It's All About The People: Creating a "Community of Memory" in Civil Procedure II, Part One

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IT'S ALL ABOUT THE PEOPLE:
CREATING A "COMMUNITY OF MEMORY" IN CIVIL PROCEDURE II
PART ONE*

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* This is the first of a trilogy of articles. The second and third installments will appear as the first "web exclusive" publications of Phoenix Law Review. I am tremendously grateful to Gabriel J. Hassen for this honor and opportunity.

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I have many wonderful people to thank for their assistance with this trilogy.

First is my closest friend and colleague, Evan Taylor, attorney for Teresa Clark and Carolyn Johnson in the Clark litigation who provided invaluable advice, material, and participation in both the course and this trilogy.

This is a trilogy for, about, and involving students. The rest of my appreciation goes to them.

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Congratulations also to Chauncey Kieley, who won the CALI Awards in both 2009 classes and knows his whiskey, how to hunt without a gun, and what snake tastes like.

I cannot thank Alex Crabb enough for shaping this issue and Aaron Hart for the nurturing TLC he gave this article during the editing process. I am so pleased that my 2009 students Victoria Baldner, Jesse Lockhart, Daniel Thorup, and Kathryn Warner, along with my Fall 2008 students Victoria Quach, Annie Smith and Christine Trueblood, were on the editing shop floor when this article came through.
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Any errors are my own.

This article is dedicated to the memory of Marvin P. Nunley, Esquire.

*** My co-authors of this article are the following of my former students: Michael J. Aurit (CP I & II, 2009; TA CP I, Spr. 2010; RA 2009-10); Aaron J. Berkley (CP I & II, 2009; TA CP I, Spr. 2010; Sr. TA CP II, 2010 & CP I, 2011); Beth M. Bruno (CP I, 2008); Kimberly J. Garde (CP I & II, 2007; TA CP I, Fa. 2008; Sr. TA CP I, Spr. 2010); Jarrod T. Green (CP I, 2008); Daniel J. Mazza (CP I & II, 2009); James P. Plitz (CP I, 2008; TA CP I, Spr. 2009; Sr. TA CP II, Fa. 2009); Daniel C. Quijano (TA CP II, Fa. 2009); Evan P. Schube (CP I & II, 2009); and Bert E. Williams (CP I, Fa. 2008; TA CP I, Spr. 2009). All but one were aware of the trilogy's likely eventual content. I received the textual and introductory quotations separate from research for this trilogy.
I. PROLOGUE

In the early summer of 2006, in Ohio County (Kentucky), David Jones won the Democrat party primary over the incumbent Wayne Hunsaker. Ohio County was a one-party jurisdiction, so Judge Jones knew he would take office in January 2007.

Judge Jones decided to make staff changes: “I wanted someone that would be loyal to David Jones, and that David knew would be loyal to him.” Judge Jones offered the Finance Officer position to Janice Embry, a woman who had worked for fifteen years in the same position for the city of Hartford. He converted the “Assistant Finance Officer” position into that of his administrative assistant and hired Cheryl Morris, a woman he had known since high school.

Carolyn Johnson and Teresa Clark already held the Finance Officer and Assistant Finance Officer positions. They stood to lose their jobs if Judge Jones proceeded with his plan to hire Embry and Morris. In November 2006, Carolyn Johnson invited Judge Jones to her home for dinner to discuss her future service with the Judge-Executive’s office, and he told her his intentions. Teresa Clark had no personal contact with Jones concerning her employment until the last workday of 2006, when both she and Carolyn Johnson received letters saying their services would no longer be needed in the Judge-Executive’s office.

Johnson and Clark consulted Owensboro, Kentucky lawyer Evan Taylor, a thirty-something with a growing reputation in civil rights
litigation. He listened skeptically; everyone knew Judge-Executive office staff positions were “political.” Proving the women had been terminated contrary to the First Amendment in a one-party county would have its challenges.

Taylor told Clark and Johnson to file for unemployment benefits; who knew what the county might say in response. Clark and Johnson returned to Taylor’s office with a gift from the employment discrimination gods. On Judge Jones’ behalf, Janice Embry had provided this explanation for Ms. Johnson’s and Ms. Clark’s termination: “Political termination. New party in office 1/1/2007.”

A few days later, Taylor filed a complaint against David Jones and Ohio County’s Fiscal Court members for violating Teresa Clark’s and Carolyn Johnson’s civil rights.

II. INTRODUCTION:
A COMMUNITY IN A CLASSROOM

“Oh my god, Evan. We have to do this!!”

I was eating dinner with my closest friend and colleague, Evan Taylor, at a new restaurant in my hometown Owensboro, Kentucky when I made a passing remark about a case we both knew well, Clark v. Jones. Evan had represented the plaintiffs, Teresa Clark and Carolyn Johnson. With the help of my research assistant Javier Leija, I had written a memorandum in

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10 Deposition of Janice Embry, supra note 7, at 16. Janice Embry completed and filed these documents; she did not consult Judge Jones in the process. Deposition of David Jones, supra note 1, at 59-65.

11 Observers worry that faculty sometimes take advantage of their student research assistants’ work for their own personal and career benefit. See generally Lisa G. Lerman, Misattribution in Legal Scholarship: Plagiarism, Ghostwriting and Authorship, 42 S. Tex. L. Rev. 467 (2001); Bill L. Williamson, (Ab)using Students: The Ethics of Faculty Use of a Student’s Work Product, 26 Ariz. St. L.J. 1029 (1994). The potential for such improprieties
support of motion for summary judgment on a consulting basis for Marvin Nunley, the defendants’ attorney. The case settled before the judge issued an opinion.

Evan spilled: it was not over! Ohio County had filed a lawsuit against Clark and Johnson to recover sick pay the prior Judge-Executive had authorized paying them prior to leaving office. Clark and Johnson alleged this collection suit was retaliation for filing the original civil rights suit. The specter of criminal sanctions had haunted key players for a year.

I had long hoped Evan would contribute a practicing litigator’s perspective to my Civil Procedure classes, and the Clark litigation’s procedural tangles were a Civil Procedure II professor’s dream. The companion cases offered intriguing deposition objections; a motion to dismiss for failure to join a necessary and indispensable party; a motion to dismiss for failing to join a compulsory counterclaim and for res judicata; a motion for summary judgment; failed efforts to set a case for trial; and good segues to Erie doctrine, fact analysis, and professionalism ideals—virtually my entire Civil Procedure II curriculum in one place. Each of the procedural disputes had a fascinating backstory, and no judge had yet ruled on any of them.

I could not wait to spread this professional canvas before my students and watch their eager fingers smear paints of brilliant color across the landscape.

** ** ** ** **

**VOICE:**

Daniel C. Quijano

The Clark v. Jones and Ohio County v. Clark cases provided a comprehensive outlook on the practical aspects of civil procedure. Although the traditional case study method provides the basics for the subject matter, the process of studying real discovery documents, must be of particular concern where the student participates in the faculty member’s consulting work. Therefore, I note that Javier earned $25 per hour for his work, above the market rate in Owensboro, Kentucky and perhaps for law students, even for Phoenix, Arizona.

12 The defendants were Ohio County Judge-Executive David Jones and members of the Ohio County Fiscal Court.

13 Ohio County v. Clark was brought to recover sick pay given to Clark and Johnson when Wayne Hunsaker was still in office, just before David Jones succeeded him.

depositions, motions to the court, briefs and rulings concerning individuals and entities involved in a pair of cases studied in depth throughout a semester gives a routine and real-life perspective of litigants utilizing the intricacies of Civil Procedure.

Initially, I believed the cases would be used as secondary reading with auxiliary materials provided to supplement the casebook . . . However, as I met with Professor Spreng, read the materials for the semester and attended class sessions once a week, I realized that Clark and Ohio County were not merely implemented into the course but were the foci and reference for each facet of Civil Procedure studied in the second section of the course. Essentially, the case documents for these cases were "behind-the-scenes" looks at complex litigation scenarios. The documents contained crucial and interesting learning points for students in a first-year Civil Procedure course.

The Clark litigation was both relevant and comprehensible to first-year law students. The number of law professors who graduated from third or fourth-tier law schools and have practiced as solos in towns of 50,000 people must be very small. We also teach to our own experience, so

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15 Dan Quijano was my teaching assistant for Civil Procedure II in Fall 2009. He attended approximately one-third of our classes to keep abreast of the enrolled students' progress and needs.

practice-oriented Civil Procedure exercises and materials in the how-to and legal education reform literature tend to involve complex litigation, class actions, and corporate litigants. Yet those cases are inapposite to the professional futures that await most graduates from local, urban law schools. Most will pursue solo or small-firm practice for a significant portion of their careers, focusing on “personal plight” clients with criminal, property/estate, personal injury and family law matters, along with some small business, insurance and maybe municipal clients to add spice. An absorbing local drama such as the Clark litigation, with its cast of local bigwig characters; so many juicy procedural nuggets; and a setting in “the real Home of Bluegrass,” tiny Ohio County, Kentucky, was an “offer” from life that I could not refuse.

Perhaps most importantly, the Clark litigation was ideally suited to presenting my not-so-“hidden” curriculum: the significance of setting and backstory to litigation and law practice; the crucial role of the “rhythms of


19 See Jonakait, supra note 16, at 881-83, 901-02.

20 See John P. Heinz et al., Urban Lawyers 58 (2005) (showing that at any given moment, more than one third of urban lawyers will be working as solo or in firms with fewer than ten attorneys), 101, 104-05 (Chicago); Donald D. Landon, Country Lawyers: The Impact of Context on Professional Practice, 23, 59-60 (1990) (rural/small city attorneys); Bar Member Survey Results Are In, MONT. LAW., Apr. 2005, at 5, 6 (Montana).


23 According to Karl Llewellyn:

[I]f you do not really get into the background of men’s practices and needs, so that you can see and feel what the parties were after and what counsel had to work with, then neither can you reach the flavor of what was there for the court to sense
the law” in solving new legal problems; and a theory of the lawyer’s place in society based on the concept of a “community of memory.”

This curriculum succeeded beyond my wildest dreams. The Clark litigation immediately engaged the students. Many of my big-city Phoenix students considered Ohio County exotic and were rapt as I presented demographics, photographs, the metaphorical “Hatfields-versus-Mccoys” political scene, and the lived experience of the key characters. Little of this appeared in the record, yet it framed the legal dispute, and as we explored the procedural developments, students grasped why that background might prove strategically and outcome determinative.

Presenting material prospectively, as an attorney or trial judge might confront it, also better replicates the experience of actual litigation. The evidence is legion: the O’Connor versus Brennan debate over the proper understanding of “purposeful availment”, standards such as whether a

as being the justice and wisdom of the situation, of what was there to help guide the court as it set to work in addition to the aid and guidance from pre-existing rule and concept. Hence the central problem, which recurs in each tomorrow—the process of the court’s work—remains blind. Nor can you, without soaking in the background, see what difference the court’s ruling makes to people—and so remember the ruling, or build an intelligent critique. Nor can you figure out what you might be doing in a similar situation in your tomorrow, in the light of that ruling—and so put what you have learned to work.


See Paul D. Carrington, Teaching Civil Procedure: A Retrospective View, 49 J. LEGAL EDUC. 311, 327 (1999) (discussing the indeterminacy of procedural rules). Cf. Stephen N. Subrin, Teaching Civil Procedure While You Watch It Disintegrate, 59 BROOK. L. REV. 1155, 1174-75 (1993) (the “civil procedure course will be an introduction to many of the central themes in our democracy: Federalism, separation of powers, and the tensions between flexibility and predictability, discretion and rule, expertise and lay experience, dignity and efficiency and the community and the individual.”).

A “community of memory ... does not forget its past” and is made up of people who “participate in the practices—ritual, aesthetic, ethical—that define the community as a way of life.” ROBERT BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 153-54 (1996).


Compare Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987) (opinion of O’Connor, J.) (“The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”),
person is of "suitable age and discretion" to accept service of process;\textsuperscript{28} the apparent absence of guiding principles for determining corporate citizenship;\textsuperscript{29} and the various gradations of Rule 26 relevance\textsuperscript{30}—to the extent these had not already convinced the students, the infusion of a more vivid landscape illustrated their indeterminacy. Identifying the elusive "genuine issue of material fact" is a challenge even in edited casebook decisions.\textsuperscript{31} Applying the standard to facts buried in a messy stack of depositions may be worse. A student who never quite "gets" the latter, however, but has a sense of what she was supposed to accomplish, is still ahead of those who can merely comment competently on \textit{Celotex v. Catrett}.\textsuperscript{32} More importantly, the student may even see that the court frequently has "choices" about the outcomes of summary judgment motions.\textsuperscript{33} Similarly, knowing if either Evan Taylor's or Marvin Nunley's deposition antics are objectionable is almost impossible on a cold, written

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\textsuperscript{28} See \textit{FED. R. CIV. P.} 4(e)(2)(b) ("leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there").

\textsuperscript{29} Until Spring 2010, I taught corporate citizenship with J.A. Olson, Co. v. City of Winona, 808 F.2d 1987 (5th Cir. 1987), and I still use it to some degree. Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010), however, purports to resolve certainty about a corporation's principle place of business in favor of the "comparatively," \textit{id.} at 1193 (emphasis in original), concrete "nerve center test," but the Court's qualifiers that a corporation's "nerve center" will "usually . . . be its main headquarters," \textit{id.} (emphasis added), and "ordinarily equates . . . to a corporation's headquarters," \textit{id.}, imply that future decisions will depend on technological and sociological change. \textit{See id.} at 1194 (discussing the possible effects of telecommuting and the Internet on corporate jurisdiction analysis).

\textsuperscript{30} See \textit{FED. R. CIV. P.} 26(b)(1) (referring alternately to "matter that is relevant to any party's claim or defense" and "matter relevant to the subject matter involved in the action").


\textsuperscript{32} 477 U.S. 317 (1986).

\textsuperscript{33} What, after all, differentiates an "issue" of material fact from a "genuine issue" of material fact? \textit{See FED. R. CIV. P.} 56(a). To know they are different does not help predict how a judge will rule or why.
record. Once the student is blessed with awareness of the problem, the abuse of discretion standard and the dearth of appellate court discovery rulings make intuitive sense and reveal practical approaches to discovery motions.

The Clark drama also introduces a foundation for professional aspirations that are very different from those stoked in most law schools: concentric “communities of memory.” Students who became immersed in the Clark litigation began to imitate both its romantic, “happy warrior” illustration of law practice and the horizontal and vertical community networks of the parties and attorneys. Enrolled students, teaching assistants, others with informal connections to the class, the attorneys, litigants, and I became knit together as one, greater than the sum of the parts pedagogically, socially, and experientially.

The students in the Phoenix School of Law Fall 2009 section of Civil Procedure II fused their shared experience of the Clark litigation with characters and students of the past, creating their own “community of memory” that enriched their academic experience and opened a conceptual door to an alternate professional future. Students cared about Teresa Clark and Carolyn Johnson. They liked and challenged Evan Taylor. They were concerned as his Clark antagonist and giant of the Western Kentucky bar, Marvin Nunley, slowly succumbed to lung cancer. Ohio County Judge-Executive David Jones shocked the class by referring to his staff in his deposition as “these girls” and seemed cast in the role of “bad guy,” until I called his character in my mid-term examination by the name of a popular second-year student. By the end of the term, mutual respect and collaborative discourse marked students’ participation in serious conversations about racial bias in jury selection and ideals of the practice of law.

This trilogy of articles describes my early experiences shaping a Civil Procedure curriculum that later reached its zenith during my Fall 2009 classes with students who enthusiastically grasped the romance and adventure of practicing law. This first article describes the foundations and early influence on my course design and delivery. Part II defends my definition of “the law”: legal analysis itself. Part III questions establishment notions of “what lawyers do” and critiques legal education’s stratifying role in distracting students from a small-firm and/or small-jurisdiction professional ideal. Part IV shows the tight-knit, small-jurisdiction bar embedded in a broader community of memory bound by a

34 See infra text between notes 414-15.
35 E.g., Deposition of David Jones, supra note 1, at 59.
shared past, present interpersonal ties, and hope for the future. Part V explains how, in light of the practical realities facing a young professor at a new law school, those three philosophical planks fused when “Rob” and “Kim”—moonlighting as oft-used hypothetical characters and apparently incompetent drivers forever getting into car wrecks—helped me refurbish my Civil Procedure I curriculum into a coherent and engaging whole. I then took that curriculum to a higher level amid a torrent of “admit slips” and role models. Those course design elements and teaching techniques again took center stage when I presented the Clark materials and helped students build the 2009 Civil Procedure “community in a classroom.”

The trilogy concludes that the students of the 2009 Civil Procedure sequence at Phoenix School of Law learned more profoundly by virtue of their success at building community, because the law, when practiced at its best, is all about the people. The law comes from the people, and the people are why we care about the law.

36 “Rob” and “Kim” are the leading characters in many hypotheticals and admit slips presented to my class, and most involve car wrecks. See infra text after note 365 (Voice: Kimberly J. Garde); infra text and notes, at 389-96.

37 For an explanation of “admit slips,” see infra text after note 365 (Voice: Kimberly J. Garde); infra text after note 384 (Voice: Jarrod T. Green); infra text and notes, at 385-87, 388-90; infra text after note 387 (Voice: James P. Plitz).

38 For examples of how I develop and use role models in my classes, see supra text and note, at 35; infra text after note 365 (Voice: Kimberly J. Garde); infra text and notes at 388-96.

39 The second article describes how the 2009 students bonded in Civil Procedure I over personal jurisdiction and shaped a nascent community in a classroom. Part II introduces “Michael” and how his enthusiasm for personal jurisdiction-as-justice elevated the class. Part III describes the contributions of “Jim,” up to then my longest serving teaching assistant, who unintentionally revolutionized the class’s deference structure. Part IV premieres “The Famous Admit Slip Nine,” playing now at ‘The Wall,’” and follows our heroes and heroines into their epic examinations, where “Jim is committed to saving Middle-Earth from mass destruction,” but also “wants the war to end so [his company] can focus exclusively on its online recreational products division”; “Javier is a secret agent for a government institution we may not name”; “JT . . . specializes in multi-jillion dollar drug product liability cases”; and “Bert” discovered that he was interesting for himself.

The third article puts the Clark curriculum on center stage. It begins with my involvement in the Clark v. Jones and Barber v. Cain cases and my student partners “Javier” and “Gabe.” The story of the Clark characters then explodes into what my new teaching assistant “Dan Q.” admiringly christened a “soap opera.” The article records our classroom community’s maturation through students’ reflections on their education; observations of a leader named “Josh,” whose nurturing guaranteed the success of the “community in a classroom” concept; and memories of “The Scamps,” an obsessive study group determined to get my attention even at midnight. The article culminates in the final examination, where ex-Judge-Executive “JT” hires “Hassen the Assassin” to shoot his successor, “Kim,” at a high school basketball game.
But the more connected a community, the more painful when those connections snap. Classmates go their separate ways. Mentors pass away. The wounds heal neither quickly nor easily. In the heady thrill of belonging to something bigger than oneself, it is so easy to forget that community is for better or for worse.\textsuperscript{40}

I intend for this trilogy to read as the sprawling, disorderly memoir that it is. Its winding path through reflections, episodes and voices\textsuperscript{41} illustrates that “community” is a reciprocal gift of self and in a law school setting that makes it as rare as it is profound.\textsuperscript{42} Many of what I hope are teaching insights are repeatable; I believe a “community in a classroom” is one of them.\textsuperscript{43} This particular story, however, is not. This trilogy presents a first-hand account of a magical year made so, because a serendipitously assembled group of otherwise unconnected individuals lived, interacted, and insisted on “the idea that we all have value, you and me.”\textsuperscript{44}

\textsuperscript{40} BELLAH ET AL., supra note 25, at 153 (“A genuine community of memory will also tell painful stories of shared suffering that sometimes creates deeper identities than success . . . .”). I am buoyed, however, because “communities of memory that tie us to the past also turn us toward the future as communities of hope.” \textit{Id.}

\textsuperscript{41} I observed the power of this technique in \textit{September, September} by Shelby Foote, also the author of \textit{The Civil War: A Narrative}. See SHELBY FOOTE, SEPTEMBER, SEPTEMBER (Vintage Books 1991) (1977) (separating four chapters written from a third-person objective point of view with three first-person “voices,” one each narrated by a different character). This trilogy is not the first time Foote’s inventive novel structures have influenced my legal scholarship, though perhaps this is the first to do so with what I hope readers will consider success. Compare SHELBY FOOTE, FOLLOW ME DOWN (Vintage Books 1993) (1950) (presenting a courtroom drama written with a decreasingly detached perspective until the precise middle of the novel when it presents the most vivid description of the pivotal event in the plot and continues with an increasingly detached perspective), with Jennifer E. Spreng, \textit{Scenes from the Southside: A Desegregation Drama in Five Acts}, 19 U. ARK. LITTLE ROCK L.J. 327, 368-82 (1997) [hereinafter Spreng, \textit{Desegregation Drama}].


\textsuperscript{43} The concept of “learning communities” is not new to law school classrooms. See generally, e.g., Paula Lustbader, \textit{Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice}, 4 SEATTLE J. FOR SOC. JUST. 613 (2006). The second and third articles in this trilogy will describe this concept as presented in primary, secondary, and post-secondary education literature.

III. "I LEARNED MORE IN CIVIL PROCEDURE THAN ANY OTHER CLASS IN LAW SCHOOL"\(^{45}\)

**THE LAW AS LEGAL ANALYSIS**

I’m a pretty firm believer that people remember very little of what they hear, only remember a little more of what they read, and that to really remember and understand something, the person must practice the material.\(^{46}\)

— Brett E. Rasner, Civil Procedure I & II, 2007

"Because you made us apply it," Kimberly Garde explained when I marveled at how effectively my Spring 2010 senior teaching assistant\(^ {47}\) recalled and presented Civil Procedure concepts to a student—and how much she remembered from 2007 when I force-fed her class with a steady diet of graded problem sets, drafting exercises, group work, research projects, and oral presentations. But our conversation raised more questions than it answered. Kim’s response differentiated between “learning the law” and “application.” I did not see the difference.

Legal education reform literature assumes a difference, however. Because the literature often fails to define its terms, I was no longer clear after my conversation with Kim whether reformers were offering strategies for teaching law or how to be a lawyer,\(^ {48}\) or if legal education considered the two distinct. And if it did consider them distinct, what either actually was.\(^ {49}\)

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\(^{45}\) Conversation between Author and Kimberly J. Garde, Student, Phoenix School of Law (Feb. 11, 2010).

\(^{46}\) Survey response from Bret E. Rasner, Student, Phoenix School of Law (Nov. 2007) (on file with author).

\(^{47}\) Kim was my 2007 Civil Procedure I & II student and also my Fall 2008 teaching assistant.


\(^{49}\) Compare Roy Stuckey, *Best Practices for Legal Education: A Vision and a Roadmap* 70, 74 (2007) (differentiating between “analytical skills” and “core knowledge of the law”), with Edwards, *Growing Disjunction*, supra note 48, at 62-63 (“The law student should acquire a capacity to use cases, statutes and other legal texts [and then] knows the full
If we do not understand the meaning of “law” or “what lawyers do,” how do we know what methods or techniques we should use to teach them?

Analysis of judicial opinions is the dominant teaching method for first year doctrinal courses. The dialogue or “Socratic” teaching technique, often associated with this “case method,” is not its exclusive presentation; some effectively employ lecture, problems, simulation, role-play, and other techniques.

How we define “the law” must influence “how we should teach it.” If the law is a set of rules, lecture is appropriate. Textual interpretation, however, calls for a more analytical approach. But if law is a vine that

range of legal concepts.”). See also Lisa Penland, The Hypothetical Lawyer: Warrior, Wiseman, or Hybrid, 6 APPALACHIAN J.L. 73 (2006).

“Method” is a strategy for teaching the law: such as lecture/textbook, case method, self-study, clinical, or others.

“Teaching technique” describes a tactic to promote learning.

I define “case method” as analysis of primary sources, such as cases and statutes. Cf. Edwards, Growing Disjunction, supra note 48, at 62-63 (differentiating between the “case method” and “a Socratic approach”). Many consider these primary sources to be the law, but this is not a self evident proposition, nor is it necessarily the most productive foundation for considering potential legal developments. See, e.g., JOHN FINNIS, NATURAL LAW 3-19 (1980).


Though not ideal, it can be useful to introduce new topics or present especially difficult concepts. E.g., MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, TEACHING LAW BY DESIGN 119-20 (2009).


My colleague, Penny Willrich, requires that students interview “clients” and conduct mock hearings but based on law gleaned from primary sources. Penny L. Willrich, The Path to Resilience: Integrating Critical Thinking Skills into the Family Law Curriculum, 3 PHOENIX L. REV. 435, 455-59 (2010).

In its simplest form, even when using the Socratic method, a professor is asking a student to act “in role.” Peggy Cooper Davis, Desegregating Legal Education, 26 GA. ST. U. L. REV. 1271, 1292 (2010).

See generally, e.g., Anderson & Kirkwood, supra note 18.

As Karl Llewellyn put it as to an analogous problem: “To train, we must know what we are training for.” Llewellyn, What is Wrong, supra note 48, at 667.

grows from the rich soil of human experience, then some effort to paint that factual landscape in law school is also de rigueur.61

The definition of "the law" itself may even be in flux. Judges cannot even find time to read their courts' voluminous slip opinions, limiting the constraining effect of stare decisis.62 The concept that "the medium is the message" seems apt: sequenced, individual, case-by-case analysis in a mostly closed universe, along with the limited product of part-time legislators has long been a reality of the past.63 We are entering an era of "total law,"64 where universal, foundational themes and rhythms in the law are constantly flowing through subspecialties, reaching even remote behaviors, subsuming other disciplines, and producing an increasingly seamless narrative of the ordering of human affairs.65 There is no law-as-a-

61 Llewellyn, What is Wrong, supra note 48, at 662-63. Modern legal education reformers are hardly ignorant of the profession's failure in this regard. See generally Menkel-Meadow, Law and ____, supra note 60. Intriguingly, this argument for a somewhat interdisciplinary approach to law teaching may vindicate the work of many so-called theoreticians or law professors with training in non-law subjects. See, e.g., Sanford Levinson, Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars, 91 MICH. L. REV. 2010, 2014-17 (1993) (noting the difficulty of classifying Professor Catharine MacKinnon as "practical" or "impractical" given her scholarship's service in lawmaking against pornography).

62 See Jennifer E. Spreng, The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split, 73 WASH. L. REV. 875, 901 & n.124 (1998). Limited en banc processes have a similar effect. Id. at 905-08.


65 According to Marshall McLuhan:

Before the electric speed and total field, it was not obvious that the medium is the message. The message, it seemed, was about the "content" as people used to ask what a painting was about. Yet they never thought to ask what a melody was about, nor what a house or a dress was about. In such matters, people retained some sense of the whole pattern, of form and function as a unity. But in the electric age this integral idea of structure and configuration has become so prevalent that educational theory has taken up the matter. Instead of working with specialized "problems" in arithmetic, the structural approach now follows the lines of force in the field of number and has small children meditating about number theory and "sets."

fixed-point; there are only trends in the development of the law. There is no finite set of matters shaping the dynamics of those trends; in the era of total law, nothing is totally separable from the law or its development. Everything matters.

There are, then, no rules; more and/or deeper principles have taken center stage. "We are all Realists now," some are wont to say. "The skill" of this wider ranging analysis is "the law," and its cultivation in the context of a legal milieu with an infinite past and an open future must be a central focus of legal education.

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VOICE:

*Bert E. Williams*

It is safe to say that my skills were truly developed in the class that every 1L fears. For some strange reason I truly enjoyed Civil Procedure. A big part of that enjoyment stemmed from the fact that I was part of a curriculum where the classes, assignments, and exams allowed me to make arguments and see both sides of the equation. There were no strict guidelines that needed to be adhered to or one form of analysis that was acceptable. Professor Spreng was willing to hear what we had to say and would delve through our fluff to see what point we were trying to make.

It may sound like a complaint, but this form of analysis was what truly made me understand how to make an argument. During my first year I had other courses where I almost lost my mind due to the fact that if I didn’t answer an exam question word for word in the form the professor wanted, I would lose points. I may have had the correct answer, but if my analysis is not what they were looking for, I was incorrect. The problem with this is that when it came time to take the

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their prior lives and "promotes an alternate identity" that even though not “actively chosen, seems natural and even inevitable.”).

66 Llewellyn, *What is Wrong*, supra note 48, at 669 ("The fact is that legal rules mean, of themselves, next to nothing. They are verbal formulae, partly conveying a wished-for direction and ideal.").

67 Whatever one’s jurisprudential ideals, a successful practitioner must have “an awareness of the flaws, limitations and openness of law” balanced by recognition that “there are practice-related, social and institutional factors that constrain judges.” Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 735 (2009) (reshaping the concept of what it means to be a "legal realist"); see also Menkel-Meadow, *Law and _____ supra* note 60, at 557-58.

68 See generally Menkel-Meadow, *Law and _____*, supra note 60.
final, I had not truly learned the law. All I would do to prepare is memorize the form of answer they wanted and insert facts. Granted, this was an easy way to earn a high grade, but I never personally felt satisfied.\footnote{After brushing away “the fluff,” I agree in general with Bert. His preliminary distinction between a law of “rules” and a law of “methods” is sound. The law of methods does not rely on rules in a given moment, so “answers” matter less than how we build them. See Davis, \textit{supra} note 57, at 1288-89 (discussing in context of Dean Langdell’s Contracts classes).}

For that reason, I will always admire the way that Professor Spreng taught her Civil Procedure class. Prior to her final, I knew everything that there was to know about Civil Procedure I. The only way to do well on her exam was to understand the law inside and out and know what you were arguing. This knowledge of the law extends from the

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\footnote{Both should be taught/tested. Students should know that the Federal Rules of Civil Procedure internalize crucial philosophical principles about justice that manifest themselves in notice pleading, liberal discovery and a preference for what we call “judicial efficiency” and learn to discern these themes themselves from the rules. To whatever degree the professor scaffolds individual students, realizing that even these ideals permit only imperfect justice is very important. There remains much to be said, however, for understanding that “a short and plain statement showing the pleader is entitled to relief,” see \textit{FED. R. Civ. P. 8(a)(2)}, rarely justifies a 100-plus page complaint stating but one claim, no matter what clever policy reason a student may argue on an examination.

But a professor’s jurisprudential views—no matter how profoundly Bert and I may disagree with them—are useful to internalize, because that professor is not alone. Law is but one of many disciplines where a professor’s philosophical view of what the discipline is may be the most important substance in the course. A student’s greatest mistake is to believe that an “A” grade gleaned from understanding “how the Prof. wants us to write our answers” reflects more achievement than a “B” or “C” earned by internalizing “what the Prof. even thinks an ‘answer’ is.”

The distinction between “method as answer” unmodified and “method as answer because it inevitably leads to another answer” is more disconcerting. The latter helps students who are struggling with the analysis via a highly programmed process. It is a widely utilized form of scaffolding. \textit{Carnegie Report, supra} note 26, at 61 (defining “scaffolding” as “providing support for students who have not yet reached the point of mastery”).

The risk is that it reinforces an excessively formalistic view of legal analysis when realism may be more apt: a view that legal analysis is a form of programming—a “legal education as methodological rote learning” notion. Where doctrine is fairly static—commercial law subjects leap to mind, though bankruptcy would be an exception that might not prove the rule—legal analysis does seem pedantic, but I prefer to test students’ facility with the law’s creativity and dynamism. \textit{Cf.} Barbara Glesner Fines, \textit{The Impact of Expectations on Teaching and Learning}, 38 \textit{Gonz. L. Rev. 89}, 121 (2002-2003) [hereinafter Glesner Fines, \textit{Impact of Expectations}] (“Teachers most effectively develop thinking skills in their students by creating a ‘cooperative classroom condition where . . . value is placed on creative problem-solving strategies rather than on conformity to ‘right answers.’”).}
weekly assignments, the group work, and the way class is run. Every day hypos would be discussed, and we would always wonder why there was never a truly correct answer. We now know that it's because there are always two sides to the question.

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This modernized concept of "the law" should liberate lawyers and legal education. Unfortunately, the legal academy continues to reinforce professional stratification and control, resisting a more natural model of lawyering as a "[non-specialized] and highly involved form of human dedication," clinging instead to a "fragmented and specialist"—and elite—ideal.

This elite ideal arose in the late 1800s, when the legal academy consigned the apprenticeship form of legal training to the ash heap of history. University law schools adopted the case method and bar admission "reforms" stifled diversification of the profession. "Two hemispheres" emerged at the bar: one catering to the "prestige" corporate clients and another to do the "dirty work" of representing individuals.

In 1870, Harvard Law Professor Christopher Columbus Langdell unveiled the first "case method" law courses that featured a professor and student in dialogue concerning the reasoning in appellate court decisions. Langdell intended the case method to be a nuanced tool for teaching legal
methods and sold it as ideally suited to prepare lawyers for practice. The case method would examine law in the context of the “nature of the subject to which the law is to be applied.” It eschewed precise, technical doctrine and “forced” students to grapple with the contradictions among and indeterminacy of legal opinions, as well as the extratextual factors shaping legal doctrine, including first principles.

Therefore, the case method should hone the skills necessary to discern the current state of the ever-shifting law in the context of a specific fact set. It provides expertise: the ability to reason from unifying and sometimes even first principles to solve problems previously unexplored. In theory, the “Socratic” technique also promotes student engagement and collaborative learning.

So Langdell got the case method right but bobbled its implementation. The English common law, the early Langdellians’ greatest interest, arose from “the raw facts of daily life” and then was refined over centuries in response. This “law” was essentially descriptive. Langdell’s methods, however, became connected with the theory that law was science and scientific methods would extract its meaning. In the early 1880s, Oliver Wendell Holmes cried foul: “The law embodies the story of a nation’s

78 Davis, supra note 57, at 1287-89.
79 See REDLICH, supra note 73, at 20.
80 See Kimball, Heretical Ideas, supra note 77, at 69-71 (quoting Langdell for the importance of considering the “practice of merchants” to infer legal doctrines of partnerships and contracts).
82 See Kimball, Heretical Opinions, supra note 77, at 71.
83 See Edward Rubin, What’s Wrong with Langdell’s Method, and What to Do About It, 60 VAND. L. REV. 609, 632 (2007) (quoting CHRISTOPHER LANGDELL, CASES ON CONTRACTS viii-ix (2d ed. 1874) as saying “[t]he number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.”); Carrington, supra note 24, at 313 (“Most of the great truths about law were fully revealed by the time of Justinian.”).
86 See Davis, supra note 57, at 1287-88.
88 Grey, supra note 81, at 51-52.
89 See AUERBACH, supra note 75, at 79-80.
development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

Langdell did not really disagree with Holmes, but he behaved as though he did. Langdellians were dedicated to the study of "pure law"—the search for "some "true" principle assumed to have been in the law all along," only loosely connected to current judicial analysis of concrete disputes—and deemphasized their mentor's original view that law arose from custom, tradition, and prevailing standards in the relevant business or industry. The significance of law's practical, prescriptive role—law as an "applied science"—diminished in legal education.

The "first Report" released in 1914 recognized that accepted purposes of legal education were changing but warned that law schools risked becoming "too academic." Under Dean Langdell, practitioners and judges disappeared from the Harvard faculty. Harvard, leading a national trend, focused on narrow intellectual training and preparation for elite corporate law practice; one of its most revered civil procedure professors and Langdell's most devoted protégé, James Barr Ames, never practiced law.

It was the critical turning point in American legal education. Langdellian legal educators deliberately "elevated logic and doctrine above practical social policy and human experience," but the notion that law-as-

91 For example, Langdell tended to look down on his former practitioner colleagues. See Davis, supra note 57, at 1283.
92 Id. at 1284 (quoting Karl Llewellyn, The Common Law: Deciding Appeals 120 (1960)).
93 See Kimball, Heretical Opinions, supra note 77, at 69-71.
94 See Davis, supra note 57, at 1284 (describing the Realist critique of post-Langdell legal education and citing Karl Llewellyn, The Common Law: Deciding Appeals (1960)). From this perspective, the apprentice system's focus on a humanistic curriculum and on-the-job experience has comparative charm. See Jones, supra note 73, at 1063-64 (describing some masters' multi-disciplinary curriculum); Mark Warren Bailey, Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science, 48 J. Legal Educ. 311, 315-16 (1998) (describing the ideal apprenticeship as "practical training, theoretical knowledge, and a general education contributing to accurate reasoning, effective expression, and moral improvement.").
95 See Redlich, supra note 73, at 22, 25.
97 Id. at 415-22. Professor Ames, taught Harvard's course in civil procedure, "Pleading," by Socratic method for thirty-six years, id. at 415, much of it from his own theoretical casebook that emphasized old English common law pleading even as more modern American code pleading was in its ascendance. Id. at 417.
98 Auerbach, supra note 75, at 80.
an-intellectual-activity and law-as-a-helping-people-activity are and possibly should be mutually exclusive is a postulate-of-choice, not an inevitable conclusion.99 Law professors actively collaborated with bar associations in the ethics movement that included establishing more rigorous requirements for law school admission, completing polarization of the urban wing of the profession into its “two hemispheres” 100 that disadvantaged personal plight practitioners.101 They ignored Justice Holmes’ warnings about the Langdellian approach’s logical extremes:

The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce everything to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. . . . [One] must remember that as it embodies the story of a nation’s development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs.102

Most importantly, they diverted budding lawyers’ attention from “‘situation-sense,’ an expert’s educated feel for how to apply and shape the law so that it is true to its perceived functions and to a shared sense of justice.”103

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I do think I eventually learned to emulate your approach to reading case law, being more careful to

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100 AUERBACH, supra note 75, at 97-101, 108-09.
101 HEINZ ET AL., supra note 20, at 30, 44-47, 315-20; LANDON, supra note 20, at 57-59, 149.
103 Davis, supra note 57, at 1284.
extract the legal intricacies. I think that was more important than any grade outcome.104

—Paul Pappalardo, Teaching Assistant, Fall 2007

Modern legal education reformers miss the point when they argue that the case method is too focused on substantive knowledge or law-as-rules, because “rule” is a rarely defined term meaning different things to different people in different contexts.105 Most would probably agree that the following states a “rule”: if two claims arise from the same “transaction or occurrence,”106 they will always arise from a “common nucleus of operative fact,”107 and a district court with original jurisdiction over one will have supplemental jurisdiction over the other.108 Yet quite a few federal district and court of appeals judges also long thought it was a rule that “if [a counterclaim is] permissive there is no Federal jurisdiction over [it] unless [it] rest[s] on independent jurisdictional grounds.”109 but only because a judge dubbed it thus and everyone went along.110 Knowing judges treated it as a rule may have been useful in easy cases where everyone already knew the answer anyway, but it must have bothered the more thoughtful lawyers who could not remember the intellectual spadework that had explained why it was true in the close cases.111 Understanding the theoretical analysis that proves the rule is no rule at all, however, if it does not help determine whether a district court has supplemental jurisdiction over a particular, uncategorized counterclaim. The discretionary factors of § 1367(c) of

104 E-mail from Paul A. Pappalardo, Student, Phoenix School of Law, to Author (May 21, 2007, 15:40 MST) (on file with author).
105 “Substantive knowledge” was the purview of the proprietary and night law schools of the nineteenth century whose professors lectured with the support of narrative textbooks, a model wholly distinct from the case method. See, e.g., Jones, supra note 73, at 1066 (describing Litchfield School of Tapping Reeve, founded in 1784 and closed in 1833); Auerbach, supra note 75, at 96-101, 109-14.
108 See United States v. Heyward-Robinson Co., 430 F.2d 1077, 1081 (2d Cir. 1970) (stating that a compulsory counterclaim is “ancillary to the claim asserted in the complaint and no independent basis of Federal jurisdiction is required.”).
109 Id. at 1080.
110 See Jones v. Ford Motor Credit Co., 358 F.3d 205, 210 (2d Cir. 2005).
111 Compare 28 U.S.C. § 1367 (2006), with Gibbs, 383 U.S. 715. The downfall of the no-supplemental-jurisdiction-over-permissive-counterclaims “rule” is that no identifiable reasoning establishes that the jurisdictional boundaries defined in the supplemental jurisdiction statute are co-extensive with those described in Gibbs or that a fact set defined by the Gibbs common nucleus standard is co-extensive with a fact set defined by Fed. R. Civ. P. 13(a)’s same transaction or occurrence standard. See Jones, 358 F.3d at 210-13.
United States Code, chapter 28 render plausibly mootable “rules” even less predictive.\textsuperscript{112}

To respond that “it’s all about judicial economy, convenience, and fairness to litigants,”\textsuperscript{113} however, verges on admitting no limits to a district court’s jurisdiction to determine its own jurisdiction,\textsuperscript{114} and worse, bases those it does admit on judicial findings about the best interests of the litigants before them.\textsuperscript{115} That cannot be the law.\textsuperscript{116} Instead, those words and factors are labels for the best available situation sense: the synthesis of the numerous recognized principles, policies, and customs—or rhythms of the law—that inform decisions in many subspecialties and define what, for lawyers, is true professional expertise.\textsuperscript{117}

Again, in theory, the outcome of the ideal application of situation sense to a problem could be said to be a rule, but given the infinite number of potential future fact sets, it would not be predictive and therefore not very useful.\textsuperscript{118} Most useful would be to harness the substance and ability to apply the power of situation sense and rhythms of the law. Unfortunately, the average law student cannot read enough cases and identify from them enough rules to glean a sense of “the rhythms of the law” by those means alone in three years, and that student is unlikely to acquire much situation sense until she encounters a few actual situations.\textsuperscript{119}

\textsuperscript{112} Even after extensive analytical gymnastics, courts can barely make discernable the appropriate application of the § 1367(c) factors or their practical distinctions from the Gibbs factors. See generally Executive Software N. America, Inc. v. United States Dist. Ct., 24 F.3d 1545 (9th Cir. 1994), overruled on different grounds in California Dep’t of Water Resources v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008).

\textsuperscript{113} Cf. Executive Software, 24 F.3d at 1564 (Leavy, J., dissenting) (“According to Gibbs, the justification for pendent jurisdiction lies in considerations of judicial economy, convenience and fairness to litigants.”). I am not making a critique of Judge Leavy; I point out what was no doubt his frustration also of having to surrender to one set of meaningless labels when another set fails to direct a conclusion.


\textsuperscript{115} Interference with what may be parties’ tactical decisions can have a range of unsavory outcomes for the practice of law. See generally United States v. Perez, 116 F.3d 840 (9th Cir. 1997) (Kleinfeld, J., concurring).


\textsuperscript{117} See supra text and notes, at 24, 82-89.


\textsuperscript{119} See Blasi, supra note 85, at 342-43 (noting that expertise, including the ability to put “deep structures” to use in problem solving, is a function of “the acquisition of a large repertoire of knowledge in schematic form.”).
Rule-focused teaching, therefore, adds only limited value to a young lawyer’s professional toolkit.

A rough outline or list of a judge’s considerations of anything more than the most pedestrian judicial opinion further reveals rule-based teaching’s inadequacy:

- The opinion will start with what may be a highly selective and abbreviated version of the “facts.”
- The opinion will list a set of established principles or describe a series of cases.
- The opinion will identify the key facts or logical steps in the cases that produced the established principles.
- The opinion will then reason in light of the key facts and/or logical steps in prior cases, the imperfections of apparent analogies and other authorities to a “holding.”
- Unifying foundational principles will confirm the correctness of the holding.

Intriguingly, when well-implemented, the case method proceeds similarly:

- Students will review the judge’s carefully selected set of facts.
- Students will identify the holding of a case.
- Students will then extract a mode of analysis based on the key facts and/or logical steps that produced the holding.
- The professor will probe the extracted material with a pointed selection of narrower and/or broader questions, critiques, and hypotheticals so that students test factual analogies, additional logical

\[\text{\footnotesize{\textsuperscript{120}}}\text{ For partial transcripts and interpretations of the “typical” and well implemented case-dialogue method I have synthesized into the following list, see CARNEGIE REPORT, supra note 26, at 64-74. I would rarely conduct a case discussion by following these steps in this order, because I do not consider the precise holding particularly important. I would start by ordering the facts and then move to extracting students’ independent views of the appropriate outcome and why; and explore why the court did or did not think the problem through in the same way.}}\]

\[\text{\footnotesize{\textsuperscript{121}}}\text{ E.g., CARNEGIE REPORT, supra note 26, at 64-65.}\]
steps, or deeper principles to resolve other legal problems. In the process, the professor will lead students to unifying foundational themes to shape the mode of analysis and confirm the correctness of the holding.

There are two crucial similarities between the published opinion and the students’ analysis. The first is essential process: reasoning by analogy or from a nascent feel for the rhythms of the law. The second is the medium. Primary sources, such as cases, deliver holdings and decisions, and judges “make” those cases. But a holding is necessarily fact specific and uniquely applicable. The mode or method of analysis is transferrable and can resolve future disputes because it is fused and formed by the rhythms in the law.

Therefore, substantive knowledge is not the law: the case method of delivering doctrinal legal education—case analysis—is the law. So the “law” equals “lawyering skill.” Why? Judges decide cases as they do because they were taught to do so from their earliest interactions with the law. It is the ultimate one-up: the Langdellian method is the law, because the traditionalists have defined it that way.

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122 E.g., id. at 65-66, 70-71.
123 E.g., id. at 72-73.
124 Cf. supra note 69 (discussing how FED. R. CIV. P. 8(a)(2) rarely justifies a 100-plus page complaint, thereby using a “100-plus-page complaint” to give meaning to the label “short and plain statement”).
125 Catharine Pierce Wells, Langdell and the Invention of Legal Doctrine, 58 BUFF. L. REV. 551 (2010); see also Edwards, Growing Disjunction, supra note 48, at 57. The equivalent would be true of statutory analysis, though it is not a “Langdellian” method, not surprisingly, law schools mostly ignore it.
126 No “rule” or mode of analysis “is separable from the skill of interpreting a text.” Edwards, Growing Disjunction, supra note 48, at 57-58; see also Grey, supra note 81, at 48; AM. BAR ASS’N, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 234 (1992) [hereinafter MACCRATE REPORT] (noting “the unfortunate tendency to define ‘skills instruction’ as dealing with skills,” because “appellate case analysis . . . involves the teaching of important professional skills.”). Together with communication of the fruit of the fusion of a “concept” and a “skill,” they are “doctrinal education.” See Edwards, Growing Disjunction, supra note 48, at 57.
127 This is true to a general extent, not at the extremes where Langdellian legal scientists tried to extract unintended ultimate principles from judicial decisions. Professor Thomas Grey argues that the legal realists’ attack on orthodox schemes to organize and conceptualize failed, though only in part, because Langdell’s case method for legal education survived:
So now we are all Langdellians as well. Most other "lawyering skills" are systems for practicing, presenting, and/or delivering the fruits of legal analysis. To quickly abandon the methodology that has produced the way the judges reach their conclusions is not legal education; it is untested legal reform.

IV. THERE ARE NO RULES!!!
THE COUNTRY LAWYER AND THE BEST TRADITIONS OF THE BAR

My brother had located in Owensboro and I fancied the idea of being part of a family law firm . . . . I have not considered moving since.129

– Charles E. Moore, elite personal injury attorney, Owensboro, Kentucky

Legal education is not a self-aware profession. A task force that produced a revered statement of requisite skills and values for law practice included only a handful of actual practitioners. Unfortunately, the otherwise useful statement is unrealistic: no lawyer can do all the task force prescribes to demonstrate professional competency, let alone a recent law school graduate. The authors of a Carnegie Foundation report criticizing

But categorical schemes have a power that is greatest when it is least noticed. . . . Modern legal theorists have not supplanted the classical ordering but have left it to half-survive in the back of lawyers’ minds and the front of the law school curriculum, where it can shape our thinking through its unspoken judgments—Langdell’s secret triumph.

Grey, supra note 81, at 49-50.
128 Even the MacCrate skills not subsumed into the analysis, reasoning, problem solving and research categories such as communication, fact investigation, counseling, dispute resolution, and office management are derivative of the first four. See, e.g., Stuckey, supra note 49, at 148-49 (arguing that law schools should “provide instruction in how to produce [legal] documents” in doctrinal courses on the basis that “it does no good to teach a student to think like a lawyer if the student cannot convey that thinking in writing”); Amy Vorenberg & Margaret Sova McCabe, Practice Writing: Responding to the Needs of the Bench and Bar in First Year Writing Programs, 2 Phoenix L. Rev. 1, 6-7 (2009) (pointing out that practicing lawyers do not use IRAC and instead, integrate facts and law in their writing, so students should be taught to do so as well).
129 Telephone Interview with Charles E. Moore, Attorney and Senior Partner, Moore, Malone & Safreed (Nov. 26, 2009) (transcript on file with author).
130 MacCrate Report, supra note 126.
131 The MacCrate Report calls these “fundamental lawyering skills essential for competent representation.” Id. at 135. These include: detailed skill sets in litigation, appellate practice, administrative proceedings and alternate dispute resolution, id. at 191-99; “[s]pecialized
modern legal education includes only one lawyer. Also not surprisingly, it misunderstands the law's "signature pedagogy" and adopts without skepticism many establishment, rule-based ideals of professionalism. The collectors of the Best Practices for Legal Education may be right, but they are also a narrow sample within the universe of law professors. It is not true, as one editor of this article argued to me, that the law teaching profession, "rarely, if ever, examines itself to determine if it is doing its best to turn lay people into lawyers," but that editor probably is correct that the profession does not often examine itself to see if it is doing its appointed task especially well.

The lack of self-awareness in legal education is most apparent in its professionalism curriculum; if "law" is "what lawyers do," one of law school's most important roles is to immerse students in the culture and standards by which attorneys do it. Unfortunately, the establishment ideals that are almost universally and uncritically accepted in the academy rest on profoundly thin theories of the good and are often inadequate to satisfy the claims of ethics, morality, or professional diversity.

questioning techniques" for fact witnesses, id. at 168; and "[s]ubstantive and technical requirements for specialized kinds of legal writing, including those applying to ... contracts, wills, trust instruments, covenants, consent decrees, separation agreements, and corporate charters ... statutes, administrative regulations and ordinances." Id. at 174-75.

132 CARNegie REPORT, supra note 26.
133 See generally Dickinson, supra note 52.
134 Compare CARNegie REPORT, supra note 26, at 138-39 (assuming the value of pro bono work for students and lawyers and supporting required hours reporting to the bar), with CARROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL- FIRM ATTORNEYS 134-35 (1996) (quoting sole practitioners opposed to mandatory pro bono requirements).
135 STUCKEY, supra note 49.
136 Being eighty percent right is good enough in most situations other than horseshoes. I believe the proper attribution is to either Aaron Hart or Christine Trueblood, two former students whose thoughts are always worthy of consideration.
137 In the vocabulary of John Rawls' A Theory of Justice, the "thin theory of the good" captures the explanation for why people have a rational desire for the "primary goods"—such as liberty, wealth and self-worth—that will permit them to pursue their substantive life plans. A "fuller" or thick theory of the good defines a substantive moral worth and set of moral claims society may have on a person and vice versa. See JOHN RAWLS, A THEORY OF JUSTICE 347-50 (rev. ed. 2000).
138 See generally W. Bradley Wendel, Morality, Motivation, and the Professionalism Movement, 52 S.C. L. REV. 557, 561-77 (2001). According to Professor Wendel, these include: oligopoly/exclusiveness; high levels of lawyering technique; altruism in terms of sacrificing some financial remuneration for the greater good; etiquette, boiling down to "civility"; aspiration; and social values of the community. Id.
I walk with my own moral compass. It may not correspond with what the over-inflated legal profession has deigned appropriate or ethical. I have always wandered in the gray areas, and frankly, my clients will be wandering in those gray areas too. The pious philosophers that “do no wrong” can kiss my ass. That is a world in a vacuum. The only vacuum I follow is my Dyson when I spill something.

If you can relate to your client—if you can communicate to your client that you will be his/her true advocate and apprise of all the possible risks—generally you won’t run into trouble. The best word I learned in my life is NO! I can tell if my potential client will burn me for anything, and I’ll give them the phone number for any ASU/UA grad and let them go.

There has to be a foundation of mutual trust. A solo attorney needs/must develop that one client at a time. More time spent? Yep. More energy? Yep. More money in the long run? Yep. The clients will become Pied Pipers and bring others to your door. Why? Because of that investment in them. Not winning: they expect that anyway. It’s that investment. I’ve done it for many, many years in business. Even if you falter, fail or have a letdown, if you have developed that bond, the hurdles can be overcome, and you will more often than not be given a second chance. People recognize their own vulnerability and humanity.

According to one oft-cited view, the legal profession makes a bargain with society. Lawyers receive the status of a “guild” that allows them to control admission to the profession. In return, society benefits from lawyers’ specialized knowledge and unique role in law enforcement, as

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141 Id.

142 See, e.g., Wendel, *supra* note 138, at 561-62. Professor Wendel challenges this critical presentation the legal profession’s “bargain” with the public, but I remain circumspect. See *Auerbach, supra* note 75, at 117-20.
well as the profession’s promises of internal regulation, limits on self-interest, and dedication to the “public purpose” and “core values and ideals of the profession.”

The profession’s promises, however, are abstract at best. “Professionalism” is an elusive concept. A leading blueprint for legal education reform calls professionalism “what is more broadly expected of [lawyers], both by the public and by the best traditions of the legal profession itself.” Unfortunately, this definition artlessly describes lawyers as aspiring to failure, because public expectations of attorney conduct are so low that to indulge them as a professional ideal would eventually trigger the proverbial race to a minimalist ethical bottom.

Moreover, the “best traditions of the bar” might be better described as being among the worst. Nineteenth-century lawyers reserved the profession’s pedestal for the many sole practitioner country lawyers whose tiny offices were magnets both for the local movers and shakers and those of more humble circumstances, all of whom sought assistance with a wide

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143 MODEL RULE OF PROF. CONDUCT 1.6 cmt. 2.
144 See Hamilton, supra note 140, at 5.
145 Lawyers are expected to “temper one’s selfish pursuit of economic success by adhering to the standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.” Rob Atkinson, A Dissenter’s Commentary on the Professionalism Crusade, 74 TEX. L. REV. 259, 275 (quoting Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 488-89 (1988) (O’Connor, J., dissenting)). This observation must seem odd to rural attorneys who define professional success by income. See Landon, supra note 20, at 78-79.
146 Hamilton, supra note 140, at 8-14; Wendel, supra note 138, at 562; see generally MODEL RULES OF PROF’L CONDUCT, preamb.
147 See Wendel, supra note 138, at 560.
149 Timothy P. Terrell & James H. Wildman, Rethinking “Professionalism,” 41 EMORY L.J. 403, 414 (1992) (pointing out that despite efforts to impose professional ethics codes, minimalistic enforcement makes “lawyer jokes” all the more ironic). Yet even Terrell & Wildman fall into the same trap, urging in their own set of fundamental professional values little more than that lawyers be very competent and accountable, have integrity, respect the system and opposing counsel (interestingly, not clients), and do pro bono work. Id. at 424-31.
150 Not surprisingly, in John Mortimer’s series of satirical stories about the culture of British barristers, the protagonist regularly sneers at those resorting to “the best traditions of the bar” to critique the professional conduct that wins his cases. See, e.g., JOHN MORTIMER, RUMPOLe. & THE SHOWFOLK, in THE TRIALS OF RUMPOLe 43, 57 (1979) (quoting pompous Queen’s Counsel after his client entrusts Rumpole unaided with her murder defense: “I cannot imagine anyone on this Circuit carrying on with a case after his leader had been sacked. It’s not in the best traditions of the bar.”).
range of legal, political and personal problems. Toward the end of the century, the Industrial Revolution and the inevitable urbanization that followed in its wake left their footprints on the profession's aspirations. Over time, the legal profession bestowed its hallmark of "prestige" on large corporate-practice firms. The irony is that "it was the low-status lawyer . . . whose generalized practice and range of human contacts most closely approximated the traditional professional ideal of the accessible generalist."

In the early 1900s, preservation of their socio-economic status, ethnocentrism, and professional protectionism motivated the elites of the bar to craft ethics rules that singled out for censure the contingent fees and "ambulance chasing" that were so foreign to their own large firm, institutional-client practices. Without shame, elite lawyers then used these tools to "cleanse" the bar of immigrants, personal injury attorneys, racial minorities, and "undesirable" others who did not understand the imperative of professional "esprit de corps."

History is written by the winners, and post-war divisions of spoils inevitably favor them. Since the late 1800s, elite lawyers have primarily represented large corporations and powerful individuals with interests in stability and conservatism across the institutional spectrum, including the legal profession. Elite law firms and academic institutions have the resources and business incentives to devote to professional organizations, particularly at the statewide and national levels. Therefore, elite educational institutions and law firms dominate the makeup of the

151 AUERBACH, supra note 75, at 14-16; Landon, supra note 20, at 1-2.
152 See generally AUERBACH, supra note 75, at 40-129; Landon, supra note 20, at 2.
153 See HeinZ et al., supra note 20, at 97.
154 See AUERBACH, supra note 75, at 51.
155 See Peter Karsten, Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940, 47 DePaul L. Rev. 231, 258 (1998) (noting that the "rapacious" conduct of "ambulance chasers" was no more offensive than that of insurance adjusters).
156 See AUERBACH, supra note 75, at 63-66.
157 See id. at 50, 106-08.
158 See id. at 49-50.
160 See AUERBACH, supra note 75, at 107.
161 Compare id. at 21-23 (describing the corporate bar in the late 1800s and early 1900s), with HeinZ et al., supra note 20, 98-101 (describing the Chicago bar in both 1975 and 1995 and noting that this characterization of lawyers' income and time investments for clients has become more pronounced).
162 See Mashburn, supra note 159, at 675-76.
American Bar Association,\textsuperscript{163} which is particularly influential in promulgating professionalism standards and evaluating law schools’ professionalism education programs.\textsuperscript{164} Bottom line: elites make the rules and their rules reflect urban, establishment norms that reinforce their own professional dominance.\textsuperscript{165}

The establishment description of the ideal legal professional operates to diminish,\textsuperscript{166} exclude, and sometimes harass non-traditional and disfavored entrepreneurial lawyers. The establishment incorrectly perceives these attorneys as unethical and untutored,\textsuperscript{167} which makes them attractive targets for deflecting attention from establishment attorneys’ own peccadilloes.\textsuperscript{168} These dynamics increase “personal plight” lawyers’ cost of doing business, limits the quality of legal services available to those of modest means,\textsuperscript{169} and functionally disadvantages many lawyers’ clients within the legal

\textsuperscript{163} See id. at 668-73.
\textsuperscript{164} Id. at 675-76. See generally AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMIS. TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2009-10).
\textsuperscript{165} Therefore, “[e]lite lawyers have thus rigged the deal,” Professor Amy Mashburn explains:

[T]hey will be seen as more courteous because of their high status, and their high status will entitle them to deference from others, which will in turn facilitate their capacity to appear more courteous than others. They will be challenged less frequently than other lawyer-status lawyers, and if they are challenged and a credibility battle ensues, they are more likely to be believed by others. . . .

Mashburn, supra note 159, at 696.
\textsuperscript{166} Professor Mashburn also argues:

With a patrician, deference-based system of social interaction, the elite espouse a political formula that identifies and rewards their traits as superior by attributing to those traits intrinsic rationality, intelligence and morality. . . . In this manner, the ruling elite persuade others that they deserve to rule because they more closely approximate the biased ideal.

Id. at 695. These pitfalls extend far beyond the bar examination, character and fitness reviews, and professional education requirements and exist even in law schools. See generally HEINZ ET AL., supra note 20, at 225-44.
\textsuperscript{168} See Mashburn, supra note 159, at 691-92.
\textsuperscript{169} See SERON, supra note 134, at 129 (quoting a solo attorney frustrated that pro bono requirements impede her ability to cover costs of doing business by doing more paid work). In another example, protection from the disproportionate number of bar complaints and discipline endured by solos and small firm attorneys all but requires solos to memorialize all conversations with clients via memoranda to files or letters to clients, resulting in increased overhead and therefore client fees.
Perversely, the volume of the establishment chorus pleading for more robust pro bono requirements then hits “ten,” perhaps even unaware that the scorned of the profession have long made good money applying their expertise—as opposed to their untutored compassion—to problems that the establishment assumes are sufficiently simple for amateurs to resolve and for people it incorrectly assumes are without the means to pay.

For the majority of bar members who represent individuals, establishment professional standards make it hard to get clients and still practice law! Whether doing estate planning for a family or preparing a seemingly uncontested divorce settlement agreement, their daily professional reality often calls on them to be “lawyers for the situation” and

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170 See infra text and notes at 172-73, 218-25.

171 A new lawyer in Owensboro, Kentucky where I practiced can go into juvenile law on a volume basis simply by volunteering with the district court and in a year or so learn enough to make sufficient money to sustain a credible young person’s practice and to sharpen the skills needed to pursue other matters. Anyone who has heard a well-meaning and venerable member of the bar consent to the juvenile court’s jurisdiction knows such a twenty-something with a year’s experience is probably the better advocate in that situation. The juvenile court does have exclusive jurisdiction of dependency matters, from a subject matter perspective, but not as to the child him or herself if the plaintiff is unable to prove the truth of the petition. Compare Ky. Rev. Stat. Ann. § 610.010(2)(d) (2010) (stating that district courts “shall have exclusive jurisdiction in proceedings concerning a child . . . who allegedly . . . (d) is dependent, neglected or abused”), with 15 Louise E. Graham & James E. Keller, Kentucky Practice, Domestic Relations Law § 6:2 (3d ed. 2008) (explaining that the district court’s exclusive jurisdiction is adjudicatory only). The court would lose jurisdiction if the child was not found to be dependent, neglected or abused or the court determined at a temporary removal hearing that no further proceedings were needed; therefore, admitting to the court implies admitting to the allegations of the petition and accepting the court’s dispositional jurisdiction until the child is eighteen years old. Compare Ky. Rev. Stat. Ann. § 620.140(1) (2010) (describing dispositional alternatives for “dependent, neglected or abused children”), with Ky. Rev. Stat. Ann. § 610.010(2)(d) (2010) (granting exclusive jurisdiction to juvenile courts in proceedings where child is “allegedly” dependent, neglected or abused).

172 Many poor persons do not pay; the state often pays. An example is juvenile dependency proceeding. See, e.g., Ky. Rev. Stat. Ann. § 620.100(1)(a)-(c) (2010) (authorizing district court to appoint counsel and provide compensation for a child or a parent or non-parent exercising custodial control or supervision of the child). As a result non-custodial parents or relatives may indirectly receive effective representation through the child’s attorney. See Stephen F. Florian, Guardian ad Litem Representation of Children in Kentucky Circuit Courts, Ky. Child. Rts. J., Spring 2001, at 1, 3-5 (describing roles for a child’s attorney in a dependency case that would involve advocating for a non-custodian’s interests as derivative of the child’s interest). States are not necessarily required to appoint so many counsel, however. See generally Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18 (1981); Patricia Kussmann, Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights, 92 A.L.R.5th 379, §§ 5-6 (2001 & Supp.).
not necessarily for a particular individual.\textsuperscript{173} They resolve problems for
groups and communities in ways that may confound with conflict of interest
rules but provide a profound societal benefit.\textsuperscript{174}

Other realities of how solo and small firm attorneys practice law also
confound the “ideals” elites have established. Many solo and small firm
attorneys need some volume business\textsuperscript{175}—Chapter Seven bankruptcies,
uncontested divorces, car wrecks—to produce the steady revenues necessary
to pay their secretaries and paralegals.\textsuperscript{176} Volume business implies mass
market advertising that admittedly under-enforced professionalism codes
have routinely discouraged, perhaps because elites who write the rules do
not need to advertise.\textsuperscript{177} Many urban solo and small-firm practitioners
believe they do their full share of “pro bono work” when they represent
clients who ignore the final bill or when they lose a contingent fee case.\textsuperscript{178}
Personal injury practice would sustain a serious blow\textsuperscript{179} if lawyers could not
get around referral fee limitations imposed by attorneys who bill by the hour.\textsuperscript{180} One study revealed that in highly personalized practices, an

\textsuperscript{173} Thomas L. Shaffer, The Legal Ethics of Radical Individualism, 65 TEX. L. REV. 963,
879-82 (1987) (describing the irresponsible damage that can be done to families and small
businesses when lawyers insist on representing “individuals” as opposed to groups).
\textsuperscript{174} A good example comes from one of the subjects of Donald Landon’s study, who said,
“we’ve got a church split here now that has all the makings of a community-wide
confrontation. The attorney on the other side and I are trying very hard to cool things down
and keep the matter contained. It could blow up the whole community if it got out of
control.” Landon, supra note 20, at 139.
\textsuperscript{175} See id. at 70; see also Seron, supra note 134, at 28.
\textsuperscript{176} See Landon, supra note 20, at 47.
\textsuperscript{177} See Fred Zacharias, What Lawyers Do When Nobody’s Watching: Legal Advertising as
a Case Study of the Impact of Underenforced Professional Rules, 87 IOWA L. REV. 971,
1006-07 (2002); see also Seron, supra note 134, at 92-94.
\textsuperscript{178} See Seron, supra note 134, at 129-33.
\textsuperscript{179} Attorney referrals are an elite personal injury attorney’s primary way of getting clients.
Markets and Reputations Shape the Ways in Which Plaintiffs’ Lawyers Obtain Clients, 21
Law & Pol’y 377, 386-87 (1999); Herbert M. Kritzer & Jayanth K. Krishnan, Lawyers
Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their
Implications for Case Handling, 21 Law & Pol’y 347, 348-49 (1999) (“before a lawyer can
begin to consider whether or not to take particular cases, the lawyer has to find clients with
those cases”).
\textsuperscript{180} See Model Rules of Prof’l. Conduct R. 1.5(e). According to the rule:

A division of a fee between lawyers who are not in the same firm may be made
only if:
(1) the division is in proportion to the services performed by each lawyer or each
lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will
overwhelming number of lawyers rejected the notion that accepting a gift, adjusting fees, or taking a former client to dinner implied any conflict of interest where the recipient party might be a source of client referrals; after all, the attorney-client relationship is often born out of friendship or blooms into such later.

Legal educators enthusiastically reinforce elitist professionalism ideals. Law professors are often products of elite educational institutions and law firms, to the extent they have spent meaningful amounts of time practicing law at all, naturally the law school’s culture reflects the experience of the next generation of professors. Some law students are prematurely identified as intellectual elites, in spite of the fact that the

receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable.

Id.; KY. Sup. Ct. R. 3.130(1.5)(3)(1). See also Sara Parikh, How the Spider Catches the Fly: Referral Networks in the Plaintiffs’ Personal Injury Bar, 51 N.Y.L. Sch. L. Rev. 243, 251 (2006-2007) (discussing the fee-splitting requirements in states that have adopted the Model Rules of Professional Conduct).

181 JOEL F. HANDLER, THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY 100, 139 (1967). Professor Handler was relying on the Canons of Professional Ethics when censuring this activity. Id. at 97-98 & n.17 (quoting Canon 28 as saying, “i[t is disreputable ... to pay or reward, directly or indirectly, those who bring or influence the bringing of ... cases ... ”). Handler observed the irony that these clear “violations” of ethics rules were so widespread that the professional disciplinary machinery would never detect them, because it would not even occur to any lawyer or client to make a complaint. Id. at 139.

182 Such potentially ambiguous relationships between attorneys and clients can be a significant problem for solos and small-firm attorneys, because they rely on friends as clients and sources of clients. See SERON, supra note 134, at 52-56 (quoting a female divorce attorney as saying, “I do more socializing with people who might send me referrals”); Kritzer & Krishnan, supra note 179, 359-62 (discussing survey data showing current and former clients are a substantial source of personal injury clients); LANDON, supra note 20, at 58, 122 (noting that smaller jurisdiction attorneys routinely refer to their clients as “friends”).

183 Jonakait, supra note 16, at 901-04.

184 See supra authorities cited in note 16.

185 If a law professor has not practiced law for a meaningful period of time (five-plus years, for example), it is a reasonable hypothesis that such a professor’s sense of professionalism is even more influenced by the norms and ideals observed and internalized in law school. See CARNEGIE REPORT, supra note 26, at 89 (describing the career paths of non-practicing law professors); Howard A. Glickstein, Law Schools: Where the Elite Meet to Teach, 10 Nova L.J. 541 (1985-1986). Ironically, routine advice to law school tenure-track hopefuls is to practice no more than five years. See Burger & Richmond, supra note 16, at 21. Those who get hired do not. See Redding, supra note 16, at 106.

186 See CARNEGIE REPORT, supra note 26, at 150.

187 Large law firms do on-campus interviews in the fall of their target candidates’ second year of law school. They only consider students at or near the top of the class, who are by
nature of law school assessments renders their results suspect for this purpose. Law schools have then funneled those “elite” law students into judicial clerkships and eventually elite law firms that primarily represent large corporations. Students chosen for this sort of mentoring have historically already been social and economic elites as well: white males of comparatively privileged backgrounds and mainstream Protestant faiths. Therefore, even cultural resources in legal education are disproportionately devoted to those groups that have traditionally filled the top spots on the grade distribution, again communicating the message that other students—and other people—lack full value to the profession and do not need or even deserve a kid-glove education.

Modern legal education reformers sometimes unwittingly reinforce the professional prestige hierarchy with passionate arguments in favor of additional clinical and experiential education on the basis that much of what matters in personal plight practice is social skills. Even in personal plight practice, however, the most sympathetic counselors, the most seductive oral advocates, and the most persuasive rhetoricians stand to win more than their share of cases if they also bring analytical and substantive sophistication to the table. Poor people’s problems—those usually addressed in law school...
clinics and other experiential models—are not inherently simpler or less profound than those inherent to wealth or business.\footnote{194} Cases clinical students and their practitioner counterparts face can be very intellectually challenging. To miss this forest for the trees is to risk producing technical apprentices instead of the savvy practitioners who add value with their insightful analysis and facility with the rhythms of the law.\footnote{195}

The concept of “professionalism education” can seem mundane, but its orientation is still elitist. A teacher might emphasize the importance of “getting to court on time” by censuring students late to class. Of course: large firm attorneys’ court dockets are small and the practice of staffing cases with multiple lawyers or assigning them to practice groups means they rarely need ever be double booked in court.\footnote{196} By contrast, personal plight attorneys juggling perhaps hundreds of matters at a time—allowing them to charge less and still feed their secretaries’ families—rush from one motion hour to another and are almost never on time except to the first hearing of the morning.\footnote{197} So the personal plight attorney ends up cast in the role of “bad guy” yet again.

settlement satisfactory to his clients prior to a decision on the defendants’ motion for summary judgment.

Personal injury attorneys do not get rich anymore—if they ever did—simply by making juries swoon. If they can finance a case and try it effectively, the ability or resources to improve the legal foundation of the case will both increase its settlement value and potential at trial. Many staples of Civil Procedure curricula prove the point. \textit{E.g.}, Gerald M. Stern, \textit{The Buffalo Creek Disaster} 52-58, 95-96, 144-45 (Vintage Books 1977) (1976) (discussing decision to attempt to create diversity jurisdiction to avoid potentially biased West Virginia state courts by piercing the corporate veil and suing New York principal even though it is “so rarely done” and then searching for the one federal district judge who had ruled favorably in a similar situation); \textit{see also} Charles W. Adams, World-Wide Volkswagen v. Woodson—\textit{The Rest of the Story}, 72 Neb. L. Rev. 1122 (1993) (describing both how effort to choose plaintiff-friendly forum resulted in groundbreaking personal jurisdiction ruling and how rapidly developing product liability law ultimately destroyed plaintiffs’ case).


\footnote{195}{\textit{Cf.} Bailey, \textit{supra} note 94, at 313-14 (describing the drudgery many apprentices experienced copying legal documents and acquiring other technical knowledge and skills).}


\footnote{197}{\textit{See} SERON, \textit{supra} note 134, at 119-20.
Other law school traditions—such as calling students “Mr.” and “Ms.”—also reinforce a hierarchical professional culture that conforms to white, male, middle-class, and urban values. Using surnames is very formal and implies that status emanates from seniority or social position, not merit. It serves as the opposite of a power equalizer, rejects egalitarianism and collegiality, and communicates an institutional preference for stratified urban rather than low deference rural norms. Young lawyers sop up the profession’s external cues and markers of belonging in law school, so these are devastating influences on the culture of the bar. Insisting on such a concept of professionalism is a deliberate choice with inevitable consequences.

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VOICE:

Michael J. Aurit

I have always been told that I am too emotional to be an attorney, that I would get too attached to my clients, and that I would take losing too hard. In a lot of ways I think the subconscious detachment from “human beings” comes from the exchange of real names for “plaintiff.”

198 Duncan Kennedy, Legal Education and the Reproduction of Hierarchy, 32 J. LEGAL EDUC. 591, 605 (1982) (“The students will pick up mannerisms, ways of speaking, gestures, which would be ‘neutral’ if they were not emblematic of membership in the white, middle-class male universe of the bar.”) [hereinafter Kennedy, Reproduction of Hierarchy]; accord Mashburn, supra note 159, at 699 (“A proper attorney is the embodiment of middle-class virtues”).

199 See Steven M. Cooper, “If I Were a Carpenter and You Were a Lady:” Power Relations Between Teacher and Student in Law School, 16 WHITTIER L. REV. 845, 849, 852 (1995) (arguing that the “artificial distance imposed by calling teachers (and students) by their surnames is not educationally necessary” and “the teacher’s authority should come from his knowledge, intellect and classroom performance rather than simply from his position.”); see also Kennedy, Reproduction of Hierarchy, supra note 198, at 602-10 (“Law teachers model for students how they are supposed to think, feel, and act in their future professional roles . . . . This training is a major factor in the hierarchical life of the bar.”).

200 See Kennedy, Reproduction of Hierarchy, supra note 198, at 602 (“Law school . . . teaches students that they are weak, lazy, incompetent, and insecure. And it also teaches them that if they are willing to accept dependency, large institutions will take care of them almost no matter what.”). Cf. LANDON, supra note 20, at 50 (observing that small-jurisdiction lawyers practice within the “egalitarian ethos” of their wider “community of ordinary folk”); id. at 52 (noting that small-jurisdiction lawyers “do claim a prized possession: autonomy.”).

201 Kennedy, Reproduction of Hierarchy, supra note 198, at 602-10.

and “defendant” beginning in law school. Students go through cases so rapidly that they don’t remember the names of the parties from one case to the next. Students are not taught to really care all that much about who the parties are, where they came from or their life stories. There are simply more important things to be concerned with, i.e. the issues and rules. Let’s face it, that is what we are tested on, so any extraneous information is just not welcome in the life of a 1L. Will I ever need to remember the name of the family who was burned so severely in World Wide Volkswagen?

I will never forget their name. They were the Robinsons.

I cared about them as people. I learned the law through their story. I learned what “reaching out” really meant and why it is so important in the life of a lawsuit. I learned the incredible nuances along the fine line between sufficient and insufficient contacts to satisfy the jurisdictional test. However, I didn’t simply learn how to apply and analyze the “tests” and “standards.” I learned at a gut level the impact those abstract tests and standards can have on people. How can a person understand what “traditional notions of fair play and substantial justice” stand for and protect against until we allow ourselves to connect to the parties themselves?

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Another way law schools reinforce stratified or flat-deference professional ideals is through the institution’s accepted culture of out-of-the-classroom student-teacher relationships. Legal education literature differs on the merits of various cultures, though prominent legal education reform experts increasingly indicate a preference for a flatter deference structure. They argue that informal contact with students outside the classroom facilitates numerous pedagogical purposes, including professionalism education, partly because a lot of students just plain like

203 Compare Susan B. Apel, Principle 1 Good Practice Encourages Student-Faculty Contact, 49 J. LEGAL EDUC. 371 (1999) (urging more student-faculty contact outside the classroom), with Susan J. Becker, Advice for the New Law Professor: A View from the Trenches, 42 J. LEGAL EDUC. 432, 445-46 (1992) (giving advice on how to avoid student-faculty contact).

204 See, e.g., Apel, supra note 203, at 278-280 (mentioning as benefits of out-of-class contact enhancing student well-being with a sense of community, motivating students to think more deeply, creating more conducive contexts for raising complex ethical and professional dilemmas, and providing better informed career and curricular advice); Glesner-Fines, Impact of Expectations, supra note 69, at 109-10 (observing that “[i]nteracting with students in a variety of settings, particularly settings in which traditional power relationships
IT'S ALL ABOUT THE PEOPLE

Professors who engage in more-than-average out-of-the-classroom interaction also report greater fulfillment from their teaching duties. In fact, the American Association of Law Schools goes as far as to characterize an appropriate student-teacher relationship as one between friends. One critic of this characterization argues that "friendship" is not an appropriate student-professor relationship due to the "power and

are deemphasized or reversed, can be especially useful in overcoming stereotypical views or hastily drawn first impressions"; Nisha C. Gottfredson et al., Identifying Predictors of Law Student Life Satisfaction, 58 J. LEGAL EDUC. 520, 528 (2008) (identifying one such predictor as "a most supportive atmosphere with positive student-student and student-faculty relationships"); Gerald F. Hess, Heads and Hearts: The Teaching and Learning Environment in Law School, 52 J. LEGAL EDUC. 75, 89 (2002) [hereinafter Hess, Heads and Hearts] (quoting a student as saying, "[i]t does a world of good for a lot of students to see a professor at a law school family picnic or at the barristers ball out there on the dance floor with us. . . . [S]eeing that other dimension of a professor, I think, goes toward breaking down barriers that the student may be putting up."); Patrick J. Schiltz, Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney, 82 MINN. L. REV. 705, 784 (1998) (observing that law professors can provide better ethics education by allowing students to see them acting ethically, such as by devoting time to students outside of class); Kent D. Syverud, Taking Students Seriously: A Guide for New Law Teachers, 43 J. LEGAL EDUC. 247, 254-56 (1993) (recommending ways for faculty to assist students with serious personal problems without solving problems for them as well as encouraging them to do well in class by simple contacts such as emails praising in-class work). The growing humanism movement also encourages less traditional student-teacher relationships and more community-oriented classroom environments that honor students as individual people and members of the group at the same time. See Justine A. Dunlap, "I'd Just as Soon Flunk You as Look at You?" The Evolution to Humanizing in a Large Classroom, 47 WASHBURN L.J. 389, 409-10 (2008) (noting that such practices are "simple acknowledgements that students are human").

205 E.g., Hess, Heads and Hearts, supra note 204, at 89. Unsurprisingly, many students do not care; their lives and concerns are different and rarely overlapping with professors', though that does not change that many students still enjoy it. See James B. Levy, As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher, 58 ME. L. REV. 49, 90-94 (2006). As Professor Levy notes, students do value the more informal professor-student relationship and off-campus contact, while others affirmatively do not. See id. at 91-95.

206 Apel, supra note 203, at 380.

207 AM. ASS’N. OF L. SCH., Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, in ASSOCIATION OF AMERICAN LAW SCHOOLS 2010 HANDBOOK 142 (2010), available at http://www.aals.org/about_handbook_sgp_eth.php. Duncan Kennedy implies that being "sort of friends" with a professor with more liberal attitudes to faculty-student relationships "can be fruitful and satisfying" in many instances. See Kennedy, Reproduction of Hierarchy, supra note 198, at 604. The country lawyer lives more comfortably in the grays where multiplex relationships have huge benefits and high fluidity and their absence has unseen and unappreciated deleterious consequences. I discuss this matter in greater depth infra Part IV.
influence disparity” between the student and professor. Nevertheless, even those inclined to be suspicious of power hierarchies argue that close mentoring relationships can actually be a very positive experience for students.

The “power and influence disparity” argument is not idle, but it proves too much. If the professor-student relationship becomes a “degrading” “master-servant relationship” because “the student is too vulnerable, too passive to be able to deal with the professor as a man,” then perhaps the law school culture should permit professor and student to interact on a more equal footing, even as to assessment. Problem: legal employers, particularly large law firms, rely on law schools to rank students to facilitate hiring and to inculcate a deference structure deemed appropriate to partners and associates, not “friends.”

Result: law professors and students may not be friends, because professional elites would not like it. Perhaps the AALS’s position reflects subconscious professional support for flatter deference structures consistent with a community culture, as opposed to a more stratified large firm structure. The propriety of a

209 See, e.g., Kennedy, Reproduction of Hierarchy, supra note 198, at 604 (noting that mentoring relationships can be “fruitful and satisfying or degrading or both at once,” particularly as a result of a student’s eventual need for the professor to validate his merits to the outside world in the form of letters of recommendation). See also Schlitz, supra note 204, at 784; Stephanie A. Vaughan, One Key to Success: Working with Professors . . . Outside the Classroom, 29 STETSON L. REV. 1255 (2000); John W. Teeter, Jr., Teaching Tips from the Lotus Sutra, 77 TUL. L. REV. 443, 449-52 (2002).
211 See Davis, supra note 57, at 855-56.
212 CARNEGIE REPORT, supra note 26, at 169.
213 See Kennedy, Reproduction of Hierarchy, supra note 198, at 604 (“The teacher/student relationship is the model for relations between junior associates and senior partners and also for the relationship between lawyers and judges.”).
214 Cf. id. at 606-08 (“legal education is as much a product of legal hierarchy as a cause of it.”); Mashburn, supra note 159, at 675 (“The social organization of the large firm mirrors its privileged status in the legal profession. The large firm uses the concept of professionalism—the ideals of professional conduct—to obscure firm hierarchy . . . .”).
215 Hess, Heads and Hearts, supra note 204, at 82 (quoting student as saying, “make it more of a community because we are here for three years”); id. at 86 (discussing value of “community-centered environments”).
216 Cf. Schlitz, supra note 204, at 722-39 (describing the dismal life of a novice attorney at a large law firm and how mentoring can help ensure happier and more ethical professional development).
particular flat-deference structure, of course, does depend on context and balance: "get too close to the students . . . and suddenly you have personal friends taking your courses and inevitably making bad grades; too distant and the law school becomes an icy and uninteresting world."

Therefore, condemning "high interacting" professors reinforces the power of the conservative, big-firm elites to define the terms of the professionalism debate with discomforting consequences. The "hidden curriculum" affects an attorney's relationship with clients, their interactions with judges, their willingness to challenge other authority figures, and their sense of autonomy. Failure to empathize with a client interferes with an attorney's zealous pursuit of justice on that person's behalf. A good lawyer must be willing to stand up for the rights of his or her client. "Sometimes the judge is the enemy," a mentor once told me. But lawyers unwilling to speak truth to power cannot make ethical or moral


218 See Mashburn, supra note 159, at 673-80 (collecting studies with results consistently showing that large firm norms are "elitist and conformist" where "[l]awyers dressed conservatively, behaved discreetly, lived in the right neighborhoods, and generally emulated a professional style that was in keeping with their cultural and socio-economic profile, that is, conservative, methodological, prudent, tactful, and disciplined"). I am intrigued by Dean Arterian's persistent use of heavy industry/assembly line motifs when describing the appropriate professor-student relationship, such as a professor's "power" over student "development" as opposed to the professor's "influence" on student "success." See Arterian, supra note 208, at 282.

219 See Shaffer, supra note 173, at 983.

220 Professor Atkinson divides professional aspirations into three types of lawyers, one of which is the "type" most clearly consistent with most law school professionalism education: the deferential "officer of the court," defined as a "quasi-bureaucrat" or "aspiring acolytes in the temple of justice" and not perhaps the most zealous advocates for their clients. Atkinson, supra note 145, at 308-10. I differentiate this model from that of the small-jurisdiction attorney who so self-labels but does not self-emasculate. See LANDON, supra note 20, at 139.

221 Kennedy, Reproduction of Hierarchy, supra note 198, at 605 ("the indirect pressure for conformity is intense" in law schools).

222 MACCRATE REPORT, supra note 126, at 178 (warning against so much dispassion in counseling a client that the attorney cannot "view issues and options from the client's perspective" or convince the client that the attorney is acting in the client's interests).

223 Charles E. Moore, acknowledged as one of, if not the best, personal injury attorneys in Kentucky cautioned me on this point when I too quickly deferred to a judge's procedural preference in my first jury trial. Evan Taylor faced disrespect from several judges when he was a very young litigator facing more senior members of the bar. Interview of Evan Taylor, supra note 192.
decisions independent of client demands. A strong sense of autonomy within professional and social communities is a powerful indicator of a happy lawyer.

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**VOICE:**

*Evan P. Schube*

In one word, the effect of utilizing an actual on-going case on our study group was dynamic. How dynamic? To put it mildly, there is no comparison between the depth of our discussions, debates, and legal analysis in Civil Procedure II and any other course-period. I believe the reason for this is directly tied to the notion that, the closer the educational experience gets to the actual practice of law, the more vested we become. Instead of just learning legal principles, you learn to become zealous representatives for your cause.

Our group started its zealous approach nearly from the beginning. In fact, it can likely be tied to our discussion of *World Wide Volkswagen*. One member of our group, in my view, took the incorrect legal position of arguing that jurisdiction is appropriate on the sole basis that the plaintiff deserved to have his day in court in Oklahoma. It was a natural position to take for a "plaintiff's attorney." There was another camp that took a more rational approach to the topic of jurisdiction and frequently argued from a natural "defendant's attorney" position. The ferocity of the discussions was limited, in large part, because the cases began and ended during one class period and wouldn't resurface again until the end of the semester.

With the dynamics of our group well established, or at least the natural inclination of members to side with either the plaintiff or defendant, the introduction of a semester-long study of an actual case was ideal. Of course, we naturally took sides and argued opposing legal positions. For example, some members of the group stretched the bounds of “same transaction or occurrence” to determine that any claim brought by Clark or Johnson was compulsory, and thus there was supplemental jurisdiction in federal court. Others in the group

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took the more legally prudent approach, defining that what constituted a compulsory counterclaim was limited by the definition of “same transaction or occurrence” as jurisprudence dictates (yes, this student author still strongly advocates his position against the others in the group despite the semester having come to a close some time ago).

The dynamics of the group were strengthened because the case lasted all semester as opposed to one class period. Because the case study lasted all semester, we were able to more fully develop our arguments. This in turn led to better discussions in and out of the classroom. The end result was a much more thorough understanding of the material, rather than the alternative of discussing the legal principles that would end after one class period.

The zealousness of our discussions can be seen from the undertones of this article. This author still advocates for his position, and there is little doubt the others in the group would do the same. The discussions we had were dynamic, and we understood just how valuable those discussions were when exam time came, and even beyond. Each of us performed well on the exam. But we didn’t just memorize the material. We learned the material.

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Elitism as a professional ideal or law school curriculum is a choice and not clearly a good one.226 Ethics is one discipline in which few schools have adopted a liberal, interdisciplinary curriculum. Law schools, therefore, yet again lead students uncritically to a profoundly conformist and deferential notion of their professional role.227

Such a uniform law school culture robs students of fulfilling alternatives marked by comparative equality and mutual respect; 228 a client base derived

226 See Penegar, supra note 224, at 483 (quoting ROBERT L. NELSON, PARTNERS WITH POWER (1987) (arguing that large firm attorneys’ client bases deprive them of the autonomy to make ethical decisions while smaller firm attorneys may retain the autonomy necessary to do so)).

227 It is not clear, however, that observers agree what law schools actually teach. See Atkinson, supra note 145, at 337-38 (arguing that law schools are more apt to encourage students to adopt an “officer of the court” professional role); Michael Hatfield, Professionalizing Moral Deference, 104 NW. U. L. REV. COLLOQUIY 1, 6 (2009) (arguing that “[f]rom the beginning of law school, a lawyer is idealized as a zealous advocate for her client’s objective.”). Neither view, however, suggests law schools teach a thick theory of ethics or urge that students reflect on nuances.

228 See Making Docile Lawyers, supra note, 65, at 2033 (“The seeds are planted early so that later, when students start down the corporate track, the journey, although a path not actively chosen, seems natural and even inevitable.”); Landon, supra note 20, at 38-39.
from those who were friends before the representation and will continue to be friends later; and complex, horizontal and vertical, professional, personal, and social networks that can give life meaning. Rural and small-city lawyers came to law school with a set of professional ambitions and values rooted in the lawyer-statesman ideal, long since abandoned in the cities. Their formative experience occurred within communities of memory that had already shaped their worldviews. Many planned to, and later did, make deliberate choices to return to those communities after law school or a few years of professional “finishing” elsewhere. In so doing, they rejected readily available professional objectives consistent with ideologies embedded in their law school experiences. “Going home” meant ensconcing themselves in a fulfilling professional life of familiar cultural norms, values, and purpose engrained in them from before they even knew how to think—like a lawyer, or by any other method.

Philosophies of lawyering rooted in rural communities might have led in a more productive direction, both for the profession and for society. Country lawyers and many city solos believe their job description starts with “helping people.” What helps people may not always mean being

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229 See Landon, supra note 20, at 127-28.
230 These networks are analogous to my “community in a classroom” concept, see supra text between notes 34-36; infra text and notes at 379-84, 388-96, 408-09, or what I perceive to be similar in theory, a “community of learners.” See generally Lustbader, supra note 43.
231 Compare Landon, supra note 20, at 90-91 (explaining that rural lawyers give considerable personal counseling separate from more well-recognized legal work), with Jones, supra note 73, at 1122-23 (explaining that the ideal of the Lawyer-Statesman was not only an excellent technician and persuasive advocate but also a local leader of “great practical wisdom”).
232 Landon, supra note 20, at 19-20, 22-23, 49. A sense of membership in a community saves the small-jurisdiction attorney from the anonymity of a city solo’s professional experience. Id. at 57.
233 Id. at 22 (noting that in a study of the rural Missouri bar, eighty-seven percent of the attorneys had grown up in a rural setting).
235 Id. at 28-30, 56-57.
236 See Shaffer, supra note 173, at 979-83 (discussing the approval of “older lawyers . . . in ordinary, county-seat, Wednesday-afternoon law practice” for the ethical merit of representing groups, such as families, in estate planning).
237 Landon, supra note 20, at 39 (quoting a rural attorney as saying, “[]Lawyers are for the people. I’ve helped a lot of people over the years. I can’t think of anything else I’d rather do.”). “Good lawyers’ in rural areas are defined by their reputation for helping people. That kind of work is seen as important, satisfying, and status enhancing,” Landon writes. Id. at
completely civil to other attorneys or wholly respectful of the court, but the
imperatives of small-community practice keep these incidents under
control. What helps people may imply compliance with local standards
of practice, including those in tension with state and ABA ethics codes, in
order to nurture a professional community that cooperates and
accommodates for the good of all. What helps people may sometimes
require acting in apparent contradiction of the client’s instructions so that
when the client perceives her best interests, the opportunity to pursue them
is not lost. What helps people may demand respect for their “second
language” by preserving the fiber of their treasured communities—family,
neighborhood, and church—but to do so, the attorney must understand the
value of those communities in the first place.

Ergo: my “community in a classroom.”

V. “GOD’S COUNTRY BY ANY STRETCH OF THE
IMAGINATION”: THE CULTURE OF THE SMALL-JURISDICTION ATTORNEY AND ITS
POTENTIAL FOR LEGAL EDUCATION

There is a romance to practicing law. Socratic method and traditional
legal education obscure that romance, because they drain the law of the
people who create it. “Skills,” “values,” “professionalism,” “bar

60. Later he explains “[t]he rural lawyer is fundamentally a helper.” Id. at 70. See also
SERO, supra note 134, at 129-35.
238 See Anita Bernstein, Pitfalls Ahead: A Manifesto for the Training of Lawyers, 94
CORNELL L. REV. 479, 494-95 (2009) (noting role of “judge as antagonist”); LANDON, supra
note 20, at 137, 140 (describing the “porcupines” of the small town bar who may be
“aggressive, combative, and indifferent to local conventions of the ‘established’ bar,” but
may also accept “risky” cases that challenge community standards and open doors to
productive change); cf STUCKEY, supra note 49, at 85 (urging that law schools should “train
students to regard themselves as agents of Justice as well as officers of the court”).
239 See LANDON, supra note 20, at 139-44. I include even the non-legal community in my
conception of “all.”
240 Id. at 134-36.
241 See BELLAH ET AL., supra note 25, at 20-21, 154; Shaffer, supra note 173, at 980-81.
See also LANDON, supra note 20, at 139 (quoting one rural attorney saying “we’ve got a
church split here now that has all the makings of a community-wide confrontation. The
attorney on the other side and I are trying very hard to cool things down and keep the matter
contained. It could blow up the whole community if it got out of control.”); id. at 144-46.
242 Interview of Evan Taylor, supra note 192 (describing Morganfield, Kentucky, a rural
jurisdiction near Daviess County and Ohio County Kentucky).
243 See, e.g., Josef Redlich, The Common Law and the Case Method in American University
Law Schools, at 18-28, (1914), reprinted in JAMES R. MAXEINER, EDUCATING LAWYERS NOW
and "humanism" do not capture the "happy warrior’s" enthusiasm. The average law professor who spent fewer than five years writing briefs as a large urban law firm associate and probably had little or no actual client contact may not be its great communicator, anyway.

The romance of law practice is a way of life for many small-jurisdiction attorneys. They practice law within concentric "communities of memory" that ground them in a collective cultural and professional past that is prologue to a future of continued personal connection and commitment. Unlike the elite ideal of the sterile "professional” member of a not-so-ideal “professional” community, members of a true community of memory revere more vivid ideals, such as those of the “happy warrior” who relishes the fray. These ideals and accompanying traditions provide a basis for identifying the “honorable man” who will rise to the pedestal of the collective professional history.


244 See generally MCCRATE REPORT, supra note 126.
245 Id.
246 See generally Longan, supra note 224.
248 See Dunlap, supra note 204.
251 See BELLAH ET AL., supra note 25, at 153. I refer to these communities as “concentric,” because these professional legal communities tend to be subsets of a wider, albeit still small, geographic communities”. See generally William Goode, Community Within a Community: The Professions, 22 AM. SOCIOLOGICAL REV. 194 (1957).
252 BELLAH ET AL., supra note 25, at 153-54.
253 See Atkinson, supra note 145.
254 LANDON, supra note 20, at 150-51.
255 Evan Taylor reflects on a senior attorney’s eccentricities of the type that so often become legend:

The story on Tom Carroll is that what he would do to get ready for trial is that he would go upstairs, put the file on the table, have his secretary hold all his calls,
Attorneys in this milieu also define “expertise” differently. Knowledge of sophisticated and often technical legal principles is the measure of professional prestige in large-city firms. Among sole practitioners, “expertise” boils down first to their interpersonal relationships with clients, judges and juries, other attorneys, and members of the wider community. Attorneys in a personal-plight practice must be wise in the face of human nature; they rely on understanding how real people think, feel, and respond to other people and events. People are the source of their livelihood, and people’s interactions are the source of the law.

“Community” is a multi-dimensional network of supplementary and complementary relationships that blur professional and social lines.

open up the windows and smoke. He would just sit there and smoke. He wouldn’t make any notes but sit there and think about what he was going to do at the trial.

Interview of Evan Taylor, supra note 192. Legend also has it that the former partner of Marvin Nunley, Clarence McCarroll, once defeated Melvin Belli with a similar technique. It does not matter if the story is true; it matters that the story is told.

See HEINZ ET AL., supra note 20, at 83-86, 89-94.

See, e.g., SERON, supra note 134, at 48-58, 107-09, 110-116; cf. LANDON, supra note 20, at 58-59, 63-64 (observing that for large city attorneys who rely on “brokers” for business, a dissatisfied client is not as damaging as it is in a rural practice where the client is more likely to have a personal connection to the attorney). Urban solos and small-firm attorneys who practice in neighborhoods also need excellent interpersonal skills for good client relations. See id. at 57-59, 86-93. But see id. at 124 (noting that entrepreneurial attorneys [generally solo and small-firm] in New York City try to eliminate as much of the personal in return for greater “speed, cost, and product”). But see id. at 63-64 (quoting one attorney as saying “[c]ountry practice is ‘people practice’.”).

See supra text and notes at 87-94, 102-03 and accompanying text.

See LANDON, supra note 20, at 86 (describing how “the lawyer’s citizenship role becomes the penumbra of the professional role”). Lawyers’ intense skepticism of “multidisciplinary practice” is intriguing to me in this context, because it is quite common in fact. See Herbert M. Kritzer, The Professions Are Dead, Long Live the Professions: Legal Practice in a Post Professional World, 33 LAW & SOC’Y REV. 713, 736-38 (1999). The social worker who testifies in most of a divorce attorney’s custody cases, the loan officers and title searchers who assist with property transactions, the investment counselors who give
These networks are more than "social capital." They are the multiplex relationships that characterize the lives of the residents of rural areas and smaller towns, which involve a variety of functions and may entail considerable emotional investment. They are the underlying context of the law.

These networks glue the wider community together. Some networks are horizontal in that they connect persons of equivalent rank in the relevant community. Others are vertical; they connect networks of persons at higher or lower rank in the relevant community. An attorney's horizontal networks may form a web that connects the attorney with her close pal, along with the social worker both have hired as an expert. It then adds the social worker's teacher friend, the teacher's real estate agent sister, and the sister's husband who does appraisals and is a member of the Lions Club with the attorney. Then, the web captures yet another Lions Club member, the one who succeeded the attorney on the local library's board of advisors and also catches her friend from church who donates to a particular city commissioner's campaigns. Then, to bring the group full circle, it envelops the former client the city commissioner referred to the attorney years ago.

investment advice and assist with other financial aspects of clients' problems are all linked service providers. Id. at 738.

The reality is that sometimes knowing the slightly shady character who drinks Wild Turkey at a bar where they do not serve Newcastle Brown Ale even in a bottle, cf. Jennifer E. Spreng, We would be happier with fewer rights that are worth more, MESSENGER-INQUIRER, June 16, 2001, at 5 (mourning the loss of Newcastle Brown Ale from the Colby's Fine Food and Spirits' beer menu), is more important than knowing the mayor or the president of the largest employer in town:

A lawyer's most critical decisions are often how to use the very limited time available for preparation of a defense. Defense preparation may include trips to the jail for client interviews, reading whatever discovery the defense can get, examining real evidence such as audio and videotapes, finding and interviewing witnesses, researching legal questions likely to be at issue, drafting motions and oppositions, drafting jury instructions, preparing real evidence for use at trial, cajoling or compelling witnesses to appear at trial, negotiating toward a plea, and preparing outlines for direct and cross examinations.

United States v. Perez, 116 F.3d 840, 851 (9th Cir. 1997) (Kleinfeld, J., concurring) (emphasis added). The most well connected lawyer may be the one who can say, "I've got friends in low places." GARTH BROOKS, Friends in Low Places, on NO FENCES (Capitol Nashville 1990).

A multiplex relationship is a "multi-interest" relationship—where the dentist who fixes your child's teeth also serves with you on the parish council and bowls in the same league as your husband on Tuesday evenings. Id. at 12, 123. In a simplex relationship, the dentist is the dentist and that is all. Id.

See id. at 90-91.
Any number of these horizontally related community members may crowd around a table in the local watering hole on a Friday afternoon. The attorney who is the fulcrum for these horizontal networks may balance them with her vertical network. This vertically related community may consist of: the attorney’s former boss; the former boss’s senior partner who refers cases to the attorney; that partner’s own mentor; the respected judge who takes an interest in every local attorney’s professional development; and the legendary local trial attorney who is a feature in all of the best war stories.

Local legends and those-to-be are equally unconstrained by substantive legal “rules.” They fuse their sophisticated interpersonal community networks to the rhythms of the law and create a “dual track” conceptual and contextual model for problem-solving. This substantive legal expertise is not the technical knowledge of a “prestigious” pure law practice, but rather an intuitive, situation sense of “what the law must be”

265 See id. at 86-88 (discussing the wide range of community organizations and projects lawyers join and lead); id. at 123; Levin, supra note 167, at 363 (quoting attorney describing mentoring relationships with experienced practitioners that he formed at the end of the day in a local bar).

266 See Levin, supra note 167, at 328-32; see also Parikh, supra note 180 (describing referral networks, some of which are reciprocal).

267 See Rubin, supra note 83, at 632 (quoting CHRISTOPHER LANGDELL, CASES ON CONTRACTS viii-ix (2d ed. 1874) as saying “[t]he number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.”);

268 See generally DiMatteo, supra note 267 (juxtaposing the thought of conceptualists such as Christopher Columbus Langdell with contextualists such as Karl Llewellyn).

269 Professor DiMatteo describes this as application of “meta-principles” of law—the result is the character of law that I refer to when I tell students “there are no rules!” See id. at 482. He lists good faith, fair dealing, unconscionability, and commercial reasonableness as such meta-principles in contracts. Id. at 482 n.414. Examples I have identified that the law protects include the following: the “reliance interest”; the imperative for judicial efficiency; the need for “predictability”, notions of “reasonableness” and “fairness.” In my consulting work, experienced attorneys have handed me assignments and said, “X must be the answer; please find the authorities and write up the memorandum of support that proves it.” Their certainty perhaps arises from their sense of “patterns” and “deep structures” in the law that they have sensed over time and the application of inductive and analogical reasoning. See Blasi, supra note 85, at 343-44, 355-57. Cf. Judith Welch Wegner, Reframing Legal Education’s “Wicked Problems,” 61 RUTGERS L. REV. 867, 918-19 (2009) (observing that
that the always-a-generalist lawyer for the people gleans over time.\textsuperscript{270} Such a lawyer requires a smaller investment in legal research compared to discovery and fact investigation at the beginning of the case,\textsuperscript{271} and as the students in my Fall 2009 Civil Procedure II class would eventually realize, such a lawyer simply “knows” what questions to ask in a deposition.\textsuperscript{272}

Whether law schools are truly competent to teach either the “skills” or the “values” so in vogue is not clear, but they are competent to create community and to expose the first drumbeats in the rhythms of the law.\textsuperscript{273} Instead of insisting students find “the rule” in a case or follow an often unprofessional set of professionalism “rules,” law schools should insist that “there are no rules” of doctrine that should constrain the intellectual imagination or “rules” of professionalism worth undermining communities of memory. This is a liberal education at its finest and essential to demonstrating the best of what law practice can be.\textsuperscript{274}

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VOICE

\textit{James P. Plitz}

I entered law school in Fall 2008, and Civil Procedure sounded like it would be something that I would really enjoy. I like order and structure, and “procedure” that is civil sounded like it would fall into my wheel house. Then I read the first case, \textit{Pennoyer v. Neff}, and I was immediately lost. I had no idea why I was reading the case and what I was supposed to get out of it. But I read and took notes and thought I was prepared for class.

As class started and Prof asked the first question, I knew I was anything but prepared. Sitting through the conversations that ensued

\textsuperscript{270} \textit{See} Blasi, \textit{supra} note 85, at 343-47.
\textsuperscript{271} \textit{See} United States v. Perez, 116 F.3d 840, 849 (9th Cir. 1997) (Kleinfeld, J., concurring).
\textsuperscript{272} Novel legal issues can leave an immense footprint on the process of case preparation; this is the benefit of specialization to some degree. \textit{Cf.} C.L. Mike Schmidt, \textit{Managing Products Liability Cases in the Small Firm: Surviving in a Small Boat on a Stormy Sea}, in ASSOC. OF TRIAL LAW. OF AM., 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 2729 (2002); \textit{see} Seron, \textit{supra} note 134, at 122-24.
\textsuperscript{273} \textit{Cf.} Long, \textit{supra} note 99, at 15-18 (2009) (arguing that law schools lack the competence to provide the experience of practice in skills education, because providing simulated practice experiences in the classroom take a disproportionate amount of the time available).
\textsuperscript{274} \textit{E.g.,} id. at 4-5, 37-39, 51-64; Menkel-Meadow, \textit{Law and ____}, \textit{supra} note 60, at 48.
during that class period made me question if I made the right choice in coming to law school, because it seemed as though everybody "got it," and I did not! The readings went on and the classes passed by, and I still did not feel I "knew" anything. Personal jurisdiction was not anything like the "civil procedure" that I had imagined. There seemed to be no "rules," no consistency, no process to determine why a court can have power over a person or not. I should have used our teaching assistants!

Prof's individual teaching style slowed my understanding, but at the same time helped me develop a deeper understanding. In my mind, the Supreme Court was making inconsistent rulings, and the high-level class discussions did not help me grasp what I needed to get my mind around "why" the Court made a certain ruling. But then it happened: we read World-Wide Volkswagen and I got it. I understood what personal jurisdiction meant, and with that understanding, I was able to look back and reflect on everything Prof had taught. Through that reflection, I was able to gain even more clarity—I saw that there was a process; you just have to argue it. Prof had provided us with more ammunition to make arguments than I would have thought, at least until my "ah ha!" moment.

From that point forward . . . I started to understand "what" I was supposed to be doing. Prof gave you everything you needed to write a good argument for both sides; the challenge was whether the student realized and took advantage of it. As we left personal jurisdiction and entered into the statutes (subject matter jurisdiction, venue, removal) and the federal rules themselves (service, pleadings, discovery), I became more comfortable; I was into the "ordered" world of elements and steps. But it was, and still is, the time spent on learning to see both sides in personal jurisdiction that has really stuck with me and enabled me to achieve what I have during my law school tenure. Prof opened my mind to understand that your client may be the plaintiff one day (make those arguments) and the defendant on another (switch hats, and make those arguments). It is that skill that will help me be a better lawyer.

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Civil Procedure is a perfect place to begin shedding our fascination with "rules." The concept of "Federal Rules of Civil Procedure" leaves the impression that rules must exist, a cruel hoax the Advisory Committee on
Rules for Civil Procedure perpetrates every year on unsuspecting 1L’s, such as my long-time teaching assistant, Jim Plitz. It gets worse: “litigation” is almost consonant with “antagonism,” which certainly sounds inconsistent with community. Undermine those assumptions—my explicit goal for my year-long, six-credit Civil Procedure I & II sequence—and the student is on the road to becoming a more sophisticated and adventurous problem solver, and therefore, a much better lawyer.

I am not convinced such a community world is solely contextual. This world is philosophical and its fruits potentially available to the self-aware. This is the professional world I want my students to see and in doing so I want to provide them with the opportunity to experience it; to choose it, either geographically or philosophically; and to derive the many benefits from it, in terms of professional satisfaction and the public good that it can provide. It is the world I successfully presented in my Spring and Fall 2009 Civil Procedure sequence. It is the world that formed my own professional experience.

It is “God’s country by any stretch of the imagination.”

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VOICE

Daniel J. Mazza

To say I was overwhelmed before my first Civil Procedure class would be a dramatic understatement. After reading Pennoyer, I was convinced the cases for this class would be cold, confusing, and boring. I was wrong.

In Professor Jennifer Spreng’s class, once we moved past Pennoyer and into more modern cases which set the standard of federal civil procedure—International Shoe, Asahi, World Wide Volkswagen, Burger

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275 Discoverability depends on “relevance?” FED. R. CIV. P. 26(b)(1). Joinder on whether claims “arise from the [same] transaction or occurrence . . . ?” FED. R. CIV. P. 13(a)(1)(A). These are not rules. Even something as comparatively concrete sounding such as “dwelling place or usual place of abode” or “suitable age and discretion who resides there” are not rules; they are topics for debate. See FED. R. CIV. P. 4(e)(2)(B). I once used the problem of how to serve an invisible demon possessing an unknowing human on a final examination. Where does that creature “reside” (especially if the demon happens to be out of town for a few days)? The Federal Rules of Civil Procedure can be the litigator’s favorite retirement program.

276 See Landon, supra note 20, at 119-46.

277 But see id. at 147-50.

278 Id. at 49.

279 Interview of Evan Taylor, supra note 192.
King—something remarkable happened. Our class came to life. We had lively and passionate discussions each class. And the discussions didn’t end following the conclusion of the casebook material. We delved deeply into the lives of our subjects, and asked hypotheticals. We debated and discussed. Time flew by, and class would end, and we found ourselves wanting to stay longer. One classroom discussion kept everyone thirty minutes beyond the end of the class period, and not one person said a word about the clock. The conversation would end when we, the students and our professor were good and ready to end it.

Owensboro, Kentucky is a town people come back to. “It’s a kind of a 21st century version of Leave It to Beaver—church and family and Little League and soccer,” Owensboro Messenger-Inquirer business reporter Keith Lawrence told Business Week when the latter named Owensboro the “Best Place to Raise Your Kids” in Kentucky.

Owensboro is located on the Ohio River approximately thirty-two miles west of Evansville, Indiana and, with its 55,000 residents, is the third-largest city in Kentucky. It is the seat of Daviess County (population 95,000) and the leading metropolitan center in the western third of the state. In 2010, MONEY Magazine ranked Owensboro 93 on a list of the Top 100 Places to Live, the only locale in Kentucky so recognized. It is the home of the attorneys who would litigate Clark v. Jones, the case that transformed my Fall 2009 Civil Procedure II class.

281 GREATER OWENSBORO ECON. DEV. CORP., ECONOMIC OVERVIEW OF GREATER OWENSBORO METROPOLITAN AREA 2 (2010) [hereinafter ECONOMIC OVERVIEW].
284 In 2000, 91,545 people lived in the Owensboro United States Metropolitan Area, defined as Daviess County, Kentucky. U.S. Census Bureau, Daviess County Quick Facts (2009), http://quickfacts.census.gov/qfd/states/21/21059.html (last visited Dec. 31, 2010).
Incorporated in 1817, Owensboro is a quintessential community of memory. It was the town of my adolescence, where in 1980, a twelve-year-old might revel in the town’s spirit and anticipation that bloomed along with the Dogwood Azalea Trail’s trees that adorn the stately Griffith Avenue neighborhood. Such a twelve-year-old on a bicycle might have crossed Griffith Avenue en route south from 105 West Eighth Street in search of adventure, whether at the gleaming and well-stocked public library or even further afield at WaxWorks, one of what were still called

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287 About Owensboro, supra note 283.
288 See BELLAH ET AL., supra note 25, at 153-54.
289 I am not a native Kentuckian. I was born just outside Pittsburgh, Pennsylvania but spent my grade school years in Southside Virginia where my father taught economics at the all-male, still-elite liberal arts school, Hampden-Sydney College. See Hampden-Sydney College, http://www.hsc.edu/ (last visited Dec. 31, 2010). The Hampden-Sydney enclave was idyllic, but the surrounding Prince Edward County community, which produced one of the Brown v. Board of Education cases, see Brown v. Board of Educ., 347 U.S. 483 (1954), was in the mid-1970s still polluted by white residents’ decision to close public schools for five years to avoid school integration ordered in Brown v. Board of Educ., 349 U.S. 294 (1955). See generally Spreng, Desegregation Drama, supra note 41. After a year living in London, England, my family moved to Owensboro, Kentucky.
291 In the late 1970s, the Daviess County Public Library building on Griffith Avenue in Owensboro was only a decade old. Facts: Daviess County Public Library, http://www.dcplibrary.org/about/facts (last visited Dec. 26, 2010). In 1995, the Daviess County Fiscal Court, the county’s legislative body, see supra note 1, had established a library taxing district to provide stable annual funding from the county’s property tax revenues in amounts determined primarily by the library’s District Board. DAVIESS COUNTY PUBLIC LIBRARY AT A GLANCE (1999) (unpublished manuscript on file with author) [hereinafter LIBRARY AT A GLANCE]. At that time, the library’s number of volumes per capita were approximately at the twenty-fifth percentile of libraries in jurisdictions with populations smaller than 100,000 in fiscal year 1996-97. DCPL & WEIGHING FACTORS, FY 96/97 (1999) (unpublished manuscript on file with author) (attaching Thomas J. Hennen, Jr. Go Ahead, Name Them: America’s Best Public Libraries, AM. LIBRARIES, Jan. 1999, at 72, 73) [hereinafter DCPL & WEIGHING FACTORS]. Collection development had slipped to the back burner of library priorities by the mid-1990s, when inadequate funding required that the library spend down its reserve fund to meet operating expenses. LIBRARY AT A GLANCE, supra, at 1. While books cost the same in all jurisdictions, however, Daviess Countians’ financial resources tend to be lower. See, e.g., ECONOMIC OVERVIEW, supra note 281, at 2 (presenting figures that Daviess Countians have a lower-than-median EBI compared to that of all Americans); infra text and notes, at 328-32 (describing economic stagnation with likely depressive per capita income effects). I deduce that thirty years prior, the libraries volumes per capita would have ranked higher among libraries from equivalently sized jurisdictions. My observation at that time was that the collection had become quite dated, which confirms my view.
“record stores” and located a block from fifteen years proud Wesleyan Park Plaza shopping center. Or maybe that twelve-year-old rode north toward the Ohio River and downtown, blind to ravages of suburban shopping center development that had robbed Main Street of tenants, because her eyes were so firmly glued to the prospect of *The Sporting News* on the cigar store shelf.

Owensboro of the 1980s was at the pinnacle of several decades of economic, social and cultural growth and recognized as the regional leader by almost every measure. According to Kentucky Wesleyan College historians Lee and Aloma Dew, “Owensboro in the 1950s was still in many respects a rawboned country town—by the 1980s, it had become a city in the fullest sense of the word.” During “the G.E. Years” as the center of radio tube production, the town emerged as a small manufacturing center. Over the next few decades, Owensboro boasted headquarters and major facilities for companies such as Texas Gas Transmission, Green River Steel, Pinkerton Tobacco, Glenmore Distilleries, Field Packing, and Ragú Foods along with smaller, thriving local businesses. In the 1980s, the Owensboro Riverport Authority became a customs port of entry.

The service sector was also on the march. Owensboro-Daviess County Hospital became the community’s largest employer and the region’s leading healthcare provider. Local developers opened more shopping centers and an indoor mall in 1978, creating a retailing and social magnet. “Eating out” became a community obsession. The “Executive Inn,” a new 366-

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294 Id. at 205.

295 Id. at 184-85. Our home during the 1980s was only a few blocks from the primary G.E. plant.

296 See id. at 185-89. Martin Marietta, National Southwire, and a Westcor paper mill eventually located in adjacent counties. Id.

297 Id. at 193.


299 DEW & DEW, supra note 293, at 192.

300 Id. Not surprisingly, the team from the Owensboro Texas Roadhouse won the corporation’s 2008 national line dancing competition. See Texas Roadhouse, Owensboro, Ky Store, http://www.texasroadhouse.com/store-sites/restaurant-detail/ky-owensboro/ (Select ‘KY-Kentucky’ from drop-down menu, then ‘KY–Owensboro’ from the second drop-down menu) (last visited Dec. 31, 2010).
room hotel, featured performances by Loretta Lynn, Dolly Parton, the Oak Ridge Boys, and Wayne Newton in its “Showroom Lounge.”

Owensboro seemed to have the best of everything, starting with education. The Diocese of Owensboro spread across most of Western Kentucky, and its thriving Catholic school system included two high schools in Daviess County alone. The growing Daviess County schools, with their middle- and upper-middle-class student populations, bragged of test scores and other indicators that they were state jewels. The twelve-year-old bicycle rider would four years later transfer to the older and poorer Owensboro Independent schools and benefit from its culture where everyone really did know your name, state champion basketball teams formed “spirit lines” for state champion academic teams, and administrators and faculty determinedly forged bonds of community between socially and economically diverse students.

Owensboro was and remains a small-town sports fan’s mecca. It is the home of “the UCLA of Small College Basketball,” Kentucky Wesleyan College, and the town’s 5,000-seat Sportscenter regularly overflowed with cheering fans watching their heroes play year after year to national and regional titles. Owensboro High School enjoyed its stature as a routine statewide favorite in basketball, football, baseball and track. No one missed Friday night ballgames, when local residents of diverse socio-economic and ethnic backgrounds mixed on comparatively equal terms. Many local athletes pursued successful college and professional sports careers.

The town made itself into a home with community-wide tugs on the old bootstraps, not state or national largesse. During the 1950s, Ursuline Sisters at Brescia College provided piano and stringed-instrument lessons to many

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301 Dew & Dew, supra note 293, at 193.
302 The Diocese covers thirty-two counties and has one of the highest Mass attendance rates in the country. See Diocese of Owensboro, http://rcdok.org/ (last visited Dec. 26, 2010).
304 See About Owensboro, supra note 283; see also Dew & Dew, supra note 293, at 205-08.
305 See Dew & Dew, supra note 293, 206 (basketball); Red Devil Tradition, http://www.owensboro.k12.ky.us/ohs/football/ (follow the link to “Red Devil Tradition” and then relevant years) (providing data on 1983 and 1986 state championship football teams).
306 A stream of NASCAR champions, led by Darrell and Mike Waltrip; former NBA star Rex Chapman; MLB pitcher Brad Wilkerson, and NFL kicker Kenny Willis are among a few. Johnny Depp and Florence Henderson are also former Owensboroans.
local children and adults.  

They also nurtured what became the well-
respected Owensboro Symphony Orchestra, with its companion youth
orchestras and a summer music camp at their mother house in the county.  

When the Daviess County Public Library moved to its modern facility on
Griffith Avenue, the Owensboro Art Museum nestled into the library’s
former home with a permanent collection partly lifted from the walls of a
local philanthropist’s home and with touring exhibits financed by whiskey
profits.  

In the 1970s, the Theater Workshop of Owensboro received a
permanent home from the Owensboro Arts Commission.  

A professional
geologist and natural history buff’s private collection became a cherished
destination for schoolchildren and eventually expanded into a civic
institution.  

Prudent city officials revitalized parks and made other capital
improvements with revenue-sharing funds instead of subsidizing current
expenditures.  

It takes swagger for a town to declare itself the “Barbeque Capital of the
World,” based on its unique signature mutton barbeque and burgoo and
its International Bar-B-Q Festival every year, but Owensboro had
swagger.  

Country singer Goldie Payne opened “Goldie’s Opryhouse” in a
former movie theater.  

Owensboro became a comfortable jumping off point for exploring Bluegrass music country in the Green River Valley to the
south.  

In 1997, I became one of those people who “comes back” to Owensboro
and encountered the town’s complicated maturity.  

Complaints about the

\[ \text{Dew} & \text{Dew, supra note 293, at 211, 213.} \]  
\[ \text{Id. at 214-15.} \]  
\[ \text{Id. at 214-16.} \]  
\[ \text{Id. at 211.} \]  
\[ \text{Id. at 209-11 (discussing Owensboro Area Museum). The institution is now the} \]  
\[ \text{Owensboro Museum of Science and History and is located downtown. See generally} \]  
\[ \text{Owensboro Museum of Science & History, http://www.owensboromuseum.com/ (last visited} \]  
\[ \text{Dec. 31, 2010).} \]  
\[ \text{Id. at 193.} \]  
\[ \text{About Owensboro, supra note 283. See, e.g., Moonlite Bar-B-Q Inn, http://www.} \]  
\[ \text{moonlite.com/ (describing mutton barbeque products from largest barbeque restaurant in} \]  
\[ \text{Owensboro).} \]  
\[ \text{Dew \& Dew, supra note 293, at 216-18.} \]  
\[ \text{International Bar-B-Q Festival: Owensboro, Kentucky, www.bbqfest.com (last visited} \]  
\[ \text{Dec. 31, 2010).} \]  
\[ \text{Cinema Treasures: Goldie’s Best Little Opry House in Kentucky, http://} \]  
\[ \text{cinematreasures.org/theater/17727/ (last visited Dec. 31, 2010).} \]  
\[ \text{Dew \& Dew, supra note 293, at 218-19.} \]  
\[ \text{The information in this paragraph comes from my personal experience as a community} \]  
\text{leader.} \]
lack of sufficient transportation connections to interstate highways and economic centers that impeded external investment had become less shrill.\textsuperscript{319} Community leaders saw (had they facilitated?) a silver lining: substandard transportation infrastructure kept outsiders away and protected our “community culture.” Once Owensboro had looked enviously at the advantages Western Kentucky University brought to backwater Bowling Green, but by the turn of the century, Owensboro leaders observed that Bowling Green had few successful independent civic or cultural institutions. Elizabethtown, Owensboro’s other regional rival, prospered economically from an adjoining military base but had never asserted its separate identity or security.

During the next eight years, Owensboro’s citizens focused as much on preserving community as using it. True, the town realized many leaders’ long-time dream—a concert and event hall providing the Symphony and its burgeoning music programs with a permanent home—when the Riverpark Center opened,\textsuperscript{320} complete with the International Bluegrass Hall of Fame. The Riverpark Center also provided a gorgeous view during Fridays After Five\textsuperscript{321} of the lights that adorned the bridge to nowhere in Indiana previously so often criticized for its inadequacy.\textsuperscript{322} Downtown, the battered victim of decades of shopping center development on the fringes of town, began an arduous renewal as a professional and recreation center.\textsuperscript{323}

Community did not banish controversies, though it helped resolve them. Owensboro Medical Health Systems embarked on stunning modernization and growth amid controversy over its perceived failure to keep promises of transparency and community consultation.\textsuperscript{324} Another modern public

\textsuperscript{319} See DEW & DEW, supra note 293, at 199-201 (discussing lack of highway connector to I-64).
\textsuperscript{320} History: RiverPark Center, http://www.riverparkcenter.org/aboutrpc/history.asp (last visited Dec. 26, 2010).
\textsuperscript{322} DEW & DEW, supra note 293, at 201-02, 204.
\textsuperscript{323} The most recent iteration of this effort is the Downtown Owensboro Development Authority. The RiverPark Center and riverfront revitalization projects of the 1990s were the most productive beginning of this work. After the Executive Inn closed in 2009, however, it left room for a new and hopefully comparable convention facility. See generally Owensboro Downtown Revitalization, http://www.downtownowensboro.com/ (last visited Sept. 26, 2010).
\textsuperscript{324} According to Owensboro’s public interest think tank and advocacy group, the Public Life Foundation:

OMHS may be a private, nonprofit corporation that is not obligated to hold public forums prior to making decisions, but it is also our community hospital and local governments (taxpayers) have a reversionary interest. It takes a little extra time to
library soon graced the town’s main drag but only after delicate discussions with nearby residents about the impact of library expansion on the neighborhood’s trees and the institution’s hallmark front lawn. After decades, the county did see the completion of another bridge providing a better link to I-64 and Louisville. Several community organizations sponsored events for deliberative discourse on tough issues such as race relations.

engage in dialogue with the public, but it would increase confidence that the board and senior management is taking us in the right direction.

Citizens have legitimate questions on hospital direction, PUB. LIFE ADVOC., iss. 3, 2005, http://plfo.org/advocate/volume_4_issue_3/ (last visited Jan. 6, 2010). See also Jennifer E. Spreng, Improving the Model for OMHS Governance: A Position Paper (Public Life Found. white paper, Sept. 19, 2003); Jennifer E. Spreng, Ensuring Accountability: A Position Paper on Hospital Governance in Daviess County (Public Life Found. white paper, Sept. 12, 2003). Tension had already developed by 1999. See, e.g., Mark Cooper, City delays vote on closing Hathaway, MESSENGER-INQUIRER, July 23, 1999, at 1C (announcing delay of Owensboro City Commission vote to close street adjacent to Owensboro Mercy Health Systems to facilitate expansion of its main facility so a commissioner could “investigate the source of rumors of impropriety” about him); Mark Cooper, Vote on Hathaway may be Thursday, MESSENGER-INQUIRER, July 21, 1999, at 1C (stating that one former city commissioner recommended that the Owensboro City Commission “settle the issue of who owns the hospital before voting on closing [Hathaway Street], a residential area, to benefit Owensboro Mercy Health Systems).

The author served on the library District Board at this time and recalls both the concerns and references to discussions with other members. See generally Our Public Library - Is it time for a larger, new facility?, PUB. LIFE ADVOC., June 2004, at 13, available at http://plfo.org/advocate/volume_1_issue_3/advocate.pdf (“Expanding the library at its existing site is complicated by its location. It is contiguous to expensive homes and Owensboro Public Schools property.”).

See ECONOMIC OVERVIEW, supra note 281, at 9 (noting completion of Natcher Bridge eleven miles from downtown Owensboro).

It was easy for elite community leaders to talk about the merits of comparative stagnation, but they were not the ones making the tradeoffs that "community" required. Owensboro’s permanent population was no longer growing, and the metropolitan region’s growth rate still lags behind both Kentucky and the United States. The high-paying manufacturing job base had already dried up. Between 2000 and 2009, Owensboro lost jobs. Mexican migrant workers struggling with unseemly living conditions now provided the county’s low-wage, unskilled farm labor.

328 Owensboro’s population in 1980 was approximately 54,500 people. U.S. Census Bureau, Characteristics of the Population, Number of Inhabitants, Kentucky 19-13 (1982), available at http://www2.census.gov/prod2/decennial/documents/1980a_kyABC-01.pdf. In 2000, it was approximately 500 fewer. Owensboro QuickFacts from the U.S Census Bureau, http://quickfacts.census.gov/qfd/states/21/2158620.html (last visited Jan. 5, 2010). The Owensboro Metropolitan Area, which includes all of Daviess County and two adjoining counties, by comparison, posted a 0.4 percent compound annual change in population. Economic Overview, supra note 281, at 2. These statistics are consistent with the sense that Owensboro city is in decline, but the county is not. Reasons for Owensboro’s decline and the impact of city-county merger are beyond the scope of this article except to the extent they reveal deeper fault lines about the residents’ public priorities and sense of community, which is plainly stronger in the city than the county. For a more complete discussion of the issues, see generally Benjamin Hoak, Merger in Owensboro: An Ongoing Conversation, Pub. Life Advoc., July 2006, at 19, available at http://plfo.org/advocate/volume_3_issue_4/advocate.pdf; Rodney Berry, What About Fairness? Local Tax Structure Has Many Inequities, Pub. Life Advoc., Mar. 2006, at 10, available at http://plfo.org/advocate/volume_3_issue_2/advocate.pdf; Rodney Berry & Chad Gesser, One County (One Community?) Three Governments: Examining Options for Owensboro-Whiteville-Daviess County Unification, Pub. Life Advoc., Jan. 2005, at 6 (Jan. 2005), available at http://plfo.org/advocate/volume_2_issue_1/advocate.pdf; Chad Gesser, Merger 1990: Fragmentation, Distortion and Disconnect Between Citizens and the Public-Private Elite, Pub. Life Advoc., July 2004, at 2, 5, 7, available at http://www.plfo.org/advocate/archive/ (urging deliberative public conversation about future merger efforts and citing Bellah et al., to guide reflection on philosophical community-related issues). Significant to “community in the classroom,” city-county school district unification proposals also reveal cultural differences between the two jurisdictions. County residents do not want to “solve” the city’s schools’ serious financial problems, and many city residents appear willing to sacrifice some academic priorities to preserve their system’s traditional culture that nurtures students living at all points along the city’s extremely wide socioeconomic spectrum.

329 Economic Overview, supra note 281, at 3. Population growth is an indicator of economic strength. Id.

330 Dew & Dew, supra note 293, at 189.

331 Money, supra note 286. Unemployment rates for the entire metropolitan area did not increase, however, and in the past five years, Daviess County and the small adjoining counties added 1700 new jobs, resulting in a gentle recession at the end of the decade. Economic Overview, supra note 281, at 2.

332 See, e.g., James Mayse, Daviess County farmers look to create housing for migrant workers, Messenger-Inquirer, Mar. 10, 2001.
It was only a symbol, but a chilling one. In 2002, a young couple opened Beyond the Brim, Owensboro’s first espresso, snack, and light lunch bar. Few Owensboroans had ever even ordered a cappuccino or latte. The owners educated curious patrons one by one.

The establishment became a small oasis for the many—women, young couples, teenagers, Evangelical Protestants, civic organizations—who needed places to gather other than a bar or mall. Beyond the Brim was one of the first local institutions to offer free wifi.333

But community is a fragile thing.

In 2006, Starbucks opened a few blocks away, and Beyond the Brim was out of business by the end of the year.334

VI. "ROB AND KIM GET INTO A CAR WRECK...":
FALL 2008 CIVIL PROCEDURE I, ADMIT SLIPS, ROLE MODELS
AND A NASCENT COMMUNITY BORN

Civil Procedure was the very first class that I attended in Law School. I had attempted to read the material the night before, but the only success I had was locating the syllabus on TWEN. After reading Pennoyer v. Neff for the first time, I assumed that I would last through the first week and then likely find the nearest watering hole to drown my sorrows. I had no clue where my analysis began or what I was looking for.

— Bert E. Williams, Teaching Assistant, Spring 2009

I brought three bits of wisdom to Fall 2008 from my two prior Civil Procedure sequences. Practice-related activities and examples were quite effective in teaching analysis and doctrine.335 Regular, rigorously graded

334 See Christy Attesley, Beyond the Brim to close doors at end of month, MESSENGER-INQUIRER, Nov. 4, 2006 (stating that owner’s reason for going out of business was primarily competition from Starbucks).
335 Erwin Chemerinsky, Rethinking Legal Education, 43 HARV. C.R.-C.L. L. REV. 595, 597 (2008). My approach and experience is similar to that of Professor Robert G. Vaughn of Washington College of Law at American University except that his activities appear to be richer and more administratively complex than mine. See generally Robert G. Vaughn, Use of Simulations in a First-Year Civil Procedure Class, 45 J. LEGAL EDUC. 480 (1995) (describing several oral argument, drafting, client interview, negotiation, legislative hearing, and advice memoranda assignments). I also agree that in a first-year Civil Procedure class,
writing assignments might convert a student into Learned Hand, but marking the papers would consume almost every waking hour not spent eating and teaching.\textsuperscript{336} Finally, even short hypothetical questions and problems could immediately engage a class and often reinforce concepts and analysis skills better than cases alone.\textsuperscript{337}

That fall I learned three more crucial lessons. First-year students will take even ungraded writing assignments seriously enough to make it worth hiring and supervising teaching assistants to mark them.\textsuperscript{338} First-semester, first-year students will do almost anything you ask, because they do not know yet that it is “too hard” or “not normal.” Finally, role models really do matter, and the ones that matter most in law schools are other students.\textsuperscript{339}

Therein lies the genesis of my teaching assistant program, admit slip regimen, and examination adventures.

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Phoenix School of Law’s Fall 2008 entering class was four times the size of Fall 2007’s. My Fall 2008 Civil Procedure I class presented this problem: how to provide the same pedagogical value to a group of forty students as I had with fifteen while also pursuing an LL.M program at the same time.\textsuperscript{340} Two staples of my prior Civil Procedure classes had been

\begin{flushleft}
\textsuperscript{1}Id. at 480. Even those who can teach skills to a large class recognize limits: my colleague Penny Willrich, a former litigator who directed Phoenix School of Law’s Lawyering Process program for several years, assigns multiple simulations during her Family Law classes but does not try to teach the art of cross-examination or client counseling. See Willrich, supra note 56, at 455-59 (2010).
\textsuperscript{2}GERALD F. HESS & STEVEN FRIEDLAND, TECHNIQUES FOR TEACHING LAW 225 (1999). A former professor of mine, Katherine Pratt, concludes that rough-cut problem-set grading has net benefit per unit of grading time. See Katherine Pratt, Graded Problems: Benefits and Burdens, in HESS & FRIEDLAND, supra, at 235, 237.
\textsuperscript{3}Cf. Shapiro, supra note 55, at 250-51 (noting that in-class hypotheticals are similar to the problem method but do not “provide the students practice with analyzing more complicated factual situations they are likely to encounter in law practice” and may produce inferior responses for lack of preparation time).
\textsuperscript{4}See, e.g., infra text after note 384 (Voice: Jarrod T. Green); infra text after note 387 (Voice: James P. Plitz).
\textsuperscript{5}See Jay M. Feinman, Teaching Assistants, 41 J. LEGAL EDUC. 269, 271-72 (1991); Kennedy, Reproduction of Hierarchy, supra note 198, at 604 (“The student/student relationship is the model for relations among lawyers as peers, for the age cohort within a law firm, and for the ‘fraternity’ of the courthouse crowd.”).
\textsuperscript{6}Colleagues at more established law schools will find this “problem” deeply amusing, they being far more concerned about how to provide a productive pedagogical experience for classes of one hundred students! In 2008, however, Phoenix School of Law, 40-70 students per class was already “large.”
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regular graded problem sets and simulations. Both could be replicated in larger classes, but only with significant changes.

Both were worth preserving. Rigorous problem sets covering jurisdiction and joinder left big footprints on time-pressed evening students’ schedules, but respondents to my non-directive survey acknowledged their effectiveness: “I am convinced that I have a vastly greater understanding of joinder as a direct result of the problems,” said one; according to another, “[t]his homework assignment took the most time out of all of them, but it burned the combined joinder rules into my mind.” Another student argued even more forcefully:

The practicality of the assignments really gauge their necessity[.] will they help me understand the material and help me process it so I can excel on the mid-term and final. . . . [W]ithout the combined joinder assignment—[the mid-term] would not have been the same. I just wish instead of the Lit Lab we got to do a combined joinder version of [Judgment as a Matter of Law] and Erie.

Given the praise extended to practice simulations such as “Litigation Lab,” if anyone said she wanted more problems instead, I could not ignore it.

The big winners for inspiring student engagement, however, were the simulations, because “they were the most like ‘real life’ situations.” In
Civil Procedure I, students write a complaint and answer based on a one-to-two page memo describing a client interview. Prior to 2008, students made an oral argument supporting or opposing a motion to amend a complaint from short briefs in a case I had worked on in practice. In Civil Procedure II, students drafted jury instructions and argued a motion for summary judgment from more complicated briefs while a three-student panel peppered them with tough questions.

Then, over three weeks toward the end of Civil Procedure II, groups of three- to two-“attorneys” and a “judge”—simulated litigation of a real labor case starting with a Rule 26(f) meeting; then preparing written discovery and responses; negotiating and if necessary arguing their objections; and briefing several motions, including one for summary judgment. Again, “real life” activities were a hit: “Creating our own filing schedule and then sticking to it was cool,” a student remembered.347 One judge kept her combatants on a short leash: “Should questions remain, I am available for a teleconference with both counsel this afternoon any time after 3:00 p.m. Arizona time. If this delay in answering your questions has caused an undue hardship, I will entertain a stipulated motion to extend the motion deadlines.”348 Another student asked if he could use concepts from his Contracts class to make his motion for summary judgment even stronger.

During our Fall 2007 joinder coverage, an attorney hired me to do consulting research to evaluate the possibility that a judge would certify a class action in an Eighth Amendment jail case.349 I allowed students to

347 Rasner survey response, supra note 46.
348 E-mail from “The Honorable” Marea D. Moseley to Joshua M. Andrews, Student, copying Author and Nicolis Faussette, Student, Phoenix School of Law (Oct. 31, 2007, 5:47 a.m. MST). Perhaps few professors underscore the significance of FED. R. Civ. P. 29 more than I do.
349 Conversation between Author and Javier Leija, Student, Phoenix School of Law (Nov. 2007). Formally coordinating courses appears to have positive pedagogical value. See, e.g., Joseph W. Glannon et al., Coordinating Civil Procedure with Legal Research and Writing: A Field Experiment, 47 J. LEGAL EDUC. 246, 252-57 (1997); Jay M. Feinman & Marc Feldman, Achieving Excellence: Mastery Learning in Legal Education, 35 J. LEGAL EDUC. 528, 534-44 (1985) (describing a course called “Contorts,” a combination of Contracts, Torts and Legal Writing).
350 One professor describes the outcome of a similar assignment in his legal writing class as follows:

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
volunteer to provide an authority plus one page memorandum explaining its significance in lieu of an assignment later in the term.\footnote{351} One remembered:

I liked working as a “research department” for a real case (class actions). It would be cool if the school (or individual teachers) could foster a relationship with outside firms and do this sort of research every semester. . . . [J]ust knowing that you are working on a real case adds a certain something to the research, makes you dig a little deeper.\footnote{352}

\footnote{351}I am always sensitive when students work with me in any capacity on outside projects that I fulfill my duties to both the students and clients and that the clients not take advantage of the students. See Stephen D. Sugarman, Conflicts of Interest in the Roles of the University Professor, 6 THEORETICAL INQIURIES L. 255, 260 (2005) (citing the possibility of ‘abuse’ or extortion of a student who assists a faculty member). I always insist students be compensated in some significant way. When I involve one or two students in a paid consulting project, the fee is twenty-five dollars per hour for the student; I keep the hiring attorney fully informed of the student’s involvement; and I do not accept the work if I lack the time or resources to perform the task without the student. See supra note 11.

In this case, a Kentucky attorney had requested this very generalized work and happily gave permission for my students to get involved, as did school administrators. I insisted that the project was strictly voluntary and required that students attend an out-of-class meeting for their crash course in class action basics—a topic I would not otherwise have covered. I did allow participants to switch out an equivalent assignment at the end of the term when time was at a premium while students were preparing LWaying Process appellate briefs, but the normal syllabus did not change. Students were not paid, but each individual project was small; I did do significant additional research, though the students’ efforts provided a useful head start. I took pains to cite every student’s authority somewhere in my memorandum; I circulated my memorandum to the students afterwards; and I provided all the students’ work to the hiring attorney who responded with a generous email to the group.

\footnote{352} Rasner survey response, supra note 46. Cf. Okianer Christian Dark, Transitioning from Law Teaching to Practice and Back Again: Proposals for Developing Lawyers Within the Law School Program, 28 J. LEGAL PROF. 17, 33 (2003-2004) (urging that law schools maintain relationships with local bars that are “intimate, involved, and serious” and “to support faculty who wish to return to practice for a limited period of time.”).
The project incited heated out-of-class argument between proponents of the jail’s and the inmates’ positions, and during class, students debated for fifteen minutes while I looked on.

The disadvantages of this curriculum exploded when I looked at it through the lens of larger classes. Detailed problem set grading required a time commitment I could no longer make.\footnote{See \textit{Schwartz, Sparrow} \& \textit{Hess}, \textit{supra} note 54, at 147 (describing the horror of grading an assignment with appropriate written feedback and realizing you are doing so at the rate of one per thirty minutes).} Graded assignments and simulations could also be burdensome for students.\footnote{\textit{Cf. id.} at 52 (urging professors to remember students’ obligations in other courses and work/life balancing during course design).} Scoring oral arguments was an administrative challenge and provoked student skepticism.\footnote{\textit{Cf. Hess} \& \textit{Friedland}, \textit{supra} note 336, at 195-96 (noting that simulations take significant preparation time).} At the end of the term, Litigation Lab competed inconveniently for student time with Lawyering Process appellate briefs.\footnote{See \textit{id.} at 53. Plus, I had to turn around feedback in twenty-four hours in order to give students some feedback before they moved on to another step in the litigation.} I prepared to apply the “80-20 rule” in Fall 2008.

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“The court must have BOTH kinds of jurisdiction over the case. Personal jurisdiction is WHO the court can boss around, and subject matter is WHAT the court has control over. I can’t go to traffic court to file for divorce, for example. So even if the traffic court would have jurisdiction over me if I got a traffic citation (personal jurisdiction), it doesn’t have jurisdiction to grant me a divorce (subject matter jurisdiction).”

-- Kimberly J. Garde, Teaching Assistant, Fall 2008\footnote{Posting of Kimberly J. Garde, Teaching Assistant, on Fall 2008 site for Jennifer E. Spreng’s Civil Procedure I TWEN site (Oct. 24, 2008, 8:14:47 a.m., edited 10:51:25 a.m.) (posting made in response to question from Christine A. Trueblood, Fall 2008 Civil Procedure I student). Answering questions in accessible language and maintaining awareness of student confusion was a central job duty for my Fall 2008 teaching assistants and remains so today.}
To avoid throwing the baby out with the bath water between Fall 2007’s Civil Procedure II class and Fall 2008’s Civil Procedure I, I made three fruitful adjustments.

First, I took advantage of Phoenix School of Law’s policy permitting students to work as “teaching assistants” for credit and hired Kimberly Garde and Roberto Escobar. Kim had prior teaching experience and was the reigning “Queen of Personal Jurisdiction.” Rob and Kim would soon circulate as co-authors on an article about subject matter jurisdiction, and even then Rob “wrote like a lawyer.” They had four roles: guiding me gently to the most productive syllabus based on their own Civil Procedure experience, drafting, testing and providing feedback on an innovation.
called “admit slips”, responding to course administration questions; and holding a few “office hours” per week to provide individual tutoring. They also wrote a five-page Guide to Pennoyer v. Neff that scaffolded enough students so I could present the case productively in one class or less.

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VOICE
Kimberly J. Garde

Professor Spreng doesn’t know it, but ours began as a hate-hate relationship. I hated her class, and I hated her for teaching it.

She was the professor of my Civil Procedure I class during my first semester of law school in Spring 2007. I was a part-time evening

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362 Cf. Donald S. Cohen, Ensuring an Effective Instructor-Taught Writing and Advocacy Program: How to Teach the Teachers, 29 J. LEGAL EDUC. 593, 596-97 (1977-1978) (noting that “[t]he less initiative one permits [student] instructors to exercise in developing their programs and specific assignments, the less likely it is that the program will continue in the future to attract instructors with creative minds and ideas.”).

363 My teaching assistants do not grade student work or even see graded student work unless I use a graded paper as a sample for the class. Dealing with pitfalls such as student conflict, lack of uniform standards, and general dissatisfaction are not worth the time it takes me to evaluate graded assignments myself. See Julie M. Cheslik, Teaching Assistants: A Study of Their Use in Law School Research and Writing Programs, 44 J. LEGAL EDUC. 394, 397-400 (1994); Kenneth B. Germain, Legal Writing and Moot Court at Almost No Cost: The Kentucky Experience, 25 J. LEGAL EDUC. 595, 602 (1972-73) (observing that students “quickly become unhappy when they discover that their evaluations are solely the products of other–albeit older and more–knowledgeable students.”).

364 These are routine assignments for teaching assistants in legal research and writing courses. See Becker & Croskery-Roberts, supra note 358, at 274. My teaching assistant program is “informal” in that no student is required to meet with a teaching assistant and teaching assistants provide feedback only on ungraded work. Teaching assistants who are “helper[s] rather than [j] overseer[s] . . . [and have] no compulsory jurisdiction over the first year student,” Leon E. Trakman, Law Students as Teachers: An Untapped Resource, 30 J. LEGAL EDUC. 331, 342 (1979) become an “assistant and ally” rather than “one of Them—a quasi-professor.” Cheslik, supra note 363, at 398. I prefer the facilitative role to improve intergenerational community, mentoring and the likelihood that students will use teaching assistants at all by casting them in the role of “assistant and ally” and thereby flattening the deference structure.

student, which meant that my days were filled with caring for my family and squeezing in what reading I could, while my evenings were spent in a law school classroom. My time with Prof was on Mondays and Wednesdays from 7:35 p.m. to 8:45 p.m.

Even at the time, I knew it wasn’t entirely Prof’s fault I hated her. Deep down, I knew it really was just the class material that I hated. My part-time evening schedule consisted of Lawyering Process I (the standard legal research and writing class), Criminal Law, and Civil Procedure I. While students with more traditional schedules had Contracts or even Property to compare with Civil Procedure I (and thus, soften the blow), I did not. Whereas the Criminal Law reading was exciting and written in words I could understand, Civil Procedure was Pennoyer v. Neff chased by International Shoe and World Wide Volkswagen with a side of Asahi. Long Arm Statutes? Traditional Notions of Fair Play and Substantial Justice? Balancing Tests?? What in the world did it mean?? This subject was for crazy people!

I finished Civil Procedure II in December 2007, and not yet having come to grips with the reality that I would need to retain some knowledge of civil procedure for the bar exam, on the day of my final exam I closed the exam booklet with a sigh of relief and promptly tried to forget all things civil procedure.

It was also around this time that I realized that despite my best attempts at resistance, I had learned more from Prof than I had in any other class (by this time I had been exposed to Property and Contracts as well as Criminal Law and Civil Procedure). Prof required participation in class—as do most law school professors—but there was more to it. Prof cared about whether we learned the material. Prof cared about whether we succeeded in other classes. Prof cared about us. She had a “tough love” approach in those days (I have to believe she’s gotten easier on her students since then). Prof gave us regular assignments requiring us to apply the information we were supposed to learn. The assignments were a great way to gauge whether we’d learned the information taught. The assignments were the reason I hated her. The assignments are the reason I love her.

Before the start of the Fall 2008 semester, Prof asked if I would be a teaching assistant in her Civil Procedure I class. Our school had received provisional accreditation and enrollment was up—way up. My Civil Procedure II class had 14 students, which had allowed Prof to give us detailed feedback on each of the assignments she’d given us. However, Prof now faced a class size of 50-75 students and needed help giving individual attention to each student. I was intimidated. I’d done my best to forget all of that Civil Procedure I stuff during the year since
I'd had the class. However, it sounded like an interesting way to earn academic credit, so I was up for the challenge.

I was serving as a co-teaching assistant with a classmate of mine, Rob Escobar. Rob and I were tasked with two things to begin with: writing a study guide for *Pennoyer v. Neff* and creating a set of “admit slips.” The admit slips were to be short hypothetical questions that would test a particular area of legal knowledge that would be covered in class that week. We divvied the work up—I was to create the first half; Rob, the second. Rob, being less of a procrastinator than I, wrote most of his questions right away. I wrote mine on a weekly basis—right before I needed to send them to the Civil Procedure I students for that week’s homework. After the first week, Prof reminded me that Rob had written a question using Rob and me as the characters. I reviewed the questions Rob had written and decided to write all of my remaining questions revolving around a single story line starring Rob and me. Writing the questions is one of my fondest memories of law school. However, I never expected it to become an integral part of Prof’s Civil Procedure I classroom. In fact, I didn’t realize how integral it had become until a year later when I met a student who, upon being introduced to me, informed me that I was the bane of his existence.

During my time as a TA in the Fall 2008 semester, I think I learned more from the students than they did from me! I really enjoyed meeting with them one-on-one to smooth out the wrinkles in their understanding of the material, but I often found they stumped me with their insightful and complex questions. When a student stumped me, we would research the answer together, honing both of our research and inquiry skills.

In Spring 2010, I once again served as a TA for Prof’s Civil Procedure I classes. This semester she was up to nearly 100 students between her day and evening classes, and my “office hours” were no longer the solitary study sessions occasionally interrupted by a Civil Procedure student as in Fall 2008. The Spring 2010 students used the TAs often and well!

I was amazed by how much I learned, once again, from the Spring 2010 students. The understanding of Civil Procedure that I thought I had back in Spring 2007 was completely different from the understanding I gained by serving as Prof’s TA in Fall 2008 and Spring 2010.

By the time I was Prof’s TA in 2010, our relationship was no longer a hate-hate relationship. I no longer hated the material. I no longer hated Prof for teaching the class, it was my favorite subject and Prof was among my favorite professors.
When I took the bar exam, after a morning of miserable essays, I
opened the afternoon exam booklet to find a civil procedure essay
question. It was entirely about personal jurisdiction and federal
subject matter jurisdiction. I felt like the bar examiners had given me a
gift by including a question that was so easy for me. But it was not the
examiners who gave me the gift by including a civil procedure question;
it was Prof who gave me the gift by demanding I have a deep, solid
understanding of the material.

Teaching assistants have long been staples of law school writing
classes, but they remain rare in doctrinal courses, despite their potential to
improve the learning environment. Giving individualized feedback is
plainly one very productive role. Sometimes knowing less can mean
more when students need help grasping difficult concepts. The teaching
assistant is "'consciously competent,' that is, [teaching assistants] still have
to think through each step of the procedure, one step at a time" while the
professor falls victim to "'conceptual condensation' . . . a process by which

\[\text{\footnotesize\[366\] Writing Institute: Celebrating 25 Years of Teaching & Scholarship, Mercer Law Review Symposium, Transcript–Afternoon Session, 61 Mercer L. Rev. 803, 827 (2010).\]}
\[\text{\footnotesize\[367\] One hears of examples, e.g., Elizabeth M. Schneider, Structuring Complexity, Disciplining Reality: The Challenge of Teaching Civil Procedure in a Time of Change, 59 Brook. L. Rev. 1191, 1196 (1993) (noting author has a teaching assistant who attends class and offers an additional optional class per week)--but few provide insight into means of using teaching assistants to provide students with additional practice and assessments.\]}
\[\text{\footnotesize\[368\] This may in part explain the hesitance of many professors to adopt writing and other non-examination assessments in their classes. Michael J. Madison, Writing to Learn Law and Writing in Law: An Intellectual Property Illustration, 52 St. Louis U. L.J. 823, 834-35 & n.36, 837 (2008) (noting regular writing assignments in doctrinal courses are "clearly a somewhat risky juggling act, especially since I don't rely on teaching assistants or research assistants for any of the work").\]}
\[\text{\footnotesize\[369\] Becker & Croskery-Roberts, supra note 358, at 277 & n.32 (citing Neal A. Whitman, Peer Teaching: To Teach Is to Learn Twice (1988) (quoting Thomas L. Schwenk & Neal Whitman, Residents as Teachers (U. Utah Sch. Med. 1984)). I had this experience while writing this section of this article. Both of my Civil Procedure II classes in Fall 2010 lost their way during joinder material. One of my teaching assistants announced a weekend review session, and both classes returned the next week back on track. In his summary of the session afterwards, he tossed out the possibility that there is value to teaching the rules prior to supplemental jurisdiction. E-mail from William Joshua Nunez, Teaching Assistant, Phoenix School of Law to Author (Oct. 4, 2010, 10:58:00 MST) (on file with author). I now realize classes may have lost their way when several students wanted to discuss 28 U.S.C. § 1367(b) too early for the class as a whole. I would now ask the students to hold those thoughts for a couple of classes, but I may yet change topic order in the future. I take Josh’s advice seriously, because he would know. I do not hire teaching assistants who would not.\]}

the expert teacher condenses a subject and skips basic steps of reasoning" that are obvious to the teacher but not the students. Teaching assistants also become mentors and role models who can help first-year students overcome academic and law school transition challenges. My teaching assistants collect student reactions to the course and help me resolve dissatisfaction or confusion while preserving students’ anonymity.

Teaching assistants receive considerable benefit from the experience. Many want the mentoring and/or résumé value teaching assistant service implies. They also learn foundational material more deeply, increase their “intellectual and emotional development,” and develop teaching skills they will eventually use with clients. Besides, it is fun to be “big


372 Feinman, supra note 339, at 271-72 (“The essence of teaching assistants’ affective role is to ease the transition [to law school] by role modeling, by providing emotional support, by identifying the occasional first-year student who has particularly severe transition problems, and by helping students develop effective working relationships and social relationships.”). I recommend students speak to teaching assistants about subjects I will not such, as study aids; I do not want to be seen to endorse certain methods or conduct, but if students will insist, I prefer they consult someone reliable. Cf. Becker & Croskery-Roberts, supra note 358, at 292-95 (noting the virtues of teaching assistants sometimes express views to students that are different from the professors’).

373 See Feinman, supra note 339, at 274; Cheslik, supra note 363, at 400. Just recently several of my teaching assistants were discussing why in-class performance had dropped from the previous semester. One argued he was not seeing less students during office hours and students should be encouraged to do so; another thought the classes should be made harder to prepare; another thought a group session might get them on track. We tried all three; I do not know which worked, but I know at least one did. Cf. Becker & Croskery-Roberts, supra note 358, at 294 & n.90 (discussing the use and value of teaching assistant feedback about a course or assignment).

374 See Feinman, supra note 339, at 275-76; see also Vaughan, supra note 209, at 1262-63.

375 See Becker & Croskery-Roberts, supra note 358, at 277, 281-82.

376 Id. at 278.

377 Cf. Stephen M. Johnson, www.legaleducation.edu: Using Technology to Educate the Public, 50 J. LEGAL EDUC. 393, 396 (2000) (arguing that students who help law professors develop materials for teaching law to the public will develop skills they need to teach clients in practice).
man/woman on campus”, even the law review editor in chief does not receive that sort of adulation from first years.

Rob and Kim were not my first teaching assistants. To prepare for my second assault on Civil Procedure II in Fall 2007, I turned to a student from the prior sequence: Paul Pappalardo, a Ph.D. in chemistry, registered patent agent, and manic Civil Procedure junkie. Paul was the ideal collaborator. He was older than I, had prior teaching experience as a graduate assistant, and was wise enough to see more of my potential as a teacher than perhaps I displayed my first year on the job. He was also sensitive enough to support my good ideas, and without passing judgment, he would present one of his own if he could not. He focused on helping reorganize the course and producing a sufficient number of high quality problems and hypotheticals.

Paul and another former Civil Procedure whiz, Amie Otis, were the first vertical relationships in my Civil Procedure “community of memory.” I discern their influence in my course design even today. Paul recommended the casebook I still use. A character named “Paul” showed up in one of his original hypothetical sets. Paul helped me convince Amie to tutor a struggling student and host a closed-door, no-holds-barred

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378 See Becker & Croskery-Roberts, supra note 358, at 278 (citing studies of college peer teachers indicating the role improved the peer teachers’ self-esteem). I now prefer to work with groups of teaching assistants of sufficient size to maintain at least a 1:20 TA-to-student ratio and ideally 1:15. One of the group becomes the “Senior TA,” to supervise the rest. I reinforce the senior teaching assistant’s authority by extending the discretion to make certain important course administration decisions on the theory that if the senior teaching assistant should decide what to do if he or she will carry the burden of implementation. My senior teaching assistants have been Jim Plitz (Fall 2009), Kimberly Garde (Spring 2010), and Aaron Berkley (Fall 2010 & Spring 2011).

379 When I was advising a student, Javier Leija, on his article for the Phoenix Law Review, a student in the Fall 2007 class, Paul, participated in a works-in-progress session of intellectual property student experts to help Javier with analysis of the substantive law I did not know.

380 At time of publication, I will have taught Civil Procedure I six times and Civil Procedure II four times and be embarking on the 2011 Civil Procedure I and II sequence.

381 Paul Pappalardo actually read two additional casebooks during the 2006-07 Civil Procedure sequence. When I decided to switch casebooks, Paul’s arguments persuaded me, happily, to adopt JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS (9th ed. 2008).

382 See supra text after note 365 (Voice: Kimberly J. Garde); infra text and notes 388-96 (discussing Kim’s innovation of using herself and Rob as characters in admit slips). Paul’s hypotheticals often featured new inventions blowing up on people, and one actually triggered a brief in-class skirmish between another inventor and a trade secrets expert over the substantive ramifications of its procedural posture. The second article in this trilogy will discuss more details related to this “real life” cast of admit slip and examination characters.
forum on “how to conquer Spreng’s final exam.” I spoke often of “The Paul and Amie Show.” Students understood they were the designated role models, and Paul and Amie exercised a subtle authority over them.

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VOICE:
Jarrod T. Green

Civil Procedure? What? Obviously I did not want to walk in cold to class. I cracked my casebook and started seeing names such as Pennoyer, Neff, some far-reaching Shoe company, a global car maker, a Burger joint, and a fancily pronounced Helicopter word. Further exploration into Friedenthal’s tome provided words such as; in rem, quasi in rem, personal jurisdiction, subject matter jurisdiction, general jurisdiction, and even supplemental jurisdiction. Huh?

Professor Spreng’s class was my first class, of the day, of my first semester, of my first year. Whoa! What the F#&+ did the terms above mean? How did they apply to the law? What was I supposed to do with this information? Luckily the Prof provided a useful tool to hold me accountable, to make me dig deeper into the material, and actually attempt an extraction of what was happening—the admit slip.

Many of my classmates dreaded facing an assignment due at the beginning of class on Monday after a hard weekend of reading, briefing, outlining, and consuming adult beverages. To my knowledge I never missed turning one in, because I recognized that the Prof had provided a tool to help me distill what was happening in these cases regarding jurisdictional issues. The admit slip helped me to see that there was an evolution in the law as society changed and as the country expanded technologically. I could see how the Court would analyze issues and move the ball, first beginning with personal jurisdiction with Pennoyer v. Neff and then expanding further in International Shoe, and then returning again to “Pennoyer-like” principles.

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383 The second article in this trilogy explains how this event became a signature feature of my examination preparation procedure.

384 Cf. Cheslik, supra note 363, at 411 (noting from survey responses that many considered providing “role models” as a potential benefit of using teaching assistants); Feinman, supra note 339, at 272 (noting that teaching assistants show how to “balance[e] classwork and social life, focus[e] on one’s studies, get[] along with classmates, defin[e] appropriate classroom behavior, and form[] and continu[e] study groups”).
My second curricular adjustment was to assign weekly “admit slips” instead of regular problem sets. In Civil Procedure I, they are normally one or two problems reflecting the prior class’s coverage; in Civil Procedure II and upper division courses, they usually anticipate in-class coverage or require reflective essays. For each admit slip written “in good faith,” I award one point out of one hundred for the term.

Rob and Kim made the admit slip innovation work. Each drafted five of the ten admit slips and wrote sample answers. Then, the other read and worked the problems to confirm their legal and factual integrity. Each week, they provided individual, written feedback and posted a sample answer on the TWEN course management system. For the most part, students took admit slips seriously, and most students turned in all of them.

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VOICE:

James P. Plitz

The hardest part of being a TA for Prof is grading admit slips. As I mentioned, admit slips are a great learning device, but the learning can only come if there is adequate feedback. The goal was to provide as much feedback as possible, so students can synthesize and build upon what they did well to overcome any shortcomings. That was the theory. But what made the “grading” difficult was the level of the writing. It was not that students did not try their best; the effort, in general, was there. Students just did not understand the topic. In the process of grading, I pulled up and looked at my own admit slips for that topic,

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385 Hess and Friedland define “admit slips” as “short pieces of writing that students turn in at the beginning of class. Examples include responses to problems, answers to questions raised at the end of class, and questions about the material covered in the previous class.” Hess & Friedland, supra note 336, at 224. In the Phoenix School of Law culture, assignments and due dates must be announced in the syllabus, so my admit slips must be pre-prepared, and I cannot assign one to follow up on significant unique points in an individual class discussion.

386 See Cohen, supra note 362, at 596 (noting that “[t]he less initiative one permits instructors to exercise in developing their programs and specific assignments, the less likely it is that the program will continue in the future to attract instructors with creative minds and ideas.”); Johnson, supra note 377, at 396 (arguing that students who help law professors develop materials for teaching law to the public will develop skills they will need to teach clients).

387 See Philip C. Kissam, Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education, 60 Ohio St. L.J. 1965, 2009-10 (1999) (proposing use of teaching assistants to provide feedback on regular writing assignments).
and I found that my admit slips were just as bad. So providing feedback, without re-writing the entire admit slip, became the challenge (I am also a believer that there should always be something positive said, in addition to any constructive feedback). This experience gave me an added respect level for professors; having to read and grade papers and exams must, at times, be excruciating.

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Rob and Kim each made a crucial contribution to my nascent “community in a classroom” through admit slips. Rob conceptualized and wrote what became “The Famous Admit Slip Nine.” Rob named the characters in her admit slip problems after herself and Rob, and her fact patterns internalized their life experiences and personalities. For example:

**ADMIT SLIP FIVE**

**Kimberly J. Garde**

Rob, who is still in Utah, continues to dream of becoming a potato farmer in Idaho. While searching for a small plot of land in Idaho to buy with his settlement money from the needle incident, he has been renting a small house near some open land.

Meanwhile, back in Arizona, Kim and her husband Jason have started a small business selling all-terrain vehicles (“ATVs”) called Desert Quads (“DQ”). They incorporated DQ in Arizona. They purchase the ATVs from a distributor in Georgia called Dealer’s Distributing (“DD”) who ships the ATVs to Kim & Jason’s house. When the ATVs arrive, Jason attaches the wheels and the handlebars (the units arrive completely assembled except for those two steps). Kim and Jason keep the ATVs in their garage and advertise them in local “Trader” magazines. Potential customers

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388 The third article of this trilogy describes the classroom response to “Admit Slip Nine” and what eventually made it “famous.”

389 The second article of this trilogy describes the student response and growth of this community of real-life and eventually mythologized characters in Part IV. Kim believes Rob first used their names in an admit slip. See supra text after note 365 (Voice: Kimberly J. Garde). I remember it the other way! Perhaps Rob used himself and his brother, first. I know I added my sister briefly, and Kim cast her husband and niece in one slip. Very soon afterwards, however, Kim switched to the “Rob and Kim” concept I still use today.
come to their house to purchase the ATVs. DQ also has a website. In the past (depending on which company hosts the website and what features have been available) the website has given visitors the opportunity to register and create an account, to purchase ATVs and accessories, to discuss ATVs in a bulletin board forum, to engage in live chat, and to bid on ATVs via an auction feature. Kim and Jason never attempted to limit DQ’s customer base to Arizona, but never made any attempts to advertise outside of Arizona either. Currently, the website hosting company (Cybertrails, an Arizona corporation) is hosting the site for free so long as they do not have any interactive features on the site. Consequently, for several months, the website has been nothing more than contact information (with a link to e-mail) and photos of the ATVs and accessories that are for sale. Kim and Jason are not able to make much money selling the ATVs and have recently been considering giving up on their business.

Back in Utah, Rob has decided that there is something lacking in his life, so he decides to buy an ATV. He gets on his computer and Googles “cheap atv” (he doesn’t plan to blow his whole settlement on a toy!). One of the first hits is the DQ website. Rob doesn’t realize the web site belongs to Kim’s business, but he likes the ATVs that DQ is selling so he clicks on the “contact us” link where he discovers that he is looking at his dear friend Kim’s business website.

He sends Kim the following e-mail:

   Hi, Kim! It’s Rob, from Law School. Remember me? Well, I left law school to become a potato farmer in Idaho but I had quite a bit of bad luck on my way. I’m in Utah now and hoping my luck has finally turned for the better. I was looking for an ATV and I came across your website. I like the models you sell. Is there any chance you could make a deal on an ATV for an old friend?

   See ya,
   Rob
Kim replies with this e-mail:

Hey, Rob! Long time no see! Sorry to hear about your bad luck. We usually just sell our ATVs locally, but I checked with my distributor and they’ll drop-ship a unit to you. Just let me know which one you want and I’ll sell it to you at cost plus shipping! Talk to you soon, Kim.

Rob immediately replies, ordering a 600cc red ATV. That same day, Rob sends the payment to DQ via PayPal (an online payment service). Kim then places the order with DD, who informs her that DD will not indemnify Kim and Jason for any injuries that occur as a result of the unit being assembled by Rob instead of by Jason. A week later, DD ships Rob’s new ATV to him.

Soon, Rob’s new ATV arrives at his house. He assembles it himself and immediately takes it for a spin. Rob’s luck hadn’t changed, however, and as he starts down a hill, the front left tire flies off, ricochets off a tree, and hits Rob in the face just as the ATV begins the first of six rolls (which end with Rob pinned under the ATV, where he lay trapped for 17 hours until a passerby notices the bright red ATV and comes to investigate).

Luckily, Rob’s plastic surgeon is able to reconstruct his face, and after several months in intensive care, all of his bones heal, he regains consciousness, and is able to walk away no worse for the wear.

Rob decides to file suit against DQ and DD in federal district court in Utah.

Questions:
1. Will the federal district court in Utah have jurisdiction over each of the parties in the lawsuit?
2. Kim was born in Utah, but moved away 31 years ago, when she was 6 weeks old. She went back to visit when she was 19. In 2005, she applied to law school in Utah but decided
against moving there. Jason has never been to Utah. If Rob brought the case against Kim and Jason personally, instead of against their business, would Kim be subject to general jurisdiction in Utah? Would Jason? Might Dealer's Distributing be subject to general jurisdiction in Utah?

ADMIT SLIP 10
Roberto J. Escobar

1) While on vacation in the Bahamas, John and Kim sold Rob sun block. The sale took place on the beach in the Bahamas. The sun block was useless and did not work at all! Rob is now severely sunburned and unable to enjoy the rest of his much deserved vacation. Rob, who is a citizen of the State of Arizona, wants to bring a suit against John and Kim for defrauding him in the Bahamas by selling him defective sun block. John is a citizen of Hawaii and Kim is a citizen of Maine. Rob wants to bring his suit in federal court in Maine, but does not know if he can. You are Rob’s lawyer and he has asked you the following questions: Is venue proper in Maine? How do venue and personal jurisdiction relate to each other? What problems will Rob face in his attempt to sue John in Maine? Please explain the answers to Rob so he knows where he stands with his suit.

2) David, a citizen of Arizona, owns the patent for the Rubik’s cube. David claims Jake, also a citizen of Arizona, violated Federal Patent Law by making and selling Rubik’s cubes without David’s permission and without paying the required royalty. David is mad at Jake, and filed a claim in Arizona State court for lost royalties. Can Jake remove to federal court?

I immediately saw the genius in the “Rob and Kim” hypothetical characters for creating community and enthusiastically adopted the practice for examinations, assignments, and “teaching by hypothetical.” The set

390 “Teaching by hypothetical” is a popular technique I refined in Fall 2008. I prepare a series of four to six hypotheticals starting with a basic fact pattern and gradually add facts to increase complexity. The second article of this trilogy will discuss this technique in depth and explain, in particular, the “Sedona” hypotheticals that my research assistant, Gabriel Hassen, inspired. Whether teaching by hypothetical is preferable to the problem method is a disputed point, but students routinely say they find the resulting discussion to be valuable. Cf. Shapiro, supra note 55, at 250-51 (“In-class hypotheticals, both by necessity and design, are usually based on very simplified facts and focused on one narrow issue.”). After
of hypotheticals below provoked considerable debate and illustrates how during the latter two thirds of a class we subconsciously internalized vertical community networks after spending the first third matching the terms of an actual discovery plan and paper discovery with requirements in the Federal Rules of Civil Procedure.

considering the view in Larry L. Teply & Ralph U. Whitten, Teaching Civil Procedure Using an Integrated Case-Text-and-Problem Method, 47 ST. LOUIS U. L.J. 91, 110 (2003) ("Although the same result can be obtained by carefully constructed hypothetical situations presented to the students for the first time in class, problems integrated with the other materials give students a better chance to prepare for the types of issues that will be raised in class.") I more frequently circulate hypotheticals ahead of class.
HYPO ONE

Rob and Kim are in a car wreck in the State of Grace. Kim is badly injured and knocked out cold at the scene. Kim sues Rob for $200,000 in the United States District Court for the District of Grace. Kim is a citizen of the State of Euphoria. Rob is currently living in the State of Doom but is looking for a job in the State of Euphoria.

1. Does the court have subject matter jurisdiction in Grace?
2. Does the court have personal jurisdiction?
3. Is venue correct?

HYPO TWO

Same incident.

Javier saw the wreck from across the street. At the time, he told Rob that Kim was going too fast and he thinks she caused the wreck. Does Rob have to disclose Javier's name and address to Kim?

What Rule applies?
HYPO THREE

Same incident.

Suppose Kim had obtained this information from Javier but Javier did not tell Rob. Would she have to turn this information over in her initial disclosures?

How could Rob obtain this information?

HYPO FOUR

Same incident and same parties.

Death Cars, Inc. manufactured Kim's car. Rob wants to obtain all documents Kim has about Death Cars, Inc. such as her Owner's Manual.

If Rob makes an appropriate discovery request, must Kim turn it over?

391 By Fall 2010, this hypothetical became an early introduction to the work product doctrine:

Suppose Aaron saw the wreck but did not talk to Rob. Kim's investigator later interviews Aaron, and Aaron says Kim was driving too fast and caused the wreck. How could Rob ever find out about Aaron and the information?
HYPO FIVE

Same incident, same parties.

Kim discovers that during the collision, Rob was making a delivery for Lindsey's Floral Shop, his employer. Kim adds Lindsey's as a defendant and otherwise correctly requests records of "all deliveries made in the past five years." Lindsey's claims this request is too burdensome and it cannot comply. Must she collect this material and turn it over?

By Fall 2010, this hypothetical became the following:

Death Cars, Inc. manufactured Kim's car. Rob wants to receive a copy of the Owner's Manual to the car through formal discovery. He propounds an appropriately drafted "Request for Production of Documents."

Kim is going through a messy divorce, and her estranged husband has the Owners' Manual. She objects to the request.

Should the judge order Kim to produce the Owners' Manual?

This hypothetical is a simplified version of the conflict in *In re Auction Houses Antitrust Litigation*, 196 F.R.D. 444 (S.D.N.Y. 2000). See Friedenthal et al., supra note 381, at 862-64. Toward the end of Civil Procedure I and into Civil Procedure II, I regularly present short, rule-oriented cases through analogous hypotheticals instead of dialogue. After combing the rules for an "answer," students inevitably match the hypothetical with the case, and we then evaluate its reasoning. By then I assume students are able to discern key facts and holdings without my direct guidance.

I am constantly amazed by how many students no longer remember Domino's Pizza's "30 minutes or less" guarantee. They end up lost until someone breaks down and explains the significance of the facts—collaterally serving to demonstrate how much factual background and formative experience matters to the law.
In “The Prof’s” Civil Procedure community, we look to the future with confidence, but we also remember our shared past and revel in its inspiring legends.395 In Fall 2008, Rob and Kim were teaching assistants, and “Javier” and “Lindsey,” two other students from my 2007 sequence, helped in other ways. Over time, “Jim,” “Bert,” “Dan Q.,” “J.T.,” “Gabe,”

394 By Fall 2010, I had inserted the following two questions to permit students to explore discovery planning prospectively:

<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rob wants to learn more about Kim’s injuries.</td>
<td>How can he use formal discovery techniques to do so?</td>
</tr>
<tr>
<td>and</td>
<td></td>
</tr>
<tr>
<td>Kim wants to get information about Rob’s physical and mental health as a</td>
<td></td>
</tr>
<tr>
<td>possible cause of the wreck.</td>
<td></td>
</tr>
<tr>
<td>How can she do so?</td>
<td></td>
</tr>
</tbody>
</table>

With my third-semester evening students, these two hypothetical questions were especially effective; students identified many ways to extract some or all of the information Rob and Kim sought based on their prior review of the rules and several cases in the reading, especially *Marrese v. American Academy of Orthopedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) (en banc) and *Schlagenhaft v. Holder*, 379 U.S. 104 (1964). See FRIEDENTHAL ET AL., *supra* note 381, at 837-43 (use of protective orders and timing of discovery in FED. R. CIV. P. 26(a), (b)), 879-84 (concerning FED. R. CIV. P. 35 as applied to a defendant). 395 BELLAH ET AL., *supra* note 25, at 153.
“Michael,” and my current teaching assistants, “Aaron,” “Chauncey,” “Josh,” and “Dan T.,” have replaced them in many hypotheticals. But icicles will snap in the underworld the day the Professor’s students no longer learn Civil Procedure to the tune of “Rob and Kim get into a car wreck . . .”

VII. CONCLUSION

[1]Infant lawyers feel just as helpless and bewildered at the start of their legal life as actual infants do and are nearly as vulnerable and inarticulate. They sleep little and cry a lot.  

(highlighted in yellow on the first page of a law review article)

I highlighted the sentence on the first page because I think the authors were writing about me.

— Todd J. Sullivan

The Fall 2008 Civil Procedure I class was a turning point in my teaching career: I taught the material better and the entire course took on an internal coherence, rooted in bigger theories about how law should be taught. So many basic design elements—teaching assistants, admit slips, role models, the “TAs and Friends” mid-term review, spiraling,
teaching by hypothetical, and four-to-six page final examination fact patterns—survive to this day. I was prepared to make Civil Procedure I a crown jewel in my course package for the Spring 2009 students. I was also prepared for the conceptual and design challenges the Clark curriculum would present.

Additionally, I found my own “voice” in the classroom: one of a low-deference, street-corner lawyer whose practice career had not been vastly different from her students’ to come. After picking apart the specifics of trust management in *Mullane v. Central Hanover Bank & Trust Co.* and bowing to its place in the constellation of “landmark cases” for the “reasonably calculated” test, I lead the class to the really interesting aspect of such a case: why in the world it ever got to the Supreme Court.405 Many students initially plump for the imperative of resolving an important constitutional issue to ensure just outcomes in the future. They are not yet wired to understand that “resolving an important constitutional issue to ensure just outcomes in the future” is rarely in the interest of the average litigant. Students must grapple long with the incentives before they recognize the justice in a settlement limiting both sides’ potential exposure for service costs and attorneys’ fees. It is discomforting to think the case could simply have been a quarrel culminating in the lawyers’ pleasant trip to Washington, D.C., meals in nice restaurants, and center stage performances before the Supreme Court of the United States. But young attorneys struggling to make rent regularly face these dilemmas. Occupying an exalted place in the history of American jurisprudence does not cleanse a case of the gritty reality from which it might have arisen, and

401 The second article of this trilogy explains the role former students play in preparing first semester, first years for their first law school examination experience in Part IV.
402 The second article of this trilogy discusses my “spiraling” syllabus design in Part II.
403 The second article of this trilogy explains my examination practices in Part IV.
405 I use *Mullane* as an example in such a conversation; hopefully a colleague reading this will tell me if the incentives I describe in the text had any effect on the attorneys’ procedural decisions in the case.
406 *Oh, for a warning order appointment in a probate case about an estate with assets!* thinketh the young Kentucky solo coming up short for the month. *See* KY. REV. STAT. ANN. § 394.190 (2010) (permitting summons of interested parties by warning order in probate cases); KY. R. CIV. P. 4.07(1) (“Such atty must make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action.”); KY. R. CIV. P. 4.07(6) (permitting a warning order attorney’s reasonable fee to be taxed as costs). How hard should the attorney search for “lost heirs?” The words “diligent efforts” and “reasonable fee” can mean so many things!
there is nothing wrong with that as long as a young attorney recognizes it and behaves honorably when she sees it.407

** ** ** ** **

The students in the Fall 2008 class left me with a great gift: they taught me how to nurture community by showing me its fragility. “Building community” was barely on my radar screen when I started the term, but the students built their own.408 They bonded quickly. They spent hours together at the “George & Dragon” pub every Thursday evening after their last class.

Something went wrong soon after the mid-term examination week. A group of very proud, individualistic, idealistic, competitive, and cussed people suddenly found they could not get along and they eventually split into antagonistic cliques. Many unfortunate events unfolded, including the official decision to divide their class and assign students to the other two tracks of first years for the next semester.409 While both Lawyering Process papers and the switch from jurisdiction material to rule-based topics were both culprits, I sensed complicated fault lines and rifts pulled the plug on participation for several classes. I felt the tension. Of course, the whole thing was mostly “silly,” as my new research assistant from that class, Gabriel Hassen, described it. But the camaraderie of the “George & Dragon” days died, and that was a real loss.

The community would survive the term in future classes, but for now, I wanted to help this class heal. I decided to bring them back together to their old haunt one last time. So I invited them to the George & Dragon myself after their last final examination and threw in the magnet that I would buy the first drink.

Students who were no longer sure they even liked each other; students who had never “belonged” anyway; and students who did not touch alcohol for religious reasons: they all showed up. Many stayed for hours. They complained lustily about the Civil Procedure examination, but they were caught off guard when I told them how well I could already see they had

407 But gritty reality should not offend us. To put it prosaically, if it did not exist, lawyers would struggle to make mortgage payments. Or more poetically, “gritty reality” is the world in which the people live, and our profession is all about the people.
408 The editor-in-chief of this publication, J.T. Green, was an indispensible community builder that term.
409 Though the decision to split the class met appropriate institutional needs, it also created considerable controversy. Ironically, it also produced many collateral benefits that I discuss in Part III of the second article of this trilogy.
done. Some fought again that evening . . . but this time over personal jurisdiction.

The bill was $64 and change. Many refused to put their libations on my tab. I know many of my own orders were not listed.

So many sent thank you notes.

I never taught any of them again.

** ** ** ** **

VOICE:

*Beth M. Bruno*[^410]

With such fondness I do reflect,
the wonder of *Pennoyer v. Neff*.
Seemingly simple going in the door,
but then we started Rule Four!
*Shoe, Gray, and World-Wide Volkswagen,*
Slaying the inevitable jurisdictional dragon.
*Asahi, Perkins and Helicopteros,*
strange “minimum contacts” bedfellows.
We learned who we could sue,
and how to determine venue.
We wrote about poor Javier, Rob, Kim and Lindsey,
each week sporting some new injury.
We drafted a complaint and an answer too,
I think my brain actually grew!
Now, that I am in Civ Pro Two,
I have a better understanding of what I thought I knew.
My brain is still a jumbled up mess,
the rules are difficult I must confess!
But, I will not give up, I will give it my best,
I may end up unscrambling my brainy mess!

** ** ** ** **

The first and last classes of Civil Procedure I are special. I devote almost all of the first class to a problem based on the Bible story of “The

[^410]: E-mail from Beth M. Bruno, Student, Phoenix School of Law, to James P. Plitz, Teaching Assistant, Phoenix School of Law (April 3, 2009, 17:05 MST) (on file with author).
Judgment of Solomon. The underlying fact pattern involves two prostitutes who gave birth a few days apart. They wake up one morning and find one of the babies dead, and they bring their quarrel over the living child’s maternity to King Solomon who tells them he will cut the live baby in half and give one half to each. The woman who apparently brought the case begs King Solomon to give the baby to the other woman, while the second woman urges him to cut the child in two. The king ultimately awards the baby to the first woman on the theory that she is the baby’s “true mother.”

The primary purpose of the problem is to entice students to volunteer to speak early in the semester in a non-threatening and familiar fact setting. Another is to trick students into applying infant lawyering skills on Day One to prove they already have some! During most terms, I can eventually guide the class to consider whether “more process” would have meant “more justice.”

The problem also illustrates the importance of skepticism and subconscious assumptions about fact sets. Eventually a student realizes that the woman to whom King Solomon awarded the baby could not, based on her description of events, have known how the baby died, despite her testimony to the contrary. This early “a-ha moment” usually renders the entire class mute for a discernably long period and changes the direction and tone of the rest of the discussion.

Later, we discuss the disadvantages of “cold records” and the effect we must remain aware they have on the appellate court decisions the students will read in law school: how radically volume, tone of voice, and body language change our interpretation of a statement such as, “Neither you nor I shall have him. Cut him in two!” We will observe this effect again when we read the depositions in Clark v. Jones. Students also identify numerous facts that would have helped King Solomon make a more informed decision—students are experts at making problems easier by adding facts rather than struggling with those given—and eventually turn the corner to

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412 One problems students quickly identify is that it is difficult to discern from the New International Version of 1 Kings 3:16-26 which woman did originally bring the case by the time Solomon is about to cut the child in half.
413 Professor Sergienko’s experience with this is consistent with my own. See Sergienko, supra note 411, at 42-43.
414 Id. In Spring 2010, one class waded into the philosophical debate between predictable decision rules and individualized justice. Id. at 43.
explore procedures and litigation strategies that might have uncovered such facts.

** ** ** ** **

I thoroughly enjoyed your remarks at the end of class.

– Larry Sumrall, Civil Procedure I, Fall 2008

The last day of class in Civil Procedure I, I show up in jeans, my “Ed” t-shirt, and a flannel. In the final five minutes of class I ask for

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415 E-mail from Larry Sumrall, Student, Phoenix School of Law, to Author (Nov. 25, 2008, 00:06:00 MST) (on file with author).


(voice over:) Big-city lawyer Ed Stevens lost his job [for misplacing a comma while proof-reading a 500-page contract] and his wife in the same day. So Ed came home to find his high school dream girl he could never ask out.

Carol: “Who are you?”

Now, Ed’s starting a new life

Ed: I bought the bowling alley.”

with a different kind of law practice.

Judge: “Mr. Stevens, the ‘bowling alley lawyer.’”


But Ed never gave up

Ed (wearing suit of armor) to Carol: “Flowers for my lady!”

and found out that true friends last a lifetime.

Ed Season One Promo on NBC, http://www.youtube.com/watch?v=WtFEok1XuW0&feature=related (last accessed Dec. 26, 2010). From the very first episode, the show’s culture rejects everything about “BigLaw” for a world where Ed represents a local teacher who owes $1,600 to a local mechanic for installing unwanted hydraulics in her car; kills two birds with one stone with business development techniques such as free consultations to any patrons of Stuckeybowl who bowl three games; and confronts a manager who offers to sell him Japanese steaks from Lane 16 on Ed’s first day as Stuckeybowl owner. Ed (NBC television series pilot broadcast, Oct. 8, 2000).
attention one last time, and the tone of my voice never fails to produce an immediate hush. As I speak, I see smiles spread across many faces: some of the students behind those smiles will earn As, but many others will be glad to nail down their Cs in a school that is not shy about awarding Ds and Fs in first semester courses.

My students may never hear this message from any other professor. It is perfectly fine to represent drunk drivers; there’s a fascinating DUI jurisprudence, and you learn how to qualify and examine expert witnesses. There is no shame in representing the man in a domestic violence case; sometimes he did not do it, and orders have severe unintended consequences on the man as well as his partner and children.

Most telling is that Ed never reveals any resentment or disappointment about what happened to him. After explaining his forced career change in a promo presented as a stand-up comedy routine, Ed says, “Call it crazy? I call it the master plan. . . . For I believe in the magic of the first kiss, and I believe the American Dream goes on right here in the best town in the whole world. I live in Stuckeyville. I am Ed. Thank you.” NBC Ed Original Promo, http://www.youtube.com/watch?v=lexEQQiTmg&feature=related (last accessed Dec. 26, 2010).


The consequences of a domestic violence award are severe, given that in some jurisdictions domestic violence orders are often entered routinely based on little more than a request from an alleged victim. Cf. Caudill v. Caudill, 318 S.W.3d 112, 114 (Ky. Ct. App. 2010) (holding that domestic violence orders are not justified when the trial court acknowledged that it was a “marginal case” where it found as sole basis for entering order that husband pushed wife to get into marital residence). Not only is the alleged perpetrator, usually the man, ordered not to commit additional acts of violence and often required to stay a certain number of feet from the victim, but he can be ordered from his home, lose custody of his children, be subjected to a child-support order, be restrained from disposing of or damaging property of the parties, and be required to undergo various forms of mental health therapy. See, e.g., Ky. Rev. Stat. Ann. § 403.750 (2010). Domestic violence orders increase the likelihood that the subject will lose custody of children permanently or his parental rights may be terminated, see, e.g., Ky. Rev. Stat. Ann. § 620.023(d) (2010) (indicating that domestic violence against anyone in the home may be considered by juvenile or family court to determine best interests of child in any juvenile court custody hearing); Ky Rev. Stat. Ann. § 600.202(1)(b) (2010) (defining “dependency, neglect or abuse as inflicting or allowing to be inflicted upon a child "emotional injury"); H. Morley Swingle, Angel M. Woodruff & Julia A. Hunter, Unhappy Families: Prosecuting and Defending Domestic Violence Cases, J. Mo. B., July-Aug., 2002, at 220, 226, available at http://www.mobar.org/4156be19-b68b-4bec-b917-fb489972643a.aspx; cf. Ky. Rev. Stat. Ann. § 4-03.270(3) (2010) (parent should lose custody of child in dissolution action due to
Whiplash injuries often hurt a lot more than defense experts’ claim.\(^{420}\) Coaching a client through a Chapter Seven bankruptcy is an act of gracious generosity to one experiencing perhaps the most frightening event of her life.\(^{421}\)

Most importantly, you can dress like this most days if you want because the solo or small-firm practitioner is free.\(^{422}\)

Of course, freedom has its price, I explain. In many months, you will wonder if there will be anything left over after you pay your secretary.\(^{423}\)

domestic violence on a third party only if child affected by domestic violence). Federal law strips those named as perpetrators in domestic violence orders of their licenses to carry concealed weapons, 18 U.S.C. § 922 (g)(8) (2006 & Supp.), and state laws require they surrender such weapons to the court. E.g., KY. REV. STAT. § 237.110(11) (2010). Among other direct consequences, including criminal assault and homicide charges, Swingle, Woodruff & Hunter, supra, at 226, and potential federal sentencing enhancements in other criminal matters. 18 U.S.C. § 922(g)(8), (9) (2006 & Supp.). Indirect consequences sometimes include job loss, Swingle, Woodruff & Hunter, supra, at 226, impact on property settlements in divorces, cf. KY. REV. STAT. ANN. § 403.190 (2010) (marital misconduct should not play role in property awards). But see Stipp v. St. Charles, 291 S.W.3d 720, 723 (Ky. Ct. App. 2009) (noting that trial court’s findings of fact on appeal will not be disturbed unless “clearly erroneous,” and though review of conclusions of law is done de novo, property award is left to the sound discretion of the trial judge), arrest by mistake, cf KY. REV. STAT. ANN. § 403.755 (2010) (requiring law enforcement personnel to enforce domestic violence orders and protecting them from liability for doing so in good faith), and damage to reputation, Zachary C. Howenstine, Note, Conforming Doctrine to Practice: Making Room for Collateral Consequences in the Missouri Mootness Analysis, 73 MO. L. REV. 859, 879 (2008). I rely on Kentucky law here, because it was the state of practice where I observed many of these dynamics firsthand.


\(^{421}\) See MICHAEL B. KAPLAN, STACEY L. MEISEL, MICHAEL D. SOUSA, CONSUMER BANKRUPTCY MANUAL § 2:2 (2010).

\(^{422}\) Cf. LANDON, supra note 20, at 29 (describing country lawyers’ zest for autonomy and independence by noting community pressures that may limit them in practice); SERON, supra note 134, at 12-13 (describing solos’ desire for autonomy and independence though it is accompanied by significant financial vulnerability).

\(^{423}\) See LANDON, supra note 20, at 47 (noting that “the need to earn a living while building a practice . . . involves doing virtually whatever presents itself to be done.”); SERON, supra note 134, at 13-16 (describing a world of solos where few attorneys feel financially secure).
You live your life in the street, and your mistakes are all your own. Can you handle clients who wear overalls? The lawyer who works for someone else may wear better suits and work on more prestigious cases, but solos can attract interesting business, and a surprising number of small communities harbor at least one elite personal injury attorney. Plus, the employee-lawyer buys his superficial prestige with a life little better than that of an indentured servant. If you are willing to accept the consequences, you-the-solo can do almost anything you want and help countless people at the same time.

It's a good business, I conclude.

It is a romantic business.

Then I ask the students to line up so I can shake their hands as they leave the room. They survived their first term of law school!

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424 See Landon, supra note 20, at 48 (describing the importance of maintaining the right "reputation" for attracting clients), 140-44 (explaining how country lawyers police the conduct of colleagues), 145 (describing intense scrutiny of attorneys in small towns). But compare Seron, supra note 134, at 52-56 (describing how brokers, repeat clients, and referrals are biggest sources of business for many attorneys, with id. at 60 (citing attorneys who regularly attract business via Yellow Pages advertising).

425 E.g., Landon, supra note 20, at 39.

426 Some solos do build practices that conform to the urban bar’s notion of “prestige.” See Seron, supra note 134, at 38, 40-41, 59, 113 (describing solos in the New York City area with specialties in “corporate, business practice,” “plaintiff-side patent law,” “legal writing,” matters that may take them to hearings of legislative committees in the state capital, “women’s law,” serving international clients, immigration, and “appeal work”). Yet it is not clear that even less prestigious and volume-oriented practices in domestic, bankruptcy, small-dollar personal injury and criminal law are uninteresting. See, e.g., Landon, supra note 20, at 56 (noting substantial satisfaction among “country lawyers” with their careers), 60 (finding that “country lawyers” have “access to virtually the full range of practice matters”), 70 (“Variety and volume characterize [the rural practitioner’s] daily work.”); Seron, supra note 134, at 112-16, (describing commitment and need to exhibit strong interpersonal skills and empathy for personal plight clients). For example, many report rewarding civic, charity, and social activities directly related to attracting clients. See Landon, supra note 20, at 58-59, 86-92, 134; Seron, supra note 134, at 49, 53-56, 65.


429 See Mashburn, supra note 159, at 674-75.

430 I am struck that Professors Schwartz, Sparrow and Hess mention that one of their colleagues “shakes hands” with the students as they leave. I cannot believe this is original to me, but Professor Hess used to be one of my colleagues, so I will steal the hat tip! See Schwartz, Sparrow & Hess, supra note 54, at 133.