Civil Procedure Parables in the First Year: Applying the Bible to Think Like a Lawyer

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Law students learn the critical reasoning skills necessary to "think like a lawyer"[1] in their first year classes. However, the legal profession is becoming increasingly concerned about a diminished sense of civility among those entering its ranks.[2] Uncivil discovery practices prompted federal rulemaking experiments which ultimately caused Rule 11 to "legislate" presumptively civil behavior through mandatory initial disclosures and requirements to supplement pleadings.[3] In addition, the American Bar Association ("ABA") responded by

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1. In the movie *Paper Chase*, Professor Kingsfield states that students come to law school "with a skullful of mush" and "leave thinking like a lawyer." PAPER CHASE (Twentieth Century Fox 1973); *see also* LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING 31 (1993) (arguing that thinking like a lawyer is dialect or argument in addition to critical analysis); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 125 (1994) ("Thinking like a lawyer means . . . thinking rhetorically within a problem-solving context.").

2. Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994); Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359 (2001); Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117 (2001); W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557 (2001).

3. Browe, *supra* note 2, at 760-61. The more frequent use of Rule 11 as amended in 1983 shows both a cause and an effect of incivility. *Id.* at 760.

amending its Model Code of Professional Responsibility and is still considering further revisions.[4] The ABA's release of the MacCrate Report, which instructed law schools to integrate professionalism throughout the curriculum and to bridge the gap between law school and law practice,[5] illustrates how reform has impacted legal academia.

There is widespread dissatisfaction within academia about the role of professional responsibility in the law school curriculum.[6] Law schools can increase the role of professional responsibility by infusing it into the main substantive courses of the first year.[7] Civil Procedure classes are primary

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4. JAMES E. MOLITERNO, CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS 26 (2000); Kenneth J. Abdo et al., *Ethics*, *in* 2 COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 2001, at 273, 278 (PLI Patents, Copyrights, Trademark, & Literary Prop. Course, Handbook Series No. 648, 2001) (reporting on ABA Ethics 2000 Commission which issued its report at the end of 2000).

5. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT–AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 4-5 (1992) [hereinafter *The MacCrate Report*]; Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLINICAL L. REV. 1 (1997). In 1977, the American Bar Association added Standard 302(a)(iii) requiring each law school to "provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession." A.B.A., APPROVAL OF LAW SCHOOLS § 302(a)(iii), at 7 (1977). This post-Watergate effort to foster ethics in law school has had mixed success. Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 723 (1998). An American Bar Foundation study conducted in the late seventies found that law students were resisting the incorporation of legal ethics in part because the Socratic method was not being used extensively in these courses. *See* Stephen McG. Bundy, *Ethics Education in the First Year: An Experiment*, 58 LAW & CONTEMP. PROBS., Autumn 1995, at 19, 29-30 (discussing Ronald Pipkin's study of legal ethics instruction); Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247. Other studies contend that the problem method is the best choice. Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 412-13 (1998); *see* Stuart C. Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools*, *in* TEACHING PROFESSIONAL RESPONSIBILITY: MATERIALS AND PROCEEDINGS FROM THE NATIONAL CONFERENCE 21, 42-43 (Patrick A. Keenan ed., 1979) (reporting 50% of schools used the Socratic method, 47% of schools used the lecture method, and 62% of schools used the problem approach).

6. *See* Frank J. Macchiarola, *Teaching in Law School: What Are We Doing and What More Has to Be Done?*, 71 U. DET. MERCY L. REV. 531, 538-39 (1994); Deborah L. Rhode, *Ethics By the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

7. DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 5-6 (2d ed. 1998) (counseling pervasive approach to teaching professional responsibility); Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (discussing the clinical approach to legal education); Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 696 (1996) (discussing integration of a Professional Responsibility course with Trial

candidates[8] because they are already considered the most difficult in the typical first-year law school curriculum.[9] In several respects, Civil Procedure introduces the nascent law student to the lawyer's foreign language in contexts which most students have little experience.[10] For Civil Procedure issues, court policy focuses on either judicial economy or procedural fairness, which seems

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Advocacy and Evidence courses); John S. Dzienkowski et al., *Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas*, 58 LAW & CONTEMP. PROBS., Autumn 1995, at 213 (explaining integration of theory and practice into their professional responsibility courses in large classroom settings); Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventive Law into the Law School Curriculum*, 5 PSYCHOL. PUB. POL'Y & L. 1123 (1999) (describing Nova Southeastern University's Lawyering Skills and Values program); Susan P. Koniak & Geoffrey C. Hazard, Jr., *Paying Attention to the Signs*, 58 LAW & CONTEMP. PROBS., Autumn 1995, at 117 (discussing the authors' approach to the pervasive method of teaching professional responsibility in Contracts and Criminal Law); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981) (explaining integration of professional responsibility through clinical education); Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1, 27 (1992) (defining "holistic curricular innovation" as curricular innovation that seeks "to integrate skills, theory and professional responsibility into the traditional doctrinal base"); Edmund B. Spaeth et al., *Teaching Legal Ethics: Exploring the Continuum*, 58 LAW & CONTEMP. PROBS., Autumn 1995, at 153 (using modules to integrate ethics into traditional courses); Dennis Turner, *Infusing Ethical, Moral, and Religious Values into a Law School Curriculum: A Modest Proposal*, 24 U. DAYTON L. REV. 283, 312 (1999).

8. *E.g.*, Richard A. Matasar, *Teaching Ethics in Civil Procedure Courses*, 39 J. LEGAL EDUC. 587 (1989); *Students and Lawyers, Doctrine and Responsibility: A Pedagogical Colloquy*, 43 HASTINGS L.J. 1107 (1992) (describing Maryland's Legal Theory and Practice course).

9. DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE, at iv (4th ed. 2001) ("Although Civil Procedure may be the most difficult course in the first-year curriculum (we have no illusions of making it truly simple), we have done our best to make our book 'user friendly.'"); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH, at v (3d ed. 2000) ("An enduring reality for civil procedure teachers is the fact that many students perceive this to be the most difficult and least comprehensible course in their first-year curriculum.").

10. In this sense, perhaps Civil Procedure is more easily taught using the "Socratic method" than other first-year courses. Judge Posner writes,

> I am led to wonder whether the highly inductive, case-oriented, analogy-saturated "Socratic" method actually teaches legal *reasoning* at all. It familiarizes the student with legal materials, most of them written in the profession's standard style, which exaggerates the uniqueness and power of the analytical methods that lawyers and judges use. It also imbues the student with the style, at the same time training him to exploit the indeterminacies in those materials. To recur to an earlier "analogy," what law school teaches is a language rather than a method of reasoning—and courses in foreign languages do not purport to teach methods of reasoning.

Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 847 (1988) (citation omitted).

foreign when compared with the rights and wrongs of criminal law or torts or the sense of the "deal" in contracts.[11] From a professional responsibility point of view, Civil Procedure may also be the most important of the substantive first year courses because it uniquely centers on the attorneys (and occasionally judges). Thus, students learn influential lessons about permissible or desirable conduct in this course because these messages are the first they receive in "professional school."[12]

At religiously-affiliated law schools, the ethics imperative is even more pronounced. For example, at St. Thomas University, which is sponsored by the Roman Catholic Archdiocese of Miami, the mission statement supports and encourages members of the law school community to explore and acknowledge the significance of Judeo-Christian moral and religious principles related to the rule of law and the legal profession.[13] St. Thomas University fulfills its mission in part by recognizing the relevance of moral and religious precepts to the practical and ethical principles that confront all lawyers.[14] In fact, all Catholic schools have wrestled with the Church's directive to preserve and enhance their Catholic identity.[15]

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11. Possibly, for this reason, some civil procedure casebooks seem to have moved their focus away from the prior policy-oriented approaches. *See* Linda S. Mullenix, *User Friendly Civil Procedure: Pragmatic Proceduralism Slouching Away from Process Theory*, 56 FORDHAM L. REV. 1023 (1988) (book review).

12. Obviously, the increasingly prescriptive limitations imposed on pleadings and discovery by the Federal Rules relate to the ethical obligations and behaviors judges desire to encourage. Lawyers must advise clients of the practical and ethical limitations on the lawyers in litigation. *E.g.*, Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71, 82-83 (1996).

13. ST. THOMAS UNIV. SCH. OF LAW, 2001-2003 CATALOG 12 (2001) [hereinafter ST. THOMAS UNIVERSITY CATALOG], *available at* http://www.stu.edu/lawschool/catalog_2002.pdf; *see* Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-first Century*, 50 J. LEGAL EDUC. 240 (2000) (studying law school mission statements).

14. ST. THOMAS UNIVERSITY CATALOG, *supra* note 13, at 12.

15. *See* Andrew L. Anderson, *Ex Corde Ecclesiae: Obstacle or Opportunity for Catholic Affiliated Law Schools?*, 34 GONZ. L. REV. 103 (1999); James T. Burtchaell, *Out of the Heartburn of the Church*, 25 J.C. & U.L. 653 (1999); John J. Fitzgerald, *Today's Catholic Law Schools in Theory and Practice: Are We Preserving Our Identity?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245 (2001); Christopher Wolfe, *The Ideal of a (Catholic) Law School*, 78 MARQ. L. REV. 487 (1995). The Pope has identified four "essential characteristics" of a Catholic university: Christian inspiration in individuals and the university as a whole, scholarly reflection and research in the light of the Catholic faith, fidelity to the Christian message as revealed by the Catholic Church, and an institutional commitment to the service of others. John Paul II, Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities (Aug. 15, 1990), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.htm (last visited Jan. 20, 2002).

One challenge for a Civil Procedure professor is to cultivate a student's taste for the subject's complexities and the perpetual tension between certainty and flexibility. Furthermore, the professor should help students realize that procedural rules reflect fundamental value judgments and social policies.[16] With this in mind, professors are often frustrated by the application of professorial questioning in the classroom, the so-called "Socratic method," which is traditionally part of the first-year culture. Students initially experience the Socratic method as a "foreign language" rather than an ethical, strategical, and tactical teaching method that will ultimately frame their understanding of the subject.[17]

In ancient literature, a teacher's question frequently served several purposes, but first-year students initially only expect the direct transfer of information and entertainment.[18] Sometimes a professor may elicit a student's correct answer in order to disseminate and highlight information for the entire class.[19] Where this is the principal purpose, there are correct answers and

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16. The better casebooks explicitly state this as an objective. *E.g.*, CRUMP ET AL., *supra* note 9, at iv ("We think that these sections will help the student to think critically about current practice. And there is benefit in looking at proposed improvements as a group. Our experience indicates that this method encourages deeper thought about the purposes of the Rules of Civil Procedure."); RICHARD H. FIELD ET AL., CIVIL PROCEDURE, at v (7th ed. 1997) ("Also wary of letting the new growth obscure the basics, we did not forget the abiding importance of typical litigation in American courts today as a locus of lawmaking and value-articulation as well as of dispute resolution, nor did we abolish among Procedure's missions its supporting role in the law-school curriculum as a source of illumination."); MARCUS ET AL., *supra* note 9, at viii ("But we also try to ensure that the practice materials always force the student to think about the policies underlying the practice and to relate it to the general process themes of the book.").

17. During the first semester, students often find the course to have a "blind man and the elephant" quality—one learns a pleading rule or a practice form without a clear understanding of the overall framework. According to a Hindu fable, several blind men, who each touch a different part of an elephant, argue about what the elephant they have never seen is more like. JOHN GODFREY SAXE, THE BLIND MEN AND THE ELEPHANT: JOHN GODFREY SAXE'S VERSION OF THE FAMOUS INDIAN LEGEND (Whittlesey House 1963) (unpaged); F. C. SILLAR & R. M. MEYLER, ELEPHANTS ANCIENT AND MODERN 139-40 (1968). This phenomenon encourages the student to simply give up, as in the original fable. *See* EDMUND C. BERKELEY, *The Six Blind Men of Nepal*, *in* RIDE THE EAST WIND: PARABLES OF YESTERDAY AND TODAY 116, 116-17 (1973); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1381 n.20 (1999).

18. *See* Jerome H. Neyrey, *Questions, Chreiai, and Challenges to Honor: The Interface of Rhetoric and Culture in Mark's Gospel*, 60 CATH. BIBLICAL Q. 657, 662-64 (1998).

19. Richard G. Fox, *Thoughts on Questioning Students*, *in* TECHNIQUES FOR TEACHING LAW 65, 65 (Gerald F. Hess & Steven Friedland eds., 1999) ("We often question students to get an immediate confirmation that they have received the information we think we have transmitted to them. All we are asking is the message be retransmitted. In this case, the

wrong answers—winners and losers.[20] To the student, however, questions posed for this purpose may imply "a contest, a game, or a combat,"[21] where the professor simply is "hiding the ball."[22] Socrates is an example of a teacher who occasionally asked such questions in order "to give birth to the truth already existing in his partner in dialogue."[23] This so-called "entertainment" can have a related objective: the professorial sparring with a student while playfully employing the "weapon of one's wits."[24] Where entertainment is the principal purpose, however, there is often little learning.[25] Law professors easily defeat their educational mission when they principally seek delight in the classroom by using this "teaching method" because students only feel entertained when they either know the answer or are confident there is no answer.[26]

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student's mind may be no more than a reflector.").

20. Neyrey, *supra* note 18, at 662.

21. *Id.*

22. *See* Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151, 167 (1999) (citing Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1684 (1996)) ("Certain distinctive methods of legal education, according to Schlag, induce students to develop an abiding faith in the substantive existence of law. In particular, the abstruseness of Socratic questioning often leads law students to suspect that their professors are 'hiding the ball'—where the ball metaphorically represents the law."); Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 748 (2000) ("Even within the presentation of the subject matter itself, 'hiding the ball' is an accepted teaching technique in which students are kept purposefully in the dark about substantive information. As one student puts it, the experience of law school 'was like coming into a movie when it was half over.'"); Andrew J. McClurg, *The Ten Commandments of [The First-Year Course of Your Choice], in* TECHNIQUES FOR TEACHING LAW, *supra* note 19, at 29, 31 ("From a student's perspective, the Socratic method might be defined as follows: 'The professor hides the ball and then tries to embarrass students who can't find it.'").

23. *Neyrey*, *supra* note 18, at 660. Socrates mused that the recognition of truth derives from a sort of remembrance in the soul, stating,

> For since all nature is akin, and the soul has learnt everything, there is nothing to hinder a man, remembering one thing only—which men call learning—from himself finding out all else, if he is brave and does not weary in seeking; for seeking and learning is all remembrance.

GREAT DIALOGUES OF PLATO 42 (Eric H. Warmington & Philip G. Rouse eds., W.H.D Rouse trans., New Am. Library 1956).

24. Neyrey, *supra* note 18, at 662-63.

25. *See id.* at 663. The ancient philosopher Plutarch opined, "those who wish to give happiness rather than distress put questions of such sort that the answers are attended not by blame from the audience but by praise, not by hatred and anger but friendliness and good will." *Id.* (citation omitted).

26. *See id.* Plutarch concludes, "Men are glad to be asked what they are able to answer easily, that is, questions about matters in which they have experience; for about what they do not know, either they say nothing or are chagrined as though asked for what they cannot give or they reply with a guess and an uncertain conjecture and so find themselves in a distressing and dangerous situation." *Id.* n.19 (citation omitted).

However, the law school version of the "Socratic method" usually encompasses other uses of the teacher's question,[27] and it is these other types of dialogues that frequently dealt with challenges to the philosophy or authority of the teacher in ancient literature. For example, Socrates himself questioned Sophists[28] in order to expose their fallacies and to shame them.[29] Similarly, Apollonius told a disciple, "[M]y question which I asked you to begin with was a fair one, although you thought that I asked it in order to make fun of you."[30] The law teacher may ask a series of questions and answers to show the absurdity of the student's position. But to the student, scoring points may seem more important than finding the truth. When the student lacks any meaningful opportunity to retreat from a foolish position after reflection, the situation seems particularly unfair.[31] Law teachers may ask questions to score points by ridiculing the answers (at least that is how it may appear from a student's point of view).[32]

Socratic dialogue in the first-year classroom may also involve the converse

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27. *See generally* Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113 (1999) (describing traditionalist and quasi-traditionalist use of the method at Harvard).

28. Francis J. Mootz III, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605, 606 (1998) (book review).

29. Neyrey, *supra* note 18, at 660. For further discussion of the Socratic method's application in legal education, see John O. Cole, *The Socratic Method in Legal Education: Moral Discourse and Accommodation*, 35 MERCER L. REV. 867 (1984); William Epstein, *The Classical Tradition of Dialectics and American Legal Education*, 31 J. LEGAL EDUC. 399 (1981); William C. Heffernan, *Not Socrates, But Protagoras: The Sophistic Basis of Legal Education*, 29 BUFF. L. REV. 399 (1980); Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1 (1951).

30. Neyrey, *supra* note 18, at 660-61 (citation omitted).

31. Fox, *supra* note 19, at 65 ("Students often give uncritical answers to questions posed by the lecturer, because they are not given enough time to produce a better one. Reflection time is valuable for understanding.").

32. *See* Neyrey, *supra* note 18, at 662. Critics have characterized the Langdellian method in strong language. *E.g.*, Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 114 (2000) ("Through subtle, unconscious aspects of classroom language, legal pedagogy continually urges students away from a focus on ethics and justice."). The method is described as "infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving, and destructive of positive ideological values." Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 457 (1995) (quoting Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 407 (1971)). It has even been suggested that some are "using questions to punish or discipline students," that is deliberately using "the student's lack of knowledge as a weapon." Fox, *supra* note 19, at 65. The Socratic method was not received well by students in Langdell's day either. *See* Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 533-39 (1991).

situation where a student asks a question, and the professor responds with a counter-question. In ancient philosophy, such a dialogue has been called a responsive chreia.[33] The frequent function of a responsive chreia is to show the wisdom and cleverness of a sage by his successful reply.[34] The sage must say something clever and witty or risk losing his reputation because the provocation challenged his role and reputation. According to the code of ancient rhetoric concerning the grounds for praise, the better philosopher displays extraordinary prowess and thus merits the loyalty and respect of his disciples.[35] The philosopher "wins" when the counter-question completely stumps its listener.[36] Epictetus explains how to differentiate winners from losers:

> When someone in his audience said, Convince me that logic is necessary, he answered: Do you wish me to demonstrate this to you? —Yes.—Well, then, must I use a demonstrative argument?—And when the questioner had agreed to that, Epictetus asked him, How, then, will you know if I impose upon you?—As the man had no answer to give, Epictetus said: Do you see how you yourself admit that all this instruction is necessary, if, without it, you cannot so much as know whether it is necessary or not?[37]

The request provokes Epictetus even though it is not formulated as a question because it challenges his status as the teacher.[38] In response to the challenge, Epictetus questions the man to reveal his ignorance.[39] The inability to answer silences the challenger and shows the audience who triumphed in the game.[40] Thus, having the last word has always been important.[41] The average first-year law student soon learns that the so-called Socratic method has the potential to

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33. *See* Neyrey, *supra* note 18, at 670. The word "chreia" has been defined as "'a brief reminiscence referring to some person in a pithy form for the purpose of edification.' It takes the form of an anecdote that reports either a saying, an edifying action, or both." *Chreia*, http://humanities.byu.edu/rhetoric/TREES/Progymnasmata/CHREIA.HTM (last visited Jan. 20, 2002). This Greek word was used, particularly in discussions with others about controversial subjects, as a rhetorical "narrative statement or story that could be cited to make a point." Mahlon H. Smith, *Synoptic Gospels Primer: Chreia*, http://religion.rutgers.edu/nt/primer/chreia.html (last modified Mar. 16, 2001).

34. Neyrey, *supra* note 18, at 670.

35. *Id.*

36. *Id.* at 677.

37. 1 EPICTETUS: THE DISCOURSES AS REPORTED BY ARRIAN, THE MANUAL, AND FRAGMENTS 431 (W. A. Oldfather trans., 1956); Neyrey, *supra* note 18, at 677.

38. Neyrey, *supra* note 18, at 677.

39. *Id.*

40. *Id.*

41. *Id.*

encompass all of these ancient dimensions and objectives—often contemporaneously.[42]

Obviously, conscientious professors desire a humane yet rigorous dialogue.[43] They also want to integrate professional responsibility and ethical issues into the study of substantive areas.[44] Can this be accomplished in the traditional first-year course?

For the past several years, I have been experimenting with addressing these challenges through a somewhat unusual approach.[45] Before each session of Civil Procedure class, I read a text from the Bible for two or three minutes before delving into substantive legal topics.[46] I may make reference to the scripture's relevance to the day's Civil Procedure topic, but sometimes it is left to the students' imagination. Based on my experience, the following are a few of the lessons which seem to work well: (1) the Good Samaritan Parable in connection with Waiver under Rule 12;[47] (2) Chreia, where inquisitors try to put Jesus on the spot, in connection with Pleadings;[48] (3) Sayings of Jesus on courts in connection with Alternative Dispute Resolution;[49] and (4) the

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42. Langdell, who developed the case method for Harvard Law School, probably never intended that his technique be truly "Socratic." *See* Stropus, *supra* note 32, at 454- 55 ("In sum, the Langdellian method was meant primarily to foster analytical skills, encourage independent learning and provide students with the opportunity to practice and refine verbal and rhetorical skills." (citations omitted)).

43. A good use of the Socratic method may lead students in "a flight of the imagination through a world of allegories, parables and myths." Paul N. Savoy, *Toward A New Politics of Legal Education*, 79 YALE L.J. 444, 468 (1970); *see also* Andrew J. McClurg, *Poetry in Commotion:* Katko v. Briney *and the Bards of First-Year Torts*, 74 OR. L. REV. 823, 830 n.31 (1995).

44. *See supra* note 7.

45. At a number of religiously-affiliated law schools, *e.g.*, Regent University, professors begin class with prayer and Bible reading. At such schools, one might view this paper as one person's effort to select passages that related to the law school lesson that follows.

46. The late Professor Edward J. Murphy began each of his Notre Dame law school classes with the sign of the cross. Edward J. Murphy, *The Sign of the Cross and Jurisprudence*, 71 NOTRE DAME L. REV. 577 (1996). Such customs are prevalent at other Christian law schools, which have the academic freedom to employ the techniques described. Public institutions are bound by the Establishment Clause of the First Amendment and are, therefore, limited in their ability to employ religious material in classroom exercises. *E.g.*, Lee v. Weisman, 505 U.S. 577, 599 (1992) (prohibiting prayer at a public school graduation ceremony). As Stephen Carter has put it, "The legal culture that guards the public square still seems most comfortable thinking of religion as a hobby, something done in privacy, something that mature, public-spirited adults do not use as the basis for politics." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 54 (1993).

47. *See* discussion *infra* Part I.

48. *See* discussion *infra* Part II.

49. *See* discussion *infra* Part III.

Widow's Mite in connection with Procedural Due Process.[50] A short discussion of the approach's value follows.[51]

I. WAIVER UNDER RULE 12 AND THE GOOD SAMARITAN PARABLE

It is valuable to provide students an example of a Socratic dialogue early in the first year. A helpful Biblical passage for explaining the Socratic method experience is from the New Testament, involving an interchange between Jesus and the "lawyer," which then leads to the parable of the Good Samaritan. In addition to its overall value as a tool for teaching the Socratic method, I use the passage when I teach Rule 12.

> 25 On one occasion an expert in the law stood up to test Jesus. "Teacher," he asked, "what must I do to inherit eternal life?"
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> 26 "What is written in the law?" he replied. "How do you read it?"
>
> 27 He answered: "'Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind'; and, 'Love your neighbor as yourself.'"
>
> 28 "You have answered correctly," Jesus replied, "Do this and you will live."
>
> 29 But he wanted to justify himself, so he asked Jesus, "And who is my neighbor?"[52]

To refresh the recollection of those who have not visited Rule 12 of the Federal Rules of Civil Procedure recently, it provides the framework for motions, which may be made prior to the filing of a responsive pleading.[53] In highly technical and, at least for first-year law students, impenetrable language, the Rule requires that a lawyer consolidate some of the more technical pre-answer motions to avoid inadvertently waiving omitted defenses.[54] Four defenses can be inadvertently waived: personal jurisdiction, improper venue, insufficient process, and insufficient service of process.[55] In many respects, Rule 12 is difficult to teach because it involves the interrelationship of the Rule's provisions as well as the Rule's relationship with other rules.[56] Most

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50. *See* discussion *infra* Part IV.

51. *See* discussion *infra* Part V.

52. *Luke* 10:25-29 (New International).

53. FED. R. CIV. P. 12(b).

54. FED. R. CIV. P. 12(g).

55. FED. R. CIV. P. 12(h)(1).

56. Rules 7(a), 12(a) (b) (e) (f) (g) (h), 15(a) (d), 19, and 56 must be read in *pari materia*. For example, Rule 12(b)(1)(B) indicates waiver where a defense is not included in

casebooks and study aids address the topic by posing a series of scenarios followed by subsequent pre-answer motions or pleadings and then asking whether particular defenses have been waived.[57] Students must search for the answers to these questions using the language of Rule 12.[58] In large measure, a casebook's questions in this area do have answers.[59] The language of the rule is precise, yet difficult for students to follow.[60] For example, some students seem "fooled by Rule 12(h)(1)(B), which appears to imply that these four defenses can be raised in either the motion to dismiss or the answer."[61] Subsection (h)(1) provides that defendants who make a pre-answer motion and leave defenses out, whether they answer or not, have waived the defenses.[62] The bottom line is that "[t]he rule does not authorize the defendant to leave some [defenses] out of a motion and then insert them in [the] answer."[63]

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the pre-answer motion or "in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." FED. R. CIV. P. 12(h)(1)(B); *see* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 525 (2d ed. 2000). Only the student who then reads Rule 15(a), which generally only permits one amendment "as a matter of course" can understand the implications of Rule 12(h)(1)(B). Of course, the contents of the Rule 12(b) motions implicate much of the materials covered in the entire Civil Procedure course such as 28 U.S.C. §§ 1331 and 1332 (subject matter jurisdiction), the Fourteenth Amendment (personal jurisdiction), and 28 U.S.C. § 1391 (venue).

57. *E.g.*, JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 315-18 (4th ed. 2001); MARCUS ET AL., *supra* note 9, at 183.

58. Because the language of Rule 12 frustrates, the first-year student frequently resorts to secondary devices seeking to "translate" the text. *See generally* Martha M. Peters, *Students' Need to Translate Ideas*, *in* TECHNIQUES FOR TEACHING LAW, *supra* note 19, at 342, 344-46. This frustrates the Civil Procedure professor as "foreign language" instructor, who seeks to have the law student think and reason in the language of the Rules and not some secondary source's translation of that language.

59. *See* GLANNON, *supra* note 57, at 318-25.

60. As Professors Teply and Whitten explain, "Rule 12(g) and (h)(1) are confusingly worded and can trap the unwary litigant." TEPLY & WHITTEN, *supra* note 56, at 525.

61. GLANNON, *supra* note 57, at 319.

62. FED. R. CIV. P. 12(h)(1); GLANNON, *supra* note 57, at 319.

63. GLANNON, *supra* note 57, at 319.

> Until 1966, a party might escape the consequences of his failure to plead the defenses set forth in Rules 12(b)(2) through 12(b)(5) by amending his pleadings. However, present Rule 12(h)(1) severely restricts this practice. The court no longer has the authority to grant leave to amend in order to add one of these four defenses; this may be done only by an amendment permitted as a matter of course under Rule 15(a).
>
> Thus, the message conveyed by the present version of Rule 12(h)(1) seems quite clear. It advises a litigant to exercise great diligence in challenging personal jurisdiction, venue, or service of process. If he wishes to raise any of these defenses he must do so at the time he makes his first significant defensive move—whether it be by way of a Rule 12 motion or a responsive pleading.

5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE

There is, however, a limited amount of maneuvering room within Rule 12. Rule 12(g) requires a defendant making a pre-answer motion to dismiss to include all Rule 12(b) defenses "then available."[64] For example, a prior motion to dismiss for insufficiency of service of process may or may not prevent a defendant from making another pre-answer motion raising the failure to state a claim upon which relief can be granted. If the objection to service of process was the complaint was not served on the defendant, he would not have known there were grounds for dismissal under Rule 12(b)(6).[65] In that circumstance, a court might allow a defendant "to file a second pre-answer motion raising this defense since the 12(b)(6) defense was not 'available'" when the first motion was filed.[66] By reading Rule 12 closely, reconciling its various provisions, and addressing questions, students must generate their own legal questions and assess potentialities.

Of what relevance is the Good Samaritan story to Rule 12? Analogous to the law student's Rule 12 waiver analysis, the lawyer's answer to Jesus' question draws together two of the great Old Testament texts: (1) "[l]ove the Lord your God with all your heart and with all your soul and with all your strength,"[67] and (2) "love your neighbor as yourself."[68] The first-year student and the lawyer both must determine what the law is by examining related statutory provisions, judicial opinions, Black's Law Dictionary, or even the Old Testament.

The prepared first-year student, who has done his homework, comes to class on the day we cover Waiver under Rule 12 with answers similar to the ones the lawyer gives Jesus.[69] They are both correct and identical to the answers

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§ 1391, at 742 (2d ed. 1990) (citations omitted).

64. FED. R. CIV. P. 12(g).

65. GLANNON, *supra* note 57, at 320; *see also* WRIGHT & MILLER, *supra* note 63, § 1391 ("[I]f a party is never served at all, he cannot be held to have waived his objection to lack of jurisdiction over the person by non-assertion within 20 days; due process would preclude the result and the rules themselves prevent it, by making the 20 day period run from the date of service.").

66. GLANNON, *supra* note 57, at 320.

67. *Deuteronomy* 6:5 (New International).

68. *Leviticus* 19:18 (New International).

69. When a student has not done his homework adequately and asks a question answered in the assigned material, a law school professor may respond by stonewalling or by asking fellow students for an answer. *See* James Jay Brown, *Forging an Analytical Mind: The Law School Classroom Experience*, 29 STETSON L. REV. 1135, 1151 (2000).

> One role [of the law school professor] is to turn questions back to you without an answer—only another question—a question related to the original question. A question about an aspect you never thought about. An answer to which you are expected to find and analyze. Because self-reliance is the hallmark of the legally trained mind, the professor adopts roles and uses methods to encourage you to develop such a quality.

that this professor (or Jesus) would provide were he asked a similar question.[70] Jesus' audience, like the Civil Procedure class, needs to know whether the lawyer's answer was a good one.[71] Jesus thus replied, "'You have answered correctly . . . . Do this and you will live.'"[72] In comparison, the law professor may elicit relevant language in Rules 4, 12, or 15, in part to demonstrate that the answer comes from the Rule, not the professor's unguided intuition or dogma.[73]

Legal education requires diligent study and extensive memorization.[74] It is

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Id.

70. *See Matthew* 22:34-40 (New International) (questioning of Jesus by an expert in the law among the Pharisees).

71. One commentator characterizes typical law school teaching as the "Vicarious Learning/Self-Teaching Model." Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 349-50 (2001). The self-teaching "approach requires the students not only to sort the insightful student comments from the comments lacking insight, but also to figure out, from the professor's comments and questions, both the professor's instructional goals and the relationships between those goals and the instruction presented." *Id.* at 352. In Civil Procedure, such an approach can be disastrous. In my view, and for many law students, the instructor *must* distinguish the "good" answer from the "bad" answer in the first-year where there are clear distinctions. Experience teaches that professorial questioning in the law school classroom necessarily assumes the risk of offending "students who are shy or whose cultural backgrounds cause them to eschew conflict with an authority figure [ ] [and who] may be unable to demonstrate their skills in an oral interaction with their instructor in front of sixty to eighty of their peers." *Id.* Unless a professor is confident that a particular technical point can and ought to be self-taught without guidance, the lack of positive reinforcement of the "correct" response or criticism of the "wrong" response risks unproductive confusion. Professors who do not provide such guidance "do not teach the material in a way that minimizes wasted effort and maximizes students' educational resources." *Id.* at 358.

72. *Luke* 10:28 (New International). *See also Leviticus* 18:5 (King James) ("Ye shall therefore keep my statutes, and my judgments: which if a man do, he shall live in them: I *am* the Lord.").

73. *See* Brown, *supra* note 69, at 1151.

> Coaching is another role of the professor. Through the classroom methods . . . [students] are given multiple chances to practice [their] analytical skills. It is the professor-coach who starts [students] on the basics of issue formulation and assists [their] logical steps toward [a] more sophisticated, multiple-issue, rule-fact analysis. Criticism will be given when [students] fall below a benchmark of acceptable performance.

Id.

74. Schwartz, *supra* note 71, at 418.

> [L]aw professors should abandon a particularly misleading and disturbingly common habit, the habit of suggesting to students that knowledge of the law and memorization are irrelevant on law school exams. In fact, as the many studies of experts have shown, a critical characteristic of an expert is the possession and ability to use huge stores of well-organized, readily-accessible domain knowledge.

Id. Part of the objection to the Socratic method of the "old school" is that dialogue also ended with recitation of the rule. *E.g.*, Thomas L. Shaffer, *On Teaching Legal Ethics in the Law*

not possible to obey the law's commands if one does not know what they are. Sometimes the correct answer is technical, complex, or contrary to common sense, justice, equity, or a client's interests. Students may want to understand why or may even object to the necessarily correct legal conclusion, but students should first learn that a defense *can be* waived under the terms of the Rule.[75] The Socratic temptation for the professor is to linger while the student struggles for a "fair" resolution of a problem.[76] The law professor should not forget, however, the dynamic of the Socratic method. One dimension of the dialogue is a challenge to the teacher.[77] Jesus put the lawyer on the spot, and the objective may be, as in many ancient chreia, to embarrass or "defeat" the

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Office, 71 NOTRE DAME L. REV. 605, 612 n.33 (1996).

75. Study aids on Rule 12 frequently contain descriptions seeking to justify waiver on policy grounds. *E.g.*, FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE (5th ed. 2001), § 4.2, at 241 ("These are all matters that can and should be resolved at the outset, before time and money have been invested in the action."); GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 50(2), at 218 (2d ed. 1994) ("They are personal to the defendants, and their availability is usually clear from the outset of litigation."); TEPLY & WHITTEN, *supra* note 56, at 525 ("[T]he policy of making personal jurisdiction, venue, and process objections waivable at an early stage is sound. These objections primarily involve the personal convenience of the defendant. If the defendant does not care sufficiently about the defenses to raise them promptly, it is appropriate that they be waived.").

76. During the first week of law school, the first-year wish is to learn "the" law. After a few weeks of Socratic dialogue, the cynicism that there are no answers, no "objective truth," becomes the saving myth to justify sloth. *Cf.* Robert J. Araujo, *The Lawyer's Duty to Promote the Common Good: The Virtuous Law Student and Teacher*, 40 S. TEX. L. REV. 83, 87 (1999) (quoting Alan Hirsch, *The Moral Failure of Law Schools*, WASH. L. & POL., June 1998, at 29) ("Indeed, the so-called Socratic method carries out the mission not of Socrates but of his adversary, the sophist Protagoras: to show that clever arguments can be made on behalf of any proposition and that there are no right answers."). Consider Socrates' admonition of Menon:

> Yes, I think that I argue well, Menon. I would not be confident in everything I say about the argument; but one thing I would fight for to the end, both in word and deed if I were able—that if we believed that we must try to find out what is not known, we should be better and braver and less idle than if we believed that what we do not know it is impossible to find out and that we need not even try.

GREAT DIALOGUES OF PLATO, *supra* note 23, at 51.

77. Brown, *supra* note 69, at 1151-52.

> The professor must play an additional role—that of a piano tuner—adjusting the levels of classroom tension and relaxation. Just the right amount helps students to be receptive by enhancing their concentration. Too much or too little of these factors, however, adversely affects the learning environment. Classroom dynamics may differ greatly all semester, as a professor is continually adjusting between competing factors. For example, the tension level must be adjusted when informing a student of an inadequate response. Given in the right manner—right for the moment, for that student, and for that subject — the respondent will not become discouraged but will try to do better on a subsequent occasion. A mature professor recognizes that being criticized in class will be a new experience for most.

Id.

teacher as much as the ostensible motive to seek the truth. Thus, the first-year student, armed with a hornbook's or a treatise's understanding of the law's ambiguities and determined to avoid the humiliations of the first-year classroom experience, turns the table on the professor with the professor's own weapon—the question.[78] This "confrontation" refocuses the class' attention and provides a "teachable moment."[79] The law school classroom experience has little value unless it moves beyond recalling memorized texts.[80]

Jesus' response to the lawyer follows a typical model of what first-year professors do when they wish to pursue the "teachable moment" to emphasize an area or to highlight legal ambiguity: he introduces a hypothetical, story, or parable.[81] The good hypothetical should be a tough one that works against the prejudices of the audience. Recalling the parable of the Good Samaritan:

> 30 In reply Jesus said: "A man was going down from Jerusalem to Jericho, when fell into the hands of robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. 31 A priest happened to be going down the same road, and when saw the man, he passed by on the other side. 32 So too, a Levite, when he came to the place and saw him, passed by on the other side. 33 But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. 34 He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, took him to an inn and took care of him. 35 The next day he took out two silver coins and gave them to the innkeeper. 'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.'[82]

The players in the Good Samaritan story portrayed stereotypes—the priest

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78. But professors should "[b]e aware that some questions may be deliberately diversionary, particularly if students know [they] are easily led off the topic." Fox, *supra* note 19, at 67.

79. The "teachable moment" is a time when "conditions for learning are optimum." DICTIONARY OF EDUCATION 586 (Carter V. Good ed., 1959).

80. Students who have done their homework probably would prefer that the law professor stop there. *See* Alice M. Thomas, *Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy*, 6 WIDENER L. SYMP. J., Fall 2000, at 49, 77 n.122.

81. *See* Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 181 (1996); Thomas L. Shaffer, *On Lying for Clients*, 1 J. INST. FOR STUDY LEGAL ETHICS 155, 157 (1996) ("Stories are a way to search for meaning in morals . . . .").

82. *Luke* 10:30-35 (New International). Clarence Jordan, in his modern translation of the parable with a "Southern accident," makes the three persons passing by the victim a white preacher, a white Gospel song leader, and a black man. CLARENCE JORDAN, THE COTTON PATCH VERSION OF LUKE AND ACTS 46-47 (1969).

ignored the injured, and the Samaritan was the hero.[83] At the conclusion of his story, Jesus asked the lawyer a final question: "Which of these three do you think was a neighbor to the man who fell into the hands of robbers?"[84] The lawyer, seeming to avoid even saying the word "Samaritan," answered, "The one who had mercy on him."[85] The Good Samaritan parable develops a "policy" argument key to statutory interpretation of the term "neighbor." Jesus contextualized the definition. Through the "Socratic" method, we explain to the first-year law student the tension between bright-line rules, which may seem harsh and arbitrary, compared to balancing tests that leave judges with more discretion. To continue with the New Testament parallel, "The law is only a shadow of the good things that are coming—not the realities themselves."[86]

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83. Biblical scholars debate the reasons that Jesus contrasts priests and Levites with the Samaritan rather than the scribes and Pharisees in the Good Samaritan story. *E.g.*, Michel Gourgues, *The Priest, the Levite, and the Samaritan Revisited: A Critical Note on Luke 10: 31-35*, 117 J. BIBLICAL LITERATURE 709, 709-10 (1998).

84. *Luke* 10:36 (New International).

85. *Luke* 10:37 (New International). To twenty-first century ears, this refusal to speak the word "Samaritan" would seem racially prejudice. However, in context the more serious problem may have been the refusal of Jesus' contemporary clerics to acknowledge the universality of salvation. *See* Rob Atkinson, *Liberating Lawyers: Divergent Parallels in* Intruder in the Dust *and* To Kill a Mockingbird, 49 DUKE L.J. 601, 624 (1999); John Dominic Crossan, *Parable and Example in the Teaching of Jesus*, 18 NEW TESTAMENT STUD. 285, 294-95 (1972) ("arguing that the Good Samaritan story should be read as a parable within its original historical context as well as an allegory of the divine" Atkinson, *supra* at 624 n.100). Crossan's thesis is now widely shared among New Testament scholars. *See, e.g.*, NORMAN PERRIN, THE NEW TESTAMENT: AN INTRODUCTION 291-93 (1974) (following Crossan's account).

86. *Hebrews* 10:1 (New International). Those critical of the Socratic method as it has been caricatured in law schools occasionally have designed educational innovations intended to energize the sort of reasoned moral judgment Jesus sought in this interchange. *E.g.*, John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, 58 LAW & CONTEMP. PROBS., Autumn 1995, at 87, 102.

> We intended our approach to be the very antithesis of the traditional law school pseudo-Socratic method of instruction, with its emphasis on "hard" cases and supposedly rigorous and rational cognitive processes at the expense of students' emotions, feelings, and values. These traditional techniques desensitize students to the critical role of interpersonal skills in all aspects of a professionally proper attorney-client relationship and, for that matter, in all aspects of an ethical law practice. They also set students' moral compasses adrift on a sea of relativism, in which all positions are viewed as "defensible" or "arguable" and none as "right" or "just," and they train students who recognize and regret these developments in themselves to put those feelings aside as nothing more than counter-productive relics from their pre-law lives.
>
> In designing the new course, we sought to reawaken and re-energize our students' capacities to make reasoned moral judgments. We hoped exposure to persons for whom ethical issues loomed large in their professional lives would grab students' attention, give them a feeling of community with ethical lawyers, and

What are the policies justifying waiver of certain defenses under Rule 12? Actually, it may not always be easy for defendants to determine that they have an objection to venue or to subject matter or personal jurisdiction upon receipt of the plaintiff's summons and complaint.[87] Yet the rule requires assertion of the defense in pre-answer motions.[88] If one is unsure about the proper venue, the defense should be raised,[89] subject of course, to the ethical restraints of Rule 11.[90] The amendments to Rule 11 sanctions, especially the "safe harbor" provisions, seem to further encourage assertion in pre-answer motions.[91] In addition, counsel may move for an extension of time to file a response if more time is needed for investigation.[92] The real difference between a motion under Rule 12 and assertion of a defense is a tactical one because if defendants answer, they must respond to the substantive allegations in the complaint.[93] If a defendant moves to dismiss, he may avoid, at least temporarily, the need to answer the plaintiff's allegations.[94] The waiver provisions simply advise caution in seeking this tactical advantage. Judges are likely to employ the same policies in construing the term "then available" and to consider whether a defendant's failure to raise the defense earlier was a result of circumstances beyond his control or lack of diligence or foresight.[95]

Civil Procedure students learn from Rule 12 that their imperfect

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encourage them to model their own conduct after good behavior. We disciplined ourselves to stay out of the way as students drew their own conclusions from raw data, a learning process judged more effective than a lecture on or discussion of pre-digested conclusions.

Id. (citations omitted).

87. GLANNON, *supra* note 57, at 321.

88. WRIGHT & MILLER, *supra* note 63, § 1391, at 744.

Thus, it now is clear that any time defendant makes a pre-answer Rule 12 motion, he must include, on penalty of waiver, the defenses set forth in subdivisions (2) through (5) of Rule 12(b). If one or more of these defenses are omitted from the initial motion but were "then available" to the movant, they are permanently lost. Not only is defendant prevented from making it the subject of a second preliminary motion but he may not even assert the defense in his answer.

Id.

89. *See id.* § 1391, at 752.

90. FED. R. CIV. P. 11(b).

91. *See* FED. R. CIV. P. 11(c) (allowing party charged with violating Rule 11 twenty-one days to remedy).

92. GLANNON, *supra* note 57, at 321.

93. Defendants must make admissions and denials under Rule 8(b), raise affirmative defenses under Rule 8(c), and assert counterclaims "aris[ing] out of the [same] transaction or occurrence" as in the plaintiff's complaint under Rule 13. FED. R. CIV. P. 8(b), 8(c), 13.

94. GLANNON, *supra* note 57, at 313.

95. FED. R. CIV. P. 12(g); GLANNON, *supra* note 57, at 322; WRIGHT & MILLER, *supra* note 63, § 1391, at 742-43.

understanding of the Federal Rules of Civil Procedure can lead to situations where they inadvertently lose important defenses their clients would otherwise have. The gamers or schemers among them begin to search for other such "traps for the unwary." This can be the beginning of an understanding of how and why the Federal Rules generally seek to move away from such traps and towards merit-based resolution of disputes.[96]

II. PLEADINGS AND CHREIA OF JESUS

In many first-year courses, casebooks focus on motions to dismiss under Rule 12(b)(6), motions for summary judgment under Rule 56, and interlocutory appeals.[97] The plaintiff, for example, may lose his case because he does not, or cannot, in good faith plead the elements which the law requires in order to establish a cause of action. By not taking the opportunity to amend his pleadings under Rule 15, the plaintiff implicitly acknowledges that he cannot prevail.[98] Judgment may be entered against him. A central theme of the Civil Procedure course must focus on the repercussions of failures to act. The New Testament is replete with stories that can be used to emphasize such risks. Consider Jesus' encounter with the rich young man:

> 16 Now a man came up to Jesus and asked, "Teacher, what good thing must I do to get eternal life?"
>
> 17 "Why do you ask me about what is good?" Jesus replied. "There is only One who is good. If you want to enter life, obey the commandments."
>
> 18 "Which ones?" the man inquired.
>
> Jesus replied, "Do not murder, do not commit adultery, do not steal, do

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96. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) (requiring plaintiff to simply make a short and plain statement of claim to give defendant fair notice); Hickman v. Taylor, 329 U.S. 495, 501 (1947) (restricting the role of pleadings to general notice-giving).

97. *See, e.g.*, JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 546, 913, 1146 (8th ed. 2001); STEPHEN C. YEAZELL, CIVIL PROCEDURE 453, 627, 780 (5th ed. 2000). Other procedural contexts for casebook opinions include motions for judgment as a matter of law (formerly called directed verdicts and JNOV), interlocutory appeals, extraordinary writs, and, obviously, the occasional actual appeal from a final judgment. 28 U.S.C. §§ 1291, 1292, 1651 (1994); FED. R. CIV. P. 50.

98. That a judge might view the same procedural motion differently depending on her perceptions of the defendant's motivations is a central theme of pleadings lessons in the first-year Civil Procedure casebook. A good example is *David v. Crompton & Knowles Corp.*, 58 F.R.D. 444 (E.D. Pa. 1973). There, the district court treated a defendant's initial refusal to admit or deny an allegation not as a denial but as an admission, notwithstanding Federal Civil Procedure Rule 8, and then refused to let the defendant to amend his pleading to deny the allegation, notwithstanding the liberal standard of Federal Civil Procedure Rule 15(a), resting on the court's assumption that the information at issue "was a matter of record peculiarly within the control and knowledge of the defendant." *Id.* at 446.

> not give false testimony, 19 honor your father and mother, and love your neighbor as yourself."
>
> 20 "All these I have kept," the young man said, "What do I still lack?"
>
> 21 Jesus answered, "If you want to be perfect, go, sell your possessions and give to the poor, and you will have treasure in heaven. Then come, follow me."
>
> 22 When the young man heard this, he went away sad, because he had great wealth.[99]

As in the story of the Good Samaritan, the rich young man asked about the requirements for eternal life.[100] Unlike the lawyer, the young man's questions appeared as genuine truth seeking rather than a trap intended to snare the "backwoods preacher."[101] Jesus answered the questions forthrightly, but the answers presented the listener with the "sad" alternative of giving up his possessions and following Jesus.[102] The rich young man realized he would not be able to meet the standards so, without seeking to press the matter further, he gave up his quest. He failed to even try to meet or understand Jesus' requirements, failing to act to meet the burden of going forward.

Pleadings present another good use for New Testament chreia. The initial hurdle for many students is simply to perceive potential grammatical traps for the unwary pleader. Consider the following passage describing an encounter between Jesus and certain clerics:

> 1 One day as he was teaching the people in the temple courts and preaching the gospel, the chief priests and the teachers of the law, together with the elders, came up to him. 2 "Tell us by what authority you are doing these things," they said. "Who gave you this authority?"
>
> 3 He replied, "I will also ask you a question. Tell me, 4 John's baptism—was it from heaven, or from men?"
>
> 5 They discussed it among themselves and said, "If we say, 'From heaven,' he will ask, 'Why didn't you believe him?' 6 But if we say, 'From men,' all the people will stone us, because they are persuaded that John was a prophet."
>
> 7 So they answered, "We don't know where it was from."

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99. *Matthew* 19:16-22 (New International).

100. *Id.* at 19:16; *see supra* Part I.

101. *See* ROBERT DEFFINBAUGH, *Blessed Babes and a Miserable Millionaire*, *in* LUKE: THE GOSPEL OF THE GENTILES 533, 539-40 (1996), *available at* http://www.bible.org.

> [E]verything which Jesus said to the rich young ruler [was] intended to draw him to Himself, to encourage him to become a disciple. Jesus was not trying to put this man off. He was not trying to create any barriers. He was not even trying to test his commitment, but was endeavoring to encourage him along the path of discipleship.

Id. at 539.

102. *Matthew* 19:22 (New International).

> 8 Jesus said, "Neither will I tell you by what authority I am doing these things."[103]

Having identified the logical trap set for him, Jesus exposed the technique by putting his inquisitors in the same dilemma.[104] Jesus refused to plead his authority and was not forced to once his inquisitors realized the unfairness of the technique used.[105] Apparently, the rules of the game in the New Testament required the same kind of internal consistency found in Code Pleading. Under the "theory of the pleadings," the court had to decide the specific single cause of action, for example, the single legal theory the plaintiff was relying upon without regard to the merits of the plaintiff's case.[106]

The Federal Rules do not require this degree of precision.[107] The Rules authorize alternative pleadings under Rule 8(e)(2) and would have allowed both Jesus and his inquisitors to explore their topic without the risk of stoning.[108] Again, the importance of pleading requirements is apparent in this passage and in the New Testament's recitation of the events leading to Christ's crucifixion. Consider Luke's recount of Jesus before the Council of Elders. In this latter passage, it is not altogether clear whether Christ claims to be the Son of God, but his refusal to plainly deny it is enough for his accusers, who use the failure to deny as an admission.

> 66 At daybreak the council of the elders of the people, both the chief priests and teachers of the law, met together, and Jesus was led before them.
> 67 "If you are the Christ," they said, "tell us."
> Jesus answered, "If I tell you, you will not believe me, and if I asked you, you would not answer. 69 But from now on, the Son of Man will be seated at the right hand of the mighty God."
> 70 They all asked, "Are you then the Son of God?"
> He replied, "You are right in saying that I am."

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103. *Luke* 20:1-8 (New International). Jesus also stumped the Pharisees when he initiated the sequence of questions. *E.g.*, *Matthew* 22:41-46 (New International). Having silenced the Sadducees, he goes on to silence the Pharisees insisting on internal consistency. *See id.* at 22:34. "No one could say a word in reply, and from that day on no one dared to ask him any more questions." *Id.* at 22:46. Another famous example of Jesus' silencing his questioners is the passage in which Jesus counsels, "Then give to Caesar what is Caesar's, and to God what is God's." *Luke* 20:25 (New International). The passage concludes, "They were unable to trap him in what he had said in public. And astonished by his answer, they became silent." *Id.* at 20:26.

104. *See Luke* 20:1-8 (New International).

105. *See id.* at 20:5-7.

106. JAMES ET AL., *supra* note 75, § 3.14, at 215.

107. *Id.* A party may also amend or supplement pleadings. FED. R. CIV. P. 15.

108. *See* FED. R. CIV. P. 8(e)(2).

71 Then they said, "Why do we need any more testimony? We have heard it from his own lips."[109]

Similarly, when Jesus came before Pilate, Jesus offered no affirmative defense to the charges against him. Pilate searched for affirmative evidence with which to convict Jesus but ultimately yielded to the demands of the mobs and the clerics:

11 Meanwhile Jesus stood before the governor, and the governor asked him, "Are you the king of the Jews?"

"Yes, it is as you say," Jesus replied.

12 When he was accused by the chief priests and the elders, he gave no answer. 13 Then Pilate asked him, "Don't you hear the testimony they are bringing against you?" 14 But Jesus made no reply, not even to a single charge—to the great amazement of the governor.

15 Now it was the governor's custom at the Feast to release a prisoner chosen by the crowd. 16 At that time they had a notorious prisoner, called Barabbas. 17 So when the crowd had gathered, Pilate asked them, "Which one do you want me to release to you: Barabbas, or Jesus who is called Christ?" 18 For he knew it was out of envy that they had handed Jesus over to him.

19 While Pilate was sitting on the judge's seat, his wife sent him this message: "Don't have anything to do with that innocent man, for I have suffered a great deal today in a dream because of him."

20 But the chief priests and the elders persuaded the crowd to ask for Barabbas and to have Jesus executed.

21 "Which of the two do you want me to release to you?" asked the governor.

"Barabbas," they answered.

22 "What shall I do, then, with Jesus who is called Christ?" Pilate asked. They all answered, "Crucify him!"

23 "Why? What crime has he committed?" asked Pilate.

But they shouted all the louder, "Crucify him!"

24 When Pilate saw that he was getting nowhere, but that instead an uproar was starting, he took water and washed his hands in front of the crowd. "I am innocent of this man's blood," he said. "It is your responsibility!"

25 All the people answered, "Let his blood be on us and on our children!"

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109. *Luke* 22:66-71 (New International). This translation tends toward the view that Christ's answer was a strong affirmative. Others, *e.g.*, the King James version, translate Christ's reply in verse 70, "Ye say that I am," which seems much more equivocal. *Luke* 22:70 (King James).

> 26 Then he released Barabbas to them. But he had Jesus flogged, and handed him over to be crucified.[110]

This interchange could be appropriate with respect to denials or perhaps in connection with Rule 55 regarding default.[111] Something analogous to a default judgment is entered against Jesus, despite the judge's reservations and initial desire to show mercy.

The verbal traps set for Jesus, before the Council of Elders and possibly before Pilate, are reminiscent of the old Code Pleading "negative pregnant,"[112] and in the Council's view, for example, Jesus' denial was so phrased as to be infused with affirmative implications. "You say that I am" becomes "I am." Affirmative implications also could be admissions under Code Pleading's "negative pregnant" principle.[113] One recent treatise explained, "There was a requirement of internal consistency, a holdover from the days when it was thought necessary to produce a single issue. On this basis, inconsistent, alternative, and hypothetical pleadings were disallowed, even when [the] plaintiff could not know the precise detail in question."[114] Jesus' failure to deny his divinity (or his treason) becomes an admission which becomes the "blasphemy" justifying his crucifixion without evidence on the merits.

III. RULE 11, COUNTERCLAIMS, AND ALTERNATIVE DISPUTE RESOLUTION

First-year casebooks introduce Rule 11 and, more generally, the Code of Professional Responsibility in connection with pleading principles. Without the pressure of Rule 11, parties might attempt to plead any plausible alternative until discovery forces them out, wasting judicial and party resources.[115] In 1993, Rule 11 was amended to allow a "safe harbor" before an attorney is sanctioned.[116] This innovation allows a party to avoid sanctions by withdrawing an offending pleading within twenty-one days after he is notified of the offense.[117] Rule 11(c) encourages parties to comply with the Rule and resolve disputes without court involvement.[118] Moreover, the 1993 amendments make

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110. *Matthew* 27:11-26 (New International).
111. *See* FED. R. CIV. P. 8(b), 55.
112. *See* JAMES ET AL., *supra* note 75, § 3.14, at 214-15.
113. *Id.*
114. *Id.* § 3.14, at 215 (citation omitted).
115. *Id.* § 3.13, at 205-06.
116. *See, e.g.*, COUND ET AL., *supra* note 97, at 587.
117. FED. R. CIV. P. 11(c)(1)(A).
118. *See* JAMES ET AL., *supra* note 75, § 3.13, at 210-11.

the imposition of Rule 11 sanctions discretionary rather than mandatory.[119] Consider the well-known story of the adulteress presented to Jesus:

> 1 But Jesus went to the Mount of Olives. 2 At dawn he appeared again in the temple courts, where all the people gathered around him, and he sat down to teach them. 3 The teachers of the law and the Pharisees brought in a woman caught in adultery. They made her stand before the group 4 and said to Jesus, "Teacher, this woman was caught in the act of adultery. 5 In the Law Moses commanded us to stone such women. Now what do you say?" 6 They were using this question as a trap, in order to have a basis for accusing him.
>
> But Jesus bent down and started to write on the ground with his finger. 7 When they kept on questioning him, he straightened up and said to them, "If any one of you is without sin, let him be the first to throw a stone at her." 8 Again he stooped down and wrote on the ground.
>
> 9 At this, those who heard began to go away one at a time, the older ones first, until only Jesus was left, with the woman still standing there. 10 Jesus straightened up and asked her, "Woman where are they? Has no one condemned you?"
>
> 11 "No one, sir," she said.
>
> "Then neither do I condemn you," Jesus declared. "Go now and leave your life of sin."[120]

Biblical scholars struggle over this chreia. Some suggest that the woman had a defense, which her accusers did not point out to Jesus.[121] For example, the woman, a remarried divorcee, was not guilty under Old Testament Law but might have been under Jesus' teachings.[122] The episode might have been another attempt by clerics to trap Jesus with his own sayings, which were contrary to the philosophy he had espoused generally.[123] Others suggest that the scribes actually came to Jesus seeking advice rather than to trap him, genuinely seeking a "way out" of the prescription of Mosaic law, which required punishment of the adulteress by death.[124]

From a pleadings point of view, however, it is interesting to note that the adulteress offered no testimony until the accusers had left.[125] If the adulteress

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119. *Id.* § 3.13, at 211.

120. *John* 8:1-11 (New International).

121. *See* A. Watson, *Jesus and the Adulteress*, 80 BIBLICA 100, 102-03 (1999), *available at* http://www.bsw.org/project/biblica/bibl80/Ani01m.htm.

122. *Id.*

123. *Id.* at 103.

124. Brad H. Young, *'Save the Adulteress!' Ancient Jewish* Responsa *in the Gospels?*, 41 NEW TESTAMENT STUD. 59, 65 (1995), *available at* http://www.gospelresearch.org/Adultress.htm.

125. *See John* 8:9-11 (New International).

had an affirmative defense, perhaps she was incompetent under existing customs to offer it.[126] Must she die because the defense is waivable? Or must the accuser refrain under the New Testament equivalent to Rule 11 from pleading a cause of action when he knows the pleading can be destroyed?[127] Some courts have imposed sanctions under Rule 11 where a lawyer did not inquire whether the statute of limitations had run or whether jurisdiction was proper.[128] If the accusers know of such a defense, does the accusation constitute a frivolous pleading sanctionable under Rule 11? Might this be the sin which made the accusers in the New Testament story "convicted of their own conscience"?

In the end, the accusers of the adulteress left.[129] Jesus noted the want of prosecution,[130] but the more appropriate analogy may be a voluntary dismissal.[131] The moral "point" of this counsels mercy in areas where all may be convicted by their own conscience or a manifestation of the Golden Rule. Jesus explored this theme directly in the following excerpt from the "Sermon on the Mount:"

> 1 "Do not judge, or you too will be judged. 2 For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you.
>
> 3 "Why do you look at the speck of sawdust in your brother's eye and

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126. *See generally* Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67 (1991); Richard E. Sering, *Paul Not Anti-Women, Scholars Say*, PLAIN DEALER (Cleveland), Mar. 11, 2000, at 1F, *available at* 2000 WL 5137664.

127. *Cf.* David H. Taylor, *Filing with Your Fingers Crossed: Should a Party be Sanctioned for Filing a Claim to Which There is a Dispositive, Yet Waivable, Affirmative Defense?*, 47 SYRACUSE L. REV. 1037 (1997) (discussing plaintiffs' options under Rule 11 when there is an affirmative defense).

128. *See* Walker v. Norwest Corp., 108 F.3d 158, 160-62 (8th Cir. 1997) (holding sanctions were appropriate where lack of complete diversity among parties was evident from the complaint); Automatic Liquid Packaging, Inc. v. Dominik, 909 F.2d 1001, 1005-06 (7th Cir. 1990) (upholding sanctions imposed when there was no evidence of fraudulent conduct to toll the statute of limitations); Levy v. Aaron Faber, Inc., 148 F.R.D. 114, 118, 123 (S.D.N.Y. 1993) (awarding sanctions for advocating claims that had "long ago become stale" and where "counsel failed to conduct the requisite inquiry into the facts and the law"); Neustein v. Orbach, 130 F.R.D. 12, 14 (E.D.N.Y. 1990) (imposing sanctions for arguing that the district court had jurisdiction over a custody dispute); Murphy v. Klein Tools, Inc., 123 F.R.D. 643, 646 (D. Kan. 1988) (finding there had not been a reasonable inquiry whether the Kansas statute of limitations barred the action); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1251 (D. Minn. 1984) (awarding sanctions for no reasonable inquiry whether continuation claim was clearly barred by statute of limitations).

129. *John* 8:9 (New International).

130. *See id.* at 8:10-11.

131. *See* FED. R. CIV. P. 41(a).

> pay no attention to the plank in your own eye? 4 How can you say to your brother, 'Let me take the speck out of your eye,' when all the time there is a plank in your own eye? 5 You hypocrite, first take the plank out of your own eye, and then you will see clearly to remove the speck from your brother's eye.
>
> 6 "Do not give dogs what is sacred; do you throw your pearls to pigs. If you do, they may trample them under their feet, and then turn and tear you to pieces."[132]

The Federal Rules reinforce analogous principles of reciprocity in the provisions regarding counterclaims. While first-year students inevitably focus on the scope of the "use it or lose it" compulsory counterclaim rule,[133] they frequently fail to grasp that the Federal Rules allow defendants to assert factually unrelated counterclaims against a plaintiff so long as jurisdictional requirements are met.[134] Thus, the prospective plaintiff who is deciding whether to seek relief in a particular federal district court must consider whether he wishes to use this forum for all claims by the defendant against him, which may exceed the plaintiff's original claim.[135]

At some point in the first semester, students also must confront the incredible expense and inefficiency of this country's system of civil litigation.[136] Jesus counsels the non-litigious way repeatedly. He rejects the self-centered reciprocal justice of the Old Testament, challenging the listener:

> 38 You have heard that it was said, "Eye for eye, and tooth for tooth." 39 But I tell you, Do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also. 40 And if someone wants to sue you and take your tunic, let him have your cloak as well. 41 If someone forces you to go one mile, go with him two miles. 42 Give to the one who asks you, and do not turn away from the one who wants to borrow from you.[137]

More directly, Jesus directs the seekers of justice away from the courthouse:

> 54 And he said also to the people, When ye see a cloud rise out of the west, straightway ye say, There cometh a shower: and so it is.

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132. *Matthew* 7:1-6 (New International).

133. FED. R. CIV. P. 13(a).

134. FED. R. CIV. P. 13(b).

135. FED. R. CIV. P. 13(c) (stating a party "may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party").

136. *E.g.*, MARCUS ET AL., *supra* note 9, at 97-106; TEPLY & WHITTEN, *supra* note 56, at 12-15.

137. *Matthew* 5:38-42 (New International).

> 55 And when *ye see* the south wind blow, ye say, There will be heat; and it cometh to pass.
>
> 56 *Ye* hypocrites, ye can discern the face of the sky and of the earth; but how is it that ye do not discern this time?
>
> 57 Yea, and why even of yourselves judge ye not what is right?
>
> 58 When thou goest with thine adversary to the magistrate, *as thou art* in the way, give diligence that thou mayest be delivered from him; lest he hale thee to the judge, and the judge deliver thee to the officer, and the officer cast thee into prison.
>
> 59 I tell thee, thou shalt not depart thence, till thou hast paid the very last mite.[138]

Jesus directly indicated that both fact-finding about righteousness and remedies lie elsewhere than with the magistrate, which can and likely will impoverish both plaintiffs and defendants.[139] The controversial Parable of the Shrewd Manager who pleased his boss by taking half a loaf now surely could be the beginning of a class discussion on settlement negotiations.[140]

But the New Testament also contains contrasting points. Consider the need of the lawyer seeking justice for his client by being persistent, seeking reconsideration and preserving a point on appeal.[141] Then consider the parable

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138. *Luke* 12:54-59 (King James).

139. Lawyers, of course, have strong inclinations to resist Jesus' teachings in this area. Consider the following commentator's analysis,

> Jesus' nonresistance-to-evil ethic has also been subjected to this criticism, sparking G.K. Chesterton's epigram: "The ideal of Christianity has not been tried and found wanting. It has been found difficult and not tried." The conventional wisdom among those who would counsel against taking Jesus' nonresistance-to-evil ethic too seriously is that the ethic is simply an example of "Hebrew hyperbole," that writing technique which overstresses in order to make a point. *E.g.*, "[I]f thine eye offend thee, pluck it out [. . . .]" *Matthew* 18:9 (King James Version). But Jesus gave examples of exactly what he meant by not resisting evil, and lawyers must be sobered by the contexts into which Jesus placed his ethic: the criminal assault, the civil lawsuit, and the act of political oppression.

Raymond P. Marcin, *Justice and Love*, 33 CATH. U. L. REV. 363, 390 n.80 (1984).

140. *See Luke* 16:1-15 (New International).

141. The federal courts can be rather particular about the requirements to preserve a point for appeal. For example, the defense of failure to state a claim under Rule 12(b)(6) cannot be raised after a trial on the merits. FED. R. CIV. P. 12(h)(2); Coleman v. Frierson, 607 F. Supp. 1566, 1574-75 (N.D. Ill. 1985). A civil contempt order is interlocutory in nature and is not appealable until the action is over. Union Tool Co. v. Wilson, 259 U.S. 107, 110-11 (1922).

Evidentiary rulings not preserved will not be heard on appeal except when they amount to fundamental error. FED. R. EVID. 103(d); Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 16 (1941). For instance, counsel must object to judicial misconduct on the trial record. Reilly v. United States, 863 F.2d 149, 160 (1st Cir. 1988); Faudree v. Iron City Sand & Gravel Co., 315 F.2d 647, 651-52 (3d Cir. 1963). Likewise, counsel who fail to object to witness

in which Luke says to show the need for persistent prayer:[142]

> 2 He said: "In a certain town there was a judge who neither feared God nor cared about men. 3 And there was a widow in that town who kept coming to him with the plea, 'Grant me justice against my adversary.'
>
> 4 "For some time he refused. But finally he said to himself, 'Even though I don't fear God or care about men, 5 yet because this widow keeps bothering me, I will see that she gets justice, so that she won't eventually wear me out with her coming!"
>
> 6 And the Lord said, "Listen to what the unjust judge says."[143]

IV. PROCEDURAL DUE PROCESS AND JESUS' PARABLES ABOUT MONEY

At some point, the Civil Procedure course must address the constitutional limitations of judicial process and the pre-judgment seizure cases.[144] In an effort to understand the Supreme Court's reasoning, the professor must explore the following: the various possible purposes of conducting a hearing prior to or immediately after a seizure of property, the incentives and disincentives to appropriate behavior, and the varying and inconsistent judicial approaches to resolution found in the line of decisions. The topic provides another opportunity in the first-year Civil Procedure course to explore the relative values and costs of bright-line rules and contextualized balancing tests.

The balancing approach of *Connecticut v. Doehr*,[145] borrowed from the administrative law decision *Mathews v. Eldridge*,[146] often causes confusion for students. This may be law students' first experience with the ambiguities and

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questioning do not preserve the issue for appeal. Stillman v. Norfolk & W. Ry., 811 F.2d 834, 838-39 (4th Cir. 1987).

Further, one must make sure that the trial judge on the record decided an issue unequivocally. United States v. Reyes, 157 F.3d 949, 954 n.1 (2d Cir. 1998) (citing United States v. Kon Yu-Leung, 51 F.3d 1116, 1121 (2d Cir. 1995)). A defendant seeking to challenge admission of his prior conviction to impeach his credibility must testify "to raise and preserve for review the claim of improper impeachment." Luce v. United States, 469 U.S. 38, 42-43 (1984). Similarly, in a criminal securities fraud case, an appellate court declined to reverse because a defendant did not testify after a trial judge ruled that if he testified about his good faith, he would waive his attorney-client privilege on cross-examination. United States v. Bilzerian, 926 F.2d 1285, 1292-94 (2d Cir. 1991).

142. *Luke* 18:1 (New International).

143. *Luke* 18:2-6 (New International); *cf.* Exodus 33:1-3, 15-17 (New International).

144. *See* Connecticut v. Doehr, 501 U.S. 1 (1991); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969).

145. *Doehr*, 501 U.S. at 11.

146. 424 U.S. 319 (1976).

politics of constitutional jurisprudence.[147] The opinion seems to mix apples and oranges by adjusting procedural requirements not only according to the requirements of accuracy and fairness but also based on the importance of the property involved to the litigants. In deciding what process is due, the Court developed a three-part test:

> first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, . . . principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.[148]

The stove in *Fuentes*[149] or the house in *Doehr*[150] may be more critical to one litigant than to the other litigant. The procedure required may vary based on this difference in relative value rather than some sort of economic or intrinsic value of the object. Is there a way to impress this point on the first-year student? Consider Jesus's story of the Widow's Mite:

> 41 And Jesus sat over against the treasury, and beheld how the people cast money into the treasury: and many that were rich cast in much.
> 42 And there came a certain poor widow, and she threw in two mites, which make a farthing.
> 43 And he called *unto him* his disciples, and saith unto them, Verily I say unto you, That this poor widow hath cast more in, than all they which have cast into the treasury:
> 44 For all *they* did cast in of their abundance; but she of her want did cast in all that she had, *even* all her living.[151]

The notion that the same money or property may represent differing values is also raised in a challenging way in some of the Kingdom parables. Consider the Parable of the Workers in the Vineyard:

> 1 "For the kingdom of heaven is like a landowner who went out early in the morning to hire men to work in his vineyard. 2 He agreed to pay them a denarius for the day and sent them into his vineyard.

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147. For example, the Marcus, Redish, and Sherman casebook introduces this line of cases at the beginning of the semester. *See* MARCUS ET AL., *supra* note 9, at 27-66.

148. *Doehr*, 501 U.S. at 11.

149. *Fuentes*, 407 U.S. at 70.

150. *Doehr*, 501 U.S. at 5.

151. *Mark* 12:41-44 (King James).

3 "About the third hour he went out and saw others standing in the marketplace doing nothing. 4 He told them, 'You also go and work in my vineyard, and I will pay you whatever is right.' 5 So they went.

"He went out again about the sixth hour and the ninth hour and did the same thing. 6 About the eleventh hour he went out and found still others standing around. He asked them, 'Why have you been standing here all day long doing nothing?'

7 'Because no one has hired us,' they answered.

"He said to them, 'You also go and work in my vineyard.'

8 "When evening came, the owner of the vineyard said to his foreman, 'Call the workers and pay them their wages, beginning with the last ones hired and going on to the first.'

9 "The workers who were hired about the eleventh hour came and each received a denarius. 10 So when those came who were hired first, they expected to receive more. But each one of them also received a denarius. 11 When they received it, they began to grumble against the landowner. 12 'These men who were hired last worked only one hour,' they said, 'and you have made them equal to us who have borne the burden of the work and the heat of the day.'

13 "But he answered one of them, 'Friend, I am not being unfair to you. Didn't you agree to work for a denarius? 14 Take your pay and go. I want to give the man who was hired last the same as I gave you. 15 Don't I have the right to do what I want with my own money? Or are you envious because I am generous?'

16 "So the last will be first, and the first will be last."[152]

There are other parables with similar themes about money such as a parable about a man who travels to a far country and entrusts differing sums of money ("talents") to his servants in proportion to their different abilities.[153] And yet a third parable about a nobleman who went to a far country to receive a kingdom and gave each of his servants money to gain as much as possible before he returned.[154] The whole concept goes completely against the grain of our own beliefs, that it is simply not fair for one person to receive exactly the same wage for working eleven or twelve hours a day as does another person for working only one hour. Where you stand on the fairness of the compensation depends on where you sit.[155] Where will the court sit?

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152. *Matthew* 20:1-16 (New International).

153. *Matthew* 25:14-30 (New International).

154. *Luke* 19:11-27 (New International). This parable reflects Jesus' final famous statement that the "first shall be last; and the last *shall be* first." *Matthew* 19:30 (King James).

155. In this parable, Jesus illustrates that individuals are judged based on how they use their natural abilities and knowledge and understanding. Again, judgment is contextualized. Expectations depend upon a person's situation, especially his talents and blessings. Much may be expected of those hired at the first hour, but those hired at the eleventh receive the

V. MINDING THE LAW

The discussion above provides a flavor of the experiment.[156] The three to five minutes spent with the Bible in the first-semester classroom seems to produce real educational dividends. Below are three of the most important.

First, students remember these readings, and some even struggle with them. Students especially remember the explanation of the Socratic method and Rule 12 waiver using the Good Samaritan parable.[157] Perhaps in this secular society, it is shock at the willingness to apply a religious text that calls these materials especially to one's conscience. Rare is the student who does not recall the three-part procedural due process test of *Connecticut v. Doehr*,[158] the irrelevance of inconsistency in pleadings established by Rule 8(e)(2),[159] or the criticality of the language "then available" under Rule 12.[160] In short, the scriptures serve as long-term memory devices for the associated Civil Procedure principles. Like *Hawkins v. McGee* (the "hairy hand" case) in Contracts or the adjunct's "war stories" from private practice, this recall is "dependent on the power of the story."[161] The style of introducing the story through a simple reading at the start of class mimics Professor Vache's[162] "Thoughts for the Day," that is "a quote from some luminary" relevant to the day's topic that may "provoke, amuse or (I hope) encourage deeper thinking by the students."[163]

Second, scripture reading reinforces a religious institution's identity. The approach carries with it the professor's "reflection of a particular mind set [or] ideology."[164] There is a related risk that some students may perceive the

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same ultimate compensation.

156. Other possible applications might be the "render unto Caesar" chreia in connection with jurisdictional disputes, *Luke* 20:20-26 (New International), or the Parable of the Ten Virgins, *Matthew* 25:1-13 (New International), in connection with the importance of timeliness in intervention under Rule 24. *See* FED. R. CIV. P. 24. This comparison is not unlike the various experiments which Amsterdam and Bruner have conducted at New York University. For example, they asked law students to write and perform a play set in the brief gap "between Genesis 22:10 (where Abraham raises the knife to slay his son, Isaac, at God's command) and Genesis 22:11 (where the Angel of God calls upon Abraham to put the knife down)." ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 290 (2000).

157. *See supra* Part I.

158. *See supra* Part IV.

159. *See supra* text accompanying notes 108-15.

160. *See supra* Part I.

161. James M. Vaché, *Storytelling*, *in* TECHNIQUES FOR TEACHING LAW, *supra* note 19, at 341, 341.

162. James Vaché is a professor at Gonzaga University School of Law. *Id.* at 342.

163. James M. Vaché, *Thoughts for the Day*, *in* TECHNIQUES FOR TEACHING LAW, *supra* note 19, at 360, 360-61.

164. *Id.* at 362.

professor as "pedantic or patronizing by referring to literature or other sources with which the readers might be unfamiliar."[165] In student evaluations, however, those expressing a view report that they appreciate the additional perspective or the refreshing detour after their struggle with the cases, notes, and questions of the typical first-year casebook. Each year some students also complain that they "miss" the Bible reading in semesters where I did not continue it throughout the semester. Moreover, pre-law advisors have reported that the readings are the first item my students mention when they inquire about the school's religious identity. This is despite the myriad of St. Thomas University's other religious features such as inter-faith dialogues, colloquia on moral issues, and religious ceremonies and symbols throughout the campus. Interestingly, the Bible readings do not seem to be perceived as proselytizing in the same way that a guest lecturer, a ceremonial speaker, or special "law and religion" colloquia sometimes are. Unobtrusive evangelism comes with the territory and merits no apology in an institution which acknowledges its religious identity.

Finally, and more importantly, the scripture readings in my view encourage law students to "think like a lawyer." Adding to the critical reasoning skills and techniques emphasized in most law school pedagogy, scripture reading cannot help but foster essential traits of good character—offering examples of good and bad, right and wrong—as would be true with any great works of literature or exemplary stories from history.[166] Faithful Catholic students in Civil Procedure have reported a renewed interest in reading the Bible, some for the first time in many years.[167] Justice comes in many guises: commutative, distributive, and social.[168] Scripture reading in the law school classroom, as elsewhere, develops the "moral compass" needed to think like a lawyer.[169]

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165. *Id.*

166. See THE BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES (William J. Bennett ed., 1993) and E. D. HIRSCH, JR., CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW (1988) for examples and discussions of moral education.

167. The Second Vatican Council stressed the importance "to prayerfully read the Word of God." *Dogmatic Constitution on Divine Revelation*, *in* THE SIXTEEN DOCUMENTS OF VATICAN II, at 401, 409 (Marianne Lorraine Trouvé ed., 1999).

168. Todd D. Whitmore, *Justice*, *in* THE HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 726-27 (Richard P. McBrien ed., 1995).

169. *See generally* THE MORAL COMPASS: STORIES FOR A LIFE'S JOURNEY (William J. Bennett ed., 1995). Natural law has been defined as "the sum of those universally binding moral principles that can be discerned by human reason, understood as analogous to a legal code." Jean Porter, *Natural Law*, *in* THE HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM, *supra* note 168, at 907, 907. Its search lies at the heart of the Socratic method.