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Afterword and Response: What Digging Does and Does Not Do

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I wish that I could tell you that I had discovered incontrovertible evidence that Pearl Morris had moved to Alaska and undertaken to become a salmon fisherwoman. But I tried and I was unable to. So I am going to have to do something else. I suspect that I was asked to comment on Professor Welke's paper not because I am an historian, because I am not, and not because I have any particular insight to offer on either the *Morris* case or *Plessy*, because I do not. But rather because I have long been of the view that something akin to what we are here calling "legal archaeology" is a useful tool in understanding cases. For some years, I have required my first year torts students to engage in what we might call a "dig." So I will not comment on the details of Professor Welke's paper on which I am fully prepared to take her word. Rather I will use it as an example in making some more general points.

Cases arise in context. Any lawyer knows that the full story of a case on which he or she has worked is not reflected in its judicial opinion. The facts as set forth by the court, for example, are often unrecognizable to either side. Sometimes they represent elements of the presentations of each or a compromise of the two. They have likely been pared down, edited as it were, by the court to reflect its view of relevance. In *Morris*, for example, none of the factual detail with which Professor Welke supplied us comes from the opinion. It all comes from other parts of the record. This is often the case. Similarly, any lawyer knows that the course and often the outcome of a case is affected, sometimes indeed determined, by strategic considerations. These include not only the obvious categories encompassed by the craft of the lawyer: how to use the rules of procedure; the choice of forum that you might make; what arguments and what cases to rely on; how to present the case; which witnesses to call; all those sorts of things. But it also includes less obvious strategic considerations. How, for example, to relate to opposing counsel; how to juggle your own cases in the context of your own workload, and the other pressures on you.

Another broad category of influential factors in the actual outcome of cases might be labeled "the contingencies of the case." These could include various personal or corporate motivations of the client. Often a lawyer's choices are driven by the client's temperament, by the client's economic

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commitment or means, by the desire or willingness of the client to compromise, by the client's ability to understand the case. Appropriately enough, clients very often will determine or greatly influence the course of your handling of a case. These features I regard as contingencies, very important contingencies. None of these is described in the typical appellate decision or in other written accounts of a case. Professor Welke's description of the railroads' political battle to retain their autonomy fits in a broad way into the category of a contingency of the case. It affected what the client was prepared or not prepared to do. This notion of contingency, of things which might constitute contingencies of a case, might also include a whole host of characteristics about the judge or about the jury whose fact finding will importantly bind an appeals court.

Then, too, there may be influences emanating from the social, political, cultural, and/or economic milieus in which a case sits. The practice of relying enormously on close analysis of the language of appellate opinions to teach the law to students necessarily misses much of the contextual richness of the law. And it doesn't very effectively convey to the student what it is that lawyers do or what they have to be prepared to contend with as they go about the business of practicing law. Nor, in my view, does it give a very complete picture of how the law itself evolved. For this reason, it has seemed to me make sense as a pedagogical matter to ask first year students, the ones whose curriculum consists most thoroughly of relatively contextless appellate opinions, to move backwards to reconstruct as much of the context of some single opinion as they can. I ask my first year tort students to choose an appellate decision and then to reconstruct what really happened in the making of that case. I have them begin by trying to retrieve the full record. I ask them to find the lower court transcripts. Often, of course, they discover that the transcripts do not exist or that they are hard to find. I am indifferent as to whether a student chooses a contemporary case or a case that happened a long time ago. I ask them to try to retrieve and read all the briefs at every level. I ask them to find and read any related social history that they can discover. I ask them, where there are living lawyers or living participants, to find as many of those lawyers, parties, witnesses, judges and jurors as possible and interview them. I ask them to consider going to visit the site where the events occurred and actually to see what the building looked like or what the geographical configuration was to see if that was relevant or not relevant. I ask them to look at photos, to read broadly, to look at contemporaneous news accounts and generally to be as imaginative as they can be in moving backwards to reconstruct what happened. To engage first year students in this way is to open their eyes to some of the interest, excitement, difficulty, power, and reality of legal practice. It also interestingly humanizes the law for them at a time when

they are often a little discouraged because they came to law school with a far different picture of what it would be like from what the first year is really like.

But this is a pedagogical technique which is justified only because it is not widespread. That is, the study of context gains pedagogical legitimacy and importance within the context of the heavy emphasis of the first year curriculum on relatively contextless appellate opinions. Ours is a legal system of rules. Particular cases themselves, often rich in history and driven by context, are transformed by our system into general rules and as such are more or less stripped of their content. They become, in a generalized state, a part of the context in which future cases will arise and be decided, a part of the context which a lawyer has to look to as he or she takes cases in their stripped-down sense to apply in the lawyers own legal analysis in the now current case which he or she has in front of himself or herself. This is, of course, the central feature of the theoretical basis of the common law. Understanding how to analyze, generalize, manipulate, and apply rules is the distinctive job of the lawyer precisely because it is the theoretical centerpiece of our legal system. Teaching students how to think like lawyers must be the principal pedagogical mission of the first year of law school. The kind of thing which I do in encouraging students to do legal archaeology in the sense that I ask them to, is, I think, only justified because it is not done by their other teachers. If everyone were doing it we would together be failing in our mission, which is to teach them how to operate as lawyers in a context of general rules. I think it is very important that we keep that in mind.

Similarly, as a scholarly enterprise, I think it is important to focus on what legal archaeology properly is and what it properly is not. In my view, legal archaeology is properly atheoretical. Its findings help us explain cases. Its findings help us describe cases. They help us understand what happened. They give us enormous insight about ourselves and about our society. As Parker aptly said at the outset, it teaches us about our institutional blind spots and it gives us both diagnostic tools and suggestions for remediation. But that is all. I think it is very important to understand that that is what we are doing when we are doing legal archaeology as scholars.

Professor Welke's fascinating account of *Morris* is in my view an example of the sort of insight that we can gain. I think that is what it should be taken for.