Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution

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Introduction

Civil procedure is tough.[1] As civil procedure legend Jay Tidmarsh writes in *Strategies and Techniques for Teaching Civil Procedure*: "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."[2]

Two big sources of student frustration are (1) their inability to view the course materials in a context that makes them seem real, and (2) our failure to engage them through active learning. I believe we can solve (well, address) these problems by using a semester-long simulated case to help structure the course, while preserving the time needed to cover the core material of the course. In Part I of this article I briefly introduce my case file, *Patt v. Donner*,[3] and explain why I think it is well-suited to teaching this difficult course. In Part II, I briefly review the literature on the reasons context and active learning matter

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1. In a survey of 231 law students taken by Top-Law-Schools.com, asking which was the "least favorite/predicted least favorite 1L course," 22% chose civil procedure, compared with 25% for legal research and writing, 19% for contracts, 10% for property, 9% for torts, 7% for constitutional law, and just 6% for criminal law. *Least Favorite/Predicted Least Favorite 1L Class*, Top-Law-Schools Blog (Sept. 21, 2011, 4:02 PM), http://www.top-law-schools.com/forums/viewtopic.php?f=3&t=163960&start=75.

2. Jay Tidmarsh, Strategies and Techniques for Teaching Civil Procedure 1 (2013); *see also* Philip G. Schrag, *The Serpent Strikes: Simulation in a Large First-Year Course*, 39 J. Legal Educ. 555, 566 n.44 (1989) (attributing the difficulty, in part, to what he calls the "engagement gap"–the fact that his students' lives are connected to torts, contracts and property, but not civil litigation).

3. David Benjamin Oppenheimer et al., Patt v. Donner: A Simulated Casefile For Learning Civil Procedure (2014).

in learning how to solve legal problems. In Part III, I review (in subpart A) and assess (in subpart B) some of the many creative innovative approaches developed by others to bring context to the civil procedure course. In Part IV, I return to my own case file, *Patt v. Donner*, to describe how I use it, offer my 90% solution, and argue that it is well-suited to teaching civil procedure. I conclude with the suggestion that the 90% solution I apply in *Patt v. Donner* can serve as a model for teaching through simulation in many subject areas.

I. *Patt v. Donner I*: Starting the Semester by Introducing a Client

I confess. I used to start my civil procedure class each year with *Pennoyer v. Neff*.[4] Now I ask myself, gosh, how could I? The students were game—bless their hearts—but bewildered. "Was this written in English? Did I miss a day of orientation? A week? What does he mean how many cases are embedded in the decision; what's a case? Why is he asking who the plaintiff is? Oy. No mas."

Now, I start with a YouTube video of a witness interview.[5] It's late August; the school year is about to begin. A 23-year-old graduate student has come to a law school clinic for advice. She's interviewed by a nervous 2L, in his first clinic case. The client has just arrived in Berkeley, and is looking for an apartment for herself and her 5-year-old daughter. She found a place she liked (a lot) and, over the phone, the landlord gushed about liking to rent to graduate students, and seemed ready to rent to her. But when she showed up with her daughter to submit the application, his attitude changed completely, and she didn't get the apartment. Could it be discrimination?

I poll my students, using clickers: Do we know enough to file a lawsuit? Is a hunch enough? Can we base a lawsuit on a change in someone's facial expression? What more could we find out (without formal discovery)? How much should we require? Now they're ready for *Conley*,[6] *Swierkiewicz*,[7] *Twombly*,[8] and *Iqbal*,[9] the cases that set forth the changing law on the sufficiency of a complaint, to make sense.[10]

4. 95 U.S. 714 (1877).

5. Here is a link if you would like to watch it: Sam Wheeler, *Paula Patt Initial Interview* (May 17, 2013), http://www.youtube.com/watch?v=KOIZccJlRoU.

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

7. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

8. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

9. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

10. For more on how *Twombly* and *Iqbal* have roiled the teaching of civil procedure, *see* Christine Bartholomew, Twiqbal *in Context*, 65 J. Legal Educ. 744 (2016), and articles cited therein. For a discussion on *Twombly's* impact on pleading standards see Z.W. Julius Chen, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 Colum. L. Rev. 1431 (2008); Robert D. Owen & Travis Mock, *The Plausibility of Pleadings After* Twombly *and* Iqbal, 11 Sedona Conf. J. 181 (2010).

By the end of three or four classes, my students are ready to draft a complaint—but not from scratch. I mean, they could, but it would take several hours, and they'd mostly be copying forms. In a clinic, or in practice, lawyers may take days, or even weeks, drafting a complaint. In civil procedure, one of three to five courses a 1L is taking simultaneously, how much time should we give the student for a complaint-drafting exercise, or any simulation exercise?

If we put ourselves in their shoes, it should be apparent that drafting a complaint is an enormous undertaking, even in a relatively simple case. What should a complaint look like? Is there a form to follow? If so, is it reliable? What kind of paper should I use? (Paper?) What kind of formatting? How much information do I need to identify the parties? The Federal Rules of Civil Procedure require a "short and plain statement of the claim, showing that the pleader is entitled to relief."[11] But how short is "short"? How plain is "plain"? How do I show jurisdiction? (Heck, what *is* jurisdiction?) Who is the "pleader"? What does it mean to show that "the pleader is entitled to relief"? What kinds of relief can I seek? What style of writing is expected?

I'll return to these questions, and how I address them with my 90% solution, in Part IV. But first, I briefly review in Part II the literature on the reasons context and active learning matter in legal education, and assess in Part III how civil procedure professors over the past thirty years have tried to make their classes come alive by putting their material into context, often by using real cases, and by using simulated lawyering exercises to stimulate active learning.

II. The Importance of Context and Active Learning

In legal education, context matters, and active learning trumps passive learning. Legal educators have been reminded and remonstrated repeatedly that by divorcing practice from theory in our teaching, we are failing to educate our students adequately. The MacCrate report,[12] the Carnegie report,[13] Best Practices for Legal Education,[14] Transforming the Education of Lawyers,[15] and many articles published here in our peer-reviewed Journal of Legal Education[16]

11. Fed. R. Civ. P. 8(a)(2) (2016).

12. ABA Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development, An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) [hereinafter MacCrate Report].

13. William M. Sullivan et al., Educating Lawyers. Preparation for the Profession of Law (2007) [hereinafter Carnegie Report]. For a critique of the Carnegie report, *see* Kristen Holmquist, *Challenging Carnegie*, 61 J. Legal Educ. 353 (2012).

14. Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Roadmap (2007).

15. Susan Bryant et al., Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy (2014).

16. For specific examples, *see infra* Part III.

and elsewhere encourage us to provide our students with opportunities to simulate or practice lawyering skills. These opportunities allow students to learn to think critically about those skills, and to put doctrine and theory into context. Whether through simulation or clinical practice, our colleagues who study learning theory repeatedly urge us to use practical skills, context, and active learning as a method of teaching the essential intellectual and cognitive skills described by Shultz and Zedeck: analysis and reasoning, creativity and innovation, problem-solving, and practical judgment.[17]

In response to these consistent calls for more practical approaches in the classroom,[18] for putting doctrine into context,[19] and for teaching through active learning,[20] civil procedure instructors have responded by:

- Assigning our students to read fictional and nonfictional accounts of cases, as described and assessed in Section III infra;[21]

17. Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 Law & Soc. Inquiry 620, 630 (2011).

18. For more arguments on the value of teaching doctrine through practice and simulation, see Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, 45 J. Legal Educ. 313 (1995); Stephen J. Shapiro, *Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 Creighton L. Rev. 245 (2000).

19. For more on the importance of context, see Paula Lustbader, *Teach in Context*, 48 J. Legal Educ. 402 (1998); Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning,* 36 Ariz. L. Rev. 287 (1994); Michael B. Mushlin & Lisa Margaret Smith, *The Professor and the Judge: Introducing First-Year Students to the Law in Context*, 63 J. Legal Educ. 460 (2014); Howard E. Katz & Kevin F. O'Neill, Strategies and Techniques of Law School Teaching: A Primer for New (and Not So New) Professors 27 (2009) ("Students are much more receptive to discussions of theory or policy if they have first been exposed to some concrete examples of the *context* in which that theory or policy will play out. Thus, when charting the sequence of materials you will cover, our advice is this: Don't front-load theory or policy without first giving the students a real case to sink their teeth into. Particularly with any first-year course, you risk losing your students if you start out with abstractions. Let them see some facts and rules first."); Susan Imel, *Contextual Learning in Adult Education*, Practice Application Brief No. 12 (2000), http://www.ydae.purdue.edu/lct/hbcu/documents/ContextualLearninginAdultEducation.pdf (last visited Mar. 13, 2016).

20. For more on the importance of active learning, see Keith A. Findley, *Assessing Experiential Legal Education: A Response to Professor Yackee*, 2015 Wis. L.R. 627, 631 (finding that according to adult learning theory: "(1) Learning should be through mutual inquiry by teacher and student . . . ; (2) emphasis should be on active, experiential learning . . . ; (3) learning should relate to concurrent changes in the students' social roles . . . ; and (4) learning should be presented in the context of problems that students are likely to face…").

21. I myself have used, in various semesters, Gerald M. Stern, The Buffalo Creek Disaster (1976), Jonathan Harr, A Civil Action (1995), and Nan D. Hunter, The Power of Procedure: The Litigation of Jones v. Clinton (2002). As outside reading, I have recommended Brandt Goldstein, Storming the Court: How a Band of Yale Law Students Sued the President—and Won (2005) and Clara Bingham & Laura Leedy Gansler, Class Action: The Landmark Case that Changed Sexual Harassment Law (2002). I have resisted assigning Franz Kafka, The Trial (Ritchie Robertson ed., Mike Mitchell trans., Oxford World's Classics 2009) (1925).

- Organizing our syllabi around simulated case files, as described in Sections III and IV, infra;
- Having students participate in litigation-oriented pro bono or clinical projects;[22]
- Recommending movies;[23]
- Passing out pleadings, as described in Section III infra;
- Using CALI exercises;[24]
- Incorporating moot court arguments into our courses;
- Combining civil procedure with first-year writing courses;[25]
- Inviting lawyers and/or judges as guest lecturers to talk about their cases or to co-teach our courses;
- Asking them to read stories about the background of cases we assign;[26]
- Using problem sets;
- Experimenting with experiential approaches to learning; and
- Organizing the course around a simulated case file using the "90% solution," as described in Section IV.

III. A Survey and Assessment of How Civil Procedure Professors Use Real or Simulated Cases to Provide Context and Promote Active Learning

A. Survey of the Existing Materials

In designing materials to help my students understand civil procedure in context, and to engage them through active learning, I truly stand on the shoulders of giants. Among the first of them are Lawrence M. Grosberg, Philip G. Schrag, Lloyd C. Anderson, and Charles E. Kirkwood. They were early adopters and proselytizers for using simulation, and they pioneered the method of using actual litigation documents to bring case materials into the civil procedure classroom.

22. *See*, *e.g.*, David Oppenheimer et al., *Berkeley Law's Student-Initiated Legal Services Projects,* 62 J. Legal Educ. 621 (2013).

23. *See*, *e.g.*, Ted Tjaden, *Law-Related Movies – Organized by Substantive Law Subject*, http://www.legalresearchandwriting.ca/movies/subject.htm (last updated Jan. 2016).

24. *See* The Center for Computer-Assisted Legal Instruction, *Civil Procedure, Lessons* http://www.cali.org/category/1l-first-year-lesson-topics/civil-procedure (last visited Jan. 15, 2016).

25. For example, the courses are combined at the University of Baltimore. *See* University of Baltimore, *Curriculum Plans,* http://law.ubalt.edu/academics/jd-program/curriculumplans.cfm (last visited Jan. 18, 2016). They are also combined at the University of Maryland. *See* University of Maryland, *Structure of the Required Curriculum,* http://www.law.umaryland.edu/academics/program/curriculum/structure/fulltime.html (last visited Jan. 18, 2016); *see also* Douglas E. Abrams, *Integrating Legal Writing into Civil Procedure*, 24 Conn. L. rev. 813 (1992).

26. *See* Kevin M. Clermont, *Teaching Civil Procedure Through Its Top Ten Cases, Plus or Minus Two*, 47 St. Louis U. L.J. 111 (2003); Kevin M. Clermont, Civil Procedure Stories (2d ed. 2008).

Lawrence Grosberg, a Clinical Professor at New York Law School, created and distributed materials[27] based on Gerald M. Stern's *The Buffalo Creek Disaster*[28] that have made their way into many civil procedure courses, including mine, and his advocacy on behalf of making the course more real has benefited uncounted numbers of students.[29]

In 1976, attorney Gerald M. Stern wrote a book about a 1972 mining disaster and flood that had killed over 100 people living in the valley of Buffalo Creek in West Virginia. Stern represented many of the survivors in a civil action against the Pittston Corporation, owner of the mining company that built the dams that failed, causing the flood. His book *The Buffalo Creek Disaster*[30] is an engrossing story of how he litigated the case, from his initial client meetings through pleading and discovery to trial preparation and settlement. It's a great read, and a great introduction to the operation of our civil justice system.

Grosberg saw that Stern's book was a wonderful tool for organizing a civil procedure course.[31] He found copies of the pleadings, and in the days before email and Web posting, he made photocopies available to civil procedure instructors and clinic directors around the country.[32] He made a series of videotapes of simulated interviews and depositions of one of the parties, which he distributed to anyone who asked. In 1987, Grosberg published an article here, in the Journal of Legal Education,[33] describing his use of *The Buffalo Creek Disaster* and the pleadings he'd discovered and videotapes he'd created. It had the effect of making the materials even more popular.

In the 1980s, Philip Schrag at Georgetown and Lloyd Anderson and Charles Kirkwood at Akron organized their civil procedure courses around full-semester simulations.[34] Schrag spent several years developing a fairly complex

27. Lawrence M. Grosberg, *The Buffalo Creek Disaster: An Effective Supplement to a Conventional Civil Procedure Course*, 37 J. Legal Educ. 378 (1987).

28. Stern, *supra* note 21.

29. In response to an inquiry on the number of book sales, Random House (publisher of The Buffalo Creek Disaster) recently informed me that the book has so far sold about 230,000 copies. This does not account for the used editions of the book that get recirculated for courses, which Random House estimates could potentially add another forty percent to the total.

30. Gerald M. Stern, The Buffalo Creek Disaster (2008).

31. *See* Grosberg, *supra* note 27, at 386 (describing The Buffalo Creek Disaster as providing a "refreshing and often positive view" of substantive law and civil procedure, and "plant[ing] the seed for questioning some of the lawyering. . . .").

32. Professor Joan Steinman of Chicago Kent Law School has uploaded the pleadings online to her civil procedure class Web page. Joan Steinman, *Civil Procedure Spring 2012*, Ill. Inst. Tech. Chi. Kent Coll. L., http://www.kentlaw.edu/faculty/jsteinman/classes/steinmancpsp2012/BuffaloCreek/BuffaloCreek_Index.htm (last updated Jan. 24, 2012).

33. Grosberg, *supra* note 27.

34. *See* Schrag, *supra* note 2; Lloyd C. Anderson & Charles E. Kirkwood, *Teaching Civil Procedure with the Aid of Local Tort Litigation*, 37 J. Legal Educ. 215 (1987).

multiparty tort case brought by a pet-store worker bitten by a poisonous snake. Students participated in a series of exercises he designed to take them from complaint drafting through eve-of-trial settlement negotiation. Anderson and Kirkwood would select a local tort case each year that they thought would serve as a good teaching vehicle, and adapt it for their second-semester civil procedure students. The students would draft pleadings, engage in strategy sessions, participate in motion practice and discovery, and prepare for a final pretrial conference. Local judges heard some of the simulated motion hearings. The Schrag, Anderson, and Kirkwood materials, however, were unpublished, and were designed by them for their own use,[35] not for dissemination to other civil procedure teachers.

By contrast, Grosberg's materials were widely disseminated. In describing his own use of the materials, he explained that he used them in several ways.

- He used the book to provide incoming students with "a refreshing and often positive view of how competent lawyers can use both the substantive law and civil procedure creatively." And, "notwithstanding the tragedy underlying the book, it depicts a lawyer who obviously was enjoying his craft."[36]
- He used some of the pleadings, including interrogatories, settlement documents, and document requests, as examples of the documents created under the law of civil procedure, passing them out without discussion.[37]
- He used other pleadings, including the complaint and a defense motion for a more definite statement, as focal points for class discussion.[38]
- He used some of the discovery motions to create in-class student advocacy exercises, having students argue the motions in class.[39]
- He used the videotapes to promote class discussions on a number of key civil procedure issues.[40]
- He sometimes based exam questions on variations of the case.[41]

In describing the ways other civil procedure professors were using the materials, he surveyed other users and found that "[n]early everyone who uses the case

35. Note, however, that Eric Freedman of Hofstra Law School has informed me that Professor Schrag shared the materials with him, and that he used them for several years before developing his own simulation. Others may have used them as well. Conversation with Eric Freedman on January 8, 2016 at AALS Conference.

36. Grosberg, *supra* note 27, at 382.

37. *Id.* at 383.

38. *Id.*

39. *Id.*

40. *Id.* at 383-84.

41. *Id.* at 385-86.

assigns the Stern book, distributes some of the actual court documents and uses hypotheticals and problems based on the case."[42]

In 1995, Jonathan Harr published the award-winning nonfiction book *A Civil Action*,[43] the story of a personal injury, wrongful death and environmental tort lawsuit on behalf of several children and their surviving family members. The plaintiffs claimed that two large companies polluted the local water supply in Woburn, Massachusetts, causing them to develop leukemia. The book was a best-seller, and an instant hit as an introduction to civil procedure. Then, in 1998, the book was made into a movie starring John Travolta and Robert Duvall.[44] In 1999 law professors Lewis A. Grossman and Robert G. Vaughn published a companion volume with the pleadings and other materials[45] to use in civil procedure classes. By 2000, Raleigh H. Levine wrote of its use in civil procedure courses: "At least fifty law schools, including Harvard, Yale, and Columbia, have assigned the book in one or more courses because it reads like a novel, portrays the story of a lawsuit in vivid detail, and compellingly demonstrates how the rules of civil procedure and evidence can profoundly affect the course of civil litigation."[46] Levine went on to explain the value of using such case studies for the contextual connection that it provides:

> Civil procedure professors who have used other journalistic accounts of "real-life" cases, such as the case reported in the book *The Buffalo Creek Disaster*, have found that case studies like *A Civil Action* have virtues in addition to showing how procedure affects real people. The case studies help students understand procedural issues by placing them in a specific factual setting; revitalize the course with "dramatic content"; examine the relationship between substance and process; and expose the "astonishing array of issues that may arise in a particular factual context." They offer a way to approximate, without the attendant costs, the connection to the "real world" that clinical courses offer students.[47]

Grossman and Vaughn's *Documentary Companion* provides over eight hundred pages of text, photos, newspaper articles, interview notes with the participants, supplemental commentary, and, most important, the actual pleadings from the Woburn case. For each of the scores of procedural issues raised by the case, introductory text sets the stage, and a number of thoughtful concluding comments and questions put the pleadings into context and stimulate further consideration and discussion.

42. *Id.* at 386.

43. Harr, *supra* note 21.

44. A Civil Action (Touchstone & Paramount 1998).

45. Lewis A. Grossman & Robert G. Vaughn, A Documentary Companion to *A Civil Action* with Notes, Comments, and Questions (4th ed. 2008).

46. Raleigh H. Levine, *Of Learning Civil Procedure, Practicing Civil Practice, and Studying A Civil Action: A Low-Cost Proposal to Introduce First-Year Law Students to the Neglected MacCrate Skills*, 31 Seton Hall L. Rev. 479, 490-1 (2000).

47. *Id.* at 491-92 (citations omitted).

In 2002, a third case made its way into civil procedure classrooms when Nan D. Hunter published *The Power of Procedure: The Litigation of* Jones v. Clinton.[48] The book republished the critical pleadings and related documents from Paula Jones' sexual harassment case against President Clinton, which was the case that led to his impeachment trial and disbarment. Hunter annotated the materials with insightful commentary on the reasons the lawyers were framing the arguments as they were, and how the various pleadings met the requirements of the Federal Rules of Civil Procedure. As Hunter explains in her (wonderfully helpful) Teacher's Manual:

> For years, I experimented with ways to incorporate actual litigation documents into the teaching of my civil procedure course. I wanted to use a series of documents from the same case to illustrate the ongoing interplay of procedural issues, but I did not want to overwhelm students with a massive amount of additional reading. I wanted a case that included at least most of the critical junctures in the stages of litigation, but I wanted it to involve facts that were relatively simple and easy to grasp. . . . Students can track the cumulative effects of a series of litigation decisions involving procedural moves, something that is not possible when a different case is used for each topic. . . . The experience of having used these materials to teach civil procedure has strengthened my belief that the course suffers when judicial opinions and positive law—primarily the Judicial Code and the Federal Rules of Civil Procedure—are the only texts that we ask students to read closely and critically. . . . We should teach our students how a lawyer reads and analyzes a complaint, for example, and not just the standards for granting a motion to dismiss for failure to state a claim.[49]

Hunter organizes and reproduces the critical pleadings in the case.[50] Each pleading is reproduced with a large margin, and Hunter embeds a running commentary with questions for the student in the margin. She supplements her questions and commentary with explanatory text and a series of sixteen exercises. Half of the exercises ask the student to take on the role of counsel, judicial law clerk, or judge. And the other overlapping half require the student to write something, including memos to partners or judges, judicial decisions, and a set of interrogatory questions.

In 2005, a fourth best-seller was adopted in many civil procedure classrooms with the publication of *Storming the Court: How a Band of Yale Law Students Sued the President—And Won* by Brandt Goldstein.[51] The book tells how the students and faculty of the Allard K. Lowenstein International Human Rights Law Clinic

48. Hunter, *supra* note 21.

49. Nan D. Hunter, Teacher's Manual for The Power of Procedure: The Litigation of Jones v. Clinton vii-viii (2002).

50. These include the Complaint, Motions to Dismiss and Set Briefing Schedule, Answer, Motion to Amend and Opposition thereto, Responses and Objections to Interrogatories, Requests for Admissions, Motions for Protective Orders and Oppositions thereto, Motion for Summary Judgment, and Motion for Discovery Sanctions.

51. Goldstein, *supra* note 21.

at Yale Law School took on a seemingly hopeless case—*Haitian Centers Council v. McNary*[52]—to help Haitian refugees seek asylum in the United States. Like *The Buffalo Creek Disaster* and *A Civil Action*, it introduces students to the scope and mechanics of civil procedure in an exciting and fast-moving narrative. And like *The Buffalo Creek Disaster* (though not *A Civil Action*), it is inspiring, giving incoming students hope that their work as lawyers will help make the world a better place.[53] Then, in 2009, Goldstein joined with Rodger Citron and Molly B. Land to publish a documentary companion to the book, providing us with the pleadings from the case.[54] Like the Woburn case Documentary Companion, the *McNary* Documentary Companion combines text, photos, newspaper articles, interview notes with the participants, supplemental commentary, and—most important—the actual pleadings from the *McNary* case. And like Hunter with her book on the *Jones v. Clinton* case, Goldstein, Citron, and Land reproduce the pleadings and deposition transcripts with a large margin, and embed a running commentary with questions for the student in the margin alongside the pleading. The book also includes four exercises (oral argument of motion to amend, witness examination at trial, oral argument on appeal, and oral argument on application of preclusion).

In their preface, the authors explain,

> What Brandt did not originally anticipate was that *Storming the Court*, together with the litigation materials from the *McNary* case, might also serve as key components in an introductory civil procedure course. But in conversations with his Yale Law School classmate Rodger Citron, it became apparent that the book was remarkably well-suited to this purpose, for several reasons. First, the case covers almost every phase of civil litigation in the federal courts, from the filing of a complaint to appeal, in the astonishingly brief period of one year. Second, *Storming the Court* relies heavily on primary sources from the case—filings, transcripts, discovery documents—and Brandt and Rodger recognized that they could readily situate court filings and other documents in the context of the narrative, providing a rich background for each civil procedure concept presented to the reader. Third, . . . books in this genre rarely feature law students in such a major role. . . . [S]tudents learning civil procedure would have a natural affinity for the protagonists in the book."[55]

As an alternative to assigning simulation exercises based on nonfiction books about actual cases, some of us have created fictional case files. As Kevin Clermont explains, "to supplement the chosen casebook…[s]ome teachers create their own running exemplar from a real or imagined case, providing a fact pattern and sample documents and referring to the case throughout the

52. 789 F. Supp. 541 (1992).

53. I assign THE BUFFALO CREEK DISASTER each year for this reason, and recommend STORMING THE COURT to the student leaders of the pro bono projects I supervise. I used A CIVIL ACTION for a few years, but felt that it contributed to student cynicism.

54. BRANDT GOLDSTEIN ET AL., A DOCUMENTARY COMPANION TO *STORMING THE COURT* (2009).

55. *Id.* at xv.

course."[56] As noted *infra*, Philip Schrag at Georgetown and Lloyd Anderson and Charles Kirkwood at Akron organized their civil procedure courses in the 1980s around full-semester simulations, and described them in the Journal of Legal Education.[57]

Another good example, and one that is published and widely available, is Michael Vitiello's case file *Civil Procedure Simulations*.[58] The case file presents the students with a defamation case, to be filed by a recent law graduate against an Internet investigative journalist with the hope of enjoining publication of a story that would badly damage her reputation. The case file contains: notes from an interview with the plaintiff; a copy of her request for a temporary restraining order and civil complaint; the defendant's motion to dismiss for lack of personal jurisdiction; deposition transcripts; an amended complaint; a second complaint as a separate civil action against other parties; a notice of removal; a motion to remand; a motion to dismiss for improper venue; a motion to dismiss for failure to state a claim; and a motion for partial summary judgment. Each exercise is accompanied by text setting forth the applicable law and copies of relevant cases. Students are asked to prepare various oral or written arguments based on the case file material.

Another published simulated case file, which was just released this year, is Jennifer Gundlach, Eric Freedman, Andrew Schepard and Kevin McElroy's *Putting Legal Doctrine Into Practical Context: A Case File for Civil Advocacy Courses, Sachs v. Jefferson Institute of Technology*.[59] The file, published by Aspen, is entirely online, a great innovation for customizing it by each adopting instructor. Students are divided into a plaintiff group and a defendant group and assigned various tasks in a wrongful death action. Because it was just coming to market as this article was being completed, I have not had a chance to fully evaluate it, but the authors are well-known civil procedure teachers with many years of experience, and one of them, Eric Freedman, was an early adopter of Philip Schrag's snakebite case in the 1980s.

The most ambitious effort to date to use real cases to structure a civil procedure course is probably the civil procedure casebook authored by Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, Thomas O. Main and Alexandra Lahav.[60] The book includes extensive portions of the case files of

56. Kevin M. Clermont, *Teaching Civil Procedure Through Its Top Ten Cases, Plus or Minus Two*, 47 St. Louis U. L.J. 111, 118-19 (2003) ("Many more teachers use one of the excellent paperback books that similarly provide a single case as an illustrative long-term parallel. Two recent ones, for superb examples, employ *A Civil Action* and President Clinton's sexual harassment litigation.") (citations omitted). *See also* Tidmarsh, *supra* note 2, at 26-31 (discussing drafting or borrowing simulations).

57. *See* Schrag, *supra* note 2; Lloyd C. Anderson & Charles E. Kirkwood, *Teaching Civil Procedure With the Aid of Local Tort Litigation*, 37 J. Legal Educ. 215 (1987).

58. Michael Vitiello, Civil Procedure Simulations (2012).

59. Jennifer A. Gundlach et al., Putting Legal Doctrine Into Practical Context: A Case File for Civil Advocacy Courses, Sachs v. Jefferson Institute of Technology (2015).

60. Stephen N. Subrin et al., Civil Procedure: Doctrine, Practice and Context (4th ed.

two actual cases, *Carpenter v. Dee*, a Massachusetts state court wrongful death action, and *Zoll et al. v. City of Cleveland*, a federal court class action claiming sex discrimination in the hiring of firefighters.[61] Forty-two practice exercises, most of which are drawn from the two cases, are embedded throughout the book. The exercises require the students to take on various roles, including plaintiff's lawyer, defense lawyer, judicial law clerk, junior associate, legislator, trial court judge, and appellate judge. Eight of the exercises require the students to draft a document, including a demand letter, a complaint, a set of interrogatories, a brief opposing summary judgment, a written opening statement, and a legal memo from a law clerk to a judge. Six of the exercises require the students to prepare oral presentations for class, including a motion to dismiss, a motion to amend a complaint, an opposition to summary judgment, a motion for certification of a class action, and an appellate argument.

The casebook authors explain their approach to teaching the course, and their reasons for interweaving the case materials, as follows:

> The impetus for this book grew out of our own experience as law students and professors. We find that students learn most effectively when legal doctrine, its context, and how doctrine actually works in practice are integrated. Empirical and theoretical research support the notion that we learn and remember at our best as a result of intense, sustained experiences in which we must perform concrete tasks that call upon a number of our faculties. . . . We wanted a civil procedure course that created a more unified learning experience. . . . We wanted a course in which the students applied the doctrine they were learning.[62]

B. An Assessment of the Existing Materials

As set forth in Section II, an assessment of the effectiveness of these materials depends significantly on how successfully they engage students in active learning and provide context for the material.[63] Generally, at the low end of the effectiveness scale lie any teaching materials that are used passively.[64] For example, asking students to listen to a lecture is passive. While great lecturers are considerably more effective than boring ones, we cannot

2012).

61. *Zoll* is a simulation, but based on an actual case, with some of the names changed.

62. SUBRIN, *supra* note 60, at xxxv-xxxvii.

63. *See* Frank I. Michelman, *The Parts and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352, 353-44 (1982) ("It is axiomatic in learning theory that when cognitive studies are accompanied by active engagement in their application to concrete problems, a likely result is fuller comprehension, better retention, and apter recall of the cognitive material"); Gary F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 402 (1999) (explaining that active learning "includes a belief that legal education should help students understand legal concepts and theory, improve critical thinking, and develop professional skills and values").

64. *See* Hess, *supra* note 63, at 401 ("[students] learn passively when their primary role is to listen to an authority who organizes and presents information and concepts.").

expect our students to do their best learning from merely listening. As the next step up, asking our students to look at something as an example can be useful, but still not very engaging. A steady diet of looking and seeing without doing is likely to be more effective than simply listening, but still a long way from achieving the full potential of active learning.[65] In contrast, using problems or hypotheticals to spark classroom dialogue is considerably more active, as it requires our students to interact with the materials, the discussion, one another, and us.[66] This is the great insight of American law school teaching that made the Socratic method a revolutionary advancement in legal instruction. And hypotheticals or problems used to create dialogues that draw on actual cases are even more engaging, because the students understand that the real work of lawyers on behalf of clients is central to the material with which they are working, and because they are seeing the discussion material in the context of how lawyers actually work. But hypotheticals still are at least twice removed from teaching by doing, because the students are not engaged in performing the actual work lawyers do in solving problems, nor are they simulating such work.[67] As further set forth in Section III, the best way to engage our students (though also the most time-consuming) is to use problems and materials that require students to do the work of lawyers, in clinical settings or through simulation.

I assume that even the very best classroom teachers use at least some passive learning techniques—I know I struggle to use more active learning in my teaching. When we reflect on how much (or little) of the material we have taken from actual cases to enrich our teaching of civil procedure, and how little we require our students to engage in active learning and learning by doing, it should be apparent that we could do far more.

Applying this observation and assertion to some of the innovative materials used over the past thirty years demonstrates both what we've accomplished and where we could seek to do more. Civil procedure instructors now have a wide variety of great context-focused active teaching materials available to them. But some of these materials don't use active-learning techniques as deeply as they could, and many lack sufficient structure and instructions, thereby running the risk of students' spending more time than they should on understanding the assignment, and performing "housekeeping" tasks (e.g., formatting).

65. *Id.* ("[Students'] activity increases as they take notes, monitor their own level of understanding, write questions in their notes, ask questions in class, and organize and synthesize concepts. They are even more active when they discuss concepts or skills, write about them, and apply them in a simulation or in real life.") (citation omitted).

66. *See* STUCKEY ET AL., *supra* note 14, at 105 (finding that one way to create context for teaching is to present "specific legal problems and have them discuss how they would try to resolve them.").

67. *See* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 516 (2007) (commenting on the Socratic method as valuable to teach analytical skills, but "ill-suited to fostering 'legal imagination,' which is what lawyers need most to become effective advocates.") (citation omitted).

For example, Lawrence Grosberg's purpose in using *The Buffalo Creek Disaster* was "to provide a 'sense of context' for the study of procedure," a goal shared by "many of the teachers who responded to [Grosberg's] questionnaire as a principal reason for using the Buffalo Creek case (citation omitted)."[68] He used the materials in a variety of ways, some active and some passive. The passive uses include his passing out several of the pleadings as examples, but without having the students engage them actively. For example, he didn't have them draft pleadings based on the case, which would have required active learning, but would have been far more time-consuming. Instead, he proposed that while "[p]reparing a critique of the complaint drafted by Gerald Stern is a different way to analyze pleading rules, [it is] perhaps as effective if not more so than a discussion of pleading cases and rules."[69] Perhaps? Of course, Grosberg knew that discussing the doctrine by applying it to an actual complaint is more effective than simply discussing the rules and cases. But how much more effective would it be, time permitting, to have our students actually draft a complaint? Grosberg did use the materials actively to have the students argue motions in class based on the actual discovery motions taken from the case, and he identified this as a "highlight" of the semester, but he did this for just one exercise. He also used the materials actively to construct hypotheticals based on the case for exams, but the timing meant that there was little room for formative assessment, since few students spend time reflecting on what they learned from a final exam.[70] Grosberg reports that others also used the book and the materials he distributed to construct hypotheticals for class discussion and simulation problems.

In their introduction to the *Civil Action Documentary Companion*, Grossman and Vaughn explain to the student:

> As you proceed through the *Companion*, you will encounter most of the types of documents that practicing lawyers prepare in the course of actual litigation. The documents illustrate, often in complex and fascinating ways, the operation of procedural rules you will study in class. Examining these documents will not only help you master these rules but also help you see their relevance to the overall process of civil litigation.[71]

Indeed, they would. Moreover, Grossman and Vaughn provide extremely thoughtful and comprehensive (nearly exhaustive) commentary, and provocative questions intended to engage the student and encourage further discussion. But what they don't do is set up simulations or other learning-by-doing exercises. And with so much additional material, a teacher using the *Documentary Companion* must sacrifice other course material. I'd love to try

68. Grosberg, *supra* note 27, at 380.

69. *Id.* at 379.

70. Grosberg does report that his students performed better on final exam questions based on the Buffalo Creek materials. *See id.* at 386, n.26.

71. Grossman & Vaughn, *supra* note 45, at vii-viii.

teaching an advanced seminar on complex litigation using *A Civil Action* and the *Documentary Companion*, and it's a great resource for civil procedure instructors who have assigned *A Civil Action* as an introduction to the course, and want to use a few pleadings as illustrations, or use it for ideas for class discussions. But as an assigned text supplementing a casebook for first-year civil procedure, I think it would be overwhelming, and would pull instructors away from using active-learning exercises.

Where Grossman and Vaughn are exhaustingly comprehensive, Hunter is admirably lean. Her *The Power of Procedure*[72] weighs in at just under two hundred pages, but they are dense with her annotations of the pleadings—a very effective way to draw the student into thinking critically about the pleading as s/he reads it. I used these materials for several years and found that they did an excellent job of providing context to the civil procedure course. The students also found the pleadings, the commentary, and the story of this highly politicized litigation all to be very engaging. Of the sixteen exercises, however, nearly half are passive, asking the students to frame (but not draft) an argument, to test their understanding, to consider or analyze an issue. The active exercises, calling on students to draft a memo or a litigation document, provided little in the way of exemplars. The civil procedure instructor adopting the Hunter materials should consider adapting them by creating additional exercises that simulate legal work, with sufficient instruction to guide the students through the exercises.

In *A Documentary Companion to Storming the Court*,[73] Goldstein, Citron and Land explain that their purpose in compiling the material was to (1) "bring to life the topic of civil procedure by presenting it in the context of a fast-paced, high-stakes case in which law students played meaningful roles"; (2) "explore civil procedure in a single case from start to finish to show how strategic choices made based on the rules of civil procedure play out over the course of a case"; (3) "emphasize not just doctrine but practice-based learning"; and (4) "make civil procedure more fun."[74] They succeed on all four counts. The four exercises are particularly well constructed in that they put the students into simulations that feel real, and provide sufficient information directing the student on how to prepare the exercises so that the student is unlikely to flail about and waste time trying to understand what's expected. I wish only they had more exercises, including some drafting problems.

Michael Vitiello's *Civil Procedure Simulations*[75] gives students a good, realistic look at a series of pleadings, deposition transcripts, and other discovery documents. The case is stimulating, raising interesting and difficult issues. The students are required to think through a series of problems of the kind that lawyers confront in litigating cases, and in some instances to prepare

72. Hunter, *supra* note 21.

73. Goldstein et al., *supra* note 54.

74. *Id.* at xvi.

75. Vitiello, *supra* note 58.

oral or written arguments. All of this is good. Through these simulations, Vitiello hopes that "students will realize why procedural rules matter and why procedure may be far more important than substantive rules in deciding how a case will be resolved."[76] They probably will. But because the substantive law of the case (Connecticut defamation law) is difficult and complex, the materials include a disproportionate amount of substantive law. Of the one hundred sixty-two pages of text, ninety-three are dedicated to either Professor's Vitiello's explanatory text or reproductions of judicial decisions. Anyone using the materials will need to spend considerable time learning and focusing on defamation law. As a result, the materials seem best-suited for a course (and a very interesting course) on litigating a defamation action. Additionally, the simulation exercises in which students are asked to draft written or oral arguments are rather unstructured, with little instruction on how to draft such arguments, or what form the written drafts should take.

The Subrin, Minow, Brodin, Main, and Lahav casebook is the best integration of any of the material available.[77] The exercises are embedded in every section of the book, and require the students to be deeply thoughtful about the work that lawyers do. The students are asked to take on many of the roles that lawyers perform in dispute resolution, from advocate to counselor, from judge to legislator. Several exercises require the students to prepare oral arguments for class or to draft litigation documents, while others require brainstorming in legal settings. In their comprehensive Teacher's Manual, the authors recommend that the simulation exercises can be conducted in class or outside class, randomly assigned in class or preassigned, and can also be peer-reviewed.[78] The only critique I would offer, which is the topic of Section IV and the focus of my 90% solution, is that the eight drafting exercises are unstructured. This is important because these exercises are at the heart of how lawyers engage our civil procedure system. For example, Exercise 11 requires the students to prepare (orally or in writing) a motion to amend a complaint.[79] The authors describe this as one of the most useful and fun exercises. The amended complaint is included in the case file appendix at the back of the book, but there are no instructions on how to construct a brief in support of a motion, and no exemplar. This means that the instructor must provide additional guidance and forms to follow, or the students must spend much of their time flailing about and/or focusing on problems like formatting, rather than the issues at the heart of the exercise. In the next section, I will set forth my solution to this problem, which I call the 90% solution.

76. *Id.* at viii.

77. Subrin et al., *supra* note 60.

78. Stephen N. Subrin et al., Teacher's Manual: Civil Procedure: Doctrine, Practice and Context 3 (4th ed. 2012).

79. Subrin et al., *supra* note 60, at 291-3.

IV. *Patt v. Donner II*: Applying the 90% Solution

Part of the problem of adding simulation exercises to add context and active learning to the study of civil procedure is the limited time we're given to teach the course. In the twenty-five years I've been teaching the course, I've seen most schools drop the units expended on civil procedure from six or seven to four or five. Meanwhile, the core doctrine is expanding, with important new developments in pleading sufficiency, personal jurisdiction, discovery limits, class actions, and arbitration.

Exacerbating the time crunch is the inefficiency of most simulation.[80] As I began to set forth in Section I, there is no better way to study the meaning of *Twombly* and *Iqbal*—or any set of cases that define a doctrine—than to actually use them or to simulate the way lawyers use them.[81] It's one thing to explain or demonstrate that lawyers find facts through witness interviews and other discovery methods. But when a student is asked to draft a complaint, s/he must confront a series of confounding questions that have nothing to do with our learning objectives: What should a complaint look like? Is there a form to follow? If so, is it reliable? What kind of paper should I use? What kind of formatting? How much information do I need to identify the parties? The Federal Rules of Civil Procedure require a "short and plain statement of the claim showing that the pleader is entitled to relief…."[82] But how short is "short"? How plain is "plain"? How do I show jurisdiction? Who is the "pleader"? What does it mean to show that "the pleader is entitled to relief"? What kinds of relief can I seek? What style of writing is expected?

Multiply these problems by eight or ten or fourteen and it becomes clear that if we teach civil procedure primarily by simulating the litigation of a case, we won't have time for much of the doctrine we deem essential.[83] The problem, then, is whether we can develop a set of simulation problems that promote active learning and put the course in context efficiently. If we want to retain some form of the current canon, and we want to teach in part through simulation and active learning, we need to find a way to keep the simulations brief.

80. For more on the inefficiency problem, see Tidmarsh, *supra* note 2, at 26-31.

81. For more on using *Twombly* and *Iqbal* in this way, see Bartholomew, *supra* note 10.

82. Fed. R. Civ. P. 8(a)(2) (2016).

83. One response is to redefine what's essential. Per William Blake, we can see the whole world in a grain of sand. William Blake, *Auguries of Innocence*, *in* Poets of the English Language (1950) (available at http://www.poetryfoundation.org/poem/172906 (last accessed Jan. 18, 2016)). Can we study everything in civil procedure through a single problem? I think of this concept as Zen Procedure, and have thus far resisted the temptation to spend the entire semester on a single Supreme Court decision. Were I to succumb, it would probably be Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), covering personal jurisdiction (over out-of-state defendants, including one over whom there might be general jurisdiction), subject matter jurisdiction (diversity and removal), venue and transfer of venue, *forum non conveniens*, joinder of parties, joinder of claims, choice of law, discovery, the *Erie* doctrine, and appeal. But I digress.

My answer to this problem has been to organize the semester around a simulated case file, with pleadings and briefs that are 90% complete. This way the students can put all their effort into completing the most challenging and important part of the simulation.[84] For example, in the initial complaint exercise, I want the students to focus on the requirement of actively finding enough facts to reach the "plausibility" level. So I give them a complaint, 90% completed. Here's a link to a copy. http://www.civilprocedurecasefile.com/forms/Exercise_1_-_Complaint.docx. Now all they need to do is the hard part—the intellectually hard part. They need to comb the transcript of the interview, from the video they watched the first day of class, to find enough facts to make the claim seem plausible. The rest of the work is already done, but this is the work we care about when we study the sufficiency of the complaint. What are the necessary facts? Where do we find them? How do we assert them? Are they sufficient to meet the legal standard described in the cases we read the first week of class, *Conley*,[85] *Swierkiewicz*,[86] *Twombly*[87] and *Iqbal*?[88] If my students can review a transcript of a 2L student interviewing a client and extract the facts necessary to state a claim that meets the requirement of FRCP Rule 8 as interpreted by the Supreme Court in the cases we're studying in class, they're engaged in active learning and putting our classroom study into context. If they can do it in a few hours, they still have time for all the other work we require of them. And they can (and do) complete the assignment in a few hours, because the 90% I didn't need them to focus on is supplied. That's it, my 90% solution.

The transformation is wonderful to watch. I hand out "clickers"[89] at the start of every class to have them vote on questions raised during class. The clicker votes tell me that on day one, when I ask if we have enough information to file a lawsuit, they start out as skeptics. When I ask if we know enough from the interview of the potential plaintiff, most say no, the plaintiff may have been the victim of discrimination, but she simply doesn't have enough to be allowed to plead her case. No way. But once required to do their best to

84. Parts of my *Patt v. Donner* file, including the YouTube videos, are available without charge at David B. Oppenheimer et al., *Patt v. Donner: A Simulated Casefile for Learning Civil Procedure* (2013), http://www.civilprocedurecasefile.com (last visited Feb. 2, 2016).

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

86. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

87. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

88. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

89. Clickers are voting devices that allow students to select an answer, or vote on multiple-choice questions in class. I find them useful to check on student comprehension, and to demonstrate the breadth of opinion that often emerges when students can express their views anonymously. For more on the value of clickers in law teaching, see Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. Legal Educ. 551 (2004), at 560-66; Catherine Easton, *An Examination of Clicker Technology Use in Legal Education*, 2009(3) J. Info., L. & Tech., http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_3/Easton (last visited Mar. 2, 2016).

complete a draft complaint on her behalf, they become believers. Uh-oh, time to switch sides.

On the second week, they do switch sides. They draft a motion to dismiss the complaint for failing to state a claim upon which relief can be granted—but again, not the whole motion; that would take forever. So again I give them the brief in support of the motion to dismiss, 90% completed. And again, all they need to do is the intellectually hard part. They need to use the now-completed complaint I hand out, and apply their understanding of *Swierkiewicz, Twombly* and *Iqbal* to argue that the claim is not plausible. Because the brief supporting the motion is mostly drafted, I can tell them to take only an hour or so to do the exercise.

Then, to make it seem real, I send the students to court to watch a "law and motion" session. Inevitably, at least a lucky few come back amazed, and their story spreads like wildfire though the class. In some of the sessions they wandered into, lawyers were arguing in support of motions to dismiss for failure to state a claim using *Swierkiewicz*, *Twombly* and *Iqbal*. OMG.

In the third week, we add a little professionalism. In the simulation, the plaintiff (whom the students are back to representing this week) has learned that another apartment in the building is available. She still needs a place to live, and would like to live there. The clinic decides to file for a Temporary Restraining Order to prevent the vacant apartment from being rented to someone else. The clinic student calls the defendant's counsel to give notice. The defense counsel promises to call him right back. She does so within the hour, confirming that there's an apartment available, and agreeing that it won't be rented until there has been a noticed hearing on a motion for a preliminary injunction. No need for the TRO hearing, she explains, because in this community, lawyers work together to avoid unnecessary hearings. (The students then complete the final 10% of a brief in support of a motion for a preliminary injunction, applying the facts from an affidavit to attempt to demonstrate that the plaintiff is likely to succeed on the merits.)

In the fourth week, we turn to personal jurisdiction, and the students again represent the defendant, moving to dismiss under Fed. R. Civ. P. 12(b)(2) (2016).[90] The building owner lives in Brooklyn, New York. He inherited the building from his aunt, and has never been in California. Can a court in California exercise jurisdiction over him? What better way to put the minimum contacts test into context than to have a student complete a brief in support of a motion to dismiss for lack of jurisdiction? And why bother to have the student draft the sections of the brief setting forth the procedural history, or the applicable law we've discussed in class, when the most important learning comes from actually using those cases to construct an argument? That's the 90% solution.

90. OK, I know, they've waived that motion by bringing the earlier 12(b)(6) motion. We finesse it by pretending that the first motion raised both defenses, and the court elected to hear the 12(b)(6) motion first.

As the semester continues, they will move to amend to add a state law claim, thus covering Rule 15 (amendment of pleadings) and section 1367 (supplemental jurisdiction); oppose a motion for intervention by a local fair housing group; and, after things get a little out of hand in a deposition (all on videotape, and another chance to teach something about professionalism), complete cross-motions to compel discovery and for a protective order, with both sides seeking sanctions. As a capstone, they represent one side or the other and attempt to negotiate a settlement of the case.

Is all this hard to organize? Legal research and writing faculty do it all the time. But for me, it was very challenging.[91] The simulation has many moving parts, and tinkering with one affects others in unexpected ways. But now that Foundation Press has published the case file, it's a breeze. The students buy the student version, which contains the partially completed exercises and all the other materials they need (retainer agreement, Greg's-List™ ad, rental application, transcripts of interviews and depositions, links to videos of interviews and depositions, correspondence, discovery documents, legal memos, etc.). The faculty get a teaching manual with suggestions for use, and samples of the completed exercises.[92] And the course website, with a password provided to faculty, provides the partial and completed exercises as Word documents, to ease distribution to the students.

The material can be used in a variety of ways. I have the students complete most of the exercises as homework. We then review them in class. But we do some of the exercises together as in-class exercises, either with the whole class as a single group or in small groups, later followed by a general in-class discussion. There are also a few that I have them read on their own. My colleague Sean Farhang, on the other hand, has his one hundred students prepare the exercises at home so they can work through them in class, together.

What are the benefits of structuring my course around this semester-long simulation? For one, my students are writing, and writing often, even if briefly. My civil procedure course is not a legal writing course, but it's a nice supplement, and for students who tend to learn by writing, it's an opportunity to write as a lawyer, instead of as a student. For another, they're reading trial-level original legal documents, transcripts, and exhibits—the (simulated) real things that real lawyers work with. And, the students tell me the exercises are fun. That can't be bad, can it?

The students also get to (are required to) work collaboratively. I have them work in teams of three, with a new team for every assignment. Collaboration runs through several of Shultz and Zedeck's twenty-six effectiveness factors

91. I had three fabulous research and teaching assistants over three years who helped me draft it, test it, redraft it, retest it, etc. They're my co-authors Molly Leiwant, Rebecca Schonberg and Sam Wheeler; I couldn't, or certainly wouldn't, have done it without them.

92. You can request a password and download it at David B. Oppenheimer et al., *Patt v. Bonner: A Simulated Casefile for Learning Civil Procedure* (2013), http://www.civilprocedurecasefile.com (last visited Feb. 2, 2016).

for successful lawyering.[93] I give my students a list of the twenty-six factors in my syllabus, and over the course of the semester, I try to have them use at least half of the Shultz/Zedeck factors.

But I think the biggest benefits come from two well-known phenomena about learning: We learn from doing, and we learn from context. By giving the students 90% of the material already completed in each simulation, we can find the time for them to do active-learning simulation exercises frequently through the semester, immersing themselves into the work lawyers do, without

93. Marjorie Shultz and Sheldon Zedeck have identified through extensive empirical work the twenty-six personal factors that most contribute to effective lawyering. *See* Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 Law & Soc. Inquiry 620, 630 (2011).
They are:
1. Analysis and Reasoning: Uses analytical skills, logic, and reasoning to approach problems and to formulate conclusions and advice.
2. Creativity/Innovation: Thinks "outside the box," develops innovative approaches and solutions.
3. Problem-Solving: Effectively identifies problems and derives appropriate solutions.
4. Practical Judgment: Determines effective and realistic approaches to problems.
5. Providing Advice and Counsel and Building Relationships with Clients: Able to develop relationships with clients that address client's needs.
6. Fact-Finding: Able to identify relevant facts and issues in case.
7. Researching the Law: Utilizes appropriate sources and strategies to identify issues and derive solutions.
8. Speaking: Orally communicates issues in an articulate manner consistent with issue and audience being addressed.
9. Writing: Writes clearly, efficiently, and persuasively.
10. Listening: Accurately perceives what is being said both directly and subtly.
11. Influencing and Advocating: Convinces others of position and wins support.
12. Questioning and Interviewing: Obtains needed information from others to pursue issue/case.
13. Negotiation Skills: Resolves disputes to the satisfaction of all concerned.
14. Strategic Planning: Plans and strategizes to address present and future issues and goals.
15. Organizing and Managing (Own) Work: Generates well-organized methods and work products.
16. Organizing and Managing Others (Staff/Colleagues): Organizes and manages others' work to accomplish goals.
17. Evaluation, Development, and Mentoring: Manages, trains, and instructs others to realize their full potential.
18. Developing Relationships within the Legal Profession: Establishes quality relationships with others to work toward goals.
19. Networking and Business Development: Develops productive business relationships and helps meet the unit's financial goals.
20. Community Involvement and Service: Contributes legal skills to the community.
21. Integrity and Honesty: Has core values and beliefs; acts with integrity and honesty.
22. Stress Management: Effectively manages pressure or stress.
23. Passion and Engagement: Demonstrates interest in law for its own merits.
24. Diligence: Committed to and responsible in achieving goals and completing tasks.
25. Self-Development: Attends to and initiates self-development.
26. Able to See the World through the Eyes of Others: Understands positions, views, and goals of others.

giving up the time needed to also study the doctrine through more traditional methods.

Conclusion

As legal educators continue to develop new approaches to active learning and teaching in context, many of us will embrace simulation, and some will organize courses around semester-long simulated problems. The technique has worked well in civil procedure, pretrial practice (civil or criminal), trial practice (civil and criminal), and evidence. It should also work well in other courses, including torts, contracts, property, criminal law, criminal procedure, business associations, wills, trusts, and taxation. But simulation can be overly time-consuming, and can waste students' time on tasks that are not central to our learning objectives. One solution is to provide our students with simulated materials that are largely completed, so that they can focus on the problem with the greatest learning opportunity. I call this the 90% solution, and hope that others will experiment with it in a variety of courses, and will publish their materials so that others can use them.