

REFLECTIONS ON TWENTY YEARS OF LAW TEACHING

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On April 16, 2008, the author received the UCLA School of Law's Rutter Award for Excellence in Teaching. This Essay consists of a revised and extended version of the remarks he gave on that occasion. In it, he addresses both his progression from frustrated Socratic teacher to happy lecturer and his aspirations for incorporating new technologies into his teaching. He also reflects on the subject of his teaching—the American corporation—and argues that being a business lawyer is a very real form of public interest lawyering.

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INTRODUCTION

As I stand before you today, I have very nearly finished my twentieth year in legal education. With any luck, I am roughly at the midpoint of my career, or maybe the five-eighths mark. So I would like to take advantage of your good nature to look back over those twenty years and then to look forward to what I hope will be another twenty. Specifically I would like to chat with you both about the pedagogical choices I have made—and will have to make in the future—and also the subject matter to which I have devoted my professional life.

^{*} William D. Warren Professor, UCLA School of Law. I thank Dean Schill for his support and his generous introduction at the award ceremony. I also thank the Rutter family, not only for this award, but also for their years of dedicated support of legal education. When I looked at the roster of my colleagues who have received this award in the past, I was deeply honored to have been inducted into their number. So I thank the selection committee and my students—both current and past—whose very generous evaluations presumably helped me win this award. Finally, I thank my wife Helen, who has been my staunchest supporter throughout all these years.

I. KINGSFIELD I AM NOT

When I joined the Illinois University College of Law faculty twenty years ago, I began a long struggle with the problem of pedagogy. Like many newly minted law professors of a certain age, I thought Professor Charles Kingsfield¹ was the standard to which I had to aspire. But Kingsfield never had to teach securities regulation at three o'clock on a Friday afternoon to a class consisting of third-year students in their last semester of law school.

Suffice it to say that it was not a success. Perhaps I lacked a certain gravitas or was just too cherubic for my own good. That I am a fairly laid-back guy, informed with *laissez-faire* sensibilities, probably did not help.

I began reflecting upon my own law school experience. As I pondered the various teachers I had in law school, it occurred to me that there were only two whose style had been truly Kingsfield-like. One was my contracts professor, Bob Scott,² whose command of the classroom was amazing. He could hide the ball and then, like a great magician, pull it out of your ear. Interestingly, however, in the courses I took from Professor Scott in my second and third years of law school, he did much more talking than he had in first-year contracts.

The other Kingsfield-like teacher I had at the University of Virginia School of Law was my torts professor, who should probably remain nameless. His idea of snappy Socratic dialogue was to respond to every student's statement with "so what?" or "who cares?" Imagine Socrates with Tourette syndrome. The only

1. I suppose it is inevitable that, as time passes, the iconic figures of a teacher's youth fade until they become for later generations of students but vaguely remembered shadows. Hence, at my editors' request, I drop this footnote to recall to your memory Professor Charles W. Kingsfield, once the most famous law professor in fiction. Kingsfield is a central figure of John Jay Osborn, Jr.'s novel, *THE PAPER CHASE* (1971). Kingsfield was brilliantly portrayed by John Houseman in the film version of the story. See generally Wikipedia, Professor Charles Kingsfield, http://en.wikipedia.org/wiki/Professor_Charles_Kingsfield (last visited Aug. 24, 2008).

My generation of law students lived in terror that some professor would say to us, as Kingsfield said to point-of-view character James Hart, "Mister Hart, here is a dime. Take it, call your mother, and tell her there is serious doubt about you ever becoming a lawyer." IMDb, Memorable Quotes for *The Paper Chase*, <http://www.imdb.com/title/tt0070509/quotes> (last visited Aug. 24, 2008).

If I could embed a YouTube video at this point, I would offer up the (once) famous scene of Hart's first day in Kingsfield's contracts class. YouTube, *The Paper Chase*, <http://www.youtube.com/watch?v=-qHEBABE6PU> (last visited Aug. 24, 2008).

2. Professor Robert E. Scott is a nationally renowned and oft-cited teacher and scholar in the fields of contracts, commercial law, and bankruptcy. . . . In 1974, Dr. Scott joined the Virginia School of Law faculty, where he served from 1974 to 2006. . . . Professor Scott became a full-time professor at Columbia Law School in July 2006, leaving his job as Dean of the University of Virginia Law School, after accepting appointment as the Alfred McCormack Professor of Law and Director of the Center on Contract and Economic Organization. Wikipedia, Robert E. Scott, http://en.wikipedia.org/wiki/Robert_E._Scott (last visited Aug. 24, 2008).

thing I learned in that class was that the Coase Theorem answers any question, which admittedly has served me well.

In contrast, most of my professors used what I have come to call the soft Socratic style. Instead of cold calling students, these professors used panels of students who were on call for a few days per semester. Instead of grilling a specific student at length, they would toss each student a few questions and then move on to the next. Students were never told that they had given a wrong answer, let alone told to go and call their mothers as they would never become lawyers. At most, the professor would gently guide a student toward the proper conclusion.

In my early years at Illinois, I frequently sat in on classes taught by colleagues who were said to be great Socratic teachers. Oddly, however, in most of those classes, Socrates did almost all of the talking. Just as at Virginia, the dominant pedagogic style was soft Socratic. In preparing this Essay, I went back and dug out an evaluation I wrote of one of my Illinois colleagues:

His style is very soft Socratic. He tosses an occasional question out there and waits for answers. If nobody responds, he answers the question himself.

He started today's session by picking up the thread of a discussion from yesterday. After reviewing the material by lecture, he started the new material. As before, he relied on volunteers. He got some participation, but it wasn't particularly interactive. Students made a comment, he made a comment, and went on.

In fairness, in those days one could have said much the same thing about my classroom style.

You see, I knew I was not then and never would be Kingsfield-like, but I was still trapped in the mindset that no self-respecting law professor could depart from the Socratic Method. So I too became a soft Socratic teacher. But doubts kept intruding. Were the students who were not on call prepared? What did they get out of listening to a classmate answer a question without having to struggle with it, since I typically moved on to another student or lectured if the student struggled?

It is [said] that [the Socratic method] teaches students how to "think like lawyers." This claim would, of course, require some evidence. For example, in most countries, including other common law countries, law is not taught via anything like the Socratic method. Yet presumptively their lawyers think like, well, lawyers. So somehow they learned. "Thinking like a lawyer" is a matter of learning how to reason and argue, in some ways that lawyers share with everyone else, and in other ways that are peculiar to lawyers (e.g., arguments from authority are not fallacious in

the law). But why think that one learns how to do this by being grilled Socratically as opposed to reading examples of lawyerly thinking and hearing lectures explaining lawyerly arguments?³

I eventually came to two conclusions. First, if students could not think like lawyers by the time they got to me in their second or third year of law school, there was very little I could do to help them except suggest another line of work.

Second, the Socratic Method does not really teach one to think like a lawyer. At best, it teaches one to think like a litigator.

Consider a typical law student who accepts a [transactional] job at a large firm. She has spent perhaps ninety-five percent of her time in law school reading and discussing cases and law review articles. Once in practice, she will go days or weeks at a time without picking up a case or a law review article. Instead, her days will be filled with drafting, reviewing, and marking up transactional documents, negotiating language with opposing counsel, participating in conference calls, and composing memos, emails, and letters to colleagues and clients.⁴

Thinking like a lawyer, as Kingsfield and his ilk would have our graduate do, is not very conducive to success in that environment.

In his book, *The Terrible Truth About Lawyers*, Mark McCormack, founder of the International Management Group (IMG), a major sports and entertainment agency, wrote that “it’s the lawyers who: (1) gum up the works; (2) get people mad at each other; (3) make business procedures more expensive than they need to be; and (4) now and then deep-six what had seemed like a perfectly workable arrangement.”⁵ McCormack further observed that, “when lawyers try to horn in on the business aspects of a deal, the practical result is usually confusion and wasted time.”⁶ He concluded: “[T]he best way to deal with lawyers is not to deal with them at all.”⁷

All of which is why in the classroom I emphasize not only doctrine but also economics and business. Transactional lawyers must understand the business, financial, and economic aspects of deals so as to draft workable contracts and disclosure documents, conduct due diligence, or counsel clients on issues that require business savvy as well as knowing the law.

3. Posting of Brian Leiter to Leiter Reports, The “Socratic Method”: The Scandal of American Legal Education, http://leiterreports.typepad.com/blog/2003/10/the_socratic_me.html (Oct. 20, 2003, 12:15 EST).

4. Victor Fleischer, *Deals: Bringing Corporate Transactions Into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 480.

5. MARK H. MCCORMACK, *THE TERRIBLE TRUTH ABOUT LAWYERS* 15 (1987).

6. *Id.* at 87.

7. *Id.* at 15.

I want my students to understand that successful transactional lawyers build their practice by adding value to their clients' transactions. Instead of thinking like Kingsfield, I want them to learn where the value in a given transaction comes from and how they might add even more value to the deal.

I had always lectured some. I defy even Professor Scott to teach the Capital Asset Pricing Model Socratically. As my teaching became more oriented toward transactions, business and economics became more important, and identifying sources of value in the deals underlying cases became the key task, while grilling law students seemed less and less effective.

Gradually, bit by bit, I freed myself from the trappings of the soft Socratic Method. Away with panels! Away with volunteers! Away with questions! Up with PowerPoint!

Once I went through the twelve-step program and became what Brian Leiter calls a "recovering Socratic teacher,"⁸ I noticed that I had some interesting company. Leiter, for example, has written that: "[T]here is no evidence—as in 'none'—that the Socratic Method is an effective teaching tool. And there is much evidence that it's a recipe for total confusion."⁹

In her 1997 book, *Becoming Gentlemen: Women, Law School, and Institutional Change*, Harvard professor Lani Guinier blasted the Socratic Method for forcing female students to adopt a style that many found alien to them. Former Secretary of Labor Robert Reich . . . wrote in a 1998 essay that the method had "morphed beyond recognition" into an exercise in intellectual arrogance in which the professor always had the right answer.¹⁰

Even so, at first, lecturing was my dirty little secret. I felt like a deacon sneaking out of town to get a snootful. What if my colleagues found out?

Gradually, however, word leaked out . . . and nothing bad happened. My classes were full to the seams. Deans patted me on the back for getting good evaluations. Promotions and raises kept coming.

And now the Rutter Award. I would like to think that this award in some way validates the evolutionary path my teaching has followed. I would also like to think that it might encourage some of my younger colleagues who are dissatisfied with the Socratic Method to consider alternatives.

8. Posting of Brian Leiter, *supra* note 3.

9. *Id.*

10. Stephanie B. Goldberg, *Beyond the Socratic Method*, STUDENT LAW., Oct. 2007, available at <http://www.abanet.org/lsl/studentlawyer/oct07/goldberg.shtml>; see also LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 28 (1997); Robert Reich, *Confusion About the Socratic Method: Socratic Paradoxes and Contemporary Invocations of Socrates*, 1998 PHIL. EDUC. SOC'Y Y.B., available at <http://www.ed.uiuc.edu/eps/pes-yearbook/1998/reich.html>.

II. WHERE NEXT?

So much for where I have come from as a law teacher. Where next?

As my long-suffering wife knows, I am a bit of a techno geek. I spend an enormous amount of time on the computer, some of which is work, but there is also blogging, shopping, and all-around surfing. I dote on my iPhone, which I regularly use to text the younger members of our family. I am addicted to my iPod. The question that intrigues me thus is how to incorporate all of this into my teaching.

My latest musings on this issue were prompted by a story in *The Chicago Daily Law Bulletin*, which reported that University of Chicago Law School Dean Saul Levmore has “removed Internet access in most of [Chicago’s] classrooms.”¹¹ The story continued:

When Levmore proposed to the faculty in early March that the school might cut off Internet access in most classrooms, some faculty responded that computers should be banned, he said.

Some professors believe that students who take notes on laptops during lectures interfere with their own learning.

“Back in the day when we took notes by hand,” Levmore recalled, “some people took fewer notes and learned more.”

...

The heart of his decision to prevent Web surfing in class, he said, is that the students “are going to go out to law firms and other settings where they’re going to miss these years where they had opportunities for human interaction and contemplating ideas.

“And that’s partly what the classroom is for. They don’t realize the value of what they’re being distracted from. That’s really what I believe in most.”¹²

I hate to break it to Dean Levmore (and my colleagues here at UCLA School of Law who have adopted a similar policy), but texting, Web surfing, or what have you is just the up-to-date version of an age-old issue. Back “in the day” when I was one of Levmore’s students at Virginia, there were times when we did not pay much attention in class. And while we did not have laptop computers, we had lots of other ways to distract and amuse ourselves. Solving crosswords. Playing turkey bingo. Daydreaming. Passing notes. Doodling. Writing letters. Editing law review articles. Reading for another class. Hiding a comic book inside our case books.

11. Jerry Crimmins, *U of C Law School Takes Classrooms Out of the Internet Age*, CHIC. DAILY L. BULL., Apr. 10, 2008, available at <http://www.law.uchicago.edu/news/cdllb-reclaim-classrooms/index.html>.

12. *Id.*

So I very much doubt that my students pay any less attention or are any more distracted than I was back “in the day.”

Having said that, however, the current generation of students is different than mine in one important respect. I have taught Gen X and Gen Y, and now I am starting to teach Millennials. For them, multitasking is a way of life. Staying connected 24/7 via text messaging, instant messaging, and email is perceived as an inherent right.

In response to the Chicago story, my friend and fellow blogger Gordon Smith observed that:

Yesterday my son brought home his high school’s newspaper, and the front page featured tips for [cell phone] texting during class. Under the table. Behind the textbook. Exactly what you would expect. Apparently, the only teachers in the universe who would be surprised at this subterfuge all happened to end up at the University of Chicago Law School! What will they do when they discover law students engaged in precisely this behavior? (Ban mobile phones!) Or, worse yet, when they discover that students have equipped their laptops with mobile broadband? (That’s it, we are banning all electronic devices!)¹³

Smith concludes, I think correctly, that “the problems accompanying laptops in the classroom are behavioral, not technological.”¹⁴ (Candid admission: I use my iPhone in precisely these ways during faculty meetings.)

Chicago is apparently trying to force legal education back into the Kingsfield model. A smarter solution would be trying to figure out how to leverage these behaviors. After all, our students are not going to stop multitasking when they get out in the workforce. Indeed, the *Economist* has a special report on the increasing extent to which Millennials are becoming nomads:

Urban nomads have started appearing only in the past few years. Like their antecedents in the desert, they are defined not by what they carry but by what they leave behind, knowing that the environment will provide it. Thus, Bedouins do not carry their own water, because they know where the oases are. Modern nomads carry almost no paper because they access their documents on their laptop computers, mobile phones or online. Increasingly, they don’t even bring laptops. Many engineers at Google, the leading internet company and a magnet for nomads, travel with only a BlackBerry, iPhone or other “smart phone”. If ever the need arises for a large keyboard and some earnest typing,

13. Posting of Gordon Smith to The Conglomerate, <http://www.theconglomerate.org/2008/04/internet-in-the.html> (Apr. 12, 2008) (emphasis omitted).

14. *Id.*

they sit down in front of the nearest available computer anywhere in the world, open its web browser and access all their documents online.¹⁵

Elsewhere in the report we learn that:

James Ware, a co-founder of the Work Design Collaborative, a small think-tank, says that nomadic work styles are fast becoming the norm for “knowledge workers”. His research shows that in America such people spend less than a third of their working time in traditional corporate offices, about a third in their home offices and the remaining third working from “third places” such as cafés, public libraries or parks. And it is not only the young and digitally savvy. At 64, Mr. Ware considers himself a nomad, and accesses the files on his home computer from wherever he happens to be.¹⁶

Law firms doubtless will resist these trends, as they are incredibly slow in adopting both new technologies and new approaches to human resources. Just as Chicago is trying to perpetuate the Kingsfieldian style of legal education, my impression is that big law firms likewise are trying to perpetuate the 1980s Wall Street model of lawyering. Just as Canute was unable to keep the sea from rolling in, however, these institutions will find that the tides keep coming: They will need to adapt or die.

I do not know yet how to leverage the technologies that facilitate urban nomadism to improve law school teaching. But it is an issue about which I have been thinking a great deal. In small classes, I have experimented with using group blogs instead of traditional research papers. I am thinking about having students build wikis. I make PowerPoint slides and audio recordings from every class available on a course website that my students can access from anywhere. I am looking at using personal response hardware to make PowerPoint-based lectures more interactive. Indeed, since many of my classes consist of 100–130 students, I think the latter offers a way to involve more students simultaneously than is possible with the traditional oral Socratic Method.

My hope is that I can find ways to use technology to become an even better teacher. At the very least, however, I have a built-in rationale the next time I have to persuade my wife Helen that I need Steve Jobs’ latest-and-greatest techno toy.

15. *Nomads at Last*, ECONOMIST, Apr. 10, 2008, available at http://www.economist.com/specialreports/displayStory.cfm?STORY_ID=10950394.

16. *Labour Movement*, ECONOMIST, Apr. 10, 2008, available at http://www.economist.com/specialreports/displaystory.cfm?STORY_ID=10950378.

III. THE CORPORATION

I now would like to turn from how I teach to what I teach.

Legal education pervasively sends law students the message that corporate lawyering is a less moral and a less socially desirable career path than so-called “public interest” lawyering.¹⁷ The corporate world is viewed as essentially corrupting and alienating, while true self-actualization is possible only in a Legal Aid office.

Our students get these messages not only in law school, of course, but also from the media. Films like *A Civil Action*¹⁸ or *Erin Brockovich*¹⁹ illustrate the general ill repute in which corporations—and corporate lawyers—are held, at least in Hollywood.

In my teaching, I have chosen to unabashedly embrace a competing view. I tell my students about Nicholas Murray Butler, president of Columbia University and winner of the Nobel Peace Prize, who said: “[T]he limited liability corporation is the greatest single discovery of modern times Even steam and electricity are far less important than the limited liability corporation”²⁰

I tell them about journalists John Micklethwait and Adrian Wooldridge, whose magnificent history, *The Company*, contends that the corporation is “the basis of the prosperity of the West and the best hope for the future of the rest of the world.”²¹

There is no doubt that the corporation is now the key economic institution in developed nations. In the United States, for example, the corporation is the predominant form of business organization by every measure except sheer number of firms.²² According to recent census data, although corporations account for only about one-fifth of all business organizations, they bring in almost 90 percent of all business receipts.²³

The corporation also has proven to be a powerful engine for focusing the efforts of individuals to maintain economic liberty. Because tyranny is far more

17. See Posting of Dave Hoffman to Concurring Opinions, http://www.concurringopinions.com/archives/2008/04/bainbridge_on_c.html (Apr. 9, 2008, 12:03 EST).

18. *A CIVIL ACTION* (Touchstone Pictures 1999).

19. *ERIN BROCKOVICH* (Jersey Films 2000).

20. William Meade Fletcher, 1 *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* 43 (1917) (quoting Nicholas Murray Butler, President, Columbia Univ., Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York (Nov. 16, 1911)).

21. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* (2003).

22. STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 1–2 (2002).

23. *Id.*

likely to come from the public sector than the private,²⁴ those who for selfish reasons strive to maintain both a democratic capitalist society and, of particular relevance to the present argument, a substantial sphere of economic liberty therein, serve the public interest. Put another way, private property and freedom of contract were “indispensable if private business corporations were to come into existence.”²⁵ In turn, by providing centers of power separate from government, corporations give “liberty economic substance over and against the state.”²⁶

Yet, two centuries ago, leading business and economic thinkers—including the great Adam Smith—derided the joint stock company.²⁷ Few businesses were organized as chartered companies. Each company’s charter required a special legislative act.²⁸ In many places, legislatures granted charters only to quasi-public entities, such as railroads and canals. In most, legislatures rarely resisted the temptation to revise or even repeal existing charters arbitrarily. Even in the United States, where the Supreme Court’s famous *Dartmouth College*²⁹ decision gave corporations substantial constitutional protections at a relatively early date, such legislative meddling remained commonplace.³⁰

And so I ask my students: What explains the relatively rapid development in the mid-nineteenth century of a recognizably modern corporation and, in turn, that entity’s emergence as the dominant form of economic organization?

The answer has to do with new technologies—especially the railroad—requiring vast amounts of capital, the advantages such large firms derived from economies of scale, the emergence of limited liability that made it practicable to raise large sums from numerous passive investors, and the rise of professional management.³¹

For the most part, these advantages are the same today. The corporation remains the engine of economic growth, both at the level of giants like Microsoft and garage-based start-ups.

24. See Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, 4 VILL. J. L. & INVESTMENT MGMT. 3, 25 (2002).

25. MICHAEL NOVAK, TOWARD A THEOLOGY OF THE CORPORATION 45 (rev. ed. 1990).

26. *Id.*

27. See, e.g., 5 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 800 (Edwin Cannan ed., Modern Library 1994) (1776) (“The directors of [joint stock] companies, . . . being the managers rather of other people’s money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own.”).

28. See BAINBRIDGE, *supra* note 22, at 39.

29. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

30. See generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 136–37 (3d ed. 2005) (discussing the status of corporations in the ante-bellum period).

31. See BAINBRIDGE, *supra* note 22, at 2 (discussing attributes of the corporation that made it the preeminent organizational form in the U.S. economy).

The rise of the corporate form thus has “improved the living standards of millions of ordinary people, putting the luxuries of the rich within the reach of the man in the street.”³² The rising prosperity made possible by the tremendous new wealth created by industrial corporations was a major factor in destroying arbitrary class distinctions and in enhancing personal and social mobility.³³

And so I put it to my students this way: You want to help make society a better place? You want to eliminate poverty? Become a corporate lawyer. Help businesses grow, so that they can create jobs and provide goods and services that make people’s lives better.

The goal is not just to make my students feel better about themselves. I firmly believe that too many of our students, when they get out in practice, may be more willing to act in ways that are ethically gray—to act as facilitators rather than gatekeepers—if they have been told repeatedly that they have already “sold out.”³⁴ If more legal academics were to celebrate the positive social aspects of corporate practice, perhaps our students would be better gatekeepers once they get out in practice.

I hope that this award has in some small way validated that message.

32. MICKLETHWAIT & WOOLDRIDGE, *supra* note 21, at 77.

33. See NOVAK, *supra* note 25, at 42.

34. Posting of Dave Hoffman to Concurring Opinions, *supra* note 17.