



[music]

**Bridget Terry Long:** Good afternoon, everyone.

**All:** Good afternoon.

**Bridget:** [inaudible 00:00:13], so I'm just warming you up. It's wonderful to see so many of you on this cold, and dark and rainy afternoon for this very very important session. My name is Bridget Terry Long and I'm very proud to be the Dean here at the Harvard Graduate School of Education. I'm just going to kick us off to tell you a little bit about the series and then the session for today. I'm very thrilled to welcome you to the inaugural session of the new exciting series called *Instructional Moves Live*. The series emerges from HGSE's Instructional Moves project. It aims to help educators incorporate and refine high leverage teaching strategies tailored to the higher education context. Please, come on in.

Before we get started, I want to share a little bit of background about the Instructional Moves projects and then how we got here today. Instructional Moves began several years ago with a proposal from HGSE faculty members; Meira Levinson, who you'll hear from shortly; Jal Mehta, who's also here; and Matt Miller, and funding from the Harvard Initiative for Learning and Teaching, also known as HILT. The project was driven by the Teaching and Learning Lab with collaboration from partners across HGSE and the Harvard community, including HILT's Teaching and Learning Consortium and Harvard's media production.

Instructional Move's website launched in 2017, featuring faculty from across the University and showcasing modules on building community, lecturing interactively and facilitating discussions. Last month, we've launched an expanded version of the website [unintelligible 00:01:51] the existing modules and introducing new resources on teaching through problems and facilitating professional development. Looking ahead, we plan to offer short online courses, leveraging this material as well as in-person institutes focused on teaching excellence in higher education. Which brings us to the event today, *The Instructional Moves Live* series.

This series, which we aim to offer once or twice a semester, is an opportunity to bring together passionate educators from across the University to explore new practices and share collective wisdom. It is built upon our core beliefs about teaching, which includes that great teaching can be learned, that we often learn best through direct experience, that the research on teaching and learning is based- the research that we're basing on this matters and the context also matters too. Thank you for joining us as we put these beliefs into practice this afternoon. I also want to thank Matt Miller, [unintelligible 00:02:56] and our many colleagues from the teaching and learning lab for their tremendous work on the instructional moves project and on this series in particular. Of course, thank you to Meira and to Professor Todd Rakoff for their participation today on the inaugural event. I can't imagine a better duo to kick us off.



Now, I have the pleasure of introducing our guest, Professor Rakoff. Todd Rakoff is the Byrne Professor of Administrative Law at the Harvard Law School, specializing in teaching contracts and administrative law. Formerly Dean of the J.D. Program, Professor Rakoff has been actively involved in many of Harvard Law School's educational experiments and reforms of the last quarter century, including the experimental integrated curriculum of the 1980s and the move to smaller first year sections in the late 1990s. More recently, he and Professor Joseph Singer have created and led the School's Problem Solving Workshop, an experiential course that is now a required part of the first-year curriculum. He has also organized programs for teachers around the country, through the Association of American Law Schools, and internationally, through the parallel international association.

Professor Rakoff rethinks classic law school pedagogies such as Socratic questioning, cold-calling and case method teaching, to create energetic, challenging learning environments for his students. Please join me in welcoming Professor Todd Rakoff.

[applause]

**Professor Todd Rakoff:** What I want to do with you today is what I do in oral orientation at the law school as the very first time that our students meet cases, all right? So, I'm going to treat you as first-day, first-year law school students. Welcome to the Harvard Law School.

[laughter]

**Todd:** Now next week, you're going to have contracts, and torts, and civil procedure and criminal law. When you walk into class, your teachers are going to expect you to be prepared to talk about the cases that they have assigned. No first-day-we'll-just-generally-talk-stuff, all right? You're going to have to be prepared. What I'm going to try to do today with you is to show you what it would mean to be prepared on a case. Let me just say a word about the case I circulated to you would against **[inaudible 00:05:46]** because it may surprise you that I'm asking you to talk about a case that was decided in the 1880s in Wisconsin.

The 1880s part of it is simply this is a great case. The facts are terrific. I could get you a modern case that would look very much the same and I could be sure that there's some modern courts would say almost exactly the same thing. But this is a more interesting fact pattern so the 1880s is just because it's a good case. The Wisconsin part is something that you need to know about. You may be saying yourself, "Well, why not a case from the United States Supreme Court? If we're at Harvard and we are in the law school, we ought to be doing the United States Supreme Court stuff." Well, the answer is this case could not go to the United States Supreme Court. The United States Supreme Court has no jurisdiction over this matter and over most of the things that you're going to learn first year. The United States Supreme Court takes cases about constitutional law, about federal statutes



and a few other things. But this is just a plain, ordinary, contracts case. And plain and ordinary contracts, and plain and ordinary torts and plain and ordinary property.

By the way, I just listed most of the lawsuits there are in the country. Our State law; the Supreme Court of Wisconsin is the final authority on this case. Now if you think about that, that means that there are- well, counting the District of Columbia- 51 final authorities on contract law in this country. That's right, and they don't necessarily agree with each other. If you thought this case came out right, there's some courts that agree with you and if you thought this case came out wrong, there's some other courts that agree with you. You may be sitting there thinking to yourself, "How am I ever going to learn the law of 51 States?" The answer is, fortunately, once you graduate law school, you're going to pay another dollar for tuition. There is something called a bar review course and they will teach you the specific doctrines of your specific jurisdiction. We're teaching you the issues, the general way of thinking about it and then whichever State you finally decide to practice in, you will have to learn the specific outcome of your specific jurisdiction.

So with that background- or if you like, with that license to say the case could come out either way because there's somebody who agrees with you- here are the five things I want to focus on today. I want you look at the case and tell me what's the out-of-court story. What happens before anybody sued anybody? Next, what happened in the lower court? We're going to be mostly concerned this semester with appellate courts, so what happened in the lower court? How did this court then frame the issue? What is to be said for and against this court's argument? Then finally, was the court right?

Maybe you're saying to yourself, "How do I know whether the court is right?" That's one of the things that you have to work on all the time you're in law school, developing your own standards of what it is for a court to be right or to be wrong. You ought to know more about that when you get out than you know today or what's your point of coming here? But today and every day you've got to be thinking about what's the right answer as well as what was this court's answer. All right, so **[unintelligible 00:10:10]** against **[unintelligible 00:10:13]**. Jennifer, why don't you start us off. What happened?

**Jennifer:** What happened-

**Todd:** Out of court before anybody sued anybody.

**Jennifer:** The plaintiff sold a stone to the respondent's two jewelers and it turned out that that stone was something other than the plaintiff believed it to be. A stone turned out to be worth a lot of money, she was only paid a dollar for it. She asked for it back. She was willing to pay interest on what they had originally given her and the jewelers refused to give the stone back.

**Todd:** All right. What's the difference between what she got and what it was worth?



**Jennifer:** They gave her a dollar for the stone and the stone was worth about \$700.

**Todd:** Is \$700 a lot of money or not?

**Jennifer:** A pretty significant amount of money in the 1880s.

**Todd:** All right. The tuition at Harvard in the 1880s was a dollar50.

[laughter]

**Todd:** The sum is five years of college tuition. This is something worth suing about, if you want to put it that way. What possible ground could there be for wanting to get it back?

**Jennifer:** Possible grounds could be that the jeweler knew what the stone's value was and the plaintiff did not and that she was misled about the value of the stone.

**Todd:** All right. Give me a little texture about how she came to sell the stone.

**Jennifer:** She was also in pretty dire financial circumstances. As she describes it, she originally refused to sell the stone and she only eventually agreed to it because she really desperately needed the money.

**Todd:** It was December 28. Maybe all her money had gone for Christmas gifts and now she had nothing left. What did they say to each other?

**Jennifer:** What did they say to each other? Let's see. She brought the stone back and she asked what he had originally offered for it. She said that it a dollar was the original offer and that he took her first offer.

**Todd:** That's a great start. Now are there other facts that other people want to add? Other things that you noticed in reading this that might sway you one way or another?

[crosstalk]

**Claire:** The stone was uncut.

**Todd:** The stone was uncut and what does that mean?

**Claire:** So, she didn't know that- he could have not known that it was a diamond [inaudible 00:13:26]. She thought it was a topaz.

**Todd:** He says it looks different from a cut diamond. Reuben, you had your hand up.

**Reuben:** I was going to say, the dialogue between them seems very deliberate. Where she says, "I had been told it was a topaz and he said it might be." Which if



you're a jeweler trying to hide the fact that you know it's a diamond that would be really carefully chosen words in the response to that comment.

**Todd:** Reuben, what do you think being a jeweler in 1885 meant?

**Reuben:** I would imagine that you probably buy and sell a fair number of jewels. I'd be curious how much experience this guy has [unintelligible 00:14:04] jeweler. He has truly never seen an uncut diamond until then.

**Todd:** On the other hand, this is not Fifth Avenue and he's not working for Tiffany's. So, we don't know what does a jeweler in Wisconsin in 1885 would know or not. I mean, he knows more than she knows, presumably, because she asks him what it is, but we don't know how much he knows. Drew, you had your hand up.

**Drew:** The text that's on the back says that, to your point, he's not an expert [inaudible 00:14:39]. So, being that [inaudible 00:14:43]. Probably, he doesn't have a lot of experience on uncut stones to begin with and then that he's not an expert [inaudible 00:14:54]. It sounds like he's acting in good faith.

**Todd:** It sounds to you as if he's acting in good faith. All right, so now this is the general background. I think we're going to come back and look at some of the particular facts with more care, but [unintelligible 00:15:07] this is a general background, let's move to the next question. What happened in the lower court? For that, this is a bit of legalese here, so I'm going to ask you to look at about the first three inches of the opinion. Just take a look at that again.

[pause 00:15:30]

**Todd:** It's not the easiest thing in the world to read, right? It's telling you what's happened in the trial court. The thing that we're reading is an appellate court opinion. There's no jury here. This is just judges, a panel of judges, one of whom is right. In the trial court, there's a judge and a jury. Generally speaking, the purpose of the jury is to decide who's telling the truth. This is not a criminal case, we're not convicting anybody, but when the witnesses got up, were they believable or not believable? How do we put together what they had to say? What inferences do we draw and so forth? Now what happened in the trial court? Ashley, you want to try that?

**Ashley:** [inaudible 00:17:11] I think, essentially you're saying that people who have that same story [inaudible 00:17:17]. He didn't know what the [inaudible 00:17:20]. I think [inaudible 00:17:24] talk a little bit about this issue [inaudible 00:17:26] but [inaudible 00:17:28].

**Todd:** No. Maybe I didn't make myself clear. What happened procedurally? What happened between the judge and the jury?

**Ashley:** I don't know, but I can [inaudible 00:17:38].



**Todd:** Okay. Claire, do you want to try that?

**Claire:** The judge told the jury to make a decision, to find a verdict.

**Todd:** Did the jury do it?

**Claire:** I'm guessing no. [chuckles]

**Todd:** [inaudible 00:17:57] three-letter word instead of the two-letter word.

[laughter]

**Todd:** The judge directed the jury. What does that mean? The judge said to the jury, "Now that I've heard all this testimony and you've heard all this testimony, there is only one conclusion you can reach and that is that there's no liability." The plaintiff loses, the defendant wins. Now, that bothers you.

**Reuben:** It does. I thought the purpose of a jury trial was to allow the jury to render a verdict, not to have a judge substitute his judgement for the jury rendering a verdict. It would seem that it would be extra-- I'm not a lawyer but it seems like it would take extraordinary circumstances to interrupt a jury trial and direct them with the verdict that they must give.

**Todd:** All right. Now, you're not wrong. That it to say this does kind of pop out of the page at me as well as at you. But what must the judge have been thinking in order to say that?

**Reuben:** He must have thought that there was literally no room for any verdict but that, but that the jury might mistakenly overlook whatever the important evidence was that made him come to the conclusion that there is no possibility to find in favor of the plaintiff.

**Todd:** All right. Now if we're appealing that, what do we have to show in order to win the appeal?

**Reuben:** That there could have been a way.

**Todd:** Correct. Now that's really important. You've got to learn to view legal arguments through the procedural framework here. The appellant doesn't have to prove that she deserved to win. At this stage, [inaudible 00:20:15]. All she has to prove is there was enough that it ought to have been sent to the jury and if she can prove that- if your lawyer can prove that- then it will be sent back for a retrial and left to the jury to decide. Do you want me to explain? Do you want me to say that again? It's a little bit tricky. On appeal, the question is what mistake was made at trial. And what mistake was made at trial was, according to the appellate, taking it away from the jury. You should have left it to the jury.

Maybe if we go on, we can come back to how that figures in the case as a whole. Play with me for a minute, all right? Now then if we say, "What is to be said for and against the court's argument?" Now the other court is upholding what the trial judge did. The court is saying, "You lose on appeal, Ms. Woods. You don't have the right to rescind this contract." So, they're upholding the-- If you look at the very last sentence, the judgment of the court is affirmed. They're upholding the court below. So why was there nothing to be said in favor of her claim? Let's try it the other way round. What is there going to be said in favor of her claim? What facts are good for her? If you're trying to put together an argument that you can take to the jury- that they ought to have that you take to the jury, what facts are good for her? You want to give me a fact?

**Male Student:** She didn't understand the true value of the stone.

**Todd:** She didn't understand the true value of the stone. But the way this court is looking at it-- No, that's all right. The way this court is looking at it is they say that she has to prove either a mistake or a fraud. That's what they say is the law [inaudible 00:22:59]. Let's just leave mistake alone because they said the action of the mistake is that she gave over the stone that they thought they were talking about. That seems like that's nothing to be said about that. But fraud, maybe there's something to be said about it. So, you're right. She was [inaudible 00:23:26] of the value of the stone, but what can we do to possibly claim that he committed fraud? Nancy, what do you got?

**Nancy:** The thing that really stuck out to me when I was previewing the case were the questions that the jeweler had for her before she sold the stone.

**Todd:** What questions did he have [crosstalk]--

**Nancy:** Around where-- He asked her a couple. Like, where did you get this? Specifically where in that town did she get this.

**Todd:** What do you make of that?

**Nancy:** It just seems suspicious to me. If I was on the jury, I would- that would have stuck [inaudible 00:24:05].

**Todd:** All right. What can we do to add to Nancy's suspicions? Is there anything else that the jeweler does that's suspicious? Krista?

**Krista:** The second time she comes back to sell the stone, he asks her what he first offered her. Which seems suspicious because he didn't look at the stone a second time to risk giving her a conflicting price. So if she had looked at it the first time and in the course of talking to her, decided, "I really think that this is valuable, but I'm going to keep my cards close to the vest and not tell her I think it's valuable." She goes away, he does additional research, he decides he knows it's valuable. She



comes back and he says, "Well, what did I first say to you?" So that he doesn't have to give her any more.

**Todd:** You have a suspicious mind.

[laughter]

**Todd:** Let me ask you, what did he do-- The first time when he made the first offer, how did that happen?

**Nancy:** He looked at it and said, I'll give you a dollar.

**Todd:** Was she asking him to buy it?

**Nancy:** No.

**Todd:** No, so maybe that's suspicious too, right? The moment he looks at it, he says, "This is something I want to buy." Then as you say, he doesn't change his offer. As Nancy says, He says, "I want to buy this and by the way, where did you find it?" When she says, "I found it in Eagle," he says, "Where exactly in Eagle did you find this?" And he's a jeweler. Should we have sent this to the jury? What do you think, should we have sent this? Is that enough for a jury to decide? Let me give you one more fact. She testifies- I'm on the right hand column, that's two-thirds of the top paragraph down- "Before I'd sold the stone, I had no knowledge whatever that it was a diamond." This is her testifying. "I told him that I had been advised that it was probably topaz and he said probably it was." **[unintelligible 00:27:07]** jury, Emily?

**Emily:** I just have a question about the amount of information that she was able to get about it because it says she had been advised. So, someone else had told her it might have been a topaz. I don't know where else she would have been able to do research in 1885 about the nature of the stone [crosstalk]--

**Todd:** That there was some other source?

**Emily:** That there was some other source.

**Todd:** Is that a good fact for her or a bad fact for her?

**Emily:** Well, it sounds like she tried to ascertain the value of this stone before coming to this person. Then yet again when she's talking to him, she's trying to get some information about it.

**Todd:** What about the period between October and December?

**Emily:** I don't know.

**Todd:** Are they bad facts for her? Are they bad-- **[unintelligible 00:27:57]**?



**Female Student:** Yes, she could've checked between that period of time before coming back. It almost sounds like she was framing them.

**Todd:** She could've-

**Female Student:** Checked whether it was actually a topaz or not [crosstalk]--

**Todd:** It seems like there's somebody else somewhere that she could've checked with, would you send it to the jury?

**Female Student:** If I would?

**Todd:** Yes.

**Female Student:** I would have. I think they would have been sympathetic with her. Someone that doesn't know what the value is and is depending on an expert to tell her. It would have been [unintelligible 00:28:34]. Yes, I think it would've been a good result for her.

**Todd:** Wait a minute. We're talking here about justice.

[laughter]

**Todd:** What you just said might convince me not to send her to the jury.

[laughter]

**Female Student:** She seems to believe that she genuinely didn't know.

**Todd:** Let the jury decide. Would you let the jury decide? Joy, would you let the jury decide?

**Joy:** Possibly, but actually [inaudible 00:29:12]. So maybe we should look at [inaudible 00:29:29] there is no fraud and no mistake. We have to have [inaudible 00:29:39].

**Todd:** All right, so there are two dimensions to that. One is-- You're quite right. To prove fraud you have to prove intentions. So, you can't just say he was negligent. You have to prove that he had the knowledge. That when he said probably it was, he knew that he was lying. That's what the judge would tell the jury if he was saying, "Now you jury, you decide whether it measures up." That's what they had to measure up with. Joy, what about just the fact that she only got a buck for something worth 700 bucks? I mean, this is more money this woman is ever going to see in her entire lifetime. [inaudible 00:30:41]

**Joy:** I don't think that's the issue and I think that's maybe it shouldn't be sent to the jury. That's not the issue at play here. It's the value of the stone. She should have gotten more money because the stone is actually worth more than a dollar. The



issues is about what happened in between. So, I think part of what resonates with this is that we all feel sorry for the woman because she only got a dollar. If you sent it to the jury [inaudible 00:31:09] would be that you would sympathize with her and you would assume that she should get more because it inherently feels unfair. But I don't [crosstalk]--

**Todd:** Which side are you on?

[laughter]

**Joy:** I actually agree that she shouldn't get the 700 [inaudible 00:31:26]. That's not what the law is. That's not what this is about. It's about whether or not it was fraud. It's about [crosstalk]--

**Todd:** This is your first year in law school and you're already telling me that the law is not about being fair?

**Joy:** Yes-

[laughter]

**Joy:** -because the law [inaudible 00:31:46] to be fair. The law is [inaudible 00:31:48]. The law is written in terms of [inaudible 00:31:52]. So it's not about morals, it's about procedure and sometimes following the procedure [inaudible 00:32:02] in ethics.

**Todd:** What do we think about that?

[laughter]

**Reuben:** Well, [unintelligible 00:32:13] the procedures themselves embody a certain sense of morality. Let's think about it from the point of view of the defendant. She entered into a transaction. She bought something, which was a willing transaction on both sides, and the thing he got ended up being a lot more expensive than she thought it was. But the reason that that system exists is not because we want to like mindlessly follow procedures because we're sort of upholding a certain notion of how contracts work in making exchanges in the world. Otherwise, we could have a world where every time I sold you something, if it turned out the thing was worth more than I thought it was, I could go and ask for it back [crosstalk]--

**Joy:** But what I'm saying is that that is the case here. Because we're saying that we think- and the court is saying as well and as we've just talked about- we're not proving that he-- It's not fraudulent, so we have to prove intention. He has the stone because he thought it was probably a topaz, so he's following procedure. To your point, yes, we're not just following procedure to follow procedure or find the procedure here, which as we've already been told that he thought it was actually a



diamond. We think that he thought it was a topaz. He was as pleasantly surprised and she was unpleasantly disappointed. So, we're still following procedure.

To your point about should we mindlessly follow procedure? No. But in this case, what we are arguing about is whether or not the procedure is about did he think it was a topaz or not, and did he try to defraud her. So, I go back to where everything started that oftentimes the law is about procedure and what we as human beings might bother us, or like scratch us like a blackboard or something- because I think this does scratch you, it bothers you in human nature- is not what this is about or legal, for sure. I am not a lawyer.

[laughter]

[crosstalk]

**Reuben:** I'm just saying that it would bother me- if it were decided the other way, it would bother me as sort of immoral, not just not following the procedure [crosstalk]--

**Todd:** Wait. It's decided in favor of not undoing the transaction, and you think it would be immoral to undo the transaction?

**Reuben:** If it were found in her favor on the basis of his fact pattern, I think that would not just unprocedural, that would be sympathy triumphing over a sort of broader notion of fairness.

**Todd:** So, I think you two agree then as to what-- I want someone who thinks- who's willing to say, [mimic] "No."

**Alicia:** I mean, I was thinking, what's the point of a jury? Why can't the jury deliberate and say, "All right, we can't prove fraud in this case, but let's consider the amount that this is worth, and why can't she have a little bit of it and you can keep the rest?" Like, why can't there be some consideration for a fairness that's a little bit deeper than just can we prove fraud or not?

**Todd:** You would give her back the stone?

**Alicia:** I would give her some kind of compensation for it. Because if I were on the jury, probably because I think I might not be able to prove his fraud but I think that she deserve something.

**Todd:** One problem with the law or one thing that we have to get used to is the result has to be announced that one side was right and one side was wrong. So the court cannot-- And neither the court nor the jury can come back and say, "Give her \$350." Either she gets it back or he gets to keep it. Now out of court, before they ever went to court, they could have reached a compromise. You might think that would have been a sensible, nice thing for the jeweler to do, to say, "Wow, now that it's worth so much more, I think let me give you a little bit of extra gravy." But he didn't do that and



the court cannot order it. It's got to declare a winner and a loser. There was a hand up over here, Alicia.

**Alicia:** Well, I'm just wondering. It seems like we're talking about either \$1 or \$700, and the fraud seems to be either he thought it a topaz or a diamond. But couldn't it be fraud if he didn't know that it was a diamond but thought that it was worth more than \$1? Which I feel like his asking to buy it indicates that maybe he thought that it was of higher value than he led on to her. So on that basis couldn't you take it to the jury and say that he may not have known it was a diamond but if he thought it was worth 100 bucks, that's still fraudulent?

**Todd:** Fraudulent because he says-

**Alicia:** Because he misrepresented- he sort of misrepresented the amount in the sale.

**Todd:** Well, he doesn't. Is offering a dollar itself a misrepresentation?

**Alicia:** I mean, in as much as if not offering \$700 for a diamond is.

**Todd:** What you just said is contrary to what happens at every yard sale in the country-

[laughter]

**Todd:** Dante?

**Dante:** In saying that the stone might be topaz, would that, in the court of law, be the same as saying, "I don't know?" Because if there is doubt as to whether he actually knew it or not- if he said it's not a topaz or he said, "Yes, it is," but there's still a bit of penumbra as to whether he knew or didn't know, if you can't prove whether he knew or not definitively. I think that's the crucial detail because the second time, she willingly goes back to him to re-engage in a financial transaction with him. If he had, maybe, come to her, I think maybe there would be a different perspective on this case. But she was in dire straits and she needed the money. Back in that time, I think a dollar is a lot more than a dollar is worth now. She did receive what she thought at the time was her compensation.

**Todd:** So, you'd leave it alone?

**Dane:** I would still not leave it alone. Because I think that given the, I guess you call it the **[inaudible 00:39:11]** evidence, the jury would probably decide they're correct- or not they're correct, would still make a decision in favor of the **[inaudible 00:39:22]**.

**Todd:** If you think about what this court is doing here and what the trial judge did, it's walking the other side of the same street which we've been talking about. That is to

say, why did the judge take it away from the jury? One of the strong motivations for taking it away from the jury is exactly what you all suspect. That the judge thinks that the jury will be sympathetic and sympathetic beyond what it should be according to the law. Therefore, the judge is afraid to leave it to the jury. Paul?

**Paul:** Well, I guess I'm just wondering if that's within the range of the prerogatives that the judge has at the time. I mean, it was set up and framed earlier- and again, you would know more about this being a lawyer than many of us would know- it seemed like the framing was that there were only really two reasons that a judge could remove the jury's judgment from this if there was some kind of a misdelivery, on the one hand, or if there was fraud. So it's clear, as a matter of fact, there wasn't a mistaken delivery. So really the matter is fraud and reasonable people can disagree, as we've been disagreeing, about whether or not there was fraud.

If that was the standard, then it would seem that the court should have let the jury decide on the basis of the facts and would argue there's no evidence there was fraud. Others would take the opposite point of view. But I guess you would think that the appellate court would want to render a verdict on whether or not the judge was acting within his proper range of prerogatives to remove the jury's judgment or at least strongly tried to influence them in a particular direction.

**Todd:** I think the court is saying that the judge was within his prerogative, but I think that subsequently, they probably agree with the trial judge. I think that to leave the jury to do this would be a dangerous thing. [inaudible 00:41:37] their understanding of the security of the transaction. That's the way they would look at it against people who would say, "Well, you can undo transactions after the fact if they turn out that they're very [inaudible 00:41:53] very unfair."

**Paul:** So, you're allowing, actually, for another criterion for a judge taking away from the jury, which is if you think the jury is going to make the wrong decision then somehow you're justified in removing it from their judge?

**Todd:** I'm not saying that's what they say in text. I'm saying that's what they're saying in subtext, as I would read this case. Does it surprise you the judges have value commitments? No. It's what we read about every day in the newspaper. I think I'm supposed to get off.

[laughter]

[crosstalk]

**Todd:** Right, I'm supposed to stop. Thank you.

[applause]

**Todd:** I'll turn the program over to you, Josh.



**Josh:** Thank you, Todd. What we're going to do quickly is we're actually going to watch a few minutes of Todd actually doing this with his own students. Hopefully, it's not somehow- not willing to go back.

[background conversation]

**Josh:** Okay. What we are going to do right now we're going to see about five minutes, and this is a class that we filmed Todd for instructional moves. It a Legislation and Regulation class, has 80 students, it's his first-year law students. The details don't matter a lot but just so you get in the mindset of where they are, it's the 58th minute of class. They are role-playing from a perspective- or they're discussing from the perspective of a deputy counsel who is in an organization of a national consumer protection agency, trying to figure out whether or not- for a certain violation that has happened, whether or not they would recommend going to rulemaking or adjudication. That's what they're trying to decide. They would be different possibilities, and Todd and his students are going back and forth just trying to figure out what makes the most sense. So, I'll play this. Although **[inaudible 00:44:18]**.

[video playing]

**Todd:** If we do rulemaking or we do adjudication, what procedures are we going to have to follow? Oh, no-

[laughter]

**Todd:** Zoey?

**Zoey:** If we do adjudication we have to follow the process on the board, correct? If we do- if we're going to go **[inaudible 00:44:54]**, we're going to go through the rulemaking process with all the guidelines outlined in the APA. So, we would have [crosstalk]--

**Todd:** We're getting close to APA. I like that. All right. Now, what would we have to do in the APA as regards to rulemaking?

**Zoey:** Well, if it was a notify 553, we'd have to go through the Notice and Comment period. So, we would [crosstalk]--

**Todd:** But I don't pay you to give me a sentence that says, if it were-

**Zoey:** I think it would be under 553.

**Todd:** Why do you think that?

**Zoey:** Because almost everything goes through 553.

[laughter]

IM LIVE - Beyond The Paper Chase



**Todd:** It's sort of a backward answer. She's right.

[laughter]

**Todd:** She's right but she got to give me a better reason for it, Sharon?

**Sharon:** Because it's **[inaudible 00:45:56]** informal process.

**Todd:** How do you know it's an informal process?

[laughter]

[silence]

**Todd:****[inaudible 00:46:12]**. Microphone is working its way down here. The law of gravity.

**Zoey:** The statute doesn't say that you have to have a hearing, so the statute doesn't specify that you go through Notice and Comment.

**Todd:** Right. Okay. D4 under the APA is 553. It's a statute that tells you, you have to have **[inaudible 00:46:30]** on the record then it's formal rulemaking. If the statute tells you nothing then it's informal ruling. If we do the adjudication, what do we have to do? **[inaudible 00:46:48]** down to the first row here. Brittany?

**Brittany:** You have to have an on-the-record proceeding.

**Todd:** How do you know that?

**Brittany:** Because that's what 556 and 557 say.

**Todd:** How do you know we're in 556 and 557? How do you know it's not informal adjudication?

**Brittany:** Well, I thought you said if it was formal adjudication.

**Todd:** If it was adjudication.

**Brittany:** Oh, okay. Well, you'd either have to have it on the record or it falls into that top right box where you're following due process considerations. So, you at least have to have the opportunity for both sides to be heard. Then I guess whether or not it's on the record depends on what box it falls in.

**Todd:** We can do better than that. The way she said it was not wrong, just not completely right. **[unintelligible 00:47:41]**?

**Brittany:** Well, it says that you need to have a hearing on the record.



**Todd:** Thank you. All right. The problem says you have to have a hearing on the record. It pays to read the problems aka exam questions-

[laughter]

**Todd:** -as to what they say. If we do it through adjudication, we're going to have to have a trial-type hearing and if we do it through rulemaking, we're going to do an informal rulemaking. That's the common pattern. That's the most common choice you'd face in an agency like this. Now, what are the differences? Well, that's our choice. What are going to be some of the differences between proceeding through a notice-and-comment rulemaking or proceeding through on-the-record adjudication? Karim, start us off.

**Karim:** One of the main differences we were finding was that with notice and comment, you're going to have an opportunity for anyone in this industry to comment. Versus adjudication, you really get to put the burden on one company.

**Todd:** Okay, so the party structure is going to look different. The people who participate in notice and comment rulemaking are "interested persons." That's the APA language. The people who participate in a formal adjudication are parties. What do you think? Who [inaudible 00:49:15]?

**Karim:** We took it from both sides to say what would the agency prefer? In our opinion, the agency would prefer adjudication. They have to listen to less people, it's easier, it has some bias in their favor. The notice and comment would presumably take longer. The industry, on the other hand, would prefer the notice and comment because they have an opportunity to give a lot of evidence and testimony from a lot of different sources and make their point publicly.

**Todd:** Having now had these thoughts which way are you- on this issue, which are you inclined to do?

**Karim:** Personally, I think that notice and comment is the better way. I think it's the more appropriate way. I think up to this point, the agency has really only heard comments from consumer advocates. So the proper way, I think, would be to open it up to notice and comment to informal rulemaking to hear from everyone out there who has an interest.

**Todd:** Okay, all right. Anybody want to go the other way on that particular issue?

[video stops]

**Josh:** Now that we have seen Professor Rakoff both with us and with his students, we now want to take it to have a conversation with him about what he's doing, what's he's thinking, what are some of the key tenets of how he teaches. So, I'll turn it over to Meira, who's going to be discussing for this part.



**Meira Levinson:** As Todd know, I'm no lawyer. I'm a law professor but not a lawyer very much. So, I really was watching this-- **[inaudible 00:51:28]**. I was watching this with an eye for thinking about what can we learn from what you do that can translate to our facilitating learning in whatever context that we try to facilitate. Especially, with young adults and adults because this is the context in which we're thinking about this. I will say just as a quick bit of background and build on what Bridget said in her intro, the video that you saw and the whole class that we have featured featuring Todd in is part of this website instructional moves that is-- For those of you who are K-12 teachers, we have often in K-12 classrooms been taught that they are generalizable pedagogical strategy that we can use whether we're teaching Math, or English, or science, or PE or whatever.

This is so much to think about what is generalizable about higher education pedagogy. So part of what we're going to be doing is thinking about less what are you doing specifically to teach law. Because in fact, as far as I know, very few **[unintelligible 00:52:47]** lawyers in this room or ever planned to become lawyers, and more what can we take from what you do that we might apply to our own teaching. I have a couple of observations based on what I saw. Partly, I'm just curious if these seem right to you. We've done no pre-work together to distill what I should've taken out of that. Then a couple of questions.

First, for the observations. One of the things that I was really interested in was how you wove in a number of what I saw as being key lessons about how we were going to be trained to think over three years and what it meant to be a professional. You started out very, very early on with the first one and really highlighted it. You said, "I am going to be teaching you ways of thinking." If you actually want to learn Wisconsin State law, go do a bar review if you plan to pass the bar in Wisconsin, but that's not actually what you're going to learn here at Harvard Law School or any of the other States, et cetera, but we're going to teach you a way of thinking. That was sort of the neon lights.

Your next one was in lights but not neon, necessarily. Which was you're going to need to develop a personal theory about was the court right, on the basis of what should courts make decisions and how do we think about that. Then the next three were in ever more subtle messaging but seemed quite intentional. One was, we're going to teach how to-- You're going to need to learn to view legal arguments through a procedural lens. That is in fact one of the features of the ways of thinking that we're going to teach you. Fourth, that court cases can only decide winners versus losers. So in fact, part of learning to think like a lawyer and like a professional in this field is not to think about if you were a legislator, or a mediator or something, but actually-- And then fifth was at the very end bringing in the text versus sub text idea. That clearly over time, I felt that that was going to be.

I was just curious how much-- In this first day, partly you're also just trying to teach us some really concrete dispositions and skills. Like, when you get into the class next week, you better actually have notated the case in such a way that you can tell



what is the case about. What is the court trying to decide. "Oh, they're not actually to decide if a fraud was perpetrated. They're just trying to decide if the circuit court was justified in directing the jury." You're going to need to pay attention to this, that and the other thing, but you're also trying to frame us into life lessons for how we should view our work as professionals. I'm just curious is that right and how do you think about the balance of that? Did I correctly pick up on your lessons for the legal professional? What are your thoughts?

**Todd:** You got more out of it than I thought I put in.

[laughter]

**Todd:** What I announced as the topic was actually my primary goal, which is that you go home and you do your homework, and you do it in a way that actually puts you in the position to start in class next week. The seeing things through the procedural lens is a crucial point there and the picking up the little details is a crucial point there. The part about is it right, is the decision right, I think that that is a value statement on my part. That it's basically saying you won't mentally and psychologically survive in this profession unless you start to build some sense of where the justice is yourself. I think there are a lot of professors who would say that can wait until the second year or the third year, so there would be a difference of opinion on that.

One thing I didn't do that I could've gone further on would be to make this yet more political. Another way of looking at this case would be to say, this is a case that's emblematic of capitalism. That the person who makes the good deal gets to keep the rewards of the good deal that he or she has made. That would've pushed it more towards the political. I decided it didn't need that at this point.

**Meira:** What if a student had raised that? I'll have a follow-up question, but what if a student had brought this up?

**Todd:** If a student had brought that up, I'd go with it. Because I certainly wouldn't want to say it's a wrong thing, but it's not something that I thought that I was going to-- My preference-- There's some students who think law is law and has nothing to do with politics. They're wrong in my view. Some students really think that law is politics and nothing but politics and I don't want to encourage that point of view, so I'm trying to walk these [inaudible 00:59:08].

**Meira:** I noticed that you called on a woman first and that the majority of people you cold-called were women. Was that a choice, and why or why not?

**Todd:** In the tape you saw- this is really not a commentary about this so much- but in the tape you saw, I called on four women in a row because I wanted to get a better and better answer. I was consciously thinking that- I don't know whether I'm right in thinking this- but that I'd rather have a woman correct a woman than a man correct woman. So if I can get a woman to give me the more precise answer. But the actual

IM LIVE - Beyond The Paper Chase



reason I called on Jennifer first-- I don't know whether you saw before class, I walked around and I asked people who had done the reading, and I didn't want to start with a dud.

[laughter]

**Todd:** I wanted to start with someone who could answer it and play along [inaudible 01:00:22].

**Meira:** Actually as I look around the room, I realize that we are, as in much of the Ed School, disproportionately currently women, and so just toying with the numbers. I have two more questions before we open it up. One is about cold-calling and the kinds of feedback and press. Sort of warm press, cold press, "Really, well, that's wrong. Where do we go?" I noticed you did a ton of things- and, again, in the beginning- to set the stage for people feeling pretty confident. So, you started out by reassuring students that they should be right either way. You then said, Jennifer, that's a good start. You then asked anything else you think people should know, like open-ended, general questions. Then you note we'll come back and look at some of the details with more texts or later, but still being willing to let people give a pretty impressionistic, general sense.

Then you started getting a little less like, [mimic] "Yes, we can all be right in this." Then we got, "You're not wrong, but what must've the judge been thinking?" You then said-- There was some other statement you have, although I didn't write it down, where you got a little more critical. Certainly, in the video that we saw, it got, "We can do better." [chuckles] Which was, I think, the kind of harshest comments that you made. How do you prepare students for that? How do you think about doing that with us? How do you think about doing it in the class? In terms of the level of, "Yes, we can all learn together, and you're all valued and actually, I expect you to step up here"?

**Todd:** There's two things. One is, just in the straight skill training point of view, part of my job is to make people speak precisely. So for that I actually just think I'm doing training work. Pointing out to people that if they're saying something general that I want them to say something more targeted.

**Meira:** You made that clear that that was an aspect of training when you said to her, "That's the right answer, but you've got to be--" Like if I'm your client, you can't just say to me, "Well, usually it's 556 or whatever."

**Todd:** The other thing is- and this is a much larger picture about cold-calling. As much as I like everybody here, as much as I liked people in my classroom, I'm also in a little bit of a war, and the war is to get you to do a lot of work out of class and really come to class prepared. So when I ask you a question about what are the facts that one way or another, you've got answers, and putting a little pressure on people is the only tool I have. Now the tradition in Law School was to be very harsh



in class and that did have the effect of getting people to prepare enormously, but it turned the classroom into a psychodrama.

If I called on Jennifer, how long would she stay in the ring with me? Everybody else is watching the price flight as it goes on. So it meant there was a lot of work out of class but very little learning, in my view, in class. So, I'm trying to hit the spot where I'm giving people enough incentive to do the work at home and really come to class prepared. Yet on the other hand, actually make them feel they can dialogue and learn something in class rather than just fearing.

**Meira:** That's super fascinating. I should say, actually, going through the meta-statement, when we were working on this module for instructional moves- and I don't know if we've said this to you- we were looking at Todd's videos. What we did in general to develop instructional moves is that- and we did a whole lot of pre-work to find out what kinds of learning did higher-Ed instructors and faculty want to get about how to teach. That set us off on two of our first things about interactive lecturing and about leading discussion. We had some ideas then about what are the more specific pedagogical moves that we wanted to be able to highlight. Then we scouted a whole bunch of faculty and then we found these great faculty who were willing to let us totally invade their classroom.

Again, we had some ideas about what are some of the specific moves that we would then highlight but, of course, then things happen in class and you see. So when we were looking at your class, cold-calling is clearly a key pedagogy in Law School, it's a key pedagogy elsewhere and we really wrestled with what is the research base for it. Because one of the things is that we would only highlight moves that had a strong research base behind them. How do we get to teach people to do that effectively and well in a short period of time, with short introductions to the research, short video clips? Six minutes is way longer than any of our key video clips that are associated within Move. We had a lot-- I don't know, Josh, what do you think? Like three different times that we wrestled with how to frame?

**Josh:** Definitely, yes. Absolutely.

**Meira:** We decided, in fact, we felt justified in highlighting it as an effective move because of how Todd does it. We would not have highlighted any old law professor cold-calling.

**Todd:** Thank you.

[laughter]

**Meira:** Well, thank you for being willing to let us do it.

**Todd:** I should add, because I know you're interested in equity in the classroom, that my former colleague; Elizabeth Warren, she felt [crosstalk]--

**Meira:** Heard of her.

[laughter]

**Todd:** She felt very strongly that cold-calling was much fairer than taking volunteers because it got to everybody in the room. That if you only took volunteers, you only got a big math fraction of the room. So it does have that virtue to it of how you get people into the conversations.

**Meira:** [inaudible 01:07:28]. If she becomes our President, well [inaudible 01:07:33]-

[laughter]

**Meira:** My last question actually relates to one point in which you did not cold-call, and where it was the only time that there was really a back and forth between two participants. This was between Rachel and Jal. I was really curious about why you decided- especially, actually, to let Rachel, the second time in her response to Jal, go on for as long as she did. Because in my read of it, basically- I will say what I heard Rachel say was, no, the law is not trying to be ethical. That's not what we look for. We look for procedural- that the law is about procedure. Jal responded procedure is ethical, and that the whole reason that we care about the procedure in the law is because that is actually a way to establish ethical relationships.

From my read, then Rachel misheard Jal because Jal framed himself as disagreeing with you, Rachel, and then reiterated your point. This went on for quite a while and then you kind of drew out, "We have two different understandings about the ethical status of proceduralism in the law." But mostly, you said, [mimic] "Actually, you should agree with each other. I'm going to find somebody who disagrees." I was curious about what was going on in your mind when you let that lengthy exchange play out between them and then why you decided to search for somebody who disagreed about, say, the sympathy of the plaintiff versus, I'll say, how ethical or not proceduralism in the law is?

**Todd:** Am I allowed to say I got a little bit confused there?

**Meira:** Sure.

[laughter]

**Todd:** Jal came in with the body English and the tone was, I'm going to disagree with what Rachel thinks. It took me a little while to figure out what he was saying. In retrospect, that did go on a little too long but that's as quick as I could do it.

[laughter]

**Meira:** Let's open it up.



**Todd:** Yes.

**Josh:** [inaudible 01:10:03] microphone just so everyone can hear each other. So just raise your hand [inaudible 01:10:07].

**Male Participant:** Thanks for coming. I've been a World History teacher for the last nine years, 10th grade. I'm wondering how do you balance turn-and-talks with students? Because something that I struggle with is I have a very [crosstalk]--

**Todd:** How do I balance what with?

**Male Participant:** Turn-and-talks, like students talking to each other- when you want to make sure that what is right people know that this is the right way, this is the correct answer if it's a specific idea. So, I would love to know your philosophy behind balancing the cold-calls with students talking to each other.

**Todd:** Actually in this tape, earlier in that class the students turned and talked to each other to look at their first answer to the hypothetical problem that I had handed out. What you were seeing was the debrief on what they had discussed when they talked to each other. I do like that technique. It's another way to get quiet students involved in the classroom because you got 80 people suddenly talking and it also allows you to call on people after that-- [crosstalk] Allows you to call on people after that because if you say to somebody, "What did your group think?" Nobody can not answer that. So that allows people who are a little bit shy, one way or another, you can bring them in. I tend to say five or at most 10 minutes is enough. What do you do?

**Male Participant:** I think it really depends on the content of what we're trying to do. If it's something that students have a little bit more creativity involved, I'll give them more time for it. I think where I struggle is I often actually don't know what the conversations are. So, I want to know, I want to participate in all of those conversations and, obviously, I can't. I'm also really worried about breeding misunderstanding about a concept. I think it depends on the context.

**Todd:** Another thing when you have this problem, I find it very psychologically hard to stand here while everybody is talking to each other for 10 minutes. I'm being paid to do this and I'm just standing here-

[laughter]

**Todd:** -I want to get back in the conversation. So that may be another unstated reason why I do say five or 10 minutes is enough.

**Meira:** Krista?

**Krista:** I have a question about what you just said about feeling like you're out of the conversation. Do you walk around and listen to what the students are saying or do



you think it's valuable that they have their own time to talk? What do you do with yourself when students are talking?

[laughter]

**Todd:** I usually let it go for a few minutes, just standing here fiddling with something. Then once I think they start to have made some progress, I will go around and say, "What are you thinking?" Just try to have- no matter where they are on the problem, have yet another question for them to think about. "Here's the next thing you want to be thinking about."

**Krista:** What you're saying reminds me- I'm not totally familiar- but a practice in Reggio Emilia. Early childhood teaching is the teachers going around and taking notes on what the kids are doing and saying and that that's central to the practice of teaching in the Reggio Emilia style. So, I'm wondering if that can translate to what we're talking about here in the higher-Ed setting. I don't know if anyone has anything to say on that. [chuckles]

**Meira:** I have to say, I love the association. I'm not sure how many frequently people have associated preschool education, or really early childhood education with Harvard Law School teaching.

[laughter]

**Dan:** Thank you. Todd, A real pleasure to see you teach and learn from you. I have one observation, one question and one suggestion. I'll try to make them very quick. The one observation, I don't use cold-calling although I've often debated doing so. But I found myself as a student right now being very aware of the possibility of cold-calling. One incentive that it created on me, and I wonder if on other students, is while I didn't volunteer, I felt tempted to volunteer more than I would have otherwise because I wanted to volunteer for things that I thought I knew the answer to.

[laughter]

**Dan:** I thought of that even not being a student in a cold-calling classroom. On this latest debate, one technique that I've used that I think it's useful if you have about seven to 10 minutes to do the group work, you can set up a Google doc or a Google slide where they actually are reflecting some of the work that they're doing. Then while you're standing there without having to awkwardly go and see, you can see what they are writing about and then you can use that to decide who call on. I don't know if you ban computers in the classroom but that might be a suggestion.

My question to you; I was baffled by how little technology or visual aids you had during class. I wonder if that's generally how you do it because you kept our attention which just having five questions on the board and we all knew where you were going. But I was wondering if you ever use visual aids or technology to help you in your class?



**Todd:** Basically, no. I also tell my students to close their laptops and turn off their cell phones. In that sense, I'm running a very old fashioned classroom. It may just be I have white hair. It may just be what I do. But I find when I'm in your position, watching someone with PowerPoints, that they just drive me crazy. I don't find them helpful, I find them distracting. Maybe if I wanted to dress this up a little bit more, I would say-- What I most and trying to do is train the skill of developing your arguments and developing your arguments on both sides, and so I need students to really be in the conversation.

As an example of how I carry that out is I don't repeat what a student says to the next student. I expect them to attach from just the fact that they were in the classroom when it was happening. So since that's-- The principal thing I do, I guess I don't use technology, but it may just be that I'm a troglodyte.

**Meira:** I actually have a follow-up question. I'm curious how many of us were following Dan's comment that he was inclined to volunteer when he thought he knew the answer so that he might not be cold-called. Can you raise your hand if you were in that category? Wow, so much of us. Then I am curious, I have noticed Asha raise her hand to try to answer a question and my guess was in part she was trying to recover from not having been able to answer a previous question, demonstrate like, "I'm with you now." You chose not to call on her but you called on Nancy instead. Can you talk to us about that line of thinking?

**Todd:** I know why I wanted to call on Nancy is because she just looked like she was ready to say something.

[laughter]

**Todd:** You make a good point that it would have been good to call on Asha and then get back to Nancy.

**Meira:** So, you would have done that had you noticed [crosstalk]--

**Todd:** If I'd thought about it, I would have done it, yes.

**Meira:** Okay. Curious. Matt?

**Matt:** Thank you. I'm curious about your preparation process. In particular, having observed law professors, it seems like you- not just in the five questions but conceptually, you know what debates you're going to get us into but that it's probably also flexible. I'm just curious, what does a teaching plan or a way in which-- If you were teaching a new case, for example, that we were going to spend most of the class on, how do you think about breaking down the discussion process such that you can prepare for it and be ready to work with a group?

**Todd:** To some extent, I have to prepare for 50 things to come up of which only four actually happen. I just have to figure out what are the tropes, if you like, that could



come out on one side or another and just be prepared. Basically, I'm prepared to say the opposite of whatever you say or to dry out- what would be the other side- the other side up. The sequencing is a little hard because if you-- I had it all worked out here. This went in the sequence that I expected, probably because I put the sequence on the boards.

[laughter]

**Todd:** But you had to decide- or I have to decide while I'm teaching, someone brings up a really interesting idea that's out of sequence. Sometimes if I'm driving for something, I'll just say, "I'll come back to you," and then you got to make sure you fulfill that promise. Sometimes if I think the student is saying something, then everybody suddenly thinks, "Wow, that's really interesting," I'll just go with it. I don't feel bad if I don't cover everything. I don't try to come back the next day unless it's something that you just simply have to know that maybe we didn't get to. But that's again because I think if I'm advancing the skill, a little bit of content- so a little bit of content, they would forget it after the exam anyway.

So the preparation though, the first time I teach a case, I work it out on paper very carefully. It takes me quite a long time to actually teach a new case because you got to know what you're talking about.

**Josh:** So, I think we have time for two more questions, but it'd probably be easier if we just ask both of them and then give those answers together. So if there's **[inaudible 01:22:55]**.

**Female Participant:** It seems like the way that you define success in this teaching method is about whether the students are learning the way of learning. I'm curious how will you know if certain students are actually developing that skills. Because I'm from Japan, it's all about lectures. It's very easy to measure if certain students actually learned certain concepts because it is about knowledge transmission. But if it is about a way of thinking, I'm curious how will you know? As a student, I always learn certain takeaways, but I'm curious from the teacher's perspective. How would you know about that?

**Josh:** Great. **[inaudible 01:23:33]**.

**Female Participant:** I was just going to ask if part of your technique was to be like a judge, and being a professional school and preparing lawyers, they're not going to have a chance to confer. They're going to have to respond to a judge. So if it's partly preparing for the ultimate context of where they hope to be.

**Todd:** Let me take the second question first, all right? We tell students that- we tell them that part of being cold-called is we're preparing you for the thrust and parry of real life. I actually think that's a lie because if you're actually going to appear in front of a judge, you've spent the last two weeks of your life, 24 hours a day, getting prepared- doing what I was talking about before- ready to answer a hundred



questions of which you'll get asked too. So the idea that you could walk in at any time that you go to work and suddenly face a barrage of questions like that seems to me probably not true. But we do say that.

[laughter]

**Todd:** As to how do we know? That's really, really a hard question. I suspect it's a hard question for anybody in here who's teaching anything to know whether you're accomplishing what you want to accomplish. The feedback to me consists of two things. One is how people do in class. So not just speaking about by my own performance, but about the Law School in general. When I come into a third-year class and teach them, they can do things my first-year students cannot do. Now whether they learned them in the lunchroom, or in summer jobs or in our classrooms, I have no way of knowing but in some way, they're smarter the way lawyers are smart.

In terms of the end of- we only give one exam, it's the end of semester. I know that's bad educational practice but that's what we do. They are tough exams. It would be like if I gave you the statement of facts from this opinion and nothing more, and told you, "Now, you write the rest of the opinion." That's roughly what our exams look like. There is a definite difference between the best and the worst. There's no question about that. But how good they are, how good the median one, if I could put it that way, is hard to judge because it's a reflection of how hard a question I write.

I'm purposely writing- I have to write questions that are tough enough that I can say, "This person is better than this person." If I write a question that tough, then some of the answers are not going to be good. As my wife who's sitting in the back can tell you, I- then you then you get really angry at the ones that aren't good enough.

[laughter]

**Todd:** Which is in a sense very unfair because I get angry because I put them in the position of not being able to do it. So, I guess this comes down to-- I've pretty good confidence in the Law School as a whole, but how much would I do in a semester to accomplish this? I really can't show you.

**Meira:** Can I add actually one thing to that? Which was what was interesting in the coverage of your question was that if you were confident that a professor was saying it, then you were confident that students were learning it. What I heard Todd saying in part, he did not actually talk at all about how much he covered or what he covered in assessing the learning. It was all about what he was getting back in terms of student performance, either in the third-year class or on the exam.

**Todd:** Which is, to be fair, partly a reflection of the students I'm teaching. If it's just what is the rules, like what are the rules?

**Meira:** Speak precisely.



[laughter]

**Todd:** I could hand out a hundred rules to my students and say, "There's an exam in five months," and they **[unintelligible 01:28:52]**. So that's not true of other situations, but knowing what you have to prove to prove fraud is something that I can leave to them to get.

**Meira:** Okay. Please join me in thanking-

[applause]

**Meira:** I will invite you to check out [instructionalmoves.gse.harvard.edu](http://instructionalmoves.gse.harvard.edu)-- It's at [harvard.edu](http://harvard.edu)? Yes, or just Google instructional moves, you'll find us.

[crosstalk]

**Meira:** Thank you.

[music]

**[01:29:40] [END OF AUDIO]**

**[01:29:41] [END OF AUDIO]**