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# Teaching Civil Procedure Through its Top Ten Cases, Plus or Minus Two

Kevin M. Clermont

*Cornell Law School*, [kmc12@cornell.edu](mailto:kmc12@cornell.edu)

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## TEACHING CIVIL PROCEDURE THROUGH ITS TOP TEN CASES, PLUS OR MINUS TWO

KEVIN M. CLERMONT\*

The thesis is that Civil Procedure teachers should give more attention to the subject's landmark cases. Law teachers' common sense and cognitive scientists' schema theory lend support to that thesis. The pedagogic implications of that thesis call for an enriched case method, the essence of which is teaching a slightly smaller number of cases and pausing on the key ones, thoroughly examining them in a rich context. The optimal sources of that context are written case studies, assigned as intermittent supplementation.

### I. INTRODUCTION

My thesis is a simple one: we Civil Procedure law teachers give too little attention to the landmark cases. And I include myself in this indictment.

Instead of savoring these choice morsels, we gulp them down. The incentives to rush through the landmark cases of Civil Procedure are manifold. We all feel the pressure to achieve coverage, obviously, as ours is a rich and broad subject. Moreover, we want to get to the latest doctrinal wrinkle, which absorbs our current interest. Or we want to reach today's hot topics, those that matter in the real world. Or we want to expound the latest insightful theory.

Most of us rationally understand that surrendering to such temptations is not the path to good teaching, and so we should be able to resist them. But still we rush through the great cases. The reason, I think, is that something more subtle and powerful propels us. My recently developed belief is that because we think we understand our own subject, we beneficently incline to share our understanding of the big picture with our students. Individual cases are just points in our big picture. We want to convey the overall vision of that pointillist picture, not merely the cases themselves. That natural inclination to share our vision is almost irresistible, but it can maim good teaching.

It is true enough that teaching the same subject for a number of years will produce expertise, in the sense of highly structured knowledge. Psychologists call each structured subunit of that general structure a schema.<sup>1</sup> We teachers

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\* Flanagan Professor of Law, Cornell University. I would like to thank for their helpful comments Paul Caron, Robert Hillman, Jeffrey Rachlinski, and Emily Sherwin.

1. See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (2d ed. 1991).

have slowly built an impressive set of schemata of Civil Procedure by reading cases and studying theory, by analogizing from related schemata, and by reflecting on the actual construction of each schema. Our schemata allow us easily to incorporate new information. They also facilitate solving new problems of doctrinal analysis, permitting us both to explain and to predict outcomes with relative ease and effectiveness. Just consider how much easier it has become to answer students' questions, or how much more tempting it now is to convey our structured views in oral debate or in published work.

Although this feeling of mastery is probably realistic as well as undeniably satisfying, it can negatively affect teaching. Knowledge is the root of some evil in teaching. Things seem clear to us, so we try to explain them. We shoot past the landmarks quickly, in order to cover the subsequent developments and to sketch the big picture. We try, in short, to convey our schemata. What we tend to forget is that law students are in class mainly to build their own schemata.<sup>2</sup> Truly learning law is not a process of receiving the other's understanding; it is rather a process of creating one's own understanding.

How do novices build schemata? Most often they begin by studying exemplars. They connect and organize the exemplars into a structure by the process of induction. Other mental processes can later refine this schema, but the beginning is critical. The students' focus should be on fundamentals, not on filigree.

As is already evident, my thesis, although a simple one, requires, first, a bit of background drawn from cognitive scientists on schema theory in the abstract, and then a little elaboration of its pedagogic implications for law schools.

## II. SCHEMATA

The "major accomplishment of cognitive science has been the clear demonstration of the validity of positing a level of mental representation."<sup>3</sup> Although disputes persist as to details and even as to terminology, wide

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2. See Richard John Stapleton & Deborah C. Stapleton, *Teaching Business Using the Case Method and Transactional Analysis: A Constructivist Approach*, 28 *TRANSACTIONAL ANALYSIS* J. 157, 157 (1998) ("The case can be made that schema change is at the root of significant learning," with schema change necessarily performed by the students themselves, and with learning defined as a persisting change in disposition or capability that is not merely ascribable to growth.).

3. HOWARD GARDNER, *THE MIND'S NEW SCIENCE: A HISTORY OF THE COGNITIVE REVOLUTION* 383 (1985). It is safer to stick to mainstream views as one ventures outside one's field. *But see generally* John Batt, *Law, Science, and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning*, 40 *J. LEGAL EDUC.* 19 (1990) (invoking curious psychological theories to argue that legal pedagogy should set aside "bite" oriented casebooks in favor of riveting narrative, especially electronic narrative, in order to attain brain stimulation and learning).

agreement prevails on the existence of what many call schemata. These structures in memory embody knowledge, whether about a stimulus or a concept, including its attributes and the relationships among these attributes. These schemata organize the world for the person, while telling the person which new inputs to seek out or to focus on and which to ignore.<sup>4</sup>

Data-driven, bottom-up processes allow the person to actively construct a schema from exemplars encountered. More general information, analogies, and metacognition help the person to elaborate the schema, by making connections multidimensionally and even generating idealized prototypes. As learning progresses, the schema becomes more complex, but also more tightly organized, and, hence, more usable. Furthermore, people arrange their individual schemata into a useful hierarchical pyramid that can embody complex knowledge, with the more inclusive schemata generally being higher in the hierarchy.<sup>5</sup>

Schemata are in constant use mentally. When a person processes data from the world, the existing schemata affect encoding, as the data fit into the appropriate niche. Schemata affect recall, as people tend to forget schema-irrelevant information and must have made a special processing effort in order later to remember schema-inconsistent information. A person uses the appropriate schema to generate inferences where information is missing or, more generally, to engage in theory-driven and top-down processes.<sup>6</sup>

More disagreement persists about how people use their schemata to categorize and solve problems. But psychologists agree that what separates experts from novices is the quality of their schemata, whether the expert is a chess grandmaster or a law teacher. In addressing a new problem, the expert does not retrieve all the details of past games or cases, but rather the appropriate schema extracted from them. That schema then, in one way or another, generates a solution, such as a chess or legal move.<sup>7</sup>

In any event, schemata are critical to converting novices into experts, so teachers are well-advised to attend to their students' schema-building. Induction is a basic mental process in this task. Teachers need, therefore, to

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4. See FISKE & TAYLOR, *supra* note 1, at 98. For an instructive application of schema theory to the law, see Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767 (2000) (stressing the negative effects of schemata on inference and explanation).

5. See FISKE & TAYLOR, *supra* note 1, at 98-99, 105-07, 115-16, 147-49.

6. See *id.* at 121-39.

7. See Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 335, 338 (1995). For a nostalgic view of lawyers' use of schemata generated by a case method, see ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993), reviewed by Gail Heriot, *Songs of Experience: The Last Lawyer*, 81 VA. L. REV. 1721, 1725 (1995) (book review); R. George Wright, *Whose Phronesis? Which Phronimoi?: A Response to Dean Kronman on Law School Education*, 26 CUMB. L. REV. 817, 828-34 (1996).

provide students with well-selected exemplars, encouraging them to examine thoroughly these prime exemplars from many different angles. A long string of half-comprehended exemplars likely produces a shakier foundation than a shorter series of well-pondered exemplars. “The case method is essentially a constructivist learning approach.”<sup>8</sup>

Of course, provision of exemplars is only the beginning of the teaching process. Research indicates that better schemata result if the teacher directs the students’ building process by providing some theory that reveals connectedness and by suggesting source analogies. Moreover, research also indicates that better schemata result if the student is actively involved in searching out source analogies and in thinking about the schema-building. Passive recipients of unconnected and two-dimensional information flounder, while directed and active students flourish. The involved students build a sound schema and only later add most of their detailed information to it.<sup>9</sup>

Unfortunately, then, there is no way directly to transplant a brilliant schema. All the teacher can do is encourage and guide students in their own schema-building. One law teacher summed up this cognitive understanding:

Most experienced law teachers have independently arrived, at least tacitly, at the result suggested by these experiments . . . . And our resistance to pleas of “just give us the rules” springs from a sense of how people learn, rather than mere sadism. It is the active process of comparing and contrasting appellate cases dealing with complex concepts that leads to an understanding of those concepts on a level deeper than one can get to from the propositional exposition of the hornbook or course outline. Langdell’s “legal science” stands on firm ground in human cognition and learning, at least insofar as lawyering entails understanding doctrinal concepts and applying them in new situations . . . .<sup>10</sup>

### III. PEDAGOGY

The law schools’ case method is wonderfully suited to this challenging process of teaching basic law courses in common-law countries. It is, of

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8. Stapleton & Stapleton, *supra* note 2, at 159 (citations omitted).

9. See Blasi, *supra* note 7, at 336 n.53, 358-61, 386-87.

10. *Id.* at 359. Earlier roots in England of the case method may have rested less on a theory of legal science and more on a sense of human learning. The first casebook editor extolled the value to the student “of early mastering, as so many *nuclei* of future legal acquisitions, a few of the ‘*leading cases*’ in the Law Reports . . . .” SAMUEL WARREN, MISCELLANIES: CRITICAL, IMAGINATIVE, AND JURIDICAL CONTRIBUTED TO *BLACKWOOD’S MAGAZINE* 73 (William Blackwood & Sons 1855), reprinted in 5 *WORKS OF SAMUEL WARREN* 73 (William Blackwood & Sons 1855); see A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 5 (1995).

course, a remarkably inefficient and ineffective way to convey information.<sup>11</sup> But it squarely addresses the primary task of students' schema-building. From its U.S. beginnings in 1870, the case method has been attacked—foolishly for yielding obscurity, somewhat more insightfully for “call[ing] upon the student to produce a synthesis that only experts could properly produce . . . .”<sup>12</sup> Precisely! “Rather than monologically telling students what they need to know for tests based on the teacher's personal schemata, case method teachers colearn and coconstruct ‘reality’ with students in a dialectical, dialogical process.”<sup>13</sup>

Now, my position here is a modest one really. Unlike Dean Langdell, I am not claiming that the case method is the only way to teach law or even the best way.<sup>14</sup> Other methods of group instruction that stress active learning seem to be as effective;<sup>15</sup> also, the case method does flag in the upperclass years,<sup>16</sup> and it is not effective for teaching many of the skills that a lawyer needs to master.<sup>17</sup> Nor do I claim that our courses should teach doctrinally focused schema-building and nothing else, because much else goes on. Nevertheless, the fact remains that the case method is the dominant teaching method for basic Civil Procedure, which still deals heavily with doctrine. So, I maintain merely that if we try to use the case method, we should do it as well as we can.

Yet we do not employ the case method as well as we can. Various and nefarious incentives degrade our classroom style from interactive engagement (whether Socratic or otherwise) toward more of a lecture approach (whether high-tech or otherwise).<sup>18</sup> So, too, do the aforementioned desires for broad

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11. See Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 215 (1948) (“For it is obvious that man could hardly devise a more wasteful method of imparting information about subject matter than the case-class. Certainly man never has.”).

12. Paul F. Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167, 170 (1986) (citing Leslie J. Tompkins, *The Lawyer's Education*, 15 AM. LAW. 423 (1907)).

13. Stapleton & Stapleton, *supra* note 2, at 160 (discussing business-school case method).

14. See C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi (Boston, Little, Brown 1871).

15. See Teich, *supra* note 12, at 168-69, 185. It is perhaps worth noting that some of the modern methods alternative to the case method—such as narrative, simulation and problem methods—share the feature of an elaborated exemplar with the enriched case method. See, e.g., Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: PowerPoint, Laptops, and the CaseFile Method*, 44 ST. LOUIS U. L.J. 1289, 1306-13 (2000) (describing a method that employs for each class period a different case file, consisting of a fictional fact pattern, a selection of authorities, and a partner's assignment to an associate).

16. See Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 328 (1982).

17. See Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 58-59 (1992).

18. See David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. LEGAL EDUC. 469 (2001); Leslie, *supra* note 15, at 1295-1306.

coverage and knowledge-sharing degrade our approach to the casebook, from a true case method, toward use of the book as a rather unclear treatise. These classroom and casebook approaches combine to impede the students' schema-building, by diluting the exemplars' power and by inducing passivity in the students. As another law teacher put it:

Some professors use the case method to teach the rules of law: they go through a casebook by asking for the facts and holding of a case, and making sure the students understand the holding. Then it's on to the next case. Langdell might well cry out (while turning over in his grave): "Stop! If that is all you're doing, go back to using textbooks and lectures. They explain the rules more clearly, accurately, and quickly than cases do. Just find a good hornbook and read it to your students."<sup>19</sup>

We teachers need to adhere more closely to a purer case method, which might be called the enriched case method. The essence is teaching a slightly smaller number of cases and pausing on the key ones, thoroughly examining them in a rich context. The benefits of the enriched case method would be numerous. For example, studying a case carefully, critically and actively teaches best that fundamental skill of how to "read a case." Most importantly, it provides the best raw materials for schema-building. By building and then applying those schemata, the student learns what a lawyer needs to know and how to use that knowledge to "think like a lawyer."

Although I view improved schema-building as a sufficient justification for the enriched case method, other benefits would flow from elaborating an otherwise acontextual presentation of a case. A thorough reading of the facts and proceedings helps students to understand the legal process, as to both dispute-processing and law-making;<sup>20</sup> it shows the law in action, along with its various actors and especially lawyers likewise in action;<sup>21</sup> it instructs on what the law values, and what the law does not;<sup>22</sup> and, at the same time, it humanizes the law, showing the roles people play in creating law and the effects law has on people's lives.<sup>23</sup> Putting the case into its socio-economic-

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19. Myron Moskovitz, *Beyond the Case Method: It's Time to Teach With Problems*, 42 J. LEGAL EDUC. 241, 244 (1992) (footnote omitted).

20. See Judith L. Maute, *Response: The Values of Legal Archaeology*, 2000 UTAH L. REV. 223, 223 (2001) ("Historical reconstruction is invaluable to understanding legal processes . . .").

21. See Robert A. Hillman, *Enriching Case Reports*, 44 ST. LOUIS U. L.J. 1197, 1197 (2000) ("Judicial opinions in contract matters often fail to reflect the intricacies of a dispute, the nuances of the lawyer's strategies in court and the general realities of litigation."); *id.* at 1204 ("the study of actual contracts helps demonstrate that law consists of more than enactments of officials in power").

22. See Joan Vogel, *Cases in Context: Lake Champlain Wars, Gentrification and Ploof v. Putnam*, 45 ST. LOUIS U. L.J. 791, 795-97 (2001) (discussing use of case studies to introduce the outsider perspective).

23. See JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS*, at xi (1976); Carrie Menkel-Meadow,

political context can illuminate the reasons for a judicial decision and its true meaning, while simultaneously attuning the students to the importance of viewing the law from the perspectives of many different academic disciplines.<sup>24</sup> All these benefits are not a bad payoff for a method that incidentally makes the course more interesting and even more fun for the teacher and students. And the benefits of context do not depend on commitment to some sort of deconstructionist jurisprudence.

This variety of pedagogic and intellectual benefits explains the recent burst of attention to the genre of classic-case studies,<sup>25</sup> with many appearing in collections and symposia in various subject areas (other than Civil Procedure).<sup>26</sup> Scholars have produced or are in the process of producing the necessary raw materials. But how should one incorporate these products of legal archaeology into one's course? A variety of possible ways to pursue the enriched case method suggest themselves.

#### A. *Enriched Casebooks*

One could rely on one's chosen casebook to incorporate the contextual materials. Some casebooks commendably include such materials for certain cases. Most notably, the soon-to-be-revised Cover, Fiss and Resnik casebook<sup>27</sup> provides delightfully detailed coverage of several of its major cases, including, for example, *Goldberg v. Kelly*<sup>28</sup> as the book's introductory case. They have the right idea. The result, however, is a long book. Moreover, as a general matter, casebook elaboration inevitably constrains a user, who in teaching cannot so easily pick which cases to pause on in a leisurely manner and which to pass through quickly. Selectivity is a necessary aspect of the enriched case method.

At any rate, one cannot expect many other casebook editors to rush to assist in one's pursuit of the enriched case method. Casebook editors have regrettably powerful reasons not to fill the need. Case studies are a lot of work to prepare. They add many pages to a casebook, and fear of length plagues

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*Foreword, Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787, 788, 793 (2000).

24. See Vogel, *supra* note 22, at 792-95.

25. See Debra L. Thredy, *A Fish Story: Alaska Packers' Association v. Domenico*, 2000 UTAH L. REV. 185, 186-87 (2001).

26. See, e.g., SIMPSON, *supra* note 10; Symposium, *Case Studies in Legal Ethics*, 69 FORDHAM L. REV. 787 (2000); Symposium, *Teaching Contracts*, 44 ST. LOUIS U. L.J. 1443 (2000); Symposium, 2000 UTAH L. REV. 183 (2001). The interest seems to have recently increased, but the interest is not new. See, e.g., RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* (1978); NOONAN, *supra* note 23.

27. ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, *PROCEDURE* (1988).

28. 397 U.S. 254 (1970), *treated in* COVER ET AL., *supra* note 27, at 37-112.



every casebook editor. They provide little professional reward if published in a new edition of a going casebook and they risk alienating prior users of the casebook, who might not want to spend class time on pursuing the particular cases elaborated.

This is not to say that casebook editors will not, or should not, take minor steps toward enriching their presentation of cases. A little case background and follow-up go a long way in making the presentation more interesting and more effective. A productive route in that direction was recently mapped by Professor Robert A. Hillman, who suggested that casebook editors contact the lawyers who litigated the more recent cases included in their casebook, asking the lawyers to share material from their case files.<sup>29</sup> This practice would facilitate introducing into the casebook excerpts of briefs and other court documents, as well as the lawyers' letters and other work product.

Incidentally, proposing improvements of this sort is not a dig at casebook editors for their close editing of cases.<sup>30</sup> Some users do complain that the cases in modern casebooks are too closely edited, so that students get neither the full flavor of the opinions nor, more importantly in these users' view, the experience of reading and dissecting cases in their native state. Yet casebook pages are just too precious to expend on loose editing. In the first place, assignments can be only so long before exhausting students' diligence and patience. Moreover, their pre-class preparation should comprise focused work. Finally, loose editing accomplishes little: it does not directly serve the purpose of schema-building, which calls for the addition of relevant detail and perspective, not for additional irrelevancies; nor is it essential to students' training, because they should get plenty of practice in addressing unedited cases elsewhere in their law-school experience.

### B. *Parallel Case*

The more reliable route to follow, then, is to supplement the chosen casebook. Some teachers create their own running exemplar from a real or imagined case, providing a fact pattern and sample documents and referring to the case throughout the course.<sup>31</sup> Many more teachers use one of the excellent

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29. Hillman, *supra* note 21 (describing his contracts casebook). Another interesting route is the teaching technique proposed by Patricia D. White, *Afterword and Response: What Digging Does and Does Not Do*, 2000 UTAH L. REV. 301, 302-03 (2001) (assigning her first-year tort students to pick a case and prepare a full case study covering the record and the context).

30. I would be more prepared to criticize the editorial practice of adding after cases all those countless, cryptic notes on vaguely related issues. See Leslie, *supra* note 15, at 1300-03.

31. See, e.g., Posting of Rogelio Lasso, Professor, Washburn University School of Law, zzlass@washburn.edu, to Civil Procedure Listserve, civpro@law.wisc.edu (June 11, 2002) (on file with author) ("I found that using *A Civil Action* or other materials was too time demanding so for the past couple of years designed my own 'class case,' which is usually an amalgam of several complex cases, usually tort cases. The class case is usually two or three single space pages that

paperback books that similarly provide a single case as an illustrative long-term parallel.<sup>32</sup> Two recent ones, for superb examples, employ *A Civil Action*<sup>33</sup> and President Clinton's sexual harassment litigation.<sup>34</sup>

Such a supplementary approach can be very productive for certain purposes. I have used, and still use, one or another of these supplemental books in my own first-year class. But this approach does not, by itself, achieve all the ends of the enriched case method, notably because that method depends on multiple exemplars. Moreover, this supplemental approach can have some problems, because the supplemental book can be hard to integrate with the casebook. My own consequent difficulty is that I tend to lapse, especially after using the same supplemental book for a few years, into leaving it mainly to the students' independent reading, thereby defeating some of its purposes.

### C. Case Studies

The more effective way to achieve the ends of the enriched case method, therefore, is to supplement intermittently as the class reaches key cases in the casebook. We all do this to some degree in the classroom, by injecting contextual information orally that we might have acquired by our own research, by word-of-mouth over the years, or by gleaning it from the teacher's manual for the casebook. Indeed, casebook editors frequently convey the juicy stuff privately in their manual with the intent of enabling the teachers to jazz up their class by springing the information on the students. But such intent and means are hardly conducive to providing the real enrichment needed.

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include names of injured parties, potential wrongdoers, and detailed accounts of 'what happened.' We begin the semester by meeting the injured parties and one or more defendant as potential 'clients' and we refer to the class case from the beginning, to determine if we should take the case, to using the class case facts and the rules to draft simple complaints, discuss how we can attack a complaint, figure out a discovery plan, etc.'").

32. *E.g.*, DAVID CRUMP & JEFFREY B. BERMAN, *THE STORY OF A CIVIL CASE* (3d ed. 2001); MARC A. FRANKLIN, *THE BIOGRAPHY OF A LEGAL DISPUTE* (1968); JOSEPH W. GLANNON, *CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS* 523-630 (4th ed. 2001); SAMUEL MERMIN, *LAW AND THE LEGAL SYSTEM* (2d ed. 1982); PETER N. SIMON, *THE ANATOMY OF A LAWSUIT* (rev. ed. 1996); GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976) (related film clips available at <http://ns.appalshop.org/film/buffalo/>), discussed in Lawrence M. Grosberg, *The Buffalo Creek Disaster: An Effective Supplement to a Conventional Civil Procedure Course*, 37 J. LEGAL EDUC. 378 (1987); BARRY WERTH, *DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE* (1998); WILLIAM ZELERMYER, *THE LEGAL SYSTEM IN OPERATION* (1977).

33. LEWIS A. GROSSMAN & ROBERT G. VAUGHN, *A DOCUMENTARY COMPANION TO A CIVIL ACTION WITH NOTES, COMMENTS, AND QUESTIONS* (rev. ed. 2002) (treating JONATHAN HARR, *A CIVIL ACTION* (1995)).

34. NAN D. HUNTER, *THE POWER OF PROCEDURE: THE LITIGATION OF JONES V. CLINTON* (2002) (treating *Clinton v. Jones*, 520 U.S. 681 (1997)).

Because a quick aside is unlikely to work, assigned reading (of moderate length, of course) is the optimal way to go. Basically, the extra assignment will compel the students to ponder the key case, examining it from various angles and milking it for multiple lessons—this is, after all, the aim of the enriched case method. The reading encourages the students to build a solid schema, as they incorporate more information into their schema and make new connections within their schema. They will, at the least, realize that their study is supposed to involve more than unearthing the case's holding. Incidentally, the very act of assigning extra reading for the particular day forces the teacher to pause on the elaborated case.

This approach of intermittent supplementation by assigned readings might depend on the teacher's compiling a personal collection of readings, drawn from the existing but scattered books and articles treating the landmark cases of Civil Procedure.<sup>35</sup> An easier way would be to assign a pre-existing collection. The fine *Civil Procedure Anthology*<sup>36</sup> moves toward opening this option. Its last section presents four articles constituting case studies of *Pennoyer*,<sup>37</sup> *World-Wide Volkswagen*,<sup>38</sup> *Erie*<sup>39</sup> and *Hickman*.<sup>40</sup>

An alternative appears now on the horizon. Last year, Professor Paul Caron submitted a book proposal to the Foundation Press for *Tax Stories: An In-Depth Look at the Ten Leading Federal Income Tax Cases*. Upon approval,

35. E.g., GEORGE DARGO, LAW IN THE NEW REPUBLIC 107–36 (1983) (treating *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811)), revising GEORGE DARGO, PUBLIC POWER AND PRIVATIZATION 114–70 (1980); Ronan E. Degnan, *Livingston v. Jefferson—A Freestanding Footnote*, 75 CAL. L. REV. 115 (1987); ALAN F. WESTIN & BARRY MAHONEY, THE TRIAL OF MARTIN LUTHER KING (1974) (treating *Walker v. City of Birmingham*, 388 U.S. 307 (1967)); C. Michael Abbott & Donald C. Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955 (1972) (treating *Fuentes v. Shevin*, 407 U.S. 67 (1972)); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769 (1995) (treating *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

36. DAVID I. LEVINE, DONALD L. DOERNBERG & MELISSA L. NELKEN, CIVIL PROCEDURE ANTHOLOGY 541-76 (1998).

37. *Pennoyer v. Neff*, 95 U.S. 714 (1878), treated in Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

38. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), treated in Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122 (1993) (In a heart-rending description of the accident and the litigation, reports the significant fact that the plaintiffs joined the distributor and retailer in order to defeat removal and thus stay in a state court known for high verdicts; soon after the U.S. Supreme Court's decision, the case was in fact removed and the Robinsons lost at trial.)

39. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), treated in Bob Rizzi, *Erie Memoirs Reveal Drama, Tragedy*, HARV. L. REC., Sept. 24, 1976, at 2.

40. *Hickman v. Taylor*, 329 U.S. 495 (1947), treated in Paul Coady, *Dredging the Depths of Hickman v. Taylor*, HARV. L. REC., May 6, 1977, at 2.

he signed ten leading tax scholars to prepare the studies on the foundational cases of tax law. Also, he convinced Foundation to create a whole new “Law Stories” series of books, of which he would be the series editor.<sup>41</sup> Torts Stories (edited by Robert L. Rabin & Stephen D. Sugarman), Property Stories (edited by Gerald Korngold & Andrew P. Moriss), Constitutional Law Stories (edited by Michael C. Dorf), Criminal Law Stories (edited by Robert Weisberg), and Contracts Stories (edited by Douglas G. Baird) are already in the pipeline. Following the publication of the tax book in late 2002, the plan is to begin the roll-out of Law Stories for first-year courses before the fall semester of 2003, with the remainder of the first-year books appearing before the following fall. Law Stories for additional second- and third-year courses will follow.

Now, dear reader, here comes the plug. So you can stop reading. But quickly in my defense, it is a sincere plug, motivated by my own genuine concerns over the increasingly explanatory teaching style into which I have been falling.

*Civil Procedure Stories: An In-Depth Look at the Leading Civil Procedure Cases*, which I shall edit, will be part of this new series. This project will involve a collaborative effort by a dozen law-school professors to provide a deeper understanding of a dozen great cases. The selected cases will cover much of the range of the existing law of Civil Procedure. Each of the professors will write a thirty-page chapter on one of the cases. The end product, which will appear in the late spring of 2004, will consist of a paperback book of approximately 400 pages.

The resulting book will tell the stories behind the cases. It also will help students, as well as academics and practitioners, better appreciate the historical context of these cases and the role they continue to play in our current debates. A subtheme running throughout the book will be the special role of interdisciplinary methods and different perspectives necessary to the study of civil procedure. Each chapter will have a consistent structure, with separate sections on:

- social and legal background of the case;
- factual background of the case;
- lower court proceedings in the case;
- final appellate disposition, including issues, decisions, reasons, and separate opinions;

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41. See Paul L. Caron, *Back to the Future: Teaching Law Through Stories*, 71 U. Cin. L. Rev. (forthcoming 2002).

- impact of the case on the development of the law (why the case is famous and when it became so); and
- importance of the case today (why it continues to be a leading case).

The analysis of the proceedings and disposition will discuss the positions taken in the briefs by the parties and describe the oral argument. The analysis of the influence of the case on the law, then and now, will consider the reaction of contemporary commentators and also later judicial and legislative adjustments.

An introduction, written by me, will draw lessons from the study of these leading cases, in terms of the development of Civil Procedure as well as the role of interdisciplinary approaches and diverse perspectives in understanding that development. I shall also produce an accompanying Web site, which could serve as a research tool for students, academics, and practitioners. The site will comprise the following material with respect to each of the cases featured in the book:

- actual pleadings and other documents figuring in the case;
- lower court opinions;
- briefs of the parties and amici curiae;
- audiotapes (which exist for all post-1954 Supreme Court decisions) and transcripts (which exist post-1934) of oral arguments or, for older cases, the summaries from the old reporters of oral arguments;
- final appellate opinion; and
- any relevant visual enhancement available.

Okay, so which will be the cases? The cases selected should be ones that (1) appear in most of the major civil procedure casebooks, (2) are foundational in the sense that they were significant in the development of the law and continue to shape the law, and (3) have a particularly interesting story to tell based on their facts and historical context. Given these criteria, the cases will probably all be Supreme Court cases. Although it would be impossible for everyone to agree on a “top ten or so” list, it should be possible to conceive a list that enjoys widespread acceptance in the Civil Procedure community. Tentatively, then, I envision these cases for *Civil Procedure Stories*, arranged in this structure:

## I. SYSTEM

- A. ADJUDICATORY—*Goldberg*.<sup>42</sup> This well-known case exposes the values expressed by our formal system of adjudication, as the Court determined the procedure that is due before the state terminates welfare benefits.
- B. ADVERSARIAL—*Lassiter*.<sup>43</sup> The squirm-worthy facts and the clashing opinions of this eminently teachable case put the values of our adversary system on exhibit, as the Court determined the representation that is due before the state terminates a parent's rights.

## II. FORUM

- A. GOVERNING LAW—*Erie*.<sup>44</sup> Exploration of Civil Procedure's most famous case, while illustrating the application of historical methods, illuminates federal-state relations for the student.
- B. SUBJECT-MATTER JURISDICTION—*Owen*.<sup>45</sup> The facts of this leading case on supplemental jurisdiction are so perfect that they seem to have been hypothesized solely for classroom use, and the background of how the Congress, the courts, and the lawyers have gone about addressing this jurisdictional problem does wonders to teach the legal process.
- C. TERRITORIAL AUTHORITY TO ADJUDICATE—*Shaffer*.<sup>46</sup> While many classic cases could expose the workings of interstate federalism, this case was the first to explicitly combine into today's law the themes of power and reasonableness, and then to apply them to nonpersonal as well as personal jurisdiction.

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42. *Goldberg v. Kelly*, 397 U.S. 254 (1970), treated in COVER ET AL., *supra* note 27, at 37-112.

43. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), treated in Lowell F. Schechter, *The Pitfalls of Timidity: The Ramifications of Lassiter v. Department of Social Services*, 8 N. KY. L. REV. 435 (1981).

44. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), treated in EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 95-191 (2000), reviewed by Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829 (2001) (book review). See also TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 101-53 (1981); JETHRO K. LIEBERMAN, MILESTONES! 200 YEARS OF AMERICAN LAW 216-29 (1976); Aaron L. Danzig, *Erie v. Tompkins at 50: Due a Respectful Burial?*, N.Y. L.J., Feb. 26, 1988, at 6; Rizzi, *supra* note 39; Irving Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011 (1978).

45. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

46. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

D. PROCEDURAL DUE PROCESS—*Connecticut v. Doehr*.<sup>47</sup> This, perhaps, most important case on procedural due process managed to rationalize the Court's earlier confusing decisions on pre-judgment seizure of property for security, but it requires for understanding the use of law-and-economics analysis.

### III. PRETRIAL

A. PARTIES—*Hansberry*.<sup>48</sup> On marvelously revealing facts, this classic case not only explores the substantive side of due process, but also introduces the subject of complex litigation.

B. PLEADINGS—*Conley*.<sup>49</sup> This ultimate case on notice pleading provides the stage for consideration of the models of procedure, as it invites tracing the movement from the issue pleading of the common law to the fact pleading of the code system to modern procedure.

C. DISCOVERY—*Hickman*.<sup>50</sup> The context of this great case on discovery of work product showcases the rulemaking process, while the case itself compels consideration of the adversary system and the lawyers' professional role therein.

D. MOTIONS—*Celotex*.<sup>51</sup> This best case on summary judgment also gives an opportunity to investigate the impact of procedure on substance.

IV. TRIAL—*Colgrove*.<sup>52</sup> This case that authorized six-person civil juries not only treats trial in its most important aspect of the jury right, but also opens the widest portal to consideration of social-science methodologies in the law.

V. JUDGMENT—*Hilton*.<sup>53</sup> This sole foray by the Court into international recognition and enforcement of judgments has had, since 1895, a peculiarly

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47. *Connecticut v. Doehr*, 501 U.S. 1 (1991).

48. *Hansberry v. Lee*, 311 U.S. 32 (1940), treated in Allen R. Kamp, *The History Behind Hansberry v. Lee*, 20 U.C. DAVIS L. REV. 481 (1987).

49. *Conley v. Gibson*, 355 U.S. 41 (1957).

50. *Hickman v. Taylor*, 329 U.S. 495 (1947), treated in Coady, *supra* note 40.

51. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), treated in RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 650-62 (7th ed. 1997).

52. *Colgrove v. Battin*, 413 U.S. 149 (1973).

53. *Hilton v. Guyot*, 159 U.S. 113 (1895), treated in Richard H. M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1 (1999).

indirect effect on U.S. law, but accelerating globalization is now pushing the case into the foreground of treaty negotiations and national lawmaking.

#### CONCLUSION

We Civil Procedure teachers could do a better instructional job by contextually enriching the presentation of a number of the key cases in our courses. A happy fact is that availability of the requisite written materials makes doing so increasingly feasible.