Opening Statement

Discovering Your Litigator's Voice

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Interpreting legal rules is the stuff of traditional law teaching. It was and is the battleground of debate among schools of jurisprudential thought, between the fact of "what is" and the postulate of "what ought." Law teachers struggle in basic courses to give students the stuff with which to weave arguments about where the law might go.

But there is something missing from law teaching. Students are weak on factual analysis, even when the facts come partly predigested in a case file or memorandum assignment. I believe that law schools are turning out students who cannot deal well with facts because the dominant teaching method gives them no appreciation of how facts are captured and evidence of them brought to court.

Earlier this year, I published these words in the *Columbia Law Review*:

> Facts are mutable because we never see them in litigation. We see instead their remnants, traces, evidences, fossils—their shadows on the courthouse wall. The witnesses recount, and they have perceived, do now remember, can express and want to tell the truth, more or less. Things—paper, hair, bones, pictures, bullets—parade by, each attached to a testifier who can alone give them meaning.

At proceeding's end, the advocate will try to impose some order on all of this, and convince the trier that it makes a certain kind of picture.

If all we see in trials are the shadows of facts-in-the-past, then appellate opinions give us only those shadowy trial facts put through a judicial Cuisinart to adorn the judges' opinion.

Learning to live with elusive evidences of fact is not solely the responsibility of the would-be litigator. In any "deal" or office transaction lurks the prospect of a lawsuit. Knowing how the facts might be shown is the key to practicing preventive law. In sum, the *process* or prospect of litigation touches the life of almost every lawyer. Yet law school teaching is dominated by attention to the *results* of litigation as embodied in appellate opinions.

To be sure, you cannot master the process without paying attention to rules: They help you to predict a result. But for you, the lawyer in your office faced with a client sobbing out a story, there are some other truths that make a bigger difference.

You must know that the facts that matter will not announce themselves, either in the office or later in court. The facts must be found by searching for evidence of them. The facts of the only case that matters—your client's—will not jump from an appellate opinion, a professor's hypothetical, or a writing instructor's memo assignment. You must usually leave your office to get them. When you have rounded up their evidences, you must turn each one over in your hand to see whether or not it is arguably admissible under a rule of evidence.

Only when you understand this process of searching and analyzing will you be able to *apply* legal rules in the sense that traditional law school teaching emphasizes. Only then can you say that you "know" the law in the only way that matters: how it can lead to a just result for a client.

Holmes and Realism

Most of us know Holmes's famous aphorism: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law." In the same 1897 address, Holmes also set out his "bad man" theory of the law, arguing that although legal rules rest on moral principle, it is not the function of the law as such to make moral judgments. The rules should be seen as established for a "bad man," who keeps his bargains only because state power

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will make it unpleasant for him not to.

The moral relativism of this position has been castigated. It is certainly true that viewing rules as disjointed entities apart from their human consequences "can make a stone of the heart." The obvious corollary of Holmes's observation is that if you can be sure that the state will not impose unpleasant consequences, you can act as you please. From such a view comes Carl Sandburg's jape that the hearse-horse snickers at the lawyer's funeral. I will return to this theme later.

The legal realists, however, made a great deal of Holmes's words. Llewellyn embraced them, but warned as early as 1931 that "there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose." In *The Bramble Bush*, he was more blunt: "*If wishes were horses, then beggars would ride.* If rules were results, there would be little need of lawyers." Jerome Frank in a famous dissent reminded us that a "legal system is not what it says, but what it does." He quoted Llewellyn: "It is the substantive rule only as it trickles through the screen of action which counts in life."

The generation of which the realists were a part helped us to see two things clearly: First, the law masks its true rules behind rhetorical constructions; second, legal ideology is more supple than some had supposed. These two insights became keys to the social activism of my own generation of lawyers. They drove me, in a real sense, to become a litigating lawyer.

The realists made us ask which of the many voices that articulated legal rules were authentic, and which voices were being shut out of the debate. We aimed, in Llewellyn's words, "to cut beneath old rules, old words, to get sight of current things."

Professor Jack Getman of Texas, in a provocative essay, has taken the discussion a step further. He wants us to consider the tone of lawyer's "voices" as well as the words they speak. He tells us of the lawyer's "professional voice," the language of legal argumentation to tribunals. That voice pays the law the compliment of taking its verbal forms seriously. He tells us of the "critical voice," perhaps containing echoes of Llewellyn and Frank. This voice knows that legal rules are not all they seem. The "scholarly voice," mostly for professor-lawyers, ranges wider, perhaps even to nonlegal disciplines, for its insights, yet is detached. "Human voice," the one Professor Getman finds missing in law schools, is "language that uses ordinary concepts and familiar situations without professional ornamentation in order to analyze legal issues."

In his essay "Voices," Professor Getman tells us of "*State v. Williams*, a case involving a Native American couple found guilty of the negligent homicide of their child because they failed to bring him to a physician when he became seriously ill." In a law school class discussion of the case, a black woman student from South Carolina sympathetically discussed the parents' dilemma. She noted that, in the South, black patients regard doctors and hospitals as alienating and uncaring. Professor Getman concludes that if this woman had represented the couple, "they would not have been convicted." His other conclusion was "how little law school teaches students about the importance of presenting the client's case in human voice."

Using Rules in Life

I agree with Professor Getman's argument, as far as it goes. The issue he raises, however, is largely unmet by existing law teaching methods. We must go further, and the *Williams* case can help us see why that is so. Professional, critical, scholarly, and human voice all find a place in law teaching today. In different ways, students receive the realist gift of parsing statutes and appellate opinions to discover the rules and doctrine that lie beneath the rhetoric. Sometimes, perhaps not often enough, students discuss the human consequence of rules. Professors pull and twist the facts around, compelling students to confront ways in which a rationale they have put forward will not cover the cases for which they have designed it.

This form of education illuminates true rules and uncovers buried doctrine. It does little, however, to help law students understand how rules move through the "screen of action." It says everything about how to evaluate results and almost nothing about how to bring them about.

I offer as an exhibit the homicide

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case about which Professor Getman wrote. The Williams couple were Native Americans in King County, Washington, which includes Seattle. Mr. Williams was the stepfather of the 17-month-old boy who died, his wife's child by a former marriage. Mr. Williams had six grades of education; Mrs. Williams had 11. They both worked. Mr. Williams's 85-year-old mother cared for the children. The young boy had an abscessed tooth that became gangrenous. He developed pneumonia and died. Both parents, the court of appeals found, loved the child.

Under Washington law, a finding of negligent homicide requires proof beyond a reasonable doubt that the defendant failed to exercise ordinary caution and that the failure proximately caused the victim's death. A Washington statute requires parents to provide necessities for their children. These legal principles trace contours familiar to lawyers in almost any jurisdiction. It does not repay one's effort to probe the wisdom or unwisdom of these settled and noncontroversial rules.

Tactical Mistakes

The appellate case report does not say whether the Williamses had appointed or retained counsel. It does make clear that their lawyer waived a jury in this homicide case, and that a judge found the defendants guilty as charged. On appeal, their lawyer argued neither that the evidence was insufficient nor that the reasonable doubt standard had been misapplied. The court on its own motion made such inquiries on its way to affirmance.

If the Williamses were suspicious of authority figures like doctors and hospitals before this litigation began, their tableau of alienation should now be more richly detailed. Waiving a jury in a homicide case is almost always wrong. Not raising significant arguments on appeal is always professional misconduct. These are not, however, the significant issues for legal educators.

The first thing law students need from the *Williams* case has nothing to do with voices and a great deal to do with ears. They need to listen to the genuine human predicament of these parents, and to imagine the hundred ways in which evidences of their lives could be found. The legal rules about negligent homicide are supple enough; but all one's learning about rules will not solve this case.

And though "human voice" will surely find its way into a summation, this will not be an abstract reference to the lawyer's own world-view. Here is a bit of sample summation:

> Members of the jury, we all have to take an oath to do what we do in this place. His Honor took one to be a judge. I took one, and so did this government prosecutor, to be a lawyer. You took two to sit in that box. One to answer all those questions we asked of you in voir dire, and another to well and truly try this case, and a true verdict render.
>
> In those voir dire questions, I asked you if you would hesitate to find Mr. and Mrs. Williams not guilty if the government did not prove its case beyond a reasonable doubt. You said no you would not hesitate. And I believed you then.
>
> You are sovereign here. The government prosecutor says he represents "the State." Nonsense. He is just an assistant district attorney. Right now, in this case, *you* represent the state. This case is so important that the prosecutor doesn't get to decide it. Some pathologist doctor who never met this family until their boy died doesn't get to decide it. And I'm going to say something right now and if I'm wrong the judge will correct me: Even His Honor doesn't get to decide it.
>
> What are the facts upon which you may rely? We all heard Mr. and Mrs. Williams. They did not make a world in which both parents must go and work long hours just in order to bring home enough to support a family. They did not make a world in which there is no child care and an 85-year-old grandmother, who has great love but sometimes flagging strength, looks after the kids. They did not make a world in which when you go to the clinic the doctors and nurses make you sit and wait and then are cold, impersonal, and uncaring. They did not make a world in which Native American people have for some good reasons—oh, you might disagree, but there are some good reasons here in this evidence—come to distrust doctors. And they did not make a world in which police and prosecutors intrude on their grief and try to add to their burden by burning on them the brand of criminal.
>
> They did not make this world, but you have the power to do something about it. You are the State. You are the people. You can say, "No, we will not brand these folks criminals unless you prosecutors show us in your evidence that they had some other reasonable, human, humane way to turn." You can say, "We the jury will not let the State lay a hand on Mr. and Mrs. Williams unless that hand is blameless in the death of that little boy."

Yes, the human voice may evoke familiar situations by analogy to make a point. But human voices heard in jury arguments must be designed for 24 human ears, and disciplined in ways that the realists largely ignored, that Professor Getman has glimpsed, and that critical legal-studies commentators have derided.

The realists were concerned with small numbers of ears, two for trial courts, six for courts of appeals, on up to 18 for the Supreme Court of the United States. They wanted to know what "courts" would do; they wanted to reform rules and judgments.

The voices heard in jury argument are "human" in *form*, but they must be professional, scholarly, and critical in *content*. The advocate will remind about legal rules, trace their limits, and counsel jurors to use insights from lay witnesses, experts, and the jurors' own life experiences.

In speaking of voices heard in jury argument, I am neither urging that law

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schools jettison the traditional curriculum nor counseling that they embrace a now-prevalent form of trial advocacy teaching. Until recently, appellate advocacy training and competitions were often arid exercises in the art of debate. The facts were predigested and students were not required to wrestle with a trial record and build their factual and legal arguments with primitive but still-useful tools. Much trial advocacy teaching has also de-emphasized the intellectual challenge of legal issues, ignored legal ethics, and even relegated most discussion of evidentiary points to the sidelines. Law school faculties, observing these failings, cited them as reasons to paint trial advocacy teaching and teachers into a corner of the curriculum.

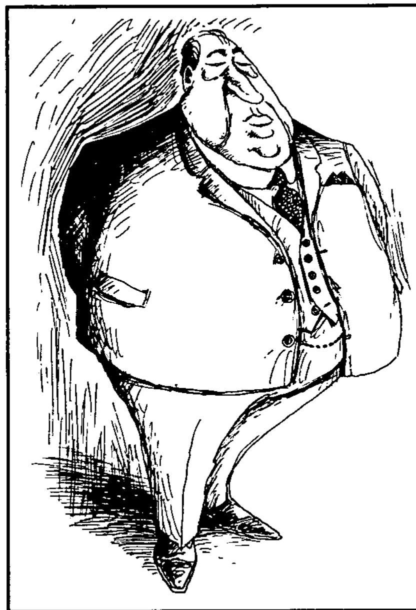
In a holistic approach to legal education, litigation insights would enrich and add to the traditional methods and curriculum. Some law students, who have done well with the curriculum as it is, will also excel in this other realm. But many will find that learning and listening to voices heard in jury argument, and seeking a voice of one's own, require different talents. Adding this dimension to the law school curriculum gives a new means to measure, and permits more students to do well at more things.

I am also convinced, as Professor Ronald Carlson has argued, that litigation insights deepen the meaning of lawyers' ethical and professional responsibility. Law schools have largely walled off ethics teaching into a separate course, not notable for its popularity or perceived relevance to anything but the bar examination. This is virtually inevitable if such courses teach only what rules are and what doctrine is, to the exclusion of what lawyers do.

Professional responsibility courses do cover material that is essential to legal education; law schools are compelled to offer them to remain accredited. But if we look at the criticisms of lawyer behavior today, it becomes clear that somebody is failing somewhere. Sanctions against lawyers for meritless pleadings, discovery abuse, and related misconduct have increased. Courts and bar associations are responding with codes of lawyer civility. I doubt the wisdom or utility of some remedies that have been proposed, but no one can rationally deny the mounting evidence of these professional lapses. The law schools should not shoulder the blame for, nor accept the whole burden of correcting, this situation. But they surely have a role.

Law schools introduce students to the two elements of professional judgment about their behavior as lawyers. First, professors tell them about the nature and function of legal rules. Second, they describe the role of lawyers in putting those rules into practice.

Traditional legal education is still firmly rooted in the realist tradition, or more precisely in variants of Holmes's



bad man theory. Law teachers challenge students again and again to focus on rules and their application; in the alembic of Socratic discourse, law teachers boil out human feelings and concerns. To the extent this is a dominant theme of legal education, particularly in first-year courses, the law school seems to embrace Holmes's moral relativism. That relativism is, in turn, disempowering in that it denies that rules may be moderated through effective advocacy. Relativism is, I submit, an inherent flaw of legal education that focuses on rules and doctrine to the exclusion of what lawyers really do.

Second, traditional legal education is about rule-makers and rule-givers. It cannot, therefore, give students the sense of being in a "profession." There was a time—Fortescue wrote of it in his 15th century treatise *De Laudibus*—when lawyers and judges lived shared professional lives. Those days are gone. At the same time, the economic pressures on traditional professional values are intensifying. Expanding law school teaching to embrace the sense of lawyering as a profession is indispensable.

The resolution of ethical problems is best seen and learned in the theater of action. When you take a case that may be destined for jury argument, and put together an imagined summation, you will necessarily implicate every ethical concern that now occupies the profession.

You cannot begin to find your summation voice without understanding what it means to be an advocate, and to have that single-minded devotion to a client's cause.

Maybe it is a myth that people are capable of making and exercising intelligent decisions about matters of deep concern to them. If so, it is a myth for which we have collectively risked a great deal. Principled advocates are engaged every day in empowering people in ways that sustain the idea that people do have such a capacity. That is the essence of our profession.

You cannot determine to delve for the fossil remains of facts without a sense—a right one or a wrong one—of the limits of advocacy. Have you an honorable cast of mind, or a paper-shredder mentality?

There is a practical side of this. You, the lawyer, are always being looked at by the jury. You will not convince them of the rightness of your client's cause unless you have impressed them as a truthful, honorable person worthy of their trust. If you are caught being sneaky or "too much like a lawyer," your client will suffer the consequences.

Living Ethics

Ethics dead and in books are artifacts. The only ethics that matter are ethics alive and in use. The only way to make them live is to re-create for students what lawyers do and the choices lawyers make. In the end, of course, adherence to these rules will either be a matter of internal compulsion or it will have no meaning at all.

Teaching about litigation also captures valuable insights about history.

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The ideology of today is the product of specific social struggles in which lawyers participated. The ideology cannot well be understood, and certainly cannot make a coherent professional ethos for the lawyer-in-training, without an appreciation of this historical and social context. Professor Carlson has spoken eloquently of the value of tradition, and of the example to be drawn from the "heroic tasks" performed by "litigants and their lawyers."

By gazing into the mirror of the past, we find more than a turn of phrase to use in jury argument or a trial tactic to borrow. We see Hamilton risking his health and reputation to defend Zenger, Otis declaiming against the writs of assistance, the wily Malone springing the suffragettes from the red-hot coop of a workhouse in Occoquan, Ellen Yaroshefsky and Karen Snell championing the sanctuary workers.

What lawyers do and have done—as far as it merits retelling—helps law students to place themselves in a profession that does more than maximize its income.

Where will we find the people, resources, and methods for legal education that instill the essence of lawyering, quicken the sense of history, and make apparent the immanent though latent ethical choices lurking in every lawyer decision? Some law schools have well begun, with first-year courses on the litigation process, and more resources devoted to advocacy teaching.

Law schools seeking to rebuild their curricula immediately confront two problems. First, many of them lack faculty who have substantial litigation experience. Second, effective litigation teaching requires small classes and some technical resources, and both of these cost money. Professor Anthony Amsterdam, among others, has developed materials that can be used for a first-year procedure course that stresses litigation. Some schools might emulate Yale, which in various years has invited Lloyd Paul Stryker and Edward Bennett Williams to lecture. Stryker's series of lectures, published in book form as *The Art of Advocacy*, remains a valuable part of the trial lawyer's library.

I will not presume to draw a map. That should be the collective work of those who will take the journey—lawyers as well as law teachers. ☐

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