

2008

How I Teach

Donald H. Zeigler
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/tribeca_square_press

Recommended Citation

Zeigler, Donald H., "How I Teach" (2008). *Tribeca Square Press*. Book 1.
http://digitalcommons.nyls.edu/tribeca_square_press/1

This Book is brought to you for free and open access by the Academic Centers and Programs at DigitalCommons@NYLS. It has been accepted for inclusion in Tribeca Square Press by an authorized administrator of DigitalCommons@NYLS.

HOW I TEACH

BY DONALD H. ZEIGLER

PROFESSOR OF LAW

NEW YORK LAW SCHOOL



2008

© 2008 by Tribeca Square Press

Tribeca Square Press, 57 Worth Street, New York, NY 10013
publisher@www.tribecasquarepress.com

Tribeca Square Press® is a registered trademark of
New York Law School
Richard A. Matasar, President and Dean
Jethro K. Lieberman, Vice President and Publisher

Book Design: Kathi Georges

Set in Sabon LT Std 11/15.5, with Gill Sans

Tribeca Square Press Book No. 2

HOW I TEACH

BY DONALD H. ZEIGLER

2007/08 MARKS MY thirtieth year of law teaching. My colleagues suggested that I write a paper describing how I teach, explaining the techniques and practices that contribute to what success I have had in the classroom. Some parts of the paper have been hard to write; other parts have been easy. I realized I hadn't reflected on how I teach for a long time. I just do it. Years ago I read a book by Mihaly Csikszentmihalyi entitled "Flow, The Psychology of Optimal Experience."¹ His description of being "in the flow" is what I experience when I teach. I am in the moment, fully engaged. Csikszentmihalyi writes:

When all a person's relevant skills are needed to cope with the challenges of a situation, that person's attention is completely absorbed by the

¹ Mihaly Csikszentmihalyi, *Flow, The Psychology of Optimal Experience* (Harper Perennial 1990).

activity. . . . People become so involved in what they are doing that the activity becomes spontaneous, almost automatic; they stop being aware of themselves as separate from the actions they are performing. . . . We feel in control of our actions, masters of our own fate. On the . . . occasions when it happens, we feel a sense of exhilaration, a deep sense of enjoyment that is long cherished and that becomes a landmark in memory for what life should be like.²

I can't fully describe how this happens. Being "in the flow" in the classroom involves for me many different components—painstaking preparation of a specific kind, interacting with the students so they feel comfortable becoming engaged in the intellectual inquiry, challenging the students without threatening them. I teach with urgency. I pour out energy. If I don't appear to be caught up in what I am teaching, the students are not likely to find it interesting. Energy and enthusiasm also implicitly convey the message that the enterprise is important.

I think it best to begin this paper with the parts of teaching that are easiest to describe; namely, the mechanics of preparation and the many little things I do to try to create a professional atmosphere in the classroom. After I've discussed these essential building blocks, I will attempt to describe the more subjective, ephemeral, emotional parts of my teaching.

² *Id.* at 3, 53.



I. GETTING STARTED

I teach Civil Procedure, Evidence, and Federal Courts, which are core doctrinal courses. Civil Procedure and Evidence usually are large classes with 100 students or more. I use the traditional case method. The textbooks I assign are filled with court opinions, linked together with short introductions and narratives and followed by notes and questions. I attempt to create a version of the so-called Socratic dialogue. I ask questions about the cases, followed by additional leading questions designed to guide students in recognizing the important points in the cases.³

The first class is important because it sets the tone for the semester. I want the students to see immediately that I am prepared and well-organized. The materials for the course—textbook, authors' annual supplement, my syllabus, and any additional supplements I have prepared—are completed and available. I tell the students I will begin with administrative, housekeeping matters and then spend the balance of the class presenting hypotheticals to introduce them

³ I recognize that there has been much innovation in legal education in the last thirty years—the clinical movement, the professionalization of legal writing instruction, and the burgeoning use of computers and related technology, to mention a few of the main innovations. I applaud all of these developments because they have greatly enriched the curriculum and enhanced student learning. Students learn in different ways, and different teaching methods help insure that more students receive effective instruction. Variety in teaching methods also makes law school more interesting. Law school would be intolerably tedious if all professors taught exactly the same way.

to some of the main themes in the course. I briefly discuss the class materials, explain how to read the syllabus,⁴ and give the students the assignment for the next class.⁵ I give them my office hours and my email address. I tell the students the exam format and invite them later in the semester to view online past essay questions and the accompanying “A+” student answers. In Civil Procedure, a first-year, first-semester course, I also include hints on how to approach law study, how to use hornbooks and commercial outlines (as a supplement to, not a substitute for, assigned reading), and I ask them to read New York Law School’s “Student Conduct: Expectations and Guidelines.” In short, I convey necessary information and, hopefully, convey the impression that I know what I am doing.

⁴ Law school textbooks, particularly in required or core doctrinal courses, generally provide comprehensive coverage of the subject they cover. Inevitably, the texts contain much more material than can reasonably be covered in a three- or four-credit course. The authors hope that by being comprehensive more professors will choose the text because they all will find the topics they wish to teach in the textbook. Professors thus are compelled to pick and choose what to assign. I assign relatively few pages, but I expect the students to read those pages very carefully. My syllabi are quite detailed, designating the cases and the specific notes and questions to be read. I leave out whole chapters, and I also leave out individual cases in chapters I do cover and many notes and questions following cases that I assign. I tell students the syllabus is so long because I’ve left so much out!

⁵ When the semester gets underway, I give the students the assignments for all the classes (usually two) the following week so they can prepare over the weekend if they wish to. Night students, in particular, find this helpful. I do not include dates on the syllabus, or designate the pages we will cover for each class. Although I know from past years approximately what I will cover each class, because the class is interactive I can’t be sure exactly how far I will get. To designate material for each class on the syllabus and then be forced to change the assignment makes a professor look disorganized.

I don't assign case readings for the first class. In Civil Procedure I assign an introductory narrative in the text about the stages of civil litigation. In upper-class courses I don't assign anything at all. In all of my classes, I spend the first class asking questions about short hypothetical fact patterns that raise some of the main issues or themes of the course. In upper-class courses students often have not finalized their schedules by the first class. They may drop one course and add another, so they have not yet bought textbooks. Consequently, if I give an assignment from the textbook, a large portion of the class will be unprepared. I believe I have a better chance of engaging the whole class with hypotheticals. Particularly in Civil Procedure, I make the beginning hypotheticals quite easy to encourage students to participate and to ensure that they get positive reinforcement.



II. PREPARING FOR CLASS

For me, careful and detailed preparation is essential to the success of the enterprise. My preparation materials are not simply "class notes," in the sense of an outline for the day, or a list of points I want to cover, or insights about the cases that I want to share with the students. My class materials are more focused and specific. I write down all of the questions that I plan to ask the students about each case. I put the answer to the question in parentheses following the question, mainly so I won't

have to puzzle over the answer the next year if I forget the answer in the interim. In addition, unless the question is a straightforward factual question—“How much money does the plaintiff seek in damages?”—I include a list of back-up, leading questions to ask when the main question elicits only silence and blank stares. I also write the short introductions and transitions from one case or section of the text to the next. I call my materials “scripts.” While I’m not expecting the pre-set, verbatim dialogue of a theatrical presentation, I tend to ask the main and back-up questions as I have written them, and I hope to evoke answers that are reasonably close to the answers I have written.

This sort of detailed preparation has several benefits. First, it forces me to decide exactly how I want to organize the discussion of each case. I tend to use a fairly standard, logical format. What are the facts, what are the issues, what does the plaintiff argue on each issue, what does the defendant argue, which argument does the court accept and why, and then what are the implications of the court’s decision? Many court opinions follow this format and many don’t. For those that don’t, I often ask questions that will reorganize the discussion in the more standard format if I think that format will enhance student understanding. This often requires saying to the students, “Drawing your attention to the second paragraph on page 35,” or “Returning now to page 32,” before asking a question.

A second benefit of this approach is that it requires me to read very carefully. Forcing myself to write

down the answers to my questions means that I must specifically identify the material facts, articulate the plaintiff's arguments, and so on. When I simply read through a complicated opinion in an area of my expertise, I understand it. I see the main outlines. But I often feel like I'm looking at a picture that is a little out of focus, at least in some parts. As I write the questions and answers for class, the entire picture—the whole opinion—comes into much clearer focus.

A third benefit of this approach is that it often allows me to have insights into a case that I would not have had simply from reading the case over once or twice. In the course of writing down the questions and answers, I see flaws in logic, gaps in reasoning. I see a court distorting precedent or making a major doctrinal change seem like a small step. When I see these things, I then can write additional questions to help the students draw these more sophisticated points of analysis from the case.

Finally, as the students answer the questions, the opinion comes into clearer focus for them as well. Law students, and particularly first-year law students, do not have the knowledge and experience necessary to understand court opinions. In addition, they often do not read cases carefully. Consequently, students often come to class with only the vaguest idea of what a case is about or why it is in the text. By being led so specifically through the details of a case, including the more sophisticated points of analysis, they come away with a sense they have learned something. Often, of

course, what they learn is that the court has announced a fuzzy, ambiguous legal standard that is difficult to apply. Students don't like ambiguity. Most believe they came to law school to learn black-letter law. Convincing them to embrace uncertainty is not easy. But if they at least know a court adopted a new, three-factor test, and what those factors are, and specifically how each factor was applied in this case, they feel they have something to hold onto.

I provide an example of a “script” in the Appendix (page 39) that helps demonstrate the benefits of the detailed preparation I do. I chose a relatively straightforward case about personal jurisdiction, a subject that most readers may remember from their Civil Procedure class or from law practice. The traditional rule allowed a state to exercise personal jurisdiction over a defendant only if the defendant was a resident of the state, was present in the state and served with process, or consented to jurisdiction. In 1945, *International Shoe Co. v. Washington*⁶ replaced the rigid traditional rule with a new, qualitative, subjective standard—the famous (or infamous) minimum contacts test. *Shoe* held that a state could exercise jurisdiction over a non-resident if the defendant had sufficient contacts with the state to make it fair and reasonable to hear the case. *Shoe* gave a green light to the expansion of personal jurisdiction, and in the years following many states enacted so-called “long-arm” statutes to take advantage of the relaxed standards. Early long-arm

⁶ 326 U.S. 310 (1945).

statutes generally addressed cases where the non-resident defendant committed a single act or conducted only isolated activity in the forum state, but the cause of action arose from that activity.

Gray v. American Radiator & Standard Sanitary Corp.,⁷ a 1961 Illinois case, posed one of the vexing questions raised by the tort arm of the new long-arm statutes. The Illinois statute authorized jurisdiction over a non-resident who either in person or through an agent commits a tortious act within Illinois. The authors of the statute presumably had in mind a case where someone physically present in the state committed a tort, as when a non-resident motorist drove into Illinois and had an accident involving the automobile. *Gray* posed a somewhat different situation. Titan Valve, an Ohio company, manufactured a safety valve that it sent to American Radiator in Pennsylvania. American Radiator incorporated the valve into a water heater that it sent in the course of commerce to Illinois. Phyllis Gray bought the water heater in Illinois and it exploded, causing her injury. Titan Valve was named as a defendant and moved to dismiss for lack of jurisdiction. The trial court granted the motion and Gray appealed to the Illinois Supreme Court.

The Q&A I wrote for the case initially follows the standard format. I ask questions to bring out the facts and procedural details, the key language of the long-arm statute, and the two issues that, kindly, the court explicitly states—whether Titan committed a tortious

⁷ 22 Ill.2d 432, 176 N.E.2d 761 (1961).

act within the state within the meaning of the statute and whether the statute, if so construed, would violate due process. I ask “What does Titan contend on the first issue?” (Titan contends that the tortious act occurred in Ohio, where the valve was negligently manufactured, rather than in Illinois, where the injury occurred.) I ask “What does the court hold on issue No. 1, and why?” (The court holds that the tortious act occurred in Illinois because without an injury there is no tortious act. The court also infers that the tort occurred in Illinois because the statute of limitations runs from the time of the injury.) As to issue No. 2, the court does not explain the defendant’s argument that exercising jurisdiction would deny it due process, so I have the students explain, using back-up questions designed to focus on Titan’s paucity of Illinois contacts. (“What exactly is the extent of Titan’s contact with Illinois, according to the proof submitted in the case? If you were Titan’s lawyer, how would you use *International Shoe* to argue for dismissal?”) Finally, I ask “What does the court hold on the constitutional issue and why?” (Jurisdictional requirements have been relaxed and jurisdiction is secure if the act or transaction itself has some connection with the forum state.)

At this point the case, and the Q&A, take an unusual turn. In the excerpted version of the case in my textbook, the court takes two and one-half pages to conduct the analysis summarized above and to conclude jurisdiction exists. The court continues to write, however, for

another three pages that seem, at first, to be rambling and repetitive. As I pondered the questions I wanted to write about these pages, I saw a subtext in the opinion that I had not seen just reading the opinion through. It became clear the court was very uneasy with its analysis in the first half of the opinion, although it never said so explicitly. Ultimately, the court makes up facts so that it feels more comfortable asserting jurisdiction.

The problems begin when the court discusses precedent, particularly its own prior decision in *Nelson v. Miller*,⁸ which the court cites as supporting its decision in *Gray*. I ask the student to tell me the facts of *Nelson*. The defendant in that case, a Wisconsin resident, sold appliances. In the course of delivering a stove in Illinois, an employee of the defendant was involved in an accident and negligently injured the plaintiff. I then ask how *Nelson* is different from *Gray*, with backup questions that focus on the earlier disagreement between the parties in *Gray* as to where the tortious act occurred. (Could the defendant in *Nelson* make the same argument Titan made in *Gray* about the tortious act occurring outside Illinois? No, because in *Nelson*, both the negligent act and the consequences occurred in Illinois, while in *Gray* the negligent manufacture occurred in Ohio, and only the injury occurred in Illinois.) Subsequent questions bring out that the defendant's contacts with the forum are much greater in *Nelson*. The defendant in *Nelson*

⁸ 11 Ill.2d 378, 143 N.E.2d 673 (1957).

purposely availed itself of the benefits and protections of the forum in ways Titan did not.

At this point students often begin to look perplexed, particularly when I point out that the court nowhere acknowledges the important factual differences between *Nelson* and *Gray*. But I suggest the court is nonetheless troubled by the differences. To support this suggestion, I specifically direct the students to a paragraph where the court says the following:

While the record does not disclose the volume of Titan's business or the territory in which appliances incorporating its valves are marketed, it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State. . . . [Titan] enjoys benefits from the laws of this State, and it has undoubtedly benefited (sic), to a degree, from the protection which our law has given to the marketing of hot water heaters containing its valves.

I ask the students what the court is doing, and through leading questions bring out that the court is making up facts not in the record. I explain that I believe the court took this unusual step because it was uneasy asserting jurisdiction without additional contacts between Titan and Illinois beyond those in the record. I also point out that the students will soon see long-arm statutes, like New York's, that explicitly require additional contacts in "act without, consequences within" cases.

Preparing the scripts makes every class well-organized. The scripts provide an anchor that helps keep the class

firmly on track. The progression of thoughts is very specifically planned. I always know what I am going to ask next. There are no down periods. I proceed briskly for 75 or 100 minutes class⁹ after class all semester long. On the rare occasions when we finish the assigned material early and I come to the end of the script I say “We finished early. That’s all for today!” Students never seem disappointed when that happens.

At the same time, having the script makes me more comfortable with elaborations or digressions. When a student asks an interesting question, but one that is slightly off track, I’m comfortable saying “That’s a good question!” or “I’m glad you asked that.” Sometimes I just answer the question; more often, I turn it back on the class, making up back-up questions as necessary to lead them to the answer. I know the class is not going to end up wandering in the wilderness because when the sidetrack comes to an end, I can return to the script and ask the next question. When a student asks a question that leaps ahead to point that I know is coming up later, I say “I want to hold that question, we’ll get to it.” And then I always do get to it, because it is in the script. I think the students appreciate that their questions don’t get lost in the shuffle. It also is not uncommon to have a

⁹ I teach a 75 minute class straight through, but usually take a 10 minute break in a 100 minute class. Seventy-five minutes seem to go by fairly quickly; my energy level remains high and the students seem engaged. Without a break, however, the final 25 minutes of a 100 minute class seem to drag. With the break, I tell the students to think of class as two 50-minute classes. Taking a break also cuts down on students leaving during class to go to the bathroom.

student ask the question that is the very next question in the script. I find this heartening, because it shows the student is with me; the student sees where this line of questioning is going. I usually say “Good question! In fact, that is the very next question in my notes here!” That makes the student feel good, and turns the question back on the class and we proceed.

The courses I teach involve many different substantive areas of law, and that makes class preparation more difficult. In a torts class, every case is a torts case; in a contracts class, every case is a contracts case. In Civil Procedure, Evidence, and Federal Courts, however, we get quite a mix—torts, contracts, trusts and estates, shareholders derivative actions, tax, corporations, labor, and criminal law. In preparing to teach a case that involves a substantive area where I have little knowledge, I make sure I learn enough to understand the facts and the legal arguments. I and the students need to know enough about the substantive law to make sure the underlying jurisdictional or federalism or evidentiary issue isn’t obscured.

One venerable Civil Procedure case, for example, concerns whether notice by publication of a pending judicial settlement of accounts given to beneficiaries of small trust estates pooled into a common trust fund violates due process.¹⁰ The case is a bear and there is no way to avoid the details of the formation and supervision of common trust funds if the students

¹⁰ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

are to understand what the Supreme Court holds about notice. What notice to the beneficiaries is reasonable depends on how their interests are affected by the judicial settlement of accounts. Students can answer some questions from a careful reading of the case; other points I have to tell them. The students must be given a basic definition of trust, trustee, and beneficiary. Small trusts that cannot afford the expenses of capable corporate fiduciaries can band together to achieve diversification of risk and economy of management. Periodically the trustee must petition the surrogate's court for a settlement of accounts. One effect of the settlement is to extinguish any right of a participating trust or beneficiary to challenge the performance of the trustee during the accounting period. Thus, if the trustee has violated its fiduciary responsibilities, the beneficiaries will lose the chance to challenge the violation. Once this basic factual and legal structure is clarified, the students can understand the Court's decision about what notice of the pending settlement beneficiaries should receive. Beneficiaries whose addresses are known must receive notice of the proposed settlement by mail; those whose addresses (or whose identities) are not known can be served by publication. Interests are balanced. Trustees are not unduly burdened; common trust funds can continue to exist; beneficiaries who receive notice can act on behalf of those who do not receive notice if the situation warrants action. In preparing to teach this case and others like it, I do not learn more than

I need to about the substantive law. I also don't want the students to get diverted from the procedural point by unnecessary substantive details.



III. CONDUCTING THE CLASS

A. PLAYING SOCRATES

I practice my own version of the Socratic method. Like most law professors, I have a seating chart and call on people from the chart. Each day I attempt to call on people in different parts of the room to keep students on their toes. I try to call on enough students in each class so that other students will believe there is a realistic possibility they might be called on in the next class, thus giving the students an extra incentive to prepare. When I call on people, I generally ask them relatively easy, straight-forward questions that someone who has read the case should be able to answer. When teaching *Gray*, for example, I call on students for the facts, the wording of the long-arm statute, and the two issues listed by the court. I call on students who don't usually participate in class discussion. I hope they will be able to answer correctly and will be encouraged to participate further as the class progresses. The students often do participate further, although the participation usually does not carry over to subsequent classes.

If student says "I'm unprepared," I simply ask another student the question. The unprepared student is already

mortified and there is no need to linger and add to the distress. (I do make a point, however, of calling on the unprepared student in the next class.) I generally move next to the students immediately around the unprepared student. I hope when that pattern becomes clear, the surrounding students will be ready when I call on one of them and the class can move along. If a student does not say “unprepared,” but is nonetheless struggling to answer, I wait a little while, but not too long, before moving to another student. At that point the first student is almost always staring intently at the textbook, trying to find the answer. I want to give the student a fair chance to answer—to find the text of the long-arm statute or read the two issues listed by the court. But if I wait too long, the student usually freezes up. The student is embarrassed and can’t think. The rest of the class becomes tense and feels sorry for the student, saying to themselves “That could be me!” There is no point in asking back-up questions because the main question is usually factual and straightforward—“What relief does the plaintiff seek?” “What are the words of the statute?” The better course, I think, is to move to another student.

For all but the easy questions, I ask the group and take volunteers. In *Gray*, for example, I ask the class “What does the defendant contend on issue No. 1?” (The defendant contends the tort took place in Ohio, where the valve was manufactured.) I could call on an individual to answer that question, but I know many students won’t be able to answer it. If the volunteer

appears to know the answer but does not articulate the answer clearly or fully, I often say, “Yes, but could you explain more fully?” or “Could you elaborate?” After the student elaborates, I almost always repeat the answer, for two reasons. I say it better, and the whole class can hear me. Unless the volunteer is one of those rare students who speaks in a loud, clear, booming voice, only a small portion of the class has heard the student’s answer.

When a volunteer gives an incorrect or incomplete answer to a question and back-up questions are appropriate, traditional practice is to stay with that student and ask the back-up questions, leading the student eventually to the correct answer. I rarely do that. I gently say “No, that’s not quite right” or “That’s a good point (or an interesting point), but not quite what the defendant is arguing.” I then call on another volunteer. If the second or third volunteer doesn’t answer correctly, I begin asking back-up questions, again to the entire group. Usually, as a group, the class can answer the back-up questions and someone articulates the correct answer to the main question. Sometimes I will stay with the first student, usually when the student has given a partially correct answer and I think the student can complete the answer. For example, if I ask “What does the defendant contend on issue No. 1?” and the student responds “The tort did not take place in Illinois.” I will ask the same student “Where does the defendant contend the tort took place? Why?” Generally, however, if

a student gives an incorrect answer I turn to the group for the answer.

I look to the group instead of staying with an individual student for several reasons. First, I've found that if a student give a wrong answer to the main question, the student usually can't answer the back-up questions successfully. Perhaps if we were in my office one-on-one, the student could answer the back-up questions. With 100 fellow students looking on, however, most students get that deer-in-the-headlights look and freeze. If I stay with that student, asking question after question without a coherent response, the student gets upset and the class gets upset. Second, leading one student through a series of questions, even if partly successful, often is like pulling teeth. It is slow going. There are long pauses. The atmosphere of the class changes as the pace changes. The rest of the class go from participating to observing. Third, there are many countervailing positive benefits to making question-answering a group effort. When the class is going well, most people are participating, either actively by volunteering or at least trying to answer the questions in their minds. The pace is brisk. When a student answers incorrectly, I call on another very quickly. There is no penalty for a wrong answer. The student is not separated or isolated. The class is working together to answer the question. The students are cooperating, not competing. As individuals, most of the students can't answer most of the

questions. As a group, they can answer almost all of them. The group is successful. The class is fast-paced, upbeat, positive.

There are pitfalls in this approach that I try to avoid. A group approach is most successful when a lot of students participate. If the same eight people answer all the questions, the rest of group become observers. If not enough people volunteer, I begin calling on more people with the in-between questions that I could ask an individual or the group. I will say, "Let's get more people involved here, "and ask a back-up question that may get more hands in the air. I also must be careful not to jump away from a volunteer too quickly. The first sentence out of the student's mouth may be a bit garbled or fragmentary; the student actually may know the answer and be able to state it if given a few more seconds. In addition, if the class gets going too fast, students become confused. They get lost. After a sequence of group answers to questions and back up questions, I restate. In large classrooms, students always have trouble hearing, and rapid or partial student answers are hard to follow. I'll say, "Did everybody get that point?" "The court is saying there isn't actually a tort or a tortious act unless a person is injured. The tort isn't complete. Therefore, the court concludes the tort occurred in Illinois because that is where Phyllis Gray was injured." My restatement pauses the class, and, hopefully, ensures that almost everyone understands the court's reasoning. Then, I proceed with more

questions and back-up questions to the group and we move ahead briskly until the next pause and restatement.

A final problem with calling on volunteers is that some students repeatedly volunteer but rarely provide a correct answer. As a semester proceeds, it quickly becomes clear which students fit into this group. In the worst cases, other students roll their eyes or almost audibly groan when I call on students in this group. I deal with this situation by rarely calling on the problem students. I call on them occasionally so they won't feel completely marginalized. I usually call on them to answer relatively easy questions to increase the chances they will give a correct answer. Most classes seem comfortable with this practice. I think most of the other students understand exactly what I'm doing.

B. ANSWERING STUDENT QUESTIONS

Some students ask terrific questions that are interesting, insightful, and give me an opportunity to explain an important point more fully or to expound on a related point. Other students raise their hands when they don't understand what I've just said. If the student is a good student and he doesn't understand, chances are good that many other students also don't understand, so the question tells me I should restate the point or explain more fully.

On the other hand, I have learned there are some points I should not explain too many times because my

explanation seems to become less coherent with each repetition. For example, in *World-Wide Volkswagen v. Woodson*,¹¹ the Supreme Court redefined “foreseeability” for personal jurisdiction purposes. To be subject to jurisdiction, a manufacturer must foresee being haled into court in the forum state, not merely foresee that their product might reach the forum state. A manufacturer should foresee being haled into court if their product reaches the forum state in the stream of commerce (which seems to mean the wholesale chain of distribution), but not if the product reaches the state by the unilateral actions of a consumer bringing it there after purchasing the product somewhere else. In *World-Wide*, an allegedly defective Audi automobile left the stream of commerce when the plaintiffs purchased it in New York. The plaintiffs subsequently drove the car to Oklahoma, where an accident occurred. The New York retailer and the New York, New Jersey, and Connecticut distributor of Audis did no direct business in Oklahoma. Since the plaintiffs’ car reached the forum state through the plaintiffs’ actions and not in the stream of commerce, the Court held there was no jurisdiction in Oklahoma over these parties. Students have trouble understanding this redefinition of foreseeability, particularly when different factual examples are presented. For reasons I don’t fully understand, if I try to explain the redefinition too many times, confusion grows rather than lessens. So I explain it twice and then stop.

¹¹ 444 U.S. 286 (1980).

Unfortunately, some students ask questions that are only marginally relevant or don't make much sense. As with problem volunteers, these students make themselves known fairly quickly, and I call on them only occasionally. In my introductory remarks in the first class, I encourage students to ask questions, but I also say: "I will answer as many questions as I can. If you have your hand raised and I don't call on you, don't take it personally. I often can't answer all of the questions from a group this size. When I pass you over, it simply reflects my judgment that it is time to move on so we can cover the assigned material for the day." I'm speaking truthfully when I say this, but the disclaimer also provides a convenient cover for passing over students who don't ask good questions.

Sometimes a student asks a question and I don't know the answer. This situation arises more than I might like because, as I explained above, many of the courses I teach involve so many different substantive areas of law. Particularly in Civil Procedure, students ask questions about the substantive law or other issues that are simply not relevant to the procedural issues at hand. It is important to slip such questions quickly and get back on track so the class is not diverted from the relevant points or confused. In *Pennoyer v. Neff*,¹² the granddaddy of all jurisdiction cases, for example, Mitchell sued Neff in an Oregon state court for breach of contract. Neff was served by publication, never got notice, and a default judgment was entered against

¹² 95 U.S. (5 Otto) 714 (1877).

him. When Neff subsequently acquired some real property in Oregon, Mitchell had the property sold at auction to satisfy the judgment. The point of the case is that Oregon had neither personal jurisdiction over Neff under existing standards nor jurisdiction quasi-in-rem because Neff didn't own the land until after judgment was entered. Students often ask questions about the auction process—How was the land seized? How did the auction work? Since the land was worth more than the judgment, what happened to the excess? and so on. I, of course, don't know the procedures for enforcement of judgments in Oregon in the 1860s. I generally say, "I don't really know, and I don't want to get into those questions because they will divert us from the central points in this case."

When students ask questions about substantive areas of law where I know little, I don't hesitate to say I don't know. There is nothing wrong with signaling students that I'm not a walking encyclopedia of legal doctrine. (Indeed, I sum up my knowledge of the world as follows: I know a lot about a few things, a little bit about a few more things, and absolutely nothing about everything else.) I often leaven the "I don't know" with humor. I make comments like "When I took torts back in 1910. . . ," or "We have now exhausted my knowledge of federal labor law."

When a student asks a relevant question and I think I know the answer, I answer it. That sounds straightforward, but there can be peril. Sometimes when I am part way through confidently laying out the rules on some

subject, a little alarm will go off in my head and a voice will say, “Don, those might be the rules. That would be a good set of rules. Perhaps those should be the rules. But you don’t actually know if those are the rules.” At that point I begin to backtrack. I usually end by saying “I think that’s the right answer, but I will check it out.” I generally write myself a quick note in class so I don’t forget the question. It is important to follow up, find the answer, and report back. Finding the answer—or finding there is no answer or that the answer is very complicated—usually doesn’t take long. I start with the simplest method of legal research—ask somebody who knows. A colleague can almost always give me the answer or enough information to make some intelligent comments on the question next class.

C. SETTING THE TONE

The general tone of the class is set largely by the mechanics of my question and answer format and my version of the Socratic method. The pace is brisk; when the class is going well the students are engaged in the group effort of answering the questions and understanding the material. Students, I think, do not feel much tension or stress; they don’t feel threatened or in danger of being humiliated. The atmosphere is friendly, but business-like, professional. The class is not overly formal, nor is it informal. While I try to adopt a friendly demeanor, I am careful to maintain a certain distance. I’m not their friend; I’m their professor. I call students by their last names. Almost

paradoxically, because each class is well-planned and I'm so clearly in charge, I can be fairly relaxed. I'm not tense, I'm not worried or uptight. Students aren't trying to challenge me or put me on the defensive. At base, careful preparation is essential to achieve a good classroom atmosphere.

As the semester moves on, I regularly attempt to lighten the mood. I usually wait several weeks until I'm sure I've "got them," the class patterns are set, and the atmosphere is good. I begin by making what I hope are humorous asides, perhaps making fun of the facts of a case, or telling a brief joke that relates to the case or subject we are studying. Humor helps keep the students alert and engaged. Laughter wakes people up. Despite my acting as though the material we are discussing is scintillating, students get bored. The energy level of the class dips as we fight our way through some complex doctrine. Humor, often unexpected, helps get the energy level back up. Humor is particularly important in night classes. Most of the students have worked during the day and they are tired. They run on the energy I pour out. Every ten or fifteen minutes I try to say something funny or silly to keep them awake.

Jokes don't always come easy in the classes I teach, except perhaps for Evidence. A high proportion of Evidence cases involve either sex or violence or both. This cannot be said of the cases in Civil Procedure or Federal Courts. Consequently, if I come up with a

funny line or a good joke, I tend to use it year after year. There are some pitfalls in repeating jokes. Some jokes over time become politically incorrect. Obviously I avoid jokes that are off-color or that would offend people. The problem is more subtle. A joke that in 1995 seemed harmless by 2005 may seem not quite right in light of evolving social norms. I've dropped several jokes over the years on these grounds. Jokes also become dated. The average day student entering law school in the Fall of 2007 was born in 1985 and didn't become marginally sentient until 1993 or 1995. I teach a case in Evidence captioned *Bill v. Farm Bureau Life*.¹³ Mr. Bill's son hung himself in a neighbor's barn. The insurance company declined to pay on a policy insuring the son's life, claiming the death was a suicide, not an accident. For many years one of the TV networks has aired a comedy program called *Saturday Night Live*. One of the comedy skits was about a little white dough boy called Mr. Bill. Each week Mr. Bill would get beaten up or torn apart by some character talking in a high squeaky voice. In the course of teaching *Bill v. Farm Bureau Life*, I would break into a high squeaky voice and say "Mr. Bill! Mr. Bill! Your son is dead!" This always got a big laugh, as the students made the connection to the television show. Then, one year, only a few people laughed and everyone else got a "What is this guy's problem?" look on their faces. It clearly was time to retire that joke!

¹³ 254 Iowa 1215, 119 N.W.2d 768 (1963).

The most reliable jokes are ones that grow from the facts of a case, do not require any outside knowledge, and carry no risk of offense. Another Evidence case, *McAndrews v. Leonard*,¹⁴ provides a good example. Surgeons removed a circular portion of plaintiff's skull to relieve pressure on the brain. The issue at trial was whether the tissue that grew over the opening was as hard as bone or was a softer substance. The appeals court upheld a trial court decision to let the jurors probe the substance with their fingers to assess how hard it was. While the jurors were not competent to assess the substance scientifically, the jurors were competent to distinguish between hard and soft. In mimicking jurors pushing on the plaintiff's skull with their thumbs, I pretend one of my thumbs plunges into the plaintiff's head. I pull it out with effort and hold it up, grimacing as though it is covered with blood, and say "Oh, sorry!" This is slapstick; it's silly. But the joke only takes ten seconds and it always has the desired effect. It catches students completely by surprise; some laugh, some groan and shake their heads. Everyone wakes up.

A teacher's efforts to maintain a positive, professional atmosphere can be jeopardized by disruptive students. The culprits are almost always a group of young men who sit in the back of the class and talk to each other a little too often and a little too loudly. I've only faced this problem a couple of times in my years of teaching.

¹⁴ 99 Vt. 512, 134 A. 710 (1926).

Again, careful preparation, a brisk pace, and being in charge help keep students from misbehaving. Being a man also helps; my sense is that my female colleagues face this problem more often than my male colleagues. The best response, I think, is to try to nip the problem in the bud by calling the students aside after class and telling them I find their behavior disruptive and distracting and I want them to stop. I must confess, however, that the couple of times I faced the problem I didn't talk to the students, seeking to avoid confrontation. In one class, my distress soured the tone as the semester went on. The irony was that when one of the culprits, a very good student it turned out, came to my office to talk to me late in the semester and I mentioned that the constant talking had bothered me, he was mortified. I should have said something early on.

The overall tone of a class is also affected by how the professor deals with politics. I am politically engaged and have strong feelings on a wide range partisan political issues. I am more a pragmatist than an ideologue these days, but my politics are definitely left of center, particularly since the center has moved so far to the right. Overtly political issues come up most often in my Federal Courts class. In area after area, the Supreme Court has erected myriad barriers that deny litigants any effective relief for violation of their constitutional and statutory rights. I don't hide my views, but I always bring out the arguments on the other side, either in the opinions of the justices or by

asking the class, “What’s the argument on the other side?” I don’t feel a need to be personally neutral. These are not small children whose minds I’m going to warp by taking a partisan position. I do want the students to know, however, that they are entitled to hold and express views contrary to mine.

In Federal Courts I generally find it more interesting to put the overtly political aspects of Supreme Court decisions to one side and focus instead on the inconsistent or incoherent aspects of the Justices’ opinions. Reaching a desired result often entails ignoring or distorting past precedent, relying on faulty logic, ignoring reality, or saying things that just don’t make any sense. I try to be even-handed in my criticism of these practices, whether the opinion was written by a conservative or a liberal justice. Often decisions have elements that do—or should—upset people on both sides of the political spectrum. *Boyle v. United Technologies*¹⁵ is one of my favorite examples of this phenomenon. Justice Scalia wrote the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, O’Connor, and Kennedy. David Boyle, a marine helicopter pilot, drowned when his helicopter crashed in the Atlantic Ocean during a training exercise. His father brought a diversity action in federal district court against Sikorsky Helicopter, the manufacturer of the aircraft, asserting two claims under Virginia tort law. Mr. Boyle won a substantial verdict in the trial court, but the

¹⁵ 487 U.S. 500 (1988).

Fourth Circuit reversed. As to one claim, the Circuit held Mr. Boyle had not satisfied one of his burdens under Virginia law; as to the other claim, the court applied a new federal common law defense for military contractors. The elements of the defense are relatively easy to satisfy, and the court held Sikorsky had satisfied them. The Supreme Court ratified the creation of the new defense and affirmed. A clearer example of judicial activism is hard to find, and it is an activism that offends both separation of powers and federalism principles. Congress, rather than the federal courts, usually legislates federal right and defenses, and, under the *Erie* doctrine, state law generally governs tort claims and defenses. To make matters worse, Congress had on six separate occasions declined to enact legislation creating a special defense for military contractors.¹⁶ Liberals, who have tended to favor judicial activism when they liked the rights and duties being created, are brought up short by this decision. Here judicial activism is being used to leave Mr. Boyle without any remedy for the death of his son due to Sikorsky's shoddy helicopter design. Conservatives face a similar dilemma. While they tend to favor restriction of tort remedies and fear any decisions that might interfere with the military, these ends are accomplished in Boyle by trampling on separation of powers and federalism principles conservatives purport to hold dear.

¹⁶ See *id.* at 515 n. 1 (Brennan, J., dissenting)(listing legislation that Congress has refused to pass for government contractors).

D. RESPECTING THE STUDENTS

On class evaluation forms, my students almost universally say I am very respectful of them. I think that's true. I never say that in so many words, of course. So how do I convey that impression? On reflection, I think it happens in a number of ways. Perhaps most directly, I try to be pleasant and polite. When students talk to me, I listen. I make eye contact. I try to be responsive. I don't make fun of them when they give wrong answers or make strange comments. I don't act bored or detached or as though I would rather be someplace else. I also think my careful planning and preparation conveys respect. My evaluation forms show that students understand that I am well-prepared and organized. I'm not wasting their time. Every class they are challenged to participate, to engage, and they are given important insights into the assigned material. The implicit message is that they are worth the effort.

Along the same line, I always dress up for class. I always wear a coat and tie. It is only in recent times that I have let myself dress down from a suit to a sports jacket and slacks. I was 32 years old my first year of teaching. My first class was 120 night students, almost all of whom were older than me. I dressed up as a defensive measure. I thought that I better look like a lawyer. As the years went by I didn't need the suit anymore, but I kept wearing it anyway, to signal that the class is important. Teaching is what I do. It is important to me. The material is important; the students are important.

I have high expectations of the students, and I think that implicitly signals respect. High expectations imply the students are smart enough to perform at a high level. Some of the material is very difficult. I expect them to read carefully. I ask hard questions. The group has got to come up with the answer. I think high expectations are particularly important at New York Law School or at any school that is not at the top in the U.S. News survey. Many of our students are insecure and have a lot of self doubts. They didn't get straight "A" grades in college. Their LSATs put them in the middle of the pack. I imagine many students say to themselves, "Here I am at New York Law School. Is this place any good? Am I smart enough to be a lawyer?" I want the students to understand and to believe that this is a real law school class. It's run the way a law school class is supposed to be run. They are reading the same textbook that students are reading at Harvard and NYU. I'm asking the same questions that are being asked at those schools, and I expect NYLS students to answer them. The implicit, but clear, message is that I respect them.



IV. EXAMS

My exams are a mix of objective (multiple choice and true false) questions and essay questions. In grading the essays, I use a number system. I put numbers in the margin as I read, "1s" for statement of legal rules,

“2s” and “3s” for points of analysis. When I reach the end of the answer, I total the numbers. I use this system for two reasons. First, it is difficult to be consistent over a period of weeks grading 200 bluebooks. My mood changes; I get worn down. I can always tell an “A” from a “C”, but can I reliably distinguish between a “B-” and a “C+” on a read through? While using numbers hardly makes the grading objective, I do think a number system makes grading more consistent. Second, having numbers in the margins suggests to students reviewing their exams that I have read the exams carefully. I remember as a student being suspicious when a professor wrote “C+” at the top of the exam and there was not a mark on it. For the same reason, I also try to scribble a few comments or questions on the weaker exams. When students come to review their exams, I talk with them about my general impressions based on the numbers and the comments, and I send them away with a copy of the essay question, their bluebook, and a copy of an “A” or “A+” answer. I direct them to reread the question, read their answer, read the “A+” and compare and contrast the two answers carefully. Most of the students see and understand the differences between their paper and the “A+.” In my essays I am looking for even-handed and thorough analysis. On the one hand, on the other hand, and in great detail. Weak exams don’t argue from both sides and are conclusory. I doubt that comparing their exam with an “A+” actually teaches the weaker students how to do

even-handed, thorough analysis. But I think most students understand the differences in the paper, which makes the weaker students more content with their lower grade.



V. BEING “IN THE FLOW”

Being “in the flow” while I teach has several distinct characteristics. I am totally focused on the class and am not conscious of my self. Time passes differently than it passes ordinarily. I feel very strong. I feel creative. When a class is going particularly well, I feel a deep sense of satisfaction.

In my daily life, I am not particularly good at focusing or concentrating on a single subject or task. I function; I can plant my tomatoes or write this paragraph. But my thoughts tend to jump around, from one subject to another. I’ve never been good at meditation. I can’t clear my mind of all thoughts or concentrate on one single object for more than ten or fifteen seconds. When I teach, by contrast, I concentrate solely on the subject we are discussing and on the interaction with the students. My mind does not jump around to the myriad other matters that crowd my mind normally. I don’t watch myself teach. I just do it. In that sense I am not self-conscious when I teach. As Mihaly Csikszentmihalyi puts it:

[L]oss of self-consciousness does not involve loss of self, and certainly not a loss of consciousness,

but rather, only a loss of consciousness of the self. What slips below the threshold of awareness is the concept of self, the information we use to represent to ourselves who we are. And being able to forget temporarily who we are seems to be very enjoyable. When not preoccupied with ourselves, we actually have a chance to expand the concept of who we are.¹⁷

Time passes differently than it does ordinarily. It goes by very fast. I'm not unaware of time when I teach. My classrooms have a large, easily readable clock on the wall. I need to be aware how much time I am spending on a topic so I don't fall behind. But I am always a bit surprised when I realize 30 or 40 minutes have gone by in what seems like no time at all.

I feel strong when I teach. I am neither bored nor anxious. I feel secure; not threatened. My classes have clear goals. Once the semester gets going, the ground rules are clear. I am able to meet the challenges I will face in the class, and as a group, the students are able to meet the challenges they face. In my daily life I feel strong sometimes, weak other times. Like everyone I have my insecurities and vulnerabilities. But in class, I feel strong.

I often feel creative in class. I believe this is possible because class is interactive. Even though I am teaching a case or topic that I have taught many times, the student answers to my questions are different each

¹⁷ Csikszentmihalyi, *supra* n. 1, at 64.

time. Exactly what back-up questions are appropriate depends on how the students have responded to the main question. I also do quite a lot of spontaneous Q&A, either in response to student questions or to try to drive points home when it is clear the class does not fully understand the material. These new exchanges with students emulate the Q&A in the script, but because they are spontaneous, I am creating as I go.

I have a sense of well-being when I teach. I believe what I am doing has real worth. I'm the center of attention. I can tell that the students appreciate my teaching, which of course makes me feel good. Who doesn't like to be liked? I feel a deep sense of satisfaction.



APPENDIX

CIVIL PROCEDURE

CLASS # 5

INTRODUCTION

We have been tracing the doctrinal evolution of jurisdictional basis. In 1945 in *International Shoe Co. v. Washington*, the Supreme Court made some major changes in the relatively rigid *Pennoyer* framework by adopting the so-called minimum contacts test. This test requires that to subject a non-resident individual or corporation to suit, the defendant must have certain minimum contacts with the forum such that the suit does not offend traditional notions of fair play and substantial justice. The new test is qualitative, not quantitative. It does not depend merely upon adding up the contacts in a mechanical way. Rather, it involves weighing and analyzing the nature and quality of the non-resident defendant's relationship with the forum to determine whether it is fair and

reasonable to exercise jurisdiction over the defendant. Shoe also suggests that in applying the test, courts should assess whether the defendant has purposefully conducted activities in forum, thus availing himself of the benefits and protections of the laws of the forum.

Shoe also suggested a series of rough categories to use as a starting point for analysis. If the non-resident is involved in systematic and continuous activity within the forum, and the cause of action arises from that activity, it is almost always reasonable for a court to exercise jurisdiction. On the other hand, if the non-resident commits only an isolated act or conducts only occasional business in the forum, and the cause of action is unrelated to that activity, courts generally should not exercise jurisdiction. In the middle categories—the defendant conducts systematic and continuous activity in the forum but the cause of action is unrelated to that activity, and the defendant conducts sporadic or isolated activity in the forum but the cause of action arises from the activity—courts will sometimes exercise jurisdiction and sometimes not.

Today we begin our discussion of state long-arm statutes. As the brief discussion in the text makes clear, legislatures as well as courts get involved in defining the circumstances in which courts may properly exercise jurisdiction. The United States Supreme Court sets the constitutional limits. The states, through their legislatures and courts, then define the circumstances under which the courts of the state may exercise jurisdiction, within

constitutional limits. The name “long-arm statute” is based on the idea that the statute extends a court’s jurisdiction. The court reaches its long arm out across the country, grabs a defendant, and brings him back to the forum.

In the 1950s and 1960s, many state legislatures enacted long-arm statutes, seeking to take advantage of the expanded personal jurisdiction allowed by *International Shoe*. The original long-arm statutes were an elaboration on one of the *Shoe* categories. The statutes applied in cases where the defendant committed a single act—or only isolated activity—in the forum, but the cause of action arose from that activity. This category is one of the in-between categories where jurisdiction is only sometimes allowed. Legislatures sought to differentiate between the “yes” and “no.” Some legislatures wrote very lengthy statutes that sought to specify all of the different kinds of cases where jurisdiction would be allowed. Other legislatures, wanting to maximize state jurisdiction, simply said jurisdiction should be exercised in any case where it does not exceed federal constitutional limits. A third group of states, like Illinois and New York, took a middle approach. They wrote statutes that gave some general guidance in major categories of cases, such as tort cases and contract cases. *Gray v. American Radiator* is a 1961 case involving the Illinois long-arm statute. It is very helpful in introducing you to the kind of issues that arise under the middle group of long-arm statutes.

What are the facts of Gray?

(Titan Valve manufactured a valve in Ohio. American Radiator incorporated the valve into a water heater in Pennsylvania. In the course of commerce, the water heater was sold in Illinois to Phyllis Gray, where it exploded, injuring her. Ms. Gray sued Titan Valve for damages in the Illinois Circuit Court—a trial court—which dismissed the case for lack of jurisdiction. The trial court also dismissed the crossclaim of American Radiator against Titan, which left American Radiator and “others” as the defendants. American Radiator had filed the crossclaim against Titan seeking indemnification by Titan if it was found liable because Titan had made certain warranties to American Radiator. Plaintiff Gray appealed the dismissal as to Titan. The Illinois Supreme Court said that because a constitutional issue was involved, the plaintiff was correct to appeal directly to the Supreme Court instead of going first to an intermediate appellate court.)

EXTRA:

- Who were the parties to the lawsuit? Where was each located?*
- Where did the valve start out? How did it get to Illinois?*
- What was American Radiator’s position in all of this?*

—*What does American Radiator mean when it claims it should be indemnified by Titan?* [Note: Put states and parties on board:

Gray—IL Titan—OH American Radiator—PA
and put an arrow from OH to PA and from PA to IL]

The plaintiff is suing under the Illinois long-arm statute.

What is the key language of the statute that the plaintiff says authorizes jurisdiction?

(Section 17(b)(1) of the statute says that a nonresident who, either in person or through an agent, commits a tortious act within the State submits to jurisdiction.)

What does the Court identify as the issues in the case?

(Page 83, bottom: “The questions in this case are (1) whether a tortious act was committed here, within the meaning of the statute, despite the fact that Titan corporation has no agent in Illinois; and (2) whether the statute, if so construed, violates due process.”)

What does the defendant contend as to issue No. 1?

(1) the wrong occurred in the place of manufacture, which is Ohio. Only the consequences took place in Illinois; and (2) “tortious act” refers only to the act or conduct, separate and apart from any consequences.

EXTRA:

—*How does Titan interpret the phrase “tortious act?”*

—*Where did the tort occur according to Titan? Why?*

What does the court hold on issue No. 1? Why?

(The tortious act took place in Illinois (1) because the consequences occurred here; namely, the water heater exploded here. Court says on page 84, “To be tortious an act must cause injury.” Thus, without the injury, no tortious act. (2) the statute of limitations runs from the time the injury occurs, from which we can infer that the tort occurs at the time of injury.)

EXTRA:

—*Where did the tort or tortious act occur, according to the court?*

—*How do we know the tort occurred in Illinois?*

—*Why is the court talking about the statute of limitations?*

—*What is a statute of limitations? (A statute that specifies how long a person has to sue.)*

—*How is the statute of limitations relevant to when the tort occurred? (Statute runs from when the injury occurs, not from the time of negligent manufacture. From this the court infers the tort occurs at the time of injury.)*

What is the defendant’s contention as to issue No. 2?

How or why would holding Titan subject to jurisdiction under the Illinois long-arm statute violate due process?

(Basically, Titan says it lacks sufficient contacts with Illinois to make assertion of jurisdiction over it

reasonable under the *Shoe* test. Titan says its only contact with Illinois is that its valve happened to end up in Illinois after passing through Pennsylvania. There is no proof that Titan has ever done any other business in Illinois, directly or indirectly.)

EXTRA:

- What exactly is the extent of Titan’s contact with Illinois, according to the proof submitted in this case?*
- Assume you are the lawyer for Titan: How would you use International Shoe to argue for dismissal?*

What is the court’s response to this argument?

(No due process violation).

Why not?

The court says, middle page 85:

We do not think, however, that doing a given volume of business is the only way in which a nonresident can form the required connection with this State. Since the *International Shoe* case was decided the requirements for jurisdiction have been further relaxed, so that at the present time it is sufficient if the act or transaction itself has a substantial connection with the State of the forum.

EXTRA:

- What does the court say has happened to the law governing jurisdiction since Shoe was decided?*

So, the court concludes that we have a tortious act within the state within the meaning of the state long-arm statute, and that exercising jurisdiction on the facts of this case does not violate constitutional standards.

Now, you will notice that the court took about two pages to conduct this analysis and decide that jurisdiction exists. But the opinion continues for another two-and-a-half pages. The court has decided the case. Why does it continue to write? Why doesn't the opinion just end? Sometimes, of course, opinions go on and on because judges are long-winded. It is not as though there is an official court editor that comes into chambers and says "Judge, this is too long. Shorten it." But I think something else is going on here, that there are other reasons why the court keeps on going, and I would like to explore those reasons now.

The court turns to precedent, mentioning several cases, including its own prior case, *Nelson v. Miller*. I want to examine *Nelson* now, and see if it is really on point.

What are the facts of Nelson?

(Defendant, a Wisconsin resident, sold appliances. In the course of delivering a stove in Illinois, an employee of the defendant was involved in an accident with the plaintiff and negligently caused the plaintiff injury.)

How are those facts different from the Gray facts?

(In *Gray*, no agent or employee of Titan delivered the stove into Illinois. In *Gray*, the negligent act occurred outside Illinois, and only the consequences, the injury,

occurred in Illinois. In Nelson, the negligent act and the injury both occurred in Illinois. The whole tort occurred in Illinois, lock, stock, and barrel.)

EXTRA:

Focus on the disagreement between the parties in *Gray* as to where the tortious act occurred.

—*Could the defendant in Nelson make the same argument that the defendant made in Gray about the tortious act occurring outside Illinois?*

—*Why not?*

Which case, Nelson or Gray, involves greater contact between the defendant and Illinois?

(*Nelson*, clearly, because the defendant's agent came into the state and while here did the negligent act that hurt the plaintiff. In *Gray*, no agent of Titan came into the state. Titan did whatever it did wrong in Ohio, and then sent the valve off to Pennsylvania.)

In which case, Nelson or Gray, did the defendant do more to purposely avail itself of the benefits and protections of the laws of Illinois?

(In *Nelson*, clearly. The defendant knowingly and purposely sent his agent into Illinois with a stove. In *Gray*, Titan only sent a valve to Pennsylvania, maybe knowing its valve might end up in Illinois or not.)

EXTRA:

—*Focus on the word "purposely."*

NOTE: The court also cites *Smyth v. Twin State Improvement Corp.*, a Vermont case we discussed earlier. As a precedent, *Smyth* poses the same problems as *Nelson*. In *Smyth*, remember, plaintiff, who lived in Vermont, sued a nonresident roofer a defective roofing job on his home in Vermont. Thus, in *Smyth*, as in *Nelson*, both the negligent act and the consequences occurred in the forum.

So, we have an interesting situation here. The court is relying on precedents that are clearly distinguishable from the case before it. And the court does not explicitly acknowledge the differences between *Nelson* and *Smyth*, on the one hand, and *Gray* on the other. Nonetheless, I think the court actually does see the differences and recognizes that there are a lot more contacts in *Nelson* and *Smyth* than in *Gray*, and I think the court is concerned about the differences. Why do I think that? Well, let me draw your attention to the top of page 87.

What does the court do in the first paragraph on page 87?

(The court presumes that a lot of Titan valves end up in Illinois, and from that the court concludes Titan enjoys the benefits of the Illinois market. It also presumes Titan knows that some of its valves put in water heaters in Pennsylvania will end up in Illinois.)

EXTRA:

- What did the record show about the volume of Titan’s business or where appliances containing Titan valves are marketed?* (Nothing)
- So what does the court do about that deficiency in the record, or deficiency in plaintiff’s proof?* (It makes facts up. The court says “It is a reasonable inference that [Titan’s] commercial transactions, like those of other manufacturers, result in substantial use and consumption in this state.”)
- And what does the court then infer from those made up facts?*

NOTE: The normal rule is that an appellate court is restricted in deciding an appeal to the facts that appear in the record of the case that it receives from the lower court. A party can’t come to the argument before the Illinois Supreme Court and say, “Judges, I’m sorry, but I have some additional evidence I forgot to introduce in the trial court and I would like to introduce it now.” And appellate judges are surely not supposed to say, “Oh, there are some facts missing that I wish were in the record so I’ll just make them up.” Nonetheless, that is what the court does in the *Gray* case.

The court takes this unusual step, I believe, because it realizes there is a difference between cases where the entire tort, negligent act and consequences, occurs in the forum state, and cases where the negligent act occurs outside the state and only the consequences occur in the forum. Generally, cases where the act

occurs outside and only the injury happens inside will involve many fewer contacts with the forum by the defendant than when both act and consequences occur inside the forum. The court in *Gray* seems comfortable saying jurisdiction exists in “act without, consequences within” cases only when there are some significant additional contacts between the nonresident defendant and the forum. As you will see, later cases and state long-arm statutes pick up on this point and allow jurisdiction in “act without, consequences within” cases only when such additional contacts exist.

The court ends by citing several other factors that make assertion of jurisdiction in Illinois reasonable.

What are those factors?

(Illinois plaintiff suffered the injury; Illinois law will govern the substantive tort issues as a matter of horizontal choice of law; Illinois the most convenient forum since witnesses and other proof likely to be located in Illinois.)





DONALD H. ZEIGLER

Donald H. Zeigler is a Professor of Law at New York Law School. Professor Zeigler has taught Civil Procedure, Evidence, and Federal Courts for thirty years. He is a graduate of Amherst College and Columbia University Law School. He has written extensively about the role of the federal courts and is a coauthor (with Professors Donald L. Doernberg and C. Keith Wingate) of *Federal Courts, Federalism, and Separation of Powers* (Thomson/West, 4th edition 2008).