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Teaching Sensitivity To Facts

Abraham P. Ordover*

The last two decades have witnessed the widespread growth of both clinical and simulation methods in legal education. To some extent, the sophisticated use of these teaching methods has met the criticism that law schools fail to prepare their students for real world practice.¹ Yet, the battle goes on. It is a battle between the practicing bar and the law teachers, and among law professors as well. It began the moment law schools replaced the clerking system of preparing fledgling lawyers.

At its most basic, the fight concerns the issue of whether the schools inculcate a sensitivity to facts. This issue includes a host of matters including fact gathering, the assimilation and marshaling of facts, an understanding of the concept of relevance in dealing with factual matters, and the difficult decisions lawyers must make in trying to determine the probability of what occurred.

Some argue that traditional case method instructors see value only in teaching the mental manipulation of abstract concepts in a context of known or fixed facts emanating from an appellate opinion. Detractors assert that traditional methods teach students to believe that principles of law are not fact sensitive.² Of course, without a context of facts there are no principles of law.³ The

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¹ Jerome Frank's criticism of the traditional law school curriculum is now well-known. He stated as early as 1947 that "[t]he sole way for these law schools to get back on the main track is unequivocally to repudiate Langdell's morbid repudiation of actual legal practice, to bring the students into intimate contact with courts and lawyers." Frank, *A Plea For Lawyer Schools*, 56 YALE L.J. 1303, 1313 (1947). In 1953 Robert Marx similarly stated: "Unfortunately the majority of our law schools have done little to give a realistic education to the young lawyer in this all important field of getting the facts, marshalling the evidence, and trying the case to a court or jury." Marx, *Shall Law Schools Establish A Course on "Facts"?* 5 J. LEGAL EDUC. 524, 524 (1953).

² Michael E. Tigar describes the "facts-in-the-past" of appellate opinions as "those shadowy trial facts put through a judicial Cuisinart to adorn the judges' opinion." Tigar, *Discovering Your Litigator's Voice*, 16 LITIGATION, Summer, 1990, at 1.

³ As noted by Professor Llewellyn: "We have learned that the concrete instance,

principles grow from the variety of factual difficulties men and women create.⁴ This we know as reality.⁵

How do we teach our corner of reality? First, we must know what it is.

I. WHAT DO LAWYERS REALLY DO?

If you ask any handful of students the question, what do lawyers really do, they would respond that they litigate or do corporate work, draft contracts and wills, advise on tax matters, and the like. They would be fundamentally incorrect. In a remarkable survey, lawyers responded that what they do, day in and day out, is investigate, gather, research, assimilate, and understand the relevance of facts.⁶ This holds true for responses all across the lines of expertise in the profession. And yet this fact work is, by and large, not taught in our law schools.

The survey, *The Making of a Public Profession*,⁷ was published in 1981 by Zemans and Rosenblum for the American Bar Foundation. They surveyed more than 500 Chicago-area lawyers drawn from throughout the profession. The results demonstrated that only two matters were considered essential "skills." Some 93% of the respondents reported that "fact gathering" was the most important skill of the practicing lawyer.⁸ The second most important real work skill for the lawyer was the "capacity to marshal facts and order them so that concepts can be applied."⁹ Some 91% of the lawyers voted that this attribute was important or extremely important.

the heaping up of concrete instances, the present, vital memory of multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all." K. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 12 (1960) (emphasis in original).

4 Judge Samuel S. Leibowitz, a leading criminal lawyer in New York as well as member of the criminal court bench, once advised: "Remember that a trial . . . is more of a fact suit than a law suit." *Quoted in* Q. REYNOLDS, *COURTROOM: THE STORY OF SAMUEL S. LEIBOWITZ* 409 (1950).

5 Indeed, Roget's defines "facts" and "reality" as synonymous. ROGET'S II: *THE NEW THESAURUS* 15 (both words are synonyms for "actuality"), 802 (defining "reality" as the "quality of being factual") (1988).

6 Justice Cardozo wrote: "Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 128-29 (1921).

7 F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981).

8 *Id.* at 124-25 (particularly Table 6.1.).

9 *Id.*

The lawyers said that they had not learned the art of fact gathering in law school but had to learn it from experience.¹⁰ Most agreed, however, that the law schools could teach these most necessary matters.

To be sure, we endeavor to make students sensitive to the facts by teaching them to draw distinctions among cases and doctrines. The result, some contend, is that students have at least an appreciation for facts in the context of using them in briefs and memoranda to support legal contentions. This is likely true but teaches sensitivity to facts from only one end of the spectrum. If all lawyers ever confronted were facts that the parties agreed upon, no further inquiry would be warranted. Agreed statements of fact, however, are not the norm in our industry. Indeed, lawyers in argument before the United States Supreme Court and the host of lower appellate courts find that it is urgent to argue the facts, despite the proceedings below. Justice Jackson contended that the purpose of the hearing is so "that the court may learn . . . facts. It may sound paradoxical but most contentions of law are won or lost on the facts."¹¹ As Judge Crane once said, "We want the facts—the hardest thing in the world to get."¹²

What students are not generally taught is sensitivity to the finding and gathering of information in the context which we define as the fact-finding process. Students know nothing about finding facts in the "real world sense." At the outset of the conflict, little is known about the complex of data, recollection, and human emotions that are referred to as facts during trial.

During our attempts in the courtroom to reconstruct an event or series of them that occurred outside, we have what Professor Tigar calls the imprint of traces of facts.¹³ If we look at

10 *Id.* at 134-35 (particularly Table 6.4).

11 Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951), quoted in Marx, *supra* note 1, at 526.

12 Crane, *Introduction to the First Edition*, in S. SCHWEITZER, TRIAL MANUAL FOR NEGLIGENCE ACTIONS xii (2d ed. 1941).

13 Tigar described "facts" as things never seen in litigation. Instead, Tigar stated that "[w]e see instead their remnants, tracts, evidence, fossils—their shadows on the courtroom wall. The witnesses recount . . . more or less. Things—paper, hair, bones, pictures, bullets—parade by, each attached to a testifier who alone can give them meaning." Tigar, *Habeas Corpus and the Penalty of Death* (Book Review), 90 COLUM. L. REV. 255, 256 (1990) (reviewing J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (1988)). See also Tigar, *supra* note 2. The complex impressions which go together to make the "facts" of a case do not stop with the witnesses' recollection, however. The judge and jury base their acceptance of each side's "facts" not only on the verbal ac-

the eyewitness' description of an event, we have his recollection—opinion of what he saw. There was a fact. Defendant did drive through the school zone at a speed of fifty miles per hour. Witness Two is certain that she saw him moving at a speed of about thirty miles per hour. Both witnesses testify at the trial. What is the fact? It is that blend of recollection, impression and opinion that a jury distills for a finding of fact based upon its estimate of the probability of what occurred.¹⁴

Where do we teach the probability of what occurred; the sifting of impressions, recorded data and the like?¹⁵ This is not a manipulation of facts but rather the attempt to find the probability.¹⁶ The use of data in argument (advocacy) involves an ordering of evidence to induce belief in a particular probability. Client representation in an adversary system requires this ordering process. The ordering is tested by the contrary ordering of the opponent. Each party selectively uses its understanding of the facts to create its theory of the case—that amalgam of fact, law, and

counts given by witnesses but on a collection of intangible impressions. Judge Frank describes the process well:

[W]hen the testimony [in a case] is in conflict . . . the "facts" of a lawsuit consist of the judge's belief as to what those facts are. That belief results from the impact on the judge of the words, gestures, postures, and grimaces of the witnesses. His reaction—inherently and inescapably subjective—is a composite of the way in which his personal predilections and prejudices are stimulated by the sights and sounds emanating from the witnesses.

Frank, *supra* note 1, at 1308 (quoting Frank, *A Sketch of an Influence*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 189, 235 (1947) (footnote omitted)).

14 Judge Frank goes so far as to describe "facts" as "what trial judges or juries guess—what they think the facts are." Frank, *supra* note 1, at 1308.

15 Judge Weinstein asserted that we do this in law school with classes in evidence. He said that "findings of fact and the way they may be shaped, is discussed in enough detail in both the advanced procedure and the evidence courses so that the student should know what he can do and what he cannot do and the advantages of adroit handling of these findings." Weinstein, *The Teaching of Fact Skills in Courses Presently in the Curriculum*, 7 J. LEGAL EDUC. 463, 469 (1955). Empirical data found by Zemans and Rosenblum indicates that Judge Weinstein's view may not be shared by practicing lawyers. See F. ZEMANS & V. ROSENBLUM, *supra* note 7, at 135-39 and Table 6.5. Moreover, most evidence classes are based on appellate opinions or canned facts in "problems."

16 Judge Frank described the lawyer's role in advising a client as one of "attempting to predict, to guess, what decision will be rendered in a specific bit of litigation." Frank, *supra* note 1, at 1310. Professor Hegland is preoccupied with his concept of the "manipulation" of facts. He stated: "The exercise [of simulated litigation] becomes a game in which the role of the lawyer is to manipulate the few given facts into any pattern or theory which will prevail." Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69, 72 (1982). To reach that conclusion, he indulges a variety of assumptions, none of which is compelled if the instructor's sense of ethics is of a higher order than Professor Hegland's assumptions.

inference which is the strongest argument that can be mustered on behalf of the client.¹⁷

Our teaching is largely based on untested assumptions of facts in appellate opinions plus hypotheticals. In a real sense, we teach students to think of facts backwards. We must teach the process of investigation, assimilation and classification of factual data together with logic (relevance) which inculcates an appreciation for the relationships among the data found. Students know how to read the record if someone has created it for them. Now they need to be taught how to make it.

Professor Amsterdam has said:

When I was in law school, I spent virtually all of my time learning analytic techniques for predicting or arguing what was the legal result, or what should be the legal result, *in a given fact situation*. Since I got out of law school, I have spent virtually all of my time dealing with situations in which the facts were not given, in which there were options as to what fact situation should be created—situations in which I had a choice whether to present evidence on certain aspects of the facts in a litigation or to leave the record silent on those aspects¹⁸

II. THE TEACHING OF FACT SENSITIVITY

The problem with traditional law school approaches is seen on the first day. Every law school has some sort of course in writing and research. In most of these first-semester programs the students, after rudimentary instruction, are asked to write a closed-end memorandum. This document is based upon cases and a slim set of facts, virtually all of which are given. The entire universe of options is provided in both law and fact. Later, the course moves to memoranda of law of the open-ended variety. That is, the students have to find the applicable cases and statutory material to support the argument they will make. The facts,

17 Neither the selection process nor the argument requires an unethical manipulation of the data or law.

18 Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 614 (1984) (emphasis in original). Professor Amsterdam listed three kinds of reasoning which, he believes, should be taught in law school, although at present are not: 1) ends-means thinking; 2) hypothesis formulation and testing in information acquisition; and 3) decision making in situations where options involve differing and often uncertain degrees of risks and promises of different sorts. *Id.* at 614-15.

however, remain as given. In this universe of canned facts, the student is never faced with making decisions (options) as to what the relevant facts are which support the contentions he or she will make.¹⁹ The same attitude toward facts is endemic in the larger law school curriculum.

Suppose that in addition to the standard research course, the law schools also required a basic course in "facts."²⁰ That course would have no closed-end memo. From the outset, the student would be required to sort out a complex of factual data from a variety of sources and, through the application of concepts of relevance, submit a narrative of selected facts, the purpose of which would be to persuade the reader as to the probability of what occurred. The selection process itself would be the subject of intense critique. It is here in the selection process that students may manifest a lack of logic or a tendency to "create" facts or manipulate them beyond ethical or common sense limits. Catching these problems at the very outset of the law school experience will do a great deal to instill an understanding of the limits of proper advocacy.

This course would be only the first experience with finding the "facts" where they are not given. It could be accomplished with the use of actual clinical cases, as some schools have done, or through simulation. In the simulation model, several complex

19 Professor Steven Lubet stated: "The lesson that we teach with canned materials is one of stasis, and except within the narrowest confines of persuasion it must be entirely wrong." Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 137 (1987). This is a long-standing criticism of law schools. See NEW JERSEY SUPREME COURT'S COMM. ON TRAINING FOR THE PRACTICE OF LAW, REPORT OF THE N. J. SUPREME COURT'S COMMITTEE ON TRAINING FOR THE PRACTICE OF LAW (1957). While finding that the average law school graduate had "developed the quality of fact sensitivity to a fairly high degree," *id.* at 6, the report conceded that most factual problems presented in law school have been "predigested." *Id.* at 7. The study concluded that, if possible, greater training with regard to "digging out" and "dealing with facts which are not known in advance to exist" would be of great help to students. *Id.* at 8.

20 Professor Marx stated that, based on his 43 years of experience in trial work, he agreed "emphatically" as to "the necessity for adding a course on 'Facts' to the curriculum of our law schools. By a course of Facts, I do not mean a course on evidence A course on acts deals with the truth regardless of the rules on evidence." Marx, *supra* note 1, at 526. Professor William Twining, slightly tongue-in-check, has gone so far as to suggest the creation of a "B.F." degree, "Bachelor of Facts." Twining, *Taking Facts Seriously*, 34 J. LEGAL EDUC. 22, 23 (1984). In support of introducing such a class at the first-year level, William Van Valkenburg noted: "Any change in curriculum or methodology that is intended to have real impact must be directed to the first year curriculum." Van Valkenburg, *Law Teachers, Law Students, and Litigation*, 34 J. LEGAL EDUC. 584, 609 (1984). See also Tomain & Solimine, *Skills Skepticism in the Post Clinic World*, 40 J. LEGAL EDUC. 307, 310 (1990).

fact situations could be created. Students would be given nothing but a client. From the client interview, the student would grope his or her way along to learning who the other witnesses might be. Gradually, the students would uncover the existence of a wide variety of documents. These would have to be found, read, distilled and understood. They may consist of witness' prior statements, official records, diaries, newspapers, and so forth. The material will contain inconsistent reports of details and some incorrect data. Motives to falsify data may be found. The student would have to decide not only which facts are relevant but also which renditions are circumstantially probable or improbable.

After sifting all of the material, perhaps learning the rudiments of client interview techniques and discovery, "counsel" would have to write a comprehensive memorandum of fact and, yes, of law, to the senior partner. This document would organize all materials uncovered into a theory of the case from which further proceedings might go forward. In the usual law school courses, the theory of the case is either not taught at all or is emphasized only from a legal standpoint. The aim of this course is to create the theory of the case from the development of the facts, the law and the decisions made by counsel as to how to use that amalgam of information.

Courses of this sort are always labor intensive. Since several fact complexes would be created, the student in the first simulation becomes a client or witness in the second simulation. The faculty members serve as senior partners and as administrators to keep things moving. Since the aim of the course is to teach sensitivity to fact gathering as a process of decision making, the real intricacies of client interviewing and formal discovery are better left to courses or portions of courses specifically devoted to those subjects.

This course, or one like it, should be required in the early weeks of every law school curriculum. It can be combined with the existing research program or be offered separately. The use of simulation for this course permits the faculty to control the complex of facts and the legal issues which will flow. This course can form the basis of all the advocacy courses offered later in the curriculum.

III. THE ADVOCACY CURRICULUM

The emphasis of the entire advocacy curriculum should be on

fact sensitivity and complexity, both legal and factual. For years, some law professors have considered the "skills" courses as the intellectual doormat of the curriculum. The word "skills" leaves their tongues as a word of derision. To the extent that advocacy courses are offered as little more than exercises in where to stand or how to do it courses with little intellectual content, we have earned that derision. However, things changed in this area of law teaching a long time ago.²¹ Courses in Pretrial and Advanced Litigation, for example, can be taught with such a high degree of complexity as to be among the most difficult in the curriculum.

If necessary, we must make changes in every existing advocacy course as well as add new ones. Starting early in the curriculum, the first-year moot court exercise found in most schools should be made a more rigorous experience. It is relatively simple to add a degree of difficulty to the legal problems. More important we must do away with the canned facts. Once again, as in the research course, the students become comfortable with the erroneous idea that the plaintiff and defendant (or petitioner and respondent, or appellant and appellee) see the facts the same way. Under these circumstances, the statement of facts in the brief is an unworthy exercise. Students cannot learn how to weave the facts throughout the legal arguments in the brief and oral argument unless they view the facts as the building blocks of their case. Moot court teaches precisely the opposite message. It is a dangerously wrongheaded message. Authors of moot court problems will have to become more adept at creating problems with a variety of debatable facts for each side to analyze and use.

The same kind of difficulty can be seen in many basic trial advocacy courses. The quality of the trial record makes all the difference in what will be taught to the students.²² Some of the problems in use today, perhaps most of them, raise too few factual issues. Often, one reads an entire trial file to find only one disagreement of fact in the file. Small wonder that students begin to

21 See generally Ordovery, *An Experiment in Classroom Litigation*, 26 J. LEGAL EDUC. 98 (1973).

22 The importance of a real-life trial record has been emphasized by members of all segments of the legal community. Judge Patricia Wald, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, has stated: "I think it is downright wrong for a student to graduate from law school without knowing how to make a record Unfortunate precedent is often the by-product of an appeal on a deficient record." Wald, *Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 39-40, 40-41 (1986).

accept the absurd notion that all the witnesses are telling the truth. No healthy skepticism is engendered. The only attention that they pay to impeachment is the gross area of prior convictions. Occasionally, impeachment with a prior inconsistent statement will be seen, usually where the witness flubs his lines.

Obviously, this is curable with attention to the objectives to be achieved in the course. Whether the course is NITA-style or one that runs through a semester, the crafting of the case files into materials with manifold factual and impeachment problems built in will result in a more interesting and more intellectually challenging course. The goals of forcing students to make decisions on what evidence they will rely and what precisely will be the theory of the case can be achieved. The additional goals of inculcating a strong sense of client representation (*i.e.*, that we are a service profession) and developing an ethical dedication in the students can better be achieved where students must make difficult decisions themselves, as part of their course training as opposed to a course where the materials make all the decisions for them.²³

IV. BEYOND THE BASIC COURSES

Just what mix of courses is best for any school is the proper decision of its faculty. It is not the purpose of this paper to discuss all the varieties of clinics, clinical law office and clinical placements which schools offer. In all of these there are doubtless the twin goals of education and public service, both of which are praiseworthy. The question for all advocacy teachers in all environments is whether the clinics or simulation programs effectively impart the goals of sensitivity to facts, the fact-gathering process, and the ability to extract relevant facts to support the legal theory counsel has chosen.

23 The importance of allowing students to learn to make decisions is stressed by many scholars. Judge Frank has stated: "The work of the lawyer revolves about specific decisions in definite pieces of litigation." Frank, *Why Not A Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 910 (1933). Judge Wald asserted: "The greatest lawyer trait of all—judgment, the art of the possible—can best be learned by confronting the infinite frustrations and dilemmas that come from having to make decisions, not just reviewing the decisions of others." Wald, *supra* note 22, at 42-43. Professor LaFrance deems the entire "lawyering process" as "essentially a process of choices, an orientation that will not change by the year 2010. Choice is of the essence in common-law development and in constitutional assurance of liberty." LaFrance, *Clinical Education and the Year 2010*, 37 J. LEGAL EDUC. 352, 363 (1987).

Pretrial Litigation is one example of a successful simulation course.²⁴ This course, at least when properly taught, has no canned problem to be given to the students. Instead, the student is given a client and told to go to work. There is formal instruction in client interviewing, pleadings, motion practice, discovery, accelerated relief, brief writing, and oral advocacy. These are separated from the portion of the course where the students simply start with the client and work as lawyers work. Under the supervision of a senior partner (instructor), the student makes all decisions, drafts and serves all papers, takes all depositions, and argues all motions. The instructor rigorously critiques the student on every aspect of his work. The legal issues are difficult and usually beyond the coverage of any particular course. Thus, the student also has to teach himself new aspects of substance and procedure to endure. The learning that necessarily goes on is extraordinary.

The Advanced Litigation course is one that should build upon the Pretrial course. Instead of ending with a hearing on an injunction, or other accelerated relief, the course builds through a maze of factual complexity in discovery to a rule 16 order and conference, and ultimately to trial.

As in all advocacy courses, these advanced courses depend upon the quality of the problems and the instruction. These two classes are not the only possibilities for simulation. Other simulations which are and will increasingly be found in the curriculum include Negotiations, Alternate Dispute Resolution, a trial ethics simulation, Intermediate and Advanced Criminal Litigation, a damages simulation, Medical Malpractice, and workshops in specialized areas.

If the emphasis is to shift to lawyering, however, some reorganization of the third-year might be in order. Now, many students view the third year of law school as a waste of time. It is not unless the student has decided to sitting in large, essentially

24 Professor Edward Cavanagh cites the development of "fact-gather skills" as one of the advantages to students being taught pretrial discovery in law school. He stated: "In isolation, data may appear meaningless, but when they are properly integrated, the facts tell a compelling story." Cavanagh, *Pretrial Discovery in the Law School Curriculum: An Analysis and a Suggested Approach*, 38 J. LEGAL EDUC. 401, 404 (1988). Professor Edward Imwinkelried praises litigation courses in general for their ability to develop students' professional judgment. See Imwinkelried, *The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme*, 39 VAND. L. REV. 59 (1986).

repetitive, and boring classes. The alternative of a clinical or simulation experience is obvious.²⁵ The whole third year of law school would be viewed differently if a required lawyering simulation was added to the required writing seminar found in most schools. Simulations in every aspect of practice can be offered from Securities Regulation to Taxation. The key to an effective third-year experience is to persuade our colleagues to create new materials in their own disciplines which will provide a capstone of lawyering experience to their substantive course area. Thus, students of criminal law not enrolled in a major clinical experience, or in addition to it, would take a simulation in Advanced Criminal Litigation. The course could proceed from the intake interview, much like the Pretrial model. It would likely involve nasty search and seizure or confession issues along with evidentiary problems of some size. The subject matter might involve RICO and forfeiture matters, and a variety of dilemmas.

Any area of the law can be used. A simulation course in real estate sales can proceed from the planning aspects through the zoning board difficulties to the host of negotiating and drafting problems associated with a real estate transaction.

These courses do exist. They can be found in bits and pieces at one law school or another. Unfortunately, they are not coordinated. This lack of coordination arises because we have not yet recognized the fundamental change in legal education which these courses will bring. The endless prattling debates over the case method²⁶ will disappear when law teachers see the remarkable progress that their students can achieve in a difficult and complex simulation. The focus of legal education will gradually shift from producing a few capable clerks to producing an avalanche of capable, thinking lawyers. They will be every bit as well educated as past generations of law students; indeed, they will be better educated. Moreover, they will be excited and interested in what they are doing in law school.

25 Judge Frank was aware of this problem long ago: "[I]n the law schools, much of three years is squandered, by bored students, in applying that technique [of analyzing upper-court decisions] over and over again—and never with reference to a live client or a real law suit" Frank, *supra* note 1, at 1318.

26 The case method will remain an invaluable tool for law teachers. The absurd idea that it is the *only* effective teaching tool is the notion that must be dispelled.

