must sign up for one project, and her performance is factored into her class participation grade. Class participation consists of a combination of the work on the group project and individual performance during each class session. Most students' final grade is unaffected, though in about five cases per semester I raise a student's grade one-half a letter. I can accomplish this without violating the law school's mandatory curve, as the range I am allowed (between 3.25 and 3.35 mean) gives me a bit of leeway.

Project #1 - Department of Justice [DOJ] response to states that legalize marijuana for recreational and/or medicinal use. Prosecutors on both sides of the issue advise Attorney General Eric Holder, who in turn drafts a Memorandum to the ninety-four United States Attorneys.

Project #2 - Judicial law clerks draft jury instructions for one case in my casebook that involves a public fiduciary (Alaskan legislator accepting a future job offer) and a second case involving a private fiduciary (lawyer taking kickbacks from a doctor). These instructions must accommodate the limitations imposed on honest services mail fraud by *Skilling v. United States*.⁵

Project #3 - The Supreme Court oral argument in *Smith v. United States* (question presented: whether the government or the defendant bears the burden of proving or disproving a defense of withdrawal from a conspiracy prior to the limitations period).⁶

Project #4 - In a project based on *United States v. Blair*,⁷ students convince their supervisor at the United States Attorney's Office to appeal the dismissal of an indictment against an attorney for money laundering of fees.

Project #5 - KBL, LLP, a project involving obstruction by a law firm. Students draft a report from an outside law firm to the managing partner regarding the wisdom of accepting a Deferred Prosecution Agreement to obstruction of justice for its over-zealous defense of a client in a securities fraud action.

Project #6 - Federal Firearm Presentation to Vice President Biden and his Task Force. Students act as representatives of DOJ, the press, members of the public, politicians, prosecutors, and lobbyists from the National Rifle Association [NRA].

Project #7 - *Moore v. Madigan*,⁸ describing the constitutionality of various state right-to-carry laws. In this appellate oral argument students act as attorneys for state and local governments.

⁵ 130 S. Ct. 2896 (2010).

⁶ 133 S. Ct. 714 (2013).

⁷ 661 F.3d 755 (4th Cir. 2011).

⁸ 702 F.3d 933 (7th Cir. 2012).

Project #8 – Supreme Court oral argument in *United States v. Alleyne*⁹ (question presented: whether the Court’s decision in *Harris v. United States*,¹⁰ holding that the Constitution does not require facts which increase a mandatory minimum sentence be determined by a jury, should be overruled). Students’ appellate arguments must include the effect of the reversal on those provisions in the United States Code containing mandatory minimum penalties.

Project #9 - *United States v. Cummings*,¹¹ charge of aiding and abetting a RICO. Students on both sides brainstorm as to whether it is better strategy to appeal the dismissal of an indictment or recharge in a superseding indictment with an alternative legal theory.

One trick that I have found effective is to vary the call and the roles of the projects, so that they are not all asking students to act as attorneys arguing a case before the Supreme Court (as in projects #3 and #8). In those, I assigned two students to act as attorneys in the Solicitor General’s Office representing the government, two to act as Federal Public Defenders representing their client, and three to represent the Justices. Students read the opinion below and the briefs that had been filed so far by the parties. Oral arguments are made in class (ten minutes per team) and the Justices rule from the bench. Finally, the class votes on how they believe the case should be decided.

There is much to learn from a mock oral argument before the Supreme Court, but students enjoy variety and may wear many hats during their careers. Thus, in project #1, Team A role plays as policy-making officials at Main Justice in Washington, D.C. who oppose federal prosecution for possession of marijuana with intent to distribute in states where this drug is legal. Team B consists of Assistant United States Attorneys [AUSA] in California and Oregon who believe that federal prosecutions for marijuana distribution are warranted, despite state law to the contrary. Each side gets ten minutes to present their position to the student playing the AG. The exercise ends with Attorney General Holder announcing a new DOJ policy, perhaps enshrined in a written memorandum.

Project #2 asks students to research the issue of whether a violation of a state law is required for federal mail fraud liability¹² and how to define “bribery” and “kickbacks.” Each team drafts jury instructions and places them on the overhead projector for the other students to view and analyze. The student judge selects appropriate instructions and the class jurors vote on the defendants’ guilt. Students are shocked at how challenging it is to instruct a jury on the elements of a federal offense and how critically the instruction can affect the outcome.

Project #4 has student AUSAs trying to convince their supervisor to appeal a

⁹ 457 F. App’x 348 (4th Cir. 2001), *rev’d*, *Alleyne v. United States*, 133 S. Ct. 2161 (2013). This project and Project #3 were completed before the Supreme Court rendered its opinions.

¹⁰ 536 U.S. 545 (2002).

¹¹ 395 F.3d 392 (7th Cir. 2005).

¹² 18 U.S.C. §§ 1343, 1346.

dismissal based upon the judge's interpretation of a provision of the money laundering statute that purports to exempt attorney's fees "where necessary to preserve a person's right to representation guaranteed by the Sixth Amendment."¹³ There is a circuit split on the issue, so the students first need to make a decision as to which position they think is just and then strategize regarding whether the case before them is the most appropriate vehicle given the facts and the procedural posture to pursue the matter.

In project #5, students are attorneys from two competing law firms and comprise the management committee of the targeted law firm. One issue is whether to sacrifice some employees and admit corporate and/or individual guilt on obstruction of justice charges.¹⁴ The student prosecutor must negotiate the terms of any agreement. Ethical and strategic issues are paramount.

Project #6 asks students to present options to Vice President Biden's task force attempting to stem firearm violence, allowing students to share their own view and to be creative, as they might suggest anything from federal legislation to block grants.

Project #7 assesses the constitutionality of state right-to-carry laws under the Second Amendment. While I normally would not have selected two projects on the same general topic, the creation of the Biden task force, coupled with the rash of semi-automatic assault weapon mass murders (the attempted assassination of Representative Giffords, the Colorado movie theater shooting, and the Newtown Connecticut massacre) and the Trayvon Martin stand-your-ground killing demanded greater attention to gun control.

Finally, in project #9, I asked student DOJ trial attorneys to decide whether to appeal an adverse federal district court decision that an individual cannot be liable for aiding and abetting a RICO¹⁵ unless he meets the management and control test. Alternatively, they might supersede with an indictment alleging a different theory of RICO liability or charge only the predicate offense.

I have found that the advantages to these projects outweigh the drawbacks. First, the student reaction to these projects is uniformly and intensely positive; some students enroll in my class specifically because of the projects. They debate over which projects they should be assigned, and virtually every student volunteers during the first week. Most spend quite a bit of time meeting as groups and working on these projects outside of class. Second, these evolving projects allow me to incorporate current events into the course, even when my casebook has not been updated that year. The subject matter of these projects can and should change every semester as the Supreme Court accepts certiorari on new cases, Congress changes federal law, and the newspapers publish the latest criminal justice

¹³ 18 U.S.C. § 1957(f).

¹⁴ 18 U.S.C. §§ 1503, 1512.

¹⁵ 18 U.S.C. §§ 2, 1962.

controversies. That way, the projects are always relevant and of optimal interest to the students.

Third, students in different groups and with different abilities learn from each other. I take student preference for assignments into account, but only in ranking the projects, not in selecting the groups. I ensure diversity of gender, law review status, level of interest in criminal justice matters, race, and anything else I can think of. The students later tell me that while they might not have selected those other students to work with, they were thrilled with the outcome. These student group-members are dependent upon each other to fulfill their part of the project. Moreover, the rest of the class is dependent upon the student groups to learn the material presented that day. I announce in my syllabus that the material covered by the projects will be included in their exam, and I always ask at least one question on my final that is directly derived from the call of a project. This, as well as respect for their peers, keeps even students not volunteering that week engaged.

Fourth, students can decide how much or little effort to put into each project. Those that have the time, energy, and inclination to devote to a project can invest more, and those not so inclined need only complete the assignment. I have had a few instances where students had not met outside of class time and were clearly winging it. On the other hand, there was a time when a group of students practiced their oral arguments and even had one of my colleagues moot it. One year, I assigned a defense project that included a claim of selective prosecution against an African-American crack dealer by her white boyfriend/confidential informant. The students in that group videotaped a performance of the drug sale and relationship that would have made the Law & Order producers proud. I had one group present a corporate-law project involving the ethical issues surrounding government requests for waivers of attorney-client privileges that resulted in a published student note.

I have found my biggest challenge in engaging in these mock exercises, other than the time it takes me to prepare them, is class size. As long as the course stays relatively small, I can utilize every student in one project. I generally place two or three students in a given role, with each project having two to three roles, for a grand total of about thirty-six students manning eight projects. Much bigger than that, and either the groups get too large for every student to have a significant role, or I have to allow too many projects to accommodate all of the students. Each project takes close to a full fifty-minute class period. I had to drop the projects from the syllabus the year when I had sixty-plus students. The few years where I have had closer to twenty students have been the most productive.

III. CONCLUSION

Creating, assigning, and grading mock exercises as part of any course is hugely time consuming. In my experience, it is well worth it. I receive calls and cards every year from students who are now Assistant District Attorneys, AUSAs,

Public Defenders, federal law enforcement agents, attorneys at state and federal agencies, or private criminal defense attorneys who thank me profusely for my course, seminar, and internship. My student evaluations have risen since I began utilizing the projects. The single disadvantage is that a professor is unlikely to receive credit from her administration for the time spent creating and updating these projects rather than producing law-review-type scholarship. I therefore hesitate to recommend this to a professor who has not yet obtained tenure.