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Turning Practice into Progress: Better Lawyering Through Experimentation

*Michael J. Saks*

This Article argues that trial practitioners and programs that teach trial practice suffer from reliance on only two pillars of wisdom: intuition and tradition. It proposes the addition of a third: empirical verification. Developing a program of empirical verification would constitute a radical alteration of the way lawyers think about the process of acquiring knowledge about trial practice and would rapidly accelerate the knowledge that is acquired. Old, ineffective techniques could be revealed and discarded; new ideas would be tested and then adopted or modified or rejected more rapidly and confidently.

This paper discusses a plan for marrying the art of trial advocacy with a methodology for systematically testing ideas about advocacy. I suggest a way that National Institute of Trial Advocacy (NITA) courses, with the investment of modest additional effort, could become laboratories for generating new knowledge about effective advocacy.

I. THE EPistemology of Trial Practice

Lawyers tend to believe in authority and argument. Unfortunately, what may work well for the development of doctrine cannot transfer successfully to the practice of law. One cannot discover the most effective ways to structure a case for presentation, to elicit testimony from a witness, or to argue persuasively to a jury, by relying on what lawyers have always done, by deferring to the assertions of leading practitioners, or by sitting around and argu-

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1 Systematic experience might be another phrase for this concept, with emphasis on the systematic.
ing about what ought to work—or even by taking a NITA course. Those approaches will teach one only what some people believe is effective, and that begs the question. How do those folks know? Long experience and diligent practice cannot insure effectiveness. To have done something only passably well for many years is not a royal road to knowledge. Indeed, unanimous consensus that a bad technique is a good one will merely result in neutralizing the harmful effects of the bad technique so that we cannot discover that it works less well than an untried alternative. It probably is not far afield to assume that about a third of the trial tactics lawyers commonly use are effective, a third are merely wasted effort, and a third are counter-productive—and that we do not yet know which is which, even though some of us may think we do.²

What will persuade is an empirical question, not a legal or philosophical one. It is a matter of psychology, not jurisprudence. Effective answers about “what works” will come not from reflection or intuition but from empirical inquiries: from concrete experience, from experimental tests of alternative techniques, and perhaps from borrowing findings about phenomena of persuasion from disciplines that study persuasion empirically.³

In criticizing legal education nearly a decade ago, Derek Bok wrote that “[e]ven the most rudimentary facts about the legal system are unknown or misunderstood.”⁴ A major part of the problem is that the legal profession has no systematic methodology for producing knowledge about its task or about how well it is accomplishing that task.

How do lawyers come to believe that certain techniques are successful and others are not? How does the acquisition of practice knowledge among lawyers compare with the acquisition of knowledge in comparable fields? How do lawyers come to know—or think they know—what works and what does not in the practice of law? The two basic sources are advice from others and

² I am assuming that the intuition of lawyers is on an approximate par with that of surgeons. When the favored procedures of surgery have been put to empirical tests, it has been found that about one third are effective, one third are neither helpful nor harmful but merely wasteful, and one third do more harm than good. See generally Barnes, Discarded Operations: Surgical Innovation by Trial and Error, in COSTS, RISKS AND BENEFITS OF SURGERY 109 (J. Bunker, B. Barnes & F. Mosteller eds. 1977) [hereinafter COSTS AND RISKS] and Gilbert, McPeek & Mosteller, Progress in Surgery and Anesthesia: Benefits and Risks of Innovative Therapy, in COSTS AND RISKS, supra, 124, 127-29.

³ See infra notes 23-24.

personal experience based on (forgive the expression) trial and error. If we ask how those from whom the advice is received know, we realize that the first of those categories is nothing more than the second one in disguise. Trial and error is not without value. But it progresses at a glacial pace and sometimes can be deceptive.\(^5\)

Imagine, for example, that surgeons relied on the same methodology as trial practitioners to learn their art. Suppose the question were whether radical mastectomy is the best treatment for breast cancer. The student would be told that this was the accepted way of treating the problem, that the profession has been using it for over a century, that many patients who received the treatment obviously survived, and that many of the most famous and wealthiest practitioners swear by the technique. If controversy arises, they might also be informed that “it could be argued” that the technique works better than any others that could be developed.\(^6\)

What is missing from this picture? For traditional lawyers, not much. For empirical disciplines generally, what is missing is the essence of the creation of knowledge: deliberate, systematic observation—especially experimentation.

Does it follow that because many women survive the disease that the treatment “works”?\(^8\) Perhaps they would have survived without it. Perhaps they survived in spite of it. Perhaps with an alternative treatment more would have survived or they would have survived longer. Or perhaps an alternative would have produced no better outcomes, but would have done so at lower cost or less pain or disfigurement. The only way to answer these questions is through comparison of one technique against its alternatives. In short, by experimentation.\(^9\)

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5 See infra notes 8-9 and accompanying text.
6 Someone suggested recently that when it comes to dealing with questions about the real world, the principal lesson of legal education is that when you do not know the answer to a problem, instead of introducing your guess with “I think . . . ,” you say “It could be argued that . . . .” Discussion with Daniel Rosen, Associate Professor of Law, Loyola University School of Law, New Orleans (1990) (recollecting address by Martha Minow, Professor of Law, Harvard Law School, Association of American Law Schools Conference, New Orleans (Jan. 1989)).
7 Trial practice is one of these, but does not yet behave as if it is.
8 The familiar fallacy, post hoc ergo propter hoc.
9 By “experiment” we do not mean “trying out something new” in a loose sense. We mean the structured observation of how two or more alternative things or events (independent variables) affect something of interest (dependent variables). In a well de-
To know that radical mastectomy has long been employed or that many "successful" practitioners have used the technique may say more about a field's monopoly on practice (so that alternatives cannot arise to compete) or its commitment to tradition (so that nothing else is available or considered respectable enough to try). The conclusion that someone survived or that a case was won may follow from a successful technique. But it can follow from techniques that simply are not disastrous (and cannot be seen to pale in comparison to more successful alternatives because those alternatives are not being tried). If pressed for evidence that a recommended technique "works" and imaginable alternatives would be less effective, trial practitioners or teachers of trial practice could not produce much more than arguments based on the authority of the technique's longevity or endorsements to support the claim of its efficacy.

A practitioner who had the benefit of experiments directly comparing radical surgery with more conservative procedures would be able to know that, at least for certain kinds of breast cancer, something far less radical than was practiced for so long would have equal success. Lawyers sometimes find it a source of fascination, and perhaps amusement, to discover that numerous other fields, such as medicine, psychology, or physics, have made so many false starts or outright errors, or still have demonstrable shortcomings and controversies. What may not be obvious is the advantage those fields possess because they have a means of figuring out what they can and cannot do, what they do and do not know. In particular, the advantage lies in the knowledge-building machinery which can reveal their errors. Because the trial practitioners' field lacks a tradition of systematic empirical testing, they have not yet reached the stage where they can

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signed experiment, the effects of the independent variables on the dependent variables may be inferred without ambiguity. For details, see J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 33-82 (2d ed. 1990); D. CAMPBELL & J. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1963).

10 See, e.g., P. D'ARCY & J. GRIFFIN, IATROGENIC DISEASES (2d ed. 1979).


12 See e.g., L. FRANK, THE BIG SPLASH (1990) (describing hostile reaction of scientific community to Professor Frank's own small comet theory); D. PRICE, SCIENCE SINCE BABYLON (1961); J. ROSTAND, ERROR AND DECEPTION IN SCIENCE (1960).
point to all the mistakes that have been unlearned. The informed practitioner in most empirical disciplines, almost by instinct, points to empirical studies of competing ideas. The trial practitioner has no similar body of information to consult.

Breast cancer treatment is an apt example, because for a century oncologists "knew"—even though they did not and could not know because they had not conducted experiments to test their beliefs—that radical mastectomy was the best treatment for breast cancer. They completed the first randomized trials little more than a decade ago and found, contrary to long-held dogma, that a lumpectomy plus radiation was as successful as the more extreme procedure. The accepted answer and the correct answer sometimes are at odds with each other. Is it likely to be different in the world of trial practice? (Does it follow that because many cases have been won that the techniques employed must "work"? Unlike medicine, someone gets to win each trial.) Moreover, the illustration also shows that law is not so far behind in bringing systematic research methods to bear on its subject matter.

We might consider why the usual casual approach to learning from experience, trial and error, is slow and ultimately may be incapable of doing what we ask of it. One key reason already has been suggested: in the absence of a comparison group, it is impossible to know what to make of our observations. From the observation that the use of a given technique is followed by success does not mean that the technique is responsible for the success rather than having made success less likely. But casual comparisons are not enough; without systematic comparison it is hard to know what is producing what effect. Other factors may vary along

13 This provides no automatic or magic solution. But it gives the debaters something substantial on which to chew.
14 A synonym for experiment, much used among clinical medical researchers.
15 Removal only of the tumor.
16 See Fisher, Bauer & Margoless, Five Year Results of a Randomized Clinical Trial Comparing Total Mastectomy and Segmental Mastectomy With or Without Radiation in the Treatment of Breast Cancer, 312 NEW ENG. J. MED. 665, 665 (1985) ("treatment by segmental mastectomy, with or without breast irradiation, resulted in disease-free, distant-disease-free, and overall survival at five years that was no worse than that after total breast removal").
17 One treatise on the subject maintains that the first clinical medical experiment was conducted in the early 1950s. See A. COCHRANE, EFFECTIVENESS AND EFFICIENCY: RANDOM REFLECTIONS ON HEALTH SERVICES 22 (1971).
18 Sometimes we succeed in spite of our efforts.
with the techniques of interest, and it will be difficult or impossible to tell whether the observed differences (or observed nondifferences) were due to the intended treatment differences or to uncontrolled variation. Moreover, subtle differences may be discernible only with large sample sizes and statistical tests. And interactions of the treatment with other variables will be almost impossible to spot without careful collection and systematic analysis of data. Without systematic encounters with a given phenomenon, it is too easy to get lost.

The instinct to test is not entirely alien to trial lawyers. Lawyers sometimes try their cases out on colleagues or taxi drivers or, more recently, on mock jurors to see how they play. But without a technology of systematic testing and a tradition to use it, these instincts do not materialize into productive efforts.

On the other hand, some experiments and other kinds of empirical studies already have been carried out on the legal process, though more often in the service of the development of legal policy or basic learning, rather than trial tactics. Thus, we have two lines of effort that have not yet crossed: the trial practitioner's undeveloped taste for testing and the social scientist's research that has rarely been aimed at answering questions of tactics or strategy.

Let us conclude this section by reversing roles another way. Imagine a trial practitioner who is the product of a movement that tests its techniques empirically. When asked why a certain strategy or technique was employed, she might answer by saying that empirical research found the technique of choice to produce more effective results (with the magnitude of the effect and the nature of the studies mentioned along with their citations). Moreover, she might also answer that the chosen technique or strategy was consistent with empirical findings on persuasion carried

19 Independent variables.
20 Confounding variables.
21 That is, one technique may work best under one set of circumstances, and another technique under others.
22 For examples and discussion, see J. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY (1987); Kassin, Mock Jury Trials, 7 Trial Dipl. J., Summer, 1984, at 26. While almost certainly useful to individual cases, these efforts usually are too case specific to generate useful knowledge of a general nature. In order to yield general learning, studies designed with that goal in mind would do better.
23 Examples of such experiments can be found in V. HANS & N. VIDMAR, JUDGING THE JURY (1986) and Walker, Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments, 51 LAW & CONTEMP. PROBS., Summer, 1988, at 67.
24 See, e.g., lists of empirical phenomena of attitude change in M. SAKS & R.
out by basic researchers from other disciplines and with relevant theory. The next question to ask is how might we get from our current state to so different a world of knowledge about "what works" in trial practice.

II. SUPPLEMENTING THE ART OF TRIAL PRACTICE WITH THE METHOD OF EXPERIMENTATION

Trial practice, oddly enough, could readily lend itself to empirical experimentation—especially NITA programs. The basic requirement is to do X half the time and to do not-X the other half and then to see which produces more desirable outcomes. Once it is learned which of the alternatives is more effective, we move on to a test of the next set of alternatives, and the next after that. As time goes by, more and more knowledge is generated about what works and what does not.

Let us imagine what an empirical, experimental component of the NITA program might look like. At a particular school where a NITA training program was taking place, students would be informed that part of what they were to be doing would be to test which of two strategies or tactics was the more effective. The choices might be: whether it is better to make an extreme or a moderate argument to a jury (e.g., to ask for a huge award or to ask for what seems to be the most reasonable award); whether to give witnesses on direct examination wide latitude to answer questions or keep them on a fairly short tether; or whether the better strategy is to "defang" an adversary by presenting harmful evidence first, thereby to risk the potential costs attending offering evidence harmful to one's own client. Of course, there exist


25 See e.g., R. PETTY & J. CACIOPPO, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE (1986).

26 See supra note 9 the definition of "experiment."

27 Complexities can be built onto this basic framework, as seems helpful.

many other such choices that trial practitioners confront repeatedly.29

Although all of the students would be taught both of the experimental alternatives, when the time came to conduct their full practice trial, half would be assigned to use one alternative and half the other. More precisely, half of those cast as counsel for the plaintiff (or prosecution) and half of those cast as the defense would be randomly assigned to use one or the other alternative. Any given practice trial might see one side or the other, or both, or neither using one or the other technique.30 So much for the assignment of the independent variables.

To measure the dependent variables, teachers and other class members, or nonlegally trained observers,31 could indicate their own attitudes formed or changed due to the trial, or rate the perceived effectiveness of each student attorney (who is, of course, using whatever technique has been assigned). Most important, perhaps, the verdict of the jurors in response to each case would be recorded. In addition, perhaps, more detailed and focused juror responses could be obtained at the end of the trial through questionnaires or during trial with more sophisticated electronic apparatus.32 At the end of the session, the teachers and students might examine the results and come to a tentative conclusion as to which technique, if either, appeared more effective. Forms on which the ratings and verdicts were recorded would be shipped to a central NITA location for more complete data analysis. The results of comparable experiments from a multitude of other program sites would be gathered together and analyzed and the results communicated through a NITA periodic or other publication.33

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29 Although trial practice treatises are written to present received wisdom more than an array of alternative possibilities, they do make it apparent that choices must be made about what will work best, and they can provide a useful source of alternative hypotheses if studied with that purpose in mind.

30 Thus, every possible permutation would be tested: X v. not-X, not-X v. X, not-X v. not-X, and X v. X. Comparisons could be made not only concerning how X compares to not-X, but what happens in cases where both are using technique X or neither are.

31 That is, people who are more similar to jurors.

32 Such as has been used in the evaluation of television commercials since the 1950s.

33 This may be the place to address briefly some methodological issues that may be posed by the thoughtful reader.

(1) "Any given trial tactic may constitute such a small effect that it will be swamped by all of the other things that are going on in a trial."

The answer is that even small and subtle effects can be detected using the experi-
A variation on this basic theme might take advantage of the large number of NITA programs conducted around the country throughout the year. Several different trial techniques could be tested from semester to semester or region to region, not just one per year.

Over a relatively short span of time a body of empirically tested knowledge gradually would be built up by NITA. The techniques taught by NITA would evolve to reflect this learning, and soon would be the most progressive, best informed, and most effective trial practice training available. Eventually the NITA compendium of trial strategy and technique would itself become the most authoritative source of knowledge about "what works."

In addition, the students, and their teachers as well, would learn something more than what works. They would acquire an orientation toward knowledge about the practice of law that is quite different from that which comes from the passing on of tradition or the assertion of authority. They would learn that all the answers are not already known, but that methods exist for mental method. Indeed, this is where they have the best chance of being detected. Through randomization, all of the other effects are spread more or less evenly across the two or more different experimental conditions and the only thing that systematically varies is what we are trying to study. Moreover, this approach puts us in a good position to measure the relative impact of the technique under study, or package of techniques, compared with other influences. If the impact of a technique cannot be detected under these conditions, then it is unlikely that it has any effect at all. That is worth knowing.

(2) "Some teachers of trial practice think that individual student talent or personality has more to do with trial practice success than any tactical steps they could take. Who does it and how well they do it is more important than what they do."

The same research approach can be adapted to studying the different characteristics or performances of trial practitioners. Data can enlighten that debate as well. Once we have a better fix on what that something is, perhaps methods can be found to help students improve their ability to do whatever they are not doing or be whatever they are not being. Or, perhaps students can be counseled into or out of trial work. On the other hand, if the specific knowledge and skills taught in trial practice cannot offer something to the student, then why teach trial practice at all? Even athletic coaches and acting teachers believe they can make the talented more effective.

(3) "What works varies from case to case. Tactics and strategies need to be adapted to each case individually."

Somewhere between the hunger for simplistic magic answers and the despair of "there is no answer," one ought to be able to find generally useful behavioral choices (and know which are generally not useful) and on top of that to learn enough to know how to adapt them to the circumstances of particular cases. If there is nothing to be learned, there is nothing to be taught.

34 Program sites might be left free to choose whether to participate in the experimental knowledge building aspect of the NITA program or perhaps be required to do so, making it an intrinsic part of the NITA program.
discovering the answers. The students and their teachers might develop a humility about what they think they know, and an openness to new techniques. As a result of participating in the process of trying out different possibilities, the students might learn not to cling to what they had once been taught or thought they knew. Instead, the students might acquire the willingness to try different strategies in different ways, testing for themselves what seems to work for them (and their clients) and be prepared to continue such experiments in a more organized way later in their careers.

As long as we are fantasizing about what the adoption of a program of empirical testing could do, let's not stop yet. Consider some additional potential benefits. In part, the lack of knowledge about what works stems from many legal scholars' view that the study of the practice of law is not worth their serious attention. Adopting a systematic methodology for studying and advancing knowledge of advocacy effectiveness may provide the additional benefit of reinvigorating the scholarly study of advocacy and making it academically respectable in law schools.

In addition, the NITA model of systematic testing of techniques may begin a revolution that would spread beyond the mock trial and into actual everyday trial practice. Perhaps organized programs of research would begin among practitioners, much as members of the medical community participate in national randomized trials of new drugs or surgical techniques.

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36 Ironically, the study of persuasion has long been academically respectable in a number of other fields, notably social psychology, where the study of attitude change is serious business to which many members of those disciplines devote large quantities of empirical and theoretical research time. Examine any general textbook in social psychology or any issue of one of its major journals, such as the Journal of Personality and Social Psychology, the Journal of Experimental Social Psychology, the Personality and Social Psychology Bulletin, or the Journal of Applied Social Psychology.

37 Is it imaginable to have trial lawyers participating in "clinical trials" of old and new techniques? That what is common in other disciplines may strike legal educators and scholars as alien is interesting evidence of the absence of a tradition of empirical testing in law.
III. SOME POTENTIAL DANGERS OF SUCCESS

Let us assume that the lack of both a body of systematic empirical knowledge in trial practice and a means of building that knowledge implies that trial practitioners, like their counterparts in the medical arts of the past, have a great deal left to discover, despite having stumbled onto a variety of successful techniques. Assume further that the addition to NITA of a program of systematic experimentation did indeed begin to rapidly distinguish what works from what does not, so that it became apparent that the trial practitioners of the next century would be much more effective than their colleagues of the past. While this rosy scenario might give us occasion to celebrate the progress of knowledge and the greater value of NITA, it might also raise several concerns. Perhaps some things should not be tampered with.

Uncertain knowledge of what works in trial practice insures an equality of sorts among litigators. It helps to dampen the differences between the advocacy available for purchase by richer and poorer clients, or clients who are repeat players rather than one-shot players, or clients who are more rather than less well organized. If powerful new knowledge developed over time, who would be most likely to acquire it and make use of it? Or if lawyers beyond NITA began to conduct their own experimental research, in real rather than mock cases, and to build their own body of research findings, which would be less publicly available than NITA's findings, who would those lawyers and their clients be? The question answers itself. The growth of powerful knowledge is likely to confer a systematic advantage to some clients and some interests over others, and contribute to more exaggerated inequalities in legal services than already exist.

I am reminded of the findings of research on the effects of the television program Sesame Street which was invented to improve the school readiness of poor children thus reducing the disadvantage they suffered relative to middle class children. The program accomplished part of what it set out to do: poor and minority children who watched Sesame Street did improve their school preparedness skills. But as a result of Sesame Street the gap

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between the poor and the middle class grew larger, not smaller. This occurred because the program was watched more faithfully by middle class children, whose parents acquired supplemental program materials and toys and spent more time reinforcing what the program taught, so they got the most that could be gained from the program. This is an old sociological story: those who already enjoy advantages use those advantages to gain still more. The same probably would happen with more effective knowledge about trial practices.

Is this possibility, then, an argument against developing an experimental component of NITA? It might be, if we thought that we could keep lawyers ignorant and equal forever. Sooner or later, larger firms or better organized groups will discover experimental social science—if they have not already. Instead, it is an argument that favors NITA leadership in this area, so that more students and more lawyers have access to this potentially powerful body of knowledge, and so such knowledge does not become a tool that gives only one side increasingly lopsided advantages.

40 I know of (indeed, have been a consultant to) sophisticated (or at least well-financed) litigators who make use of diverse kinds of social science help. The evolution of jury selection firms into more full blown litigation support firms begins to make this available to a wider spectrum of litigators, but still only those who can afford it.

41 More extreme distributional possibilities exist, such as radical reform of the way legal services are made available. Although that seems highly unlikely to come about, consider that unlike medicine or psychology or video technology, the adversary system would be served best by evenly balanced advocacy, thereby enhancing substance as the controlling force in the outcomes of trials. Anything that makes practitioners more evenly matched advances this goal, and anything that leads to imbalance interferes with it. Perhaps lawyers could be assigned to cases in evenly matched pairs, or equalized like racehorses through handicapping.