

A PARTING REPRISE

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It is hard to imagine the semester is already at an end. Finals are just around the corner. Before long, you will be through your second and third years of law school and, thereafter, to lives as lawyers. Less than fifteen weeks ago our journey together began. We have covered much terrain since then, you and I; and yet, in perspective, what a short and fleeting span. Is it not presumptuous of me to think of having accomplished with you anything substantial, to say nothing of having made an indelible mark on your education and training? Still, in even less time, Lawrence managed to cross the Nefud desert and lead disparate tribal bands to successful revolt against the Turkish army in Aqaba. Our conquests have been less grandiose—less cinematic, to be sure—but still I say conquests we have made. After having come this far, we are entitled to sit back and reflect on the journey taken.

Between now and the time you enter the world as lawyers, there is twice as much schooling still before you to complete. Yet, in many respects, you have already taken the first and most difficult step. You have begun to lay a foundation for how to approach the law: intellectually, professionally and ethically. As your teacher, it is my hope that you will remember some of the lessons I intended to impart. What teacher does not wish it to be so! In the maddening rush through your first semester of law school, though, I fear you may have been distracted at times by what must have felt like a wild footrace to keep up with the course reading, by the demands of your other classes, and—dare I say—even of your own personal lives (yes, the world outside of school defiantly continued turning, unabated by your recent anointment as first-year law students). I want to take this opportunity, then, to spend a little time summarizing what I sought to accomplish in the course and what it is I would like you to take away from this experience. If I have done my job well,

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then much of what I am about to say will sound unnecessary and transparent, like I am clubbing you over the head with lessons already assimilated.

As I endeavored to stress from the outset, a single theme characterizes my pedagogic choices in organizing this course. That theme is that the most exciting, effective, and enriching way for me to teach the first-year class in Civil Procedure is to teach “by example.” It is a concept with three different, but associated, meanings.

Teaching by example signifies that I place little emphasis on rote memorization of rules and doctrines, preferring instead to focus on how the law actually works. Acquiring knowledge of written law (that is, in the sense of the open-a-book-and-find-it variety) is a part of what is required of your legal studies, but it is only one part. Beyond knowledge, there is comprehension, application, analysis, synthesis and evaluation.¹ To encourage you toward more constructive and advanced learning, we worked with concrete exercises and hypothetical problems as a complement to our reading. By placing the law of procedure into a problem-oriented learning process, you were exposed to authentic examples of legal decision-making and asked, thereby, to respond to the material by thinking about law as lawyers must.

Teaching by example also means that I focus on a smaller number of subjects in procedure—that is, on a few *examples* of the law of procedure—rather than try to expose you to a smorgasbord of topics, not a single one of which you know in any detail or for which you have any appreciation of its true complexities. Through careful consideration and rigorous dissection of the material we do cover, my aim is for you to begin to acquire independent tools of legal reasoning that you may then apply on other occasions. Broadly stated, I seek to train and encourage you to think through and assess legal questions on your own and to help you construct a well deep with self-sustaining analytic abilities from which you will be able to draw for years and years to come.

The third, and last, respect in which I invoke teaching by example is as shorthand for saying that this course is concerned not only with the “law of procedure,” but also with emphasizing and identifying the ethical boundaries and context in which legal problems and issues necessarily arise. The technical term for this is teaching ethical norms through the pervasive method.²

1. See TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK I, COGNITIVE DOMAIN (Benjamin S. Bloom et al. eds., 1956) (classifying different degrees or levels of intellectual tasks relevant in learning); see also DONALD H. JONASSEN ET AL., HANDBOOK OF TASK ANALYSIS PROCEDURES, ch. 12 (1989) (discussing “Bloom’s Taxonomy of Educational Objectives”).

2. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD, at xxix (1994) (observing that “[p]rofessional responsibility questions should be addressed in all substantive courses because they arise in all substantive fields, and because their resolution implicates values that are central to lawyers’ personal and professional lives”).

In plainer English, it means I do not believe it wise to teach a subject as powerful and as potent as Civil Procedure without trying to install some sense of the professional responsibilities that ought to flow from its embrace.

TEACHING BY EXAMPLE STRESSES ANALYSIS AND APPLICATION OVER
MEMORIZATION OF RULES AND DOCTRINES

The first sense in which I mean I teach by example is that I value studying cases and problems not because they are vehicles for memorizing legal rules and doctrine, but because they can be used to introduce you to the kind of rigorous cognitive exercises in which all good lawyers must engage. Rather than working exclusively from the cases, statutes and rules contained in our casebook, we wrestled with hypothetical problems and exercises throughout the semester as a supplement to and overall framework for our studies. The goal was to have you not just think abstractly and passively about a legal issue or a set of facts, but to push you to create something tangible: draft a pleading, frame a request for relief, lodge an objection, or make an argument. My objective, thus, was to encourage you toward active learning—toward the constitution of the tangible. The end product of your study became something you could pick up and hold in your hand and in your mind; something you could turn over and critique, analyze, assess and improve upon; something more than just a summary you read about what someone else had done.

I have found that students do not come to this style of learning easily or with much enthusiasm. Conventional teaching, as typified by the lecturing model, is based on the idea that teachers impart knowledge into empty, expectant vessels waiting passively to be filled. Having been conditioned to accept this traditional form of educational instruction, what Paulo Freire and bell hooks have called the “banking system of education,”³ most of the vessels find the traditional pedagogic approach unthreatening. In law school, the belief that course material can be imparted through straightforward recitation of the law comports jurisprudentially with a formalist view of our legal system. For formalists, rules and doctrines are assumed to be definite and ascertainable.⁴ As a result, the lecturing style of teaching fits comfortably with a formalist approach to teaching law that assumes there are answers to be gleaned and conveyed from careful study of the relevant authorities; and answers, especially for those who have just begun their studies in the field, are welcome indeed.⁵

3. BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 5, 14 (1994).

4. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (discussing the rise of formalism in America in the latter part of the nineteenth century).

5. Note that the “Socratic” style of teaching, usually associated with law school teaching,

It must surely, then, have caused a great deal of anxiety for many of you that this course always seemed woefully short of answers. Although those early dog days of August may seem a distant memory now, think back to our earliest classes and you may recall the confusion and uncertainty you felt then. Consider, for instance, how we treated the subject of Rule 8's pleading requirements. After you had read some of the relevant cases, I asked you to draft a complaint, based on the results of an in-class mock client interview we had previously conducted. Your first reaction to all of the demands being made on you to create and think, not merely to read and regurgitate, naturally might have been: "I have no idea what should go into a complaint. I'm not a lawyer. I've only just begun law school. Why can't we see an example of what a lawsuit should look like so that we can use it as a model for drafting this one?"

I must confess these reactions were hardly unexpected. The question you may be asking, then, is why did I insist on this exercise if I thought that many or most of you would dislike it or be even further frustrated by it? My explanation is thus: drafting a lawsuit forced you to wrestle with the actual application of the case law you read to a particular fact pattern you had been given, rather than just debating how close or how far any particular case was from the standard promulgated by Rule 8 and as refined by common law precedents. If I had asked you how much factual information needs to go into a pleading to satisfy Rule 8, based on your reading of the Supreme Court's precedents in *Conley v. Gibson*,⁶ *Leatherman v. Tarrant County Narcotics & Coordination Unit*,⁷ or of particularly important lower court decisions like Judge Keeton's in *Cash Energy, Inc. v. Weiner*,⁸ what kind of answer would you have given? Indeed, is there an answer to this question in the abstract? By insisting that you take the doctrinal background and apply it to a particular fact pattern, you were forced to synthesize, as much as possible, the relevant authorities. In the language of educational theory, you were being asked to produce an authentic response to what you read about the law of procedure—

could just as easily as not be bottomed on a formalist view of law. One could prod students by asking a series of questions about the material covered and still maintain that the law is definite and ascertainable. Indeed, Christopher Columbus Langdell, the iconic image of formalism in the law school classroom, was also the popularizer of the Socratic style of teaching at Harvard Law School. See generally KRONMAN, *supra* note 4, at 170-74. Relating formalism to Socratic technique may be merely an entirely academic exercise anyway, insofar as the most reliable figures suggest that less than a third of professors teaching first-year courses rely primarily on the Socratic method, while nearly 95% of those teaching upper level classes lecture, at least some of the time, to their students. See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28-29 (1996).

6. 355 U.S. 41 (1957).

7. 507 U.S. 163 (1993).

8. 768 F. Supp. 892 (D. Mass. 1991).

that is, you were directed to act as lawyers must act when addressing legal issues as they arise.

At the end of the exercise, most of you may not have fully digested the lesson. Many, of course, still yearned for a definitive answer about pleading and still urged that we pinpoint precisely how much detail must be included in a complaint. But even as old habits and attitudes die hard, the process of working through problems and trying your hand at drafting exercises—rather than viewing the question only from the perspective of a dry appellate record—slowly, but surely, began to make some sense. As the semester wore on, more and more of you gradually became less and less uncomfortable with the idea that we were not going to provide answers in class. Having undertaken one exercise after another, the thought eventually began to percolate around the room that there might be more than one right way to put together the allegations of a lawsuit, or to draft discovery requests, or to respond to a summary judgment motion, and on and on. You began to see that there was no Answer, in the sense of some all-encompassing Truth, whether we were talking about the requirements of notice pleading or most of the other topics we addressed. There are boundaries to the law with which one must be familiar, to be sure, but the rules rarely come in one-size-fits-all packages.

My preference for active learning and for framing the in-class conversation around constructive understanding gained through application and analysis over recitation of formal rules is hardly revolutionary. Long before I began teaching, formalism's once firm hold on law school classrooms already had been thoroughly loosened.⁹ Today, it is surely right that most law professors favor more nuanced approaches to legal study than Christopher Columbus Langdell would have recognized or understood. Yet, if formalism's heyday has come and gone (as Jerome Frank¹⁰ and, more recently, Andrew Taslitz¹¹ remind us), the ghost of our Langdellian past still haunts the modern law classroom. How could it be otherwise? I have argued elsewhere that the assumptions about law embodied in formalist thinking are firmly rooted into our societal constructs about the rule of law in general and, to a large extent, may be inherent in the essential base of legitimacy upon which our American judicial system rests.¹²

In the context of the law school classroom, students certainly welcome the traditional approach to legal study. They instinctively feel less threatened by more straightforward recitation of the subject matter. From the instructor's

9. See generally KRONMAN, *supra* note 4 (discussing the demise of formalism, and the role of legal realism, law and economics, and critical legal studies).

10. See Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 21 (1951).

11. See Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143, 143 (1991) (book review).

12. See generally Lonny Sheinkopf Hoffman, *A Window Into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533 (2001) (book review).

vantage point, teaching is not only made easier by reciting that which is knowable and certain, but it also serves as a measure of academic validation. “*I am sir Oracle—and when I ope my mouth let no dog bark.*”¹³ If I, as your professor, lack some superior body of finite and complete knowledge (something upon which I may *profess*), what claim do I have to the podium? Answers—definite answers in the form of black and white rules and clear doctrinal principles—are instant gratification to the newcomer and barometers of accomplishment for the teacher. Formalism is dead; long live formalism.

As with much else in life, I think the more sensible view is to recognize that the pedagogic debate about formalism and its place in legal pedagogy is a matter of emphasis and degree. With other like-minded souls,¹⁴ I believe I endeavor with greater fervor than most to move far away from a doctrinally-centered view of law. On the whole, I prefer application to answers; rigorous thinking to rote recitation of authorities. One of the perceived costs of this pedagogic orientation is that it engenders feelings among students of uncertainty and indeterminacy, at least in the short run. The law never seems settled with the rules pliable to the point of breaking. In practice, however, and over the long run, I think you will find that the kind of intellectual efforts we cultivated here will turn out to be the bread and butter of what you will be asked to do for your own clients. Our in-class efforts were meant, in some measure, to be a valuable practical experience and to provide a training ground of sorts for your future work. By insisting on placing legal questions in a concrete context, the main objective is to encourage students toward the kind of active, applicative learning I think ought to be an integral component of the legal education experience.

I have watched a handful of truly great lawyers represent their clients and, without exception, all of them share at least one remarkable skill: the sage ability to discern that in the hard cases it is usually the *facts*, and not the law, that matter most. The law is never irrelevant, of course, but where there is a legitimate dispute between two or more persons, the relevant rules serve only to frame the context of the debate; by themselves, they do not predetermine outcomes. Memorizing case holdings and legal doctrine will never lead you closer to becoming a great lawyer; and while a successful career surely is not defined solely by the ability to apply your knowledge of the facts of a particular case to the relevant law and then to analyze wisely, these are, nonetheless, essential traits that you must have if you are to be a valued counselor and advocate for others.

13. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 105 (1960).

14. See, e.g., Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the CaseFile Method*, 44 ST. LOUIS U. L.J. 1289 (2000) (discussing his CaseFile Method of study); see also EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* (4th ed. 2000) (applying problem-based approach to property law casebook).

TEACHING BY EXAMPLE EMPHASIZES CAREFUL ATTENTION TO DETAIL OVER
A BROAD SWEEP THROUGH AN ENTIRE FIELD

The second sense in which I have tried to teach this course by example is by focusing in detail on a smaller number of subjects in procedure rather than undertaking a broad sweeping coverage of the entire field. I have grand ambitions here: to produce students capable of thinking on their own and, thereafter, capable, thinking lawyers. The ambition is grand precisely because it is all too often the case that law students are not trained in a manner that encourages the development of independent reasoning ability. Students then matriculate to the profession without having worked on strengthening this essential skill set. Rigorous teaching can and does take place in law school but the forum, more often than not, is a smaller setting than the first year, large class experience (such as seminars, other small, intensively-focused classes and independent study projects with faculty members). By the time students take these courses, however, attitudes toward law and legal study largely have been set. Eventually, experience in the workplace may fill the holes left by formal legal education but the costs borne will have been substantial: for the lawyer, for her employer and, most of all, for the client. To my mind, as educators, we should strive in the very beginning of a student's studies to inspire good intellectual habits by sifting of the vast riches that can be mined from the development of keen analytic capabilities and from the cultivation of a temperament willing to endure the hard, lonely work that careful and rigorous study usually requires.

In consciously narrowing the number of procedure topics covered in the course, I recognize I am inviting controversy from both students and colleagues who may be concerned that an insufficient quantum of knowledge is being imparted. If I am going to make a convincing case for my pedagogic approach, then it is necessary to begin by recounting what was covered and what was left out from the class, though from having sat through the course you may already have some sense of the lacunas. Our syllabus provides a summary of the topics we examined, broken down into the eight main subject areas as they were addressed:

- (i) Pleadings and related issues (fair notice and special pleading requirements; sanctions; answers and affirmative defenses; amendments; counterclaims and cross claims);
- (ii) Personal jurisdiction and related issues (statutory and constitutional limits on the exercise of territorial jurisdiction; notice and service of process; venue and transfer; forum non conveniens);

- (iii) Subject matter jurisdiction (diversity jurisdiction; federal question jurisdiction; supplemental jurisdiction and removal);
- (iv) Choice of law (brief discussion of *Erie*);
- (v) Pretrial discovery (scope of discovery; written discovery; depositions; initial disclosures and other timing issues; responding/objecting to discovery; discovery disputes);
- (vi) Judgment as a matter of law;
- (vii) Additional parties/claims; and
- (viii) Preclusion law (brief discussion of general principles of res judicata and collateral estoppel).

Even this list is misleading insofar as we did not devote equal attention to all of these subject areas. Noticeably absent are several major topics that nearly all procedure casebooks and—I suspect—a good number of my procedure colleagues around the country do cover. Class actions and complex litigation were omitted entirely. We never addressed the subject of interpleader. The subject of prejudgment remedies was left out. We spent virtually no time either on trial practice and procedure or on appellate procedures, except as certain discrete subjects arose coincidentally with some other part of our conversation. I have no doubt that this list of topics not addressed surely could be expanded further and further. It is, quite clearly, then, an incomplete list. By extension, has not your exposure to the subject of Civil Procedure also been incomplete? Should you ask for your money back?

I have two answers to offer in defense of my pedagogic decision to focus on depth over coverage, although I hasten to add that I regard the former as less my reason for acting than is the latter.

I left off certain topics, not because I think they are unimportant, but rather for the more pedestrian reason that most of you, over the course of your entire careers, will either never come across these legal topics directly in practice, or you will address them very, very infrequently. For my own part, I find virtually the entire field of procedure fascinating. After this year is done, I would be delighted to work with you, through independent study or as a mentor on a law review note, regarding any of these or other topics. For those who know they will need more in-depth coverage of a subject, I encourage further exploration. If you are inclined toward banking law, then take our banking law offerings and immerse yourself in the mud of interpleader actions to your heart's content. My own, best pedagogic judgment, however, is that the topics we covered in class will arise most frequently in the practices of the

vast majority of students—and here I have tried to keep in mind that this room may be filled with as many future transactional lawyers as litigators—and that it is a better service to concentrate our efforts on the issues most of you are most likely to encounter.

There is a second answer I want to give to explain my pedagogic choice. It is, as I indicated before, the more compelling motivation for my adoption of this approach. Through my decision to focus on fewer topics in more detail, I endeavor to challenge you to truly learn something, to digest an issue fully and precisely so that you can draw upon your acquired skills in future study or work. I choose this path instead of seeking to expose you to “everything” related to procedure, as though that were even possible. I believe I have done my job well if I succeed in producing students who are able to think and reason through legal issues on their own, rather than merely attaining a passing familiarity with a topic but no real sense or understanding of it. In short, my guiding philosophy is that I care much more *that* you learn and *how* you learn than about *what* you learn.

Educational theorists would describe this approach as pushing students beyond the “zone of proximal development”; that is, beyond the level of learning they could otherwise obtain on their own.¹⁵ Put another way, rather than merely urging fluency in the vocabulary of the law, I believe that as a teacher I ought to be asking, “What can I do to help students gain a more lasting and deeper intellectual framework than they would otherwise possess if they had not taken this course?” By teaching a smaller number of subjects in greater detail, my firm pedagogic belief is that students will leave more capable of applying their acquired legal acumen to any problem, whether the particular issues were addressed specifically in one of their law school classes or not.

I believe it bolsters the case for teaching procedure by example to say that the subjects one could cover in this course, to a large degree, are fungible. I have created my own list of must-cover topics. Other syllabi may look somewhat, or even markedly, different than mine. Rather than regard these differences as indictments, I view them as confirmations that the subject of procedure is an excellent tool for teaching students how to think critically. Because procedure cuts across the entire legal landscape, I am able to address the entire class at once, without regard to whether you will become estate law lawyers or tax lawyers, environmental lawyers or lawyers who specialize in tort law. It also does not matter whether your career choice is litigation or transactional work. Procedure is relevant to everyone. As a result, I can employ any number of subjects falling under the general rubric of procedure to aid in the development of the skills that are important to all students in

15. L. S. VYGOTSKY, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES 86-87 (Michael Cole et al. eds., 1978).

becoming successful lawyers and critical thinkers. I could not do the same if I were teaching an advanced course with a specific focus. It is precisely because the contexts in which you will encounter procedural issues are so vast and so innumerable, that I believe it makes little sense to try to pretend it is possible to cover all subjects in the field. Instead, my role is to help sharpen the intellectual tools that will serve you well in a number of different contexts.

There is time enough in later classes, and later in life, for you to become familiar in detail with particular questions and points of law. This course and law school, in general, are of most value if you are pushed to truly dissect a problem, to turn it upside down, to examine it from every side and then, finally, to carefully produce a thoughtful answer. This is a fundamental part of real teaching and learning. By contrast, I do not comprehend how students are served by wide, unfiltered sweeps through vast terrains. Even if the sole measure is how many right answers to legal doctrinal questions will students get after they have taken the final exam and moved on to other courses, conventional law school teaching, particularly as found throughout the first-year curriculum, usually disappoints.¹⁶

A Jewish fable recounts how a famous pianist once was asked how he managed to be so adept in playing the musical notes. To the question, he replied, "The notes I handle no better than many musicians, but the pauses between the notes—ah! That is where the art resides." In law, the pauses between the notes may be likened to the exacting skill of knowing when and how to slow down long enough to ponder a question more deeply than the next. The rules that may apply to any one particular case are readily ascertainable; any conscientious person ought to be able to find them, along with the pertinent case law. But it is the student who has not merely knowledge but a *command* of the law who is exceptional. Stand back! For when you hand her the same rule book, the words may fly off the page. Watch her wield the law, as a sharpened tool—no, better still, as a precisely tuned instrument—to reach the desired result for her client. Having mastered this rare ability, she is one of the few who is capable of recognizing and then invoking the enormous power that lies within the formal rules.

TEACHING BY EXAMPLE EMPHASIZES THE ETHICAL CHOICES AND RESPONSIBILITIES INVOLVED IN BEING A LAWYER

There is, finally, a third respect in which I have tried to teach Civil Procedure by example. I have stressed that there is much more to being a lawyer than merely knowing the law. There is also the challenge of recognizing and then acting on one's ethical obligations: to clients, to other lawyers and to the judicial system.

16. See, e.g., Leslie, *supra* note 14, at 1293 (discussing results following pop quiz given to students).

One irreducible component of a lawyer's professional responsibilities is to treat people with respect and to honor the views, opinions and arguments of others. In the classroom, I regard respect—both as a matter between teacher and student and among students—as an essential element that must be nurtured. In this regard, consider Leigh Van Horn's description of how vibrant educational environments are created and sustained at the secondary school level in her book, *Creating Literary Communities in the Middle School*:

There must be more to my role in developing and sustaining the community than my outward expressions of enthusiasm. The word "respect" is one that is frequently used by my students as they describe aspects of teacher behavior they consider important to their own growth. How is it that we show our students that we have respect for them? It occurs to me that respect is reflected in various ways—our willingness to participate in the learning experience as we work alongside our students, the emphasis we place on learning from one another, the way that we honor the products of our learning, and in the way that we care for one another.¹⁷

I have long felt that law academia has much to learn from the scholarship of teaching and education in other fields. Although we teach to different students, and for different purposes, what we do is fundamentally no different, in my estimation, than what any instructor must do to teach effectively. In my law school classroom, creating an environment of mutual respect is paramount. I never call on students to intimidate them. Rather, I do so to encourage students to wrestle outside of class with the ideas, arguments and issues about which they have read and to come prepared to defend a viewpoint (or, at least, be able to articulate various sides of a debate). I recognize that it is a tricky business at times, particularly since I want to encourage volunteers to answer as well, and not set up a culture that only the person who is "on" should be involved in the discussion. Moreover, it is obvious that some are not as keen on speaking out in class as others.

I regard it, therefore, as one of the most rewarding compliments I have received to be told that those who choose in other settings to be silent, out of fear, intimidation, or merely disinterest, choose instead to come to my class prepared and ready to engage in the daily classroom dialogue. This evidence of the blossoming of mutual respect—as it occurs between teacher and students, and among students—helps create the trust upon which a vibrant learning community depends. And make no mistake, the yield that is produced by the fostering of a healthy and dynamic learning environment truly should be valued at a price far above rubies. Students come prepared to converse, argue and debate, but also with a willingness to consider and listen to the viewpoints of others. Class discussions are made richer by having a greater and wider

17. LEIGH VAN HORN, *CREATING LITERACY COMMUNITIES IN THE MIDDLE SCHOOL* 18-19 (2001).

degree of student participation. Best of all, the dialogue often does not travel unilaterally merely from teacher to student and back again, but flows multilaterally. A chart of many of our discussions would trace a path from teacher to Student 1, then to Student 2, back to teacher, to Student 3, back to Student 1, and so forth. In this more complex web of dialogue and discussion, both individualized and collective learning experiences take root. As the professor, I cannot ask for more.

Building on our classroom experiences, I emphasized throughout the semester the importance of taking these lessons about respect and applying them to thinking about your soon-to-be future lives as lawyers. The responsibility of being a lawyer triggers professional obligations of decency, honesty, promptness, diligence, and general professional courtesy to other lawyers, to your clients, and to the judicial system. Some of these traits are naturally self-enforcing. In seven years of trial practice, I rarely saw a lawyer behave badly in court. Like the unruly child in grade school, unprofessionalism in lawyers tends to rear its ugly head only when the teacher is not looking. Acting professionally should not depend upon whether there is oversight, though. It should be instinctive and expected. Alas, we cannot depend entirely on people doing the right thing only for the sake of doing the right thing. As a result, there are punitive rules in place to deter malfeasance. The extent to which they do so, however, is a matter of some debate.

In addition to the exogenous rules the system imposes on all lawyers, I want to suggest there is another incentive that is particularly potent in encouraging lawyers to strive to take the highest ethical and professional road available. I am referring to the enormous power produced through the cultivation of an upright, honorable reputation. A personal story may help illustrate this point.

When I was in practice, I represented an investment brokerage house against one of its former clients. The client alleged that the company and her agent, in particular, had treated her very badly by churning the account. By this allegation it was meant that the agent (and through the agent, the company) encouraged her to make many small stock transactions that, on the whole, benefited the company and the agent more than the individual by generating commissions through investments that were not always client-appropriate and on which the returns were often sub-par.

One of my main client representatives was the compliance officer for the company. His job was to oversee all of the investments made by the brokerage agents on behalf of their clients, in order to ensure that these transactions were all proper and that everything done was in compliance with the existing securities laws, rules and regulations. During the pretrial phase of the case, I worked with this compliance officer to collect and then produce for the other side all of the documents that the company maintained that were relevant to the case. After I was satisfied I had done a thorough investigation to locate all

relevant records, I submitted all of the material that had been gathered to counsel for the claimant.

Opposing counsel and I disagreed on plenty of occasions throughout the case. Notwithstanding these differences, we managed to treat each other decently, courteously and respectfully. In effect, we amicably agreed to disagree. In this manner, each of us represented our respective clients' interests zealously, but still acted within the bounds of our professional obligations to each other.

The day of trial finally arrived. After opening statements, opposing counsel called their first witness to the stand. By mid-afternoon, several more witnesses had testified briefly and things appeared to be proceeding slowly, but surely, forward. Then, just before our afternoon break, opposing counsel called the company's compliance officer to the stand. The compliance officer had only been on the stand for about half an hour or so when the judges decided to take a brief fifteen-minute break. I never could have predicted what was to happen next.

Immediately upon the recess being called, the compliance officer approached me to ask if we could talk in private. For reasons that I do not think I will ever fully understand, for the first time ever in the case, the compliance officer confessed that he had withheld documents. As he now told me, about a month before this lawsuit had been filed, he had taken some files pertaining to the claimant and put them into his garage.

"Why are you telling me this only now?" I asked, stunned. Silence followed. "And why did you take them to your garage in the first place?" But he offered no explanation that made (or makes, even today) any sense.¹⁸ In retrospect, my best guess as to why he decided to come forward at all rather than remain silent is that this man suddenly found himself jolted into confession. It was as though his appearance on the stand as a sworn witness somehow ignited within him a profound sense of ethical torment. Possibly, this feeling had already been building inside of him for some time, and his sitting on the witness chair was a final straw, the necessary spark, to cause this eruption. I do not know for sure, and I suspect I will never know. I certainly did not know at the time. What I did know was that he was about to return to the witness stand to continue testifying and I had to do something about this new information I had just been given.

Returning to the proceedings, I began by explaining I had just been informed by the witness—literally out in the hallway—that there were additional documents relating to the claimant at the compliance officer's home.

18. What surely makes the story stranger still is that when the documents were finally produced, it turned out that none were particularly probative of the claims being made in this case, although we had little sense of this at the time he made his abrupt announcement in the middle of the hearing. What mattered then, of course, was the appearance of impropriety.

I explained that I had not been told of the existence of these documents before and that, to my knowledge, no other company official had known about them. I expressed my commitment to proceed in whatever fashion the court and the claimant's lawyer thought best, given the extraordinary circumstances.

I can still recall the silence that followed my short remarks. It was palpable and tense. After some time, the lawyer representing the claimant spoke. "I am deeply troubled by this announcement," he began,

and I beg the Court's indulgence to consider what is the best approach to take, under the circumstances. I suspect that an immediate suspension of the trial is in order so that we be given an opportunity to review these newly-discovered documents. After we have an opportunity to do so, I will be in a better position to advise the court on how I think we should proceed.

He then turned and looked directly at me.

I want to add, however, that I do not doubt for a minute that Mr. Hoffman was as taken aback by this announcement as I have been. Throughout my dealings with him, I can say without qualification that he has always acted professionally and with the highest degree of integrity. We have not always agreed about all things in this case, but I am certain that if he had known about these missing records beforehand, he would never have kept it secret. I am not as confident about the integrity of his client, but this should cast no black mark on his record.

As I reflect on the moral of the story, I am reminded of my childhood little league experience. I was never a very good baseball player. When I found myself at bat (which was rare, since that necessitated having me occupy right field, which I did far less adeptly than occupying the right side of the dugout bench), I would often shut my eyes just before the pitcher's release. At times, I liken the experience of being a lawyer to standing there in the batter's box, unprotected and blind. More often than not, we do not see the pitch coming. It whizzes by, and the hot wind trailing behind sends a surge of adrenaline through the body, but it is already too late. The collision either has happened or it has not. Even if we manage to keep our eyes open, unexpected occurrences in our work, as in life, are inevitable.

One of the lessons I take away from my experience in this case is that we ought to act honorably not solely because it is the honorable and right thing to do. We ought to act honorably, as well, precisely because it is not possible to foresee all difficulties we will face in the future. If this sounds pretextual, it is not intended in that way. I did not treat my opposing counsel with respect because I anticipated problems would arise later in the case, and I certainly did not work at building a reputation as a lawyer whose word could be relied upon because I thought I might need to cash in down the road. But knowing that reputation matters—that for a lawyer it is often all that matters—can serve as a powerful reminder that even if there is no way to insure against all unforeseen occurrences, it is still prudent to try, in the main, to fortify ourselves in

advance. We are still going to get hit, of course, though probably not as frequently, and the resulting damage may often be sustainable.

CONCLUSION

One of my intellectual heroes, Karl Llewellyn, once spoke to his own class of students at Columbia, exhorting them to rise to the challenges they would face in law school and beyond:

What I am trying to write in fire on the wall is that the task before you is immense, is overwhelming, and that the official courses of the school are not enough to compass it. "TEKEL: thou art weighed in the balance and found wanting." To do the work is not: to do the classes. Rather must you immerse yourself for all your hours in the law. Eat law, talk law, think law, drink law, babble of law and judgments in your sleep. Pickle yourselves in the law—it is your only hope.¹⁹

The effort required of you is great, but there is no other way around it. This is how it must be with your education and training. I can provide a suitable and encouraging forum in which learning can take place. I can create an environment that is conducive to rigorous thinking and study; but I cannot do it for you. As Llewellyn put it, "[W]e do not teach—you learn."²⁰ At the end of the day, when this course is over, and you have graduated from this place and entered the world as lawyers, you will be on your own. Still, take comfort: the work you have done here and the habits you form as students *can* carry you a great way. The question is only whether we have provided a brilliant space in which you may thrive, and whether, then, you will make the commitment to do so.

19. LLEWELLYN, *supra* note 13, at 110.

20. *Id.* at 109.