



Notre Dame Law Review

Volume 66

Issue 3 *Colloquium: Teaching Trial Advocacy in the 90s and Beyond*

Article 5

April 2014

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Recommended Citation

Steven Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 Notre Dame L. Rev. 721 (1991).
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Advocacy Education: The Case for Structural Knowledge

Steven Lubet*

For most of the last two decades nearly all discussions of advocacy education have begun with consideration of the National Institute for Trial Advocacy (NITA). Whether addressing NITA directly¹ or implicitly,² it is well recognized that the NITA-pioneered method of simulation and critique is the natural starting point for further evaluation and analysis of advocacy education. The National Institute for Trial Advocacy is a not-for-profit organization dedicated to enhancing the skills of practicing lawyers; although some variant on the NITA method has been adopted at virtually every American law school, NITA itself is concerned only with continuing education.

In brief outline, the NITA method emphasizes direct involvement in the setting of a simulated courtroom. Teaching materials take the form of mock case files, consisting of pleadings, deposition extracts, witness statements, correspondence, reports, diagrams, and other documents and exhibits. Based upon these materials, students are assigned to play out various courtroom exercises such as direct examination, cross-examination, opening statement, closing argument, and introduction of exhibits. Following each performance the student is "critiqued" by members of the faculty. Some, but usually not all, of the student performances are also videotaped and reviewed.³ The centerpiece of the official

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1 See, e.g., Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69 (1982); Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123 (1987); Neumann, *On Strategy*, 59 FORDHAM L. REV. 299 (1990).

2 By "implicit discussion" I mean evaluation of the "simulation/critique" method, without necessarily identifying its NITA-based origins. See, e.g., Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 GA. L. REV. 663 (1989); Tomain & Solimine, *Skills Skepticism in the Postclinic World*, 40 J. LEGAL EDUC. 307 (1990).

3 For further description of the NITA teaching method, see K. BROWN, M. HERMANN, J. KALU, F. MOSS & J. SECKINGER, *TEACHER'S MANUAL FOR PROBLEMS AND CASES IN TRIAL ADVOCACY* (4th Ed. 1990); for a description of the same methodology

NITA programs is the annual "National Session," a three week intensive program that draws students from the entire United States.⁴

Given the nature of law professors, not to mention trial lawyers, it is not surprising that the widespread success and emulation of the NITA method has led to an increasing level of scrutiny, reevaluation, and criticism of its theory and implementation. In the following sections I will discuss the conventional critique of the NITA method, the need for law schools to develop a differentiated method of teaching trial advocacy, and, finally, I will propose a law school model for advocacy education.

I. NITA CRITIQUED

There are four aspects to what might be called the conventional critique of the NITA method. First, reliance on canned files is necessarily two-dimensional. Students cannot be presented with any truly difficult strategic choices due to the limited nature of the materials. Neither may they be confronted with deeper tactical problems involving motivation, bias, interest, or perception. With most canned materials, what you see is what you get; therefore, what you do is what you're assigned.

Closely related to the "two-dimensional" critique is what Professor Richard Neumann has referred to as the "motor skills" problem.⁵ An inevitable tendency in NITA-style courses is to over-emphasize presentational techniques such as question form, witness control, elocution, and demeanor. This inclination can be reinforced by the use of videotape, which tends by its very nature to elevate appearance over substance.

The third standard critique of NITA is that its training takes place in a moral vacuum. Since all of the problems are canned, there are no real interests to be pursued and no actual truths to be established. In this setting, the overwhelming emphasis may be on technique, with no opportunity for reflection on the moral implications of counsel's conduct.

Finally, as Professor Ronald Allen posits elsewhere in this

conducted outside of NITA, see T. MAUET & W. WOLFSON, *TEACHER'S MANUAL FOR MATERIALS IN TRIAL ADVOCACY: PROBLEMS AND CASES* (1982).

4 Indeed, the National Session frequently draws students from beyond the United States. Recent attendees have come from Canada, Australia, New Zealand, and other common law countries.

5 See Neumann, *supra* note 1.

Colloquium, the NITA format is entirely outer-directed.⁶ The goal of the program is to enhance the skills of the participants, rather than to examine the assumptions of the adversary system. It does not partake routinely of academic inquiry.

So long as we are discussing NITA *qua* NITA, the obvious rebuttal to virtually all of the above criticism is that those flaws, however serious they might be, are inherent in the concept of continuing legal education. The NITA course itself is tailored to busy practitioners. Its intensive, highly structured, quick-feedback format is virtually dictated by the nature of the audience. NITA, then, has limited aims precisely because practicing lawyers have limited time.

It is well accepted in other contexts that continuing professional education may take a limited, tightly focused form. A good analogy may be found in the "Master's Classes" that are frequently attended by professional musicians. Master's classes typically last only one or two days. The participants simply "play for the master," who then advises them of what they have done poorly or well. There is virtually no other structure to the format. Indeed, the students themselves choose the pieces that they will play and the aspects of their work on which they will concentrate. The master's input is then limited to a critique of the student-initiated performance. In professional education it is simply commonplace for individuals to target their skills and work to enhance them.

This is not to say that NITA courses have been perfected, or that the conventional critique has no merit. NITA, in fact, has devoted significant attention in recent years to the modification of its programs. New problems and workshops have been added to raise issues of professional responsibility, theory choice, and strategic planning.

Nonetheless, the restrictions inherent in the continuing education format will always limit what NITA is able to accomplish. There is only so much that can be taught in a two or three week period. Frankly, there is only so much that practicing lawyers will be interested in learning. This limitation should not be viewed as cause for alarm. Rather, it provides part of the explanation of why we teach trial advocacy in law schools.

In the early years of the clinical education movement it was common for "traditional" law school faculty members to make

6 See Allen, *NITA and the University*, 66 NOTRE DAME L. REV. 705, 714 (1991).

light of advocacy education. The real work of the law school took place in the Socratic lectures and seminars. As for professional competencies, well, the students could always "pick those up in practice." Professor Edward Imwinkelried captured perfectly this spirit of the *ancien régime*, quoting the following passage from an official history of the Harvard Law School: "A fact trial now and then is well worth while, but only as a relief to the tedium of serious work."⁷

Whatever else may be said or debated about the law school curriculum, we have seen from the conventional critique of the NITA model that advocacy education cannot simply be picked up in practice. There are far more layers of thought to advocacy education than can reasonably be explored in even the best post-graduate courses. The notion that lawyers will simply make these investigations on their own was outdated in Langdell's time. Thus, the task for the law schools is neither to abjure advocacy education nor to approach it in the manner of a continuing education course. Our challenge is to build upon the simulation/critique method to develop a university model of advocacy education.

II. LAW SCHOOL DIFFERENTIATED

Recognizing that law schools must adapt the simulation/critique method to their own goals and purposes, we can explore more fully the classic NITA course⁸ and compare it with the university's necessary objectives.

It is fair to say that the primary trial skills emphasized in NITA programs are: (1) question formation; (2) witness control; and (3) persuasive presentation. Participants are successful if, at the completion of the program, they are able to ask proper questions, ensure that they receive the desired answers, and arrange their examinations and arguments for maximum persuasive value. To be sure, more complex aspects of trial work are also discussed, but nonetheless, virtually all of the typical NITA cri-

7 HARVARD L. SCH. ASS'N., THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917 85 (1918), *quoted in* Imwinkelried, *supra* note 2, at 663. The full text preceding the quoted portion is even more revealing: "Efforts have been made from time to time to give students some experience in the trial of cases by substituting a trial of the facts before a jury for the argument of questions of law . . . Such experiments have been more successful in affording amusement than in substantial benefit to the participants." HARVARD L. SCH. ASS'N, *supra*, at 84-85.

8 It is a reflection upon the extraordinary success of the NITA programs that it is now possible to refer to a "classic" model after fewer than 20 years of experience.

tique can be fit into the above three categories. These are not minor skills. Moreover, they are a far cry from the caricature of trial practice teaching that reduces the concept of advocacy to good posture, clear diction, and some measure of courtroom drama. Still, the "NITA skills" are primarily geared toward the presentational aspects of a trial.

These NITA skills are honed in a format that emphasizes quick return. Professor Kenneth Broun accurately described the NITA approach as utilizing short problems, selected facts, frequent performances, tight organization, and extensive critique.⁹ The purpose of this approach is well understood. NITA programs achieve much of their cachet by simulating "on trial" pressure. The use of numerous short exercises, requiring constant overnight preparation, serves wonderfully to concentrate the minds of the participants. Given the limited time-frame of each program, it is necessary also to achieve a quick return. Thus, NITA courses must center on skills that may be demonstrated, acquired, used, and refined in rapid succession. There is little space, nor need there be, for reflection, introspection, or what Professor Randy Barnett calls "recalculation."¹⁰

A. *Vision*

Law schools, as we have noted above, are not constrained in the same manner as is NITA, and also partake of a broader mission. As a recent presidential candidate might have put it, we cannot ignore the "vision thing." Modern legal education differs from apprenticeship precisely because the law schools have become fully integrated into the university.

Membership in the university requires a closer examination of assumptions, practices, and norms. Professor Robert Condlin calls this process "political critique,"¹¹ and Professor Ronald Allen calls it "mature inquiry."¹² However denominated, there is universal agreement that issues of social policy, moral choice, individ-

9 Professor Broun made these observations as moderator of the panel at which this paper was originally presented. K. Broun, Remarks in Panel Discussion, "What is Missing from the NITA Model?" during "Trial Advocacy Teaching in the 90s and Beyond," Northwestern University School of Law (October 26, 1990).

10 See Barnett, *The Virtues of Redundancy in Legal Thought*, 38 CLEV. ST. L. REV. 153, 165 (1990).

11 Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 50 (1986).

12 Allen, *supra* at note 6, at 715.

ual responsibility, personal autonomy, and resource allocation should drive the law school curriculum. Professors Tomaine and Solimine phrase this question as "How should lawyers practice?"¹³ An alternative formulation might be, "How should law be implemented?"

In any event, there has been much recent discussion of the ways in which normative and theoretical concerns may be incorporated and explored in the skills courses. "[A]s Judge Richard Posner might suggest, [the skills courses could] critically examine the economic foundations of legal institutions and decision making through the use of economic, scientific, and social science literature."¹⁴ My own earlier work posited that we should use the trial advocacy course to teach concepts of justice in the context of social accommodation and the political nature of fairness.¹⁵

Elsewhere in this issue, Professor Allen argues that the trial advocacy course can only justify itself through the incorporation of "global conceptualizations and theories that organize the fields and give guidance to research."¹⁶ His primary example is the theory of truth-seeking through trial, and he acknowledges that other inquiries would also mesh with the purpose of university education.¹⁷ This position may conflate the promise or potential of the advocacy course with its baseline value, in effect arguing that advocacy programs may be out of place in the university unless they are driven by inquiry into the nature of the adversary system.¹⁸ This analysis demands too much. As I will demonstrate below, there are other, more modest, goals that nonetheless place the trial advocacy course squarely within the tradition of university-based professional schools.

B. Knowledge

Theory generation is not the sole purpose of the university. As another recent Presidential candidate would have put it, some discussions are not about ideology, they are about competence.

13 Tomaine & Solimine, *supra* note 2, at 319.

14 *Id.* (footnote omitted). They continue: "Or, as Duncan Kennedy or Jay Feinman might suggest, a skills course could explore the social forces that make substantive and procedural doctrine, and indeed the profession itself, less than autonomous." *Id.* (footnote omitted).

15 Lubet, *supra* note 1, at 132.

16 Allen, *supra* note 6, at 712.

17 *Id.* at 715.

18 *Id.* at 715, 717.

Competence writ small, of course, is the signal feature of the NITA program. There is, however, another larger and more textured competence that is more exactly the province of the law schools. To differentiate it from solely presentational skills, I refer to this concept as "structural knowledge."

Structural knowledge may be defined as the understanding of the basic constructs of the profession, the manner or means in which the profession functions, or the language and grammar of the professional discourse. It is the knowledge from which other understandings, inquiries, and theories will develop. Professional education in particular requires that students acquire new information in order to proceed. Clifford Geertz, in defining the tasks of interpretive anthropology, uses the term "local knowledge," noting that "the shapes of knowledge are always ineluctably local, indivisible from their instruments and their encasements."¹⁹

In the advocacy course, the "instruments and encasements" begin with the very design of the common law trial, familiarity with the components of the trial being an obvious necessity for further instruction. Structural knowledge, however, implies something deeper than a simple description of a typical trial, deeper even than a systematic correction of *L.A. Law*-inspired misconceptions. Structural knowledge elucidates the relationships among the various elements of the trial. How does a theory of recovery (or defense) control the content of argument? What impact does case theory have upon the admissibility of evidence? How do the rules of evidence control the availability of case theories? How do the formal rules of ethics constrain advocacy? What is the impact of theory choice upon the ethics or permissibility of a particular course of action?

Perhaps an example from my own teaching will better illustrate this concept. In a class session near the end of the semester I use a simulation exercise to illustrate the relationship between case theory and the ethics of cross-examination. The case is one of simple robbery and attempted rape.²⁰ The victim, a young woman, was attacked in a dark parking lot. Her purse was snatched, she was knocked to the ground, and the assailant pulled

19 C. GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 4 (1983). Geertz continues: "[O]ne may veil this fact with ecumenical rhetoric or blur it with strenuous theory, but one cannot really make it go away." *Id.*

20 Facts derived from a case file in J. TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS TRIAL PRACTICE PROBLEMS AND CASE FILES* (1983).

at her clothing, tearing her blouse. She screamed and he ran away. The defendant, who matched the description given to the police, was arrested twenty minutes later approximately two miles from the scene of the crime. The victim's purse was found in some bushes about a block away from the site of the arrest. Following the arrest, the victim identified the defendant in a one-person show-up.²¹

Having given the students this information, I then conduct a cross-examination of the victim who, it turns out, has been undergoing treatment for anxiety and depression for the past several years. The cross-examination is blistering, unfair, and probably counter-productive.²² Some of the questions are:

- Q. You have been under the care of a psychiatrist who is treating you for depression and anxiety?
- Q. Depression means that you become easily upset? You worry about things that do not bother normal people?
- Q. Anxiety means that you are fearful and nervous? You suffer from exaggerated responses to stimuli?
- Q. Your psychiatrist has given you medications because of these problems? You had taken the drug Prozac on the night of the incident? In fact, you took that psychiatric drug just a few hours before you made your identification?

We then talk about the cross-examination. The students inevitably want to raise issues of evidence, procedure, or tactics. Why didn't the prosecutor object? Wouldn't the judge keep that information out? Aren't you hurting yourself with the jury?

With some effort, the discussion turns to ethics. A majority of the students always think that the cross-examination was unethical, but a substantial group takes the position that "you have to do everything you can to defend your client." From this juncture we are able to explore the purpose of the cross-examination, the theory of the defense, and the factual premises for the various assertions. Without belaboring the discussion, our usual conclusion is that it is "ethical" to utilize the victim's treatment history if the defense theory is that there may have been a purse snatching,

21 The show-up was justified by the short time which elapsed between the crime and the arrest. It was necessary to determine whether the right man had been arrested, or whether the actual perpetrator was still at large.

22 I inform the students at the outset of the class that the purpose of the demonstration is to raise issues in legal ethics and that I have not set out to demonstrate desirable cross-examination technique.

but there was no attempted rape. It is "unethical" to conduct the identical cross-examination if the defense theory is misidentification, since that would involve asking irrelevant questions solely for the purpose of degrading the witness.²³

Through this discussion we explore the relationship between the formal rules of ethics and the advocate's choice of theory.²⁴ The rules of professional responsibility may either constrain or validate a particular approach to advocacy, but they must be a constant subtext in trial preparation. It is important that this class occur at the end of the semester, when the students already have conducted a significant number of cross-examinations themselves. In that way, they can measure their own past preparations and analyses against what they have just seen. In the absence of the students' experiences, the exercise loses much of its power.

I use this exercise as an example of teaching structural knowledge precisely because of its limited scope. The class is not designed explicitly to "participate in a chain of thought leading to inquiry into the nature of the legal system."²⁵ We discuss only the positive-law aspects of the problem. What are the formal rules? How do they affect your choices? What range of decisions is available? What will a good, conscientious advocate do?

The discussion, of course, could run more deeply. The identical exercise could be used to inspire a normative discussion of the need for a mental-health shield law to protect crime victims from further abuse. Indeed, in other contexts it should be used that way. I will explain below why we do not reach these issues in the trial advocacy class.²⁶ My point here is simply that, even in

23 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(2) (1980). This conclusion is premised upon the acceptance of my assertion that there is no factual link between the victim's mental health and her ability to perceive and identify an individual. In further discussion we delve into the issue of jury prejudice or misconception. Perhaps the jurors, or some of them, believe that people who see psychiatrists are undependable witnesses. Why isn't it ethical to gear a defense to that perception? Indeed, isn't it unethical to interpose your own view of the facts between the defendant and the jury? Let the jury decide if there is a relationship. This, of course, leads us to a discussion of race and gender bias. Perhaps some of the jurors will generally disbelieve racial minorities, or Jews, or women who have been victimized. Is it ethical to exploit those tendencies on cross-examination? Why not let the jury decide?

24 If the discussion that I have outlined seems incomplete, please trust me. Other issues, such as the lawyer's duty to investigate, are raised as well.

25 Allen, *supra* note 6, at 717. This is not to say that the class discourages or avoids this inquiry, but only that its baseline purpose is less grand.

26 See *infra* subpart II(D) at p. 733.

the absence of normative hypotheses, the exercise has plenty of depth. It illustrates and explores trial structure in a way that provides a basis for both implementation and inquiry.

Structural knowledge also includes education in the understanding of strategy. Perhaps there is no greater discontinuity between the study and the practice of law than in the area of planning. Most traditional law school classes, and virtually all law school exams, emphasize fast thinking and quick return. As much as students study and plan, much of the lesson of the first year is that the professor can always change the hypothetical. The prize often goes not to the most studious, but to the most facile. Even the best Socratic courses are highly episodic, consisting of discrete hours of discussion that take place days apart.

In contrast, a university model of the trial advocacy course will include education in strategy.²⁷ A lawyer's strategic thinking²⁸ begins with the determination of a goal; the recognition of the objectives that might reasonably be achieved through the legal process. Thereafter, the lawyer must formulate a route within the law for the attainment of that goal. To do that, the lawyer will need to evaluate the consequences, favorable and unfavorable, of the various available choices, and to map alternative approaches. This, in turn, calls for risk assessment and, ultimately, for decisiveness.²⁹

These aspects of structural knowledge of the law are not covered elsewhere in the law school curriculum. Indeed, they are positively absent, if not affirmatively discouraged, in most traditional classes. The standard law school lesson is that all arguments

27 In my course, for example, the students work out of only two case files. The files are long and complex, containing numerous relevant, irrelevant, helpful, contradictory, admissible, inadmissible, questionable, supportive, scandalous, consistent, and other facts. Both cases go to trial in the course of the semester. The weekly class sessions are used in large part to prepare for those trials, with the students constantly evaluating and reevaluating their theories, approaches, and use of facts. Others use similar approaches. See R. CARLSON & E. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS* (1989).

28 For an excellent discussion of the role of strategic thinking in legal education, see Neumann, *supra* note 1. The following treatment of the components of strategic thinking is based in part on Neumann's description of the process.

29 Neumann believes that NITA and NITA-inspired courses do a poor job at addressing strategy. *Id.* at 328 & n.91. He is half right. The classic NITA course alerts students to the need to consider strategy. It does no more because the constraints of the format allow for no more. Law school classes should be better. To the extent that they adopt the classic NITA format they will not be, but, as I have explained, it is surely possible to use the simulation method to bring strategic thinking into the law school classroom.

may be made in the alternative, that no choice is irrevocable, and that most positions may be harmonized. In contrast, strategic thinking requires a recognition of the need to develop parallel, but mutually exclusive, solutions to problems.

C. *Structural Knowledge and Professional Education*

Structural knowledge, then, is an integral part of Llewellyn's seamless web.³⁰ As Edward Imwinkelried has observed, the seamless web includes the development of the skills to "emphasize, arrange, [and] classify the facts of the case"³¹ and to develop "predictive" abilities.³² Imwinkelried persuasively demonstrates that the trial advocacy course can "wholeheartedly embrace Llewellyn's philosophy" in the same manner as the adjectival courses.³³ This claim, if anything, does not go far enough. In the context of professional education, structural knowledge must be seen as a necessity. The trial advocacy course performs a unique, necessary, and irreplaceable function within the law school. It is not so much that we, too, teach the seamless web, but rather that we teach it better.

In disciplines other than law there is hardly the same reluctance to recognize the worth of structural knowledge. There is no stigma attached to the study of anatomy in medicine, harmony in music, or statics in architecture. Each of these well recognized, even bedrock, fields plays a similar role to that of trial advocacy in the law schools, although none require participation in a chain of thought leading to inquiry into the nature of the underlying discipline.³⁴ Students in medicine study anatomy as an introduction to the intricacies of the human body. Some of the students of anatomy will go on to explore new theories of, say, cellular biology, but anatomy for most consists primarily of the acquisition of structural knowledge. Similarly in music, students of composition must learn the classical harmonies as a basis for any future work. Some will go on to experiment with new forms and tonalities, but even today most professional composers stay well within

30 See K. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960).

31 Imwinkelried, *supra* note 2, at 674 (quoting K. LLEWELLYN, *supra* note 30, at 72).

32 Imwinkelried, *supra* note 2, at 676 (citing K. LLEWELLYN, *supra* note 30, at 77, 22).

33 Imwinkelried, *supra* note 2, at 677.

34 See Allen, *supra* note 6, at 717.

the classical format. Architects study statics to ensure that their buildings will not fall down.

Professor Allen challenges the analogy of trial advocacy to other studies in professional disciplines, most explicitly in the case of medicine. The study of anatomy, says Allen, is justified in a way that trial advocacy may not be because medicine, unlike law and certainly unlike litigation, is dedicated to the "extirpation of pathology, and the training and research in the medical schools serves that function directly."³⁵ But what is the basis for this "extirpation of pathology" exception to Allen's conception of the university? If the purpose of all study in the university is to generate theories,³⁶ then why carve out an exception for certain instrumental, non-theoretical courses simply because we believe they will be put to good use? The anatomy class, after all, does not address pathologies directly, but only supplies students with tools for later use. Would the anatomy class be decertified if too many of its graduates did not go on to extirpate pathology, but rather practiced liposuction instead?

On the other hand, if there is a pathology/tool exception, why would it not encompass the trial advocacy class? The adversary system has its flaws, but certainly it addresses social goals. One hopes there can be agreement in the law schools that an orderly, government funded, reasonably predictable, relatively accessible, broadly accepted system of litigation is preferable to the alternative "pathology" of self-help and might-makes-right. Perhaps the trial advocacy course only equips students to understand and function in this system, rather than directly confronting its inadequacies. But the same can be said of anatomy; it equips students to understand illness, but does not confront illness directly.

Allen rejects this view, arguing that the inculcation of skills is questionable in the university unless each individual course also fulfills some greater goal.³⁷ Thus, the trial advocacy course, to be fully justified, should be used to investigate the truth-seeking function of the trial or to improve upon the "dead weight loss" of the contemporary litigation system.³⁸ But where would this leave the study of, say, statics? Anyone who has ever looked at a fast-food

35 *Id.* at 716.

36 *Id.* at 713.

37 *See id.* at 718-19.

38 *Id.* at 716.

restaurant or visited a suburban tract-housing development knows that much of modern architecture stakes a strong claim at being a dead weight loss. Must the statics course be used to encourage aesthetics or ergonomic building design? Or is it sufficient to give students the structural knowledge that they will need in order to effectuate the visions instilled in the balance of their professional training?

D. A Return to Vision

Although I have taken issue with Professor Allen's discrete criticism of the trial advocacy course, I hope it is apparent from the first part of this essay that I agree with his general theme regarding the university and the law school. University education in the professions absolutely requires inquiry and investigation that goes beyond simple skills training. The law school trial advocacy class should expand upon the NITA model in precisely the same way that the study of harmonies in music school expands upon piano lessons.

Nor do I mean to suggest that the trial advocacy course should not be pushed to its limits or utilized in creative, research-provoking ways. If structural knowledge defines the justification for the course, it does not confine its potential.

Still, there is a danger to ambition, particularly in the course of a single semester. Concepts of truth-seeking, rights distribution, and social accommodation are well-covered in other parts of the law school curriculum. It is not necessary that every single course must exist as a microcosm of the legal academic world. Each class need not be designed to evoke Supreme Court argument or a complete redevelopment of the entire concept of law. Indeed, the greatest failing of the contemporary law school curriculum may well be its lack of calibration. If every class is a recreation of the whole of legal life, there can be little room for students to experience a process of incremental development.

The trial advocacy course employs a teaching method, but it also teaches method—the method by which other values can be pursued.

III. A LAW SCHOOL MODEL

What are the hallmarks of a law school advocacy course based on the concept of structural knowledge? First, such a

course will stress sustained involvement with facts.³⁹ Rather than rely upon short, unitary problems, it will utilize case files that are nuanced, complex, and detailed. The facts of the cases will be subject to continual reevaluation, and the students will be required to work with the same files for weeks, if not months, in succession.

This, in turn, will build into the course a process of reflection and reconsideration. Deemphasizing the idea of facile thinking and quick return, students will instead learn that problem solving is an ongoing process and that solutions must constantly be reappraised. Different theories of recovery or defense will dictate alternative approaches to the students' work.

Third, weekly lessons will then be integrated on three levels: legal, factual, and forensic. As the facts are more fully explored the legal issues will become more complex and acute while the forensic challenges intensify. Solutions will have to be sought on all three levels, driving home the lesson that there are few purely forensic (or legal, or factual) answers.

Finally, the course will deemphasize presentation as an end in itself, and instead will use presentation as a means to arrive at greater understanding of the trial process. Students will be more successful not because they can speak well or argue more persuasively, but rather because they can structure facts and law into a compelling and theoretically sound case.⁴⁰

A law school advocacy course should, therefore, be as broadly paced as possible. Semester or year-long courses should be preferred to the classic NITA model, where students engage in nothing but their advocacy course during intercession or at the beginning of the summer break.⁴¹ There is no pedagogical advantage

39 Regarding the importance of "fact sensitivity," see Ordover, *Teaching Sensitivity to Facts*, 66 NOTRE DAME L. REV. 817 (1991). See also D. BINDER & P. BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* (1984); F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981).

40 The deemphasis of presentational skills argues against videotaping student performances. NITA courses all make heavy use of video review, and many law school courses have adopted this technology. In my view, the widespread use of videotape, as popular as it is among students, is corrupting for three reasons. First, it cannot help but create the impression that appearance is more important than content. Second, it encourages what I call lazy critique, where the faculty focuses on superficial shortcomings at the expense of deeper analysis. Finally, video review suggests that trial advocacy is easier than it really is. It is highly unlikely that any law student will really have sufficient mastery of the basics to be able to profit from video replay. Polish is the last thing that they need during law school, and it is the one thing that they can learn with some dependability in practice.

41 I recognize that there may be reasons to prefer the intensive or intersession

to simulating "on trial" pressure among law students. Indeed, since good teaching motivates continuous thought and reflection, both on the subject of the course and on deeper issues as well, time for such reflection should be built into the advocacy course. If students are truly to explore alternative trial theories, they need days, not hours, in which to think and prepare.

This principle of sustained reflection holds just as true for traditional classes as it does for simulation courses. Consider Socratic method teaching. In bad Socratic teaching each case in the book is taught as though it presents a single rule or idea. Once that principle is digested, the class moves on to the next case. In many ways the bad Socratic class can be seen as a drill: What are the facts of case X? What are the facts of case Y? The teaching is entirely linear and episodic.

In good Socratic teaching, however, the concepts presented by the cases build upon each other. Cases are read, returned to, and reconsidered in light of subsequent material. The goal of the class is not to assimilate a series of discrete, intense lessons, but rather to emerge with a broadened understanding of a larger discipline. Trial advocacy can, and should, be taught on the same agenda.

IV. CONCLUSION

Many of the best illustrations of trial advocacy principles were originated or popularized by the late Irving Younger. In his now classic lecture on cross-examination⁴² he told the story of a defendant who was charged with biting off another man's nose. The prosecution called a single witness to the incident, who testified that the defendant had indeed done the heinous act. The cross-examination was going well until the very end, when the defense lawyer asked the fateful "one question too many:"

- Q. The two men were fighting in the middle of a field?
A. Yes.
Q. You were birdwatching at the time?

model. Use of the intensive model makes it easier to teach large numbers of students at once, as well as to attract adjunct faculty. In some schools, the intensive course is used as an introduction to advanced, more complex courses. It is my view, however, that as an academic specimen the semester-long course is more sound.

⁴² Younger, *The Ten Commandments of Cross-Examination* (Videotape, Basic Concepts in the Law of Evidence Series (1975) (available from NITA, 1991 Catalog, Notre Dame, Indiana)).

- A. True.
- Q. Weren't the birds in the trees?
- A. They were.
- Q. And the trees were on the edge of the field?
- A. That is right.
- Q. So you were looking away from the middle of the field?
- A. I was.
- Q. Then how can you say that you saw my client bite off the other man's nose?
- A. Because I saw him spit it out.

This story can be used to teach three lessons about trial advocacy. The first lesson is instrumental, the second normative, and the third is based upon structural knowledge.

At its most simple level the story is, as Younger introduced it, a commandment. It teaches lawyers the need to control witnesses, and alerts them to the inherent danger in asking the "ultimate question." This lesson is strictly instrumental: "If you ask the right questions your client can win, if you ask the wrong ones your client will lose."

This approach has been criticized as amoral by Hegland,⁴³ Allen,⁴⁴ and others. Allen, in particular, points out that the parable of the nose will be used, either hypocritically or ignorantly, to detract from the students' commitment to truth-seeking.⁴⁵ A second use of the story, then, would be the precise opposite of the first—to illustrate the ways in which the trial process obstructs truth, and to investigate normative remedies.

The third lesson behind the story corrects the shortcomings of the first two. Of course, amoral skills training is not the goal of the university. On the other hand, the bitten-nose story need not be characterized as one that is told about truth. It can also be seen as a story that is told about advocacy, and therefore about autonomy.

If the story were only about truth, then its moral might indeed be that skillful questioning can conceal truth. But that approach fails to consider the full structure of the trial. Following cross-examination comes redirect examination. Even if defense counsel had refrained from asking the one question too many, the prosecutor certainly would have provided the missing informa-

43 See Hegland, *supra* note 1, at 78-86.

44 See Allen, *supra* note 6, at 713.

45 *Id.*

tion at the very outset of redirect. Of course, the witness's declaration would have been less damaging on redirect, because it would have seemed more apologetic or contrived. The cross-examiner's error was not that the testimony came out, but rather that it came out during cross-examination. The cross-examiner lost control of the examination, failed to advance the defense's theory, and thus allowed the insertion of damaging "prosecution facts" in what should have been the strongest part of the defense presentation.

Moreover, why assume that the witness was telling the truth? Wouldn't it be at least as plausible to assume that the witness, caught in a lie, had come up with a clever rejoinder? If the witness's knowledge had indeed come from the disgorgement of the victim's nose, shouldn't that have been established during direct testimony? And isn't the witness's failure to be straightforward on direct a telling comment on credibility? All the more reason, then, to leave the explanation to redirect, rather than allow the witness to undermine what was otherwise an extremely effective—and truth seeking—cross-examination.⁴⁶

Finally, since this is a criminal case, perhaps the perception of even a subjectively truthful witness should be tested against the standard of reasonable doubt. Is it credible beyond a reasonable doubt that the witness could recognize a piece of nose all the way across a field? And wouldn't it be less credible, and therefore more doubtful, if that detail of the story came out only during redirect examination?

Thus, Younger's story may be taught in a context not about the concealment of information, but rather about its elicitation. More specifically, the story is about the advocate's responsibility to the client, and the ways in which the design of the trial may be utilized to advance or impede the client's goals. That is the case for structural knowledge.

⁴⁶ Indeed, the original and longer version of the nose story was about a lying witness. The cross-examiner was Abraham Lincoln, who went on to ask how the witness could have seen so well, given that the fight occurred at night. The witness replied, "I could see by the light of the full moon." Lincoln went on to impeach this testimony by reading from the *Farmers Almanac*—there was no moon at all that night.

