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Witnessing the Process: Reflections on Civil Procedure, Power, Pedagogy, and Praxis

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WITNESSING THE PROCESS: REFLECTIONS ON CIVIL PROCEDURE, POWER, PEDAGOGY, AND PRAXIS

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I. POWER

We who believe in freedom cannot rest. We who believe in freedom cannot rest until it comes.[1]

In 1960, seventeen year old Joseph McNeil, a college student at North Carolina Agricultural and Technical (A&T) College, approached three of his classmates and proposed that they demand service at the lunch counter of a Greensboro variety store.[2] The next afternoon, the four college students entered a segregated dining area at a Woolworth's in Greensboro, North Carolina.[3] They quietly took

* Associate Professor of Law, University of Tennessee College of Law; B.A., Lehigh University 1984, J.D., Harvard University 1987, LL.M., Temple University, 1995. This essay is an attempt to encapsulate the small group facilitation on how to incorporate student activism into a Civil Procedure class that occurred during the Society of American Law Teachers (SALT) Teaching Conference. As a result, the ideas presented in the essay are not solely those of the author. Rather, they reflect the collaborative efforts of David Benjamin Oppenheimer, Golden Gate University School of Law; Annette Appell, Boyd School of Law, University of Nevada, Las Vegas; and myself. Any errors contained in the essay, however, are mine. The author would like to thank Theresa Glennon and Dean Rivkin for their invaluable insights and commitment to incorporating activism and values in law teaching. The author would also like to thank George White, Jr.

1. SWEET HONEY IN THE ROCK, *Ella's Song, on* BREATHS (Flying Fish 1988). The song written and performed by members of Sweet Honey in the Rock is about and dedicated to Ella Baker.

2. *See* Claude Sitton, *Negro Sitdowns Stir Fear of Wider Unrest in South*, N.Y. TIMES, Feb. 15, 1960, at 1.

3. *See* WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS 99 (1980); PAULA GIDDINGS, WHEN AND WHERE I ENTER 273 (1984); ROBERT WEISBROT, MARCHING TOWARD FREEDOM 17 (1994). One of the students later remarked, "I think the thing that precipitated the sit-in, the idea of the sit-in, more than anything else, was that little bit of incentive and that little bit of

seats at the lunch counter reserved for whites and asked for service.[4] They were refused and sat coffee-less until the store closed.[5] Their action, which only later became known as a "sit-in," swept the nation within weeks.[6] After several months, sit-ins at segregated lunch counters across the South began to fracture the color barrier.[7] Later, under the guidance of leaders like Ella Baker, students began to organize and form groups like the Student Non-Violent Coordinating Committee (SNCC).[8] Similarly, in 1966, two Oakland City College students formed the Black Panther Party for Self-Defense.[9] This organization would later become internationally recognized as a revolutionary force despite the fact that its membership probably never exceeded 5,000 members.[10] Although their reputation grew from the fact that they armed themselves with guns, few remember that they relied heavily upon law as a method for positive change.[11]

The movements that "rocked a nation" were initiated and maintained by small groups of students and youth who were willing to act for social justice.[12] The movements in no way represented a majority

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courage that each of us instilled within each other." HOWELL RAINES, MY SOUL IS RESTED 75 (1977).

4. *See* CHAFE, *supra* note 3, at 99.

5. *See* Sitton, *supra* note 2, at 1.

6. *See* CHAFE, *supra* note 3, at 99.

7. *See id*; *see also* RAINES, *supra* note 3, at 80-81.

8. Ella Baker was a field secretary for the National Association for the Advancement of Colored People (NAACP). *See* CHAFE, *supra* note 3, at 27. She encouraged youth leaders to form their own civil rights organization rather than join existing ones so that they could maintain their independence of direction and tactics. *See* GIDDINGS, *supra* note 3, at 274.

9. *See* HUEY P. NEWTON, REVOLUTIONARY SUICIDE 110-11 (1973); HUGH PEARSON, THE SHADOW OF THE PANTHER 76, 112 (1994). Huey Newton, one of the founders of the Black Panther Party, got the idea for the name of the Party from a pamphlet of the Lowndes County Freedom Oranization in Mississippi which used a black panther as its symbol. *See* NEWTON, *supra*, at 113; PEARSON, *supra*, at 108.

10. *See* Reginold Bundy, *The Possible Rebirth of the Black Panther Party*, PHILADELPHIA TRIBUNE, July 24, 1998, at 7A; Glenn Giffin, *Still an Idealist, Says Bobby Seale, Black Panther to be Taped by Channel 12*, DENVER POST, May 7, 1998, at E05. The Black Panthers initially achieved notoriety by challenging police brutality in Oakland, California. *See* PEARSON, *supra* note 9, at 113-16.

11. Panther members would routinely use law as a vehicle of social change by reading case law to police officers who were in the process of arresting or "interrogating" a suspect. *See* NEWTON, *supra* note 9, at 114-16, 120-21.

12. The "Civil Rights Movement" was actually comprised of many separate movements that varied in theory, tactics, and goals. *See* GIDDINGS, *supra* note 3, at 261-75 (discussing the beginnings and the growth of different groups that

of youth, white or black, but the force of their actions is legendary. They differed in tactics and methods but shared a goal of empowerment and rhetoric of equality. They acted where others more powerful failed to act. Despite pressure from parents and teachers to conform, many walked away from middle class homes and promising futures in order to take a stand. These students and other youth recognized the power of idealism and zeal to effectuate positive social change.

II. PEDAGOGY

> *That which touches me most is that I had a chance to work with people. Passing on to others, that which was passed on to me. To me young people come first, they have the courage where we fail. And if I can but shed some light, as they carry us through the gale.*[13]

I have developed the habit of weaving historical fact into law school courses, creating a connection between doctrine, history, and action. Thus, the call by the Society of American Law Teachers (SALT) Conference to focus on ways of integrating pedagogy, theoretical critique, and political engagement into "action pedagogy" in law school courses reminded me of stories like these from the "modern" civil rights movements. These events, although familiar to many people, must be told repeatedly. I remind my students about these events, in part, because of their historical and social importance, and to ensure memory of historical struggles against injustice, but also to illustrate the power of the few to affect the many.

Students, even those otherwise privileged by education and position, often feel overwhelmed and powerless. Legal education must, at a minimum, empower students and teach them to empower others through legal discourse and precedent, legal process, and social action. Legal education can equip students to confront systems of oppression, injustice, and inequity. Doing so requires some conscious exploration of what it means to achieve parity in process and result. It is easy, however, to lose the message of "justice for all" in conveying the intricacies of consideration, proximate cause, and res

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collectively formed the Civil Rights Movement).

13. SWEET HONEY IN THE ROCK, *supra* note 1.

judicata. Thus, it is incumbent upon law professors, *early on,* to inculcate students with stories of how small actions can lead to momentous changes. Howard Lesnick has noted that the first year of law school "shapes students' consciousness of what is important and not important to being a lawyer."[14] Lesnick adds that "[a]ny significant shift in the portrayal of law and lawyering in subsequent courses does not alter students' 'map' of the legal world. Rather, students judge that shift in light of what has gone before."[15] Lesnick explains that some law students may regard issues not raised in the first year of law school "as peripheral, exceptional, or questionable."[16] For others, avoiding discussions of fairness and justice during the first year results in a feeling of marginalization and isolation.[17]

While numerous opportunities exist in the law school curriculum for discussions of whether there is meaningful and consistent justice, Civil Procedure provides unique opportunities to explore equity in process, as well as the interrelation between values and process.[18] It is axiomatic that "'[t]he fundamental requisite of due process of law is the opportunity to be heard.'"[19] The hearing must be conducted "'at a meaningful time and in a meaningful manner'"[20] and must be "tailored to the capacities and circumstances of those who are to be heard."[21] Even though these statements sound simple, they are often difficult to convey in a classroom. The challenge is in breathing life into the axiom that equal justice must remain at the center of procedural battles and in critically examining how well

14. Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum,* 37 UCLA L. REV. 1157, 1159 (1990) (citing Leonard Riskin, *Mediation and Lawyers,* 43 OHIO ST. L.J. 29, 43-46 (1982)).

15. *Id.*

16. *Id.*

17. *See generally* Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy,* 77 VA. L. REV. 539, 553-54 (1991) (noting the importance of including personal experiences in the teaching process to reach marginalized students in law school).

18. This approach stands in direct contrast to the "perspectivelessness" approach in law school criticized by Kimberlé Crenshaw. *See* Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education,* 11 NAT'L BLACK L.J. 1, 1-3 (1989).

19. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

20. *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

21. *Id.* at 268-69.

dispute resolution meets those goals.[22] A careful and thoughtful analysis of where disparities in Civil Proceedings occur should be integrated into a course in Civil Procedure. The value and methods of incorporating activism in civil procedure provided the backdrop for a two-day discussion at the SALT Teaching Conference.[23] The discussion group articulated the reasons why faculty should engage in activist work with students, as well as the methods for doing so. Our defined task was to develop a course overview that integrates an activist project with an agenda for a semester long course. The colloquy culminated in the presentation of a mock class in which a course overview and project were presented to mock students.

III. PRAXIS

> *Struggling myself don't mean a whole lot, I've come to realize. That teaching others to stand up and fight is the only way our struggle survives.*[24]

Action pedagogy expands the walls of the classroom, combining theory, practice, process, and substance into an integrated whole. Witnessing the impact of theory on individual participants enriches discussions of due process. It allows students to appreciate their power and privilege as lawyers. It nourishes an interest in serving the needs of the underrepresented and encourages a more conscious exploration of how civil procedure impacts outcome. Professors can expose students to the limitations on access to justice and allow for a natural integration of discussions concerning the gender, race, and class of the participants in the process. Hopefully, action pedagogy

22. *See generally* Stephanie M. Wildman, *Democratic Community and Privilege: The Mandate for Inclusive Education*, 81 MINN. L. REV. 1429, 1431 (1997) ("[L]egal education (indeed all education) shares a responsibility to consciously educate students for participation in democracy and with appreciation of democratic norms such as equity, civil rights, and mutual respect for the ideas of others.").

23. The small group of professors who fleshed out the ideas for this paper were joined during the first day of discussions by Nancy Marder, University of Southern California Law School; Katherine C. Sheehan, Southwestern University School of Law; Frank Askin, Rutgers, The State University of New Jersey, S.I. Newhouse Center for Law & Justice; and Katherine Vaughns, University of Maryland School of Law. The ideas shared during the first day of discussions provided a meaningful base for the group's subsequent colloquy.

24. SWEET HONEY IN THE ROCK, *supra* note 1.

will inspire students to use their skills on behalf of those most in need of assistance. However, incorporating activism in a first year Civil Procedure course presents unique challenges given the density of the material, the breadth of issues, and the difficulties inherent in including a clinical component in the first year curriculum. Despite these difficulties it is possible to plant the seeds which will encourage critical thinking about justice, process, and developing a commitment to activism.

Instituting programs which encourage students to observe and compare various dispute resolution forums "unveils the wizardry" and mystery of legal processes.[25] Law students in general, and particularly first year students, are often eager to see parallels between the "natural" world and the legal world. For example, students who recognize that there are a range of values to which professors ascribe importance will be better able to identify participants in a dispute. At a minimum, personalizing litigation allows students to recognize themselves and the people they know in the litigants, lawyers, and adjudicators. In turn, this facilitates and contextualizes a discussion about justice, equity, and values.[26] It also allows students to begin to develop "multiple consciousness" and to view society from "the standpoint of the oppressed."[27] Providing a personal and real context

25. *See generally* L. FRANK BAUM, THE WONDERFUL WIZARD OF OZ 173-83 (1986). Frank Baum's allegorical work encourages us to look behind the curtain and unveil and demystify power structures in the interests of advancing social parity and justice. Similarly, taking students outside the classroom in the first year of law school can help to demystify legal processes by enabling them to conceptualize abstract ideals of equality and justice. Students can be directed to make specific comparisons of various forums and to explore whether the principles studied in the classroom and propounded in case books were actually achieved for the individual participants in the processes which they observed.

26. *See generally* Culp, *supra* note 17. Articulating the importance of black autobiographies in legal discourse, Culp notes that "*[w]ho we are* matters as much as what we are and what we think. It is important to teach our students that there is a 'me' in the law, as well as specific rules that are animated by our experiences." *Id.* at 543.

27. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method,* 11 WOMEN'S RTS. L. REP. 7, 9 (1989); *see generally* Culp, *supra* note 17. Highlighting the importance of including stories of African-Americans in law, Culp notes that "[w]hen we leave out the personal in the realm of the law, what is left out is the truth of the experiences of black people in American society." Culp, *supra* note 17, at 546-47. I would add that this is also true of the experiences of the poor, disenfranchised, immigrants, the imprisoned, as well as all people of color. Culp goes on to assert that "by ig-

for the rules of personal jurisdiction, venue, subject matter jurisdiction, and collateral estoppel is not a simple task. Thus, many law professors try to flesh out the stories that supply the fodder for procedural disputes by shedding light on the human drama within the cases.

Some institutions have committed significant resources to blending theory and practice.[28] While courses that blend theory and practice offer an excellent way of merging the study of doctrine with exposure to clients, many law schools are not equipped to teach Civil Procedure in this manner. Nonetheless, a less intensive yet equally instructive curriculum allowing students to experience the dispute resolution process first-hand can be developed.

The SALT small group discussion on Civil Procedure developed a court visitation program that professors can easily integrate into any Civil Procedure course. The project is primarily reflective, providing students an opportunity to observe, compare, and contrast access to justice. Classroom and small group discussions would be used to further explore and evaluate the students' experiences. Students would be divided into court visitation groups of approximately three to four students. Each visitation group would be assigned to visit various dispute forums, including rent court, small claims court, family court, superior court, federal court, as well as an administrative hearing and a mediation or negotiation. Students would be asked to compare and contrast the forums. Throughout the course, students would be asked to think critically about whether the processes were fair and met the needs of the participants. In addition, each court visitation group would be asked to meet with at least one other court visitation group in order to discuss their visitations and the quality of the processes witnessed by the group. Finally, each visitation group would be asked to respond to a written questionnaire—which could be posted on a class web site—as a means of allowing each group to focus on relevant issues and to share their ideas.[29] The questionnaire might require students merely to observe

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noring the experiences of black people, we are limiting our vision of law." *Id.* at 547.

28. *See* Barbara L. Bezdek, *"Legal Theory and Practice" Development at the University of Maryland: One Teacher's Experience in Programmatic Context,* 42 WASH. U. J. URB. & CONTEMP. L. 127, 127-28 (1992).

29. Group responses to the questionnaire could also be published on a class

and note the nature of the process. Alternatively, students could be asked to state the factual nature of the dispute; identify the apparent race, gender, and age of the decision-makers; describe the decisions or rulings; and the evidence and legal arguments on which they are based.

Students can be directed towards a more critical analysis and comparison of the process. Students can be asked to compare and contrast how much control the litigants in each of the settings appeared to have over the process; the degree of formality in each of the settings; the dress, demeanor, race, gender, and class of disputants, attorneys, parties and decision-makers; time spent on each case; and the matter being heard. Students can be asked to identify differences in the various forums and to speculate about what accounts for those differences. Finally, students could explore whether the process met the parties' needs and whether they would have been personally satisfied with the process. Based on what the students have observed, hypotheticals could be presented which ask students which forum they would choose for a particular matter, and what the positives and negatives would be of doing so.

Court visitations allow students to critically evaluate judicial access and dispute resolution processes. They permit discussions about justice and fairness that are grounded in reality; and classroom discourse is enriched by the students' ability to contribute to the discussion because of what they have witnessed. This type of action pedagogy will give students a more accurate gauge by which to measure the idealism of procedure and should deepen commitments to serving the interests of justice and the needs of marginalized clients. This project differs from the traditional clinical experience because it allows students to make assessments without being vested in the action or with particular litigants. It creates opportunities for students to engage in critical analysis and to explore the nexus between the legal and "natural" worlds—for example, to explore whether and how disparities in wealth, class, and power affect process and outcome. It encourages students interested in engaging in counter-hegemonic advocacy while allowing each student to make their own judgments about whether and how to do so.

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