Strategies and Techniques for Teaching Criminal Procedure

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Strategies and Techniques for Teaching Criminal Procedure

Michael Vitiello
Distinguished Professor and Scholar
University of the Pacific, McGeorge School of Law

Howard E. Katz
Series Editor
Elon University School of Law

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I extend my thanks to Howard Katz for inviting me to participate in this series. He and his co-author, Kevin O'Neill, deserve kudos for persuading Aspen to do this series. Many older professors like me only wish that books like Katz and O'Neill's *Strategies and Techniques of Law School Teaching* had been available when we began teaching many years ago. I also want to thank my colleague Ruth Jones for sharing her syllabus and ideas about assessment. Finally, I want to thank my colleagues Jay Leach and Cary Bricker, who have taught me a great deal about teaching experientially.

Strategies and Techniques for Teaching Criminal Procedure

I. Introduction

If you are new to teaching law, welcome! Old-timers like me came into the field of legal education without much help in getting started. A few years before we began teaching, we sat in classrooms, probably with professors using the Socratic Method, and sat in awe or fear of our professors. When we began teaching, we may have consciously emulated our professors, or we vowed to do something different if we did not like traditional legal education. But we had few resources to fall back on. Perhaps we had an older colleague or former professor who could serve as a mentor. But the literature on legal teaching was quite thin. Books like this one simply did not exist.

Howard Katz and his co-author, Kevin O'Neill, deserve a great deal of credit for coming up with the concept for this series on strategies for teaching law school classes. Aspen also earns kudos for buying their concept. Even as an experienced teacher, I have enjoyed reading Katz and O'Neill's book *Strategies and Techniques of Law School Teaching: A Primer for New (and Not So New) Professors*, and, later, Andrew Taslitz's *Strategies and Techniques for Teaching Criminal Law* (both by Aspen Publishers). Books like these would have made my transition from law clerk to law professor much easier back in the dark ages.

You are coming into the enterprise of teaching law at a particularly challenging time. Books like Brian Tamanaha's *Failing Law Schools* (U. of Chicago Press, 2012) suggest that we are in for some difficult times as enrollment declines and law schools must adjust to new realities. Legal employers want law school graduates to bring "value-added" to the practice. Their demands suggest a greater emphasis on exposing students to an expanded set of skills.

Having taught for 36 years, I have been in the practice of teaching law during earlier periods of low enrollment, when traditional legal education was under fire. This time may be different. Even before the economic downturn and the focus on student debt, the Carnegie report *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) raised questions about whether law schools are doing an adequate job in training lawyers for practice. While the report gave law schools good marks for teaching critical thinking in the One-L year, it suggested that they do not do a good job in introducing students to the use of legal thinking in the practice of

law. Similarly, it argued that law schools do not do a good job in helping students develop ethical and social skills.

Many committed law professors have taken to heart the call to action in the Carnegie report and in books like *Failing Law Schools*. We can integrate experiential learning into traditional classes and provide students with skills beyond the development of critical legal thinking. Learning critical legal thinking does not end after the One-L year, as all of us know from our own experience as lawyers.[1] But many of us believe that students learn critical legal reasoning more effectively when they are learning in a realistic context, in a situation where they can see how the rules make a difference in resolving a particular conflict.

I offer these thoughts by way of introduction. In this short book, I introduce you to traditional approaches to teaching Criminal Procedure, but I also suggest various ways in which you can integrate experiential learning into your course. Further, many of us began teaching our first class staying only a few pages ahead of our students and scurrying to fill in gaps in our learning along the way. My hope is that this book will get you thinking about teaching strategically.

Thinking strategically about teaching a course in Criminal Procedure—or any course for that matter—requires you to begin planning well before your first day in the classroom. I have organized this book on the assumption that you will do a good bit of planning before you arrive in the classroom. Section II deals with developing course goals. Section III focuses on how to prepare for your course, including how to select a casebook. Section IV explores the development of your syllabus, including a clear explanation about what your goals are and how you will assess whether students have met those goals. That section also focuses on the need to assign a realistic amount of reading. Section V offers some thoughts about teaching. It also invites you to think not just generally about the role of the law professor, but about how you can implement those goals in the classroom as well. Section VI discusses a potpourri of issues, from effective use of office hours, a course Web site, exam review sessions, and practice exams. Section VII discusses the creation, grading, and review of exams. Section VIII offers a few concluding thoughts.

After you begin reading this book, feel free to contact me if you would like further advice or if you would like to share your thoughts

[1] Studies have shown that it takes about five years of practice for lawyers to feel confident about their abilities.

about teaching. My e-mail address is mvitiello@pacific.edu. I also urge you to join the Criminal Law and Procedure Professor listserv at owner-crimprof@chicagokent.kentlaw.edu. You may be surprised at how willing many experienced professors are to help you acclimate to the profession.

II. Developing Course Goals

In developing goals for your course in Criminal Procedure, consider when the course is taught and whether it is a required course. About 10 percent of all law schools require Criminal Procedure during the One-L year,[2] and another 20 percent require Criminal Procedure for upper-level students.[3] Thus, the majority of law schools offer the course as an elective. At most law schools, Criminal Procedure is a three-unit course.[4]

As a student at U. Penn in the early 1970s, I took Criminal Procedure as a One L. As a law professor at a number of different law schools, I have taught Criminal Procedure as an upper-level required course. Obviously, your goals will differ depending on whether you are teaching One-L or upper-level students.

One-L students have some exposure to constitutional rules if they are taking Civil Procedure, so long as the professor of that class follows the traditional sequence of topics, starting with personal jurisdiction and moving to subject matter jurisdiction. But Criminal Procedure is likely to be One-L students' first immersion in constitutional law. Apart from being quite daunting for One-L students, Criminal Procedure allows you to set a number of big goals.

Students who have taken undergraduate courses in constitutional law may have a more sophisticated view of the law. But most students probably still view the law as a fixed set of rules. Many of my One-L students are surprised to learn that judges make law instead of merely interpreting the law. Obviously, even if justices are interpreting the Constitution, they have leeway in interpreting broadly worded terms in the Constitution and its amendments, like "unreasonable searches and seizures." Further, your students may be surprised to see

[2] A Survey of Law School Curricula: 2002-2010 (ABA, 2012) at 52.

[3] A Survey of Law School Curricula: 2002-2010 (ABA, 2012) at 33.

[4] A Survey of Law School Curricula: 2002-2010 (ABA, 2012) at 35.

how the Supreme Court is able to erode and eventually even overrule its own precedents.

Before you focus on your goals for the course, check the course description in your school's catalogue. Most likely, the basic Criminal Procedure course focuses on police investigation. While most hardcover casebooks include investigation and adjudication material, some publishers, especially those with softcover books, divide the material into two books, one dealing with the investigation of crime (police practices) and a second dealing with the adjudicatory phase (in-court procedures). Your course almost certainly will focus on the Fourth, Fifth, and Sixth Amendments and police investigation practices.[5] Frame your goals accordingly.

I have adapted the following list of goals from Katz and O'Neill's first book in this series, *Strategies and Techniques of Law School Teaching: A Primer for New (and Not So New) Professors*. Although extensive, it is not an exhaustive list of possible goals that you may set if you teach the course to One-L students. Here is the list:

(a) Giving your students a strong grasp of the black-letter rules;

(b) Teaching them how they can apply those rules to new fact patterns;

(c) Getting them to see—through problems and hypotheticals—how a seemingly minor change in the facts can produce a change in the outcome;

(d) Teaching them case analysis—how to dissect a case and break it down into discrete components (facts, issue, precedent, rule, application, holding) in order to discern what the court is actually doing;

(e) Honing their ability to distinguish between facts that are pivotal to the outcome of a case and facts that are irrelevant;

(f) Getting them to focus on procedural issues, and to recognize that the outcome of a judicial decision must be viewed in terms of its procedural posture;

5 I conducted an informal survey on the Criminal Law Professor listserv when I was writing *Bridge to Practice Series; Criminal Procedure Simulations* (West 2012), which confirmed my expectation that the basic course covers those topics, with some professors finding time to include eyewitness identification as well.

(g) Exposing them to ethical and professional responsibility issues that lurk beneath the surface of a case;

(h) Giving them practical tips on how cases are actually litigated in the real world;

(i) Giving them litigation-oriented skills training through courtroom simulations that involve questioning a witness or arguing a motion;

(j) Giving them transaction-oriented skills training through contract-drafting exercises and mock negotiations;

(k) Giving them litigation-oriented drafting exercises (pleadings, motions, jury instructions, etc.);

(l) Taking care to include, in your coverage of a given case, the lawyering problems that likely occurred *before* the lawsuit was filed;

(m) Teaching your students the methods of statutory construction and giving them statutory drafting exercises;

(n) Tracing the historical development of the doctrinal rules in your course;

(o) Giving your students an appreciation of the policies upon which the rules are grounded;

(p) Covering the larger jurisprudential or philosophical framework of the subject;

(q) Developing a coherent theory to explain and justify the rules;

(r) Getting your students to examine the subject through a law-and-economics perspective; and

(s) Helping them to see the race or gender implications in the rules and cases.[6]

In thinking about teaching Criminal Procedure, you may come up with some goals related specifically to that course. Here are a few themes that may be worth pursuing:

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[6] Howard E. Katz & Kevin Francis O'Neill, *Strategies and Techniques of Law School Teaching: A Primer for New (and Not So New) Professors* (Aspen Publishers, 2009) at 3.

- Cases like *Wolf v. Colorado,*[7] *Mapp v. Ohio,*[8] and *Herring v. United States,*[9] among many others, allow you to explore the art of overruling. Specifically, you can show how the *Mapp* Court treats post-*Wolf* developments as eroding its foundation. You can explore how *Herring* characterizes prior cases like *Mapp*, and you can discuss whether the Court is ready to overrule *Mapp*. Similar examples are not hard to find.
- Throughout the course, you may choose to explore how larger social trends influence the Court. For example, many of the cases during the 1980s that eroded Fourth Amendment protections—for example, the drug courier profile cases and the over-flight cases—allow you to discuss the war on drugs, which was in full swing at that time. Cases like *United States v. Drayton*[10] allow you to explore the way the 9/11 terrorist attacks have influenced the Court.[11] *Terry v. Ohio*[12] invites a discussion of the race riots across the United States during the late 1960s.
- You will probably want to focus on the role of race in the Court's jurisprudence. Your choice is almost certainly not whether to focus on the role of race, but how extensively to explore the question throughout the course. Cases like *Powell v. Alabama*[13] and *Brown v. Mississippi*[14] bring the theme front and center, as do cases like *Miranda v. Arizona*[15] and *Whren v. United States.*[16] It is only slightly below the surface in cases like *United States v. Drayton* and *United States v. Mendenhall.*[17]
- In teaching cases like *Miranda v. Arizona,* you may want to explore how the political process limits the Court's power. Despite the popular perception of federal courts as unchecked by the political process, the 1968 election provides a classic example where the Court got too

[7] 338 U.S. 25 (1949).
[8] 367 U.S. 643 (1961).
[9] 555 U.S. 135 (2009).
[10] 536 U.S. 194 (2002)
[11] Justice Kennedy seems to have post-9/11 increased security in mind when he states, ". . . bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them." Id. at 205.
[12] 392 U.S. 1 (1968).
[13] 287 U.S. 45 (1932).
[14] 297 U.S. 278 (1936).
[15] 384 U.S. 436 (1966).
[16] 517 U.S. 806 (1996).
[17] 446 U.S. 544 (1980).

far out in front of an angry electorate, leading to Richard Nixon's victory in 1968 and subsequent appointment of four new justices in a two-year period. That led to the erosion of *Miranda* in short order.

- Again, in teaching cases like *Miranda v. Arizona*, you may discuss broad and narrow holdings. Obviously, *Miranda* speaks broadly in an attempt to get the Court out of the fact-specific adjudication of voluntariness cases. But its sweeping breadth opened it up to criticism that it read more like legislation than a judicial opinion.
- You may also choose to use Criminal Procedure as a vehicle to discuss federalism. Cases like *Brown* and *Powell* demonstrate the Court's tentative foray into regulating state criminal procedure. The Warren Court caselaw presents a dramatic shift, resulting in calls for the impeachment of the Chief Justice after *Miranda*. Quite unpopular among conservatives for many years, selective incorporation has made a comeback in *McDonald v. Chicago*.[18] Federalism resurfaces in the independent and adequate state law grounds doctrine. In addition, because all of the lead cases are from the Supreme Court, you can explore how state courts attempt to follow or frustrate the Court's jurisprudence.
- You may want to introduce students to how Supreme Court caselaw works "in the trenches." For example, when you discuss cases that altered police practices, you may want to explore how the new rules get implemented or circumvented. *Missouri v. Seibert*[19] demonstrates how the police are able to erode the protections that the Court attempted to create. In this case, the police used a two-step technique recommended by national police organizations, whereby police conducted an interrogation without reading the *Miranda* rights, and then, after securing an initial confession, they gave the warnings. While the state could not use the original statement, until the divided Court in *Seibert* limited the practice, the state could use the confession that followed the *Miranda* warnings. You can find many similar examples. Trial courts can circumvent Supreme Court rulings when they make factual findings (e.g., in consent cases that turn on multifactored factual findings). You can discuss classic cases in which the judge hearing a suppression motion must decide whether a police officer or the defendant is more credible, again suggesting that lower courts have ways to limit the expansion of constitutional rights.

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18 561 U.S. 3025 (2010).

19 542 U.S. 600 (2004).

Some of the issues in this last point flow naturally in your discussion of the caselaw, as in your discussion of *Seibert*. If you use simulation exercises, students will recognize that the judge's decision will turn on credibility findings. As a result, the judge's ruling may be immune from reversal on appeal. If your law school is near a criminal courthouse, you may want to have students attend a suppression hearing. If time permits, you may want to invite a prosecutor or defense attorney (or both) to discuss how the legal rules work on the ground. The approach developed here is especially useful if many of your law school's graduates become prosecutors or public defenders.

- You may want to develop an overarching theme that integrates all the material covered in the course. That kind of approach has become more common in some areas of the law in the past 20 years. For example, Torts is often taught from a law and economics perspective. Other overarching themes might include feminist theory or critical race theory. I do not believe that any of the leading Criminal Procedure casebooks develops any of those themes. Race is probably the most common theme that you could use to integrate Fourth, Fifth, and Sixth Amendment issues.

  However, trying to find an overarching theme may distract students from important aspects of the course. No doubt, race is relevant to the Court's decision in some cases. That was true in *Brown*, the involuntary confession case, and in *Powell*, the Scottsboro boys' case. But most legal rules apply without regard to race, and overemphasis on race may skew that point.

  Even more important, having an honest discussion about race is tricky. Most law schools have relatively few African American students. Having their perspective on police interactions can be enlightening.[20] In particular, many young African American men have had encounters with police, usually on more than one occasion. But at times, African American students express frustration when they are called on to "represent" their race. Beyond that problem is the obvious one: data demonstrate that many of us

[20] Over three generations of teaching, I still remember the best discussion of race my Criminal Procedure students have ever had. An older African American woman described how police officers in New Orleans treated her sons. She indicated that officers treated her sons with disrespect and pushed them around. She was fearful that her sons would be harmed physically if they did not act subserviently.

harbor racist feelings. The expression of those feelings can lead to unpleasant conflicts and hurt feelings. This is especially true if you encourage students to share their feelings in class.[21] As you will see below, I do not recommend spending much time focusing on your students' feelings, and this example demonstrates one of the reasons why. Recognize in advance that race is relevant, and often important, to an understanding of the Supreme Court's caselaw. As a result, you should not avoid the topic, but you will need to direct the discussion so that it remains relevant and professional.

Realistically, some of these goals will be out of reach for One-L students, perhaps even at the best law schools. If you teach the course as an upper-level course, you can assume a certain level of proficiency in some of these areas, like goals (a) through (f) from Katz and O'Neill's list.[22] Upper-level students should be prepared to explore many topics more deeply because they should not need to struggle to understand the structure of a Supreme Court opinion.

Before I move to other topics, here are a few of my thoughts about which of these goals can be integrated most naturally into the cases that you are likely to cover in the course.

Prior to the Warren Court,[23] Criminal Procedure was not a separate course. Some issues, like venue and jurisdiction, might have been covered in a Criminal Law course. Some Constitutional Law casebooks included a section on criminal procedure. Today, the basic Criminal Procedure course is almost exclusively about the constitu-

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[21] If you teach Criminal Law, you are familiar with a similar problem: if you teach the chapter on the law of rape, you must use extra caution to avoid insensitive, hurtful remarks, given the reality that some percentage of your students have been victims of sexual offenses.

[22] Don't overestimate the ability of even upper-level students to read cases. Especially if you demand close textual analysis, you may be disappointed with students' ability to read cases closely.

[23] While Earl Warren was appointed to serve as Chief Justice in 1954, the criminal procedure revolution began with *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the exclusionary rule applied to state criminal proceedings). Between 1961 and 1969, the Court held that virtually all the protections in the Bill of Rights applied to the states through the process of selective incorporation.

tional protections in the Bill of Rights.[24] As a result, discussing constitutional interpretation flows naturally out of the material.

Criminal Procedure invites a discussion of constitutional theory for another reason as well. Unlike almost any other area of the law, Criminal Procedure "evolves" before our eyes. That is, a shift in the composition of the Court can significantly change the direction of the law in short order. Witness, for example, what happened to the Supreme Court's eyewitness identification caselaw. In 1967, toward the end of the Warren Court years, the Court held that a suspect was entitled to counsel at a lineup.[25] Not entirely clear was whether the decision was based on the Sixth Amendment right to counsel or the confrontation clause. Grounding the right in the confrontation clause would have made the right more important. During his first two years as president, Richard Nixon appointed four new justices to the Court. Shortly thereafter, the Court made clear that the *Wade* line of cases were grounded in the Sixth Amendment right to counsel. The change in direction was sudden and meaningful.[26]

Throughout the course, you will find examples where four justices have dissented in Case A, only to learn that, two years later, the justice who wrote the earlier dissent has now written a majority opinion in a case that seems remarkably similar to the earlier decision.[27] Often, recently appointed justices bring new perspectives to interpreting the Bill of Rights. Justice Scalia's preference for original understanding is only the most obvious example. In an earlier era, Justice Black insisted that the Court rely on the specific guarantees in the Bill of Rights rather than on the more open-ended language of due process. Justice Brennan was famously known to believe in a "living Constitution."

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[24] You may touch on a few non-constitutional law topics. For example, on occasion, you may refer to state or federal rules of criminal procedure or other statutes that may give protections in addition to those found in the Constitution. Some casebooks cover federal statutes dealing with wiretapping. They may also include recent developments where state legislatures and courts have given non-constitutional protections for defendants when they have been identified by witnesses in or out of lineups.

[25] See, e.g., *United States v. Wade*, 388 U.S. 218 (1967).

[26] You will have no trouble finding many other examples where the Court's approach to an area of the law has changed significantly over a short period of time.

[27] Compare *New York v. Class*, 475 U.S. 106 (1986), with *Arizona v. Hicks*, 480 U.S. 321 (1987).

Most law professors find interpretative theory to be exciting. Further, as indicated above, it is woven into the cases. As a result, plan on discussing interpretative theory. I like to explore the implications of following a particular approach to see if a particular justice follows the same method of interpretation even if it leads to a result that may be out of line with his or her personal preference. One of my favorite examples is Justice Black's concurring opinion in *Mapp*. A stickler for text-based arguments, and unable to find an exclusionary rule in the Fourth Amendment in *Wolf*, Justice Black reread the Fourth and Fifth Amendments together, where he found the exclusionary rule. But heavy emphasis on interpretative theory and the philosophy of individual justices have their pitfalls. Here are a few thoughts about those pitfalls.

I am not familiar with any comprehensive survey of law professors that asks us about our most common mistakes in our first years of teaching. You may want to poll your colleagues. If you do, I predict that many of them will include on their list that they overestimated their students' abilities. This is not a rap on your students, but a realistic assessment of our myopia: most professors, typically graduates of the top 25 law schools, excelled in law school. As a result, they no doubt grasped concepts easily. But even if at the top law schools, not every student has such facility with reading and understanding caselaw. And of course, if you are teaching Criminal Procedure to One L's, they are true novices. As a result, think realistically about your goals and be ready to scale back a bit if you have set the bar too high.

Closely related to the previous point is the following reality: you will probably want to discuss theory and to spend little time on black letter law. If you are writing in the field, you will probably not be writing narrow doctrinal scholarship. Here again, I urge caution: even upper-level students are not yet experts in extracting legal rules. Almost certainly, you will test them on their knowledge of black letter law. Students are likely to be far more receptive to legal theory if the discussion comes naturally out of the caselaw. Further, the level of interest that students may have in theory will depend on your audience. Many students at the two law schools where I have spent the bulk of my career have hoped to practice criminal law as prosecutors or defenders. They have been more interested in rules than in theory. Meeting them halfway has allowed me to explore theory more readily than if I had made theory the central theme of the course.

Focusing too closely on individual justices' philosophies may distract from what the Court has done. For example, in a number of cases, Justice Scalia has seemed ready to change direction and overrule *Katz*. He would substitute a historic definition of the "search" concept. Following that approach would alter a good bit of modern caselaw. But to date, he does not have four other votes to achieve that result. Scholars may enjoy exploring the implications of the "new" Fourth Amendment according to Justice Scalia. But spending too much time on topics like that may take you away from the core of the course: what is the law, and how does the Court apply the law to new facts? As a result, my advice is to expose students to interpretative theory as an important sub-theme, but not as the major focus of the course.

Thinking about your goals in advance is important for a number of reasons. As developed in Section III later in this book, knowing the way you want to cover the material will influence which casebook you choose. Having clear goals in mind helps you develop a coherent syllabus. Keeping those goals in mind is important when you reflect on how you want to teach your course.

So here is an assignment before you move on to the next section of this book: spend some time creating a list of your goals. Think about which of those goals are most important. Do so in light of the culture of the law school where you will be teaching. Scale your goals to be consistent with where your students are in their legal education. For now, be ambitious, but be ready to rethink your goals as you get into the nitty-gritty of your course.

III. Preparing Your Course and Selecting a Casebook

A. DOING SOME BACKGROUND READING

During my interview at Swarthmore College, the dean of admissions asked me what three books I would take with me if I was going to be stranded on an island. You may want to ask yourself a similar question: "What three books should I read to give me a good background in Criminal Procedure?" As you can see below, I can't limit

myself to three books on criminal procedure, but I have exercised some self-restraint.

After you have been assigned your courses, you can request examination copies of casebooks, treatises, and study guides from most publishing companies. Once you have assembled more reading than you will have time for, consider which of the books are worth a thorough reading. Here are my thoughts on the topic.

Still on my bookshelf is *A Criminal Procedure Anthology,* edited by Silas J. Wasserstrom and Christie L. Snyder, published by Anderson Publishing Company. Despite its publication date (1996), I would urge you to get a copy. (A Google search indicates that copies are still available.) Don't be daunted by the number of articles in the table of contents. The editors did an effective job in excerpting dozens of articles, many of which remain classics in the literature.

Another book that you may want to take to your island retreat is *Criminal Procedure Stories* (Foundation Press, 2006), edited by Carol S. Steiker. Given the considerable reading that you are likely to assign your students, you may not want to require your class to read *Criminal Procedure Stories*. But you can enliven the material by sharing the backstories of some of the leading cases. You can focus on several cases that you almost certainly will teach in the basic Criminal Procedure course, including *Powell, Mapp, Miranda, Hoffa v. United States,*[28] and *Katz v. United States.*[29]

If you are interested in exploring interpretative theory, get a copy of Kermit Roosevelt's *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (Yale University Press, 2008). Roosevelt offers a very sensible analysis of extravagant claims about judicial activism. Other titles come to mind: Antonin Scalia's *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) and Steven G. Breyer's *Making Democracy Work: A Judge's View* (Vintage Books, 2011) and *Active Liberty: Interpreting Our Democratic Constitution* (Vintage Books, 2005), as well as William J. Stuntz's *The Collapse of American Criminal Justice* (Belknap Press of the Harvard University Press, 2011).

If you intend to cover *Gideon v. Wainwright,*[30] another classic is *Gideon's Trumpet* (Vintage Books, 1964) by Anthony Lewis. Similar

[28] 385 U.S. 293 (1966).
[29] 389 U.S. 347 (1967).
[30] 372 U.S. 335 (1963).

to *Criminal Procedure Stories, Gideon's Trumpet* offers a fascinating backstory of a major Supreme Court case.

Having urged you not to be too theoretical, I should also recommend that you take a look at the various treatises and study guides now available to your students. Below, I discuss supplements and give my standard caution about such books. But you may want to have a good treatise at hand when you are preparing your classes or thinking about selecting a casebook. The classic hornbook is Wayne R. LaFave et al., *Criminal Procedure,* 5th ed. (West, 2009). Your students are likely to be reading Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure, Volume I: Investigation,* 5th ed. (LexisNexis, 2010). Beyond those treatises, you will be inundated with criminal procedure books once you are on publishers' mailings lists. The books range from short treatises like Erwin Chemerinsky and Laurie L. Levenson, *Criminal Procedure: Investigation* (Aspen Publishers, 2008) to outlines like Stephen A. Saltzburg et al., *Basic Criminal Procedure,* 6th ed. (West Black Letter Outlines, 2012) and books that include sample essay exams and multiple-choice questions like Joel W. Friedman, *Criminal Procedure: Essay & Multiple-Choice Exams,* 2d ed. (Aspen Publishers, 2009). You will have no shortage of reading material! Hence, you can see the wisdom of limiting the number of books that you commit to reading before you unpack the casebooks.

B. SELECTING A CASEBOOK

By now, you should have assembled a pile of casebooks and teacher's manuals for those books. You should have a third pile as well. Unlike many courses, Criminal Procedure undergoes frequent updates, and most casebook authors need to provide a supplement in the late summer or early fall each year to include the important Supreme Court cases from the previous term.

Even before you peel off the shrinkwrap or open the boxes containing your casebooks, think back to your experience as a law student. If you are a relatively recent grad, you may be able to remember your reaction to the casebook you used. Was it user-friendly? Were there too many notes following the lead cases (or not enough)? Was the format attractive? Did the book contain too many pages in light of course coverage?

Beyond your own experience, solicit your colleagues' opinions on casebooks. Many of us have used two, three, or more casebooks over the course of our careers and can share insights into the pros and cons of those books. I do want to offer a caveat: At every law school where I have taught, colleagues have been helpful. If I solicited but rejected their advice, I never sensed hard feelings on their part. But that is not the case at every law school. At some schools, reportedly, infighting may be so divisive that you will be judged by your book selection or by your rejection of a colleague's advice. That may be especially true if one of your colleagues is an author of a casebook.

If you do not have a strong preference for a casebook based on your experience or that of your colleagues, look back over your list of goals that I urged you to create earlier in this book. With those in mind, leaf through the casebooks stacked in front of you. You may have decided to make race or gender[31] a focal point of your course. Check whether the casebook that you are examining includes excerpts from scholars raising those questions. For example, take a look at Allen et al., *Comprehensive Criminal Procedure,* 3d ed. (Aspen Publishers, 2011) at 411. In the notes following *United States v. Drayton,* the authors include a discussion of Professor Tracey Maclin's thesis that "the dynamics surrounding an encounter between a police officer and a black male are quite different from those that surround an encounter between an officer and the so-called average, reasonable person." See also Dressler & Thomas, *Criminal Procedure: Principles, Policies, and Perspectives,* 4th ed. (West, 2010) at 402 (note 5, "Racial profiling and reasonable suspicion.")

What happens if you have goals for your course and the casebook that you select does not include material that covers those goals? For example, what if you listed among your goals an introduction to interpretative theory, but the casebook includes no readings on the topic? You must face a couple of choices: you may assign additional

[31] As indicated above, not considering race in a Criminal Procedure course is hard to do. Gender is a harder topic to weave into Criminal Procedure. Some cases, like *Mendenhall*, involve female defendants. Others, like *Georgia v. Randolph*, 547 U.S. 103 (2006) (involving consent), allow discussion of some issues relating to gender. There, for example, the defendant's estranged wife gave the police consent to search their premises, over the defendant's express refusal to consent. The dissent made much of the risk created by refusing to allow the search on those facts, including the fear that the husband would retaliate. Other examples exist but are not nearly as substantial as are gender issues in a Criminal Law course.

readings to give your students grounding in the topic, or you may end up lecturing on the topic. Neither choice works well. As I discuss below, you will be hard-pressed to cover the basic material. It is dense, and the Supreme Court repeatedly addresses issues relating to the basic Criminal Procedure course. As a result, adding outside reading does not sit well with your students. Lecturing to fill in the gaps takes time away from the material as well. My advice is to use either method sparingly.

In listing your goals or in thinking generally about your course, you should consider the extent to which your own philosophy will animate the course. Are you a civil libertarian? Have you come to teaching law from a U.S. Attorney's or prosecutor's office or from a public defender's office? Do you believe in the original understanding of the Constitution as a guiding legal principle, or do you believe in the need for an evolving Constitution? How important is it that the text that you choose supports your views? Most authors try to include balanced commentary and select excerpts from scholars representing differing views. But we are never entirely free of our own biases. At first reading of a casebook, the authors' biases may not be noticeable. If determining the orientation of the casebook authors is important, read some of the authors' scholarship to determine their point of view.

Consider whether you are teaching One-L or upper-level students. One-L students will have a much harder time slogging through long, lightly edited opinions. On the other hand, overly edited cases may not provide students with a sufficient challenge.

Even if you are teaching upper-level students, you should consider how much explanatory material the authors include in the book. A few authors provide little, if any, explanation of overarching themes. Others introduce each new topic with a detailed explanation of the topic and an overview of the issues in the particular section of the text. How consistent with your goals is such explanatory material? For example, do you want your students to have to do most of the heavy lifting on their own? Does too much explanatory material make their job too easy? My experience has been to the contrary: it allows students to dig more deeply into the cases when they have a head start in understanding why cases are in the text.

Also, ask whether the authors of the casebook have written supplemental material. For example, what if an author has written a supplement that largely tracks the casebook? As you will see below, I am not a fan of supplements and would rather have class discussion

based on students' close reading of the cases. Many professors disagree. You will need to decide whether the existence of such supplements is a plus or minus in your selection of your casebook.

Above, I mentioned a frequent occurrence: bright professors enter the field of legal education with a serious scholarly bent and a desire to expose their students to theory. Depending on where you are going to be teaching, you will have more or less success in achieving that goal. In selecting your casebook, be sensitive to who your students are and how well the casebook meets their interests and needs. Many of us can speak from experience. I will do so: when I began teaching, three years after graduation from Penn, I chose the highly theoretical Criminal Law book that I used as a student in law school. Suffice it to say, among my numerous challenges that year was overcoming my students' resistance to theory. (Candidly, I never did overcome their resistance.)

Exploring hypotheticals is critically important in legal education. Examine the authors' notes following the lead cases. Do those notes include effective hypotheticals? Do the notes include citations to cases (usually lower-court cases)? Is that a plus or minus from your perspective—that is, do you want students to reflect on the hypotheticals in light of the major Supreme Court cases, or do you want them to read state or lower federal court opinions interpreting Supreme Court caselaw?

Before I get to the most important factor for a new professor to consider, think about one minor consideration. How recent is the edition of the text? How long is the supplement? Some students are frustrated when the supplement for the casebook contains a large amount of the assigned material. Further, integrating old and new material adds to your workload.

I have left the most important consideration to the end: take a close look at the teacher's manual. Teacher's manuals were not the rule when I began teaching in 1977, and often, the ones that were available were not all that helpful. That has changed dramatically in recent years. Book representatives will tell you that teacher's manuals sell books.

I offer my own experience with the first great teacher's manual that I used. After using two other Criminal Law casebooks, I adopted Kadish et al., *Criminal Law and Its Processes* in the early 1980s. The book is dense, filled with scholarly excerpts, wonderful hypotheticals, and cross-references to the Model Penal Code. I enjoyed using

the book, but at times found myself unsure how best to integrate the material. Then along came the authors' first teacher's manual in the mid-1980s. Using the teacher's manual ratcheted up my enthusiasm for the course. To this day, it includes a thorough explication of the material and provides excellent hypotheticals and analysis of those hypotheticals.

Especially at the beginning of your career, when you will be juggling competing demands on your time, choose a book with an excellent teacher's manual. It is not a substitute for preparation, but it helps. In addition to the teacher's manual, some casebook authors host Web sites or are otherwise available to provide input into how to use their books. Don't be embarrassed about contacting the authors of the book that you are thinking about adopting. From a purely selfish point of view, they benefit by each new adoption of their casebook and are likely to be quite helpful. And as I pointed out earlier, many of us are genuinely interested in helping colleagues. Finding out whether the casebook authors are accessible is worthwhile; their accessibility should be a plus factor in selecting the book.

C. ADDITIONAL MATERIAL

After you have selected a casebook, consider whether you want to recommend additional material to your students. Some professors recommend or even assign hornbooks or study guides. I do not, but many of your students will ask you for your recommendation. I do not recommend outside reading for a number of reasons. My focus is on the careful reading of cases. Even upper-level students are still learning how to read cases carefully; students who rely on study aids probably do less of their own work. In addition, I do not spend much time reading study guides that book companies send me. As a result, I am hesitant to make recommendations based on limited knowledge about those sources. And they vary greatly in quality.

If you do make a recommendation, do so in light of the casebook you have chosen. Some of the casebook authors also have written study guides or treatises. The authors' material is likely to dovetail well with the casebook.

One source that enlivens the cases is the United States Supreme Court Web site (http://www.supremecourt.gov). There, students can find transcripts and audio of oral arguments for recent cases heard

by the Court at http://www.supremecourt.gov/oral_arguments/oral_arguments.aspx. Another site where you can find oral arguments and other interesting information is The Oyez Project (http://www.oyez.org/).

Consider whether you want to require students to listen to at least one oral argument. You could allow your students to select one of the leading cases, or you could have them all listen to the same oral argument. That may make class discussion more interesting. *Katz v. United States*[32] would be a good choice if you go the latter route. A few years ago, Katz's attorney wrote a law review article in which he shared some previously unknown details about the case.[33] Notably, despite Justice Stewart's statement to the contrary, Harvey Schneider claims that he did argue in favor of the Court's new test to determine the meaning of a Fourth Amendment "search." Background like this can enliven the caselaw.

IV. Preparing Your Syllabus

A. THE VALUE OF A GOOD SYLLABUS

According to the stereotype of new law professors, they are only one or two assignments ahead of their students. Some stereotypes are based in reality, and in a moment of honesty, some of the old guard will admit that they fit the stereotype.

A somewhat less common stereotype is the new law professor who, with extraordinary ambition, drafts a syllabus designed to cover the entire casebook. Almost from the first class, the professor falls behind the ambitious pace set in the syllabus. Students grumble about being lost and resent that the syllabus provides little guidance about class coverage. Or, where the syllabus is too ambitious, the professor may put the class on a forced march through the material. The results are not likely to be pretty: coverage and depth are at war with one another. Students will be unable to give any real attention to nuance if all they are doing is racing through massive assignments.

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32 389 U.S. 347 (1967).

33 Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 McGeorge L. Rev. 13 (2009).

That dilemma raises another important question for you to consider as you put together your syllabus. If you have not already thought about your goals for your course, now is the time to do so. Over more than a decade, legal educators have been discussing the competencies that our students should develop. Faculty members involved with the Institute for Law School Teaching at the Gonzaga University School of Law have taken a leadership role in introducing concepts of assessment and outcomes into the law school universe. If you are not familiar with the movement, take a look at Gregory S. Munro, *Outcomes Assessment for Law Schools* (2000). The book is out of print but is available as a PDF at http://lawteaching.org/publications/books/outcomesassessment/.

Law professors at your school may already be considering proposals to implement assessment techniques. The American Bar Association and the Association of American Law Schools are now involved, and law professors are expected to address assessment and outcomes.

At the risk of oversimplifying the concepts in this limited space, I offer a broad overview. *Outcomes Assessment* discusses the need for an institutional mission statement and the development of standards to measure whether the school has achieved its mission. That has less relevance for you as a beginning teacher than how the concepts work in each professor's course.

As *Outcomes Assessment* states, "Assessment is not only a means of determining what and how a student is learning, but is itself a learning tool. Because law schools are educating for professional service, rather than focusing exclusively on what students know, assessment should emphasize the abilities required for effective performance."[34] Assessment requires more than designing and grading an exam. The goal of assessment is to enhance student learning and provide more than the single evaluation of a student's performance. Further, "it is an approach to legal education that fosters more active teaching and learning."[35]

Much of this is intuitively sound: we know that we are transmitting more than legal knowledge. Students must be able to apply that knowledge. One advantage of learning about assessments and outcomes is that it helps you to articulate why you are adopting certain strategies. You will be more effective not only if you have thought

34 *Outcomes Assessment* at 11.
35 *Outcomes Assessment* at 11.

about assessment, but also if you communicate your goals to your students. Doing so in the syllabus is ideal: it means that you have thought about your goals and how you will achieve them before you begin teaching. It also helps students understand the purpose of their assignments and in-class discussions.

"All of this sounds terrific," you may be saying, "but how much time do you expect me to spend designing the course?" That is fair enough. As developed below, you do not have to invent your syllabus or your goals on your own. For now, recognize the value of a good syllabus. It will make you more reflective about what you want to do in class and will give your students guidance about your expectations.

B. THE CONTENTS OF A GOOD SYLLABUS

As with the practice of law generally, you do not have to create a document without a template. Colleagues may be willing to share their syllabi. Further, experienced teachers at other law schools are generous in sharing their syllabi. Check with professors on the Criminal Law and Procedure Professor listserv (owner-crimprof@chicagokent.kentlaw.edu). Many of them will share their material with you. After you have selected a casebook, consider writing the authors and ask for their syllabi. They will almost certainly be delighted to share with you; many professors will be genuinely interested in helping you. And they do have a significant financial incentive to make you a satisfied customer.

Another helpful source of information is the Teaching Materials Network. It is a database of contact information for professors who have volunteered to share their teaching notes, Microsoft PowerPoint slides, syllabi, and exams. That site is available at http://www.law.stetson.edu/teachingmaterialsnetwork/. You may search the site by course, casebook, and credit hours. You have to create an account, but the process is simple and free of charge.

A good syllabus should include certain basic information. Here is a list adapted from Katz and O'Neill:

A. Required and recommended texts;

B. Contact information, office hours, and related matters, like your policy for appointments at times other than office hours;

C. Rules for your course, including how you will call on students (e.g., randomly; in panels); what your expectations are with regard to participation (raising or lowering grades depending on quality of preparation); and how you will use cases and the notes following the cases;

D. Attendance policy;

E. A course Web page or listserv if you intend to use one;

F. The structure of your exam (or exams if you intend to give more than one test);

G. The policy about audio recording in class;

H. Your policy concerning the use of laptops in class;

I. Exam review session(s);

J. Reading assignments.

That is all common sense. Beyond that, consistent with my discussion of assessments above, consider including a clear statement of your goals for the course or for each assignment.

I am a recent convert to sharing my goals with my students as part of my syllabus. As is the case with many law professors, I assumed that my goals were obvious. I am still fine-tuning the statement of my goals for Criminal Procedure. But here are a few examples from a course that I taught in McGeorge's summer program in Salzburg during the summer of 2012. The course was a comparative criminal procedure course in which I used the Amanda Knox[36] case as a vehicle to compare the Italian and United States criminal justice systems. Half of the students were European and not familiar with legal education in the United States. As a result, the need to state my goals was especially important. Here are a few examples:

> **Class 1:** My goals for the first class include the following: providing an overview of the course; introducing the class to the facts of the Knox case; exploring some of the American criticisms of the Italian criminal justice system; and beginning a discussion of the adversary v. inquisitorial criminal justice systems.

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[36] In 2009, an Italian court convicted Amanda Knox, an American college student, of murdering her British roommate. An appellate court acquitted her of murder in October 2011.

> **Class 2:** My goals for Class 2 include the following: providing an overview of the United States criminal justice system; exploring the protections found in the Bill of Rights (the first ten amendments to the United States Constitution) relating to criminal defendants and the values advanced by those protections; and examining the role of judges and prosecutors in the United States system.
>
> **Classes 3–11:** My goals for Class 3 include the following: developing an overview of the inquisitorial and the Italian criminal justice systems and beginning to compare those systems with the United States system. In Classes 4 through 11, we will focus more closely on specific aspects of the two systems to see how the Knox case was tried, what Americans found objectionable about that procedure, and how her case would have been tried in the United States.
>
> **Classes 12, 13, and 14:** My goal for the last three cases is to bring to life the material that we have studied by creating a simulation entitled *The Trial of Amanda Knox*. That is, the class will put on a mock trial of the case against Amanda Knox as if it were being tried in a United States court.
>
> Well in advance of class, you will get a chance to sign up for various roles. Some of you may be part of the prosecution team, some the defense team, some witnesses, some jurors, and someone Amanda Knox. During Class 12, we will discuss trial strategy. During Classes 13 and 14, you will try the case of Amanda Knox. Students who volunteer to serve as counsel will have available readings on trial advocacy skills.

Thinking about my goals in advance was particularly important in a three-week course, where I had little time to retool if the assignments did not work well. The process of thinking about and articulating my goals was well worth the time.

One of my colleagues, Ruth Jones, has focused closely on the literature dealing with assessment. Here is a section from her syllabus in which she sets out her goals for her course:

Learning Objectives

Criminal Procedure Law

1. This course requires you to demonstrate comprehension and of the legal doctrines developed under the Fourth, Fifth, and Sixth Amendments and the exclusionary rule.
2. This course requires you to demonstrate the development of general analytical skills:

    a) Analyze appellate opinions, specifically Supreme Court opinions, in order to extract relevant principles and rules, draw analogies and distinctions, and develop legal arguments;
    b) Articulate important doctrinal rules, standards, and principles from memory;
    c) Apply known principles of law to given facts to determine how to predict likely results;
    d) Demonstrate an ability to analogize the facts or circumstances in the problem to known cases or principles and apply precedent in solving the legal problem;
    e) Demonstrate an ability to evaluate factual and legal arguments and predict a reasonable conclusion that solves the problem;
    f) Communicate orally and in writing appropriate legal and factual arguments in support of each side of legal controversies.

PREPARATION

In this course we review and analyze United States Supreme Court decisions that interpret the Fourth, Fifth, and Sixth Amendments to the United States Constitution. Whereas other courses such as criminal law are derived from penal codes enacted by state legislatures, and historical doctrines developed by English courts over the centuries, criminal procedure is primarily shaped by Supreme Court cases. The cases in the textbook do not merely reflect the law, they create it.

In preparing the cases for class discussion, you should identify the legally relevant facts that the Court relied on to reach a decision; how the Court framed the issue (consider if the issue is framed differently by the majority, concurrence, and dissent);

the reasoning of the Court's majority, including which major cases it cited and for what purposes; the reasoning of the dissent, including which (major) cases it cited and for what purposes; and the Court's holding.

You must also consider how each case advances or changes the development of the legal doctrine.

Central to mastering the cases will be the examination of several "problems" found thoughout the text. These problems are generally adapted from actual cases decided by lower federal and state courts, which face the challenge of determining the law in a specific situation, being guided by only a few U.S. Supreme Court cases, none of which are directly on point factually. In preparing the problems, you must determine which cases are stronger authority, and in the process, explain which facts were most central to the U.S. Supreme Court's decision in the prior case—and why. You must prepare your analysis of these problems before class.

PARTICIPATION

I expect that each of you will be fully prepared to actively participate in class. Full preparation requires that you analyze the cases as described above and prepare the assigned problems. I do not accept notes indicating that you will be unprepared. Being unprepared can result in a reduction of your final grade, and significant participation can raise your grade. Significant participation requires full preparation when called upon and consistent voluntary participation that contributes to the discussion.

Being prepared means having read *and thought about* the material in the assignment for that class and any matters that you are asked to think about from the previous class, such as discussion questions, or that are assigned as problems.

Participation will frequently mean discussing the difficult social issues. Your thoughts and opinions are valuable and you should not be afraid to disagree with me or your classmates. But even when you disagree with someone, it is important to treat others with respect so that everyone will feel comfortable voicing their opinions.

Now I will return to a discussion of your goals. At this point, as you think about your goals, what skills would you like your students to develop in your course? As discussed above, for example, you may use the course as a vehicle to discuss judicial philosophies and interpretative theory; or you may use it as a way to introduce students to the racial bias in the criminal justice system. You may want to use the course as a way to introduce students to advocacy skills as well. Thus, you may want to use simulations as part of your course. Whatever your goals, state them clearly in your syllabus and explain how you will achieve those goals.

Also, ask yourself and explain to your students how you will assess whether you and your students have met your goals. If you use the course as a vehicle to introduce students to different interpretative theories, will you have a question on the final exam that tests students' understanding of such theories? If you focus closely on the role of race in United States criminal procedure, how will you test students on their views on the topic? Students may fear that if you test them on topics like these, your political views may influence their grades. They are rightly concerned if conformity of students' essays to your views on sensitive political matters influences their grades. A respected colleague occasionally tests students' understanding of judicial philosophies, for example, by posing a hypothetical and asking how Justice Scalia or Justice Breyer might analyze the problem. Such questions allow students to show familiarity with positions taken in the leading cases without compelling conformity to any particular position.

Here, my point is not that you should avoid controversial discussions about a subject. Instead, consider how you are going to measure whether students have learned the material you set out to teach.

C. A FINAL THOUGHT ABOUT COVERAGE

When I took Criminal Procedure as a One L in 1971, we covered the right to counsel (the *Gideon* line of cases), the Fourth Amendment, the *Miranda* Fifth Amendment cases, the *Massiah*[37] Sixth Amendment right to counsel cases, Sixth Amendment right to

[37] *Massiah v. United States*, 377 U.S. 201 (1964).

counsel developed in *Wade*[38] and *Gilbert,*[39] and other issues relating to eyewitness identification, double jeopardy, and more. When I first taught Criminal Procedure in 1978, I covered most of what I had learned less than a decade earlier. I was never able to cover as much material again. That was so for one primary reason: the Fourth Amendment, *Miranda*, and *Massiah* material ballooned during the Burger Court and Rehnquist Court years.

Earlier in this book, in the section "Developing Course Goals," I mentioned in a footnote an informal survey that I conducted when I was writing *The Bridge to Practice: Criminal Procedure Simulations*. I asked participants on the Criminal Law and Procedure Professor listserv about the scope of their coverage. The responses were virtually unanimous: the core coverage includes the Fourth Amendment (and exclusionary rule); the *Miranda* material (usually including the Due Process compelled testimony cases); and the *Massiah-Brewer v. Williams*[40] Sixth Amendment right to counsel cases. Beyond that, some professors cover the *Gideon* right to counsel cases (sometimes including ineffective assistance of counsel). Others cover the *Wade, Gilbert,* and *Stovall v. Denno*[41] eyewitness identification cases. Don't reinvent Criminal Procedure. Make the Fourth Amendment, *Miranda,* and Due Process doctrines, and the *Massiah* and *Brewer v. Williams* caselaw the core of your course. Consider adding either the *Gideon* or eyewitness identification material, but avoid being overly ambitious for the reasons described above.

Once you have focused on the topics that you hope to cover, also consider whether to assign all the pages in your casebook. In recent years, I have used Dressler and Thomas's casebook. The paperback dealing with investigating crime includes everything that I need—and saves students some money and shaves a few pounds off the weight of their backpacks! The authors include numerous scholarly excerpts. In recent years, I have assigned that material as background reading. Where I am able to do so, I integrate theory into a discussion of specific cases or lines of cases. But detailed discussion of the theoretical material cuts into time available for developing the cases in depth. The casebook includes numerous excellent hypotheticals; I leave plenty of time for exploring that material in class. Depending

[38] *United States v. Wade*, 388 U.S. 218 (1967).
[39] *Gilbert v. California*, 388 U.S. 263 (1967).
[40] 430 U.S. 387 (1977).
[41] 388 U.S. 293 (1967).

on the goals you have set for yourself, consider a similar weeding of the material. You cannot cover it all, or at least not effectively.

V. Teaching

A. CHOOSING AN IDENTITY

Before you read about the Socratic Method and related topics, ask yourself who you are and who you want to be in the classroom. Even if you are in your first year of teaching and you do not already have a reputation around your law school, students will form a judgment about you quickly.

If you have followed all my prescriptions above, you will have already considered the kind of teacher you hope to be. You probably began thinking about that when you were in law school, either because you loved the process or because you hated it and thought you could do a better job than your professors. Now is the time to think even more closely about how you want your students to see you.

Katz and O'Neill offer some good advice in their book. For example, in discussing how you "play the role" of a law professor, they suggest several important points: you must demonstrate a professional manner (not too informal or familiar with your students); and you must show respect for your students, as well as a "seriousness of purpose and a genuine commitment to helping your students learn."[42] They recommend that you be transparent but then caution that you not let "students in on every internal debate you've had about every nuance of the course."[43] The advice seems so sensible and so uncontroversial that you may wonder why they felt it necessary to state it.

They did so because experienced teachers have made or witnessed others make common mistakes. Many of us come to teaching fresh from a judicial clerkship and perhaps two or three years of practice. New professors may not be much older than their students. They may be closer in age to their students than they are to their colleagues. As a result, young faculty may get too close to their students and may be too eager for their approval. Almost all of us want to be liked and

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[42] *Strategies and Techniques of Law School Teaching: A Primer for New (and Not So New) Professors* at 29

[43] *Strategies and Techniques of Law School Teaching: A Primer for New (and Not So New) Professors* at 29.

fail to realize that some students will take a show of friendship too far. Toss in a few drinks at student functions, and young faculty may learn all too quickly that it would be wiser to begin by being too formal and easing up over time than starting out as too accessible and then trying to regain students' respect.

Who doesn't want to be honest? Depending on how much time you may have had to prepare your course, you almost certainly will not be an expert in your field at this point. And if you have not had that much time to prepare, you will not be all that far ahead of your students. Sensing your lack of experience, a few students will question your authority. When I was a law student, a classmate had the audacity to ask a recently hired female professor assigned to teach Corporations whether she was competent to do so. Even in 2012, women and minority professors are still more likely to have their authority questioned by some students than are white male professors. And apart from gender and race, some students will show little patience for a professor who is not an expert. They may raise the legitimate point that they are paying a great deal for their legal education and are entitled to professional competence. The risk of losing control of your class is real. As a result, I would counsel that you not share too much with your students in the name of honesty.

Another way to think about how you want to project yourself in the classroom is to realize that you are the person responsible for the overall experience that your students will have. Like Katz and O'Neill, I urge you to consider your role in the classroom before you step in front of the class for the first time. And remember my earlier admonition: it is easier to begin by being too formal and easing up later than starting out being too casual and trying to regain students' respect after losing it initially.

B. SOCRATES AND ALL THAT JAZZ

Here is the most important part of your job and this book: having thought about what you are going to teach, what your goals are, and how you want to come across in the classroom, what are you going to do once you walk into the classroom and the class begins? If you have been hired as a law professor, you almost certainly are aware of the debate about the Socratic Method.

Think back to your experience in law school. Did you watch or read *The Paper Chase*? Did you like the Socratic Method? Did you participate in endless arguments with your peers about its effectiveness? Did you read any of the extensive literature discussing the Socratic Method? Are you going to use the Socratic Method in your class?

If you are committed to doing so, you can skip the next discussion. If you take a dim view of the Socratic Method, be open to rethinking your opposition.[44] You may be familiar with an extensive literature that is critical of the Socratic Method. You may have seen or read *The Paper Chase* and may have compared your Socratic professors to the often-reviled Professor Kingsfield. Student guides on how to succeed in law school almost all make some passing reference to Kingsfield, and most, especially those written by recent graduates, describe the Socratic Method in unflattering terms. You can also find plenty of articles written by law professors critical of the Socratic Method. One professor, for example, has accused colleagues who use the Socratic Method of being lazy. The criticisms are numerous, but largely unfounded. As is the case with any teaching tool, the Socratic Method is bad when used poorly; but properly used, it teaches essential lawyering skills.

My guess is that you know what the Socratic Method is in this context. The literature includes an interesting debate about whether the technique used in law school should be called the Socratic Method. Similarly, commentators debate the meaning of the Socratic Method. For purposes of this discussion, Orrin Kerr's description of the Socratic Method works well:

> I consider the "traditional" Socratic method to be a teaching style in which the professor selects a single student without warning and questions the student about a particular judicial opinion that has been assigned for class. Often the professor begins by asking the student to state the facts of the case and then asks the student to explain how the court reasoned to an answer. The professor might then test the student's understanding of the case by posing a series of hypotheticals and asking the student to apply the reasoning of the case to the new fact patterns. The purpose of this questioning is to explore the strengths and weaknesses of various legal arguments that might be marshaled to support or attack a given rule of

[44] My views are more fully developed in *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 Hofstra L. Rev. 955 (2005).

> decision. To that end, the professor's inquiries are often designed to expose the weaknesses in the student's responses. This description works well. It identifies the goal of the Socratic discussion, suggesting that a good Socratic dialogue is not a broad ranging discussion of theories, but instead, forces students to prepare for class, increasing their ability to learn the material and to learn legal analysis by applying rules to new facts. [45]

Despite the suspicion of many of us that the highly demanding, Kingsfield-style Socratic dialogue is on the wane, the literature is nonetheless filled with a host of claims about how bad the method is. Here are some of the criticisms, with a brief rejoinder to each.

For a time, the Socratic Method was condemned as discriminatory against women. Most famously, Lani Guinier and her co-authors' empirical report claimed that the Socratic Method impaired the performance of women.[46] The authors collected data from women and men in law school. Among other findings, they found that the experience of most women's first year was "radical, painful, or repressive . . . one that they will never forget."[47] For some time, commentators cited this study as evidence of the evils of the Socratic Method.[48] A growing literature has raised serious doubts about their conclusions, however.

Even the authors admitted that their sample was not properly drawn. It was too small and not randomly selected. The study was not capable of replication. The most objective evidence relied upon in the study—women's underperformance—was not tested by the authors. For example, they made no effort to determine whether women performed better in courses in which the professor used a gentler form of the Socratic Method or a method of pedagogy other than the Socratic Method.[49] Further, others have questioned the study's reliance on the combined LSAT-undergraduate grade point average (GPA) as the measure of a student's ability. According to

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[45] Orrin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 Neb. L. Rev. 113, 114, n. 3 (1999).

[46] Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. Penn. L. Rev. 1 (1994).

[47] Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. Penn. L. Rev. 1, 42 (1994).

[48] See *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 Hofstra L. Rev. at 975, n. 133.

[49] *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 Hofstra L. Rev. 955, at 977.

those critics, GPA is not a particularly reliable predictor of academic success in law school.[50]

Others have contended that the Socratic Method is ineffective as a teaching tool. Closely related to that claim is the belief that it leads to cynicism and depression. When I was researching my article on Professor Kingsfield and the Socratic Method, I wondered if I would find good empirical support for those claims. Evidence is anecdotal and quite subjective. Designing a good study would be impractical and probably be resisted by students and faculties.

Gerald Hess, founder of Gonzaga's Institute for Law School Teaching, has identified eight elements for effective teaching and learning environments. Those elements are mutual respect, expectation, support, collaboration, inclusion, engagement, delight, and feedback. That Hess intends to create a classroom environment quite distinct from Kingsfield's is obvious. For example, "Intimidation, humiliation, and denigration of others' contributions are disrespectful, cause many students to withdraw from participation, and hinder their learning."[51] But none of those elements is inconsistent with the use of the Socratic Method.

Sometimes the argument that the Socratic Method is ineffective focuses on how few students may be engaged during a long grilling of an individual student. Classmates' attention spans are short; their minds wander and they lose the drift of the discussion. If you do use the Socratic Method, you can counter some of these problems by varying how long you stay with one student. On occasion, you can have a student develop the case and explore hypotheticals to test her understanding of the legal principles in the case. If a student is stuck, you can call on other students and later return to the student whom you called on initially. You can vary your approach and call on several students, perhaps by having one comment on the answer of a classmate. Consider alternating your approach from class to class to maintain students' interest and not getting into predictable habits.

Happily, from my perspective, the authors of *Educating Lawyers,* the 2007 report published by the Carnegie Foundation, concluded that the Socratic Method is an effective tool for teaching analytical thinking. Unlike many critics of legal education, they found that law

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50 *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 Hofstra L. Rev. 955, at 978-979.

51 Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law Schools*, 52. J. Legal Educ. 75, 87 (2002).

schools do a reasonably good job teaching students analytical skills. In their close study of 16 law schools in the United States and Canada, they found that the Socratic Method was the signature teaching method. The report did not urge abandoning its use. Instead, they found that law schools did a poor job training lawyers in other critical skills. For example, it found that we do not do a good job teaching students how to use the abstract legal rules in practical situations. That criticism, that law schools do not provide enough hands-on training in the application of rules, is a longstanding one. I address that topic below. But the good news about the Carnegie report was that it acknowledged the virtue of the Socratic Method in teaching in analytical schools.

Many of my students, even in my One-L Civil Procedure class, begin to understand the value of the Socratic Method when they engage in a simulation exercise (each student has to argue for or against a motion to dismiss for lack of personal jurisdiction). They also often come back wide-eyed when they attend a morning of arguments in the local federal courthouse. The Socratic Method should effectively simulate the exchange between a judge and a lawyer or a senior partner and her junior associate. Further, it compels students to deal with the fear that they must overcome if they are to be able to practice law effectively.

All law professors should agree that teaching analytical thinking is at the core of our mission. If you agree, recognize that achieving that goal may come with a cost for some students. Analytical thinking requires students to question easy solutions to complex problems. The Socratic Method requires students to prepare well for class so that they can answer questions about the reading material and then requires mental agility to answer further questions about the application of the rules developed in the material. This comes with a cost. As Phillip Areeda has observed, professors who engage in probing questioning that exposes the weaknesses of their students' responses inevitably bruise their students' egos.[52]

Critics suggest that forcing students to argue both sides of a legal issue produces students who are cynical. As one author stated, we set them off on a "sea of relativism."[53] After all, we seem to be telling

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[52] Phillip E. Areeda, *The Socratic Method (SM)* (Lecture at Puget Sound, 1/31/90), 109 Harv. L. Rev. 911, 915 (1996).

[53] John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, 58 Law & Contemp. Probs. 87,102 (1995).

them that they must be able to support any position, even positions they do not believe in. My rejoinder is quite simple: at a minimum, a lawyer must understand the position that her opponent will take. Failing to understand the possible counterarguments may lead to negative consequences when a lawyer is unable to rebut arguments that she has never considered. Thus, imagine a Constitutional Law professor in a Catholic or other religious law school refusing to ask his students about arguments in support of *Roe v. Wade*. One wonders how insulating students from complex ideas helps them to become good lawyers.

Further, intellectual growth requires seeing the world in more than monochromatic tones. The human brain develops the capacity to understand more nuanced arguments as we move from our teens through our college years. Law school should be a place where students confront intellectual challenges. Remember that we are preparing students for a demanding profession. Demanding a great deal of your students, for example, by asking difficult questions and requiring a high level of preparation and attention on students' behalf helps them become responsible professionals.

Challenging students is especially important in the current employment context. Books like Tamanaha's *Failing Law Schools* and David Segal's series of articles in the *New York Times* in 2011 highlight the difficult job market. As a result, graduates must be better prepared for practice than ever before. While that has other implications for teaching as well—as I discuss below—new lawyers need the ability to meet many difficult challenges. We do them no service by putting them in a hermetic bubble.

Do not misconstrue my overall point. I do not advocate demeaning students. But pushing students to do good legal analysis probably does not lead to them feeling demeaned unless their egos are so frail that they may want to reconsider whether they should practice law in the first place. Bad lawyering will lead to unhappy consequences, a lot of low self-esteem, and poor results for their clients.

C. HYPOTHETICALS AND PROBLEMS

I state the obvious when I say that lawyers are problem solvers. No matter what teaching strategy you adopt, your students need to do more than identify holdings and supporting reasoning in the cases.

They must be able to use the rules to solve new problems. Above, I suggested that, in selecting your casebook, you examine the authors' hypotheticals. If you have chosen a book that does not include good examples, consider drafting your own before class. Trying to make up a good hypo as you stand in front of the class is likely to lead to bad results.

When students have hypotheticals ahead of class—whether from the professor or from the casebook—students can prepare more adequately. Trying to digest complex hypotheticals tossed out without time to consider the questions can frustrate students. Further, you can dig much more deeply when students have a chance to reflect on the hypos in advance. No doubt, on occasion, you will pose a new hypothetical in class specifically to explore a student's answer to your questions. But a steady diet of hypos made up on the spot, no matter how dazzling, is likely to frustrate your class.

Again, depending on whether yours is a One-L or upper-level course, consider explaining to your students how hypotheticals work. Learning theory supports the idea that thinking about learning improves students' understanding of the material. So after posing a hypothetical, you may want to explain why you did so. Even upper-level students may not have figured out the game. My students seem to appreciate my explanation of how I construct an example, typically changing one fact to see if that fact explains the result. Thus, before *Arizona v. Gant*[54] explained that the Court did not create a bright-line rule in *New York v. Belton,*[55] you could have posed a hypothetical in which Officer Nicot was not faced with four passengers on an isolated section of the New York State Thruway. You could offer an example where Nicot and a partner stopped an elderly person, driving alone, and ask students to apply the rule from *Belton*. The point of the example, of course, would be to focus students' attention on the Court's statements in *Belton* that seemed to indicate the need for a bright-line rule and to move away from the need to tie the rule to its underlying justification. (The search-incident-to-lawful-arrest rule is grounded on the needs of officer safety and preventing destruction of evidence.)

Good hypotheticals enliven the material and test students' analytical ability. The time spent developing thoughtful examples

[54] 556 U.S. 332 (2009).

[55] 453 U.S. 454 (1981). Many commentators find implausible the claim in Justice Stevens's *Gant* majority that *Belton* did not create a bright-line rule.

is time well spent. Avoid too many distractors when you create hypotheticals. Also, prepare your analysis of your examples in advance of class. After your class has discussed the hypothetical, share your analysis. Often the answer will be "maybe." Students really appreciate clear answers on how you reached the conclusion you did and how you expected them to do so. Even when the answer is "maybe," your answer should be a good example of how students should do legal analysis. Again, especially if you are teaching a One-L course, go back over the discussion of the hypothetical and tell them, "What you have just done is legal analysis, something every law professor will tell you is the measure of success as a law student and lawyer."

Your review of your hypotheticals helps students see what analysis is. Your review of the class discussion of your hypos also shows that you were listening to your students' answers. Finally, it helps overcome any sense that the discussion was random. So, for example, you may want to explain why, when a student gave her answer, you followed up with yet another question in which you changed one more fact. When you comment on exams, you may write on some answers, "Show your work." Following my advice in this paragraph gets you started showing your work to your students and gives them confidence that you know where you are going.

I offer one final thought about hypotheticals. During class, students may pose their hypotheticals for you to answer. They may have several motives for doing this. They may have legitimate interest in their hypos. But they may also be testing you to see if you can be distracted or may be seeing whether you like being put on the spot. Some of their hypotheticals are good; many are not. Some may reflect a student's particular interest and may detract from the overall direction of the class. As a result, unless you can answer easily and consistently with the direction of the material, consider asking the student who posed the hypothetical to follow up with you after class. If she does not do so, her interest in the example may have not been

genuine. If she does follow up, you and the student can dig more deeply into the example.

The same point applies to students' questions generally. You should be willing to answer some questions in class, especially about the point of your hypotheticals. But students may be testing you, especially if you are young and relatively inexperienced. Answering incorrectly because you feel compelled to be an expert leads to bad results. When you come back and say, "Remember what I said yesterday? Well, forget it," you lose credibility. A much better approach is to get back to the class after you have a chance to ponder the question. Yet another approach might be to pose the question to the class and suggest that they follow up on your Web site and let them explore the question before you post your answer.

D. SIMULATIONS

Most law professors still use the Socratic Method, even if a gentler version than portrayed in *The Paper Chase*. But few of us use it exclusively. Instead, most professors use a variety of teaching techniques. We do so for various reasons. For all but the truly extraordinary law students, the pure Socratic Method leads to a great deal of frustration. As a result, its use makes maintaining the class's interest difficult. Further, changing the teaching technique makes the class more interesting for students and for the professor. In addition, many professors integrate some simulation exercises into their course.

Using simulations is effective for a number of reasons. To some extent, the Socratic Method is an experiential teaching tool: calling on a student may parallel the dialogue between a judge and a lawyer arguing a case. But, especially in a large classroom, the technique has its limits. Recent literature on learning theory emphasizes the advantage of experiential learning. Integrating simulation exercises into the classroom can add to the students' understanding of the material.

After creating and using simulations for many years, I have published a set of nine simulations that cover most of the issues covered in the basic Criminal Procedure course.[56] I am aware of professors at other schools who have developed their own simulations. Using simulations is worthwhile for a number of reasons.

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[56] *The Bridge to Practice Series: Criminal Procedure Simulations* (West, 2012).

Most obviously, seeing how cases develop is invaluable. Beginning law students typically do not understand how attorneys build a record.[57] Further, the simulations place students in the roles of attorneys. They become more engaged in the material: it is no longer a series of abstract rules. Instead, students become problem solvers, whereby they must understand the caselaw as it applies to the facts. Often, their desire to win has them digging more deeply into the caselaw than they would do otherwise. These kinds of exercises help students understand how the law works on the ground.

If you use simulations, you will need to decide how to integrate these activities into the course. You may want to use class time to do so. If you do not want to lose ground, you can use a simulation that covers a block of material. For example, I have used a simulation based roughly on the facts of *Colorado v. Bertine*.[58] The Court upheld a police search of a vehicle as a valid inventory search. But by changing the facts, including altering the local inventory procedures, I have been able to create a simulation that forces students to argue the applicability of search-incident-to-lawful-arrest doctrine as it relates to vehicles and the warrant exception when the police search a vehicle. Doing so allows me to cover all the automobile search cases in a single exercise.

Alternatively, students are usually interested in doing simulations even when you do them as an extra activity. When I have done so, I do not require attendance, but usually most members of the class attend. Students find the events enjoyable as well as beneficial.

In addition to having students conduct full evidentiary hearings, I created hearing transcripts that raise issues that students must argue to the judge. Students take the role of counsel who must argue the factual record to the trial court. Those activities are somewhat easier

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57 If you doubt me, ask them in class. When you teach *Mapp v. Ohio*, share some of the facts that have come to light that do not appear in the record. For example, the Court states that "A paper, claimed to be a warrant, was held up by one of the officers." In context, the Court suggests that this was a complete charade on the part of the police. Dressler and Thomas suggest in their teacher's manual that "According to one version of the story, an officer prepared an affidavit for a search warrant, but he mistakenly had the affidavit—not the warrant—signed by a judge. When the officers at the scene noticed the error, they decided that they were not 'going to make an issue over it.'" *Teacher's Manual to the 4th Edition*, at 2-5. The *Criminal Procedure Stories* essays also include interesting historical background, which is sometimes at odds with the facts as developed in the Supreme Court opinions.

58 479 U.S. 367 (1987).

to integrate into the classroom because they usually do not take as much time as do evidentiary hearings. If you have a small enough group, consider having students submit memoranda in support of their positions.

E. REQUIRED PREPARATION

At the beginning of my career, I announced the requirement that students be prepared for class. I did not impose sanctions for the lack of preparation. My optimism was based on boundless enthusiasm. On their own, students would see the benefits of preparation. And, of course, they would find my teaching so compelling that they would digest the material with enthusiasm. Results varied, but were largely predictable. Some students prepared thoroughly; most were sort of prepared; and some were not prepared at all.

For over two decades, I have imposed sanctions for lack of preparation. I allow a student to submit one unprepared (UP) slip during the course. But if I call on a student who has not submitted a UP slip and is unprepared, I lower the student's grade (by a third of a grade, for example, from a B+ to a B) at the end of the semester. No doubt some students object to this policy and may avoid taking my course. But the flipside is that discussion in class is much better than when I did not require preparation.

Requiring preparation helps advance learning objectives. For example, students must prepare thoroughly if they are going to learn to "[a]nalyze appellate opinions, specifically Supreme Court opinions, in order to extract relevant principles and rules, draw analogies and distinctions, and develop legal arguments." Even more obviously, requiring students to prepare for class is the only way to achieve the goal of teaching students to "[c]ommunicate orally . . . appropriate legal and factual arguments in support of each side of legal controversies."

As discussed above, I reject the idea that students should be able to make their own choices about preparation. You are the professor and must help your students become professionals. Anyone with professional experience knows the importance of preparation and due diligence in the practice of law.

Another way to think about requiring preparation is to remember why you were hired. You got your position as a law professor because

of your ability to do high-quality legal work. Students are not paying for you to tell them the holdings of Supreme Court cases. They will appreciate your hard work and your analytical ability when they are prepared and when you can lead them to meaningful insights into complex material.

Finally, requiring class preparation and participation with a sanction eliminates the need to embarrass unprepared students. Some professors who require preparation but who do not have clear sanctions comment adversely when a student is unprepared; or they may let the student sit uncomfortably after it becomes obvious that he is unprepared. Katz and O'Neill describe yet another sanction sometimes imposed, perhaps, inadvertently: "The classic example is the young teacher who slams his book down and storms out of the classroom."[59] These sanctions can be demeaning to students and, in the latter case, demeans you as well. Having a clearly stated rule works better than the alternatives: when a student is unprepared, you can simply note the fact and move on.

F. PERSONAL VIEWS

Part of the claim that the Socratic Method puts students on a "sea of relativism" is that the use of the Socratic Method makes one's personal views and values irrelevant.[60] Indeed, you will often hear claims by some in the teaching profession that we need to solicit our students' views. No doubt, asking students how they feel about an issue or what their personal views are is legitimate on occasion. But consider how central such an inquiry should be to your course.

Criminal Procedure is an especially tempting course in which to solicit students' views. In fact, one reason why you are fortunate to be teaching the course is that every student has strong personal views about the material. The cases are inherently the most interesting in any course in law school.[61] If you do want to explore students' opin-

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[59] *Strategies and Techniques of Law School Teaching: A Primer for New (and Not So New) Professors* at 37.

[60] John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, 58 Law & Contemp. Probs. 87,102 (1995).

[61] I have not attempted to test empirically the following proposition, but I am confident of its accuracy: student evaluations are higher for Criminal Procedure than for any other course in law school.

ions, you will have no problem stimulating such discussions. But should you?

On occasion, you may regret inviting students to discuss their personal views. Imagine a situation that may arise in Criminal Law when professors invite students to discuss personal feelings about rape law. If you are familiar with the modern caselaw involving acquaintance rape, you risk insensitive remarks about the woman's complicity ("she had it coming") and you don't want to put women on the spot to discuss their experiences as victims. As I discussed earlier, similar problems arise in Criminal Procedure where racial attitudes about crime are so close to the surface.

Even if you remain on safer ground, how relevant are students' personal views? Think about your goals for your course. Isn't your primary goal to teach analytical skills? In my article about the Socratic Method, I used a scene from *The Paper Chase* to make the point about the relevance of students' personal views. In this scene, which earned Professor Kingsfield the contempt of his critics, he engages in a discussion with Mr. Bell, one of Mr. Hart's study partners. Mr. Bell insists that the Dead Man's statute is unfair in a case in which the application of the rule prevented a plaintiff from recovering damages. Should Kingsfield affirm Mr. Bell's intuitive sense? Or should he press further and show Mr. Bell the superficiality of his answer? Do we do our students a favor by allowing them to be superficial? Further, does any employer or judge really care about a young lawyer's feelings about an issue?[62]

Many of your students come to law school with either pro-prosecution or pro-defense leanings. They may want to use class time to voice their strongly held positions. But many of them end up switching sides at some point during their careers. Even if they don't, they must understand how the other side thinks about legal issues if they are going to be effective advocates. Consider something that I often do in class: have a pro-prosecutor or pro-defense student argue the opposite side of the issue. Even if students do not like the idea of switching sides, having them do so deepens their understanding of the law.

Beyond concerns about the relevance of one's views in the practice of law, consider your objectives for the course. Are you going to test students on their personal views? I doubt it—doing so is unpro-

[62] For a more in-depth discussion of this point, see *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 Hofstra L. Rev. 955, at 995-1004.

fessional. Would a professor really be able to lower a student's grade for not sharing his worldview? The question answers itself.

More likely, even if you spend time in class exploring students' personal views, you will not test them on their views. Instead, you will probably write a conventional exam with a detailed fact pattern. Students, including some who have written books on the travails of law school, comment unfavorably when a professor has spent a great deal of time on students' views and then tests on the law.

If you adopt a set of learning objectives like those cited above, ask how you should achieve those goals in the classroom. Spending a lot of time exploring personal views takes time away from teaching students how to "[a]nalyze appellate opinions, specifically Supreme Court opinions, in order to extract relevant principles and rules, draw analogies and distinctions, and develop legal arguments" and to "[a]pply known principles of law to given facts to determine to predict likely results." The point is straightforward: your classroom discussions should advance your learning objectives.

G. PANELS AND THE LIKE

Some of my colleagues rely solely on volunteers or use panels of "experts." Both approaches have significant downsides.

While Lani Guinier and her co-authors' study has been refuted, it did highlight gender differences. Other studies show that, as a general rule, women are less likely than men to volunteer. If you are convinced that participating in class is valuable (and as a law professor, how can you doubt that?), relying solely on volunteers puts women at a disadvantage. Calling on them directly gives them the chance to develop oral advocacy skills.

The use of panels has become quite popular among many professors. Often, they will notify students in advance that they will handle a particular assignment. The professor may assign several students to prepare together (i.e., as a panel). Professors who use panels are usually motivated by the desire to reduce stress on their students. If the professor does not lower students' grades when they are unprepared, using panels is one way to assure that *some* students are well prepared.

Opinions differ on how effective panels are. Katz and O'Neill observe that the expert panel approach does away with a classroom

atmosphere where students are "too anxious to think straight." They argue in favor of panels that the approach "gives non-panelists a better chance to learn by allowing them to relax, to follow the threat of your presentation, and to ask questions." They also lay out the argument against panels: panels may be an invitation to come to class unprepared. As they state, a professor using panels may ask, "Are [the] expert panelists the *only* students who bother to prepare?"[63]

I have never used panels out of concern about the lack of preparation by those not on call.[64] As I explain to my students, preparation is a lawyer's stock in trade. Developing good habits early is essential. Also, I premise my teaching on the fact that students are familiar with the cases; my aim is to explore the material more deeply than students may have done on their first or second reading of the cases and notes. Allowing questions from students largely unprepared wastes time. Further, assuring that students are prepared on the relevant topic increases the chance that they will have a good foundation on the next topic. For example, in the chapter on *Terry v. Ohio*, students who do not have a good grasp of the Chief Justice's opinion in that case will not be able to understand how the Burger Court used *Terry* to erode many of the protections erected by the Warren Court.

If you are inclined to use panels out of concern that students will be too anxious otherwise, be sure not to embarrass them when you call on them randomly. The Socratic Method is not inevitably demeaning. If a student is prepared but struggling, move on to another student, and come back to the first student when you have a softball question to help her get comfortable answering questions.

You can use techniques other than panels to lessen the tension in the classroom. Even if you use questioning as your primary method of teaching, consider breaking the rhythm of your class by having students work on questions in small groups. For example, assign them a hypothetical and give them five or ten minutes in which to consider how the court should resolve the problem posed in your example. That technique helps well-prepared students: explaining the law to others helps them understand it better.

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[63] All the quotes in this paragraph come from *Strategies and Techniques of Law School Teaching: A Primer for New (and Not So New) Professors* at 36.

[64] One colleague who used panels in the past has given up the practice. He confirmed my suspicion that students not on call would be unprepared, or only marginally prepared.

Consider also some other ideas about how to get students engaged. If a student seems a bit lost in class or too shy to do well, assign that student a problem and have him post an answer on your Web site. Or even if a student does not appear ill prepared, occasionally assign a student or ask for a volunteer to post an answer on the Web site. Consider also assigning a second student to comment on the original posting. Like breaking the class into small groups, this exercise gets students engaging with one another.

Yet another similar exercise is to assign a group of students to post questions on your Web site about the material that you have covered in class. Often, you will believe that you were perfectly clear in teaching the material. Their questions may help you see where your explanation or where the class discussion was not so clear.

H. LAPTOP POLICY

Should you ban laptops in the classroom? Most faculty members don't do so. But consider whether you want to.

I became frustrated with the presence of laptops in the classroom during the early 2000s. Increasingly, students were obviously surfing the Internet, playing solitaire or other computer games, or otherwise using their laptops in ways that prevented learning. An increasing number of students would have to ask me to repeat my question when I called on them. Further, I could not see many of their faces because they were hidden behind the computer screens. In 2005, I adopted a policy that limited students' use of their laptops to taking notes or reviewing their notes. Apart from an occasional complaint by a student distracted or annoyed by a classmate's improper use of a laptop, the policy was impossible to monitor. The policy was a failure: some students were obviously ignoring it, and others who may have been adhering to my policy still were not following the class discussion. They may have been trying to read their notes instead of listening to the discussion, or they may have been trying to transcribe everything said in class.

As I was preparing my Civil Procedure syllabus for the fall of 2008, I picked up a copy of the *Journal of Legal Education* and read Kevin Yamamoto's article *Banning Laptops in the Classroom: Is It Worth the Hassles?* 57 J. L. Ed. 477 (2007). Yamamoto made a number of arguments. The most important focused on data suggesting that students'

performance improves when they do not use laptops in class. The reasons seem obvious: many students use them for surfing the Internet, including checking their e-mail or shopping online. Despite their belief that they can multitask, the evidence is to the contrary. Further, even if students are not using their laptops for improper purposes, many of them attempt to transcribe everything the professor says. Note-takers must be more selective because they cannot keep up with the discussion in class. Following his advice, I have banned laptops altogether in class since 2008.

I have some soft data suggesting that students perform better in my class without laptops. Using the same set of multiple-choice questions for two years running, I found an improvement in students' performance. During the first year that I banned laptops, students averaged one correct answer more than students did during the previous year. The next year, the advantage was smaller. I did not subject the data to rigorous testing, although the entering credentials of the three groups remained roughly the same.

Beyond data, classroom discussion is much better without laptops. Students seldom ask me to repeat questions. Making eye contact is easier. An occasional student comments adversely in an evaluation, but more students comment favorably on the technology-free zone that I have created.[65]

Some of my colleagues object to this policy. A few of my colleagues use electronic casebooks and need their students to have access to the Internet during class. Fair enough. One argument I find unconvincing is, in effect, a libertarian one: students should be able to make their own choices about whether they are going to pay attention in class. Often, those colleagues are liberals like me, willing to support of variety of regulations in public life. For some reason, though, they reject the analogous arguments for banning laptops. The student who uses her laptop to shop and to catch up on e-mail detracts from the quality of the classroom experience. Further, unless we believe that our class discussion does not advance a student's understanding the material, a student who spends the class ignoring what happens

[65] I have a similar policy with regard to other electronic devices like personal digital assistants (PDAs). Further, if a student's cell phone goes off during class, the student must leave the class and is treated as having been absent, even if her phone goes off toward the end of class. I explain the purpose of the policy: having cell phones go off in class is distracting to their peers. You may want to tell your students horror stories about judges holding lawyers and litigants in contempt when their phones go off.

in class is not likely to develop the same understanding of the law. Poor student performance has a ripple effect: for example, lower bar passage has a cost for the school by lowering its reputation; poorly prepared graduates do not represent their clients as effectively as well-prepared lawyers.

You may be convinced that your class will be so exciting and your students so engaged that they would never misuse their laptops. If you believe that, I urge you to conduct an experiment: peek in colleagues' classrooms and see how many students are using their laptops for other than academic purposes. Some students are surfing the Net even in the most engaging professors' classrooms.

I. YOUR FIRST CLASS

The majority of jurors have decided how they will vote after they have heard counsel's opening statement. First impressions matter. Keep that in mind as you get ready to teach your first class; setting the right tone is imperative.

Setting the right tone is also difficult: students respect teachers who care about them. They will respect you if you set high standards and demonstrate a commitment to them. At the same time, you may hope to set a friendly tone so that your students are not fearful. Studies show that students who experience too much anxiety do not learn well; at the same time, those who are too comfortable do not learn well either. Getting this balance right is hard to do.

Some years, concerned about fearful students, I have begun the semester with a lecture aimed at reassuring them. Some students take that as an invitation to coast, and I find myself regretting lowering the bar at the outset. Typically, the next year, I end up with a bit of fire and brimstone; and then, of course, I find myself regretting the sternness of my tone. When I get it right, my opening remarks are short, referring my students to the syllabus for how I administer attendance and preparation and invite students to come to office hours to discuss any administrative matters. I review briefly my reason for banning laptops and emphasize the literature indicating that students perform better without the use of laptops.

Based on their experience in college, many of your students expect you to let class out after reviewing the administrative matters. I know almost no law professor who does so. Your school probably has had

an orientation program where students have been given assignments for the first week of classes. Upper-level students almost certainly have access to the syllabus for their courses well in advance of the beginning of the semester. Expecting them to be prepared should not come as a surprise.

Using the first class to cover material demonstrates your seriousness of purpose. In addition, as indicated earlier, you have a lot to cover in Criminal Procedure. Skipping a class leaves you with less time to cover important material.

Again, depending on whether Criminal Procedure is a One-L or an upper-level course, you may want to offer an overview of the course in the first class. Doing so is less important for upper-level students. An alternative to using class time to develop the overview is an assignment of an introductory chapter or other reading material that describes the criminal justice system. Not all casebooks include that kind of material, but finding an overview should not be difficult.

Keep the preliminaries short and move into the course material. As you may have done if you have given oral arguments before trial or appellate courts, your starting goal is to have a clear direction for your class and to be sufficiently flexible to engage in a real dialogue with your students. My strategy is to prepare detailed notes, including hypotheticals and their answers, in advance. But to avoid reading, I reduce those notes to a few highlights on a separate sheet of paper. If I get stuck, I take a quick look at that sheet to remind me where I planned to go next. That allows me to establish a clear direction and to be flexible.

You are probably part of a younger generation than mine. As a result, you may be inclined to use PowerPoint or other computer program to organize your class discussion. I take up that topic next.

J. TECHNOLOGY IN THE CLASSROOM

By now, you may have guessed that I am not a big fan of technology in the classroom. For example, along with banning laptops, I do not use PowerPoint. Studies vary on the utility of PowerPoint and similar technologies. The audience may focus on the screen rather than attending to the discussion, for instance. Further, using PowerPoint makes you less flexible. What happens if a student's answer takes you to Point Three on your presentation before you have covered Point Two?

Katz and O'Neill provide a more balanced view of PowerPoint and offer some of the advantages of using technology like this. Among the advantages they cite is the ability to use a hyperlink to take the class to a Web site with interesting information relevant to the class discussion. Further, they indicate that PowerPoint can solve the problem that students face in trying to produce accurate and complete class notes.

Their discussion of using PowerPoint to provide accurate and complete class notes begs another question: is that your goal or responsibility? It may be, but you may not believe that it is. For example, you may think that notetaking detracts from the flow of a discussion, or that students should not rely primarily on class notes in preparing for exams. Some of us believe that students learn best by preparing their outlines by rereading the material toward the end of the course.

Some professors have found a compromise between in-class reliance on PowerPoint and providing no other guidance than the assigned reading. They make available on the course Web site or elsewhere an outline of the major points covered in the assignment. That allows students to see the overall direction of the particular class discussion but does not distract students during class.

VI. Office Hours, a Course Web Site, Exam Review Sessions, and Practice Exams

If you are a new professor, rather than an established professor teaching Criminal Procedure for the first time, you will have plenty to do during your first year. Preparation for class will consume many hours of your time. You can expect to spend six to eight hours preparing for each hour of class. Depending on your law school, you may be expected to spend time researching and writing during your first year, serving on committees, and attending other professional functions, like works in progress. Depending on the culture of your law school, students may expect face time with their professors. And you thought the move from practice to teaching would give you more time for your family or social life!

Your school probably has a policy with regard to maintaining office hours. At McGeorge, we are required to offer at least five hours

a week. Obviously, if your school has a clear policy, follow it. But you may feel pressure to meet with students more often than that.

Students are especially likely to seek you out if you are demanding in class. If you have high expectations, students want your input. Further, students may point out how much they are paying for their educations and expect access. You may also like the contact with students; after all, one hopes that you got into teaching out of a sincere desire to work with students. But being too readily available has its costs. I realized that I was too accessible to my students in my first year of teaching when a student called me at home on a Sunday night! You may find yourself drained if you are constantly on call.

In recent years, I have established an open-door policy and welcome students to drop in. That would have been a luxury in my early years of teaching. I encourage you to guard your preparation and research time by setting limits. For example, in addition, to scheduling regular office hours, you may offer to set up additional appointments only for special reasons.

You may also circumvent the need for an open-door policy by encouraging active use of your class Web site. Students are Internet savvy and expect information to be available online. In addition, the Web site gives you flexibility. Thus, you may have fallen behind the assignments in your syllabus and need to alert students what they need to prepare for the next class. Or you have come up with a good hypothetical and want students to prepare it before class. That kind of information and more can be shared through the Web site. Or you may choose to use the group e-mail function on TWEN (The West Educational Network).

You and your students can engage in a dialogue about course material on the Web site. Answering questions there may stem the tide of students seeking you out during your office hours. Further, using the Web site gives you flexibility on when you are available. You can check in there after you have met your most pressing commitments. In addition, providing answers online memorializes them for your students. The written word stays with them longer than does the spoken word. You can also edit your remarks before you submit them, unlike the situation when you are answering questions on the fly.

Students will ask you whether you will hold an exam review and if you will review practice exams. Here are a few thoughts about those activities.

Similar to students' expectations about access, many students hope for an exam review session. There may be a "corporate culture" at your school with regard to such sessions. Many professors use the last class meeting to hold a review. I don't use class time to do so. As indicated above, I can fill class time with important material. But I schedule a voluntary session outside of ordinary class time because students are very appreciative of the effort.

If you decide to hold a review session, consider the format. As Katz and O'Neill discuss, some professors give a lecture that sums up the course material; others limit the review to a Q and A session; a third approach is to go over an old exam in the review session. Each has its pluses and minuses.

Giving a lecture is fairly labor intensive. Of course, once you have created the lecture, you can use it in the future, with minor modifications. However, I have not adopted this approach, for a couple of reasons. I want students to prepare their own outlines and come to their own "Aha" moments in doing so. I am also concerned that providing them with a lecture leads them to believe that the material covered in the lecture is all they need to know for the exam; perhaps they will believe that the depth with which material is covered in the review session is the level of detail that they will need to know on the exam. Those may be their expectations from their undergraduate days. I do not want to give my students a false impression by giving them such a lecture.

I take the second approach, a review based on students' questions. Here, you can do the review session in one of two ways. You can show up and let students toss out questions on the spot; or you can have them submit questions in advance to give you time to collate and hand out the questions and prepare your answers. I have done this both ways, and I find the first approach unsatisfying. Almost no one other than the questioner understands the question, and even you may have trouble following it. The question may catch you off guard; especially right before your exam when students feel extra stress, they will express frustration if you do not appear to know your stuff. Therefore, I have settled on the second approach. Students must submit their questions in electronic form at least 24 hours in advance of the review session. I then collate and circulate the questions on the Web site. I encourage students to review the questions before the review session. Having questions well in advance allows

me to prepare thoroughly. The need to prepare is even more acute if the material is new to you.

The third approach, building the exam review around an old exam, has some real advantages. You can discuss an attack strategy. Doing so may reduce the desire of your students to have you review their individual practice exam answers. Of course, as someone new to the course, you do not have any past exams (not of your own, at least). Obviously, you can create an extra exam—easier said than done—or you can borrow an exam from a colleague. The disadvantage of a review built around a past exam is that the discussion focuses on the narrow range of issues in that particular exam.

In my first year of teaching, I gave the class a practice exam in Criminal Law. Little did I realize how long it would take me to make comments on their exams. At least one student commented unfavorably on his/her evaluation that, unlike Professor H, Vitiello took weeks to give back the practice exams. As a friend is fond of saying, no good deed goes unpunished. So what should you do about reviewing practice exams?

If you are teaching Criminal Procedure as an upper-level course, do not feel compelled to review practice exams. By the time they reach the upper level, students have had a good bit of practice in taking exams. If you are teaching the course to One Ls, you may want to offer to review practice exams. If you do so, you probably want to borrow one from a colleague. Drafting a good exam is difficult. Further, your colleague may have prepared an analysis of the exam that you can use to guide your students. In deciding whether to do a practice exam for your One-L students, remember how little feedback they may have had thus far at many schools. Unless some of your colleagues are giving mid-semester exams or otherwise testing their students, some of the sense of anxiety and frustration experienced by law students can be attributed to the lack of feedback.

The risk of offering to review practice exams is that large numbers of students may prepare answers, leaving you with little time to review them. I have an outstanding offer to review practice exams for One-L students. In truth, relatively few students take me up on my offer. But if too many students do take you up on it, you could face a time crunch. One of my colleagues has come up with a solution to the problem: he has his students take a practice exam and then reviews a handful of them. He comments on those and then posts them on his Web site. To avoid embarrassing his students, he posts them without

indicating the students' names. You will soon learn that many exams look alike—students make common mistakes, like doing too little analysis. As a result, looking at other students' exams with the professor's comments gives them an idea of how they performed.

Over the long term, consider drafting your own analysis for each year's exam. Then, over time, you will build up a bank of exams. Posting those, along with your analysis, allows students to self-test.

Consider when students are likely to want to submit practice exams or otherwise discuss the course material with you. Students may wait to seek your feedback after classes have ended. You have probably worked hard all semester, leaving little time for various activities. You promised friends or family that once the semester is over, you will be fully human. In fact, if you have not already done so, you face the considerable task of drafting your exam. So are you going to be available to your students? Again, there is no single right answer. Ask your colleagues whether the culture favors one approach over another. You may not be bound to follow their lead, but if colleagues discourage access, you will have natural cover by invoking your colleagues' practice.

As I indicated above, I conduct an extensive exam review session based on students' questions. The session often runs as long as three hours. That allows me to limit office hours once that review session is complete. Alternatively, some of my colleagues hold extended office hours. They do so because they recognize the pressure that students are under. Further, often the students most in need of help are the least likely to submit their questions for the review session. (Students who do not do well are often so confused they don't know what to ask, or they are too embarrassed to ask what they think might be foolish questions. Further, students who do not do well are often students whose work habits are not good. As a result, they may fail to meet a deadline to post their questions.) In assessing your availability, consider one other important fact: you and your colleagues may have explained to students that, unlike undergraduate courses, students cannot wait until the last minute to learn the material. Providing too much assistance at the end of the year may undercut that message.

Offering a review session, providing extended office hours, and, for that matter, answering questions on your Web site all have pluses and minuses. You must assess whether you have time to do any of or all those things. There is one thing you should do and one thing you should avoid at all costs. Here's what to do: explain to the entire

class whatever decision you make and explain why you are making that decision. Now, the no-no: once you post your policy, do not vary from it. Announcing that you will not be available for additional questions and then allowing some students to ask a few questions not only appears unfair to other students, but it actually is unfair.

VII. Creating, Grading, and Reviewing Exams

A. CREATING YOUR EXAM

During your first time through the course, you may feel like you are staying an assignment or two ahead of your students. Almost certainly, you have not thought about creating an exam during the semester. As the semester winds down, you assume you will have time to put together a good exam. But doing that is a lot harder than it looks.

Long before the semester ends, think about the format of your exam. Review your goals. If you emphasized policy or history, are you going to test your students on issues that you have stressed? If so, how will you do it? Will you make your exam an open-book or a closed-book exam?[66] Most of us explore different themes during the course, but most professors want students to understand legal doctrine and to be able to apply it to new fact patterns.

On occasion, a professor creates an unusual exam. For example, a professor might ask how Justice Scalia would resolve a Fourth Amendment issue in light of his originalist position. Or a professor might find a case working its way through the courts and ask how the Supreme Court would decide the question. Given indications that the Court may be set to narrow yet again the scope of the exclusionary rule, a professor could find a case where the police conduct was not outrageous but nonetheless inconsistent with Supreme Court precedent and ask how the prosecutor should frame the question presented

[66] The decision whether to make an exam an open-book or a closed-book exam may turn on your view of how important you believe it to be that students memorize legal rules. But from my perspective, the belief that an open-book exam gives students an advantage is an illusion. In most instances, students lack the time to look up material in the amount of time available to them.

in a petition for certiorari. These kinds of questions are hardly the norm.

An essay exam, with a complex fact pattern, is the typical format. Alternatively, some professors use short-answer questions or mini-essays. Professors often include a section of multiple-choice questions as well. Each format has advantages and disadvantages, discussed below.

A long fact pattern, weaving together several issues, forces students to spot issues, select relevant facts, organize their answers, and do legal analysis. Obviously, designing an exam to test students' ability to do legal analysis is desirable, even if you use other forms of questions to achieve additional goals.

Drafting a good fact pattern-based question is another matter. Start drafting your exam as early as possible because effective exams are hard to write and, as I discuss below, you should leave plenty of time to edit the exam and to prepare your analysis of the question or questions. You probably will not write your exam until you have completed the course. But you can make notes during the semester on topics that you want to test on the exam. For example, class discussion of the automobile exception to the warrant requirement may show you that students did not grasp some important distinctions in the law. That may be an area worth testing on the final exam.

Before you start writing, you may want to take a look at exams written by colleagues. Alternatively, you may want to ask professors from other schools for exams. Here are two resources: the Criminal Law listserv (owner-crimprof@chicagokent.kentlaw.edu), cited earlier in this book, and the Criminal Justice section of the Association of American Law Schools (AALS) Web site (https://connect.aals.org/p/co/ly/gid=95). The AALS section has some exams on file. Another resource may be lower-court cases that are working their way through the system, perhaps bound for the Supreme Court.

Using exams from other professors may pose some concerns: if you borrow a colleague's exam, could your students get hold of it to use to prepare for your exam? Ask around and you will probably hear horror stories about a professor who used an old exam and learned later that some students had reviewed it before taking the exam. Relying too heavily on someone else's exam may pose the same risk. In addition, be sure that your colleague covered the same material that you did. Otherwise, the exam may include issues that your students cannot resolve. A similar problem may result if the

professor whose exam you use as a model did not use the same casebook. Even though casebooks include many of the same big Supreme Court cases, they do vary in some areas.

Taking a look at other exams is helpful. The process can get you thinking about how to construct a good fact pattern. With or without examining other exams, you should focus on issues raised in your course. Even if you test some issues covered in the material that were not emphasized in your class discussions, make sure that most of the exam does test what you actually taught. But avoid another temptation: you cannot cover all the issues raised in your course in a single essay exam or in a three-hour exam. Be selective. What are the most interesting areas that you covered about, say, the Fourth Amendment? What issues have divided lower courts? Most casebooks, even though focused primarily on Supreme Court cases, include hypotheticals from lower-court cases. Those hypotheticals may signal ambiguity in the lead case in the casebook and may suggest a circuit split among lower federal courts. Facts from some of the note cases may provide the basis for your essay question.

Here are a few lessons I have learned in drafting Criminal Procedure essays. Avoid long narratives. Students' answers to such questions will be hard to grade. That is especially true if you include Fourth and Fifth Amendment issues in the same question. An overly long fact pattern may present students with many close questions. If they choose one route (e.g., the police lack probable cause for the arrest), they may end up analyzing the Fifth Amendment issue as a fruit-of-the-poisonous-tree question and not consider other issues that would have been raised had they concluded that the entry was lawful. Their analysis of issues spotted may be sound, but failing to see a plausible alternative conclusion early in the analysis means that they may miss a lot of other issues. If there are too many forks in the road, no two answers will look much alike.

Long narratives are also likely to result in racehorse exams. Students will have too little time to do good legal analysis. Your students will be frustrated with an exam where they could not do much analysis, and you will regret not having drafted a more manageable exam when you read their essays. In recent years, I have experimented with shorter essays that cover discrete areas. For example, a short essay may test whether students understand and can apply the precise holding in one of the leading cases. The format, using facts from a leading case, dovetails with some of my goals: I emphasize the need

for students to pay close attention to the facts of the leading cases and to be able to argue by analogy. Basing questions on facts similar to leading cases rewards students who have paid close attention to the factual context in which the Court has announced general legal rules.

Here is an example and my analysis to help you see my point:

> Officer White received a letter indicating that Dahlia Davis was involved in drug trafficking. The letter stated that Dahlia lived at Apartment 6 at the Lynwood Terrace Apartments in Nutley, New Jersey, and owned a blue 1978 Dodge Omni with a dent in the left side of the car. The letter also explained that Dahlia routinely left for work at 8:30 a.m. and drove south on Highway 21 toward Newark, New Jersey. Reportedly, she would be carrying a half-ounce of black tar heroin on November 1, and she would be carrying it in a brown shoulder bag. She would be taking it to her office on Maple Street in Newark. The letter described Dahlia's physical appearance: a six-foot-tall woman with brown hair, weighing about 100 pounds.
>
> On November 1, Officer White decided to set up a surveillance at the Lynwood Terrace Apartments. At around 9:00 a.m., he saw someone fitting Dahlia's description exit Apartment 8 and get into a blue 1980 Plymouth Horizon. (The Horizon and Omni were based on the Chrysler Simca, which was sold in Europe. The Horizon and Omni were introduced into the United States in 1978.) The suspect was carrying a shoulder bag. She headed toward the entrance to Highway 21. White radioed ahead to Officer Green, who began following Dahlia south on Highway 21 toward Newark.
>
> Eager to stop her before she got to her office, Green followed Dahlia until she exceeded the speed limit. He then pulled her over. Green, a rookie officer, did not realize that under New Jersey law, he could not perform a custodial arrest for speeding unless the driver's conduct amounted to reckless driving. (Recently, the New Jersey Supreme Court held that unless a driver engaged in other dangerous conduct, a driver had to exceed the speed limit by at least 20 mph for the conduct to be reckless.) Green placed Dahlia in his patrol car and called for a backup unit.
>
> Once the backup unit arrived, Green went back to Dahlia's vehicle, seized her shoulder bag, and opened it. After he found

nothing in the bag, he searched within the passenger compartment, where he found some black tar heroin. He then opened the trunk, where he located a few more ounces of heroin.

Charged with possession of heroin with intent to distribute, Dahlia has moved to suppress the evidence seized during the search of her shoulder bag and vehicle. Discuss fully how the court should rule on that motion.

I borrowed these facts from *Alabama v. White*.[67] There, the Court held that the facts amounted to reasonable suspicion, justifying the brief detention of the suspect. But the Court also emphasized that the case was a close one. As developed in more detail in my analysis, students who started by arguing that the police may have had probable cause to justify the stop demonstrated a lack of familiarity with *White*.

Here is the analysis exploring the issues raised in the question:

The exam question is designed to test the meaning of *Arizona v. Gant*. Here is the significance of the facts in the first couple of paragraphs: I borrowed them from *Alabama v. White*, a case in which the Court found that the police had articulable suspicion to stop Ms. White's car. The Court was closely divided, and the majority stated explicitly that the case was a close one. As a result, students should not argue that the facts give the police probable cause to believe that Dahlia Davis is engaged in drug dealing. In rejecting that this information, even in conjunction with the facts that are corroborated, students should point out that the police corroborated only innocent seeming detail. That may be enough to create articulable suspicion, but that Supreme Court has never held that such corroboration is sufficient to create probable cause. [Many students will notice comments to the effect that probable cause was not worth arguing: that is so for reasons explained here: *White* was a close case on articulable suspicion. It follows that a marginal articulable suspicion case could never arise to the level of probable cause.]

Instead, they may argue that the facts are even weaker than in *White*. For example, they may point to the difference between the tip and the facts seen in the surveillance—the wrong kind of car (though this was certainly a reasonable mistake in light of the fact that the Horizon and Omni were both based on the same make of

[67] 496 U.S. 325 (1990).

car), the wrong apartment (tip says Apartment 6, but the police officer sees her come out of Apartment 8); the tip says that she will come out of the apartment at 8:30, but she comes out at 9:00; the tip says that the shoulder bag will be brown, but the facts are silent on its actual color. Given those factual differences between the tip and the observed facts, one might argue that the tip + corroboration do not amount even to articulable suspicion. But counterarguments are available as well. For example, in *Alabama v. White,* the officers were not able to corroborate the most incriminating fact (the officers did not see her carrying an attaché case that could contain the drugs). Another fact bringing the exam facts within *White* is that both involve predictions of future conduct. Further, despite the disparities between the tip and the officer's observations, White does apparently see a woman who is six feet tall and weighing 100 pounds—certainly an unusual physique.

Whether the police had only articulable suspicion as opposed to probable cause becomes relevant later. Officer Green had probable cause to stop Dahlia. He observed her speeding. One might argue that the custodial arrest, illegal under state law, rendered the arrest and subsequent search illegal. Not so, said the Supreme Court in *Virginia v. Moore*. (An arrest is "lawful" for purposes of the Fourth Amendment search incident doctrine if it is based on probable cause, not if it is lawful under state law.) As a result, the stop based on speeding and the arrest based on the probable cause of speeding is lawful. [Students read the facts as ambiguous on whether Dahlia exceeded the speed limit by 20 miles to allow the custodial arrest. While the facts imply that she did not (the officer stopped her as soon as she exceeded the speed limit), that should not have changed the analysis: so long as the officer had probable cause to arrest for the offense, the police did not violate the Fourth Amendment.]

Pre-*Gant*, the police search of the interior department of the vehicle would have been lawful. Under *Belton* (expanded in *Thornton*), the search incident to lawful arrest extended to the passenger compartment. Whether the search of the trunk would have turned on whether finding "some black tar heroin" in the interior passenger compartment gave the police probable cause to believe that Dahlia was a drug dealer. (As we discussed on a couple of occasions, some lower courts have held that the discovery of a small

amount of drugs does not give the police probable cause to believe that larger amounts of drugs will be found elsewhere. By contrast, if the amount of drugs is consistent with drug dealing, courts have found that the police do have probable cause to believe that additional drugs will be present, here, in the vehicle.) As I write this in advance of the exam, one argument that I doubt anyone will make is that drug addicts are often quite thin, as is Dahlia (six feet, 100 pounds).

But this is post-*Gant.* Although Justice Stevens denies that his opinion overruled *Belton,* it almost certainly did so. At a minimum, under *Gant,* the police cannot conduct a search incident to lawful arrest of the passenger compartment simply on the basis of the arrest for a traffic offense, as is the case here. As in *Gant,* the suspect was in Green's patrol car. (Not mentioned is whether Dahlia was in handcuffs or whether the patrol car was locked. One might argue that unless she were, she may still have presented a threat to Officer Green and, therefore, even under *Gant,* the search is lawful.)

The facts in the exam question are similar to those in *Gant*, but they require analysis of an issue not discussed there. As in *Gant,* the police may have reasonable suspicion that the suspect is engaged in some kind of drug-related activity. (As summarized in the text, Gant was discovered and arrested after he got out of his car in a driveway where two other persons had moments earlier been arrested on drug charges.) Would that allow the police to search the vehicle? Here, I was trying to get students to see that Justice Stevens's lead opinion seems to invite a search of the vehicle under some circumstances on a showing less than probable cause. Specifically, he states even if the search is not justified on grounds of officer safety or the prevention of the destruction of evidence, "circumstances unique to the automobile context justify a search incident to arrest when it is *reasonable to believe* that evidence of the offense of arrest might be found in the vehicle." Although open to debate, the opinion seems to suggest that were the defendant under arrest for a drug violation, even absent probable cause to believe that drugs would be found in the vehicle, a search may be justified on a lesser showing of suspicion. Commentators are already speculating on the meaning of "reasonable to believe." That does seem like a lesser showing than probable cause, but is it higher than reasonable suspicion? More important, students should recognize that a search based on this

> lesser showing is justified only if the evidence relates to the offense for which the defendant has been arrested. Since Dahlia is under arrest for a traffic violation, the police cannot use the arrest as a justification for a further search.
>
> Alternatively, as both Justices Stevens and Scalia indicate, the police may be able to conduct a warrantless search under some other recognized exception. Presumably, they may do so if they have probable cause to suspect that the vehicle contains drugs. As I indicated above, the facts do not support a claim that the police have probable cause.

I have included my analysis for two reasons. First, it allows you to see my point about structuring the question to reward students who have paid close attention to the caselaw. Second, it introduces you to my next topic.

Earlier, I suggested that you draft your essay question with plenty of time to spare. Doing so allows you to draft your answer to the question before you give the exam. Trust me: you will avoid many problems by doing so. Like most of us in the early stages of our careers (and maybe those of us who are not in the early stages of our careers), you have probably created a racehorse exam—one that will force students to decide between spotting issues and doing analysis. Further, you will probably find ambiguities that you did not intend to include. You may have omitted some essential facts needed to raise issues that you intended to include in the exam. Essays that are overly complex and too long are all too common and end up producing a great deal of frustration among your students. Spending time preparing the analysis in advance is well worth the effort.

Another way to avoid the overly busy essay question is to use shorter essay questions. Professors who use shorter essays typically use them to get focused answers. Thus, a short question might be based on facts different in some ways from a leading Supreme Court case. You can create the facts, borrow them from lower-court cases, or look for questions not resolved by the Court, but perhaps noted by the Court. Thus, in some cases, the Supreme Court may have noted that it is not resolving a particular question. Such an essay question can test whether your students can do precise legal analysis, based on a thorough understanding of the material. You will have an easier time grading short essays as well.

Consider also whether you want to include a section of multiple-choice questions on your exam. Your school may have a policy with regard to multiple-choice questions; for example, it may not allow more than a certain percentage of the final grade to be based on multiple-choice questions. Even if not, limit the amount of credit that you allocate to the multiple-choice section of the exam.

Multiple-choice exams have their critics. They argue that the overreliance on multiple-choice exams is motivated by the ease with which professors can grade them. Further, they argue that multiple-choice questions cannot measure students' ability to do legal analysis. Used in connection with essay questions, though, multiple-choice questions are useful. As you begin drafting your essay exam, you may attempt to cram far too many issues into the fact pattern. You would not be alone in doing so. If you include a section of multiple-choice questions on your exam, you can achieve breadth of coverage.

You may be able to share writing multiple-choice questions with colleagues. Effective questions are hard to draft. If you make mistakes in writing your essay, students' essays may alert you to the problems and you may be able to adjust grades in light of the confusion. You are not likely to have that luxury if you draft multiple-choice questions that include unfair ambiguities. The lesson is clear: take great care in drafting your multiple-choice questions. Further, inquire whether your support staff grades multiple-choice exams with a computer program. The program used by faculty support staff members at McGeorge generates a good bit of information about the validity of the questions. For example, the printout shows how students in each quartile performed on the question. (Obviously, you should be concerned if more students otherwise performing poorly on the exam get the correct answer than do students who have done well otherwise.) This allows you to cull out poorer questions, either immediately (if there is a serious problem with the question) or for the next time that you give the exam.

Beyond problems of ambiguity, you should consider the prerequisites for drafting a valid multiple-choice exam. See whether your library has books on the science of writing multiple-choice questions. Get a copy of Michael Josephson's *Learning and Evaluation in Law School* (1984). While it is out of print, it is still available online (at http://books.google.com/books?id=lVQ7AQAAIAAJ&q=bibliogroup:%22Learning+%26+Evaluation+in+Law+School%22&dq=bibliogroup:%22Learning+%26+Evaluation+in+Law+School%22&

hl=en&sa=X&ei=7c3cUJ5RitaLAoCkgJAB&ved=0CDkQ6AEwAQ). Josephson covers essentials for drafting good questions, including topics like content validity, instructional objectives, and factors that cause invalidity.

Publishers may have sent you books that include sample multiple-choice questions. Examining the questions may be helpful, but resist borrowing questions from published sources. Students will question the fairness of the exam if some students are familiar with the questions that you have borrowed. Whether you agree with the criticism, you don't need the hassle. Play it safe and draft your own questions. And once you have completed your set of questions, take the exam that you have drafted. You may spot ambiguity in some of the questions. In addition, if you have trouble finishing the exam in the allotted time, imagine how hard it will be for your students to do so. Some of your colleagues may be willing to review your exam questions as well. They will be too busy to take your exam, but they probably can provide helpful insight into the quality of the questions.

B. GRADING YOUR EXAMS

Law professors are among the happiest lawyers. Ours is a remarkable profession, with ample opportunities for creativity both in the classroom and in our scholarship. That takes me to grading exams: it may be the only unpleasant part of the job. When I am grading exams, I remind myself that my worst day as a professor is better than most other working people's best days.

What's so difficult about grading exams? That may depend on your personality. Reading your first set of papers may be a shock: you did a great job teaching the material—or so you thought. And at least some of your students' essays will suggest otherwise. Apart from the quality of the essays, you are likely to be mildly compulsive: after all, you were successful in law school and/or the practice of law, and good law students and lawyers are somewhat neurotic. As a result, you may agonize over your papers. No doubt, you recognize what is riding on grades: grades may determine whether a student finds a good job or maintains a scholarship. Grades are especially important for One-L students, and their grades may determine whether they

qualify for law review. In light of these considerations, you may be obsessive about reviewing students' essays.[68]

If my description fits you, consider a few strategies. Few experienced professors read a full set of exams twice. Before I begin grading in earnest, I read about 10 to 20 percent of my students' papers (depending on the size of the class). I do not make comments or otherwise grade the papers. My goal is to get a sense of how students have handled the exam. Only thereafter do I get down to the nitty-gritty of assessing the papers for a final grade.

Decide whether you are going to use a grading grid. For example, consider ascribing points to each issue and to the analysis. A good grading key helps you assess whether you are grading consistently. If you merely ascribe a grade as you read each paper, you risk a couple of problems: your evaluation of the papers may change depending on the context. If you have read three poor essays in a row, you may overvalue the fourth paper; or you may encounter a string of good papers, making the fourth paper seem unusually weak. A good grading key offers a measure of objectivity. However, recognize the pitfalls of a grading key.

In creating your grading key, you must make subjective judgments: which issues deserve more points than other issues? Should you give more points for issue-spotting than for analysis, or vice versa? And how should you handle an exam that does a really good job on all the issues raised, but because the student went into great depth in the analysis of issues covered, she was unable to finish the exam? You can sense the problem: rigid adherence to a grading key has disadvantages as well as advantages. Be flexible: even if you use a grading key, include a place on the grading sheet for a more holistic score. If you do so, you can review exams if your overall impression differs from the numerical score that you come up with.

Having drafted your analysis beforehand makes grading a lot easier. Your analysis should memorialize your expectations about what a good answer should include. Further, if you use a grading sheet, your analysis facilitates the creation of the answer key.

Legal educators in recent years have paid far more attention than in the past to the need to provide students with feedback. Many of us

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[68] You may also make another kind of mistake: some of us put off unpleasant tasks as long as possible. Waiting until the deadline for grades is near at hand will leave you frustrated. You can't do a good job of evaluating exams if you are reading them at breakneck speed. Start early, and give yourself lots of time.

now give students feedback prior to the final exam in various ways. For example, some professors give mid-semester exams or short writing assignments. Learning takes place when students understand where they have gone wrong and are then able to correct their mistakes. If you are a new professor, you are not likely to have time to give your students a mid-semester exam. But, at a minimum, make comments on students' papers. You owe it to your students to give them guidance on how you evaluated their papers.

Not all professors agree. For example, they may point out that few students read the comments and, therefore, making comments, which slows you down as you grade, is not worth the effort. Despite that argument, I don't see the question as a close one. Some students will read your comments. Further, many students are frustrated if their professors do not make comments on their exams; it feeds cynicism about whether the professors have read their essays. Grading is an important part of our jobs, and we ought to do it in a professionally responsible manner.

Grading short-essay questions is easier than grading long essays. If your questions call for analysis of specific issues, you will need to exercise less discretion in determining if an answer is good or bad. If the question is well drafted and a student misses the point of the question, the student gets no credit for the answer. Obviously, the opposite is true as well. Giving points per answer allows you to get a raw score for the short-essay section of your exam. Once you have reduced your grades to numerical scores, you can use a spreadsheet to curve those scores.

Use the same spreadsheet to grade your multiple-choice questions. If you are technologically challenged, check with your IT department to see if it has a program that helps you to curve your multiple-choice scores. A colleague shared one with me many years ago and it has helped immensely. Using Microsoft Excel, I can enter students' scores and then set parameters and determine immediately what the median and mean scores will be, as well as the percentage of grades above a 79, between 70 and 79, and below 70. The spreadsheet rationalizes the process quickly.

C. REVIEWING EXAMS

Above, I discussed the importance of providing students with feedback on their exams. Without meaningful feedback, students have difficulty learning from their mistakes. As a result, offering some kind of exam review is sound educational policy. The question, of course, is what kind of review to provide your students.

At the outset, here is a caveat: students who have done poorly may insist on an immediate meeting to review their exams. Resist the temptation. Especially if they get their exams back piecemeal, as soon as each professor submits grades, they may not yet realize that the grade in your course is typical of their overall performance. Further, students who are emotionally upset about their performance are less likely to absorb feedback.

Because Criminal Procedure is not likely to be a yearlong course, you may not be inundated with students asking for an exam review, especially if it is an upper-level course. They may be disinclined to review their exams if your law school has a policy that does not allow you to change grades after they have been posted. Most law schools have a policy in place that preserves the value of anonymous grading. If your school does not, adopt such a policy as your own. Even if students are not likely to insist on an exam review, encouraging them to attend a review session makes a lot of sense. Reviewing their exams helps them understand how they can improve.

Through the years, I have experimented with different exam review formats. Especially in yearlong courses, I have conducted mandatory review sessions for students who want to make individual appointments. That, along with comments on their exams, usually resolves their questions. The process is efficient.

On occasion, instead of conducting a review session, I have set up extra office hours to allow students to make appointments to go over their exams. Depending on the class, you may find yourself overwhelmed, especially early in your career. A few years ago, 80 percent of my students took me up on the offer to meet one on one. However, many of their questions could have been answered more easily had I conducted a review session before allowing them to make individual appointments.

Above, I urged that you make comments on exams because of the educational value to your students. Providing comments on the exam is helpful for another reason as well. When you are reviewing

students' exams, if you didn't make comments, you must reread the exam and try to reconstruct why you gave the student a particular grade. Detailed comments allow you to reconstruct your thinking during the grading process.

You can also make the review process more meaningful if you have prepared the analysis for your exam. Students can see what the question was driving at and can compare what they wrote. In addition to sharing analysis, consider getting permission from the students who wrote the best papers to let you share their essays with other students.

If you have used a grading sheet, you may be tempted to share it with your students during the review session. For me, the jury is out on this practice. Doing it advances transparency and gives a sense of objectivity to the grading process. But it also invites a good bit of quibbling about whether you gave the right number of points to a student's discussion of a particular issue.

VIII. Concluding Thoughts

If you are a new professor, recognize the steep learning curve that you face as you make the transition from a clerkship or practice to teaching law. Becoming an excellent teacher is harder than it looks. But recognize the resources that are available to help you make the transition.

As I mentioned at the outset, many established professors are willing to help you make the adjustment to the profession. I hope this book helps you get started on a positive course. Look for a mentor among your colleagues or elsewhere in the profession. Share your ideas and be willing to listen to advice from those of us who have been in your shoes at some point in our careers. Take me up on my offer and get in touch if you would like to more advice or if you would like to share your thoughts about teaching. Good luck!