

What Can We Do on Monday to Improve Our Teaching?

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INTRODUCTION

I have taught Internet Law and Intellectual Property Survey for six years, after having practiced law in New York for an even longer time. Influenced by Eric Goldman¹ and Larry Lessig,² two mentors, I encourage my students, from day one, to embrace the challenge of learning how to make smart decisions in a dynamically changing environment. As law professors in 2013, we need to embrace the same challenge. I ask my students: When representing a client, what would you do differently for these parties? Not just based upon law, but based (as relevant) upon business objectives, market forces, social norms, unexpressed assumptions, and (last but not least) rules of professional responsibility?

With this essay, I seek to modestly address the challenge

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¹ Eric Goldman is a professor at Santa Clara University School of Law where he teaches Cyberlaw and Internet Law. *Cyberlaw/Internet Law*, ERIC GOLDMAN, <http://www.ericgoldman.org/cyberlaw.html> (last visited June 11, 2013).

² Lawrence Lessig is the Roy L. Furman Professor of Law at Harvard Law School and Director of the Edmond J. Safra Center for Ethics at Harvard University. *Lawrence Lessig*, HARV. L. SCHOOL, <http://www.law.harvard.edu/faculty/directory/10519/Lessig/> (last visited July 7, 2013). For examples of Lessig’s publications, see LAWRENCE LESSIG, *FREE CULTURE* (2004); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

that we, as law professors, face in making smart decisions in the dynamically changing environment of legal education. How can I meet the goals that I set for my students in our current academic and professional environment? Structural changes take time and money. But what can we do, on the cheap, right now?

I am here to make three relatively simple suggestions to law professors in tandem with the three general standards for promotion and tenure: listen (teaching), bring your scholarship to your classroom (scholarship), and be attentive to your students' career objectives beyond the classroom (service). I am proposing conceiving the law professor as a learning guide, and, in that way, the traditional three pillars of promotion and tenure as pedagogical markers for what scholars have called "generative learning."³

My suggestions are keyed to keeping students current in intellectual property (IP) and technology, but applicable broadly to any law class that can be implemented relatively easily and on Monday when you return to the classroom. To that end, I am crafting my suggestions for the professor who is not engaged in the current debate over legal reform directly. I should also note that I am not the inventor of these ideas; rather, my goal is to gently remind law professors that we can all do something to address today's academic challenges on Monday, regardless of outside forces.

As we all know, these are challenging and perhaps unprecedented times in legal education. The lag time from the economic collapse of 2008–2009 has, literally in the last year, finally visited its wrath on law schools' most insulated actors—professors. This is not climate change's lag time—what Jamais Cascio has observed as the problem in environmental regulation: what we (as humans) did twenty or thirty years ago to the environment is felt now, and what we do now will be felt twenty years hence.⁴ Pedagogical change can, and I say thankfully does, move more quickly. The economy, and the social norms that develop as a result, move *far* more quickly. Current technology, market forces, desire for immediate gratification, and needs to pay bills, have vested in a matter of a few years, and law schools must now pay out in the form of tenure's three pillars: teaching, scholarship, and service.

³ Manuel London & M.J. Hall, *Unlocking the Value of Web 2.0 Technologies for Training and Development: The Shift From Instructor-Controlled, Adaptive Learning to Learner-Driven, Generative Learning*, 50 HUMAN RESOURCES MGMT. 757, 758 (2011). Thanks to David Moss for pointing me to this scholarship.

⁴ JAMAIS CASCIO, *HACKING THE EARTH* 12 (2009).

Sure, we professors knew that the legal job market was bad. Of course, we witnessed (and many, to be clear, experienced) that our paychecks—particularly for those of us who came from private practice, as I did—were not always covering what we expected—mortgages, after school activities, a night out with the family. Perhaps, we thought, a personal *reprioritization* has to occur in order for those activities (luxuries?) to continue.

But these were still, in many ways, abstract problems. And while few were oblivious, and even fewer unsympathetic, there was a sense that “toughing it out” and “staying the course” might be sufficient.

Fewer professors feel that way now. Crocodile tears for law professors notwithstanding, the economic realities facing today’s students have forced most law schools to confront what other disciplines have confronted for several years.

Law schools, legal educators, and by extension, the legal profession, have to act, have to *reprioritize*, now. Not because a failure to act now will cause a school to soon fold (although there may be some institutions that do not weather this ordeal). But rather, failure to act now will cause law schools to exacerbate the extravagances and errors of the past in ways not sustainable for our May 2014 graduates. And by 2015 or 2020, the schools that do not act may find themselves marginalized, or worse.

That said, this essay does not discuss a grand vision for the law school of 2020 or even 2015. While I have opinions as to what the 2015 law school model should be (recognizing that no model will be adequate for all audiences and communities), I want to offer observations as to what full-time, tenured and tenure-track professors can do *right now* to address the changes of which we are increasingly unable to ignore.

How can we, using our charges of teaching, scholarship, and service, concretely address these concerns *on Monday*? I want to make one simple but perhaps overlooked suggestion in each area (which some professors may be doing already), with the built-in assumption that each promotion and tenure pillar adds value to our performance as educators.

I. TEACH: PAUSE AND LISTEN

In 2005–2007, while a resident fellow at CIS, I experimented with virtual world teaching at the invitation of my colleague Lauren Gelman. I “lectured” in There.com about trade secrecy in public infrastructure. Attending: six or so graphical representations of the humans listening in, known as “avatars.” Playfully, I got a jetpack and landed on the platform to give my

talk. The six known attendees were then joined by a few avatars wandering the landscape. They walked in, listened, and left. They paused, reflected, and made a decision. They left, and it was instructive. What did they do in that limited time? They presumably listened. Is there a role for serious downtime—for listening—in the classroom?

In our zeal to react, we talk (and increasingly act) through concepts like engaged and experiential learning. These are laudable and complex endeavors that take time, effort, and much planning, and I encourage it. But, on Monday, a relatively easy thing to do is to (surprisingly) pause and listen.

I am suggesting that we consciously and structurally pause and listen, especially given how fast-paced legal education has become. For example, I do this regularly in Internet Law through requiring my students to blawg.⁵ We discuss theory and caselaw, but (also) in each class one student posts and one student replies to a post on a class blawg. In that way, students can pause and reflect on a current topic of their choice, and digest. It keeps them current in a dynamic field where, in every of the six years that I have taught it, a case that I have taught has been reversed or amended during the semester. It also allows them to practice (a little) what it is like to write for a busy, perhaps uninterested, client. And we have a ten-minute class discussion around it. My role during the discussion? I listen, and in the process I reflect on how my students are thinking about the law, and they seem to do the same.

On day two of my Contracts I class, I pause and listen again. I assign an excerpt from *Wolters Kluwer Financial Services, Inc. v. Scivantage*,⁶ a 129-page sanctions opinion written by Judge Baer of the Southern District of New York (yes excerpt, the students read six pages). We discuss NY DR 7-101,⁷ involving treating your colleagues with respect, dignity, and civility. And I show on a slide a sentence from the opinion: “while our system is by its very nature adversarial, it goes without saying that such a system expects—indeed, requires—a measure of civility.”⁸

In the process of discussing civility, I confront, head-on and candidly, the challenging legal landscape that the students face. I

⁵ *Blawg*, WEBOPEDIA, <http://www.webopedia.com/TERM/B/blawg.html> (last visited Aug. 28, 2013) (defining blawg as a “[s]lang term used to describe an online blog that is written by lawyers, or one that is focused on providing legal-oriented content”).

⁶ 525 F. Supp. 2d 448, 451 (S.D.N.Y. 2007), *aff’d in part, rev’d in part*, 564 F.3d 110 (2d Cir. 2009).

⁷ N.Y. CODE OF PROF’L RESPONSIBILITY DR 7-101 (2007).

⁸ *Wolters Kluwer Fin. Servs.*, 525 F. Supp. 2d at 451.

mention, and seek feedback, on their prospects for employment, the practical benefits (aside from ethical rules) of civility, and how I see my role as an educator teaching (influencing) fifty 1Ls. I listen to their responses and reflect on how contract law might influence their experience in law school and in practice. I share my own personal experience making my way into the legal education profession from the unusual perch of Case Western Law School (a great school and education, to be clear, but not a traditional “feeder” to legal academia)—and doing it effectively and civilly.

Always, a discussion that would not normally occur this early in their legal career begins. And almost always, a student approaches me immediately after class with a question regarding ethics that (I suspect) would not have been raised otherwise.

By pausing and listening, up front, lines of communication are established that pay dividends throughout the course, and throughout law school. Although much of my day-to-day classroom conduct is the more traditional quasi-Socratic dialogue and open discussion that (in my experience) serves well to teach the skills of lawyering and the theoretical underpinnings of law, pausing and listening, deployed deliberately, vests me with the ability to react more rapidly to the dynamism of law practice and education today. By not pretending that things are going along as planned, and infusing my classroom with that non-abstract, non-hypothetical urgent reality, I begin to establish lines of communication between my students not built upon friendship *per se*, but rather professionalism and seriousness of the shared purpose to address our shared unprecedented challenge. Interested students working with professors can address these problems internally, beginning in their own classrooms. This can be done on Monday.

II. SCHOLARSHIP: BRING IT TO THE CLASSROOM

What happens to those blawg posts? No, I do not plagiarize them. Rather, they open a discussion about my work, which focuses largely on policy matters like whether the public should have access to source code in voting machines over the objections of the authors of that code who claim proprietary trade secret rights, the role and theory of secrecy in the innovation process, and how international IP law should be created. Indeed, I was very proud that two of my students in my fall 2012 Trade Secrets seminar presented their draft final papers as works-in-progress to the conferees at the first Trade Secrets Law Works-in-Progress Workshop that I hosted because of the generosity of Elon University School of Law.

Through their blawg posts and discussion of my scholarship, students begin to see not just what I do, but where they too can make contributions—*now*—to their profession. The changing economic landscape has not altered one of the great blessings of being a law professor: the opportunity to think and write about how the law can be re-conceptualized, re-theorized, and improved. I consider this work not only exciting and fun, but a privilege and a duty, as we have been given the extraordinary luxury to have the time to do this work as salaried employees rather than having to find modern-day de Medicis to fund it.

Students, albeit for a limited time unless they are fortunate enough to be able to pursue it beyond law school, have the same opportunity for influence enjoyed by professors. And we all have access to the Internet, the greatest leveler (albeit imperfect) of the influence playing field ever created. Creating an *esprit de corps* around making such contributions can create the bonds that build an institution. Because influencing the legal and policy world around you can actually happen.

Aside from the pedagogical benefits of keeping your teaching current by bringing recent scholarship into the classroom, bringing scholarship into the classroom can help create the institutional fortitude to not only survive the current turmoil but thrive. Moreover, the students can carry those skills of communication, thought, and ambition to the marketplace. No time more than now (in the last several decades at least) has called for students to engage such unconventional and aggressive thinking.

On Monday, ask your students to write a 500-word blawg post (which you can host on TWEN, Blackboard, etc.) on a legal topic *of their choosing* in your given field. So long as they make a decent effort, these blawg posts will motivate and inform more thoughtful discussion and inquiry inside your classroom.

III. SERVICE: SERVE YOUR INSTITUTION BY SERVING YOUR STUDENTS AFTER THEY PASS THE BAR

Perhaps the hardest concept to assess, as it is often the third wheel of tenure, is service. But now, more than ever, it is time for professors to embrace the notion that our responsibilities to students lie not just within the classroom, or within the school, but into their careers. The notion that what you do with your JD is not the concern of doctrinal faculty is, in my view, somewhat archaic and increasingly a luxury (if viewed as a burden, which I do not) that we cannot afford. Indeed, my pitch for taking Internet Law and Intellectual Property has gone from primarily “it is a fascinating and dynamic area of law” in 2006 to primarily

“people are hiring in these areas of law” in 2013.

I call my students Mr. and Ms. not because I worship formalities, but because I believe that our social media-infused “friend” culture blurs the line between professor as expert, guiding discussion and learning, and professor as mentor. I remind students—subtly—that while I care for their success as a student and lawyer, and will help them get there, and I wish them all personal happiness, I am not their “friend.” That can wait until they graduate, and if they (and I) so desire. Modeling such professional behavior serves your institution as much as it serves the students themselves.

Perhaps counter-intuitively, my experience is that this seeming disparity gives me more credibility to have a candid discussion about the state of the profession, the job market, and their role in the law. There is respect and support, but not necessarily friendship. Friendship, conceived through the prism of social media, has contorted professional relationships in ways that we (or I) have yet to adequately incorporate into the role of professor.

Fortunately, students do not need to be my friend for this effort to be successful. Thus, I offer my advice, but more importantly, my concrete support, to my students. No, professors should not decide what students should do with their JDs, nor should professors be looking for jobs for them. But at the same time, now more than ever, students need the guidance of not just career and student services staff, but professional mentors, both during and after law school.

That mentorship, beyond what you teach in class and model in terms of analysis and legal reasoning, can start on Monday. Even if you have had it relatively easy professionally—and let us be clear, many law professors have—your time spent analyzing concrete ways that students can seek and acquire employment can do wonders. Have no sympathy for those who are capable but refuse to help themselves, but offer that time to your students on Monday. And through social media and other forms of connection and communication yet to be invented, when you are friends after they graduate, you can use new technology to be an old mentor.

Admittedly, IP and Internet Law are one of the few areas where there is job growth and significant hiring. But they are not the only areas, and all students can benefit from this engagement. So watch, as I have, as more and more students take up the mantle, and inspiration, and forge their uncharted path in this challenging legal environment. Internships (paid and

unpaid) in technology transfer, start-up in-house counsel, and government small businesses incubators can await—as they have been found by several of my students in the last eighteen months.

CONCLUSION

I do not profess that anything that I am saying here has not been done before, or done well. And I do not think that anything that I am doing is heroic.

But that is the point. Law schools do not need to throw up their hands and conclude that we must conform to the current market by being less ambitious or more conservative in our goals—at least not yet. Before we (or any individual schools) declare the end of an era or our options as to how to structure our institutions, we should at least try the above (and other ideas too numerous to discuss now).

I have been fortunate, and indeed this was a huge motivating factor in my choice of foci, to teach IP and Internet Law from 2005 onward (and practice in the areas since 2000). Dynamic, fast-moving, theoretical, exciting, reversal-prone, geeky—I love it. And I like to (attempt) to pass that excitement to my students. I like dynamism. But it is not for everyone. I relish the challenge that we face, even as I wish that we could face it hypothetically as we do when we teach.

Nonetheless, from day one of teaching law, I wanted suggestions on what I could do right now to improve my teaching. With the demands on time that are ever-increasing, my goal with this essay is to offer three relatively easy courses of action that can be implemented almost unilaterally and quickly. I hope that I have achieved that modest, but important goal, and offered thoughts and advice useful to the neophyte as well as the mentor.