

Strategies and Techniques  
for Teaching  
Civil Procedure

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# Strategies and Techniques for Teaching Civil Procedure

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# I. Introduction

So you've just been assigned to teach Civil Procedure. Congratulations! You are now teaching the class that, for many of your (and my) students, is the most mystifying, frustrating, and difficult course in their first year of law school. Don't panic. Some of the challenges that Civil Procedure poses are endemic to the course, and there isn't much you can do about them other than recognize that they exist and manage student expectations. Some of the challenges you can do something about. One thing is certain: Civil Procedure is one of the most important courses in the law-school curriculum, and you have the privilege of guiding your students through it.

One reason the class is so frustrating is also one reason it is so critical. Civil Procedure isn't a class about how people are supposed to behave in the real world. It doesn't explore the kind of "law" that students expect to study when they come into law school—and that they are studying in all their other courses. Rather, Civil Procedure focuses on the question of how the American judicial system resolves disputes. Students might come to law school with strong intuitions about what the law should be for murders or car accidents, but they usually have weak intuitions about process—other than the far too simplistic idea that they want the dispute to be resolved accurately.

As a result, students often read the material you assign for the wrong thing: They read to see what the substantive law is. Did the telephone companies conspire to fix prices or not (*Twombly*)? Can the State of Washington tax an out-of-state corporation or not (*International Shoe*)? Students don't realize—at least not for a long time—that answering these questions isn't the point of the cases they read or this course in general. And reading the Federal Rules of Civil Procedure and Title 28 of the United States Code only makes matters worse for them—especially because so many of their other courses focus on common-law reasoning rather than statute- and code-parsing skills.

Because it focuses on *how* we enforce rights, not *what* those rights are, Civil Procedure seems odd or out of kilter to most students. In fact, if the truth be told, procedure is best understood by working with it. Imagine trying to understand the game of basketball by only reading the rule book. You have to watch and play the game, at least a little, before the rules make sense. Unless they worked as paralegals

before law school, however, your students have neither watched nor played the civil-litigation game.<sup>1</sup>

Besides, knowing the rules isn't even the most important thing. LeBron James and I can both play by the same rules—same 94-foot court, same 3-point line—but that doesn't mean we'll achieve the same results when we play. The rules of procedure define the boundaries within which the game of adjudication happens, and sometimes you can win just by knowing the rules; but in many cases the rules of procedure are only a small part of the story of how cases are resolved. So, even though there is no substitute for knowing the rules, you need to have some modesty about what that knowledge gains students. At some point, most thoughtful students will sense that there is more to adjudication than the classroom is capable of revealing, and they'll wonder if there isn't a better way for you to teach this course than the way you are teaching it. At the same time, students need to start somewhere, and starting with an introduction to the rules of this very complicated game makes sense.

Teaching Civil Procedure well presents some challenges. With a few years of experience, you'll be a pro. I hope that this short guide gets you started down the path.

## II. The Big Picture

### A. THREE QUESTIONS

The answers to three questions will go a long way toward shaping your Civil Procedure course. First, how many credits do you have to teach your course? Second, are you planning to be a procedural scholar, or is Civil Procedure a service course for you? And third, why, in your opinion, is Civil Procedure a required course?

I can't answer any of these questions for you, but let me explain how some possible answers that you might give should shape your thinking about your course. First, consider the number of credits. "I don't have enough credit hours" is a common lament among Civil Procedure professors. A few schools still devote six credits to the course; if so, you're in pretty good shape for covering most of the

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1 I'll talk about simulations, mock exercises, and problems in a little bit. *See infra* Part III.C. Although these methods can be valuable aids to student learning, they are still a poor substitute for real litigation experience.

issues a standard Civil Procedure course is likely to include. But most of you have either four or five (and a few of you only three) credits to work with. That isn't enough time to cover the entire subject in sufficient detail, so you face a choice: Do I try to teach almost everything, just grazing across the surface of many issues—or do I pick and choose issues that, in total, give students a sense about what makes this subject “tick”?

To some extent, your decision should be determined by the rest of your school's course offerings in the procedural field. If your school offers a class in Complex Litigation, maybe you can skip class actions. If your Federal Courts class teaches *Erie* and subject-matter jurisdiction in detail, maybe you can skimp on coverage of these issues. Perhaps your school has a class on pretrial practice, so you can shorten up discovery and case management. Your decision will also be informed by your school's institutional history, its expectations about what the basic Civil Procedure course should cover.

In the end, however, your school's other offerings and its tradition about what Civil Procedure covers aren't dispositive. This is your course, and you have to be happy with it. I'll talk soon about some of the specific doctrinal-coverage choices you might want to make. For now, consider the second question, which is probably the least intuitive of the three: What will your scholarly focus be? You might not think that your scholarship has much to do with how you teach a course, but I believe it does. I have taught many courses in my law-school career, some very much in my scholarly wheelhouse (like Civil Procedure) and some not (like International Environmental Law). I have found that I tend to teach courses differently depending on my familiarity with the theory, history, and doctrinal intricacies of a subject. With courses farther from my scholarly interests, I tend to keep the course more on the surface—analyzing the doctrines more, engaging the theory less, and hewing fairly close to the casebook. When a course falls within my ken, I have more confidence about what I can (and should) exclude from a course as a doctrinal matter without losing sight of the big picture.

Moreover, we all tend to see other courses through the lens of our own scholarship. For example, if your real interest is in Alternative Dispute Resolution, a course in Civil Procedure takes on a particular hue, and you will teach the course differently as a result. Likewise, maybe your real interest is Constitutional Law or Federal Courts, in which case you might emphasize the jurisdictional parts of the

course. Or maybe you approach scholarly issues from a law-and-economics or an empirical orientation; there are wonderful ways to focus the material to bring out these perspectives.

Of course, your own interests can't so overwhelm the class that you fail to respect the course material, your school's institutional expectations for a Civil Procedure course, and your students' needs. For instance, if you are focusing your scholarship on class actions, it isn't okay to spend 37 of the 39 class periods on Rule 23. But what you bring to the class in terms of your scholarly agenda is going to shape what and how you teach, and should also help you to take any "advice" I give you with a big grain of salt.

The first two questions bleed into the third: What is the purpose of this course? There are a lot of possible answers to this question. You need to come up with your own. Now. Once you have it, let that answer guide you as you structure your course and as you teach the material day by day. Don't worry that your answer binds you for all time; it doesn't. After you have taught the course for a few years, and as new procedural rules and doctrines emerge, your ideas will evolve. I know that what I perceive as the core purpose of Civil Procedure has changed over the years, but we all need to have something to aim at. Your answer to "Why is Civil Procedure a required course?" won't help you to teach the details of required-party joinder or service of process (although it might help you to decide *whether* to teach these issues). But having a clear message—and sticking to that message to the extent possible—will give the class coherence from a student's point of view.

In the next subsection, I talk more about possible goals or purposes of a Civil Procedure class.

## B. CHOOSING THE CLASS OBJECTIVE(S)

One reason that Civil Procedure is a challenging course is because there are so many potential goals or purposes for the class, as a result of which there are coverage and pedagogical choices that professors rarely face in other subjects. Not to pick on Torts (a class that I love to teach), but the basic objectives in Torts are fairly straightforward: It is a class in common-law reasoning, with a fairly standard set of doctrines (intentional torts, negligence, and strict liability) and well-



developed theoretical lenses (fairness, efficiency, and history) through which to analyze the material. Civil Procedure isn't so simple.

To help you think through class objectives, here is a list (albeit incomplete) of questions you should consider:

- *Adjudication or power to adjudicate?* In most schools, Civil Procedure is really a combination of two related but distinct courses. One course concerns the process of adjudication: How should any court (whether state or federal) resolve a dispute, from filing the complaint through judgment and appeal? The second course is an introduction to American federalism: How far does the power of one state's courts to render binding judgments extend beyond its borders, and how do state and federal courts share adjudicatory authority? Except in a few schools that divide these two halves into separate courses (with one being an upper-level elective), we Civil Procedure professors must meld these two subject areas into a cohesive whole. We need to strike a balance between the two halves, but which half will you emphasize? Put differently, with which half will you lead off your class?
- *Adjudication or dispute resolution?* Most lawsuits settle. As a result of standardized consumer agreements and a Supreme Court that seems to be doubling down on arbitration, more and more disputes never reach courts at all. Should you focus students only on the (already difficult) task of learning the rules of adjudication and jurisdiction, or should you have students step back and see adjudication as just one form through which disputes are resolved?
- *State or federal?* Most casebooks focus on federal courts, federal jurisdiction, and the Federal Rules of Civil Procedure. Most civil lawsuits (more than 98.5 percent, in fact) are filed in state court. Many state courts have rules of procedure similar to the Federal Rules, but many of the biggest states (California, Florida, Illinois, New York, and Texas, to name a few) still use code-pleading systems in which the vocabulary, rule numbers, and level of detail vary substantially from those of the Federal Rules. So how much local practice and state rules of procedure will you build into your course?

- *Doctrines or skills?* As I have said, most people understand procedure best when they work with it. In addition, law schools face significant pressures to produce practice-ready lawyers at graduation. But students also need to understand the foundation of the American adjudicatory system. So will you treat Civil Procedure as a standard classroom subject, analyzing the system's rules, statutes, and cases? Or will you build drafting and simulation components into the course, to give the class a real-world feel?
- *How much emphasis on interpretation?* Civil Procedure brings students into contact with a wider array of primary legal material than most first-year classes. They read rules, statutes, cases, a bit of common law (especially with preclusion, which is often taught through the use of the *Restatement (Second) of Judgments*), and even the Constitution. Interpreting each of these sources presents a different challenge. Interpretation is also one skill that every lawyer must acquire. You can foster this skill and emphasize the interpretive methods for each type of source material (for instance, by assigning the advisory committee notes for each Federal Rule you study), but only at a significant cost to coverage. So which will it be: skills or coverage?
- *Depth or breadth?* You cannot teach each procedural rule or doctrine fully. For instance, you could easily spend eight days just on Rule 23. You can also spend hours teaching deadlines—21 days to respond to a complaint, 30 days to respond to an interrogatory, and so on—and other minutiae of the Federal Rules that matter a whole bunch in practice. (Beware: Studentsglom onto such clarity as life preservers in the sea of uncertainty that is the first year of law school.) The more depth and fine-grained detail you supply, however, the fewer rules and doctrines you can cover. One of your challenges will be to figure out which subjects deserve in-depth treatment, which deserve quick treatment, and which deserve no treatment.
- *Practical or theoretical?* Related to the past three questions is the question of theory. You can teach the class at doctrinal, practical, or skills-based levels, but you can also add a theoretical spin, maybe by having students see procedure from an economic or historical viewpoint, or by introducing them to rights-based or

process-based theories of procedure. Do you want to provide students with bigger lenses through which to understand the subject, or should you stop short and pitch the class at the already challenging levels of doctrine and practice?

- *How much ethics?* Ethical rules describe the obligations and limits of a lawyer's representation. Many ethical rules are tailored to litigation. Should you use Civil Procedure to begin to inculcate a sense of professionalism in your students, or is that goal best left to the Professional Responsibility course?
- *How much civics lesson?* Most students know little about how the American judicial process works. Civil Procedure is, in part, an extended civics lesson on the dual system of courts, and on the division between trial and appellate courts. But how much should you emphasize the civics lesson? In part, the answer might depend on whether Civil Procedure is a first-semester or second-semester course. In part, it might depend on how much your colleagues teach about judicial structure in their Torts and Contracts courses, and how much they expect you to do. At some point the "civics lesson" aspect of Civil Procedure trails off, but the need to provide (or not provide) this lesson could affect the first couple weeks of your course.

As you have noticed, I have for the most part avoided answering the questions I have posed. I have my own answers to these questions, but many of them change somewhat from year to year. In any event, my answers don't matter; you need to come up with your own. One way to figure out your own answers is to return to the list of questions in the prior section on credit hours, scholarly agenda, and your view of the reason why Civil Procedure is a required course. (Conversely, you can see the list of questions about class objectives as an attempt to spell out in more detail how you should go about answering the three questions in the prior section.) But I'm sure that you didn't pick up this book just to read again the questions about teaching Civil Procedure that have already been running through your mind. You want answers!

As you can tell, I don't believe that there is a single right answer for any of these questions. For much of the rest of this guide, I'll be giving possible answers to many of these questions. But here are two initial thoughts that should help a lot. First, the questions about class

objectives are linked, so answering even one of these questions starts to shape your answers to the rest. A good place to attack the issue of class objectives is to address the first question: What will I teach first? Second, Civil Procedure has a core content—both in terms of doctrine and in terms of ideas—that nearly every Civil Procedure course needs to address in some fashion. Choosing different course objectives will shape how extensively or with what emphasis some of this content is taught, but the core content creates a skeleton on which to build your course.

I address both of these points in depth in the following section.

### III. Designing and Preparing Your Course

This section focuses on the content of your course, the casebooks and supplements you might consider, and the background reading you should undertake to get ready to teach. Along the way, I also mention a few pitfalls that I've fallen into, in the hopes that you might avoid them.

#### A. WHAT YOUR COURSE SHOULD COVER

You must decide which doctrines you are going to cover. That's obvious. But something often overlooked in preparing a course is considering what *ideas* or *concepts* you should cover. The two aren't the same thing, as I'll explain.

##### 1. Doctrinal Coverage

Here is a pretty complete checklist of the topics that a Civil Procedure course *might* cover:

- Notice and opportunity to be heard (Due Process Clause)
- Personal jurisdiction
  - Constitutional basis (Due Process Clause)
    - Minimum-contacts basis
    - General-jurisdiction basis
    - Consent
    - Waiver

- Presence
  - Statutory or rule basis (including long-arm statutes and Rule 4(k))
- Subject-matter jurisdiction
  - Federal question
    - Constitutional basis (“original ingredient” — *Osborn v. Bank of the United States*)
    - Statutory basis (28 U.S.C. § 1331)
      - Well-pleaded-complaint rule
      - Meaning of “arising under”
  - Diversity
    - Constitutional basis (minimal diversity—*Tashire*)
    - Statutory basis (28 U.S.C. § 1332)
      - Complete-diversity rule and determination of citizenship
      - Amount in controversy
  - Supplemental
    - Constitutional basis (“common nucleus of operative fact”—*Gibbs*)
    - Statutory basis (28 U.S.C. § 1367)
  - Removal (28 U.S.C. §§ 1441 *et seq.*)
- Venue
  - Original venue (28 U.S.C. §§ 1390 *et seq.*)
  - Transfer (28 U.S.C. § 1404)
- *Erie*
- Pleading
  - The complaint (Rules 8-9)
  - Service of process (Rule 4)
  - Responses
    - Motion to dismiss (Rule 12(b))
    - Motion for judgment on the pleadings; motion for more definite statement; motion to strike (Rules 12(c), -(e), -(f))
  - The answer (Rule 8)
  - Amendments (Rule 15)
  - Sanctions (Rule 11)
- Joinder
  - Claim joinder

- By plaintiff (Rule 18)
- Counterclaims (Rule 13(a)-(b))
- Crossclaims (Rule 13(g))
- Party joinder
  - Permissive joinder
    - Rule 20 permissive joinder of plaintiffs and defendants
    - Third-party joinder (Rule 14)
  - Required joinder (Rule 19)
  - Intervention (Rule 24)
  - Interpleader (Rule 22 and 28 U.S.C. § 1335)
  - Class actions (Rule 23)
- Discovery
  - Discovery techniques (Rules 30-36)
  - Scope of discovery
    - Relevance (Rule 26(b)(1))
    - Proportionality and e-discovery (Rule 26(b)(2))
    - Privilege (with an emphasis, if at all, on attorney–client privilege) (Rule 26(b)(1))
    - Work product (*Hickman* and Rule 26(b)(3)-(4))
  - Protective orders and sanctions (Rules 26(c), 26(g), and 37)
- Case management and pretrial conferences (Rule 16)
- Summary judgment (Rule 56)
- Trial
  - Right to jury trial (Seventh Amendment and Rule 38)
  - Selecting a jury (Rule 47)
  - Judgment as a matter of law (Rule 50(a))
  - Renewal of judgment as a matter of law (Rule 50(b))
  - Motion for a new trial (Rule 59)
  - Nonjury trial (Rules 52 and 59)
- Appeal
  - Appealability (the final-judgment rule and its exceptions) (28 U.S.C. §§ 1291-92 and related doctrines)
  - Standards of review (for facts, law, and discretionary decisions)
- The effect of a judgment
  - Relief from judgment (Rule 60)
  - Preclusion

- Claim preclusion
- Issue preclusion
  - Mutual preclusion
  - Nonmutual preclusion (defensive and offensive issue preclusion)
- Remedies
  - Damages
    - Compensatory
    - Punitive
  - Injunctions
    - Permanent
    - Preliminary (Rule 65)
    - TROs (Rule 65)
  - Declaratory relief (28 U.S.C. §§ 2201-02)
- Alternative dispute resolution (ADR)
  - Settlement (Rule 68)
  - Arbitration, mediation, and other forms

A few words about this checklist. First, you'll notice some overlap (for instance, you can handle service-of-process issues either as a constitutional notice-and-opportunity-to-be-heard issue or as a Rule 4 issue). Second, you'll notice that the list is not exhaustive; it does not cover every Federal Rule of Civil Procedure or relevant provision of the United States Code. Some provisions are best encountered in their substantive habitat (e.g., Rule 23.1 in a Corporations class). Some are best left to an upper-level course on Complex Litigation, if your school offers one (e.g., multidistrict transfer under 28 U.S.C. § 1407). Third, the checklist is *not* a course outline that you should follow in constructing your course. For example, putting joinder right after pleading would probably be a bad idea, and putting remedies near the end is almost certainly a bad idea.

But the dominant feeling that you likely experience when you look at this checklist isn't that some things are left off; it is "I can't possibly teach all this!" Of course you can't, especially if you have five or fewer credits. The trick is to figure out which of these doctrines you don't teach, which you teach lightly, and which you go into full bore. The answer to this question comes back to the number of credit hours you have, to the other courses your school offers that cover some of the same ground, and, above all, to your objectives for the

course and your sense about what every practicing lawyer (whether or not they become litigators) *must at a minimum* know about the American approach to civil adjudication.

Based on my years of discussions with colleagues, my guess (which is the right word here) is that most of us who teach Civil Procedure do very little with the bookend issues on the preceding checklist: notice and opportunity to be heard, remedies, and ADR. (My ADR-oriented colleagues will tell you why “most of us” are wrong; but I’m making a descriptive and not a normative claim.) Most of us also spend little to no time on the right to jury trial. We don’t tend to dwell on discovery and case management, although that is more variable—some of us believe that, because discovery is the modern litigator’s bread and butter (as well as a common source of research assignments in 1L summer jobs), we need to spend significant time on these issues. Class actions and the fancier joinder devices (intervention, interpleader, and required-party joinder) typically get little to no shrift.

On the other hand, most of us put some emphasis on the following:

- Personal jurisdiction (three weeks if you start here; two weeks if you don’t)
- Subject-matter jurisdiction (two weeks)
- Venue (a day or two)
- Pleading (a couple of weeks, plus a couple of extra days if you start the course here)
- Discovery (anywhere from a couple of days to a couple of weeks)
- Summary judgment (at least a couple of days)
- Basic joinder, including counterclaims and Rule 20 permissive joinder (a couple of days)
- Preclusion (a week)

With the time remaining—roughly three to four weeks—we pick a few extra issues to examine. (My calculations here assume that you have a one-semester, four-credit class. If you have five or six credits, obviously you can do more.)

*Erie* is always a tough call. Many of us leave it to the end of the course (or at least to the end of the jurisdiction-and-venue half of the course), and we teach as much of it as we have time for. Just about everyone I talk with gives *Erie* two days (or three days tops), which is nowhere near enough time to do a complex doctrine justice. A quick look at *Erie* itself and a tour of a couple of the “procedural *Erie*”



cases (probably *Guaranty Trust* and *Hanna v. Plumer*) are all that two days can include. Some years I think that I should just cut *Erie* out of the course; it is so hard, and the middle-of-the-pack students invariably botch *Erie* questions on the exam because I can't give the subject enough class time to ensure widespread comprehension. So far, though, I haven't had the courage to cut *Erie*, and I'm pretty sure that the same is true of most of us.

Of course, just because "most of us" teach this group of subjects, you don't need to do the same. In making your choices, try to pick doctrinal topics that feed into the themes of your course. For instance, suppose the theme of your course is "What process makes the most sense if we care about efficiency and accuracy?" If so, it makes a lot of sense to study jury trial, as well as its relationship to summary judgment and other jury-control devices. The same is true of a course focused on the theme of "What constraints should we impose on the power of an unelected federal judiciary?," although the way in which you teach jury trial might well be different if you approach the matter from an accuracy, as opposed to a limitation-of-powers, perspective. But that doesn't mean you definitely should do jury trial. Sometimes even thematically interesting material has to be left on the cutting-room floor. For instance, the Seventh-Amendment right to jury trial is not something you can jump into halfway. It takes at least two days to teach it right. It is an issue that is almost impossible to test well (students won't have the knowledge of common-law practice in 1791, which is the first part of the Seventh-Amendment analysis). And the issue arises infrequently in practice. So many of us don't think the Seventh-Amendment game is worth the candle, even though we all acknowledge the centrality of juries to the American litigation structure.

In making your choices, one thing to be aware of is whether there are some synergies among materials. As a small example, if you decide to teach required-party joinder under Rule 19, consider also including intervention under Rule 24; nearly identical language in the two statutes has received a decidedly different interpretation because of the different objectives the two rules attempt to achieve. Teaching summary judgment and judgment as a matter of law next to each other (or at least not separated by too much distance) helps to reinforce the basic idea of how far a judge can go in taking a factual dispute away from a jury. Likewise, the words "transaction or occurrence" pop up repeatedly throughout the course (Rule

15(c) relation back, claim preclusion, and Rule 20 joinder); but in each context, the purpose of the rule or doctrine gives the phrase a slightly different twist that is worth exploring. Finally, taught from the perspective of tactical litigant choice, the four subjects of joinder, personal jurisdiction, subject-matter jurisdiction, and venue compose a nice unit; the joinder rules define the breadth of potential joinder, and the rules of jurisdiction and venue shape the precise size and location of the suit—with lawyers sometimes needing to abandon (or add) certain claims or parties to land in the most desirable forum.

Once you pick the doctrines you intend to cover, you need to order their study in a logical fashion. Topic ordering is a real challenge in Civil Procedure. Civil Procedure is often described as a “seamless web”; everything is connected, and to understand anything you need to understand everything. With almost every subject in the course, students need to know more about some later doctrines or ideas to form a full opinion about the subject presently under study. A classic example is pleading: How high we want the pleading bar to be set is to some extent related to how well we think the discovery system works. Another is diversity jurisdiction: What we ultimately think about its wisdom depends to some extent on the difficulties that *Erie* creates. That doesn’t necessarily mean that you should teach discovery before you teach pleading—or *Erie* before diversity—but you need to be aware that students often won’t have all the information they need when studying pleading. Sometimes you will need to take time to point out how a later issue connects up with an earlier one (“Now that we have finished discovery and case management, do you believe that *Twombly* and *Iqbal* were correct in setting the pleading bar where they did?” or “Now that we have seen the complexities of *Erie*, do you think that we should abolish diversity jurisdiction?”).

At the same time, you should also be aware of the pitfalls of teaching procedure in a mercilessly chronological progression, starting with the first issue that a lawyer thinks about before the case is filed and then marching right through each step of the lawsuit. For instance, one of the very first issues a lawyer must consider, even before filing a case, is who to join. But I wouldn’t advise sticking joinder right before or right after you study pleading. Start small, lay the foundation on basic points, and build up from there. Let me give an example of what I mean, and it will get me on the wrong side of many of my colleagues. When you teach diversity jurisdiction, you need to teach the rule of complete diversity. Thus, a lawsuit by A

from Wisconsin against B from Maryland and C from Wisconsin fails for lack of complete diversity. If the course handles subject-matter jurisdiction before joinder—and many do—students haven't yet learned that you can join two defendants in one lawsuit. So isn't it more sensible to do Rule 20 joinder before jurisdiction? I think so, although some would probably reply that students can pick up the joinder point by osmosis.

Here are a few other course progressions that I personally think are mistakes (although I am sure that others will disagree with me):

- Don't teach joinder before you teach preclusion. That might seem illogical; the preclusive effects of a case arise at its very end, but joinder is one of the earliest decisions a lawyer will make in that case. But to understand the consequences of joining (or not joining) a party, you need to understand the foundational principle of American preclusion: As a general rule, a judgment binds only properly joined parties.
- Don't teach supplemental jurisdiction before you teach joinder. 28 U.S.C. § 1367 is already one of the thorniest challenges students will face in the course, and if they don't already know what Rules 14, 19, 20, and 24 are, they won't get the point of § 1367(b). So either teach joinder before § 1367, or teach the two subjects contemporaneously by interweaving joinder and § 1367.
- Don't teach *Erie* until you've taught subject-matter jurisdiction, especially diversity. That bit of advice seems very obvious. So here is another, more controversial claim: Don't teach *Erie* until you have taught some significant chunk of the Federal Rules of Civil Procedure. Otherwise, the *Hanna v. Plumer* framework, which creates a separate track for determining when federal courts may permissibly adopt Federal Rules promulgated under the Rules Enabling Act, is a complete abstraction to students; they won't even know what the Federal Rules are, much less why the Rules get this distinct treatment. I'd go further and argue that *Erie* is a great way to end the course: It forces students to think about the difference between procedure and substance, and shows some of the hard questions of federalism and diversity jurisdiction. I'll admit that others disagree with me on this point; I know a number of professors who start with personal and subject-matter jurisdiction and handle *Erie* right afterward.

- Wherever you teach the Federal Rules, I would progress from pleading to discovery and case management (if you discuss it), and then to summary judgment and trial. In other words, teach the life of the lawsuit from its start to its end, leaving out only joinder for later consideration. Don't jump around, handling motions for new trial before pleading or something like that. Someone I know starts his course with summary judgment, but he is a distinguished teacher and scholar in the field. I recommend trying to plow your way through the lawsuit from start to finish a few times before you get more creative, if you ever do. After many years of teaching, I still start with pleading, then tick off discovery, case management, summary judgment, jury trial and controls on juries, post-trial motions, appeal, and preclusion in order. It works for me.
- As I mentioned earlier, I wouldn't teach remedies at the end of the class. I'm not sure I would teach them at all, but if you do, it makes sense to lead off the course with remedies to give students a sense of what the entire litigation process aims at. Putting the issue at or near the end of the course will make the students sag under the weight of yet another thing to remember for the final. Because the issue of remedies has only a tangential relationship to many of the themes in Civil Procedure (I also teach Remedies, and in my judgment, the field marches to the beat of its own theoretical drummer), ending with remedies isn't the way to bring the course to its rousing conclusion and summation.

Take this advice with due skepticism. I'm not sure that any course ordering is off limits, so long as there is thought behind your progression. Even the "mistakes" I just mentioned aren't necessarily problematic so long as you have a reason for what you are doing. Keep in mind, though, that your students don't know what you know, and a novel ordering that makes brilliant sense to you might be confusing to somebody who is still trying to figure out the very basic rules of the game.

## 2. Coverage of Concepts

A first-year course doesn't convey just doctrinal information. It also conveys ideas or concepts that serve as building blocks for other courses and for a life as a practicing lawyer. When new professors

worry about what they're going to cover, they often worry about what doctrines they are going to teach. I encourage you to think as well about the ideas that Civil Procedure should convey, and make sure that you find ways to teach those ideas as you are teaching doctrine. Some of these ideas are not unique to Civil Procedure. For instance, Civil Procedure raises the same justice versus efficiency debate as Torts or Contracts, albeit with a procedural twist. But some ideas are unique to Civil Procedure, and you should bring these concepts out at relevant parts of the course.

Here are the concepts I have in mind:

- *Civil versus criminal.* Okay, this one is pretty basic, but students need to understand how civil and criminal law differ, and how the procedures used in the one setting don't necessarily correspond to those used in the other. Recall that most students have little to no familiarity with the law when they come to law school, and the little they have derives from watching real or fictional criminal trials on TV or in movies. The civil process is new to them, and they have a lot of misconceptions about it.
- *Procedure versus substance.* Proceduralists know that this distinction is slippery at best, but there is a difference between what your rights are and how you enforce those rights. At some level, this notion is easy for everyone to understand. What students might have a harder time understanding, and what they won't get from their substantive courses, is that there is no perfect way to enforce substantive rights. The process we choose affects the outcome we achieve. An expensive process discourages enforcement of rights every bit as much as a change in the substantive law itself. No procedural rule is outcome-neutral. Those who control the process can often dictate the result. As one of my former students remarked after class, "Now I get it. Procedure is power." Bingo.

That doesn't mean that process and substance are the same thing. Sometimes students can get too carried away with the "process is related to substance" insight. But they need to understand that, in terms of accomplishing a result, you can attack an issue head-on through substance or indirectly through process. Whatever else they might be good at, good lawyers are experts in process.

- *Claims, elements, and burdens.* In all their classes, students will encounter mysterious words like “claim” (or the code-pleading equivalent, “cause of action”), “elements of a claim,” “defenses,” “burdens of proof,” and “burdens of production.” Some of these words defy easy definition (“claim,” for instance, has numerous meanings). To some extent, students figure out the meaning of these phrases by repetitive exposure. Some of your colleagues teaching substantive courses might also define some aspects of these terms (for instance, in Torts students might learn that the “elements” of a negligence “claim” are duty, breach, causation, and damage). But a systematic study of these phrases is also helpful, especially if Civil Procedure is a first-semester class and you start by teaching pleading. If Civil Procedure is a second-semester class or if you start with personal jurisdiction, students have probably already started to figure the meaning of these phrases out by the time you would logically get to them (with pleading, discovery, and summary judgment). Even then, reinforcing the meanings of these critical legal phrases is a good idea.
- *Fact, law, and discretion.* Many years ago, one of my best students (now a very successful lawyer) told me that the biggest things he learned from my class were the difference between fact and law, and the discretion often involved in applying the one to the other. The problem is that the class I taught him was Contracts! He hadn’t picked up these ideas in his Civil Procedure class. Ever since, I have tried to do a better job helping students to understand the differences among fact, law, and discretion and the roles that different participants in the litigation process play in their development.
- *Standards of review.* One way in which to bring out the distinctions among fact, law, and discretion is to teach standards of review. Students often struggle with the concept of different standards. The obvious place to raise the issue is when you study the appellate process. Even before then, however, students will probably read cases that discuss standards of review. Find ways to emphasize the point. The level of deference due to a decision is an important object lesson for lawyers: You don’t necessarily win the day just by showing that the decision was wrong. You might need to show that it was egregiously wrong. There are

good reasons to set up a system in which there is some deference to the initial decision-maker.

- *Procedural justice.* Concerns for fairness or justice, especially in contrast to the demands of efficiency, are a common focus for all first-year courses. In those courses, however, the emphasis is on whether a given substantive rule or case outcome is fair under one or another theory of justice. Students should realize that substantive fairness might not be all that matters. How we arrive at a conclusion also matters. As a rule, philosophers and economists haven't concerned themselves with the process of arriving at a just outcome (to some extent, John Rawls and Amartya Sen are recent counterexamples). But one of the ideas that most lawyers grasp is the importance of process. Civil Procedure is the class to raise these issues.
- *Efficiency in the litigation context.* Students will likely be exposed to economic analysis in other classes like Torts and Contracts. In those classes, they likely will learn Coase's Theorem—that in the absence of transaction costs, any legal rule is allocatively efficient. From an economic point of view, civil process is one of those transaction costs, acting as a drag on an efficient legal system. There are two components of this cost: the direct costs of litigation (attorneys' fees, filing fees, expert-witness fees, discovery costs, and so on) and error costs. The two are more or less inversely proportional; we can cut litigation costs by deciding cases with coin flips, but the costs of erroneous determinations are unacceptably high. Likewise, we could have a highly accurate legal process if we spent \$5 million on each case, but that would be cost-prohibitive for most disputes.

In procedure, we often claim that we should try to minimize the sum of litigation and error costs. That idea isn't quite right. The goal should always be to minimize the sum of accident costs, preventive costs, *and* transaction costs such as litigation and error costs. To do so doesn't necessarily mean that litigation and error costs must be reduced to their minimums.

In short, the idea of efficiency is not unique to Civil Procedure, but the way in which procedure and efficiency intersect is.

- *Access to justice.* Access to courts might be the signature issue of your students' legal lifetimes. Generally, procedural justice addresses the fairness of the process for those who have already entered the legal system. Economic analysis is somewhat broader, considering the disincentive that high litigation costs create for filing lawsuits as a type of error cost. But neither approach tackles head-on the question of how broadly our society should make legal recourse available, or how we can ensure that low- to middle-income people can have access to lawyers. We are increasingly restricting access to courts at the front end (by means of proliferating and enforceable arbitration clauses in consumer contracts) and the back end (by encouraging settlement). Are these approaches right? Civil Procedure is the place to get students thinking about these issues.
- *Adversarial process.* Finally, you should examine the basics of adversarial adjudication, and compare this approach to the civil-law tradition. Our system is less adversarial than it once was, but it remains the most adversarial in the world. To some extent, your task is descriptive; you should point out the ways in which our system relies on the initiative of lawyers rather than judges to frame the issues and move the process forward to conclusion. But you might also want to challenge students to think about whether litigant autonomy and adversarial process are desirable social goods, and how much of the adversarial approach is embedded in our Constitution.

For the sake of brevity, I have neglected a few other concepts that you might teach. I think it is a useful exercise to sit down and ask yourself what you want students to get out of the class—not in doctrinal terms, but in terms of larger issues about the law. Build these ideas into your class. Don't worry if they aren't on the preceding list.

## B. THE FIRST WEEK OF CLASS: WHERE TO BEGIN?

If you were to teach Torts, you would probably have a simple choice: Start with either intentional torts or negligence. If you taught Contracts, it would probably be either offer and acceptance or consideration (and other theories of obligation). In Civil Procedure,



you have many more choices; indeed, one of the favorite topics of Civ Pro professors is “Where do you start your class and why?”

Because Civil Procedure is a “seamless web” (and in spite of my own views about logical course progressions), I suppose you could, in theory, start the course anywhere. One professor I know starts his class with appeals, on the theory that understanding the appellate process will most help students in comprehending their other classes, in which they are always reading appellate opinions. I previously mentioned another colleague who starts with summary judgment, on the theory that it allows him to examine the nature of adjudication (determining the facts, declaring the law, applying the law to the facts, and, if necessary, determining the remedy). Some professors start with remedies—in other words, what you can get from litigation—on the theory that students should know what the practical purpose of litigation is. Some start with constitutional due process (*Goldberg v. Kelly*, *Mathews v. Eldridge*, *Connecticut v. Doebr*, *Mullane*, *Hamdi*, or like cases), on the theory that these rules explore the meaning and foundational content of adjudication. Getting at the same idea of adjudication’s foundational principles in a different way, some start with a problem—such as a proposed expulsion of a student from law school—and ask students to design a fair process.

Most professors, however, start in one of three places. The least common is to start with federal subject-matter jurisdiction. Next, some courses begin with the rules of adjudicating a lawsuit—in particular, with the complaint, and then moving through responses to the complaint, discovery, summary judgment, trial, appeal, and preclusion. Somewhere along the way, joinder gets added into the mix. After the basic structure of a lawsuit is set into place, the course turns to jurisdiction, venue, and perhaps *Erie*. By far, however, the most common starting point for Civil Procedure is personal jurisdiction (usually followed by subject-matter jurisdiction and venue, perhaps *Erie*, and then circling back to the process of adjudicating the lawsuit).

So where do you start? Beginning with subject-matter jurisdiction engages students immediately with issues about the federal system and about the power to adjudicate, and it focuses them on one of the first (and most important) strategic decisions that a lawyer makes. Starting with personal jurisdiction likewise focuses the source of a court’s power to adjudicate and puts students into the lawyer’s seat, asking them to think strategically about who can be sued and where. It introduces students to another aspect of a federal system (the limits

on state power) and brings them into immediate contact with the Due Process Clause. The cases that form the core of personal jurisdiction (*Pennoyer*, *International Shoe*, *World-Wide Volkswagen*, and so on) are excellent vehicles for teaching students how to make distinctions among cases, to extract rules from opinions, and to see the historical progression of a doctrine. These cases also help you to perform the “civics lesson” part of Civil Procedure.

If you start with pleading, you postpone studying a doctrine (personal jurisdiction) that consumes weeks of class time and thus risks losing student attention on a doctrine that comes up only occasionally. Starting with pleading allows you to sketch the entire process of the lawsuit before coming back to the strategic and time-consuming questions of party and venue choice. Moreover, starting with the Federal Rules gets students started immediately in developing a critical skill (interpretation of rules) that, much to the chagrin of our upper-level colleagues, most first-year classes do not address adequately. According to this line of thinking, starting with personal jurisdiction reinforces in student minds common-law case-reasoning skills, which is exactly the opposite of the skills students need.

I’ve short-sheeted the arguments for each starting point (especially subject-matter jurisdiction), but you get the idea. Let’s say that you find the last arguments most persuasive, and you decide to start the class with the process of adjudication. What does this mean for your class? Well, the first thing is that federalism is likely to be a muted theme. Themes of fairness, efficiency, accuracy, and the importance of resolving cases “on the merits” will be more dominant. On the other side of the ledger, starting with pleading leaves the door open to a comparative “litigation versus other dispute-resolution methods” approach in a way that starting with personal jurisdiction does not. You also leave open more possibilities for integrating skills-enhancing problems and simulations from the get-go, rather than using them as a mid-semester add-on to your class; every class develops a rhythm, and students sometimes have difficulty with sudden changes in teaching method (e.g., from pure Socratic to problem-based). Another consequence of starting with pleading is that the ethics of lawyering (usually introduced through Rule 11) are encountered earlier in the class. There is more opportunity, if you choose to use it, to compare federal and state rules of procedure. Of course, if you start with personal jurisdiction, you will have less opportunity to explore some

of these ideas, but more chance to examine constitutional and other foundational notions of a court's power.

I'm not trying to convince you to start the class with either of the two most common approaches. I have used them both (and I have also started with remedies). These days I prefer to start with pleading, but that's just my present choice. My point is that your starting place very much dictates which course objectives you can achieve. Put differently, choosing the course objectives you wish to achieve helps to determine where you should start your course. Especially if you have a four- or five-credit class, you don't have time to do everything. Wherever you begin the class, the pace will be very slow the first few weeks and you're going to spend a lot longer on the first issue than you think you will. Moreover, in any class you can't push the reset button ("Okay, I know that for the first six weeks we were concerned with federalism, but now let's forget all that and move to efficiency and accuracy."). You have to craft your entire class around common themes and ideas.

Here are four bits of cautionary advice. First, I think it is a fairly common practice among new professors to teach the class that they were taught. Therefore, if your Civil Procedure class started with personal jurisdiction, you start with personal jurisdiction. I don't buy into that particular conventional wisdom. You always need to begin by asking what the needs, talents, and career paths of your present students are. Undoubtedly, your own educational experience will influence how you think about Civil Procedure. In the end, however, you have to make the course your own.

Second, as I mentioned at the beginning of the book, students have little experience with the civil-justice system or its procedural rules. Later on, I'll discuss some of the specific misconceptions about the system that students have, and that you are working against as you teach the class. Another consequence of their lack of exposure is that you need to be very conscious about how you organize your class and teach its doctrines and concepts. Build from one doctrine and idea to another. As you organize your syllabus (and before you teach every class), put yourself in the position of someone who knows nothing more about our civil-justice system than what he or she had learned up to that point in the class. If you do so, you often find that you need to oversimplify.

For example, assume that you start with pleading. It's not likely that students will ever have given much thought to what a complaint

or an answer should say. They won't know that how high (or low) you set the pleading bar depends on what the rest of the pretrial and trial system looks like. Nor will they know what discovery and summary judgment are. Don't try to teach a minicourse on discovery or Rule 56 while you're teaching *Twombly* or *Iqbal*, just so students can understand these cases in their full complexity. I'm very happy if my students leave the pleading section with the ideas that (a) deciding cases on their merits is an important goal of American procedure, but (b) that preference sometimes has to give way because the vaguely understood next step of the pretrial process (discovery) can be costly. I'll use the next part of the course—on discovery—to discuss the importance of efficiency, and to begin to introduce issues of the adversarial system. As we move to the next step—case management and summary judgment—we examine more fully the idea of adversarial process, and I also begin to discuss both the value of juries and the effect of procedural rules on substance. I then continue the jury-trial theme with the subsequent trial material, and I come back to the outcome-influencing potential of procedural rules with joinder and *Erie*. I could have used the pleading material to bring out all of these ideas, but it's best to be patient. Organize the early parts of your course to bring out one idea with each new doctrine, and to build from one doctrine (and one idea) to another. Wherever you start the course, keep it simple at the outset.

Third, although my experience is different, some colleagues tell me that their first-year students (in many courses, not just Civil Procedure) dislike skipping around in the casebook, and say so on their course evaluations. Even though I am skeptical about this claim of student preference as an empirical matter, it is true that concepts in Civil Procedure build on each other. It is also true that you shouldn't skip around too much; avoid a syllabus that, for each and every day, says something like: "Read pp. 12-15, pp. 495-500, pp. 130-135, and then then pp. 15-20." It probably behooves you to pick a casebook that more or less matches up with the way that you want to teach the course. Of course, no casebook lines up perfectly with your own teaching preferences. When you skip around in the casebook, be sure to explain why you are skipping some material for the time being and spend some time discussing how the new topic you are about to study relates to the topic you just finished studying. If you intend to come back to the material you skipped over, you can also add that you will return to the skipped-over topic(s) once the students have

additional information with which to understand the topic(s). Then, when you do come back to the skipped material, emphasize again the reasons why you ordered the material as you did. I have found that if you verbally reassure students that you have a thoughtful plan for their education, they don't mind some deviations from the casebook's organizational scheme.

Fourth, wherever you choose to start the class doctrinally, you don't need to start your very first class at that point. A couple of my colleagues spend a couple of days taking a case from start to finish (pleading through appeal) before starting back at square one with personal jurisdiction. In my case, although I now start the course with the process of adjudication—pleading, discovery, case management, summary judgment, trial, appeal, and preclusion, followed by joinder, jurisdiction, venue, and *Erie* (if there is time)—I don't start my first class with Rule 8 and a pleading case. My own “big picture” idea that I carry through the course is procedural reform: Do we have the right set of procedural rules, and (in light of our lengthy history of procedural reform) how can we make them better? So for the first day I assign a theoretical overview of procedure, a historical account of procedure, and a description of the basic features of the modern American litigation system. Then I spend the day asking students what the goals of a well-functioning procedural system should be: accuracy, efficiency, finality, neutrality, equality, fairness, and so on. Should the same process apply to all substantive claims (or, in procedural parlance, should rules be “transsubstantive”)? Should we respect litigant autonomy by using an adversarial process? What should the role of juries be? How important is it to hold courts democratically accountable? How important is judicial independence? How do we reconcile the tensions when different goals point in different directions? I want students to focus on that big picture before we launch into the details of the procedural system we in fact have.

I'm not trying to convince you to teach the course in the way that I do. In choosing to start my class with the process of adjudication and the theme of reform, I don't emphasize federalism as much as I could (and should). I don't like that fact, but Civil Procedure is a class in which I can't have everything, especially in the four credits that I have to teach the course.

## C. PROBLEMS, SIMULATIONS, AND SKILLS DEVELOPMENT

Because Civil Procedure concerns the very practical subject of how to resolve disputes, and because its backbone is a procedural code, the course lends itself more than other 1L courses to nontraditional, non-Socratic approaches like problems or simulations. (By “problems,” I mean condensed factual hypotheticals designed to test comprehension or raise ambiguities in course material, in which the problems rather than the casebook materials drive the classroom discussion; by “simulations,” I mean problems in which students act as lawyers to draft memos, complaints, and interrogatory responses; file objections to discovery; and the like.) Moreover, as I said at the outset of this guide, students ultimately learn procedure by working with the rules in “real-world” settings. Therefore, you might think that it is a good idea to simulate that environment and to integrate learning with doing. But Civil Procedure’s amenability to this approach doesn’t mean that you must teach the course in this fashion. Civil Procedure can also be taught as a standard 1L class.

Therefore, one of the critical questions you need to decide is whether you want your Civil Procedure course to run in a nontraditional vein. As always, I don’t want to answer that question for you; the role that your colleagues expect Civil Procedure to play in the professional and intellectual development of your students and your own sensibilities on these points matter a lot more than any “wisdom” I can provide.

In fact, I have taught Civil Procedure by using a simulation, and I have taught it as a fairly standard classroom course with a few problems thrown in. (I have never taught a problem-driven course.) I like both of the approaches. As I have gotten older, I have gravitated toward a more traditional classroom approach, but not because I think that the educational experience is better (nor do I think that it is worse—if I did, I wouldn’t have moved in this direction). The approaches are just different.

Using my own experience and what I hear from some of my colleagues, let me lead you through some of the considerations that should help you to make an informed choice about this central pedagogical question.

1. *Time.* Working through problems or conducting simulations takes time. Part of that time involves the preparation of the

problems or simulations. You can cut down on those costs by using a casebook that contains significant litigation materials (complaints, depositions, and the like), although there aren't many such casebooks on the market. Or you can borrow materials from established colleagues; there is a listserv of Civil Procedure professors, and they are incredibly generous in supplying their own course materials to others who ask.<sup>2</sup> But there will always be some start-up cost in preparing (and then perhaps supplementing) the materials, just at the time that you are also being asked to ramp up your scholarly enterprise.

Another part of the cost is classroom time. You can't work through problems or simulations quickly. You still need to teach the basics of the rule before you let students see how the rule plays out in the problem or simulation. So a course that has a significant problem-or-simulation component can't cover as many topics or ideas as a course that proceeds in a more traditional fashion.

Once again, therefore, you come back to the old "how many credit hours do you have" bugaboo. When I had six hours to teach the course, I had more time for a simulation; I didn't have to sacrifice too much breadth for the extra depth. When my course went down to five hours, the simulation went out the door (largely for other reasons I'll discuss shortly, but partly for time considerations). I then used discrete problems to teach specific topics. When our faculty cut Civil Procedure to four credits, most of the problems also went out the door. Now I use just three or four during the semester.

A final part of the time calculus is grading time. Most students won't treat ungraded simulations or problems seriously (which obviously defeats the purpose of using them), so you probably need to grade the exercises. Some professors who use only problem sets construct them so they are much like quizzes, and have software to handle the grading automatically. I'm

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<sup>2</sup> A few years ago, the job of list administrator fell to me. Please write me at [jtidmars@nd.edu](mailto:jtidmars@nd.edu) if you want to be subscribed to the list. I recommend that you subscribe, and not just to have access to potential course materials. The discussions about matters of classroom and scholarly interest make the list one of the best in the business—and I say that with all the objectivity I can muster.

not sure that such a thing is possible with simulations or with problem sets designed to raise issues that aren't easily testable in a multiple-choice or true-false format.

2. *Sustainability*. I don't know if "sustainability" is the right word, but one of the difficulties I ran into when I wrote up my own mock problem and tried to run a simulation was my ability to sustain it throughout the class. I always started with the best of intentions, and tried to loop every subject we discussed back to the problem, so students could see how what they were learning in the class related to the real world. It took me several years to create a simulation with enough facts, documents, and legal issues that I was able to have a simulation that ran the length of the course, and that raised the issues in a way in which students could see how procedural choices affected the outcome of the litigation. Needless to say, the simulation had strengths and weaknesses; no case raises every procedural issue, and some of the ways I forced the facts to raise certain issues were contrived.

But then I found a curious thing happening every year. Sooner or later (and usually before the halfway point of the course), I stopped using the simulation to illustrate some points, and pretty soon after that the use of the simulation petered out completely. My own sense was that students were getting bored with it. However "real world" I tried to make the simulation, for the students it was just another hypothetical. They were struggling enough to learn the law, and the simulation seemed to help some and to get in the way of others. At least that was my observation.

So the fault might have been mine. Maybe I didn't have enough faith in the method to let it work. But be prepared for the possibility that you, like me, might find it difficult to sustain a simulation through an entire course.

Problems, as opposed to a simulation, don't raise this concern in quite as acute a fashion. But you still need to ask yourself if you intend to work through a problem set for every day, or for every unit of study (e.g., one for complaints, one for answers, one for motions to dismiss, one for amendments,



and so on), one for every chapter, or one for every several chapters. Too many and students might weary. Too few and students will wonder why some aspects of the course deserve favored treatment.

For now, I favor a few problems, written to force students to integrate different parts of the course. They are more like law-exam hypotheticals. I also do a couple of other problems earlier in the class, just so it doesn't seem too odd when I bring out the other problems later in the course. But problems are definitely a secondary part of the classroom experience, not a pedagogical driver.

3. *The “seamless web” problem.* I don't mean to pile on the simulation method, but one of its difficulties (not raised by the use of discrete problems) is that it fails to capture the inherent contingency of litigation strategy. A good lawyer already knows all the procedural options before setting out on a particular course, and that choice can't be “walked back.” In Civil Procedure, students learn one doctrine at a time. They don't know how Doctrine A fits in next to Doctrine B, which follows in the next section of the book, so they can't properly evaluate whether it makes more sense to do A or B, which ultimately is the way a lawyer thinks. I grant that it is possible to hold off on doing the simulation until they have both A and B on the table, but Civil Procedure is a seamless web, so it would also be good to have Doctrine C, which they haven't studied yet.

To me, simulations make more sense in classes that are principally about skills acquisitions—say, a Negotiation course. I have also used a simulation in my Complex Litigation course, by which time the students have already seen most of the procedural issues in Civil Procedure and are in a better place to think strategically. It is very difficult to integrate skills development with substantive learning.

4. *Integration of theme and theory.* Perhaps the biggest reason why I finally downplayed simulations and problems was the difficulty that I had integrating those tools into my course theme and into the deeper issues of procedural theory (justice,

equality, efficiency, history) that I care about. Again, this might be a confession of my own lack of teaching skill, but as I became more committed to making sure that students grasped the bigger issues that the design of a procedural system raised, I found it more difficult to be equally committed to the nitty-gritty of a detailed simulation or set of problems. I don't mean to suggest that these two things are unrelated; sometimes the only way to answer a novel, nitty-gritty, real-world problem is to return to first principles. But trying to loop each issue back to the simulation and then also trying to loop each issue back to the themes of my class and the theoretical issues in Civil Procedure became too great a challenge.

Moreover, as an intellectual matter, I became worried that using a simulation or problems as the driving mechanism for my class sent a wrong message: that Civil Procedure was principally a how-to course or a study of strategic gamesmanship bereft of intellectual rigor. I happen to think that Civil Procedure is in part a how-to course, and that knowing how to set up (and to evaluate the fairness and outcome-influencing consequences of) a decision-making process is one of the most important skills lawyers possess. But beneath the how-to and the strategy lie deep questions, and focusing my class time on such things as technical proficiency in writing a good interrogatory—which is a part of the course some students invariably remember best—diverted the class from those points.

In the end, I've aimed for balance: using some issues to explore theory, some to work on rule- and statute-reading skills (for which simple problems are helpful), and some to talk about strategy (for which larger, day-long problems are useful). I am committed to the skills-development aspect of Civil Procedure, but I ultimately gravitated toward a selective use of problems rather than a simulation or a full-bore problem approach to facilitate theoretical inquiry, acquisition of doctrinal knowledge, and skills development.

5. *Other sources.* Another consideration in choosing your classroom methods is the prevalence of study aids that adopt a problem approach. They usually include multiple-choice

questions with explanations of the correct answers. These aids are very popular among students, regardless of whether you use a problem method in class.

6. *Engagement.* Most lawyers never see the inside of a courtroom. The same will be true for your law students. Thus, many of them aren't as engaged by extensive role playing and insights into the strategic gamesmanship of litigation as you (and some other students) are. Using a few problems to break up the flow of a standard Socratic class is a different matter; we all appreciate a little change-up in our classroom education now and then.
7. *Final thoughts.* More than elsewhere in this guide, I have laid out my own thinking about how much to incorporate simulations, problems, and skills development into the class. I am not trying to persuade you that I am right. In fact, I am conflicted. Many of my colleagues will disagree with what I have written. Each of us needs to wrestle with this issue. In a sense, everything comes back to the very first issue in this guide: What, in your opinion, is the reason that Civil Procedure is a required course? I'm pretty sure that your answer to that question will also help to resolve this issue of how you teach the class.

#### D. CASEBOOKS, SUPPLEMENTS, AND STUDY AIDS

Designing your course and choosing your casebook has a chicken-and-egg quality to it; it is hard to know which comes first. Maybe you want to think about your course conceptually and about the cases, rules, and themes you want to cover, and then see how casebooks do it. Or maybe you want to look at casebooks first to get some ideas, and then design your course. Most likely, you'll do some combination of the two, carrying some rough ideas into your perusal of casebooks and then refining your ideas as you see how the books are organized.

As I mentioned before, one rule of thumb is to use a book that more or less follows the organization that you have in mind for your course. If you want to start with personal jurisdiction, look first at the books that get to this topic in an early chapter. But as I've also said,

don't worry excessively if you decide to skip around in the book. If you like a particular book but its organization is different from your syllabus, you can make it work.

Another consideration is length. Civil Procedure casebooks vary greatly in this regard. Most books cover basically the same set of issues (admittedly there are exceptions to this statement; for instance, a few books address remedies but most do not). Length is often a function of how many cases are devoted to each topic, how heavily edited the cases are, how exhaustive the notes after each case are, and how many unanswered questions the casebook authors dangle before students. I have found that, on average, a 50-minute class can probably cover about 10 to 15 pages out of a casebook (say one or two cases) plus a *cursory* examination of one Federal Rule or one section of Title 28 (I emphasize *cursory*, because it is not hard to spend an entire 50 minutes parsing a single Federal Rule if you want to go into depth in developing that skill). So think about the number of class periods you have and the time you want to devote to each subject on your syllabus, and then compare that to the number of pages on each issue in the casebook. My guess is that you'll find some good options pretty quickly.

From there, you can figure out if the perspectives of the casebooks that survive the first cut comport with your own, whether you like the way the cases are edited, how helpful the teachers' manual is (assuming you'll be using it), and so on. There are a lot of good casebooks in this field, and you should have little trouble finding a match.

As for supplements, of course you'll need to order a supplement that includes the Federal Rules of Civil Procedure, Title 28, the Constitution, and perhaps the Federal Rules of Appellate Procedure. Most casebooks prepare supplements that are keyed to their own casebook. As a low-cost alternative, you can have students get rules and statutes off the Internet; Cornell Law School maintains an excellent Web site. Or you can reproduce the rules and statutes from some other public-domain format and make them available to your students as a PDF file.

I won't say much about standard course supplements: outlines, hornbooks, treatises, and so on. As with all basic subjects, there is a real range, from the conceptual down to the detailed black-letter. Some include multiple-choice questions or sample exams. I don't

recommend any of these books for the class as a whole. Like most professors, I prefer students to focus on the class I'm teaching, and not to be distracted by material that isn't tailored to my class. I occasionally recommend one or another to a student who comes to my office with a specific concern that a particular approach is especially useful at addressing. I am always mindful that Civil Procedure is one of the most confusing and difficult courses that students take, and if an aid can really help clear up confusion, I can't be opposed.

One other type of side reading is worth mentioning. There are a number of "war story" books that some professors use as an aid to class discussion. One type is a book that tells the story behind some of the famous cases students are likely to read in class. The rest are stories of particular pieces of litigation: the Buffalo Creek flood, the Woburn TCE-contamination trial, or the *Jones v. Clinton* litigation, for example. These books are usually designed to be something of a prepackaged simulation; they talk about what happened during pleading, discovery, trial, and so on, so students can see a real-world application of the course issues under discussion. A number of professors have reported good success with "war story" books. I have looked at several of these books but never used one.

Finally, you might consider Computer Assisted Legal Instruction (CALI) exercises for Civil Procedure. These exercises help to reinforce doctrine and capture some of the strategic elements of litigation. My impression is that the CALI exercises are less popular today than they were when they were a radical new use of computer technology a couple of decades ago, but they are still worth a look.

## E. WHAT SHOULD I READ TO GET READY?

To teach any class well, you need to do a lot of background reading. It took me a few times before I learned how to exploit connections between material from different points in the course, and I'm still finding new ways to do so. Reading widely in the field helps all of us to see those connections. If you need any further incentive, reading also helps you to answer the inevitable questions that students will throw at you from out of left field during class.

Other books in this Aspen series provide lengthy recommended reading lists for new professors in Torts, Constitutional Law, and so on. You aren't so lucky. Although I'm a huge advocate of reading, I'm

not a fan of telling you what you should read. I'm going to list only two articles that I think every proceduralist should read:

- Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978)
- Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).<sup>3</sup>

Many of you know the story of these two articles: Fuller's article, written in the 1950s and posthumously published, was a strong normative defense of adversarial adjudication; Chayes's article, looking at the world of American litigation after *Brown v. Board*, was a largely descriptive refutation of Fuller's theoretical model. So read Fuller first. In many ways, the history of modern American litigation can be told as the attempt to reconcile the yin of Fuller and the yang of Chayes. Indeed, the only element that needs to be added to these two articles to understand the tensions in modern American procedure is efficiency—a procedural goal that neither Fuller nor Chayes adequately addresses but that has been a dominant motif in procedural reform since the 1980s.

To slim down the list of essential reading to two articles was difficult. I have favorite articles on almost every subject. For instance, on *Erie*, would that I could approach John Ely's elegance, influence, and insight! See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). Likewise, if you need a starting point for thinking about the relationship between adjudication and alternative methods of dispute resolution, you can't beat Owen Fiss, *Against Settlement*, 93 YALE L.J. 920 (1984). I could go on, but let me stop here. The reason why I don't provide a longer list is that each of you should (and will) develop your own list of favorites soon enough. Rather than giving you mine, I have a different piece of advice about developing a list: Pick up recent symposia on procedural topics and read them.

After you have read several symposia, you will develop a sense about the literature and the authors who have staying power, as well

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3 I am not alone in thinking that these articles are significant. In a recent study of the most cited law review articles of all time, regardless of subject area, Fuller's article finished 26th on the list and Chayes's article finished 11th. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483, 1489-90 (2012).

as those whose ideas interest you. Then pick up some of this work and read it.

I do have some recommendations for the type of reading you should be doing. Good procedural scholarship is like every other kind; some of it involves big ideas or sweeping claims about large swaths of procedural or jurisdictional law, and some of it analyzes very specific problems, doctrines, or rules. The articles by Chayes and Fuller are the first type, and Ely's article is the second type. Try to read articles of both varieties.

In terms of subject areas, I recommend that you read some in procedural theory and some in the economics of procedure. As a field, procedure is undertheorized, so there isn't a lot to read. On the economic side, begin by getting down the basics of neoclassical theory. You'll soon find that many claims about the efficiency of proposed procedural reforms are poorly supported. (For instance, both Justice Souter's majority opinion and Justice Stevens' dissent in *Twombly* make economic claims to support their positions. But each analyzes only half of the cost equation; Justice Souter considers only litigation costs and Justice Stevens only error costs.)

In addition, we get more and better empirical and experimental data about our civil-justice system all the time. Add some of this work to your intellectual diet. Over the years I have changed both what I believed and what I taught because the data disproved my presuppositions.

Be sure to read some legal history as well. I advocate going all the way back to the Norman invasion; pick up Pollock, Holdsworth, or Maitland to find out how procedure worked in the days of yore. Even if that isn't your cup of tea, at a minimum you should get an understanding of the reasons why we adopted the radically different procedural vision of the 1938 Federal Rules. Going back to some original sources—Roscoe Pound's and Charles Clark's early works—can't be beat, but there are also a number of good histories of the procedural world before 1938, and how the 1938 Rules changed the world. In addition, make sure that you have a rough sense of what the more momentous post-1938 amendments (especially the 1966 and 1983 amendments) sought to accomplish.

That said, I don't believe in teaching Civil Procedure as a course in legal history. Students don't need to know all the iterations in language that a particular Federal Rule went through or why changes were thought necessary; they struggle plenty to understand the Rule

as it stands today. But it is important for you to have a longer view of the subject than they do. Knowing how certain rules or doctrines came to be structured as they are can often give you insights into how to teach material to students.

Next, through the indulgence of my library, I keep copies of both *Wright & Miller* and *Moore's Federal Practice* in my office. I read them regularly—principally to find answers on specific research points or to scan over a couple of pertinent sections to get myself ready for the next day's class. I don't adopt either treatise's analytical structure in teaching the relevant Rules or doctrines in class. But perusing these treatises, together with reading a couple of the recent cases found in the treatise's pocket part, helps a lot in handling oddball student questions. Lest you think that I am overzealous, however, I have never read either treatise from cover to cover.

Finally, my library subscribes to a couple of electronic trade publications that cover procedural issues, and I have a Westlaw service that regularly dumps cases raising procedural or jurisdictional issues into my e-mail inbox. I try to stay current with practice; even though Civil Procedure is more than a how-to course, keeping up with the ways in which lawyers and judges use procedural and jurisdictional doctrines is, in my judgment, important both pedagogically and intellectually.

## **IV. In the Classroom**

Until now, I have focused on getting your class ready to teach. Let me talk about a few issues that arise in class.

### **A. HYPOTHETICALS AND CASES**

Like in any law-school class, you will use some hypos to further student understanding. Just one observation: Remember that students don't have a lot of substantive law under their belts yet. So using some complex antitrust hypo won't work; you'll spend too long describing what the substantive law is. Students' ears always perk up when they hear about substantive doctrine; they often don't realize that they don't need to know the substantive doctrine. So it's best not



to distract them, and instead to work with hypos that involve claims arising under the substantive law of the classes they are taking (or have taken, if you teach the course in the second semester). As a rule, torts hypos work best.

A related problem is handling the substantive law in the cases they read. Unfortunately, some of the most significant cases in Civil Procedure do not involve simple tort and contract claims. Sometimes you need to be prepared to summarize the substantive law for the students. And I do mean summarize; don't spend five minutes doing a full disquisition on the law of libel. Provide just enough information to bring the procedural point into focus. Be clear that the substantive law isn't what matters. You can also bring the substantive law out through the questioning of students, but that can be dicey, because a student just learning to read a case might struggle with getting the substance right. If you get a stumped student, you can try to draw out the substantive principles patiently and Socratically, but you probably need to be prepared to jump in and give the answer more quickly than you would if you were teaching the substantive class. In other words, whether you ask questions to get out the substance of the dispute or lecture yourself, do everything you can to draw the focus away from the substance and toward the procedural point—unless the substantive context matters (as it does, for example, in *Anderson v. Liberty Lobby*).

## B. TECHNOLOGY

I am not the world's biggest user of technology in the classroom. At most, I project the text of the relevant Federal Rule, statute, constitutional provision, or case on the overhead computer screen, just to make sure that the entire class is focused on the same text. I don't do Microsoft PowerPoint presentations; I am fairly Socratic, so I can't anticipate what the next point of the discussion is going to be with sufficient certainty to make PowerPoint work for me. On the other hand, I know a number of colleagues who teach Civil Procedure with PowerPoint, and who would likely be willing to share slides with you.

Some of us are technology users and some are not. I don't see unique issues that Civil Procedure poses in that ongoing debate.

## C. WAR STORIES

I'll assume that one reason you have been tapped to teach Civil Procedure is that you probably have some background as a litigator or law clerk. That means you have some war stories—either your own, or those of people that you've worked with. Lawyers love good war stories, but law students love them even more.

So here is the question: Do you tell war stories in class? This is a bigger issue in Civil Procedure than in most classes. No one sits in Contracts waiting to hear how their professor drafted blockbuster language to seal a deal. But litigation is theater, so you're going to have some good stories to make your points.

As with everything else, the answer depends on the type of class you want to teach, on your personality and teaching philosophy, and on your storytelling ability. As a general rule, stories about what happened to you in such-and-such a lawsuit are better when they advance the point that you are trying to get across than when they go off on a tangent. But that doesn't answer whether you should tell stories at all.

For what it's worth, I don't tell them and (except for a couple of times that I now regret) I never have. Sometimes I find myself about to do so, but I bite my tongue in time. My view is that these stories are usually a lot funnier to the folks who were there; it also takes a while to unfold the story, and that's a waste of precious class time. I also prefer to focus on the material and not on me. Sometimes I have found ways to turn a war story into a hypothetical, but I resist the temptation to then tell the students about the origins of the hypo or the back story about what happened in the real case on which I based the hypo.

My reluctance to tell war stories doesn't mean that I don't inject humor into class. On the contrary, I love to keep a smile on students' faces. It encourages learning. But war stories are not a part of my classroom method. (I might have been known to tell one or two when students visit me in my office, though.)

Again, I'm giving you my opinion. Feel free to disagree with it. What is important is that you think about how you are going to handle war stories *now*. You might not plan to tell war stories, but some student will ask a question, and it will trigger the memory of that one time when you were sitting in a deposition in Waco and the witness said ....

If you don't think now about what your attitude toward war stories will be, I guarantee that you'll be answering the student's question by telling the rest of the story.

#### D. COMMON MISPERCEPTIONS

One thing to be aware of before you walk into class is that students come into Civil Procedure with a lot of mental baggage about litigation, even if they lack much contact with the civil-justice system specifically. I don't think that you need to start your first class clearing up these misperceptions, or that you should teach to the misperceptions (i.e., structure your class to address, and where appropriate refute, the misperceptions). But inevitably, in answering your questions, some students will ground their answers on assumptions about the civil-justice system that they have brought in the door with them. Likewise, unless you are aware of their mindset, students might reject (or completely misinterpret) some of your lecture points because they don't jive with their own (mis)perceptions. One task of all law professors is to push students beyond their assumptions about the world. Here are a few beliefs to listen for and to be conscious of:

- *Americans are the most litigious people ever.* Not really. We are litigious, but our rate of litigiousness isn't that different from that in a number of other Western countries. In addition, Americans rely much less on the regulatory system, and much more on post-hoc litigation, than many countries, so higher rates of litigation don't necessarily mean that we have higher levels of legal response to social conduct. Indeed, some argue that post-hoc litigation deters socially useful innovation less than regulation. Some people also argue that Americans don't sue enough; one study showed that less than one in ten claimants with a tort claim ever pursued the claim in any fashion, much less sued. You don't need to go so far as to say that lawsuits are the best thing since sliced bread, but students' assumptions of American litigiousness need qualification.
- *There are too many frivolous lawsuits filed by money-grubbing plaintiffs.* Related to the "too much litigation" concern is that there is too much frivolous litigation. We can all agree that some

lawsuits are frivolous, and that the American tort system has more of a lottery quality than it should. But students with this misperception probably have in mind cases like the McDonald's hot-coffee lawsuit, which was not so frivolous if you look at the facts. (If the McDonald's case comes up, you have a good teaching moment: Don't leap to conclusions based on what you read or hear.) We don't have crystal balls and we don't know which cases have merit when they are filed. "Frivolous" and "lacking merit" are not the same thing. Moreover, one consequence of an open, messy democracy is allowing people to sort out disputes in court.

- *Juries are pro-plaintiff.* No, they aren't—at least not in civil cases. As studies have shown, judge–jury agreement is very high, with judges being ever so slightly more pro-plaintiff than juries. On the other hand, it is true that, when they find defendants liable, juries award higher damages.
- *Juries are stupid and irrational.* Juries have some predictable problems; for instance, they have a hard time comprehending the legal gobbledygook that we call jury instructions. It is true that many knowledgeable, competent people try to get out of jury service, or are excluded by peremptory strikes, but studies suggest that juries tend to make good decisions. And who is to say that judges are any better at figuring out which witness is telling the truth and what really happened? Studies show that judges also struggle to understand expert testimony.
- *Juries decide every case.* Not in the federal system or in most state systems. In the federal system, about two thirds of all cases filed (and tried) are jury cases. Students know very little about the system of equity or its influence on modern American procedure, but they easily catch on to the difference between injunctive and damages claims. You can then point out that in equity parties typically sought injunctive relief, and judges determined the facts without a jury; only for common-law actions, which sought damages, did juries determine the facts. This division (“injunction in equity” but “money at common law”) isn't quite accurate, either as a historical matter or as a matter of modern Seventh-Amendment jurisprudence, but it is a good rule of thumb to give them if this misperception pops up.

- *Litigation is too expensive.* Thank God, you might joke—don't you have student loans to repay? Seriously, though, studies don't back up this claim as a general matter. Perhaps half of all civil cases in federal court involve little or no discovery. Recent surveys of lawyers suggest that litigation costs are not out of line when the costs are compared to the stakes of the litigation. These same surveys show a high level of litigant and lawyer satisfaction with the American civil-justice system. There is a small subset of cases—typically the large, complex ones—for which the previous statements aren't necessarily true, but do we throw out the baby with the bath water?
- *Defendants must be found “guilty” “beyond a reasonable doubt.”* Early in the class, there will be some terminology failures; students will describe “liability” as “guilt.” I patiently correct students, and through osmosis, the class eventually absorbs the right vocabulary. In the casebook I use, there is a note that students read on the second or third day about the “more likely than not” burden of proof. I spend a few minutes distinguishing that burden from “beyond a reasonable doubt.” Students seem to get this one without difficulty.
- *Lawyers aren't civil toward each other; litigation is a nasty business.* Sometimes, yes. It saddens me, and as I look at the business model of modern law-firm practice, it's easy to see why this behavior is far more prevalent than it should be. We're a long way from the days when Abe Lincoln rode circuit with his legal opponents, and ate meals, swapped stories, and slept in the same bed with them. Most law students are decent people, though, and they don't become less decent or treat people less decently once they get their license.

You'll hear a few other misunderstandings pop out of students' mouths, especially early in the course. You need to make a split-second decision whether to spend class time correcting the mistake, or just to let it go.

## E. COMMON CONFUSIONS

Distinct from the misconceptions with which students enter the classroom are confusions that arise from the class itself. When you read your first set of exams, you're going to be depressed. Some exams will say the darnedest things, and you'll wonder how badly you must have taught the material. After a few years, you'll become more inured to the problem. The truth is that you will never avoid some students' 180-degree wrong views about a rule or doctrine.

You can, however, minimize the number of mistakes for most students. In particular, you need to stress the distinctions among certain doctrines that seem related in students' minds or take extra time to explain some concepts that might seem evident to you but nonetheless confuse students year in and year out. I don't completely believe in the old adage "repeat until true," but don't expect most students to understand these distinctions if you explain them only once. Find ways to go over them a few times, and be imaginative in how you reinforce the distinctions.

- *Personal versus subject-matter jurisdiction.* The difference between personal jurisdiction and subject-matter jurisdiction will be a stumper. The two doctrines address different issues: power over the parties versus power over the claims. But they both involve power. To add to students' confusion, they share a common term ("general jurisdiction"), even though the phrase has two very different meanings in the two contexts. They also share a common legal consequence: An absence of either form of jurisdiction renders a judgment invalid. Making matters worse, in certain forms (general personal jurisdiction and diversity jurisdiction) both concepts hinge on notions of citizenship. It's no wonder that students confuse the two doctrines. In particular, don't be surprised if some students use the test for corporate citizenship provided in 28 U.S.C. § 1332(c) to determine corporate citizenship for personal-jurisdiction purposes.
- *Venue and jurisdiction.* Whether a court has power to hear a claim (subject-matter jurisdiction) and whether it is a convenient forum for that claim (venue) are distinct ideas. Likewise, the way in which venue cashes out the concern for convenience and the way in which convenience enters into personal jurisdiction's

minimum-contacts analysis (through the so-called convenience prong) are not the same thing.

- *Res judicata*. *Res judicata* has a broad and a narrow meaning. In the broad meaning, it refers to the entire law of preclusion. In the narrow meaning, it refers only to claim preclusion.
- *Erie analysis*. Students will see *Erie* issues where they are not, and not see them where they are. They will mix up the “relatively unguided,” twin-aims branch of *Erie* with the Rules Enabling Act branch.
- *Work product versus attorney–client privilege*. Even though a detailed exploration of the attorney–client privilege is a matter best left to Evidence or Professional Responsibility, you might find yourself teaching at least a little about the attorney–client privilege when you teach work product. *Hickman v. Taylor*, which is the seminal work-product opinion still found in most casebooks, discusses both issues.

Student confusion about the differences between work product and the attorney–client privilege is rampant. Often the doctrines overlap; a single attorney communication about a litigation matter can fall within both doctrines. But not necessarily. Attorney–client privilege applies (as a rule) only to attorney–client communications; the work-product doctrine does not require any communication. Work-product protection blankets material prepared in anticipation of or for litigation; attorney–client privilege has no comparable limit. Finally, attorney–client privilege is absolute; with the arguable exception of core work product, the work-product doctrine is qualified. (I wish I had a dollar for every exam informing me that the attorney–client privilege can be overcome on a showing of substantial need and undue hardship!)

- *Liberality of amendment and relation back*. If you teach Rule 15 (and in particular relation back), a party’s ability to obtain an amendment under Rule 15(a) is distinct from whether a claim asserted in the amended pleading should relate back under Rule 15(c) to the filing of the original pleading. If you ask an exam question that brings both issues into play, a lot of students will

analyze one issue or the other—but not both—unless you stress in class the need to do both halves of the analysis.

- *Counterclaims, crossclaims, and third-party claims.* The difficulty here is a fairly minor annoyance in the grand scheme of things. Once they have learned all three doctrines, students will often mix up the labels, and call a crossclaim a counterclaim or a counterclaim a third-party claim. I correct the vocabulary mistake when I hear it in class. On exams, showing more mercy than justice, I usually overlook such mistakes so long as the paper shows an understanding of the correct principles.

## V. Examinations

Even after many years, I struggle to write good Civil Procedure examinations, so read anything I say here with a jaundiced eye. To some extent the difficulties in examining Civil Procedure are not different from those in other courses. Among the big questions are whether you should have interim graded projects (an issue that is most salient if you use a simulation or problem method), whether you should try to test comprehensively or instead test selective topics, whether you should have an open-book examination (in particular, allowing students to bring in their Federal Rules and statutory supplement), and whether you should use multiple-choice and true-false questions in addition to essay questions.

Your pedagogy and grading philosophy can guide you here. I suspect that, taken as a whole, we Civil Procedure professors use more objective questions than our other 1L colleagues—in part because, with federal statutes and the Federal Rules, Civil Procedure has a content that is more easily testable in objective fashion than the content of common-law courses. I am an outlier here; I used objective questions only once, about 20 years ago. I prefer all-essay exams, mostly because it better reflects the way that I teach my course.

But writing good essay questions in Civil Procedure is challenging. First, for most questions, you need to give students the substantive context out of which the dispute arose. You need to make the substantive law clear and indisputable; you don't want students writing a Torts or Contracts exam. As I mentioned earlier with in-



class hypotheticals, you should generally aim to use substantive law with which the students are familiar. But this isn't always possible; it doesn't work, for example, if you are trying to raise a *Merrell Dow-Grable* embedded federal question, because inevitably you're going to need to describe some federal law that lies beyond the students' ken.

A second concern is length of the questions themselves. In substantive classes, professors need to lay out the facts of the dispute and ask what should happen. In Civil Procedure, you need to lay out the facts of the dispute as a setup, and then lay out the procedural history to tee up the question you want to ask. For example, if you're going to ask a question about the sufficiency of a complaint, you need to give the students the complaint. That's a page right there. When you realize that you might have to do the same lengthy setup for each question you ask, you can see how the pages start to add up.

The length of the questions matters. Many students start to panic when they see a long exam. Moreover, you need to allow more reading time, which cuts down on the number of subjects you can test.

Third, writing questions that integrate different parts of the course is often difficult. With some imagination, I could blend a work-product question with a subject-matter-jurisdiction question and an *Erie* question, but it isn't easy and the question would be pretty stilted and forced. Moreover, my experience is that, more than in other courses, students have a hard time with blended questions, seeing only one or two of the issues and missing the rest. Many students think of each part of the course as a sealed container, and they have a hard time making strategic connections among different containers. That is one reason why, as I teach, I use problems designed to make them pull information together from different parts of the course.

Fourth, it isn't as easy to write questions that test the limits of the Federal Rules as you might think. On the other hand, it is easy to write questions that raise joinder, personal-jurisdiction, and subject-matter-jurisdiction issues. But you don't want to skew your test to those issues just because they are easier to test.

Finally, it is difficult to test some issues. I mentioned earlier the problem of testing the Seventh Amendment in anything other than a cursory way; students do not possess the knowledge about eighteenth-century common-law pleading to answer a serious Seventh-Amendment question. Testing summary judgment or its cousins (judgment as a matter of law and new trial) also presents challenges, because you need to write a problem with a strong

evidentiary imbalance but with just enough evidence on the other side for the student to make an argument for the party opposing the motion. Aside from the technical difficulty of accomplishing this goal when the students haven't yet had Evidence, laying out the evidence for both sides adds yet more length.

You can work around these problems. One technique I use is to write a single, overarching set of facts that covers the entire exam, and then supply additional information with each question to tee up the issues that the specific question raises. For instance, I'll provide a set of general facts about an arguable legal wrong against A by B and C. I'll give information about the parties' citizenship, their contacts with the forum state, the legal theory of the case, and so on. Then the first question will be to ask them to evaluate a (very minimal) complaint I provide in the exam—perhaps A suing B. The question might raise issues under Rule 8 (*Twombly-Iqbal*); personal jurisdiction over B; federal subject-matter jurisdiction over the case; mandatory joinder of C under Rule 19; and the fate of B's state-law (but jurisdictionally insufficient) counterclaim against A. Then the second question asks students to assume that all motions to dismiss from the first question were denied and that the case has moved into discovery. It then adds some facts about a later discovery dispute between the parties, perhaps raising work-product and e-discovery issues. The third question describes the evidence that discovery developed, and asks if summary judgment is appropriate.

You get the idea. I don't use this approach every year, but I use it more often than not. If you use this method, be careful to tell students that they cannot use the additional information from the later questions to answer any earlier questions.

The other godsend for writing questions is the American judicial system. Courts issue dozens of potential fact patterns every week. There is no shortage of cases that raise interesting and novel procedural questions. Sometimes the opinions contain an odd juxtaposition of procedural issues—nested combinations that I wouldn't have imagined being together. As I do my ordinary reading of opinions, a piece of my brain is always evaluating cases to see if they might serve as the kernel for a good exam question.

## **VI. Conclusion**

To end where I began, Civil Procedure is a challenging course to teach. I hope that some of what I have said has been helpful in explaining why, and in giving you some ideas about how to manage its challenges. But let me again emphasize that Civil Procedure is also a great course to teach. It imparts important skills and ideas that 1Ls don't get elsewhere.

If you ever want to talk anything over, please e-mail me or give a call. In the meantime, I wish you the very best. There is a lot of satisfaction that comes from teaching Civil Procedure well.

