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PANEL DISCUSSION: Civil Litigation in the Twenty-First Century: A Panel Discussion

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Et Al

STRUCTURING COMPLEXITY, DISCIPLINING REALITY: THE CHALLENGE OF TEACHING CIVIL PROCEDURE IN A TIME OF CHANGE

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INTRODUCTION

Steve Subrin's article highlights many of the problems that law professors face in teaching Civil Procedure today.[1] As I have discussed elsewhere,[2] Civil Procedure is one of the most important courses in the law school curriculum. In the most immediate sense, it is crucial because it cuts across every aspect of the legal system. Students must understand civil procedure in order to understand the cases that they are reading in their first-year torts, contracts and property courses. Yet, students find procedure enormously complex and challenging, and it has the reputation for being the hardest course in the first-year curriculum. In addition, as a course, Civil Procedure is internally complex, for every discrete area is interrelated with every other area in a kind of seamless web.

Professor Subrin's article underscores contemporary developments in procedure that make teaching procedure today particularly complex. As the subject of this symposium highlights, what we are witnessing—if not a "reinvention" or "disintegration" of procedure—is a dramatic modification of some of the most fundamental aspects of procedure. We have local rules,[3] and with the passage of the Civil Justice Reform Act of

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[1] Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155 (1993).

[2] Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993); Elizabeth M. Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. LEGAL EDUC. 41 (1987) [hereinafter Schneider, *Rethinking*].

[3] *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989); Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853 (1989).

1990 ("CJRA"), the proliferation of much experimentation at the local level.[4] We now have the 1993 amendments to a whole host of Federal Rules, most significantly the discovery rules which change basic assumptions of civil litigation. As Professor Subrin suggests, we are also seeing the interrelationship of procedure with every theoretical current and strain within law from feminist theory to law and society to law and economics. In sum, the substantive content of the procedure course has become more fractured, more interconnected and more elusive.

Professor Subrin suggests that the challenge for procedure teachers is how to impose "discipline on reality," and he describes a course in procedure that he has developed, focused around two actual cases. I agree with Professor Subrin that the imposition of structure on the increasingly complex subject matter of the course is the fundamental challenge for Civil Procedure teachers today. In this comment, I discuss this challenge from my perspective in teaching procedure. My approach has been to balance the need for structure with the richness and complexity of civil procedure in theory and in practice. It is an effort to make the course intellectually manageable and, at the same time, rich with the human and social context of procedure, lawyering, ethics, theory and an understanding of the way that law works in action. I explore some of the approaches that I have developed to strike the balance of manageability and richness and raise some questions about new directions for the teaching of procedure.

I. REVISION

I began teaching procedure in 1983. Although there were many new developments in procedure reflected in the amendments to the Federal Rules in 1983, particularly Rule 11, the structure of the procedure course was fairly straightforward and organized around the basic principles of the Federal Rules. I made the then-radical choice to begin my two-semester, five-credit course with the chronology of a lawsuit, starting with pleading and ending with appeal in the first semester, and then tackling preclusion, subject-matter and personal jurisdic-

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[4] *See* Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879 (1993).

tion, venue, parties and *Erie* in the second semester. Over the ten years that this approach has evolved, as I describe more fully below, it has remained focused on the Federal Rules as a way of structuring and simplifying the course.

Over the past few years, the assumptions of uniformity and simplicity on which this model have rested have been challenged by the proliferation of local rules,[5] the CJRA and the development of "grass-roots" procedure.[6] There has also been constant revision of the Federal Rules by amendment and Congressional mandate. Constant change is now the norm. My introduction to almost every topic contrasts the "old" version of the rule or doctrine at issue with the "new" version. "Old" summary judgment must be contrasted with "new" summary judgment, "old" Rule 11 must be contrasted with "new" Rule 11 and now even "newer" Rule 11, "old" directed verdict must be compared with "new" judgment as a matter of law, "old" "pendent" and "ancillary" jurisdiction must be compared with "new" "supplemental" jurisdiction and the "old" venue and "new" venue statutes must be examined. As Professor Subrin suggests, these changes underscore the importance of historical context. Students frequently ask, "do we have to know the old and the new rule" and the answer is always yes. Without knowing what the rule or doctrine was before, it is impossible to understand how it was changed and assess the significance of the change.

II. MANAGING THE TENSION

Professor Subrin describes his plans for a simulation, based on two actual cases, as a way of having the students work with a fuller procedural story, and a particular context for analysis. He describes several reasons for the use of simulation in general. Working on simulation with actual cases, he argues, will enable students to explore procedural doctrine and decisionmaking in a more realistic and sophisticated way, to see the importance of facts, to test students' understanding of procedural concepts by having to apply them and to sensitize students to the way in which arguments are constructed based

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[5] *Id.* at 881.
[6] *Id.* at 884.

on balancing and judicial discretion.[7] Yet at the same time, Professor Subrin points out that, in light of the massive amount of material that needs to be conveyed, a procedure teacher's impulse may be to do quite the opposite, to lecture the background:

> particularly during a time of such disarray in Civil Procedure the instructor may feel that she cannot convey through the normal case method general principles that have much meaning for there are so many contradictions, exceptions, accretions and variables. In order to convey larger amounts of information quicker perhaps we turn to lecturing more 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.[8]

Professor Subrin suggests that materials for civil procedure should simplify and lay out the doctrine in order to have time to apply the doctrine, to free time for more complex treatment of the doctrine in context. He ends by drawing parallels 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 simultaneously knowing that the broader reality overflows the enclosures."[9]

I agree that simulation in the context of an actual case is an important dimension of a civil procedure course. For many of the reasons that Professor Subrin suggests, procedure is a course for which simulation is particularly crucial. My experience as a civil rights litigator and my background as a clinical teacher gave me a critical perspective to rethink the teaching of civil procedure.[10] Because of my interest in feminist theory, law and society and other critical theoretical perspectives, I want to enrich the theoretical framework with which students approach procedure. At the same time, ten years of experience in teaching procedure has given me a perspective on the need to make the conceptual, doctrinal and rule-based framework manageable so that students can do the more rich, analytic work in a simulation context.

For the last ten years, I have taught procedure with some kind of simulation component. At the same time, I have also

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[7] Subrin, *supra* note 1, at 1183.
[8] *Id.* at 1185-86.
[9] *Id.* at 1188.
[10] Schneider, *Rethinking*, *supra* note 2, at 41.

sought to use materials that I think simplify and make manageable the concepts that the students use. Except for the first year that I taught procedure, when I used the Field and Kaplan casebook, I have used the Landers and Martin (now Yeazell, Landers and Martin) casebook.[11] I have used this casebook because it is very simplified and "stripped down," with relatively few appellate cases and notes. I supplement it with assigned readings from the Friedenthal, Kane and Miller hornbook,[12] which provides a fuller context of the issues, as well as a set of my own materials to offer fuller theoretical and alternative perspectives. I have also assigned Glannon.[13]

Since 1986, when Brooklyn began a "seminar section" program in the first year, I have used a simulation as the focus of the course. As I have described elsewhere, the first simulation was built around a DES case and was fully integrated with the students' Legal Writing course, which runs concurrently in the first year.[14] This simulation was very ambitious and labor-intensive, and depend on the full collaboration of a Legal Writing instructor. The following year I experimented with another simulation, involving a wrongful discharge and whistle-blowing claim, which another Civil Procedure colleague and I had jointly developed and which also had a Legal Writing component.

From the first year that I had taught Civil Procedure, however, I had also assigned the book *The Buffalo Creek Disaster*[15] as an introduction to civil procedure, and had developed teaching materials on *Buffalo Creek*, both alone and with other colleagues. I then decided to make *Buffalo Creek* the focus of the simulation. I have used actual pleadings and other motions, and the students have drafted complaints, discovery documents and argued motions. This approach has involved only partial integration with Legal Writing. I have also devel-

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[11] STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE (3d ed. 1992).

[12] JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE (2d ed. 1993).

[13] JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS (2d ed. 1992).

[14] Elizabeth M. Schneider & Kathleen O'Neill, Simulation Materials for Civil Procedure: The Cases of Ellen Warren and Marian Fleming (Fall 1986-Spring 1987) (on file with the author); see Schneider, *Rethinking*, *supra* note 2, at 44, for a further description of this course.

[15] GERALD M. STERN, THE BUFFALO CREEK DISASTER (1976)

oped a version of these *Buffalo Creek* simulation materials for a large class, which I used for the first-year Civil Procedure class that I taught in the fall semester of 1991 at Harvard Law School. By that time, Larry Dessem had published his *Pre-trial Litigation*[16] book which focuses on *Buffalo Creek*. Because the Harvard first-year program concurrently runs a Legal Methods class in the first semester, I supervised the Legal Methods component for my first-year students, and the materials for both Civil Procedure and Legal Methods were based on my *Buffalo Creek* simulation materials.

These simulation exercises, focused on an actual case, have been very useful ways to teach procedure and, in general, they have been enormously popular with my students. But I have also found, as Professor Subrin suggests, that if one is going to use these simulation exercises, it is important that the rest of the course be pared down and structured in such a way as to facilitate the effective use of the Federal Rules, doctrine and theory. To do that I use simple case materials, enriched by hornbook excerpts or problem books, and theoretical materials. In class, I introduce each section with a brief lecture that highlights the larger procedural themes, outlines the history, the appropriate Rule and mentions the relevant cases in their context. With that introduction, which pulls together the various materials that the students have read, I feel more free to spend class time with the students tackling the application of these materials in discussion of cases or simulation exercises.

I also have a Teaching Assistant, a second-year student who has taken my Civil Procedure course, and has done very well. The Teaching Assistant attends every class, teaches one additional class per week for the students to review the material covered in class and is available as an additional resource for support and assistance in outlining and exam preparation. Although attendance is optional, this class offers students a different, more peer-directed learning experience.

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[16] R. LAWRENCE DESSEM, PRE-TRIAL LITIGATION, LAW, POLICY AND PRACTICE (1991).

III. THE CHALLENGE

There are no easy answers to teaching Civil Procedure today. However, I want to suggest that the notion of "disintegration" of the subject is too simplistic, because it assumes that there was previously a fixed, static and linear framework for procedure. Contemporary developments in procedure are enormously complex, as demonstrated by the richness of the contributions to this Symposium, but they are an important example of the evolutionary nature of the law in general. Law is constantly changing, unpredictable, with no clear rules, guidelines and answers, and it is shaped by political, social and economic forces outside the law itself. In a sense what has happened in procedure is but a larger "legal process" lesson encapsulated within a particular field. From this perspective, Civil Procedure can be viewed as a paradigm for the larger, multifaceted ways that we must think about law and assist our students to understand and think about law. If contemporary procedure teachers saw the course more as a paradigm of "legal process" than a "disintegration" of a familiar structure, it could provide an opportunity to rethink the course and highlight new issues for study, such as allocation of powers for rulemaking and ethics.

At the same time, I have suggested that if we present Civil Procedure as a lesson in the changing nature of law, we must also do this in a way that makes it intellectually manageable. An emphasis on live cases or simulations as a vehicle for students to learn by doing is critically important, but it only heightens that need. Students first must have some preliminary understanding of basic concepts before they can interconnect them and use them. It is a tremendous challenge to help students see the unwieldy nature of legal reality, the range of social, political and economic factors that shape fundamental concepts of procedure and the rules that develop, the *ad hoc* and random nature of lawmaking and, at the same time, impose intellectual discipline on this reality. This, however, is the challenge that contemporary teachers of Civil Procedure must embrace.