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In this Issue

Time for the United States to Join the Party? Prospects for US Ratification of the United Nations Convention on the Law of the Sea

Clive Schofield and Ian Townsend-Gault

The re-election of President Obama in November 2012 once again raises the tantalising possibility that the United States (US) will finally become a party to the United Nations Convention on the Law of the Sea (UNCLOS).[1] The question is, following many dashed hopes in the past, will the US finally 'join the party' and, in common with the vast majority of the international community, subscribe to UNCLOS?

So Much to Gain, So Little to Lose

A particularly confounding, if not ironic, aspect of the non-ratification of the Convention by the United States is that not only did the US play such a significant role in shaping the Convention but that the US has so much to gain from UNCLOS.[2] A selection of the benefits to be derived from becoming party to the Convention are articulated below.

A Global Consensus

UNCLOS provides the overarching framework governing international ocean affairs. The Convention is one of the most wide-ranging, comprehensive international Conventions and, together with its associated agreements,[3] covers or touches on virtually all marine activities. UNCLOS has, moreover, achieved broad acceptance from the international community. At the time of writing the Convention boasted 164 parties, comprising 163 States plus the European Union. When it is recalled that there are 'only'

1 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (hereinafter LOSC). The Convention goes by a number of different acronyms, "UNCLOS" (United Nations Convention on the Law of the Sea) is used here as it is generally the most widely used and recognised term. "LOSC" (Law of the Sea Convention), is also used as this distinguishes the Convention from the three UN Conferences on the Law of the Sea (UNCLOS I, UNCLOS II and UNCLOS III) of 1958, 1960 and 1974-1982 respectively. In contrast, opponents of the treaty in the US tend to use the term "LOST" (Law of the Sea Treaty).

2 While the US needs to ratify the Convention domestically, as UNCLOS is in force the US would accede to it internationally.

3 Notably the Agreement relating to the Implementation of Part XI of the convention and the UN Fish Stocks Agreement. See, *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, available at, <http://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm>; and, *The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, (in force as from 11 December 2001), available at, <http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm>.

155 coastal States in the world, the near-comprehensive uptake of UNCLOS is underscored.

Indeed, despite being a non-party itself, the US nonetheless accepts that key aspects of UNCLOS, such as the maritime jurisdictional and boundary delimitation provisions, are declaratory of customary international law and conducts its policy accordingly.[4] In terms of international law and international relations, US accession to the Convention would therefore consolidate and reinforce the oceans policy and practice pursued by successive administrations of both political persuasions in the US.

Order for the Oceans

As noted above the Convention provides the overall governing international legal framework for ocean affairs. Fundamentally, the Convention promotes law and order in the oceans by specifying the nature and extent of state rights in maritime spaces while setting out concomitant responsibilities. It is founded on principles that counties such as the US have adopted and promoted, such as sustainable development, optimum utilisation of resources, equity, and the protection and preservation of the marine environment in the context of the legitimate rights of States. The Convention therefore serves to safeguard key concepts that are entirely keeping with US national interests, including freedom of navigation (see below). By providing the generally agreed framework governing oceans jurisdiction the Convention has played a significant role in restraining and regulating the so-called 'creeping jurisdiction' of coastal States.

Strategic Imperatives: Preserving Freedom of Navigation

As noted above, the US already conducts its oceans policy in accordance with the terms of UNCLOS. Indeed, and again rather ironically, it is the US that has proved itself to be the primary defender of the Convention. In particular, the United States has sought to counter excessive maritime claims on the part of other coastal States that run counter to the balance of rights and obligations laid out in the Convention. In particular the US has sought to defend and preserve freedom of navigation through the oceans.

The US seeks to achieve this aim through its Freedom of Navigation (FON) program which was established in 1979.[5] Through the FON program the US routinely protests against any practice excessive or contrary to the provisions of UNCLOS, or, more specifically, the United States' *interpretation* of those provisions. The rational for these actions is that, as a maritime nation, the national security of the US "depends on a stable legal regime assuring freedom of navigation on, and overflight of, international waters", and that in view of this, the United States will respond to what it views as excessive maritime claims in order to preserve the "careful balance of coastal and maritime state interests" enshrined in UNCLOS.[6]

4 Roach, J.A. and Smith, R.W., *United States Responses to Excessive Maritime Claims* (The Hague: Martinus Nijhoff Publishers, 1996), 4-6.

5 *Ibid*., 3-13.

6 *Ibid*., 4.

The Freedom of Navigation Program provides for three types of responses – diplomatic representations in the form of formal protest notes, notes verbale or aides mémoire, "operational assertions" whereby United States air and naval forces undertake missions designed to emphasise freedom of overflight or navigation in a "low-key and non-threatening manner but without attempt at concealment" and through bilateral and multilateral consultations.[7]

Freedom of navigation remains a core strategic priority for the US, a view that the US has repeatedly and clearly articulated. For example, in January 2009 outgoing US President George W. Bush issued a National Security Directive in which it was stated that freedom of navigation was a "top national priority."[8] Contrary to the allegation that the Convention somehow undermines US military and strategic interests, therefore, UNCLOS is actually a critical means by which the US safeguards its security.

Leadership

The US is, of course, the world's sole superpower and its pre-eminent maritime power. Accordingly, the US clearly plays a leading role in global affairs. The US also perceives itself to be a world leader and is keen to project and promote this image and reality. The fact that the US is not a party to the Convention undermines that leadership role in the maritime sphere. Critically, when the United States comments on maritime issues of concern to it, such as regarding excessive maritime claims through the FON program or on the South China Sea disputes for instance, a frequently raised objection to Washington's interventions is that the US has not signed up to UNCLOS. This serves to compromise the credibility and authority of the US in global ocean affairs. US accession would therefore remove a somewhat irrelevant, but far from unimportant barrier to the United States playing a strong leadership role as the contemporary law of the sea. The counterpoint here is that by choosing not to participate the US is abdicating or at least undermining its credential to a leadership role in international ocean affairs. The rationale for ratification on this front alone is therefore, it is submitted, persuasive.

A Place at the Table

US accession to the UNCLOS regime would also enable and facilitate full US participation in how the law of the sea is further defined, applied, and modified. The 1982 Convention marked the end of the Third UN Conference on the Law of the Sea (UNCLOS III). It did not mark the cessation of the evolution and development of this branch of international law. And yet, the international community, by and large, has decided to pursue this process of evolution and development in the context of the UNCLOS regime. This alone speaks to the importance of securing the participation of all major ocean states. US non-participation compromises this. In essence, US non-participation denies the US a 'place at the table' within key institutions created as a

7 *Ibid*., 6-7 and 10-11.

8 While this statement was made in the context of the Arctic, it is nonetheless reflective of US oceans policy more generally. See, Memorandum from The White House Office of the Press Secretary, Presidential Directive on Arctic Region Policy, III(B)(5), 9 January 2009, on file with the National Science Foundation, available at <http://www.nsf.gov/od/opp/opp_advisory/briefings/ may2009/nspd66_hspd25.pdf>.

consequence of the Convention and related agreements. For example, as a non-party the US has no representative on the International Tribunal on the Law of the Sea (ITLOS) and is ineligible to put forward a member of the Commission on the Limits of the Continental Shelf (CLCS). This is surely problematic from a US perspective. As noted above, the Convention is now widely accepted as the basis for global oceans governance yet the law of the sea continues to evolve and change. Without US input, the international law of the sea is likely to be shaped in a manner that does not fully take into account US national interests. This is why complacent arguments that the US can take advantage of the benefits that the Convention offers on the basis that it is reflective of customary international law, whilst avoiding the costs of participation are flawed. Such a strategy represents a distinct abdication of responsibility that carries with it the long-term risk that international custom will ultimately run counter to US interests.

Jurisdictional Gains

Perhaps the most obvious and compelling gain for the United States will be secure title to jurisdiction over the non-living resources of the seabed and subsoil of the continental shelf extending beyond 200 nautical miles (nm). Both customary and conventional international law recognize state rights to this limit, but sea areas beyond are high seas, and sea-bed and sub-soil are part of the common heritage of humanity. These principles have been in process of development since the 1960s. The Convention, however, allows coastal States to establish outer limits to the continental shelf that go beyond 200nm provided the conditions set for in Article 76 of the Convention are satisfied. Through this process the United States stands to gain rights to enormous areas of seabed, especially in the Arctic. The Convention established the Commission on the Limits of the Continental Shelf (CLCS) to give official imprimatur to such outer continental shelf limits and thus the 'extended' or 'outer' continental shelf areas enclosed within them.[9] This is crucially important, because without secure legal title, it is hard to envisage any commercial entity wishing to explore and exploit resources beyond 200nm being able or willing to invest the billions of dollars necessary to conduct such operations, especially in hostile environments such as the Arctic. It should not be forgotten that security of title, and the need to ensure proper control of activities, were among the policy considerations which led to the 'Truman Proclamation' on the Continental Shelf of 1945.[10] This Proclamation laid the foundation for the entire modern law of the sea, because it took state rights beyond the limits of the territorial sea for the first time.

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9 Neither of the terms "outer" or "extended" continental shelf are ideal or have gained universal acceptance. The term "outer continental shelf" suggests that there are distinct parts of the continental shelf when legally this is not the case. For its part the term "extended continental shelf" gives a somewhat misleading impression that coastal States are somehow extending or advancing claims to additional areas of continental shelf. This is not the case as the sovereign rights enjoyed by the coastal State over the continental shelf are inherent. See, LOSC, Article 77(3) and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases (ICJ Reports, 1969, 3, at para.19).

10 See, Presidential Proclamation No.2667 "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", 28 September 1945, Federal Register 12303; 59 US Stat.884; ; 3 C.F.R. 1943-1948 Comp., p. 67; XIII Bulletin, Department of State, No. 327, September 30, 1945, p. 485. Copy included in Volume II of Brown, E.D., *The International Law of the Sea*, (Aldershot: Dartmouth, 1994), at 113.

An added dimension to this equation is the prospect of the Russian Federation resubmitting to the CLCS in respect of substantial parts of the Arctic seabed. This may well occur in 2013. This will, in all likelihood, reignite US jurisdictional concerns over Russian claims in the Arctic and will, moreover, be reinforced by Canada and Denmark's (on behalf of Greenland) submissions due in 2013 and 2014 respectively.

Clearly one way for the US to address these concerns would be to become a party to the Convention and make its own submission to secure jurisdiction its own extended continental shelf rights. Indeed, the US is already well advanced and prepared in this respect. Alternatively, the US could simply take the view that that outer continental shelf limits defined on the basis of the CLCS's recommendations are not binding upon the US and thus of little interest. The latter perspective is, in our view, a less than sure way to address US policy imperatives. The major expansion of US maritime jurisdiction available through the provisions of UNCLOS also directly contradicts the oft-repeated myth pedalled by opponents of the Convention that it somehow undermines rather than enhances US sovereignty. A particular concern raised by opponents of the Convention in this context relates to the UNCLOS regime on seabed mining including the creation of the International Seabed Authority (ISA) to regulate activity on the international seabed ("the Area") beyond national jurisdiction and distribute the proceeds of that activity. However, these concerns were addressed through a supplementary agreement to the Convention negotiated in 1994. In short, the US stands to expand its maritime jurisdiction to a significant extend through UNCLOS.

Prospects

Prior to the election a series of hearings were held before the US Senate's Committee on Foreign Relations. US Secretary of State Hillary Clinton spoke passionately in favour of US ratification whilst US Defense Secretary Leon Panetta commented that US accession to the Convention "secures our freedom of navigation and overflight rights as bedrock treaty law." Similarly, the Commander of the US Pacific Command (PACOM), Admiral Samuel Locklear stated unequivocally that "The Convention in no way restricts our ability or legal right to conduct military activities in the maritime domain." The Chairman of the Joint Chief of Staff Army General Martin Dempsey expressed analogous views. The strong showing in those hearings from proponents of the Convention reflected the broad alliance of interests that favour US accession to UNCLOS. Those speaking in favour of the US becoming a party to the Convention therefore included not only senior representatives of the US Executive branch and military as noted above, but representatives from key industries with a stake in the oceans (oil and gas, fisheries, shipping and telecommunications for example) as well as environmental groups.

No vote on UNCLOS was taken by the Committee at that stage. Instead it was decided to delay a vote until after the Presidential election. It was envisaged that post-election the Senate Committee on Foreign Relations would take a vote. It was (and is) anticipated that the vote would be heavily in favour of US domestic ratification of the Convention. UNCLOS could then be put to the vote in the 'lame duck' period prior to newly elected legislators arriving in Washington at the end of January 2013. The advantage of this

timing was perceived to be that narrow political interests such as assuaging the concerns of powerful even if in our view deeply misguided domestic constituencies that oppose not only the UNCLOS but anything to do with the United Nations and even international law itself, could be side-stepped. That time is now upon us.

The critical consideration now is whether the US President backs ratification of UNCLOS with conviction or not. This will be critical to achieving the two-thirds majority necessary for passage of the treaty. The fear must be that other concerns will take priority (the so-called 'fiscal cliff' for instance) and that the seemingly in-built, if in our view deeply misguided, opposition of conservative Republicans to international law and treaties will prove an insurmountable obstacle. We have been here before. There is always some other apparently more urgent concern that distracts attention from UNCLOS. Similarly, the instinctive scepticism of US conservatives towards anything associated with the words "United Nations" remains as a major obstacle. The benefits of US ratification do, however, considerably outweigh the alleged costs so one can but hope that the present opportunity to pursue US ratification of the Convention will not once again be lost. Most unfortunately, at the time of writing (December 2012), the outlook for US accession to UNCLOS appears to be bleak.

Geopolitical Tales

Mladen Klemenčić and Clive Schofield

Starting from this issue *International Zeitschrift* will publish a dozen articles provided by political geographers hailing from different countries. Political geography, sometimes also known as geopolitics, is just one of many subdisciplines within probably the most diverse of scientific fields, that of geography – a discipline which has been described as encompassing everything between geology and ideology. Geography and political geography in particular has continued to evolve and further diversify over time. However, contrary to many other geographical subdisciplines that have emerged in recent times, the beginnings of political geography can be traced back to the 19th century. This is not to suggest, however, that political geography has stood still as the contributions of political geographers to research on the themes of, for example, multi-scale identity politics in an era of globalisation and through critical social and political theory (critical geopolitics) testify. Consequently, political geographers have not only contributed significantly to developments within geography generally but have also contributed to a better understanding of international relations.

These trends have been especially evident in the engagements of political geographers in the inherently multidisciplinary field of border studies where much recent work has moved beyond traditional conceptions of boundary lines themselves to examinations of borderlands as dynamic spaces of interaction. While *IZ* has in the past generally had an international law focus, we believe that contributions from political geography perspectives complement such viewpoints and enhance the conversation on the international events which represents the core objective of the journal.

In particular, as a part of their work political geographers often travel to places removed from standard tourist routes and even intentionally visit places that most other people would prefer to avoid. Consequently, their experiences sometimes include weird and even downright funny situations. On occassion the authors featured in this series have had the chance to exchange experiences, often through joint research projects and via international conferences. These engagements inspired the idea of a series of short articles to be collected together under the overarching title of *Geopolitical Tales*. The premis of this enterprise was to share what might be termed fireside tales, experiences and reflections. The articles contained in the series are therefore not traditional academic texts. Instead, contributors were asked to draw on their often rich and distinguished careers something unusual and personal, even anecdotal.

The texts to be published through *IZ* were originaly published in Croatian language in 2010 in a special issue of the journal *Hrvatska revija* [Croatian Review] in Zagreb. However, as the majority of the articles were originaly written in English, therefore *IZ* has opportunity to make them available to its audience. The first group of papers consists of three articles which provide good insights as to the scope of topics and type of narratives, characteristic of the series.

Gerard Toal [Gearóid Ó Tuathail] wrote on his early fascination with skyscrapers as symbols of New York and the US as well as the end of the Twin Towers which he witnessed from a safe distance. Gerard is Professor of Government and International Affairs at Virginia Tech in Washington D.C. Within political geography he is particularly well known as a proponent of critical geopolitics.

Elena dell'Agnese wrote an anecdote relating to her trip to Africa, but in fact it is a story on boundaries, a topic that has often, as noted above, been something of a synonim for political geography. Elena is Professor at Italian University Milano-Bicocca and is currently Chairperson of the Commission on Political Geography, a specialized subdivision within the International Geographical Union (IGU).

Julian Minghi, Profesor Emeritus of the University of South Carolina is one of the best known veterans in political geography, particularly interested in borders and border regions. He provided an anecdote which involves another legendary political geographer.

Despite the somewhat unconventional character of these tales, we commend them to the readers of *IZ* as they nonetheless provide, we hope and trust, informative insights as well as reading pleasure.

II & I

Gerard Toal

The first time I saw them was in my uncle's room. They were on a pennant that hung on his wall, a souvenir of his recent trip to "the States." The year was 1977 and I was fifteen years old and spending the summer with my uncle, helping out around the farm. 'Skyscraper' was a word that always fascinated me. I knew that New York had lots of them and I wondered, 'did it rain there like it did in rural Ireland?' I mean, if the sky was full of skyscrapers, was there any weather? I bet it didn't rain sideways like it did across the green fields I walked to fetch the cows for milking. I also knew one skyscraper in particular: the Empire State Building. I remember watching *King Kong* with my father. New York was the Empire State Building and the Statue of Liberty. So why were there two skyscrapers that looked exactly the same on the pennant he had? When he explained that these were the 'Twin Towers' and that they were the tallest buildings in the world, I marveled at 'the Yanks' constructing not one but two fecking skyscrapers that were exactly the same. Of course, they had to be the tallest buildings in the world. Yanks were really full of it. We all knew that.

I wasn't particularly bothered when I first rode up the elevator to the 'Top of the World' observation deck. Typical Yank overstatement, that. I was with my parents and they were visiting me in "the States" for their twenty fifth wedding anniversary. The year was 1986 and I was a graduate student at Syracuse University in upstate New York. When I first came to Manhattan I had, of course, gone to see the sites I knew from childhood: the Empire State Building and the Statue of Liberty. I didn't see the 'Twin Towers': no magic nor history, and now they weren't even the world's tallest buildings. Now I was nervously stepping out of an elevator onto the top of the world. A momentary flash of panic: they're going to collapse just when I am at the top! Settling down, I came to realize that these buildings were truly amazing. What incredible wonders! What a divine vantage point on the sprawling metropolitan monster that is New York City. I was thrilled and terrified, amazed and awed – entranced by the technological sublime.

I went again, of course. I remember eating lunch on one of the stone benches in the plaza below. I now had a girlfriend working nearby in the Manhattan Borough Presidents Office and I was spending the summer with her in New York. The scene was somewhat sterile but the space was abundant, unusual for lower Manhattan. The ground level vista seemed normal and human scale until one looked up and up and up.

The relationship did not work out. I moved away. A few years later I was back, with another woman friend who I was hoping might just work out. She was Italian and wanted to see New York. I now knew this meant a visit to the Twin Towers. We went there at the end of a long day walking around. Our energy was low and, well, I had more or less decided that this relationship wasn't going to go anywhere. As she took in the views I sneaked off and placed a phone call to my former girlfriend. I didn't get through. My

mopey Italian returned. She tried to hide it in nonchalance but I saw she had caught a little of the technological sublime.

Fast forward to the summer of 2001: after seven years with my Italian girlfriend we break apart. Crash and burn. My uncle and father were dead, and now this amazing relationship was over. That August she visited New York with her parents, and, of course, they went to the Twin Towers. I spent the summer in Washington DC where in early September an old school friend, now an ordained Columban Father came to visit. He has spent all summer in lower Manhattan saying mass daily in a chapel next to the World Trade Center. Bankers and janitors and all walks of life in between came: he got to know them all. Now he was returning to Ireland, visiting me in Washington DC before flying home. I was leaving myself, not for Ireland but for my first trip to Russia. My destination was a conference in Stavropol, a mostly ethnically Russian city in the North Caucasus. The first day and evening of the conference were wonderful. As the sun set next to a lake, musicians played while we all ate, drank and danced. I was enthralled by two Caucasian beauties, one from Vladikavkaz, the other from Makhachkala. A photo from this majestic evening features me between these two towering beauties, between Orthodoxy and Islam. They returned to their hotel, and I to the foreign guest hotel. A few of us decided to have a wee nightcap and as we shared a little bottle from the party, someone turned on a television. Amidst a haze of the alcohol we all stared at pictures of a plane going into a skyscraper.

In Ireland, my friend was awoken the morning after his arrival. The Irish media were baying on the phone. He never answered.

Soft Drinking in Zambia

Elena dell'Agnese

At the end of the Eighties, Zambia was a country stricken by severe economic crises. In the mid-Seventies, the global price of copper, the most relevant of its exports, had declined sharply and the country had fallen into poverty. In order to deal with the crisis, the socialist regime of President Kenneth Kaunda had tried to reduce dependence on copper exports as the mainstay of Zambia's international trade, introducing programs aimed at stabilizing the economy and restructuring it. In the meanwhile, it had turned to foreign and international lenders, trying to make up for falling revenues. As a result, the country, instead of recovering from its difficult situation, had rapidly turned into one of the most indebted nations of the world.

In order to avoid making things worse, Kaunda had blocked every import from the outside. For example, in Lusaka, the national capital, at the time it was impossible to find a Salvelox. But I didn't know it. By then, I was a young woman, just at the beginning of her academic career, working very hard in order to publish (and not perish), teaching, engaging in research. In the month of December 1988, in the middle of the academic year, I was already overloaded with working hours and, feeling extraordinary tired, I decided that I needed a break.

A few days before Christmas, I went to my usual travel agent, asking for a ready-made trip, for the upcoming winter holidays. Well, 'everything has been booked months,' was the answer, 'but you are going to be very lucky. A couple of clients have been forced to give up their reservation for a wonderful trip to Africa.' Specifically, they had organized a trip to the breathtaking country of Zambia, in order to visit the majestic Victoria Falls, the mighty River Zambesi, and the renowned National Park of South Luangwa. 'To get there, you need a visa and that could be a problem; but, since you are really lucky, there is an easy solution' – went on the travel agent – 'I am leaving tomorrow for Rome and I will not find any difficulty in getting one for you, if you give me your passport.' After such a reassuring speech, I asked for the price – and, since it was really discounted, I decided I could afford it.

So, in a couple of days I was going to Africa (my first visit to the continent), in order to see the mythical falls, the great game, the savannah. In two days I had really little time to prepare for my visit. I collected some information about the climate (I knew I was going to face the wet season), some health tips (don't drink water, if it is not coming from a sealed bottle; don't eat anything that hasn't been properly cooked before; avoid ice-creams, glass cubes, sliced fruits, juices; don't go out sleeveless after sunset; always wear a hat). I succeeded in finding the anti-malaria prophylaxis tablets; I even bought some books about Austral Africa's national parks, about its mammals and its birds, which I intended to read during the flight. But, since there was no Internet at the time and I had no time to go to the University library, I did not read anything about the specific country I was going to visit. I left Milan with enthusiasm, without knowing anything about Zambia,

its economic and geopolitical situation, the difficult circumstances its people were suffering at the time.

Upon arrival, I found a driver waiting for me at the airport – the trip had been prepared in detail by the couple who were unable to make it in the end – and I was taken immediately to the Luangwa National Park. There, I was astonished by the colors of the land, the red of the earth mixed with the green of the savannah and the dark of the trees. The lodge was overlooking a dead branch of the river, a watering point where herds of elephants gathered at sunset amid the lush of vegetation. The building was elegant, the place very clean. The food was heavily spiced but quite palatable, especially after a long day engaged in a photo-safari tour. As far as drinking was concerned, we were provided with large quantities of tea and coffee in the morning, with a lot of local beer in the evening. We were also provided with plenty of drinkable water offered in large carafes that I was cautious enough never to touch, and with a green stuff locally produced and called *Quench*, which, notwithstanding the promising name, was far too sweet for my tastes. But, considering that I was in the mid of the savannah, many driving hours from any other settlement, what I was offered was more than enough and I never dreamed of asking for anything else.

After almost a week spent observing the wild game in the National Park, I was supposed to visit the Victoria Falls. Indeed, I was told, they are much more impressive from the Zimbabwe side; but you can drive quite easily to the border and then cross on foot. Following this suggestion, I reached the border by car, asked the driver to come and pick me up in a couple of hours. After a very quick check of my passport by the border patrol, I crossed the border and got into Zimbabwe. Indeed, the falls are majestic and the view from Zimbabwe impressive. But, if leaving Zambia had been very easy, going back was going to prove to be much more complicated. Indeed, when I decided to cross the border back to Zambia, I was surprised to find a long line of people, properly standing in queue, at the check point. Everyone was carrying a couple of plastic bags, and each bag was apparently full of bottles. Each bag was going to be checked by the border patrol and the waiting was going to last apparently forever. After some time, I eventually succeeded in getting back to the other side of the border, where the car driver was patiently waiting for me. 'What is going on?' I asked him; and he answered, you know, today is Last Year's Eve.

The explanation was apparently self-evident, and my question dumb, so the driver started immediately talking about the falls, the Livingstone's monument and the beauty of the area. Ignoring everything about the autarchic regime imposed by the Zambian government on its people, the border mystery remained with me while he was driving me back to the capital of Zambia, Lusaka. Again, in Lusaka everything was properly organized. I was supposed to spend the night in a big hotel in the city centre, and to leave the day after back to Italy. Again, I was quite lucky. The hotel was full of members of Zambian high society, because some local politicians were giving a party and, since I was the only foreigner there, I was invited. Again, I did not have to worry about my eating, since the party buffet was plentiful, or about my drinking, since there was a lot of local beer around (together with the usual carafes of drinkable water).

The day after, I had once more an appointment with the driver. But this time I was quite sad, because I was leaving the country. After a few words of farewell, he left me at the airport. It was about noon, so, after checking in the luggage, I decided that I could re-establish my good temper with my first (and last) independent lunch in Austral Africa. I went to the airport restaurant that was, at the time, packed by stewards, hostesses and pilots. But there were no other clients, so I was seated at a nice table close to the window and waited on by not one waiter, but by three of them, extraordinarily serious and polite. Chicken curry was indeed the only possible choice, but I was quite happy with it. 'And, what do you want to drink?' 'May I have a beer?' 'I am sorry, miss, there is no more beer today. Why don't you try a Quench?' - Oh, my God, I thought, the green stuff is way too sweet to accompany a chicken curry, the drinkable water is undrinkable, there is no beer - and so I ventured: 'What about a Coke?' The three waiters looked one another astonished for a few seconds, then they boomed synchronously in a roaring laughter. 'Coke?' said the taller of the three, 'It has been finished for seven years now.'

A little embarrassed, I quenched my thirst with the green stuff, I finished my chicken curry and got to the plane. There I was lucky again since the seat near mine was taken by an English diplomat who took his time explaining me a lot of things about the copper crisis, Kaunda's politics, and above all the mysteries of local drinking: and further, why the name of Coke had a humorous effect at the Lusaka airport. Probably, I would have been luckier if I had met the English diplomat on the way in. I would have seen the country with different eyes (and drank more Quench in order to improve the local economy).

Should Students Tell Professors When They Are Wrong?

Julian Minghi[1]

In early January of 1960 – just over 50 years ago – I left the office of Richard Hartshorne, a distinguished professor of geography at the University of Wisconsin in Madison, a very worried graduate student. Hartshorne had just handed me a manuscript he had written a decade earlier and wanted my opinion about its veracity. As an exercise in political geographic documentary analysis, he had examined the details of a new peace treaty incorporating a boundary change and assessed, without any fieldwork or any bibliographic search, the impact this change would have on the borderland geography. After I had read it, my stress level went through the roof. If I told him it was an accurate analysis, it would not be the truth and he may find out later I had lied. But if I told him the analysis was flawed due to his ignoring of many relevant factors, I might incur his wrath and put my academic future in jeopardy. So I faced a real dilemma! What was I to do? But first let me share some essential background information.

As a newly-arrived student, I was having my first official meeting with my new advisor. Hartshorne learned that I had written my BA honors thesis on the Italian Upper Val di Susa along the French border and that, during my second year at King's College, Durham University (later to become Newcastle University), I had, during the Easter break of 1956, assisted my tutor, John House, in fieldwork on the impact of the 1947 boundary change in the Alpes Maritimes. House's project was to assess the long-term impact of the 1947 transfer of some 460km^2 from Italy to France. He was later to publish his findings but despite the 1959 publication date, the article did not appear until later in the spring of 1960. In my first year at King's, I had been one of twenty or so students in House's special aspect honors course in political geography which included a week's fieldwork in the spring of 1955 walking the entire length of the Anglo-Scottish border, officially long a relict boundary but with a borderscape revealing many evidences of the persistent contemporary differences between the two polities. Hence, House knew about my early and compelling interest in boundaries and also valued my background as the son of Italian immigrants to the United Kingdom which gave me a facility in the Italian language he felt he needed for his field research.

For the entire summer after graduation from Durham in 1957, I added to my boundary experience as a member of a UK student expedition to remap the surface geology of Andorra along the then-tense Franco-Spanish border. Moving to the USA for graduate work, I had completed a master's thesis in the summer of 1959 at the University of Washington on new maritime boundaries restricting Japanese salmon fishing in the North Pacific. I started in the doctoral program under Douglas Jackson in Seattle in the fall of 1959, passing my preliminary examination.

But the smooth progress of my graduate training was to be rudely interrupted. Jackson had been invited as a visiting scholar to join Harvard's Russian Studies institute for the

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spring of 1960. As he felt there was a good chance that he would not be returning to Seattle, he began to place his graduate students with other advisors or to find a new home in a quality department under an advisor with political geography interests. The University of Wisconsin had one of the strongest programs in geography and Richard Hartshorne had become a central figure in political geography based on his pre-war work on European boundaries and especially on his landmark 1950 article on "The Functional Approach in Political Geography". In a pre-e-mail and pre-fax era, all arrangements were made rapidly by long-distance telephone to have Hartshorne take me on as a new student in the Wisconsin doctoral program, and supported for the spring semester of 1960 as Hartshorne's teaching assistant in his course "The International Scene", a core requirement in Wisconsin's prestigious undergraduate Integrated Liberal Studies program. Unlike Washington which had a quarter system, Wisconsin began its spring semester in February so instead of having to find work in Seattle for a month before leaving for Madison, I was most grateful for the promise of work in the Madison cartography lab for January before starting the doctoral program thus allowing me to acclimatize to the Madison frigid campus for a month.

I drove my disreputable 1950 Ford through the harsh winter landscape of the American interior, arriving in Madison on New Year's Day, 1960. Later that day, as the news arrived from Pasadena that Washington had beaten Wisconsin in the Rose Bowl football game, I came in for much unwanted attention due to my distinctive state of Washington license plates! Hartshorne was very kind. I was not only among the many geography foreign students the Hartshorne's routinely invited to celebrate the New Year but, obviously having nowhere to go at the end of the party, I was offered a bed at the Hartshorne abode for several nights before moving into a shared room at the YMCA. Indeed, as the semester started in February, as a prominent and respected member of the Madison Unitarian community, Hartshorne was able to get me into the Unitarian Student Cooperative, a four-month experience I have since treasured as a precious memory.

As the campus came back to life after the holiday break, I started my routine of working several hours a day in the cartography lab and dutifully scheduled my first official meeting with my new advisor with three topics on the agenda – first, my assistantship duties in the International Scene course and secondly the requirements of the doctoral program which included taking Hartshorne's seminar on Theory in Geography which was based on his two magnum works – *The Nature of Geography* (1939) and *Perspective on the Nature of Geography* (1959). Lastly we talked about my research interests, past and future and he suddenly became very animated. He stood up, reached up high to remove a thin file from the top of a file cabinet, literally blew a decade of dust off the file, and, with a smile, extracted a typed manuscript of about 10 pages. He told me he had written this in 1947, based only on the materials associated with the new boundary change treaty between France and Italy, and had not touched it since. He ended the interview by handing me the file and requesting me to return soon with an opinion about its contents.

Hartshorne had been correct on some aspects of his analysis about the impact the border change would have on the local human geography. Most people who had

migrated into the region from other parts of Italy during the final two decades did indeed take advantage of the six-month grace period to leave before becoming automatically French citizens. And this did lead to an economic decline in the several towns in the region lost by Italy. Neither France nor Italy considered the region critical to its national interest and hence the treaty did not prevent the two countries working in close cooperation in post-war Western Europe. All of this, he had correctly assumed. Yet his analysis missed the mark on several important points. In the treaty both countries agreed to cooperate in rebuilding the railway through the region, linking the Italian Mediterranean coast to Turin that had been destroyed during WWII. Hartshorne assumed this would be done in short order. But a decade later, no progress in rebuilding had been made. Indeed, only in the post-De Gaulle era did construction start with the Roya Valley railway reopening in 1979. Hartshorne assumed that the local rural populations, all Savoyard in culture and language on both sides of the boundary, would easily reach accommodation and compromise in rearranging their traditional transhumance activities around the new boundary. Not so, at all! France applied stringent regulations about the movement of cattle and people across the new boundary, making access to high pastures and communal forestry resources for the Italian communities along the new boundary virtually impossible. And two developments further undermined the local economy in the area gained by France. The powerful national agency responsible for generating and distributing electrical power in France, the Electricite de France (EDF), immediately moved into the region, building new dams and raising Italian dams originally built to provide electricity for operating the railway. This activity flooded pastures, forest land and access routes to summer pastures, seriously undercutting the rural economy, and it also brought in a large temporary population of construction workers – mainly of North African origin – creating serious social problems for the local alpine population. Exacerbating these developments was the fact that France at this time was a major colonial power fighting to regain its influence in Algeria and Indochina after years of German occupation at home. As now the poorest region of the country, an unusually high proportion of its young men were conscripted into the armed forces and many had lost their lives in the process. Hartshorne had given these possibilities no consideration in his analysis.

Honesty had to be the best policy. Clearly I really had no choice – I had to tell Professor Hartshorne the truth. So I did with great trepidation about my future at Wisconsin. But I had misjudged the man. He was kind and he was fundamentally an academic with great intellectual integrity. He seemed delighted with my report and very pleased not to have sought to publish his experimental exercise! We had established a rapport which was to stand me in good stead for the rest of the semester, and indeed over the following decades as we met regularly at geography conferences to exchange as colleagues and fellow political geographers recent research activities and experiences.

And the story has an even happier ending. Doug Jackson decided to return to Seattle after all and I returned to the doctoral program at the University of Washington in the fall of 1960. And the "interruption" was not without profit. As a lowly graduate student I had forged a friendship based on mutual respect with a senior political geographer. And Hartshorne showed no rancor over my decision to transfer back to Washington after only

one semester. I had learned much from the three seminars taken at Wisconsin as a "visiting" graduate student – one on the historical geography of Canada offered jointly by Andy Clark and visiting history professor from Manitoba, W.L Morton, and one on scope and methods in political science, and also Hartshorne's. But without any doubt the most important and longest lasting advantage was that in that cold early January in Madison I had met my future wife, a student in the master's program in Social Work. We were engaged in Madison on Friday, 13 May, married in early September in time to return to Seattle so very much better off than when I had left nine months earlier.

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The kind of teaching that I do doesn't fit at Corporate U

The-Artist-Formerly-Known-As-Professor-Wexler

For 42 years, I have been a professor at the University of British Columbia's Faculty of Law. Since I will retire on July 1, 2012, you wouldn't think it was time for me to be doing something new, but on April 12, 2012, I did something I had never done before. I made a motion at a faculty meeting. My motion was that:

Professor Stephen Wexler's proposed course: Advanced Torts – Burden of Proof and Politics be approved and forwarded to the Senate for its consideration.

Now, a motion such as this would ordinarily be made by the Chairman of the Law Faculty's Curriculum Committee, but the Curriculum Committee had turned down my proposed course. This was a sort of appeal.

I lost. My motion was defeated. The vote was: 1 in favor (me) – 27 opposed (everyone else at the meeting). I didn't just lose. I was trounced and in a way, I am grateful because if the vote had been close, I'd have spent a lot of time wondering what I could have done to make it come out the right way. As it is, I realize there was nothing I could have done. My motion was destined for defeat.

Still, I ask myself two questions: one, what was so wrong with my proposed course? What was so bad about it that it was uniformly disapproved of, and two, how could Advanced Torts – Burden of Proof and Politics ***not*** be approved as a law school course? What could be wrong with a course like that at a law school?

The short answer is that it wasn't my proposed course that was uniformly disapproved of; it was the way I teach, in particular that I require students to write a one paragraph essay at the beginning of the course and a 10-12 page essay at the end. In every other 4 credit course where a paper is a required, the paper must be 30-40 pages.

My papers are different because they are read out loud by the students who wrote them to the whole class and discussed. I tell the students exactly what I think about their papers while they are reading them. In the other classes, the students slide the paper under the teacher's door and the teacher gives written comments with a grade. If you measure work by page length, which they do, they require more "work" from the students than I do and however you measure "work," they require more from themselves. Every faculty member I know groans when they talk about grading the 40 page papers they require students to write. I am not required to read student papers. My students read their papers to me, out loud, in class. It takes the other professors a lot of time to write their comments and the comments go to one student. I don't write comments, I make whatever comments I have out loud to all my students.

No wonder the faculty voted against me. If what I am doing is acceptable, why are they doing what they are doing?

As we will see, the length of the papers I require is the short answer to the question why was my motion voted down. A second part of the short answer is that there is no reading list in my course. This is absurd. A university course must have a reading list.

I read out loud with my students. I developed this technique through my 42 years of teaching at the UBC Faculty of Law where my experience was that the students have so much reading assigned to them that they learn to either not read or read badly. I read out loud with my students and discuss everything: content and writing, including spelling, diction, grammar, style, etc. Nothing is excluded as irrelevant. The purpose of reading this way is to teach the students to read more slowly, more carefully and in greater depth, paying attention to, rather than ignoring, their inner discourse.

My colleagues could not approve my way of teaching without condemning their own: that is the short answer to my question 'why did my motion lose.' The long answer, the story of my losing motion, is interesting

a) for what it says about teaching law at a corporate university, and

b) for some illustrations it provides of legal theory, the theory of how rules or norms or laws work.

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For the past eight years I have taught a course called *Topics in Tort – Burden of Proof and Politics*. This course grew out of three earlier courses I taught for about eight or ten years each. They were called *Automobile Negligence Law*, *Consumer Protection Law* and *Burden of Proof*.

Two years ago I was told I could no longer teach *Topics in Tort – Burden of Proof and Politics*. I was informed that according to a university rule, the designation "Topics in …" could only be used for three years. After that, a professor was required to apply for Senate approval of the course.

When I received this information, I was also told that since the academic calendar for 2012 had already been set, I would be allowed to teach the course in 2012, but for 2013, I had to apply for Senate approval. So I did.

The first point of legal theory is that rules can be either applied or not applied and there's a big difference between the two. This may seem obvious, but as Aristotle said, when we are doing theory, the obvious is precisely what we must notice.

I had been teaching *Topics in Tort – Burden of Proof and Politics* for eight years and no one had ever said anything about a three year rule. Now, suddenly, things were changed. Why? What happened? Why now, was this rule being enforced, when before it had not even been noticed?

At the meeting where my motion was trounced, a former Chair of the Curriculum Committee explained that last year, at her first meeting of the Senate Curriculum Committee, it had been announced that Senate had done a "census" and discovered that *Topics in* … was being widely used around the university to evade applying for Senate approval.

Now, the fact that many professors around the university, people who in general do not disobey university rules, were disobeying this particular rule might have led Senate to wonder whether or not it was a good rule, but it didn't. Instead, Senate clamped down on the disobedient professors. The rule would be enforced.

I am a legal realist so I put theory aside. I was required to apply for Senate approval, so I did and I immediately saw one reason why other professors had not been applying for Senate approval. The application process is a bureaucratic nightmare.

My application had to be put into a special form, with two columns and certain headings: a form mandated by Senate. Only one secretary at the law school knew how to type this form – the secretary of the Faculty of Law's Curriculum Committee.

After looking at some examples of prior successful applications I gave him my application and he put it into the shape Senate required. Then it was submitted … but not to Senate. My application went first, to the Faculty of Law's Curriculum Committee. If that committee approved my proposed course, it would then be recommended to the Faculty of Law's Faculty Council for its approval. If the Faculty of Law's Faculty Council approved the proposed course, it would be forwarded to Senate.

At Senate, the proposed course would be reviewed by a subcommittee of the Senate's Curriculum Committee. If that subcommittee approved the proposed course, it would be considered by the full Senate Curriculum Committee. If the full Senate Curriculum Committee approved the proposed course, it would be put before Senate, and if Senate approved the proposed course, it would be listed in the catalogue and I could teach it.

Elaborate procedures like these are a hallmark of the modern corporate university and notice that they are not simply the mechanism for gaining Senate approval. The elaborate procedures create the idea of "Senate approval". Without the elaborate procedure, there would be no such thing as "Senate approval". Or rather, there would be no such *substantive* thing as "Senate approval".

I have not studied the history, but I believe "substantive Senate approval" is a relatively new phenomenon. I had not applied for "Senate approval" of *Automobile Negligence Law*, *Consumer Protection* or *Burden of Proof* and I had not applied for "Senate approval" of *Aristotle and the Law*, another course I taught.

My impression, without checking the history is that the Law Faculty used to set its own curriculum. If Senate then approved, it was merely as a formality. Taking "Senate approval" seriously, establishing the bureaucratic nightmare, is part of what people mean when they talk about "the corporatization of universities."

"Senate" approval makes no sense. How is Senate better able than the law school to decide what courses should be taught at the law school? The Senators come from all over the university and from outside the university. What can they know about teaching law? The law faculty has a representative on Senate. What does a law professor know about teaching medicine or mathematics?

Universities must be on guard against sexist or racist courses, but if a course was racist or sexist that fact would be unlikely to arise in a proposal for it. If the issue of sexism or racism arose, it would be through complaints. After the fact, the university might decide that a course had not been proper, but *prior* substantive Senate approval is conceptually flawed. It makes no sense and has no purpose. Why should a professor who wants to teach a course have to apply for anyone's approval, let alone Senate's? A law school might think it required certain courses and hence, might not permit a professor to teach a proposed course unless all the required courses were covered, but other than that, what reason could the Senate or a law school or anyone else have for denying a professor's proposed course?

At Corporate U, courses are taught by the professors but the courses do not belong to the professors. They belong to the university. They are the product the university produces and the customers (the students) must all receive a product that meets university standards. The idea of a course at Corporate U is like the idea of a hamburger at McDonalds. Just as all burgers at McDonalds must be the same and meet McDonalds' standards so all courses at the university must be the same and meet university standards.

This is not a stupid idea. All university courses should meet a standard: students should learn something in them, but that standard is maintained not by the Senate approving courses. It is maintained by the hiring of good faculty. What, pray tell us, is Senate trying to prevent? What kind of courses does Senate think professors will propose? To what kind of courses does Senate expect to have to *deny* approval?

Because prior substantive Senate approval is conceptually flawed, because the Senators are not competent to judge what should be taught at the law school, they turn the question into one of numbers. At Corporate U, if something cannot be counted, it does not count. Everything that counts must be measured.

Just as a burger at McDonalds must have so many and so many ounces of such and such grade beef, just as it must contain so much fat and so much salt, so a course at Corporate U must have so much and so much "work" per credit for the student. "Work" = learning. "Work" = number of pages.

My Proposed Course

My proposed course was a description of the course I'd been teaching for eight years. Here is my application. Here is the course that was so bad it was disapproved of by all my colleagues.

Category l Curriculum Proposal

Course Proposal: Law ***

Advanced Torts: Burden of Proof and Politics

The proposal is to regularize and include in the calendar a seminar that has been taught for 8 years under the designation Topics in Tort.

1. Description and Rationale for the Seminar

Content:

In their first year of law school, all law students study Tort Law. This elective seminar takes students deeper into the study of Tort Law in two ways: first, we examine burden of proof in detail and second, we explore the political bases of Tort Law.

Burden of proof is discussed in all first year classes, but beginning students are given neither a rigorous analysis of burden of proof nor a detailed explanation of the procedural consequences of decisions regarding burden of proof. In this seminar, they get both. Topics covered include: pleading, the evidentiary burden, the persuasive burden, presumptions.

Students are also given a historical, social and legal treatment of Tort Law, including an analysis of Workers Compensation and other No-Fault schemes. The political causes and consequences of these alternatives to Tort Law are examined.

Learning Objectives:

Students are expected to develop an approach to Tort Law that focuses on burden of proof and takes account of the political forces that shape Tort Law.

In addition to covering this content, the seminar is designed to help students improve their reading and writing. These latter goals are accomplished through four distinctive teaching techniques that mesh with the content of the seminar.

a. At the beginning of the seminar, each student is required to write a one paragraph essay beginning: "One thing I don't know about tort law is …" An example the students are given is: "One thing I don't know about tort law is when a product may be sold, but only with a warning, and when a product may not be sold at all."

Each student is required to read his or her paragraph out loud to the class. The student's writing and the issues raised by the student in the paragraph are all discussed. One or two students read their paragraphs in each class and these paragraphs often form the basis of students' later work in the seminar.

Doing this exercise helps the students begin to talk with each other and leads them to concentrate on what they do not know, rather than what they do know. This helps them learn. As Aristotle pointed out: learning begins with wonder.

b. During the first three quarters of the semester, each meeting of the seminar is divided into two parts. In one, the students read their paragraphs and the paragraphs are discussed; in the other, the professor reads a scholarly article out loud to the students. The students all have copies and read along. As the professor reads, he comments on

both the article's content and the writing in it, including spelling, diction, grammar, style, etc. Nothing is excluded as irrelevant.

The purpose of reading this way is to teach the students to read more slowly, more carefully and in greater depth, paying attention to, rather than ignoring, their inner discourse.

c. Over the course of the semester, each student is also required to write a paper on some question in Tort Law. Over the last few weeks of the seminar, each student reads his or her paper out loud to the seminar. All the students read along. We are able to read and discuss two student papers in each 1½ hour meeting of the seminar. Reading the papers out loud provides an extraordinary amount of positive peer pressure for students and leads them to work very hard on their papers.

Reading the papers out loud is also part of the Oral Method of Composition, a technique for improving writing. As they read, students often say something that is different from what is written in the paper. Whenever a student does this, the difference is noted and the student is encouraged to examine the difference.

d. Students are restricted in the length of their papers. The papers can only be 10-12 page double spaced. Using papers of this length serves two purposes. It makes it possible for students to read their work out loud in class but it also requires students to focus on one legal question and write about it clearly, completely and briefly. It is critical for law students to learn this skill; the Supreme Court of Canada and the law reviews all insist on brevity now. (Several papers from this and other seminars taught on this model have actually been published: e.g. Hung. C. *Strata Plan NW2294 v. Oak Tree Construction Inc*.: Implied Warranties on New Homes, CONSTRUCTION LAW REPORTS, June 1995)

Evaluation:

Students are graded subjectively on their final papers. I use traditional standards such as interest of topic, research (where applicable) and writing. These form the basis of the grade. There is no expressible percentage breakdown on these three elements. Attendance is kept. A student who is absent too much is penalized in terms of grade. Again, there is no expressible percentage breakdown of this factor.

2. Materials

The articles the professor reads to the class are selected from materials prepared by the professor. The article that always begins the class is *Legal Proof and Tort Law*. This article was written by the professor and published in 2007 in Advocates Quarterly. The other readings change each year depending on the interests of students and come from materials which include A.W.B. Simpson's *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, Journal of Legal Studies, 1984, and 18 other articles published by the professor:

Conceptual Garbling in Automobile Negligence, THE ADVOCATE, September 1985

Accelerated Depreciation: Driving an Investment, THE ADVOCATE, January 1986

Reprinted:

B.C. ADJUSTOR, April 1986

The Impecunious Plaintiff: Liesbosch Reconsidered, CANADIAN BAR REVIEW, March 1987

Why It Is Sometimes Hard to Know Who Was Negligent, THE ADVOCATE, July 1988

Passing a Stopped Bus: *Carvell v Lai*, THE ADVOCATE, January 1989

Contributory Negligence, RECOVERY, February 1991

Case Comment, *R. v. Sweeney*, THE ADVOCATE, May 1992

On Burdens, of Proof and Otherwise: Lord Wilberforce's Use of the Phrase `Prima Facie', THE CAMBRIAN LAW REVIEW, 1992

Case Comment, *ter Neuzen v. Korn*, CANADIAN CASES ON THE LAW OF TORTS, December 1993

Case Comment, *Fraser v. Kelowna Motorcycle Club*, THE ADVOCATE, March 1994

Book Review, Gaskins, *Burden of Proof in Modern Discourse*, CANADIAN BAR REVUE, June 1994

Case Comment: Damages in Tort and Contract: *B.G. Checo* and *Rainbow Caterers*, THE ADVOCATE, January 1995

Case Comment: Consumer Protection: *MacKay v. Bank of Nova Scotia*: *Rushak v Henneken*, CANADIAN BAR REVIEW, March 1995

Annotation: *Vout v. Hay*, ESTATES AND TRUSTS REPORTS, October 1995

Tock v. Swinamer: The Defence of Statutory Authority in Nuisance and The Policy/Operation Dichotomy in Negligence, ADVOCATES' QUARTERLY, November 1995

Liability for Medical Products: *ter Neuzen v. Korn* and *Dow v. Hollis*, UBC LAW REVIEW, 1996

Burden of Proof , Writ Large, UBC LAW REVIEW, Fall 1999

Comment: Do We Really Need the Hand Formula, THE TORT LAW REVIEW, March 2001

The Rejection of My Proposal

Why was my proposal disapproved? What was wrong with it? It might, I suppose, be said to be immodest: perhaps I read too much from my own work, but is that a reason to reject the course?

No. I have already indicated the short reason for the rejection: the papers I require are too short, but here is the official reason my course proposal was rejected. Here is the response of the Curriculum Committee. I will break into the response periodically with comments.

Dear Steve,

The Curriculum Committee met on Wednesday to discuss your proposal for a new course entitled Advanced Torts: Burden of Proof and Politics. Although members of the Committee thought that the proposed course looked extremely interesting, concerns were raised about the lack of detail in various areas

{Lack of detail? What more details could there be?

When I received the rejection, I reapplied, giving more detail. I supplied the table of contents of the materials from which my students and I read aloud.

Table of Contents

My reapplication, containing this added "detail," was denied. That's when I made my motion to the faculty.

On the morning of the day of the faculty meeting at which my notion was trounced, I had a pre-meeting meeting in my office with the Chairman of the Curriculum Committee. We discussed the rejection and the question of how detailed the application had to be. I pointed to the Table of Contents printed above and asked him "How much more detailed could it be?"

He said, "You could have a sentence or two under each heading. My syllabus is 52 pages long."

The Chairman of the Faculty of Law's Curriculum Committee teaches a course of which Corporate U can be proud: the syllabus is 52 pages long! This must be a serious course: a course worthy of the university. My course has no syllabus. How could it possibly meet the "standards" of Corporate U?}

… and the assessment strategy for the course, and as a result it was decided that we could not recommend the proposed course to Faculty Council in its current form.

I have also consulted with S.W. – who is on the Senate sub-committee that will be considering your proposal before it is brought to the full meeting of the Senate Curriculum Committee – who also identified a number of issues with the proposed course. She indicated that the proposal is unlikely to gain approval from her subcommittee (and therefore Senate Curriculum Committee) in its current form.

{Theoretically, this is quite interesting. How can what will happen at the next committee influence what should happen at this committee? What's the point of all the committees if they all make the same decision? Is a trial judge supposed to ask him or herself, what would the Supreme Court of Canada decide?}

As a result, I am now writing to you with a list of questions and suggestions for amendment. Assuming that you are able to address these issues and submit a revised proposal, I will then circulate it to the Curriculum Committee for reconsideration. My hope is that we will then be able to recommend that Faculty Council approve the new course and send it to the various Senate committees for approval.

List of questions and suggested amendments:

(1) The Committee was unclear about the relationship between the burden of proof and politics as mentioned in the title and the course description. We would recommend adding detail to the course description to clarify this relationship, and possibly altering the title. One suggestion was that the title could simply be "Advanced Torts: Burden of Proof", but there was no clear consensus on this.

{In my reapplication I said this:

The Curriculum Committee suggested that I drop the words "and Politics" from the title of the course. Every year, one point about tort law comes up in the course: the difference between negligence and worker's compensation. Sometimes we reach a passage where I've written about that point, sometimes it comes up in connection with something else, perhaps something in a student's one paragraph essay. I teach the students that in the late 1800s, three doctrines – the fellow servant rule, contributory negligence and assumption of the risk made it virtually impossible for an injured worker to sue a negligent employer in tort. These doctrines allowed the industrial revolution to proceed without paying for the consequences of the factory system. Injured workers,

members of the *lower class*, absorbed the cost of the lost limbs and ill health created by their employers' negligence. Injured passengers, often of the *upper class*, were able to sue negligent railways for *restitutio in integrum.*

I take this to be political. I teach many other political things. Tort law, indeed, all law, is political. The message of my course is that a society's politics is expressed in who has the burden of proof and how burdensome it is. Every society places burdens on any one who seeks to change the legal status quo, for instance by suing in tort. The plaintiff in a tort action asks the court to declare that money having the legal status property-of-the-defendant be changed to money having the legal status property-of-the-plaintiff.

I do not think the committee would have objected if I had called the proposed course: Advanced Torts: Burden of Proof and **Policy**. For the committee to object to the word "political" is a betrayal of academic freedom.}

Readers who were also radical flower children in the 60s will have been saying from the very beginning that a course called "Advanced Torts – Burden of Proof and Politics" could not be approved. The people who approve things do not talk about law as "politics". As I explain throughout, I see my disagreement with the UBC Law Faculty as pedagogical rather than political and personal rather than pedagogical.}

In considering this question, the Committee was concerned to ensure that students were given clear guidance as to the nature of the course,

{My course is selected by a small minority of students; I have a niche market. Many students say the reason they select my course is because it does not fit the usual pattern. There have been no complaints from students. A few students drop the course after the first class. I always want that class be as fragmented and disorganized as possible because I know there are some people who do not like or think they can learn in a disorganized way.

I am very organized about one thing, however. On the first day of class, I hand out the following sheet and read it aloud. This sheet, too, was part of my reapplication.

Topics in Torts – Burden of Proof and Politics – Wexler

Attendance will be taken in every class. Students are expected to attend regularly. One or two absences will not be a problem, but extensive absence will be penalized. If you have to be away for a legitimate reason, please let Professor Wexler know.

A set of readings for the seminar is available in the bookstore.

1st assignment: due Tuesday, January 10

Write one paragraph beginning: "One thing I do not know (or cannot understand) about tort is …." These paragraphs will be read out loud to the class by their authors. Bring 7 copies so that everyone can read along.

E.g. One thing I don't know about tort is how the law distinguishes between products that cannot be sold, products that can only be sold with a warning and products that can be sold with no warning. Why is it unnecessary to say on a knife: "Be careful, this product is sharp"?

2nd assignment: due in the last month of the course on a date that will be scheduled during the first month of the course.

Write a 10-12 page essay (typewritten, double-spaced) about tort. In almost all cases, this will be a research paper with footnotes, but it may be possible to write a theory paper that does not have footnotes. These papers will be read out loud to the class by their authors. Bring 7 copies so that everyone can read along.

Students are welcome to discuss their ideas for papers with Professor Wexler. My office is Rm. 453. My home phone is 604-228-2953. I do not have office hours, but will arrange to meet any student who asks for an appointment.

I read this sheet out loud to the students the first day of class and I repeat it, out loud, for several classes for the benefit of newcomers and the whole class. I am very concerned that students know what will happen in my class. I don't want anyone to take the course who doesn't want to study in the special way I study.

The concern about students at Corporate U is a concern for them as customers. In my course, they do not have to "work" as much so they will learn less, but the concern about students at Corporate U is also a concern for them as abstract human being with rights. "Extensive absence" is not precise enough. At Corporate U a student has a right to know exactly how often he or she may be absent and what the consequences are of any further absences.

Corporate U is all about numbers. Anything that cannot be measured is irrelevant. Corporate U must supply a large amount of product to a large number of customers and every customer must receive a product that is uniform and meets appropriate standards. Efficiency is key.

Deep down, I think my teaching is too expensive for Corporate U. It's like a homemade burger. Everyone knows the hamburgers at a backyard barbeque are better than those at McDonalds. Everyone knows you learn more in small groups than in large ones, but a corporate university is about conveying a curriculum and large classes are a more efficient way to convey a curriculum.

My course is an upper year elective. I don't worry about curriculum. The curriculum in my course is to talk about tort law in terms of burden of proof and politics. What we say doesn't matter.}

and that the course needs to be well enough defined so that other members of the faculty may be able to teach it in the future.

{Professors must be fungible. Courses must be fungible. They must fit a model. At Corporate U, the classrooms are like the elevators: they can only go up and down.}

As regards the course description, we wondered whether there may be material in your 2007 article that you could use to flesh out what is covered in the course.

(2) The Committee was concerned about the lack of detail as to the learning objectives of the course, and would like you to add more detail to this section of the proposal. S.W. also indicated that her committee requires considerable amounts of detail in this section, and suggested using phrases like "By the end of this course students will be able to …" when amending this section.

{In my reapplication, I included the following:

You ask about learning expectations. In my course, we read about and discuss some very technical law: for instance we talk, in great detail, about pleadings and presumptions, the ultimate burden and the persuasive burden. I expect my students to learn something about tort law from this reading and discussion. I expect them to learn more about tort law from the other students' papers. But, of course, they learn most about tort law from their own research and writing.

In my academic judgment students learn as much, if not more, from doing the research for and writing **a 10-12 page paper that has to be read out loud** as they would from **a 40 page paper that is simply turned in**. The peer pressure is enormous. All my students comment on it. They work very hard. They have to learn to focus their work and that, I think, is the main message of my course.

For S.W.:

At the end of this course students will be able to:

a) Understand tort law better
b) Write better
c) Think in terms of burden of proof
d) Analyze the politics of law
e) Think creatively and in more general terms about law
f) Learn from other students' work
g) Focus their work

Focus. Reading a text together out loud provides a great deal of focus. Writing a 10-12 page paper **that has to be read out loud** requires even more focus. The Supreme Court is requiring shorter briefs and memos. Focus is a practice skill and I am teaching it.}

(3) The Committee was concerned about the current description of the assessment method, and would like you to provide more detail about what is meant by "graded subjectively" in this context.

{"Graded subjectively" is as bad as "extensive absences". If I had to say how I grade, I would say I grade the "goodness" of the essay: how interesting the idea is, how well

researched and thought out it is, how well it is written, what did the student get out of writing it. I do not have a percentage breakdown of these factors, but I have always suspected that writing ability is the key one. This has been a problem for me through the whole of my 42 years as a law professor. If students wrote their papers the first day of the course, they would probably get about the same grades as they get for a paper they write at the end of the course. I don't see how the grade is a grade "for the course".

In *Succession*, which I have taught for 25 years, I give an exam and grade objectively. My grades last year ranged from 24 to 98. In *Topics in Torts Burden of Proof and Politics* and two other courses I teach every year: *Philosophy of Law* and *Fundamental Jurisprudential Problems*, I grade subjectively and for the last few years, I have been giving almost every student the same grade. Every now and then a student marked her or himself out in some way and I gave that student a higher grade or a lower one, but mostly I gave the same grade to every student.

This is not to say I don't take grading seriously. I do. I teach three seminars every year and sometimes the grades in one seminar are higher than the grades in another. I grade the way I teach, collectively and cooperatively, rather than competitively. Sometimes I think one seminar does better than another.

A few years ago, I was told by an Associate Dean: "You can't give everyone the same grade." My response was that there was no such rule.

This raises an interesting point about rules. The premise of any system – in the case of grading, that different students get different grades – is never written down. There is a rule that the average in a class may not fall outside a certain range and my average never does. But there is no rule that says different students must get different grades}

S.W. indicated that her committee is likely to raise questions about the possibility that there will be no research required,…

{I always tell my students that they do not have to write a paper that requires research. They can explore an idea, but that is a risky paper to write. Pick a topic I always tell them. Find a line of cases or a statute; something small and technical and work on it. By and large that is what my students do, but every now and then a student has an interesting theoretical idea about torts. I don't want to preclude that idea.}

and she also raised the Senate Curriculum committee's concern to ensure that students are given certainty around matters of assessment and evaluation.

(4) The Committee has been advised that the Senate subcommittee and Senate Curriculum Committee will require a detailed syllabus and reading list for the course, setting out what material will be covered in each week of the course. Can you please amend the reading list to provide references for all the reading to be covered in the course, and redraft the syllabus to indicate when that material will be covered (i.e. in which class/week)?

{The Committee has a model for a course. It is the model for all courses at Corporate U. One of the things it includes is that the teacher knows what will be covered in every class. I do not follow that model. I explained this in my reapplication.

I do not know what will be covered in every class. In the first class I ask the students to write a one paragraph essay: one thing I do not know or understand about tort law is … Over the first weeks of the course, we read these papers out loud in class and discuss the issues raised in them. Here are a few examples from this year's course:

- How can the application of tort law be decolonized so as to observe principles of equality and the predictable delivery of justice and the rule of law for Aboriginal litigants?
- One thing I cannot understand about tort is how the tort of nuisance relates with the tort of negligence. Particularly, when is it necessary to first find negligence before a case of nuisance can be established?
- One thing I cannot understand about tort law is its proper role in society. Should tort be reactive or progressive? Can it be both?
- One thing I cannot understand about tort is why courts are able to discount pecuniary damages for lost earning capacity to take account of contingencies (such as employment, illness, accidents and business depression) which might affect future earnings.
- One thing I do not know (or cannot understand) about tort law is its effectiveness at achieving its functions. Could an expansion of criminal law and no-fault insurance someday replace tort law?
- One thing I do not understand about tort law is joint and several liability: how can someone be held responsible for the actions of another?

We discussed the last question for three classes. Instead of teaching the students what I think they should learn, I teach them what *they* think they should learn. I try to let my classes grow organically. In my reapplication, I told the story of a change in my course that occurred this year:

This year, I did something new. It came up by accident. I read the first two lectures in Maitland's *Forms of Action* with my students. I did all the reading. The idea of reading Maitland arose in the first class. The students were introducing themselves and saying why they were taking the class and what they expected to get out of it. One of the students said she was an exchange student from China. After she spoke, I interrupted the circle and said to the class: "This is great. We have to teach Ms. Chen common law. You can't know torts if you don't know common law. You all know it. She doesn't. We have to teach her what you know. Hey … we could read Maitland!"

Ms. Chen dropped the class, but I read Maitland out loud with the rest of the students. I would never have done this if I'd had the course rigidly planned in advance. My teaching is reactive. I react to what the students and I say in class. I don't know what I will teach until I hear what my students want or need to learn.}

In addition, we will need to submit a library consultation form, which also requires

a detailed reading list, before the proposal can be passed to S.W.'s sub-committee.

{O.K. That we can do.}

(5) The Committee raised serious concerns about the length of the paper required for what is to be listed as a four credit course.

{Ah! Here, at last, we come to the nub of the issue. In the model course, the professor knows what will be taught in every class, there is a list of assigned readings and there is a 30-40 page paper. I think I could supply a long reading list and a course plan, then I could teach the course however I want. I am told this is what other professors do at Corporate U.

But the length of the papers is not something that can be faked. Students could not read longer papers out loud in class.}

The current faculty convention …

{Notice how this convention will turn into a rule.[1]}

is that where upper level courses are assessed solely on the basis of a written paper, the length of paper should approximate that required for a directed research paper of the same credit weight. At present, the rule …

{Here is the subtle shift.}

for directed research papers is that the final paper be approximately 2500 words per credit (excluding bibliography). As a consequence, we would expect that the requirement in this course would be for a paper of approximately 10,000 words in length (or about 40 pages, typed and double spaced). Although the Committee did not want to be too prescriptive on this front, the fact that the proposed paper length is a quarter of that which would normally be expected was seen to be a problem. The Committee would like to suggest that the requirement be amended to specify that the paper must be in the range of 7500 to 10,000 words (30 – 40 typed pages, double spaced).

{Far be it from the Committee to be "too" prescriptive. The Committee will be "prescriptive"; that is its function, but it does not want to be "too" prescriptive. This is the myth of the corporate law school. No one and nothing is "too" anything at Corporate U. Goldilocks would love the place. Nothing is too hot; nothing is too cold; everything is just right. At Corporate U, there is a uniformity of just-the-right-amountness of everything.

As I have already said, I could probably deal with the first two aspects of the model course. The real issue – the real reason my course cannot be taught at Corporate U – is

[1] This phenomenon noted since Greek times is embodied in the word Greek *nomos*, which means both law and convention and comes from the Greek word *nomeus*, which was a shepherd and the pastureland that belonged to his family.

the length of the papers I require. How does it look if all the burgers have 30-40 ounces of meat and one has 10-12 ounces? The 10-12 ounce burger must be sub-standard.

Because no number can be put beside it, the reading-out-loudness of the papers I assign counts for nothing and the fact that the first paper, on which students tell me they work very hard, is less than one page makes it count for nothing. At the faculty meeting where my motion was trounced, one of my colleagues suggested that if a 10-12 page paper was good, three 10-12 page papers would be even better. One of them could be presented orally, the other two would be read by and commented on in writing by the professor.

I don't think the colleague who made this suggestion understood how absurd it was, but several of my students who were at the meeting to support my torts class spoke up and said "We put everything into the one paper. There's no way we could do that with three."}

I hope that all of these questions and suggestions are clear, but if you have any questions please let me or another member of the Committee know. We are very keen to get the proposal into a form that we can then recommend to Faculty Council (and ultimately take to the Senate for approval), and are happy to help in any way we can.

Conclusion

In the course of my argument at the faculty meeting, one colleague raised a problem that I found very troubling. She said "You shouldn't suggest that other professors aren't teaching in a way students can learn from." I don't suggest that. I believe it, but I don't say it.

An Associate Dean once said to me: "You're a narcissist. You think your classes are better than everyone else's."

Every professor should think their classes are better than everyone else's and in my experience, every professor does. I teach the way I do because I think its better than the way other people teach, **but** …

I would never tell another professor how to teach his or her course and the professors at the UBC Faculty of Law have told me I can't teach my course the way I want to.

At the meeting where my motion was trounced, one after another colleague was very careful to insist that: "I am not voting against your course or your teaching method. I am voting against approval of your motion."

I responded that I was a legal realist. The result of a vote against my motion was that I would not be able to teach my course and that was the result of the meeting. I lost my motion. I can't teach my course anymore. It doesn't fit at Corporate U.

Earlier, I mentioned a pre-meeting meeting in my office with the Chairman of the Faculty of Law's Curriculum Committee. I had not been able to see the point of this pre-meeting meeting before we had it, but I am grateful to the Chairman of the Faculty of Law's Curriculum Committee for suggesting it. Without the pre-meeting meeting I'd have blown up at the Faculty meeting and started screaming.

As it was, I went through the Faculty meeting quite calmly because at the pre-meeting meeting, when the Chairman of the Faculty of Law's Curriculum Committee started talking about "standards", I got angry. I suppose, narcissist that I am, I put a great deal of value on meeting standards.

When I got angry, the Chairman of the Faculty of Law's Curriculum Committee said: "Calm down," and because we were in my office, where I am not used to being angry, I did calm down. I stayed calm even when the Chairman of the Faculty of Law's Curriculum Committee constructed a *reductio ad absurdum* of my class.

"Suppose," he said, "a professor wanted to teach the whole of tort law by reading one paragraph from Wagon-mound?"

Wagon-mound is a famous Tort case, but it seems obvious that the whole of Tort law could not be taught even from the whole of Wagon-mound, let alone from one paragraph in the judgment. The Chairman of the Faculty of Law's Curriculum Committee was making fun of my idea that reading a little is better than reading a lot, and he continued: "And suppose, the faculty member wanted to do this with interpretive dance."

Because I had calmed down, I laughed and said: "If a professor wanted to teach like that, I think it would be a great course."

Of course, like my course, it could not be taught at Corporate U.