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## THE ZEN OF GRADING

*Ruthann Robson\**

### I. INTRODUCTION: WHAT IS GRADING?

As law professors, we spend a substantial amount of time engaged in the activity of reviewing exams, papers, and other “evaluative devices” with the purpose of assigning our students grades. Personally, I estimate that I have spent over four thousand hours (almost six months of days and nights, or a year of long summer days) hunched over student work during my teaching career. It can be difficult not to consider student exams as a mere obstacle, a chore of the most unpleasant type to endure, and the worst part of our otherwise usually rewarding work as professors. Grading law school exams has been declared a “deadening intimacy with ignorance and mental fog” which saps a professor’s pedagogical and scholarly energies.<sup>1</sup> It is a “terrible occupation,” a “cloud,” a task which we accomplish with less efficiency and more distaste as our teaching career advances.<sup>2</sup> Professorial engagement with Blue Books, in which most law student exams continue to be written, is deemed tedious and boring, leading to a “corrosive negativity” regarding the intellectual abilities of our students as well as a destructive influence upon our own character.<sup>3</sup> In short, grading, especially of final

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\* Professor of Law, City University of New York (CUNY) School of Law. I have benefited from the presentation of this work at the Carmel Summer Scholarship Retreat, 2002, and from the critical comments and support from Penelope Andrews, Janet Calvo, and Andrea McArdle. Additionally, I am thankful to S.E. Valentine.

1. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 359-60 (Carnegie Foundation for the Advancement of Teaching, Bulletin No. 15, 1921) (1976), *quoted in* Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, With a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV. 657, 687 n.177 (1997) (discussing development of hypotheticals in law school essay exams).

2. George C. Christie, *The Recruitment of Law Faculty*, 1987 DUKE L.J. 306, 310 (1987) (discussing making law teaching a more attractive profession).

3. Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 484-85 (1989) (exploring problems of current law school examination techniques).

examinations, is universally disparaged.<sup>4</sup>

Given such aversion, it is not surprising that our scholarly attention to grading has not overwhelmed law reviews when compared with doctrinal and theoretical subjects.<sup>5</sup> Nevertheless, the extant literature regarding evaluation of law student work is impressive. For example, Phillip Kissam's comprehensive discussion of contemporary law school examination practices and suggestions for reform<sup>6</sup> extends Steve Nickles' earlier piece reporting the results of a survey of the grading and examination practices of American law schools.<sup>7</sup> Steve Sheppard's useful history of law school examination practices (or non-practices in the case of graduation without tests) also contains an entertaining appendix of a selection of law examinations from 1853 to 1994.<sup>8</sup> In addition, those of us who teach large substantive classes could profit from Paul Wangerin's proposals for reconciling the fact that "most law school teachers will not do anything that increases the time they spend grading" with general educational theory promoting frequent testing and frequent feedback as more conducive to student learning.<sup>9</sup> In the large classroom context, the pre-eminence of essay questions has been questioned by those advocating objective examinations,<sup>10</sup> as well as the relationship between law school examinations and the "case method" of instruction.<sup>11</sup> For research and writing courses which privilege the process of learning, Laurie Magid has argued that the inclusion of a

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4. Accord Linda R. Crane, *Grading Law School Examinations: Making a Case for Objective Exams to Cure What Ails "Objectified" Exams*, 34 NEW ENG. L. REV. 785, 789 (2000) ("It is almost axiomatic to say that law professors would teach for free, but require a salary to grade final exams. This statement is understood by all as expressing the general feeling most of us have about the task of grading. We do not like to grade final examinations.").

5. In addition, scholarship on grading, like scholarship devoted to skills and pedagogy, is generally less respected in the legal academy, therefore providing a disincentive to its production.

6. Kissam, *supra* note 3, at 493-502 (suggesting changes in the types of questions, feedback, teaching styles, grading practices, and types of exams).

7. Steve Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411 (1977) (examining the problems associated with grading in law schools).

8. Sheppard, *supra* note 1 (providing several sample exams).

9. Paul Wangerin, "Alternative" Grading in Large Section Law School Classes, 6 U. FLA. J.L. & PUB. POL'Y 53, 56 (1993) (suggesting several alternative grading methods).

10. Crane, *supra* note 4 (arguing that examinations and their assessment need to become more objective by using objective questions rather than essay questions, even when professors use score sheets as a method of attempting to "objectify" essays); Norman Redlich & Steve Friedland, *Challenging Tradition: Using Objective Questions in Law School Examinations*, 41 DEPAUL L. REV. 143 (1991) (arguing for the use of objective tests in law school).

11. The case method refers to a teaching style involving "student examination of judicial decisions coupled with Socratic style analysis." Russell Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518 (1991). Weaver elaborates on the problems of current law school examination methods. *Id.* at 576, 578, 588-90.

specific assignment can promote “fairness” while “easing the grading burden.”<sup>12</sup> Ian Weinstein in the area of lawyering skills has compared evaluating simulations and written examinations in light of eventual lawyering performance.<sup>13</sup>

Yet despite such notable examples, the scholarship does not mirror my subjective experience of all those hours – that summer! – of grading. Moreover, although at least one commentator believes that “of the most frequent topics of conversation among law professors is grading,”<sup>14</sup> and I teach at a law school which prizes pedagogy to an extremely high degree,<sup>15</sup> my collegial discussions have been similarly unsatisfying in a manner that can be difficult to express. Certainly, I have participated in wide ranging deliberations about many aspects of grading policies. Although not an expert in learning theory, I generally feel conversant in the advantages and disadvantages of various techniques, strategies, innovations, and critiques of testing and grading. I possess opinions about methodologies, mandatory curves, and class rankings. I have frequently discussed and made decisions about various evaluative devices including in-class essay exams, multiple choice exams, research projects in large classrooms, closed book vs. open book vs. take-home exams, student research papers on independent topics, and student-researched advocacy papers on assigned material. Yet, these engagements have been primarily intellectual, and rightly so. What I have found lacking is a more personal and subjective discourse about the activity, rather than the effects, of grading.

For example, my colleagues at CUNY as well as elsewhere in legal

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12. Laurie Magid, *Awarding Fair Grades in a Process-Oriented Legal Research and Writing Course*, 43 WAYNE L. REV. 1657, 1682 (1997) (suggesting improvements for grading in legal research and writing courses).

13. Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247, 264-69 (2001) (looking at student evaluation via simulated client centered exams).

14. Crane, *supra* note 4, at 790 (discussing the grading of law school exams).

15. For discussions of CUNY School of Law, see John Farago, *The Pedagogy of Community: Trust and Responsibility at CUNY Law School*, 10 NOVA L.J. 465 (1986) (emphasizing the difference between CUNY and other law schools); Charles Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L.J. 549 (1986) (discussing the founding of CUNY law school); Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L.J. 633 (1986) (discussing what CUNY law school has to offer); Joyce McConnell, *A Feminist's Perspective on Liberal Reform of Legal Education*, 14 HARV. WOMEN'S L.J. 77, 88-94 (1991) (discussing how CUNY is unique in its comprehensive approach to liberal reform); Vanessa Merton, *The City University of New York Law School: An Insider's Report*, 12 NOVA L. REV. 45 (1987); Ruthann Robson, *The Politics of the Possible: Personal Reflections on a Decade at the City University of New York School of Law*, 3 N.Y. CITY L. REV. 245 (2000) (discussing the author's experience as a professor at CUNY).

academia often discuss results of the process. “How are your exams?” is a common greeting in hallways, telephone conversations, and emails at certain times of the year. We are less likely to trade specific anecdotes or information about our actual practice of grading. Yes, I know that one colleague prefers to grade at night and another in his office rather than at home. I still recall the colleague who checked herself into a hotel in order to grade and I am awed by a colleague who mentions grading bluebooks on an airplane. I treasure the food references: one colleague confides that she cannot have chocolate in the house while she grades lest she consume it all, another treats himself to a new restaurant after he turns in his grades, and one colleague describes her assessment of student papers by how much “orange junk food” she consumes while grading them (“this was definitely a three giant-bag Doritos set of exams”). However, even these examples merely allude to those hours and hours of work without capturing their spirit.

## II. THE SPIRIT OF ZEN

Zen is a spiritual tradition with a specific history, culture, and meaning, but it has often been used in the United States in a casual manner. The popular counter-culture book, *Zen and the Art of Motorcycle Maintenance*, confesses at the outset that the book has virtually nothing to do with Zen, and in fact the book draws on classical Greek traditions without alluding to Eastern philosophies.<sup>16</sup> Similarly, with varying degrees of attention to Zen teachings and traditions, writers have “applied” Zen to: archery;<sup>17</sup> writing;<sup>18</sup> golf;<sup>19</sup> corporate culture;<sup>20</sup> travel;<sup>21</sup> sex; playing the guitar; computers;<sup>22</sup> driving;<sup>23</sup> gardening;<sup>24</sup> pets

16. ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (1974).

17. See EUGEN HERRIGEL, *ZEN IN THE ART OF ARCHERY* (1989) (applying Zen to archery).

18. Compare RAY BRADBURY, *ZEN IN THE ART OF WRITING* 129 (1989) (“I knew nothing of Zen until a few weeks ago. What little I know now” . . . has been derived from Herrigel’s *ZEN IN THE ART OF ARCHERY*), with GAIL SHER, *ONE CONTINUOUS MISTAKE: FOUR NOBLE TRUTHS FOR WRITERS* (1999) [hereinafter SHER, ONE], and GAIL SHER, *THE INTUITIVE WRITER: LISTENING TO YOUR OWN VOICE* (2002) [hereinafter SHER, INTUITIVE] (Sher is described as an ordained Zen monk and teacher of Zen who, in this book, provides a collection of short narratives on Zen and writing).

19. See JOSEPH PARENT, *ZEN GOLF: MASTERING THE MENTAL GAME* (2002) (applying the art of Zen to golf).

20. See, e.g., THOMAS F. CLEARY, *ZEN LESSONS: THE ART OF LEADERSHIP* (1989) (using Zen to enhance leadership skills); ALBERT LOW, *ZEN AND CREATIVE MANAGEMENT* (revised ed. 1993) (applying Zen to business).

21. See ERIC CHALINE, *ZEN AND THE ART OF TRAVEL* (2001) (applying Zen to travel).

22. Philip Toshio Sudo has published a plethora of books on these subjects. See PHILIP TOSHIO SUDO, *ZEN COMPUTER* (2001) (applying Zen to computers); PHILIP TOSHIO SUDO, *ZEN GUITAR* (1998) (applying Zen to guitar); PHILIP TOSHIO SUDO, *ZEN SEX: THE WAY OF MAKING*

and animals;<sup>25</sup> cleaning;<sup>26</sup> being Black;<sup>27</sup> Christian or Jewish;<sup>28</sup> to psychotherapy and depression;<sup>29</sup> and most expansively to “anything.”<sup>30</sup> Additionally, Zen has been popularized by Americans such as Alan Watts<sup>31</sup> and less rigorously by “Beat” generation writers such as Jack Kerouac, Allen Ginsberg, and Gary Snyder.<sup>32</sup> Among others, the work

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LOVE (2000) (applying Zen and the seven ways of the mind to sex).

23. See K. T. BERGER, *ZEN DRIVING* (1988) (applying Zen to driving).

24. See, e.g., GILL HALE, *ZEN AND THE ART OF GARDENING* (2001) (applying Zen to gardening); SUNNIVA HARTE, *ZEN GARDENING* (1999) (applying Zen to gardening).

25. Compare JUDITH ATLER & TONI TUCKER, *ZEN DOG* (2001) (providing photographs of dogs with Zen quotes), and JANA MARTIN & YOSHIYUKI YAGINUMA, *ZEN CATS* (2001) (providing photos of cats), with ROSHI PHILIP KAPLEAU, *AWAKENING TO ZEN: THE TEACHINGS OF ROSHI PHILIP KAPLEAU* 45 (Polly Young-Eisendrath & Rafe Martin eds., 1997) [hereinafter KAPLEAU, *AWAKENING*] (using Buddhist scriptures to argue that animals are manifestations of Buddha). Of course, Zen literature is filled with references to animals and one of the most famous koans features a dog. See ROSHI PHILIP KAPLEAU, *The THREE PILLARS OF ZEN* 63-82 (Kenneth Kraft ed., 2000) [hereinafter KAPLEAU, *THREE PILLARS*] (“Ever since Joshu, one of the great Chinese Zen masters of the T’ang era, retorted “Mu!” to a monk who had asked whether dogs have Buddha-nature, the reverberations of the incident have been echoing through the halls of Zen monasteries and temples down through the centuries.”).

26. See GARY THORP, *SWEEPING CHANGES: DISCOVERING THE JOY OF ZEN IN EVERYDAY TASKS* (2000) (discussing Zen and cleaning).

27. See ANGEL KYODO WILLIAMS, *BEING BLACK: ZEN AND THE ART OF LIVING WITH FEARLESSNESS AND GRACE* (2000) (discussing Zen Buddhism as described by a Black female ordained Zen priest).

28. See, e.g., DAVID BADER, *ZEN JUDAISM: FOR YOU, A LITTLE ENLIGHTENMENT* (2002) (incorporating Zen with Judaism); WILLIAM JOHNSTON, *CHRISTIAN ZEN* (3d ed., 1997) (discussing how Zen and Christianity have combined in the author); ROBERT E. KENNEDY, *ZEN GIFTS TO CHRISTIANS* (2001) (attempting to align Eastern understanding with Western interpretations of God); ALAN LEW, *ONE GOD CLAPPING: THE SPIRITUAL PATH OF A ZEN RABBI* (1999) (describing spiritual path of the author).

29. See, e.g., DAVID BRAZIER, *ZEN THERAPY: TRANSCENDING THE SORROWS OF THE HUMAN MIND* (1997) (attempting to fuse the two psychotherapeutic traditions); PHILIP MARTIN, *THE ZEN PATH THROUGH DEPRESSION* (2000) (showing how to ease depression through Zen); ROBERT ROSENBAUM, *ZEN AND THE HEART OF PSYCHOTHERAPY* (1999) (using classic Buddhist texts as guidelines for psychotherapy).

30. Compare HAL FRENCH, *ZEN AND THE ART OF ANYTHING* (2001) (applying Zen to everyday activities) with CHARLOTTE JOKO BECK, *EVERYDAY ZEN: LOVE AND WORK* (1989) (providing transcriptions of lectures of ordained Zen Buddhist monk).

31. See, e.g., ALAN WATTS, *THE WAY OF ZEN* (1956) (providing history of Buddhist thought). Interestingly, Watts, writing in 1956, notes that “[d]uring the past twenty years there has been an extraordinary growth of interest in Zen Buddhism.” *Id.* at ix. Watts’ work further contributed to that growth.

32. Beat writers popularized various forms of Buddhism including Zen and Tibetan sects. For a general introduction to the relationship between Beat writers and Buddhism, see BIG SKY MIND: *BUDDHISM AND THE BEAT GENERATION* (Carole Tonkinson ed., 1995). Jack Kerouac’s novels incorporated various Buddhist ideas, but perhaps his most Zen novel is *THE DHARMA BUMS* (1958) (centering in part on a character modeled after poet Gary Snyder). For an introduction to Gary Snyder’s poetry and essays, see GARY SNYDER, *THE GARY SNYDER READER* (1999) (providing a collection of poetry). Allen Ginsberg’s Buddhism is more closely derived from Tibetan sources.

of Japanese scholar D.T. Suzuki and the Japanese Zen monk Shunryu Suzuki have presented the more traditional Zen teachings to Western audiences.<sup>33</sup>

The aspect of Zen which is most amenable to various applications (and which I want to adopt in the context of grading) is the notion of practice. In the strict sense, zazen (the Japanese word from which Zen has taken its name)<sup>34</sup> is akin to meditation—sitting for countless hours with attention to posture and breathing.<sup>35</sup> However, many Zen practitioners have sought to expand the notion of practice so that it infiltrates every aspect of life. For example, as Shunryu Suzuki states in his influential book *Zen Mind, Beginner's Mind*, practice encompasses everything: “To cook, or to fix some food” is practice, because “sitting is not our only way. Whatever you do” can be practice.<sup>36</sup> Similarly, Alan Watts explained that Zen practice “does not confuse spirituality with thinking about God while one is peeling the potatoes. Zen spirituality is just to peel the potatoes.”<sup>37</sup> It is no coincidence that the examples tend

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See MICHAEL SCHUMACHER, DHARMA LION: A CRITICAL BIOGRAPHY OF ALLEN GINSBERG 565-66 (1992) (discussing the life of Allen Ginsburg). The legacy of the connection between Beat writers and Buddhism continues in The Jack Kerouac School of Disembodied Poetics at Naropa University in Boulder, Colorado. See *The Beat Legacy*, available at <http://www.naropa.edu/beatlegacy.html> (last visited June 21, 2002) (providing a description of a summer writing program).

33. Although both Suzukis are proponents of Zen in the West, the two Suzukis are nevertheless quite distinct, living in different eras, having different callings, and belonging to different sects of Zen. Daisetz T. Suzuki, 1870-1966, a disciple and translator of Soen Shaku, a master of the Rinzaï sect of Zen, was a scholar who taught at American universities and published widely. His best known works include D.T. SUZUKI, *THE ESSENTIALS OF ZEN BUDDHISM* (1962) and DAISETZ T. SUZUKI, *ZEN AND JAPANESE CULTURE* (1959) (providing analysis of Zen and Japanese Culture).

Shunryu Suzuki came to the United States from Japan in 1959 to be the priest of the Soto Zen Temple in San Francisco. He later founded the Zen Mountain Center at Tassajara (California) and the Zen Center in San Francisco. The classic collection of his lectures is SHUNRYU SUZUKI, *ZEN MIND, BEGINNER'S MIND* (Trudy Dixon ed., 1970) [hereinafter SUZUKI, *BEGINNER'S MIND*] (describing the application of Zen to practice, attitude, and the mind). For a further discussion of his life and teachings, see DAVID CHADWICK, *CROOKED CUCUMBER: THE LIFE AND ZEN TEACHINGS OF SHUNRYU SUZUKI* (1999) [hereinafter CHADWICK, *CROOKED CUCUMBER*] (providing a history of Shunryu Suzuki). “When confused with D.T. Suzuki, Shunryu Suzuki would say, ‘No, he’s the big Suzuki, I’m the little Suzuki.’” *Id.* at xiii.

34. Kapleau explains that the “word Zen comes from the Chinese chan, which comes from the dhyana, the Sanskrit term for meditation.” KAPLEAU, *AWAKENING*, *supra* note 25, at 74.

35. Kapleau, however, advised that “zazen should not be confused with meditation,” and distinguishes zazen from other types of Buddhist meditation which concentrate on specific words or objects. KAPLEAU, *THREE PILLARS*, *supra* note 25, at 12-13. Nevertheless, it is one of the three central components of Zen. *Id.* at 9-10. In his collection, Shunryu Suzuki’s first two subjects regarding Zen practice are posture and breathing, respectively. SUZUKI, *BEGINNER'S MIND*, *supra* note 33, at 25-31.

36. *Id.* at 53 (“Our way is not to sit to acquire something; it is to express our true nature.”).

37. WATTS, *supra* note 31, at 151.

toward the prosaic. As Zen practitioner and scholar Philip Kapleau has declared, for more than a thousand years “manual labor has been an essential ingredient of Zen discipline.”<sup>38</sup> As a “mobile type of zazen,” it provides the opportunity to cultivate the requisite mindfulness, leading to the eventual “enlightenment” that “all work, no matter how menial, is ennobling.”<sup>39</sup>

Grading exams is the menial and manual work of being a professor.<sup>40</sup> Nevertheless, it remains largely an intellectual task, to which the applicability of Zen may be suspect. Zen’s emphasis on direct perception, in contradistinction to the study of texts,<sup>41</sup> and its use of “koans” as a teaching methodology,<sup>42</sup> may make Zen appear anti-intellectual and anti-linguistic. Yet while Zen enlightenment may be a non-intellectual and non-linguistic experience, Zen practice seems inclusive of the intellectual and linguistic. Most famously, there is the haiku form of poetry.<sup>43</sup> Moreover, traditional Zen training includes lectures and private instruction, which may be devoted to the discussion of historical writings,<sup>44</sup> and initiation as a monk may include an exam.<sup>45</sup>

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38. KAPLEAU, *THREE PILLARS*, *supra* note 25, at 200.

39. *Id.* at 200-01.

40. *See supra* notes 1-4 and accompanying text.

41. As D.T. Suzuki points out, Zen, as a sect of Buddhism, is a historical reaction to the perceived failings of other spiritual practices including preoccupation with the “highly metaphysical,” the mere observation of ethical precepts, or excessive contemplation. ZEN BUDDHISM: SELECTED WRITINGS OF D.T. SUZUKI 9-10 (William Barrett ed., 1956). Suzuki’s remark is directed to the acceptance of Ch’an (Zen) Buddhism in China, but seems generally applicable. Thus, as expressed by Suzuki, “Zen never explains but indicates, it does not appeal to circumlocution, nor does it generalize. It always deals with facts, concrete and tangible.” *Id.* at 10.

42. For discussions of the koan, see SUZUKI, *supra* note 41, at 134-54 (describing the koan exercise) and WATTS, *supra* note 31, at 154-73 (explaining zazen and the koan). *See also* ZEN FLESH, ZEN BONES: A COLLECTION OF ZEN AND PRE-ZEN WRITINGS (1957) (containing various stories and koans).

However, the well-respected Zen monk and scholar, Philip Kapleau, has offered this interpretation of the koan, particularly interesting in the context of legal education:

Although these days the word koan has become a buzz word describing or referring to any insoluble problem, strictly speaking, a Zen koan revolves around the sayings and doings of the Zen masters. Etymologically, the word means “a place where there is truth,” *not unlike a case at law which serves as a precedent for resolving future cases.*

KAPLEAU, *AWAKENING*, *supra* note 25, at 233 (emphasis added).

43. For examples of the relationships between Zen and haiku/poetry in the work of various masters, see *MOUNTAIN TASTING: ZEN HAIKU BY SANTŌKA TANEDA* (John Stevens trans., 1980) (providing a collection of poems by Santoka Taneda); *ONE ROBE, ONE BOWL: THE ZEN POETRY OF RYŌKAN* (John Stevens trans., 1977); *MAKOTA UEDA, BASHŌ AND HIS INTERPRETERS: SELECTED HOKKU WITH COMMENTARY* (1991) (providing poems for the 17th century); *RYŌKAN: THE ZEN MONK-POET OF JAPAN* (Burton Watson trans., 1977) (translating poems of Ryokan into English).

44. Kapleau’s *THE THREE PILLARS OF ZEN* is a compilation of teachings, lectures, and private instructions from his years in a Japanese Zen monastery, containing translations of many lectures and individual conferences. KAPLEAU, *THREE PILLARS*, *supra* note 25. Similarly, scholars have

Contemporary Zen monk Gail Sher maintains that writing can be a Zen practice.<sup>46</sup> Thus, it seems to me, that grading exams is susceptible to being examined as a Zen practice.

Yet my scrutiny is not meant to be a set of prescriptions to achieve enlightenment (!) or even the mindfulness of “good practice.” Instead, proceeding in the fragmentary form of much of Zen writing,<sup>47</sup> my goal is only to share my introspection about my own practice of grading. These observations are divided into five sections, Invisible Practice and Practice, Beginner’s Mind, NOW, Sangha,<sup>48</sup> and Desire and Suffering.

### III. A GRADING PRACTITIONER’S NOTES

#### A. Invisible Practice and Practice

“Invisible practice. It helps to have a dignified name for what we might easily label ungratifying time wasters.”<sup>49</sup>

Burgundy or violet ink cartridges, a few extra boxes including those I bought in London in bulk; I’d been thrilled to find them since I’d been told that they were no longer being manufactured. That special pen with a certain nib. I have criticized myself for being too obsessive, too ritualistic, too frivolous, even as I have marveled at a colleague’s scratchy ball-point pen remarks seemingly hurled across a student paper. I realize that the danger is that I will become enamored of my own words rather than those of the student. But I continue to believe, superstitiously or not, that such preparation is integral to my practice.<sup>50</sup>

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expounded upon the work of Zen masters in previous centuries. See RATIONAL ZEN: THE MIND OF DŌGEN ZENJI (Thomas Cleary ed., 1995) (consisting of works from Dogen Zenji); ZENKEI SHIBAYAMA, ZEN COMMENTS ON THE MUMONKAN (1974) (providing a collection of classic Zen poetry); HAKUUN YASUTANI, FLOWERS FALL: A COMMENTARY ON ZEN DŌGEN’S GENJŌKŌAN (Paul Jaffe trans., 1996) (discussing a Zen Master’s interpretation of Buddhism).

45. See CHADWICK, CROOKED CUCUMBER, *supra* note 33, at 42 (discussing the “head monk” ceremony of Shunryu Suzuki in Japan in 1926 at which he first recited a poem, then invited questions, and was “grilled by his peers and elders in the traditional dharma-combat ceremony”).

46. See SHER, ONE, *supra* note 18.

47. See ZEN FLESH, ZEN BONES, *supra* note 42 (discussing various stories and koans). See also KAPLEAU, THREE PILLARS, *supra* note 25 (containing many examples); SHER, INTUITIVE, *supra* note 18 (containing short “chapters” and vignettes); BEGINNERS MIND, *supra* note 33 (containing short lectures/chapters).

48. See *infra* notes 69-83 and accompanying text.

49. SHER, ONE, *supra* note 18, at 77.

50. Gail Sher makes similar points regarding the practice of writing. See *id.* at 101 (“The way you take care of anything is the way you take care of everything. If you don’t take care of your writing tools (your pen, notebook, eraser, stapler, tape), you may not bother to take care of yourself.”); SHER, INTUITIVE, *supra* note 18, at 135 (“To function well, you must prepare carefully

I arrange the desk in its particular grading configuration and retrieve a glass of water, mineral with ice and a lemon, placing it on a coaster to the right. A cushion is on the chair. Everything is ready.

Except me.

The copy-paper box—or two—of Blue Books sits on the floor, patient, seeming at first. Then, more anxiety emanating as the grade submission deadline is not so comfortably distant. The other course I've taught this semester has almost certainly been graded. Those individual research papers or even those take-home exams are such a joy to read by comparison.<sup>51</sup> Not to mention the fact that the number of students is significantly fewer. Like many law professors, I teach at least one large class a semester, with the number of students ranging from eighty to two hundred. And like many law professors, I administer a final exam which consists of a hypothetical fact pattern which students must analyze during a specific time period, filling as many blue books as they desire, or can.<sup>52</sup> Which leaves me with the daunting task of reading what the students have written.

When I finally approach the exams, my initial attitude is rather enthusiastic. After all, I think I have composed an imaginative and fun hypothetical and I am interested to learn how they have received it. At this point, I am also “tweaking” my feedback sheet/grading grid, the instrument I will use to assess points in particular areas and then reach a total raw score. I read about twenty exams without “grading” them, keeping the grading grid on the table without affixing any numbers to it. After making any necessary adjustments to the grid, I then grade twenty other exams, using the grid and this time being very conscious of each particular section and the total raw score. This preliminary practice is a method of adjusting and settling expectations. It is also an opportunity to compensate for any failing of the exam question, such as a remark intended only to be witty but which invokes a note case from the textbook or leads students otherwise astray.

Now, it is time to be serious. I arrange the exams in numerical order, putting them in piles of fifteen or twenty or twenty-five insisting to myself that such an organization has no relationship to any daily quota

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all tools clean, ready, reachable”).

51. *But see infra* notes 88-89 (discussing academic dishonesty).

52. Some differences in my own practices include the fact that, at CUNY, our faculty policy requires two evaluative devices. In most large classes I teach, this means I administer a “midterm examination,” which consists of some sort of objective short-answer exam, usually similar to multiple-choice bar exam-type questions. In smaller classes, I typically use class presentations, individual research papers, assigned research advocacy memos, take-home exams, and other evaluative devices.

I may have set for myself in very un-Zen-like fashion. I watch as these piles of bluebooks spread across the floor or the futon, waiting to be selected, meanwhile spilling into each other. On the desk, a pile of unread bluebooks cascade on the left and the unmarked feedback sheets on the right, and the one exam draining all my attention sits stolidly in the middle as I hunch over it.

Zen practitioners stress the importance of straight-back posture while practicing zazen and while doing all else.<sup>53</sup> “If you slump, you will lose your self.”<sup>54</sup> I am lost so often, stooped so that I can see better, sometimes bent so low that my nose touches the paper. When my back starts to ache, I reward myself with a ten minute stretch and another glass of water with ice.

Sometimes a better reward awaits me when I return to grading. Like a surprise gift, I find one of the previously graded exams hidden in a stack of work. It’s like a holiday, a long lunch break, or a bit of time found. But I always grade the exam again, casting away the feedback sheet and approaching the bluebooks anew, as if it is a test not only of the student’s work again, but also of my own. If not of my objectivity, then of my consistency. I am startled that within a point, the grading sheet reflects the same numbers.

Then the stack is done, joining the others on the floor. Satisfied. Complete.

“Nirvana is seeing one thing through to the end.”<sup>55</sup>

### B. *Beginner’s Mind*

I strive to approach each exam with a “beginner’s mind.”<sup>56</sup> “In the beginner’s mind there are many possibilities; in the expert’s mind there are few.”<sup>57</sup> The previous exams must be banished from my mind. Even more importantly, perhaps, I try to maintain an open mind throughout the reading of each individual exam. A slipshod, inaccurate, or inarticulate beginning does not mean that the entire exam will be substandard. Ideally, a student will have “warmed up” before starting to write, but this is not always true. And, on the contrary, a brilliant

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53. SUZUKI, *BEGINNER’S MIND*, *supra* note 33, at 25-26 (discussing Zen and posture); SHER, *ONE*, *supra* note 18, at 13; KAPLEAU, *THREE PILLARS*, *supra* note 25, at 315-20 (containing illustrations).

54. SUZUKI, *BEGINNER’S MIND*, *supra* note 33, at 27.

55. CHADWICK, *CROOKED CUCUMBER*, *supra* note 33, at 397.

56. *See* SUZUKI, *BEGINNER’S MIND*, *supra* note 33 (discussing how to approach problems). The notion, however, did not originate with Suzuki. *See id.* at 14 (“Beginner’s mind was a favorite expression of Dogen-zengi.”).

57. SUZUKI, *BEGINNER’S MIND*, *supra* note 33, at 21.

opening exegesis does not necessarily predict trenchant analysis. To read each sentence with a “fresh mind” is the most difficult task and the “real secret” of the Zen of grading.<sup>58</sup>

Perhaps somewhat paradoxically, I find that a pre-prepared grading feedback sheet or grid assists me in maintaining this “beginner’s mind” with each exam. While some students are consistent in their exceptional or disappointing performances, most students are not.<sup>59</sup> By allocating points to individual issues raised by the problem I have written, I am forced to approach each issue—if not each sentence—with a “beginner’s mind.”

The preparation of the grid in tandem with writing the exam question has also required me to try to exercise this beginner’s mind. Thus, I do not agree that the essay exam is merely an objective exam in narrative form.<sup>60</sup> If this beginner’s mind is achieved then the essay question and the grading grid allow for the recognition of unpredicted or unusual insight in a manner in which multiple choice and other correct/incorrect grading mechanisms do not.

When I’ve achieved my goal in preparing the exam question, it also allows the student to exercise beginner’s mind by expressing something fresh, original, and wonderful about policy, theory, and even well-established doctrine. It might seem strange to make “beginners mind” an aspiration for student work because the students by definition are “beginners” not experts. But as all professors know, even first year students can become enervated, second year students can be complacent, and need I mention third year students? Moreover, the process of preparing to sit for the exam—the outlining, the memorizing, the discussions in study groups—transforms the student into an expert of

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58. *Id.*

So the most difficult thing is always to keep your beginner’s mind. There is no need to have a deep understanding of Zen. Even though you read much Zen literature, you must read each sentence with a fresh mind. You should not say, “I know what Zen is,” or “I have attained enlightenment.” This is also the real secret of the arts: always be a beginner. Be very careful about this point. If you start to practice zazen, you will begin to appreciate your beginner’s mind. It is the secret of Zen practice.

*Id.* at 22.

59. Even within a doctrinal framework such as equal protection, I often have exams which are inconsistent. For example, an exam can be superlative on a racial identity classification and merely adequate on a gender, disability, or sexuality classification and marginal in its analysis of an economic classification issue. It would be tempting, of course, to infer that the student author of such an exam is a racial minority, but my experience in reviewing exams with student authors after grades have been submitted has refuted any such presumption. *Cf. infra* note 83 (discussing handwriting and syntax in the context of anonymous grading and student identity).

60. *Cf. Crane, supra* note 4 (arguing against the objectification of essay exams in favor of true objective exams).

sorts. How wonderful if the actual exam can provide the student with a fresh insight. And how wonderful if that insight makes itself known on the page.

*Great!*

My pen with its burgundy ink spills across the grading grid.

### C. *The Now*

It is always now. “We cannot live without being this moment, because that’s what our life is.”<sup>61</sup> And now is the time that this student’s work and I will co-exist, spending time together, living together.

This may be the most time I will ever spend with this “student,” especially if she or he sits in the seventeenth row, where my vision is at its most precarious (my congenital myopia and the far-sightedness of forty, merging in a conspiracy of blurriness) and has not spoken in class (maybe I didn’t even call on him or her, though I try to be thorough; in a class of over a hundred this can be difficult). I may recognize this student in the hall while not really remembering if she is in this year’s class or last even though I know she is definitely not in any of my seminars. But now, it is she and I or he and I, alone together. I am armed with a pen running out of ink, and she does not even realize she is “here.”

The student’s “now,” of course is over. It occurred, with the other hundred-plus students in the room, during a three hour period in which I mostly stood at the front of the room pretending to read but watching students, often in awe of their concentration. While there has been criticism of the “unnatural” nature of the in-class exam,<sup>62</sup> (and I agree it has limitations), the in-class law school essay exam is a Zen “now” experience. The student must engage in the moment. The exam presents the student with an ultimate deadline. It’s now or never. You can’t put this aside. The only time is now!

The “now” preserved in these bluebooks exemplifies the Zen adage that “time goes from present to past,” meaning that the past is present in everyday life as well as in written texts such as poetry.<sup>63</sup> The student’s past efforts, however, are not the only ones reflected in the bluebooks. My own career as a law student is refracted back to me. I remember or imagine the bluebooks I wrote, filled with black ink from a fountain pen

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61. BECK, *supra* note 30, at 150.

62. See, e.g., KISSAM, *supra* note 3.

63. SUZUKI, BEGINNER’S MIND, *supra* note 33, at 33 (discussing how to acquire freedom of the mind).

with mistakes blotted over in liquid paper (more than twenty years ago, I guess I had the same affectations). I remember: my incisive analysis of an irrelevant issue; The manner in which I always tried to incorporate some feminist legal theory, or at least my idea of feminism since it was barely being broached in the classroom or texts. I remember the time I tried to impress one of my two women professors with not only the full case name, but with which Justices formed the majority and which dissented, and the precise date the Court rendered the decision. (Shall I confess after more than two decades that the remembered date was my birthday, Professor Green?). The peril in this recalling of my own student exams is that I will use myself as a template,<sup>64</sup> or that I will become too self-centered in a very un-Zen-like manner.<sup>65</sup> However, it seems to me that remembering my own quirks makes me more compassionate towards the various idiosyncrasies of my students.

My career as a law professor is also mirrored in these bluebooks. Perhaps more than the official student evaluations completed before the exam is administered, the students' performance is a judgment of my own work.<sup>66</sup> Was the class clear and cogent yet sophisticated? Is the exam question well-written? Are there emotional indications of backlash, anxiety, or fear reverberating in the exams?

Certainly, each student bears responsibility for his or her learning, but as the teacher I have created the context for that learning. The boundaries between student responsibility and my own can be unclear. For example, student exams that accuse a trial judge of "abusive discretion" rather than the correct legal standard of "abuse of discretion" mean that these students did not attend carefully enough to the cases in the casebook on this issue. It also means there is something in my verbal communication that creates this impression. It is commonplace for professors to find humor in our students' mis-statements. Our academic list-serves occasionally blossom with competitions of student bloopers and publishers have found a new humor niche.<sup>67</sup> In the practice of grading, it is always good to have a laugh. Yet if we merely laugh at

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64. CUNY's Director of Academic Support, David Nadvorney, has often discussed this problem in teaching symposia with faculty.

65. As Kapleau notes, "Zen emphasizes transcending the ego," although this can be especially difficult for speakers of English given that our language itself requires incessant use of the personal pronoun. KAPLEAU, *AWAKENING*, *supra* note 25, at 64-65.

66. Again, the risk is that "I" will become too ego-centered, yet to deny my involvement seems to me to be an escape from my responsibilities. *See id.*

67. *See, e.g.*, ANDERS HENRIKSSON, *NON CAMPUS MENTIS: WORLD HISTORY ACCORDING TO COLLEGE STUDENTS* 33 (2001) (containing such student misstatements as "The Wholey Roman Empire' amazed many when it was found in Germany").

our students' mistakes without considering how we are implicated in them, our practice of grading, and our practice of teaching, suffers.

Correcting mistakes, in my teaching and in the student's expression, is the future-orientation of the endless now of the practice of grading. Instruction to the students is the purpose of the feedback sheets I painstakingly prepare and then meticulously complete with my burgundy or purple handwriting. There are evaluations that are expressed in numerical point allocations, specific comments, and at the end a general comment which relates to the overall exam performance and is intended to improve performance on future exams.

After years of teaching, I remain surprised that every student does not take advantage of the opportunity to review such feedback. Like a parent to a child, I cannot fathom that they do not realize their tremendous good fortune. When I was a law student, walking to school through the terrible Florida winters, "feedback" was not a word in the professorial vocabulary. Should a student dare to request a viewing of a "graded" exam, he (and at the time the vast majority of students were male) would see nothing other than what he had submitted, except for a lonely letter grade on the front. So, my hours and hours (that entire summer) spent on feedback can seem as if they are wasted hours when I learn that a substantial number of students did not retrieve their exams. Satisfied with their grades, or perhaps simply wanting to put the unpleasant experience of constitutional law or another course behind them, my efforts seem squandered.

In the now, however, engaged in the practice of grading, I do not know which exams will be reviewed and which will not. Although the proportion of students who do not claim their exams is much lower, even if I knew that 99 percent of students would never bother to look at my work, I must grade for the 1 percent who would. Or perhaps more honestly, I must grade for myself. As a practice, grading exists in the "doing, moment after moment."<sup>68</sup>

#### *D. Sangha*

Taken from the Sanskrit word for the Buddhist monk community, the Zen concept of sangha encompasses one's fellow practitioners and perhaps the wider world.<sup>69</sup> It comprises the community in which love

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68. CHADWICK, CROOKED CUCUMBER, *supra* note 33, at 371.

69. KAPLEAU, AWAKENING, *supra* note 25, at 88 ("The Sangha in one sense means not to put down the subtle interrelations, the vast web of connections that hold us all. It can mean, then, to uphold the environment itself, the fundamental, informal Sangha of plants, animals, watersheds, and the great wide earth").

and compassion are paramount.<sup>70</sup> For professors engaged in the practice of grading, our sangha consists of all our colleagues who are (often simultaneously) engaged in a similar practice. Yet our sangha also consists of our students. For without the contribution of our students, this practice of grading exams is impossible.

Moreover, sanghas often form around a teacher and the relationship between teacher and student is vital to Zen. “Teaching” is theorized as one of the three pillars of Zen,<sup>71</sup> in which the relationship between the teacher and student is emphasized rather than on texts and doctrines.<sup>72</sup> While this relationship may be “personal and deep”<sup>73</sup> it also requires the teacher to maintain a distance.<sup>74</sup>

While many aspects of professorial life implicate the Zen notions of sangha and teaching, the practice of grading throws them into sharp relief. “Love” may seem like a strange emotion to consider in the context of bluebooks, but each exam can present itself as a love letter of sorts. It’s a personal communication from the student to me (only in rare cases will someone else read this exam) which the writer has a chance to display amazing revelations, if not of heart and soul, then of mind. This is the student’s opportunity to express utmost attention, such as some fragment of a class discussion that reverberates on the page with lyrical intensity.

Of course, like other romantic expressions, the exam has its conventions. Most importantly, the writer must be subtle. The notes at the end of the exam about how much the student: enjoyed the class; thinks I am the greatest professor who ever lived; hopes I have a fantastic vacation; or even pleads for a good grade—these have a rather sordid taint to me. This is especially pronounced because I provided the students with a feedback sheet as the last page of the printed exam question (which they may submit separate from their exam).<sup>75</sup> So, such

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70. *Id.* at 88-90 (discussing various aspects of Sangha).

71. KAPLEAU, THREE PILLARS, *supra* note 25 (defining the “three pillars” of Zen as “Teaching, Practice, Enlightenment”).

72. KAPLEAU, AWAKENING, *supra* note 25, at 155-60 (discussing the relationship with dokasum).

73. *Id.* at 158. Kapleau attributes such a relationship between a Zen master and a disciple to “karmic affinity.” *Id.*

74. As Shunryu Suzuki observed, this distance is necessary so that the student has some freedom and the teacher can discover how to help the student. CHADWICK, CROOKED CUCUMBER, *supra* note 33, at 292.

75. The sheet poses an open-ended question about whether the exam was what they expected and whether there were any exam “issues” that they would like to address. Students usually take the time to write a few sentences, often saying something general about the class (“fun class!” or “this course should be more/less credits”) as well as their experience of the exam (“I needed more time!” or “I hope you don’t take off points for handwriting!”) or something very specific about a particular

comments on their exams feel manipulative, even if they are not.

The writer must also be secure. Students often seem compelled to advise me that they disagree with particular constitutional cases, especially *Bowers v. Hardwick*.<sup>76</sup> I have the luxury of assuming that they do not support the opinion,<sup>77</sup> yet I am always startled to read such bald assertions in their exams. Is it a ploy to seek approval from their (lesbian) professor? Or is it a genuine statement? I corral my sentiments and suspicions into an “objective” assessment of their theoretical perspective on the issue. Is it a mere opinion? A clever comment? An incisive critique? And how do I categorize a comment that Justice Powell, the Justice who changed his opinion in the case and then after leaving the bench announced he’d made a mistake,<sup>78</sup> “is a major creep”? I am most pleased, of course, by the nuanced perspective on larger questions, such as: the role of the Court; the future of substantive due process; or the implications for the conundrum of equality. To fall in love with an exam means more than agreeing; it requires being dazzled.

Furthermore, it is the substance of an exam that must shine. There are non-substantive aspects to a written exam that may have a subconscious effect, as some argue,<sup>79</sup> but the relationships may be more complicated than have been suggested. Most handwritten exams start out neatly and then deteriorate, but I find that a paragraph or two of neatness provides any necessary clues to decipher words that become illegible. Handwriting may also contain clues to the student’s identity. Some propose that gender, race, ethnicity, and education are all revealed in handwriting.<sup>80</sup> Yet I don’t believe any such assumptions are warranted, having sat in conferences with a sufficient number of

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aspect of the fact pattern (“I kept looking for a sexuality issue, but couldn’t find one—I hope there wasn’t one!”) Students will occasionally raise other issues about their colleagues (“I don’t think you should allow people to crack their gum!”) or the atmosphere of the room (“Can’t you turn off—or on—the air-conditioning?”). These sheets are kept separately from the exams and I read them as soon as the exam administration is completed, first to make sure that there are no immediate issues that should be addressed (such as an allegation of academic dishonesty), but most importantly to provide me with the students’ sense of the exam experience while they were engaged in it.

76. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (declaring laws prohibiting homosexual sodomy constitutional).

77. See Robson, *supra* note 15, at 252-53 (discussing CUNY students in the context of controversial constitutional cases).

78. For a textured discussion of Justice Powell’s well-known post-Court pronouncements that he “probably made a mistake” in *Bowers v. Hardwick*, in light of Powell’s concurring opinion, see Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 416-20 (2001).

79. See, e.g., Crane, *supra* note 4, at 786-88 (arguing that grading essay exams on an objective scale increases fairness).

80. See *id.* at 787 (discussing gender).

students who I would never match with their handwriting.<sup>81</sup> Assumptions I may have made linking certain styles of grammar, syntax, and spelling with certain identities have been similarly dispelled in student conferences. This may be attributable to the fact that I teach at one of the most diverse law school environments in the United States,<sup>82</sup> but it is also related to the practice of anonymous grading.

Like most law schools, mine has an anonymous grading policy which means that students use confidential exam numbers to identify their work. This policy applies to large classrooms using exams rather than other evaluative devices and remains rather inviolate despite student worries to the contrary. As one legal educator has accurately phrased it, it is a “wild assumption” that professors would want to know the identity of their exam-taking students.<sup>83</sup>

Like most professors in seminars, I work with students individually through various drafts towards a final paper for independent research. I become implicated in the final draft as a piece of writing from working closely with students. I also make judgments about the students abilities, efforts, and “personality,” which influence my reading of the final product. Contrary to what students may believe about professors, I too often find myself being most generous to students I like the least. Worried about being influenced by my subjective dislike, I become preoccupied with being fair and can wind up resolving every doubt, even a few unreasonable ones, in favor of the student. Once conscious of this bias, the other papers are re-assessed to insure that these students didn’t suffer because I didn’t find them obnoxious.

Nevertheless, working closely with a student on his or her own ideas and midwifing them into a “publishable paper” is a tremendous gift. It is probably the closest experience most of us have to becoming Zen masters who witness their disciples’ enlightenment. Yet the more mundane practice of the grading of hundreds of anonymous bluebooks seems more peculiarly in keeping with the spirit of Zen. To struggle to relate simply to the exam as a thing-as-it-is, without any attachments or pre-conceived ideas about its author, is our contribution to our community, our sangha.

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81. In our computerized age, handwriting may become less and less identified with particular identities, even as it becomes less practiced and therefore sloppier.

82. See U.S. NEWS AND WORLD REPORT, BEST GRADUATE SCHOOLS 64 (2003) (ranking CUNY as having the most racially and ethnically diverse student body among all ABA accredited law schools).

83. Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH U. L. Q. 171, 172-73 (1998) (discussing the biggest myths associated with law school).

*E. On Desire And Suffering*

Zen practice is prescribed as a deliverance from desire and suffering. To be attached to “some fancy ideas or some beautiful things,”<sup>84</sup> or to suffer “discontent and disappointment” about negative experiences,<sup>85</sup> is to be unenlightened. Yet even the Zen practice of zazen provides occasions for attachment to “beauty” and causes for disappointment,<sup>86</sup> so I suppose I should not be surprised that the practice of grading contains such pitfalls.

While grading, there is the incessant desire for my own accomplishment. No matter how much I strive to be “in the moment,” part of my mind is always tallying the number of exams graded. In true Buddhist fashion, the “beauty” of finishing one pile of exams is quickly extinguished by the realization that there are more exams to grade. And even at the end of grading, there is more “grading”: calculating the grades, posting them, being available for student conferences.

Most of my desires when grading come in small waves. As I read an individual exam, I often engage with it in a desiring fashion: “Come on, state the damn rule!” “Maybe the end of the exam will contain some theoretical perspective.” “Is there a page missing somewhere?”

My most craven desire, however, is for the beautiful, perfect exam.

The exam that makes me leap out of my chair for joy. The exam that makes me want to cry. The exam that I don’t think I could have written any better myself, and in fact, may be better than what I would have written, for it contains some insights and some analysis that did not occur to me even as I carefully constructed the hypothetical. That fantasy, illusory exam.

And in the thousands of exams I have read, I have read almost a handful of these. Four. And I know when I approach my next set of exams, I will be hoping for number five.

If I find it, I will be insufferable. I’ll read it with increasing astonishment and respect. And then I will reread it to make sure I was not overwhelmed by some superficial flash of brilliance. I’ll go through several grading grids assessing it. I will not grade any other exams today, because to try to do so will result in gross disparities—even above-average exams will pale in comparison and I will grade them too harshly. I will resist the urge to telephone people I know, including my

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84. SUZUKI, *BEGINNER’S MIND*, *supra* note 33, at 65 (discussing creation).

85. KAPLEAU, *AWAKENING*, *supra* note 25, at 103 (discussing pain and practice).

86. *See* SUZUKI, *BEGINNER’S MIND*, *supra* note 33, at 73-74 (discussing the problems with finding either joy or discouragement in zazen practice).

colleagues, to tell them about this miracle. Or to read aloud to them the section analyzing the future of Congressional power under the Spending Clause in light of the Court's recent Commerce Clause jurisprudence. Instead of alienating my friends, I will cease work for the day and celebrate. A nice dinner or a glass or two of wine.

The next morning, I long to re-read the exam, but I know I cannot if I want to spend a productive and fair day grading. The beauty (there is no other word) of the exam will continue to haunt me. Perhaps the experience will gradually subside and I will begin to doubt my own perceptions. It couldn't have been *that* good, could it? I will promise myself that I can read the exam again, but only after I am finished grading and calculating the final scores.

And when I re-read the exam? I have never been disappointed. I appreciate it again. I marvel. All thoughts of equanimity are banished.

Perhaps here is where my practice of grading exams is most un-Zen. I'd like to preserve this exam for posterity. And worse, I am not convinced that my attachment, my longing, my desire for these rare exams is destructive.

If this perfect exam is the exhilarating high that cannot be maintained and is seldom duplicated, then it might be expected that the failing exam is the disappointing low that causes me suffering. Inadequate exams, however, cause me less pain than I would have supposed when I first started grading. Unless there is some large portion of the exams that I judge inadequate—which in turn I assume reflects on me—then I do approach an inadequate exam with equanimity. I may be a bit frustrated by the “almost” quality of some portions or the exasperating forays into the province of another professor's subject, but I do not feel pained. Moreover, as a former managing attorney in a legal services office now teaching at a law school devoted to public interest law, I feel obligated to insure that the future clients of all of our graduates have attorneys who can perform adequate legal analysis.<sup>87</sup> Certainly, there is the “pain” of grade appeals and the “pain” of sitting in a student conference trying to be honest and tactful and constructive, but even these events are not truly disturbing because they seem to me to

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87. For example, the AMERICAN BAR ASSOCIATION SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), known as the MacCrate Report after Robert MacCrate, Chair of the Task Force, found that law schools were deficient in the skills/values training required for J.D. holders to become competent attorneys. For a discussion of the MacCrate report in the context of legal education, see John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993) (evaluating the McCrate Report).

be part of the pedagogical process. Perhaps delusionally, I always expect that both the student and I will learn something from these interactions and that the student's work will improve, as will mine.

I do not have the same delusions with regard to academic dishonesty.

If there is suffering in the realm of the practice of grading, it is not in being overburdened with exams or having a spate of inadequate ones; it is the discovery of a lack of integrity. It starts as a glimmer, a suspicion, a nauseated feeling as the words on the page turn ugly and evolves into an internal argument followed by an investigative approach. Forget Zen. I have become a detective. I am ensconced in the philosophy of science, in epistemology, and in logic and evidence and questions of verifiability versus falsifiability as well as burdens of proof. The specter of academic dishonesty haunts the entire evaluative process, and so observable in the administration of in-class exams with proctors. Acting as my own proctor, I believe cheating is impossible, but there are bathroom breaks and occasionally rumors. One year, in a first semester class, there was the same opening line in a large portion of the exams. Could all these students have copied from each other? Luckily, I soon remembered the practice question we had analyzed as a class exercise that was complete with a model answer boasting that same opening line. Yes, they should have known better, but I forgave my first semester students easily and gratefully.

My experiences with academic dishonesty, which are as few and far between as the rare perfect exams, have caused a deeper imprint. I take little, if any, credit for the perfect exam, but berate myself for the dishonest incident. I also feel, more personally implicated, betrayed, irate, and somewhat aghast. Did the student think I was so naïve and stupid that this transgression would be undiscovered? Ah, I have discovered that strange intermingling of pride and anger. I have reached the "gateless gate" of Zen and can go no further.<sup>88</sup>

The threat of plagiarism is most vivid when the student is submitting an independent research project. Despite the outlines and the drafts and all the close supervision, along with a detailed explanation of what plagiarism is and is not, the possibility of plagiarism exists in every set of research papers. Computerized databases such as Lexis and Westlaw make plagiarism easier, but also make proving plagiarism

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88. As Charlotte Joko Beck writes, "Now the child of pride is anger . . . to understand how to practice with anger is to understand how to approach the 'gateless gate.'" BECK, *supra* note 30, at 49. In Zen tradition, the gateless gate is that which practitioners must pass through before enlightenment.

easier. I no longer have to spend hours in the library sifting through law journals. I also need not resort to what one colleague at another school tried, by sending the suspicious paper to someone she thought might recognize it “right off.” Indeed, I did recognize one of my own articles and wondered why my colleague did not. These days, I can spend a few hours on-line plugging in queries of particular phrases that occur in the paper in order to retrieve that one law review article, or perhaps two, that has been cannibalized extensively without citation. Or, I find none. For once I suspect a single paper in a class, there is an insidious cloud permeating my practice of grading. I rationalize that it is “only fair” to subject every paper to plagiarism testing, but really, my heart feels broken by having my suspicions vindicated in that single instance.

Like other law professors, I make choices about how to resolve the rare academic dishonesty incident occurring in a law school, which, like other law schools, has an honor code. I aspire to: justice; equanimity; separating my own ego-involvement; and acceptance. I admit I have not grasped the Zen of dealing with cheating. Worse than a thousand illegible Blue Books that ruin my posture, the discovery of academic dishonesty seems to me to be the experience most akin to suffering involved in the practice of grading. Next semester, I am teaching another seminar in which students will be writing independent research papers. “How not to be lost in our problems is our practice.”<sup>89</sup>

#### IV. CONCLUSION

“Doing Zen practice is never as simple as talking about it.”<sup>90</sup>  
Grading is the same.

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89. CHADWICK, CROOKED CUCUMBER, *supra* note 33, at 367.

90. BECK, *supra* note 30, at 31.