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TEACHING CIVIL PROCEDURE WHILE YOU WATCH IT DISINTEGRATE

*Stephen N. Subrin**

The map of Europe, Northern Africa and the Arab nations published in Monday's editions contained the following errors: Libya was labeled as the Ukraine; Bulgaria and Romania were transposed; Bosnia-Herzegovina was identified as Bosnia; Montenegro should have been identified as a separate state bordering Serbia; Cyprus and the West Bank were not labeled; Andorra, a country between France and Spain, was not labeled; the Crimean Peninsula appeared twice on the Black Sea; Kuwait was not identified by name, instead the initials of the Knight-Ridder News Service were in its place.¹

I. WHILE YOU WATCH IT DISINTEGRATE

So often these days we hear someone say: "My world is falling apart, forcing me to question my assumptions and threatening my sense of security." Is that what is happening to civil procedure? Is my field really "disintegrating?" Weigh the evidence.

A. *The Changing Procedural Landscape*

Most of us were introduced to civil procedure by the Federal Rules. It is commonplace to point to their characteristic ease of pleading and amendment, breadth of potential joinder of parties and issues and liberal discovery. Also well documented is their underlying philosophy: the importance of uniformity

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¹ *No Comment Department*, THE NEW YORKER, Feb. 22, 1993, at 182 (from the Norfolk (Va.) *Virginian-Pilot*).

from court to court and from case to case, and the twin virtues of simplicity and flexibility. That the Federal Rules simultaneously offered lawyers procedural latitude and judges enormous discretion is beyond realistic debate.²

Judicial discretion aside, this procedural world has now largely collapsed. Since 1980, amendments to the Rules have been predicated on an entirely new set of assumptions, what Professor David Shapiro has called a "sea change."³ The 1983 amendments brought the new Rule 11, designed to force lawyers to "stop and think" before filing documents,⁴ provisions designed to contract the scope of discovery,⁵ and the explicit enlargement of the "subjects to be discussed at pretrial conferences."⁶

The new ideology emerged in 1976 at the Pound Conference, called to celebrate the seventieth anniversary of Roscoe Pound's famous speech on the popular dissatisfaction with the

² CHARLES A. WRIGHT & ARTHUR R. MILLER, *CIVIL FEDERAL PRACTICE AND PROCEDURE* §§ 1041-50 (2d ed. 1989) (cumulative effect of the civil rules). The early amendments followed the same assumptions as the original Federal Rules of Civil Procedure ("Federal Rules") and carried them further. Consider, for example, the 1948 amendments eliminating the bill of particulars, and the expansion of the compulsory counterclaim and cross-claim rules the same year. FED. R. CIV. P. 12(e), 13(a), 13(g). In 1966, an amendment to Rule 14 permitted early impleaders without leave of court. FED. R. CIV. P. 14. The new class action rule the same year made the device less rigid and more accessible. FED. R. CIV. P. 23. In 1970, insurance agreements were explicitly added to the types of non-admissible evidence that one could discover. FED. R. CIV. P. 26(b)(2). In the same year, Rule 34 was amended to add production of documents to the means of discovery in which lawyers could engage without obtaining permission of the court. FED. R. CIV. P. 34(a).

³ David L. Shapiro, *Federal Rule 16: A Look At the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989). Professor Shapiro was speaking primarily of the 1983 amendments to Rule 16, and the movement towards managerial judging. Concern about discovery abuse already had been manifested in 1980 when "widespread criticism of abuse of discovery" was sufficiently intense to result in the addition of the Rule 26(f) discovery conference. FED. R. CIV. P. 26(f) (Advisory Committee's Note to 1980 amendment). But the Advisory Committee believed that "abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases." FED. R. CIV. P. 26(f) (Advisory Committee's Note to 1980 amendment). Justice Powell, joined by Justices Stewart and Rehnquist, dissented to this amendment to express his disappointment at the timidity of the amendments in only adding discovery conferences as a discovery-containment device. Lewis F. Powell, Jr., *Dissent from the Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521 (1980).

⁴ FED. R. CIV. P. 11 (Advisory Committee's Note 1983 amendment).

⁵ FED. R. CIV. P. 26(b)(1) (second paragraph added in 1983).

⁶ FED. R. CIV. P. 16(c).

administration of justice. Chief Justice Burger used the occasion to attack the "handful of members of any profession [who] can inflict harm out of proportion to their number, on both the public and on the image of their profession."⁷ The Chief Justice followed with the time-honored and virtually always-true accusations of unjust delays and excessive costs in civil litigation, and urged flexible and informal neighborhood tribunals, greater utilization of arbitration and correction of "abuses of the pretrial processes in civil cases."⁸

At the same Conference, former United States District Judge Simon H. Rifkind complained of the "backbreaking burden which the courts are carrying" because of "the litigious character of our citizenry." He queried whether the courts should continue to be "problem-solvers" rather than "dispute-resolvers." "Our reflection," it seemed to him, "ought to address itself to the question whether the tether which holds the court . . . is straying into the territory which more appropriately belongs to the Legislature, the Executive Commission, the Legislative Committee, or even to the academic self-selected task force." He questioned what we can do "to keep out the worthless, the trivial and those litigations which, by a definition not yet formulated, ought not to be in the courts?"⁹

Francis R. Kirkham, at the time Chairman of the Anti-trust Section of the American Bar Association, also complained at the Pound Conference about the abuses resulting from "notice" pleading and virtually unlimited discovery in some large cases:

Judges throw up their hands and ask how they can examine a mil-

⁷ Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation* (keynote address), in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 29, 31 (Leo Levin & Russell Wheeler eds., 1979) [hereinafter *THE POUND CONFERENCE*]. This "few bad apples" rhetoric echoed David Dudley Field who sought change in the mid-nineteenth century, and Thomas Shelton and other Federal Rule advocates in the early twentieth century. David D. Field, *What Shall Be Done With the Practice of the Courts?* (Jan. 1, 1847), in *1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 226, 239 (Abram Sprague ed., 1884); see *Simplification of Judicial Procedure: Hearings on S. Res. 522 Before the Subcommittee of the Committee on the Judiciary*, 63d Cong., 3d Sess. 12 (1915) (testimony of Thomas Shelton, who argued that uniform Federal Rules would make it "go out of fashion to be a 'procedural sharp.'").

⁸ Burger, *supra* note 7, at 31-35.

⁹ Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, in *THE POUND CONFERENCE*, *supra* note 7, at 53, 56, 58, 61 & 63.

lion documents and say whether they are relevant, and the problem is all too often solved by simply giving plaintiffs access to all defendant's files and records, relevant and irrelevant. And thus the second evil emerges—a massive and unequalled invasion of privacy and business records.¹⁰

At the same Conference, Professor Frank Sander urged participants to consider the “significant characteristics of various alternative dispute mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices).” He suggested the possibility of a multi-doored courthouse, which he called a “Dispute Resolution Center.”¹¹

To be sure, not everyone agreed.¹² But there was an unmistakable tone at the Conference that the underlying ideology of liberality of pleading, wide-open discovery and attorney latitude was no longer feasible. The alleged litigation explosion would have to be controlled; the few bad lawyers could not be trusted to control themselves.

The “sea change” also occurred in the courts. Recall the early cases, such as Charles Clark's *Dioguardi*¹³ and the Supreme Court's *Conley v. Gibson*,¹⁴ which had embraced ease of pleading. But in the 1970s, some courts began requiring quite precise pleading for certain types of cases.¹⁵ For example, many federal courts required plaintiffs in cases brought under the Civil Rights Act of 1964 to plead specific facts in their complaints.¹⁶

¹⁰ Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, in THE POUND CONFERENCE, *supra* note 7, at 209, 213, 214 & 217.

¹¹ Frank E. A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE, *supra* note 7, at 65, 67 & 84.

¹² See, e.g., Laura Nader, *Commentary*, in THE POUND CONFERENCE, *supra* note 7, at 114; Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, in THE POUND CONFERENCE, *supra* note 7, at 87.

¹³ *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

¹⁴ 355 U.S. 41 (1957). This case was unanimously reaffirmed in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993).

¹⁵ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 447-51 (1986). Professor Marcus identifies securities fraud, civil rights and conspiracy as types of cases in which the courts have required more specificity in complaints.

¹⁶ Phyllis T. Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 243-52 (1992).

This sea change took place at the local level as well. In 1988, the Judicial Conference Local Rules Conference counted over 5000 local rules, of which 412 related to discovery.¹⁷ Many of those sought to control and limit discovery, and to reduce discovery disputes. Fifty-two districts had local rules that required a conference between the parties prior to bringing any discovery motion, and fifty-four had local rules limiting the number of interrogatories that could be served on each party.¹⁸

Perhaps the assumption that has taken the greatest beating is that of uniformity. The most basic attack was made by Professor Burbank who noted that the Federal Rules were uniform in name only, because the broad judicial discretion granted by so many of the rules hid the ad hoc nature of much judicial action under the rules.¹⁹ Professor Burbank also noted the non-transubstantive nature of some procedures.²⁰ Stricter procedural requirements for some types of cases, as well as different local rules for other cases, also erode the sense and reality of the uniformity principle. Tracking systems, emerging in many state courts, have a similar effect.²¹ As the Federal Rules were amended more often, and as many states that had adopted the original federal rules failed to adopt the amendments, the dream of intrastate uniformity—dear to the Conformity Acts and also espoused by the Federal Rule Reformers—was also punctured.²²

The most recent blow to uniformity, of course, is the one that has occupied a good deal of attention at this Symposium. The Civil Justice Reform Act of 1990 (the "Biden Bill") explicitly espoused experimentation, and required each of the ninety-four federal district courts to adopt its own expense and delay reduction plan, and then to implement it.²³ I would like to

¹⁷ Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2020, 2023 (1989).

¹⁸ *Id.* at 2024-25.

¹⁹ Stephen R. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1986-87) (book review).

²⁰ *Id.* at 1474-75.

²¹ Subrin, *supra* note 17, at 2038-39 n.207.

²² *Id.* at 2006 n.39 (on aspiration of intrastate uniformity), 2036-37 (on failure to adopt amendments).

²³ 28 U.S.C. §§ 471-77 (1992) (requiring development and implementation of

describe for you the local rules that became effective on October 1, 1992, to implement the Expense and Delay Reduction Plan for the Federal District of Massachusetts.²⁴ I do this both because I have studied them and because they will vividly demonstrate the further collapse of the proceduralist's universe. Because many of the new Massachusetts Federal Local Rules are similar to the federal rules amendments that became law in December 1993, this description also provides a basis of comparison for those changes.²⁵

The foundation of the new Massachusetts local rules is a mandatory scheduling conference to be held in most cases within ninety days of the appearance of the defendant.²⁶ The purpose of the conference is to set cut-off dates for the major procedural events up to trial, as well as to consider other issues such as the potential use of a magistrate to conduct the trial, various types of "alternative dispute resolution" and early settlement possibilities.²⁷ Prior to the conference the plaintiff's lawyer must present written settlement proposals to all defendants, and the defendant must be prepared to respond to the proposals at the scheduling conference.²⁸ Also prior to the conference, lawyers for all parties are required to explain to their clients the potential costs of the litigation under different alternative courses, and to "consider the resolution of the litigation through the use of alternative dispute resolution programs such as those outlined in" another rule.²⁹ The lawyers must file a certification signed by both lawyer and client that they

local expense and delay reduction plans).

²⁴ Amendments to the Local Rules of the United States District Court for the District of Massachusetts (approved and adopted by the full court on November 18, 1991) ("The effective date of the amendments shall be October 1, 1992."). *Id.* at 1.

²⁵ Examples of similar or identical proposed amendments to the Federal Rules: Compare D. MASS. R. 16.1(B) with FED. R. CIV. P. 26(f) (Proposed Official Draft) (mandatory pretrial conference); D. MASS. R. 16.1(A) with FED. R. CIV. P. 16 (Proposed Official Draft) (judge sets the scheduling conference); D. MASS. R. 16.1(D) with FED. R. CIV. P. 26(f) (Proposed Official Draft) (requiring submission of a joint discovery plan, conforming with Rule 26(b)); D. MASS. R. 26.2 with FED. R. CIV. P. 26(a)(B) (Proposed Official Draft) (requiring mandatory automatic disclosure of "all documents . . . that are relevant to disputed facts alleged with particularity in the pleadings"). The proposed amendments became law on December 1, 1993.

²⁶ D. MASS. R. 16.1(A)-(F).

²⁷ *Id.*

²⁸ D. MASS. R. 16.1(B) & (C).

²⁹ D. MASS. R. 16.1(D)(3)(b).

have conferred with their clients in conformity with the local rule mandate.³⁰

To prepare for the scheduling conference, lawyers are obligated to confer with each other in order to prepare an agenda for the conference as well as a pretrial schedule. They also must consider whether they will consent to trial by a magistrate judge. The lawyers are required to file a joint statement with a schedule they have agreed upon, including a joint discovery plan which, among other things, takes into consideration the desirability of phased discovery, with the first wave limited to the development of information for the realistic assessment of the case. Following the conference, the judge is instructed "to enter a scheduling order that will govern the pretrial phase of the case."³¹ Unless the judge orders otherwise, the order must "include specific deadlines or general time frameworks" for twelve separate events, and "any other procedural matter that the judge determines is appropriate for the fair and efficient management of the litigation."³²

In contrast, the Federal Rules require only a complaint and an answer. Under the Massachusetts Federal Local Rules, however, the lawyer now finds that she is told what to discuss with her client, what to discuss with her opponent, what to discuss with the judge and to then file a written certification and a written joint plan—a plaintiff's lawyer must give the other side a written settlement demand.³³ Moreover, additional rules strongly suggest management conferences and a "final" pretrial conference, each with their own detailed set of rules.³⁴

The Massachusetts Federal Local Rules also dramatically change the discovery process. The parties first must consider voluntary exchanges of information, and the judge is told to

³⁰ D. MASS. R. 16.1(D)(3).

³¹ D. MASS. R. 16.1(B) & (D)(1)(b).

³² D. MASS. R. 16.1(F).

³³ D. MASS. R. 16.1(C) ("[u]nless otherwise ordered by the judge").

³⁴ D. MASS. R. 16.3 (case management conferences); D.MASS.R. 16.5 (final pretrial conference). Massachusetts Local Rule 16.1(F), on what should be included in the scheduling order which the judge "shall enter" after the scheduling conference, which includes "specific deadlines or general time frameworks for . . . (8) one or more case management conferences and/or the final pretrial conference; (9) a final pretrial conference, which shall occur within eighteen months after the filing of the complaint" The list is preceded by: "Unless the judge determines otherwise" D. MASS. R. 16.1(F).

consider requiring the plaintiff to file sworn statements itemizing their damages, names of witness, names of those from whom they have taken statements and known governmental investigations. The judges also must consider a similar order for defendants.³⁵ The local rules also set limitations on the numbers of depositions (5), sets of requests for production (2), and interrogatories (30).³⁶

And then there are the "mandatory disclosure rules," which are similar to the 1993 Federal Rule amendments. Before any party can initiate discovery, "that party must submit to the opposing party a description, including the location, of all documents that are relevant to disputed facts alleged with particularity in the pleadings."³⁷ By agreement, the party can submit copies.³⁸ I have attempted to explain these new local rules to at least five separate trial departments: toxic torts, general litigation, business litigation, environmental litigation and professional practice litigation (e.g., liability of lawyers, doctors, architects and accountants). The departments disagree among themselves as to what is required by this rule, and there are extreme disagreements within each department. What is a document "relevant to a disputed fact?" And what documents are required to be produced by defendants' counsel for druggists, wholesalers or manufacturers when a pharmaceutical product has been labeled "unfit" in a complaint?

There are also intriguing new local rules about the addition of parties. What used to be a simple motion now requires the lawyer to confer with the opposition, file a certificate about conferring, serve a motion on the party to be added, serve a separate document on the party to be added stating the date on which the motion will be heard and file a certificate of compliance with the new rule.³⁹ Moreover, "[a]mendments adding parties shall be brought as soon as an attorney reasonably can be expected to have become aware of the identity of the proposed new party."⁴⁰ Put aside the question of how one adds a

³⁵ D. MASS. R. 26.1(A) & 26.1(B).

³⁶ D. MASS. R. 26.1(C).

³⁷ D. MASS. R. 26.2(A).

³⁸ *Id.*

³⁹ D. MASS. R. 15.1 (service on opposition); D. MASS. R. 7.1(A)(2) (certificate of motion conference).

⁴⁰ D. MASS. R. 15.1(A).

party "as soon as an attorney reasonably can become aware of the identity of the proposed party," short of having a pre-programmed word processor attached both to the lawyer's brainwaves (or to those of a hypothetical reasonable lawyer) and also by direct cable to the clerk's office. More interesting is the source of the authority for such a rule under some combination of the Civil Justice Reform Act of 1990, the Rules Enabling Act, Federal Rule 83 and the *Erie Doctrine*, as explicated by *Hanna v. Plumer*.⁴¹ Even more interesting to consider are: (i) whether this rule mandates a violation of the lawyer's obligations under Rule 11 not to file any paper without reasonable factual inquiry; (ii) whether this rule standing alone is enough to scare any plaintiff's lawyer away from federal court; and (iii) how to give any first-year student an exam in which she can realistically rely on current federal procedure, unless you provide her with a complete set of local rules from some district to accompany the Federal Rules.

At the final pretrial conference the judge must consider such matters as utilizing testimony given by written narratives and the extent to which time limits should be set for each side's evidence.⁴² The work necessary to prepare the matters which will be contained in the required pretrial memorandum (including "a concise summary of the evidence" that will be offered by each party) is sufficiently rigorous and expensive to provide strong incentive for settlement.⁴³ And, by the way, the new local rule amendments start with a sanctions section: non-compliance with any direction or obligation in the local rules "may result in dismissal, default, or the imposition of other sanctions as deemed appropriate by the judicial officer."⁴⁴

Moreover, even without considering the effect of local rules, the Federal Rules are almost self-contradictory: the pleading requirements in Rule 8(a) are highly influenced by Rule 11,⁴⁵ and the wide-open discovery is circumscribed by the

⁴¹ 380 U.S. 460 (1965).

⁴² D. MASS. R. 16.5.

⁴³ D. MASS. R. 16.5(D)(1).

⁴⁴ D. MASS. R. 1.3.

Lawyers in Massachusetts report that the judges themselves are applying the new rules—which are retroactive as to those stages of prior cases which have not yet transpired—with wildly different amounts of enthusiasm. At least one judge is said virtually to ignore them.

⁴⁵ It is true that amended Rule 11 does not in fact change the pleading re-

amendments to Rule 26.⁴⁶ When one adds the local rules, virtually every major section of the Federal Rules has been influenced or altered. Pleading rules are now influenced by the urge to be more precise in order to trigger the mandatory disclosure of documents. There are new discovery rules. New documents abound. Motion and amendment practice have been changed. There are potentially several required conferences. And the congruity of Massachusetts state rules with the Federal Rules upon which they were patterned has been dramatically reduced by the non-adoption of the federal rule amendments of 1980 and 1983, and by tracking rules, adopted by court order in Massachusetts,⁴⁷ which influence the flow of litigation in the Commonwealth considerably more than the procedural code. And this is just in one state.

But the disintegration of civil procedure runs much deeper than conflicting assumptions about rules and the confusing and contradictory nature of the rules themselves. Consider the relationships of the attorney to her own professional growth, to the structure of the law firm, to her clients, to opposing attorneys and to the judge. Lawyers, after all, still have clients who pay them for representation. "Zealous advocacy" is still part of the Canon of Ethics.⁴⁸ Under the new Massachusetts local rules—and the new federal rules—the lawyers are supposed to attempt co-operation throughout the process. They are asked to share information voluntarily, to make joint plans and to try in

quirements of Rule 8(a). But it would be odd, indeed, if the obligation to conduct prefiling investigation under Rule 11 did not influence the degree of specificity in pleading. One way to discourage an opponent from filing a motion for sanctions under Rule 11 is to file a complaint that is so obviously well-researched on its face that it would be patently frivolous to file such a motion. But the unanimous decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993), reaffirms the liberal pleading regime of *Conley v. Gibson*, 355 U.S. 41 (1957). See also the recent case of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489 (1993), which seems to take a more relaxed view on the application of procedural rules than the direction taken by many of the lower courts (application of a bankruptcy rule, but the opinion calls upon the language and philosophy of the Federal Rules).

⁴⁶ See generally FED. R. CIV. P. 26(b) (providing for restrictions on discovery); *id.* (Advisory Committee's Note to 1983 amendment) (amendments were designed to "minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information.").

⁴⁷ MA. R. SUPER. CT. 30; Superior Court Standing Order I-88.

⁴⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1991); MASS. SUP. JUD. CT. R. 3:07.

good faith to resolve motion questions.

And what is the relationship of the lawyer to the court? The new local rules cry out distrust from the bench to the bar. The new Rule 11 already turned judges into the lawyers' adversaries when it required them to sanction lawyers. Even under the proposed new Rule 11,⁴⁹ judge and counsel often will continue to be at loggerheads. The new Massachusetts Rules instruct the lawyers what to discuss with their clients, and at several junctures instructs the judge to foster settlement. The philosophy is no longer attorney latitude, but judicial control.

Another quite significant change is that the new local rules force litigators into specialization. There is no way one can learn each new field in time to make the decisions necessary for the initial scheduling conference, yet alone to engage intelligently in early settlement talk or early decisions about ADR. Others may debate the extent to which the new local rules reduce expense. Most lawyers I have talked to say that the rules have the opposite result. Regardless, one thing is clear: they require the front-ending of case preparation. If they work, cases will be prepared earlier and settled or tried earlier. This means that a firm or single lawyer will have fewer pending cases, because cases will not be dragged out, and because lawyers will need to blanket those cases early on. This obviously alters staffing patterns and fees.

When, as here, old assumptions are dead and new rules have created a complex and often contradictory mosaic, I think it is fair to say that the system is disintegrating.

B. *The Changing Legal Curriculum*

In some ways, it is even more confusing for the law professor. Not only must she deal with the disintegration we have already addressed, but the very field itself has, depending how one views it, either fractionated or materially enlarged. For a long time there have been courses in federal courts, conflicts of law, remedies, evidence and trial practice, all of which touch upon matters of civil procedure. But since I became a law pro-

⁴⁹ FED. R. CIV. P. 11 (proposed amendment by Federal Judicial Conference); see *supra* note 25.

fessor in 1970, many, if not most, law schools have added courses in ADR, complex litigation and international procedure as integral parts of the overall law school civil procedure curriculum. To what extent should the civil procedure teacher at least anticipate these other topics? Do we want to force every student to have to take all four courses, and also conflicts, federal courts, evidence, and remedies in order to have a general education in civil litigation sufficient for the lawyer who does not become a litigator?

That is a minor question compared to the issues raised by the attacks on legal education from those who feel we do not teach the basic skills needed to be a lawyer and from those who point out the exponential growth in insights garnered from new fields. Almost all of the fundamental lawyering skills identified in the Report of the ABA Task Force on Law Schools and the Profession are inherently related to the tasks of a civil litigator as well as to the student who only wants to understand the doctrine of civil procedure. The skills identified in the Report are: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and ADR measures, organizing and management of legal work and recognizing and resolving ethical issues. Do any of these skills have nothing to do with civil procedure and its application?⁵⁰

Consider now the contributions to the field of civil procedure from other disciplines during the time I have taught. There are superb empirical studies from, to name a few, Marc Galanter⁵¹ and the University of Wisconsin Law School Civil Litigation Research Project,⁵² the Federal Judicial Center, the Institute for Civil Justice of RAND's Domestic Research Division and the American Bar Foundation, as well as individual studies from scholars like Steve Burbank on Rule 11,⁵³ and

⁵⁰ SEC. LEG. ED. AND ADMISSION TO THE BAR, ABA REPORT ON THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, 1992, at 135, 138 & 140 (Robert MacCrate ed., 1993); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

⁵¹ See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

⁵² E.g., David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 73 (1983).

⁵³ STEPHEN B. BURBANK, THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF

from those who have studied issues of jury composition. Just in the past few years one finds wonderful reviews of our state of knowledge about tort-adjudication by Michael Saks,⁵⁴ and about ADR by Kim Dayton.⁵⁵

Indeed, I do not know how law professors could honestly address the amendments to the federal rules without discussing the almost total lack of empirical data to support any of the changes. Could one discuss the massive amount of judicial control based on litigiousness and frivolousness without noting that the facts probably belie the allegations?⁵⁶ Could one discuss case-management without noting that the facts seem to say that firm trial dates, without continuances, may be the fastest, least expensive method of delay and expense reduction, and that trial judges who stick to such firm dates and do not otherwise try to promote settlements may both effectuate more trials and more settlements?⁵⁷ Can one discuss civil litigation

CIVIL PROCEDURE 11, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989).

⁵⁴ Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

⁵⁵ Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991).

⁵⁶ See *supra* notes 51, 54. Judyth W. Pendell, a Vice President of Aetna, was at the Symposium at which my paper was delivered. She wrote me, citing a 1990 Harvard Study (*Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation and Patient Compensation in New York* (1990)), an informal poll taken at a Fall 1992 summit held by the American Board of Trial Advocates, and data from the Automobile Insurers Bureau of Massachusetts and the Massachusetts Insurance Commissioner which may all suggest more fraudulent and frivolous litigation than I am aware of. See generally Letter from Judyth W. Pendell, Aetna, to the Author (June 22, 1993). I have not yet seen the poll or studies. It seems to me that the Galanter and Saks articles, see *supra* notes 51 and 54 respectively, are persuasive in that many allegations of litigiousness in our country have been overstatements, but perhaps new data will show otherwise. In any event, it is clear that the enormous increase in case management and judicial control during the past fifteen years, the amendments to the Federal Rules of Civil Procedure during the 1980s and the proposed amendments which are currently pending before Congress have not been based to a significant degree on serious or comprehensive empirical studies. Judyth Pendell's letter to me ends as follows: "The ICJ and RAND has begun a study of insurance and litigation fraud, which we expect will add significantly to the available data, which is mostly narrow in scope or based on estimates by the judiciary and members of the bar." *Id.*

⁵⁷ See, e.g., Thomas W. Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166 (1978) (summarizing his findings and those of Federal Judicial Center civil case management study). "Research has not so far confirmed that more judicial intervention produces more settlements." Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 262 (1986).

at all without mentioning the paucity of return for most plaintiffs⁵⁸ or that litigants often still receive more than if they did not litigate? Should not the law professor point out that there appears to be a paucity of data that truly supports the efficiency claims of ADR advocates?⁵⁹ How does one deal with the issue of jury trial, without talking about the known differences between juries of twelve and six? How do we discuss discovery and its alleged reform without noting that a very high percentage of the cases have minimal amounts of discovery by most standards?⁶⁰

Then the conscientious civil procedure instructor must turn to the literature about the social psychology of procedural justice. The works of E. Allan Lund, Tom R. Tyler, John Thibaut and Laurens Walker come to mind.⁶¹ It seems to me that a student studying notice and the right to be heard ought to know the results of studies about the importance to litigants

⁵⁸ THE INSTITUTE FOR CIVIL JUSTICE, 1992 ANNUAL REPORT (1992); Trubek et al., *supra* note 52, at 110.

⁵⁹ See *supra* note 55.

⁶⁰ Trubek et al., *supra* note 52, at 91, see also PAUL R. CONNOLLY ET AL., FEDERAL JUDICIAL CENTER, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 29 (1978). Judyth W. Pendall suggested at the Symposium and in her letter to me that there is more discovery than I suggest. She sent me two papers: Susan Keilitz, Roger Hanson & Richard Semiatin, *Attorney's Views of the Civil Discovery Practice in the State Trial Courts* and Susan Keilitz, Roger Hanson & Henry W. K. Daley, *Is Civil Discovery in State Trial Courts Out of Control?* In the latter mentioned paper, the authors describe the data from a recent National Center for State Courts study of five state courts. I believe the data supports my statement that "a very high percentage of the cases have minimal amounts of discovery by most standards." For instance, the author's report that there was no recorded discovery in 42% of the cases, and in 37% of the other cases there were three or fewer pieces of discovery. They report: "Across the five courts, the level of discovery activity is lower than proponents of discovery reform might expect to find" and that the median number of discovery vehicles is four. *Id.* at 8. They conclude: "Perhaps the most salient observation that can be made from the NCSC study is that for the majority of civil litigation, formal discovery is not out of control." *Id.* at 23. I agree and made the same point during an address that I made at an international conference on equity in which I summarized much of the empirical data on civil litigation in the United States as of the summer of 1990. Stephen N. Subrin, *The Empirical Challenge to Procedure Based in Equity: How Can Equity Procedure Be Made More Equitable?*, in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENT 761, 768, 769, 773 & 774 (Stephen Goldstein ed., the Hebrew University of Jerusalem, 1992).

⁶¹ See generally E. ALLAN LUND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 7-10 (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

of telling their own stories and having some control over their own disputes. And they should also have the counter-evidence of how rarely these goals are met.⁶²

Then there are jurisprudential strains that have an enormous impact on civil procedure. The move to efficiency which has driven much civil reform is certainly related to the Law and Economics movement. I do not know how to talk about the relationship of law and equity and of the judge and the jury while ignoring the contributions of James White and others in the field of law and literature to our thinking about how every field of expertise confronts the problem of what is left in and what is left out of the total reality.⁶³ Can one teach very much about trial by jury or ADR without considering the many contributions from feminist jurisprudence? How does one talk about law and equity, or the jury, or summary judgment, while ignoring differences between linear and contextual thought, whether or not one uses that vocabulary? How does one talk about the jury and its composition, or about civil justice generally, without considering race theory, American history and gender bias studies?

This moves us to Legal Realism and the Critical Legal Studies Movement. Most civil procedure books have hundreds of pages on jury-control issues, whether or not they label them as such. Is not the Legal Realist and the New Deal infatuation with the judge who is among "the best and the brightest" relevant to this discussion? How do we talk about the positions of Charles Clark, Owen Fiss or Jack Weinstein while ignoring the pervasive judge-fetish which is at least as strong as the alleged irrational jury-fetish?⁶⁴ There is the even more basic question of the extent to which rules dictate results, what the "crits" have called the indeterminacy issue. A student of mine is in the process of studying whether the procedural rules on pleading are considerably less important to results than the broader

⁶² See, e.g., Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89.

⁶³ JAMES B. WHITE, *THE LEGAL IMAGINATION* (1973).

⁶⁴ I take the term "jury fetish" from the title of this article: David Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442 (1971). By the way, this is a dispute that leads back to the empiricism of Kalven and Ziesel. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

legal culture. For example, the rules in the state court and federal courts of Illinois, although dramatically different over fifty years, may each be interpreted in the Clarkian spirit of permissiveness in the nineteen-fifties and sixties, but in the spirit of the Field Code, in the nineteen-eighties and nineties. Do we ignore these or other insights on indeterminacy?

And consider for a moment the importance of history in trying to make any sense out of the current ferment in civil procedure. Usually when proceduralists talk about history it is in the Maitland sense of writs "ruling us from the grave."⁶⁵ And many civil procedure books contain information about writs, single issue pleading and a few of the provisions of the Field Code.⁶⁶ But there is a good deal of procedural history which is far more important. As I mentioned, every procedure book touches upon the right to trial by jury and the manner by which the judiciary hedges in that right. It is difficult to assess the importance of the right itself and judicial control of the right (such as bifurcated trials and the enlarged role of summary judgment) without knowing of the history of juries. The history teaches that the debate is by no means only about efficiency and alleged predictability; it is about the jury as a buffer against judicial power and the jury's role in granting the citizenry political power and educating them about the law and the importance of obedience to it. It is also about permitting citizens' stories to be heard and acted upon by their peers.

The differences between the Field Code's emphasis on facts and causes of action, the Federal Rule's insistent avoidance of those words and the manner in which amended Rule 11 and mandatory disclosure have returned to notions of factual inquiry and "facts alleged with particularity" make little sense without a knowledge of why various groups have wanted different procedural regimes. How does one honestly talk about the Federal Rules (or structural cases under them) without talking about the New Deal or the Warren Court, and how does one talk about the backlash against flexible, liberal procedure without talking about the Burger court or the judicial ap-

⁶⁵ FREDRIC W. MAITLAND, *EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW* 296 (1909).

⁶⁶ JOHN COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* (1982); RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* (1989).

pointments of Presidents Reagan and Bush? History shows that the Field Code and the Federal Rules were the result of a coalescence of liberal, conservative and professional agendas, as well as the result of procedures that were in fact not working very well.⁶⁷ The expansion and contraction of the utilization of the class action rule during the past fifty years makes little sense devoid of the historical times and events which led to such changes.

It is not only historical context that is needed to make sense of the various contradictions and cross-currents that inhere in procedural rules. In at least some areas, it seems pretty clear that the type of case being adjudicated has a bearing on how the rules are applied, and this admixture is itself influenced by the political currents of the times.⁶⁸ It is not likely that during the 1960s the pleading requirements for civil rights cases would have heightened or that current Rule 11 and its chilling effect on civil rights litigants would have been adopted.

In fact, a major problem in trying to figure out how to teach civil procedure in the late-twentieth century is that it seems like so many things are related to so many other things. It is not so much that empiricism, feminist theory, law and economics or history are a lens that can inform civil procedure; civil procedure is part and parcel of these other disciplines as much as they are a part of it. In a sense, this is the disintegration of a field not only by fission but also by fusion.

Edmund Wilson argues that Jules Michelet discovered the central notion of modern history when he gained an insight from his studies of Giovanni Vico. In August of 1820, Michelet preached the following

on the occasion of the awarding of school prizes: "Woe be to him who tries to isolate one department of knowledge from the rest . . . All science is one: language, literature and history, physics, mathematics and philosophy; subjects which seem the most remote from one another are in reality connected, or rather they form a single sys-

⁶⁷ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *Equity*]; Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311 (1988).

⁶⁸ See, e.g., Baumann et al., *supra* note 16.

tem."⁶⁹

If my tour through current Civil Procedure is at all accurate, then the New Yorker "no comment department" citation to the Virginian-Pilot map of Europe, Northern Africa and the Arab nations may be a pretty good metaphor for the plight of civil procedure today. The old civil procedure maps are not very good guides. What is in fact labeled a flexible Federal Rule that still remains may have a less flexible rule sitting beside it, and an inflexible local rule or a flexible local judge superimposed on top of it. They all may be operating at the same time and in strange combinations. If the Supreme Court of the United States can cut the historic jury in half in deference to local rules,⁷⁰ we can surely forgive the cautious or unconscious mapmaker who failed to give Cyprus and the West Bank any names at all. And who knows what to call Bosnia?

II. TEACHING CIVIL PROCEDURE WHILE YOU WATCH IT DISINTEGRATE

I do not enter into a discussion about how to teach civil procedure with assurance that I should be listened to. I have taught from only three major procedure books (plus one accompanying problem-book a few times) over twenty-three years.⁷¹ I doubt whether one really knows whether a book will work without trying to teach from it. I have browsed through other books and read many of the fine book reviews of other procedure books,⁷² but I distrust my ability to know what will work

⁶⁹ EDMUND WILSON, *TO THE FINLAND STATION: A STUDY IN THE WRITING AND ACTING ON HISTORY* 6 (1972).

⁷⁰ *Collgrove v. Battin*, 413 U.S. 149 (1973).

⁷¹ I have taught most often from Cound, Friedenthal & Miller, a few times from Marcus, Redish & Sherman and once from Field, Kaplan & Clermont. I have on occasion also assigned JOSEPH W. GLANNON, *CIVIL PROCEDURE EXAMPLES AND EXPLANATIONS* (1st ed. 1987). I was introduced to procedure by Professor Richard Field in 1959, using his and former Justice Benjamin Kaplan's pioneering book.

⁷² See, e.g., Book Reviews of ROBERT M. COVER ET AL., *PROCEDURE* (1988); William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945 (1989) (book review); Martha L. Fineman, *Unmythical Procedure*, 63 S. CAL. L. REV. 141 (1989) (book review); Linda S. Mullenix, *God, Metaprocedure, and Metarealism at Yale*, 87 MICH. L. REV. 1139 (1989) (book review); V. K. Puchinskiy, *A Soviet Perspective*, 63 S. CAL. L. REV. 155 (1989) (book review); Mark V. Tushnet, *Metaprocedure?*, 63 S. CAL. L. REV. 161 (1989) (book review). Book reviews of DAVID CRUMP ET AL., *CASES AND MATERIALS ON CIVIL PROCEDURE* (1987); John E. Kennedy, *Review*, 38

for me, let alone for others.

In teaching, it seems to me, we largely teach ourselves. Current books, so far as I can tell without delving deeply into each, do not fit my fantasy of how procedure can best be taught. It would not surprise me, though, if each suggestion I make has been tried by others. Also, methods that I hope may work for me may well be contrary to what in fact will work best for other teachers. And just as we differ, so, too, do our students. Some types of procedure books and methods of teaching undoubtedly work better for some students than for others. There may be some approaches, though, which have a good chance of meeting the needs of many teachers and many students during this disintegrating period in civil procedure. Let me offer some that I have been working on.

Even before our field became as chaotic as it now seems to me, there were problems inherent in the teaching of civil procedure. Students seem instinctively to understand some things about their other first-year courses. Courses such as torts and criminal law are closer than procedure to everyday experience. Many first year students also seem to expect that law school will teach them about rules that govern the every-day behavior of people and the relationship of people to property. For some, it is an unpleasant surprise that some courses deal with rules

J. LEGAL EDUC. 474 (1988) (book review); Linda S. Mullenix, *User Friendly Civil Procedure: Pragmatic Proceduralism Slouching Away from Process Theory*, 56 *FORDHAM L. REV.* 1023 (1988) (book review). Other relevant book reviews include: Jeffrey W. Stempel, *All Stressed Up But Not Sure Where to Go: Pondering the Teaching of Adversarialism in Law School*, 55 *BROOK. L. REV.* 165 (1989) (reviewing STEPHEN LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* (1988)); Book reviews of RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985): Robert H. Abrams, *The New Civil Procedure*, 32 *WAYNE L. REV.* 1269 (1986); Stephen R. Burbank, *The Costs of Complexity*, 85 *MICH. L. REV.* 1463 (1987); Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 *TEX. L. REV.* 929 (1983) (reviewing JULIUS B. LEVINE, *DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS* (1982)). Other articles relevant to the teaching of procedure include: Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 *J. LEGAL EDUC.* 461 (1987); Bryant G. Garth, *ADR and Civil Procedure: A Chapter or an Organizing Theme?*, 37 *J. LEGAL EDUC.* 34 (1987); Linda S. Mullenix, *The Influence of History on Procedure: Volumes of Logic, Scant Pages of History*, 50 *OHIO ST. L.J.* 803 (1989); Elizabeth M. Schneider, *Rethinking the Teaching of Civil Procedure*, 37 *J. LEGAL EDUC.* 41 (1987); Paul J. Spiegelman, *Civil Procedure and Alternative Dispute Resolution: The Lawyer's Role and the Opportunity for Change*, 37 *J. LEGAL EDUC.* 26 (1987).

that govern how lawyers deal with disputes arising in these other fields. Moreover, the procedural language is often strange and technical and the appellate cases studied often first require one to understand the law from entirely different fields, many of which are not covered during the first year. *International Shoe*,⁷³ for instance, is a case about state taxation and corporate behavior. *Gibbs*⁷⁴ is about labor-organizing, company shops and violence during labor disputes.

This is all obvious. What may be less obvious is the desirability under these circumstances to share with the student early on why procedure is important, what it covers, what values it entails, and why it will not be boring. Perhaps we should start our courses with explanations and materials which will substitute for the intuition that the students lack. It is not self-evident to a first-year student why and how lawyers take the massiveness of the too many realities of a dispute and encapsulate them into elements and causes of actions. It is not self-evident to students that the skillful litigator—and in fact all lawyers much of the time—are engaged in continued acts of imagination, on one hand trying to reconstruct what has happened and, on the other, trying to foresee what may occur in the future. That lawyers simultaneously try to persuade a number of different audiences (themselves, clients, opposing lawyers, opposing parties, insurance adjusters, judges, magistrates, mediators, juries) about a number of different things appears disjointed: difficult and creative, and sometimes elegant or unseemly work. Students should be told early on why it is both fascinating and important.

Most students will not know in advance that their 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. Nor do they expect that their civil procedure course will expose them to many of the critical skills of the successful lawyer: thinking, advocacy, fact-sensitivity, problem-solving, statutory interpretation and decisionmaking with imperfect knowledge. Maybe we should be

⁷³ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁷⁴ *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

more explicit about why the depth and breadth of procedure excites us.

At the beginning of this talk I borrowed from the corrected map reprinted in the February 22, 1993, *New Yorker* in an attempt to illustrate some problems of chaos. The same *New Yorker* may provide a clue about how to teach a field in flux. The editors asked several contemporary artists to paint their own renditions of the famous cover which adorned the first issue of the *New Yorker* in 1925, and which reappears every year around Washington's birthday. Art Spiegelman, the artist and author of *Maus I* and *II*, redid the figurehead of the fictional Eustace Tilley in the style of early cubism. The hat has been deconstructed to show a dunce hat and a falling three-quarters of the original hat; the head now turns right while the fragment of the hand and the monocle remains left. The hand is in several parts. Think of Picasso's early cubism, and you'll have the picture.

Red Grooms crossed the realism of the thirties' printmakers with the colors and figurative abstraction of the expressionists of the fifties and, in so doing, he created his own new style, merging different, previous methods. Spiegelman's cubism and Red Grooms's eclecticism both rely on the viewer's having a firm grasp of the original figurehead. The confusion of fission in the case of Spiegelman and fusion in the case of Grooms are relieved by the well-known image that can be still be discerned in each.

What I learned as a trial lawyer remains true for teaching. Audiences need logical ways to order and remember what they hear. They need firm and understandable lines in which to organize a more confusing reality. I do not know about others in the audience, but lack of clarity in my own assignments has often interfered with the clarity of my teaching. Often in class, I am either trying to do too much or am unclear about what I am trying to achieve. Even—only occasionally of course—my class wanders. We read a few cases, talk about them in various ways, and move on or not as the spirit wills. I did not do that when I taught high school. Each assignment had a purpose, even a lesson plan. I told the students precisely what would be covered, what would happen in class and the types of things I expected them to learn. This does not mean "spoonfeeding," or that students are unchallenged. One can be clear about cover-

age and goals, yet leave plenty of room within those constraints for rigor, complexity and creativity.

During a sabbatical this past year I decided to try my hand at creating my own new civil procedure course. I tried not to look at other texts and, for the most part, adhered to this resolve. For the first few months, I met weekly with eight students who had taken my civil procedure course during the previous semester. For each topic, we kept asking what would work best for the students we attract to Northeastern and for me. True enough, sometimes I tried to engage in a reality check by asking myself and the students whether other teachers and students could learn through the lessons we were creating. But for the most part, we looked only to ourselves.

I decided to put at the beginning of each assignment three things: its purpose, what preparation I expected from the students, and precisely what we would do in class. We found that such clarity enhances rather than diminishes opportunities to deal with complex matters.

One thing I learned as a trial lawyer is that judges and juries seem to learn better and remember more through chronological stories. When a witness on direct is led out of chronological order, it is often confusing. Skillful cross-examiners frequently pull the stories out of chronological order in order to rattle witnesses.

The importance of chronology as a way of organizing knowledge is why I think that casebooks that follow the contours of a litigation are probably not mistaken. Whether one starts with personal jurisdiction on the grounds that the trial lawyer cannot even think about pleading before she knows she has jurisdiction or whether one starts with complaints and then works her way toward the other stages, the chronology aids understanding. There are probably plausible reasons for organizing a procedure course around major themes, relationships, or interactions. But my mind does not remember things that way, and I think my students may have difficulty with such an abstract organization. Then again, I like knowing the concreteness of the initial *New Yorker* cover, before going to the Red Grooms and Art Spiegelman.

Many casebooks also give an early map of the whole litigation path so that the students can fit in the pieces as they go

along. The famous Field and Kaplan⁷⁵ effort in that direction made sense. Perhaps it is confusing, though, if the introduction consumes a significant portion of the whole, and if the student is never sure what has been covered for good and what was just a smattering to be returned to with greater compulsiveness in the future.

We are fortunate in Civil Procedure to have a *leit-motif*, or *idée fixe*, that runs through much of the discipline, whether at the time of writs, the Field Code, the Federal Rules or the new emerging world. No matter how we describe it, most civil litigation examines events and determines if they add up to believed facts which fit within the elements of a cause of action. I have written about how Clark and his cohorts eschewed the terms facts and cause of action.⁷⁶ But that is the reality within which litigators have to work. Even in *Dioguardi*,⁷⁷ Clark had to think in terms of what facts the immigrant importer had and what causes of action they supported. Many of the individual pieces of the litigation process—pleading, 12(b)(6), discovery, burdens of production and persuasion, relevancy issues, summary judgment, directed verdict, jury instructions, opening and closing arguments, one's sense of various methods of ADR—require a mastery of the concept of causes of action and their elements.

Personal jurisdiction frequently turns on an analysis of where the cause of action arose or the nexus of the claim with the forum state. Federal jurisdiction requires the action to arise from federal law. Pendant jurisdiction, even under the name "supplemental,"⁷⁸ requires one to analyze state and federal causes of action in order to see the overlap of facts, evidence or transaction. Preclusion law looks to the breadth of a cause of action or to a claim that may include several causes of action.

It has become increasingly important to concentrate on causes of action and their elements as a result of amended Rule 11, mandatory disclosure of documents related to disputed facts alleged with particularity, case management attempts

⁷⁵ RICHARD H. FIELD & BENJAMIN KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE (1953).

⁷⁶ Subrin, *Equity*, *supra* note 67, at 976.

⁷⁷ *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

⁷⁸ 28 U.S.C. § 1367 (Supp. IV 1993).

to focus and limit cases and limitations of time for the trial. Since our field does have this critical unit of measurement—the cause of action with its elements—I think the concept should be explored early on and returned to throughout the course. It is the original cover of the *New Yorker* around which one can deconstruct and merge.

The reality that procedure attempts to confine is the larger story involved in any dispute. The counterpoint to elements and causes of action in a procedure course is story-telling, and the tension between confinement and expansiveness. There are a series of events—a much broader reality—that the legal system tries to constrict by focusing on a specific set of facts fitting into elements, which permit the state, through its courts, to intervene. If one looked only at elements without a story-line of what happened, it would be almost impossible to talk about overall fairness, a sense of proportion or the relationship of what happened to society at large.

In fact, litigators—and especially trial lawyers—constantly think both about the story (what it looks like, what seems fair) and whether it permits recovery or other judicial intervention. Many casebooks, regrettably in my view, fail to include full stories.

Appellate cases, the major ingredient of most casebooks, are already the end of the story, a story made stylized by the constraints of judicial-opinion writing. The appellate opinions reprinted in casebooks are usually severely edited, leaving out critical facts about the underlying events and the procedural choices made by lawyers and their clients. The casebooks often tell so many fragmented stories that the learner has shards rather than jugs to contain the knowledge she is accumulating.

A notable exception to the dearth of story-line is the treatment of personal jurisdiction. I believe those chapters are successful because they give an historical picture of the development of personal jurisdiction from *Pennoyer v. Neff*⁷⁹ to *International Shoe*,⁸⁰ and then to cases such as *World-Wide Volks-*

⁷⁹ 95 U.S. 714 (1877).

⁸⁰ *International Shoe Co. v. Washington*, 316 U.S. 310 (1945).

wagen,⁸¹ *Burger King*,⁸² *Asahi*,⁸³ *Shaffer v. Heitner*⁸⁴ and *Burnham*.⁸⁵ These appellate cases seem to work quite well to convey doctrine and its evolution.⁸⁶

Casebooks do not integrate viewpoints on procedure—empirical data, jurisprudential writings or even history—with the stories that are told. In fact, much of the serious contextual matter in procedure is provided in separate books.⁸⁷ The not-so-hidden message to students is that these matters are an add-on, not critical to the essence on which the student will be tested. Problem-solving books are also deficient because they tend to deal with stick-figures.⁸⁸ One does not

⁸¹ *World-Wide Volkswagen v. Woodson*, 244 U.S. 286 (1980).

⁸² *Burger King v. Rudzewicz*, 471 U.S. 462 (1985).

⁸³ *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987).

⁸⁴ 433 U.S. 186 (1977).

⁸⁵ *Burnham v. Superior Court of California*, 495 U.S. 609 (1990).

⁸⁶ Perhaps civil procedure teachers are often frustrated about teaching the pleading, pretrial, and trial aspect of civil procedure because there are very few landmark cases, and the appellate case law does a poor job in conveying the bulk of what is important to attorneys and their clients. Did not civil procedure teachers give a sigh of relief when the summary judgment trilogy finally provided some major case-doctrine around which to teach another procedure topic in the traditional appellate case-method? See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁸⁷ See, e.g., ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE* (1979); ANTHONY A. D'AMATO & ARTHUR J. JACOBSON, *JUSTICE AND THE LEGAL SYSTEM* (1992); GEOFFREY C. HAZZARD & JAN VETTER, *PERSPECTIVES ON CIVIL PROCEDURE* (1987); STEPHEN LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* (1988). Many civil procedure teachers have accompanied their course with a book that describes an entire litigation. I have assigned GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976) a few times in my civil procedure course, and I assign PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1987) in my complex litigation course. Many procedure teachers give their students the materials from actual cases. These include Professors Mel Zarr at the University of Maine Law School, Phil Schrag at Georgetown University Law Center, and Liz Schneider at Brooklyn Law School. See Elizabeth Schneider & Kathleen O'Neill, *Simulation Materials for Civil Procedure: The Cases of Ellen Warren and Marian Fleming* (1987). At my law school, we have a separate Legal Practice course which uses the simulation of one or more cases a year in order to teach beginning lawyering skills.

⁸⁸ On occasion, I have assigned the first edition of JOSEPH W. GLANNON, *CIVIL PROCEDURE EXAMPLES AND EXPLANATIONS* (2d ed. 1992) to my civil procedure class. I liked the book, as did my students, but I concluded that it gave them a false sense that civil procedure contained more "black letter" law than I believe to be true. For my taste, it fed the students' deep taste for "answers," which was at cross-purposes with my desire to force them to ask questions and to learn to live with the uncertainty which pervades the lawyers' professional life.

know enough about the problem or the cases to have a serious discussion about the procedural complexity. Even when pleadings or other documents are provided in casebooks, the student is infrequently asked to stand in the position of a lawyer who must make decisions, draft documents and argue the case at various stages.

In my view, we need methods to tell procedural stories in deeper and more thorough ways. We need methods to permit the student, like the lawyer in action, to bring her perspectives, values, knowledge, intellect and skills to bear. There are a number of reasons why I think this integration is so important. First, students will feel less alienated from technical material if they must use that material to solve problems that appear important to them and that are related to human beings to whom they can relate. Second, students have majored in a number of different disciplines and have a good deal of prior experience in jobs, politics, relationships, philanthropies and hobbies. Contextualized stories that permit them to draw on their prior intellectual and life experiences will make law seem more real and accessible to them and help them more readily to integrate legal knowledge and skills into what they know already.

Perhaps the insights of other disciplines on law will help students begin to see themselves as something other than doctrine-memorizers or technocrats. We need to help embryonic lawyers begin to form a view of themselves as lawyers that provides even a small measure of protection from the boredom, disenchantment and malaise that have driven so many from the profession. Successful lawyers do not look at legal doctrine on the one hand, and their skills, values, emotions and policy-insights on the other as separate compartments. They understand law and their relationship to it in a more organic manner. We should aid rather than hinder such integration. As I suggested earlier, much of contemporary civil procedure can be understood only superficially unless we contextualize and enrich the doctrine.

Here are some possible ways of conveying more complete procedural stories. We could return to longer, less-edited cases, even though this means fewer of them. We could also use more trial court opinions in order to demonstrate the more typical judicial interventions. The highly edited appellate case, fol-

lowed by fragments of other cases and questions that neither the author nor the student can usually answer—with cites to scholarly articles or other cases—strikes me as bad education. This method engenders guilt because the student does not have the time to pursue many of the squibs on her own. It also engenders a “what the hell attitude; there is so much here I can’t learn it all anyway, so I will only scratch the surface.” The fragments are superficial. Lawyers use treatises and digests to narrow their focus, and then turn to full texts.

It is a mistake to insist that fact-consciousness is important and not provide facts. It seems to me that many case-books doubly fail in this respect: they have too little of a major case, a major article or a major issue in legislative history to enable a student to follow the whole story or the whole argument in an intelligent way. They have too many one-paragraph squibs and one-sentence ideas for most human minds to absorb. In short, they are superficial in both their longer and their shorter pieces.⁸⁹

Since we are in a disintegrating stage of civil procedure, I think it is even more imperative than usual that we provide a good deal of historical information. By this I do not mean merely saying what a writ is, or that the drafters of the Federal Rules believed in uniformity. The students should be educated on who wanted what types of procedures and why. By seeing the political and professional agendas that resulted in the Field Code and the Federal Rules, they can begin to make sense out of who is pushing what reforms now and why. Indeed, they can decide on their own the ways in which my emphasis on the cause of action, the jury and the roles of lawyers, and on the pretrial and trial level of activity as opposed to the appellate-level, is itself value-laden. History can also provide students with a sense of human limitation, and of the inexorable tensions between predictability and discretion, law and equity, and between lawyer, judge and jury. Moreover, law schools are part of the university; the lawyer and the law are part of greater society. A sense of history should both help to

⁸⁹ Perhaps we should mention fewer articles, but print longer excerpts of those which we do. We complain that many of our students do not make good, step-by-step coherent arguments. How often do they read or hear a full-blown argument that integrates facts, doctrine, values and insights from other disciplines?

explain the materials and provide one with context in which to survey her condition and the condition of her clients.

And one can provide history in a number of ways. One can include narrative history about the development of civil procedure. One can include original documents by the protagonists and legislative materials—not snippets, but full reports and full speeches. One can force the reading of advisory committee notes. One can provide background about the characters in cases and about what was going on at the time. Indeed, two students of mine—a former journalist and a former union-organizer—have helped me write background stories on *Joint Anti-Fascist Refugee Committee v. McGrath*,⁹⁰ *Adickes*,⁹¹ *United Mine Workers of America v. Gibbs*⁹² and the First Circuit case of *Manego v. Orleans Board of Trade*.⁹³ And, of course, scholars have already provided background on such cases as *Pennoyer*,⁹⁴ *Erie*,⁹⁵ *Hansberry v. Lee*⁹⁶ and *World-Wide Volkswagen*.⁹⁷

Finally, one can see history unfold the way lawyers see history unfold, in the context of having to make decisions about their actual cases. I have decided to run two cases throughout the procedure course next year. These are not add-ons. They will be as integral to the course as the legislative hearings, the opinions, the articles, the speeches and the empirical data which I also will assign. I am using a case of a jeep that rolled over allegedly as a result of the installation of an elevation kit and monster tires, plus the lift provided by—no kidding—four hockey pucks above each tire; tragically, the driver's best friend was killed. The students will also participate in several stages of a class action brought to force the

⁹⁰ 341 U.S. 123 (1951). This is the first case my students read in my course this year. I chose it because the facts are so interesting, because it deals with important political events through the technical procedural step of a Rule 12(b)(6) motion and, most importantly, because it contains elegant writing in several opinions about underlying procedural values which I cherish.

⁹¹ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

⁹² 383 U.S. 715 (1966).

⁹³ 773 F.2d 1 (1st Cir. 1985).

⁹⁴ Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

⁹⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁹⁶ Allen R. Kamp, *The History Behind Hansberry v. Lee*, 20 U.C. DAVIS L. REV. 481 (1987).

⁹⁷ *World-Wide Volkswagen v. Woodson*, 244 U.S. 286 (1980).

City of Cleveland to hire women in their fire department. Both are real cases for which I was provided complete documentation from commencement through trial (including pleadings, amendments, 12(b)(6) motions, discovery documents, summary judgment motions, trial transcripts, directed verdict motions, instructions and openings and closings). Between them, these cases have intriguing and complex issues relating to multiple parties and theories, Rule 19 joinder, cross-actions, motions to dismiss, discovery, summary judgment, instructions, directed verdict, bifurcation, preliminary and final injunction and monetary damages, as well as issues of jurisdiction, venue, and preclusion.

There are many reasons for running two full cases throughout the course. They provide giant, chronological set-pieces around which the students can organize and remember their learning. They permit a realistic and sophisticated exploration of procedural doctrine and procedural decisionmaking. They permit the students to see the relationship between decisions made early on to later stages of the litigation. They vividly demonstrate the importance of facts and how one arranges them. They permit multiple opportunities to tell the same story different ways to different audiences. They permit exposure to more types of skills than are typical in first-year courses. They permit the student to contrast and compare two very different types of civil litigation. They also provide the students with a good deal of substantive law in the two cases, so that they can realistically see the interplay of substance and process.

I am not using these cases only because I want to provide occasions to meet the needs of students with a variety of learning styles, or for skill-development in the clinical sense, although I believe these are both important goals that are enhanced by this method. I do not think our students understand procedural concepts until they can apply them. I think I need these cases in order better to teach the substantive law of procedure. Much of current procedural doctrine involves balancing tests and the invocation of judicial discretion.⁹⁸ One

⁹⁸ Consider how much of civil procedure involves open-textured rules, blurred lines and weighing variables. Some examples are the meaning of the word "claim," the minimal requirements for a complaint, the meaning of the word "transaction,"

cannot learn such doctrine in the traditional sense of knowing black-letter law. Through the use of highly-textured simulations, though, one can teach students how to make arguments using such amorphous doctrines. One can also show how lawyers attempt to make rational decisions in a world of blurred legal lines, incomplete factual data and a hodge-podge of variables.

The normative issues of procedure make more sense and have more meaning when one has to think about them in the context of fleshed-out facts. I want the students to think about the relationships between judge and jury after they have learned about the firefighters case. I want them to think about Rule 11 and its impact on the bringing or not bringing cases with respect to an actual complaint that they know intimately. I want them to think about court bias and about the insights of feminist jurisprudence in the context of the richly textured cases about which they know a great deal.

I teach at a law school in which students are required to have four three-month work experiences before they graduate. Consequently, we may have a student-body that has chosen us because they learn better by doing. But I suspect that most people learn more about doctrine, policy and lawyering as a result of having to do concrete chores which force that precision which is the hallmark of superb lawyering. Since civil procedure is so tied to advocacy, strategic planning and making choices, I think requiring students to make full arguments and to exercise judgment is vital. Well over half of the assignments that I have prepared for my civil procedure class this year require the students to do something other than discussing appellate opinions. Often, they will engage in lawyer-strategy sessions. At other times, they will advise a Senator on a procedural bill. During some classes, the students will defend

common questions of law or fact, "interest relating to the subject of an action," "as a practical manner impair or impede the person's ability to protect that interest," the meaning of "citizenship" or "domicile," sufficient contact with the forum state, the gestalt-like test in *Asahi*, "arising out of" federal law, Rule 23 "commonality" and "typicality" and "predominate over any questions affecting only individual members." One can memorize the words or tests, but the action that counts is at the level of application in concrete situations in which "the facts" rarely stand still. The lawyer's task is to make winning—or at least sensible—arguments utilizing the doctrine, facts and policies in an integrated way.

or oppose proposed amendments to the Federal Rules. At others, they will argue 12(b)(6) motions, impanel a jury or help a judge decide a summary judgment motion. I will usually take the role of a senior partner, a judge or a legislator.

The written materials help prepare the students for the assignments in class. In more than half the classes, every student must be prepared to carry out some role, although perhaps only six or eight will be called upon at random. On one occasion, they must decide whether they will agree to any of the ADR alternatives suggested by the judge. I am giving them an embarrassing amount of data from which to conclude that formal litigation is itself highly problematic. And on three occasions, I will require short papers.

Most casebooks do not explicitly discuss the materials available to the researcher in the library. This is a mistake. Course readings should describe different sections of the typical law library and different research techniques in our field. So far as I can tell, research methods are by no means trans-substantive. Tax lawyers, business lawyers and trial lawyers do different types of legal research. In fact, environmental, labor and tort litigators do different types of research. One of my writing assignments requires the students to describe how they have tried to locate certain relevant cases.

Recently I returned to my old law firm to help my former partners with an internal continuing legal education program. I had dinner with the head of one of the trial departments and asked him what type of programs he wanted. He said that the young lawyers do not think very well. In his view, they do not force themselves to ask hard questions and then try to answer them on their own. Frequently, they do things by rote or because someone told them this is the way it should be done. He added that this includes quite successful law students from the elite law schools.

Although older lawyers may always feel that the younger do not think rigorously, maybe the criticism has more bite today. I have the sense that a good deal of law teaching in many courses, not just Civil Procedure, is being done through lecturing, or through an ersatz Socratic method in which questions are asked not to provoke deep thought and analysis but in order to have the student answer what the teacher had in mind. One reason for this may be the eternal demon "cover-

age." Particularly during a period of such disarray in Civil Procedure the instructor may feel that she cannot convey general principles that have much meaning through the normal case method for there are so many contradictions, exceptions, accretions and variables. In order to convey large amounts of information more quickly, perhaps we turn to lecturing more often than we would like to admit. But with the law changing so rapidly it may be more important than ever that we find ways to encourage the depth and mastery of basic concepts. It is a sense of the meaning of excellence that we are trying to convey and a sense of what it means to think. Many law firms, so tied as they are to high overhead and billable hours, will not find the time to teach lawyering skills, that is to say, "thinking."

The major reason I want our students hearing full stories and handling them like lawyers is that I want to force them to think in front of me. Teasing a principle or two out of an edited case is thinking, but not enough of it. Having a value-laden discussion in class without the history, empirical data or jurisprudence to think about the questions tends to lead to cocktail talk. I know of no better way to instill in students the sense of the importance of procedural values—human dignity, predictability, efficiency, community, autonomy—than to provide readings that explore these concepts, and situations in which the students are forced to act in ways that enhance or detract from the values, and to explain their choices.

Perhaps the materials for a civil procedure course should lay out the doctrine that is not readily conveyed or understood through a few judicial opinions. This would leave the time to use the doctrine in concrete situations. Why do students buy hornbooks and outlines? If the law can be laid out more simply, maybe we should do it, but only if that then frees the time for the more complex. I want the students to use the contextual materials in a way that brings them directly to bear on the doctrine and on practice. I want to see if we can put the students in situations where they have to think without the excuse that they are covering so much so fast that they have no time to think.

I have lost sleep over two major fears about my course for next year. First, will there be unbearably long periods of silence in the classroom? The assignments are structured so that

if the students do not carry the ball nothing will happen. My experience with assignments that carefully define questions and roles for students is that students usually take them quite seriously.⁹⁹ In any event, I am steeling myself to outlast the moments of silence, and counting on the fact that first-year students, particularly in the fall when I am teaching them, tend to do what they are told.

Second, I am trying to teach a good deal of doctrine by requiring the students to use that doctrine in richly textured simulations, while simultaneously interweaving contextual matters. Will this increase rather than diminish anxiety and chaos, and interfere with learning? If I am correct about the positive aspects of more complete stories and integrated learning situations, then procedure taught this way should be more interesting and make more sense to some students who do not connect with more traditional methods. It is unlikely that the type of student who has had little trouble learning procedure in traditional courses will be less challenged and learn less when more complex situations are offered and more realistic and complete questions are probed. I hope I am creating a giant sandbox for students that will encourage each type of student to play as hard and creatively as she can.¹⁰⁰ I have tried to reduce the potential for added confusion through the many methods of providing firm lines and clarity that I described previously.

Finally, I would like to address a few mundane questions, and one more lofty one. On the practical side, how will I include longer cases, the materials from two real cases and the longer contextual materials all in one course? I am not done yet, but it looks like it will take about 2000 pages of materials, using letter-size pages, double-spaced. I will have about sixty-three assignments, with an average of thirty pages per assignment. The students will also need a rule and statute book, but I do not think they will need a hornbook or commercial outline. By laying out some of the doctrinal material and by returning

⁹⁹ I have used simulations to teach civil procedure, complex litigation, evidence and an advanced course called "civil advocacy." The latter experience was described in JUDITH OLANS BROWN ET AL., A.B.A. SECT. LEG. EDUC. AND ADMISS. TO THE BAR, THERE ARE NOT GOOD ADVOCATES IN CUBBYHOLES (1975).

¹⁰⁰ For a description of this type of teaching and learning in an upper class course, see *id.*

frequently to the same two simulated cases, pages are saved. Also, four of the sixty-three assignments are review quizzes to be discussed in class. These assignments use very few pages.

There is also the issue of evaluating students since so much of the course has students performing on a daily basis. I intend to keep a file on each of my eighty students. I will periodically jot down what I recall of their performances. Since my mind is a sieve, I will also ask them occasionally to write down briefly what they have done in class for inclusion in their file, which will also contain their written assignments.¹⁰¹

I am unsure whether the type of course I have described in any way fills the void identified by Geoffrey Hazard¹⁰² and others for an overall theory of procedure. But let me make the case that such a course at least provides a useful framework in which to think about many of procedure's more vexing problems. I believe the tension between the story and its legal elements is central to the discipline of civil procedure. It helps us understand differences and similarities between law and equity, judges and juries, formal litigation and ADR. The ways in which stories, legal elements and procedural rules are entwined help us understand differences between good and bad advocacy. By concentrating on fuller stories and their elements, and on a variety of relevant audiences, we are providing multiple opportunities to speak to the relative places in our procedural universe of community, the individual, law-application, dispute-resolution, predictability, discretion, dignity and efficiency.

Concentrating on formal causes of action enveloped in fuller stories captures much of the professional life of most civil litigators. It also exposes students to the excruciating tension in human existence: how can one impose discipline on reality in order to talk about it and deal with it, while simul-

¹⁰¹ Two of the students who helped me develop my new civil procedure materials have agreed to be teaching assistants during the course, so that one of them will be in the room with me during each assignment. They will be able to help me keep track of the class participation of students.

At our school we have a Pass/Fail grading system, with written narrative evaluations for each student in each course rather than grades. I will evaluate their final examinations blind, and then have student services give me the names. I will then add comments on their performance throughout the course.

¹⁰² GEOFFREY C. HAZARD, JR., *RESEARCH IN CIVIL PROCEDURE* (1963).

taneously knowing that the broader reality overflows the enclosures? Litigators are like historians and novelists; they deal both with the boundaries necessitated by language and convention, and with the larger, untidy reality beyond. To paraphrase Robert Frost's vision of poetry, procedure deals with exquisite order and exquisite chaos.¹⁰³

EPILOGUE

Seven months have passed since I presented the paper which is printed here. The Civil Procedure course which I described has now ended, and the students took their exam today. Their assignments covered both the "old" procedural rules and the new ones, which became law on December 1, 1993, due to congressional inaction. I was able to reduce the number of the students' assignments to fifty-seven and the number of pages to 1560. The course met fifty-seven times, one hour for each of three sessions per week, and an hour and one-half for a fourth session each week.

I am considerably more optimistic about the course than about the new mandatory discovery rules as now constituted—but that is a topic I will soon address in a subsequent paper.¹⁰⁴ My concern that there would be long moments of silence in the classroom during my new course proved unfounded. The classes were almost uniformly lively, and there were usually a surplus of volunteers on those occasions in which I did not randomly pick names. Some students complained that the course required considerably more time than their others, and that many assignments were too long and too

¹⁰³ My thinking about law and civil procedure has been greatly influenced by JAMES B. WHITE, *THE LEGAL IMAGINATION STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973). On a few occasions, I have taught a course based on this book. Some of my ideas on "order" and "chaos" surely grew out of the experience of teaching that course. I particularly enjoyed his chapter on *The Imagination of the Lawyer*, with its section on *Is the Judge Really a Poet?* White prints excerpts from two Robert Frost essays, *The Constant Symbol* (Introduction to *THE POEMS OF ROBERT FROST* (Modern Library ed. 1946)) and *The Figure a Poem Makes* (1949) (*SELECTED PROSE OF ROBERT FROST* (Cox & Lathem eds. 1967)). WHITE, *supra*, at 766-73. I have been unable to find the phrase "exquisite order and exquisite chaos," but suspect it is not my own.

¹⁰⁴ I have been asked to present a paper on the new discovery rules at the civil procedure section of the annual meeting of the Association of American Law Schools on January 7, 1994.

demanding. Moreover, they not only had to read the material, but they had to use it (of course, that was the point!). The students were almost always well-prepared.

By the end of the course, most of the students sounded more knowledgeable about, and comfortable with, procedural issues than in any other civil procedure course I have taught over the past twenty-three years. Most students seemed to internalize the doctrine and values in meaningful ways. As they prepared for their exam, many told me that they found that they already knew the material.

Although I will know more about results when I read the exams over the next several weeks, my teaching assistants and I were extremely pleased with what we witnessed over the past four and one-half months. After I evaluate the exams, I will then be able to read the rather detailed evaluations of the course many students wrote during the last week of class. Five of the students have agreed to help me improve the materials and the course for next year's beginning law students.