Saint Louis University Law Journal

Volume 48
Number 4 *Teaching Criminal Law (Summer 2004)*

Article 5

10-15-2004

On Teaching Criminal Law from a Trial Perspective

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ON TEACHING CRIMINAL LAW FROM A TRIAL PERSPECTIVE

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I. AN ERA OF INNOVATION IN TEACHING METHODS

In the late 1970s, under the direction of Professor Paul Brest, a number of Stanford Law School faculty began to discuss the use of innovative methods to teach first-year courses. The impetus was a very successful effort by the law school to enrich the second- and third-year curriculum with "clinical" courses. These courses did not resemble the kinds of courses associated with today's clinics. Their purpose was not to teach students by having them handle aspects of cases accepted by law school sponsored or affiliated clinics. Rather, the goal was to teach advanced substantive law courses through exercises that simulated the conditions practitioners encountered in a particular field. The assumption was that students could best master and critique a field of law when they were required to put theory into practice.

The first of these "clinical" courses was Advanced Criminal Law, taught by Professor Anthony Amsterdam with the help of a psychiatrist. Students taking this course were expected to conduct a full direct and cross-examination of mental health experts testifying in hearings involving mentally disordered defendants raising diminished capacity and insanity claims. Another was Advanced Criminal Procedure, a course that I designed. Students played the role of prosecutors or defense counsel in a criminal proceeding, from arraignment through trial, including a hearing on a suppression motion. As in the case of Professor Amsterdam's course, use was made of forensic experts and police officers, and much of the course was devoted to the direct and cross-examination of experts. Members of the Palo Alto community served as jurors.

By the early 1980s, the number of "clinical" courses had expanded and included Advanced Real Estate Transactions, Injunctions, Freedom of Information, Expert Testimony, Complex Litigation, and Advanced Evidence. Juvenile Law, taught by Professor Mike Wald, was one of the earliest of the clinical courses and had both simulated and live client components. Students who successfully completed the simulated part were allowed to represent clients in the local juvenile court under the supervision of a faculty member.

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The clinical courses proved to be enormously popular. To assure participation by the maximum number of students, the clinical faculty devised its own application process. Students admitted to one course were dropped to the bottom of a waiting list when applying for a second course. By the early 1980s, about one-third of the upper-division students could be offered an opportunity to take one clinical course.

In part, the clinical courses were popular because they contrasted sharply with the teaching methods employed in the traditional classes. In the late 1970s, Stanford's faculty still adhered to the Socratic method as the principal mode of teaching and assessing doctrine. In contrast, the tasks the students were asked to perform in the clinical courses required the students to go beyond case analysis and engage in systematic problem-solving in concrete situations similar to those encountered by practitioners in diverse fields. Because the settings for the clinical exercises were adversarial, students learned that much of what transpired in their cases depended on their initiative as lawyers. Particularly in clinical courses emphasizing evidentiary hearings, students learned that it would be up to them to decide which witnesses to call, the order in which to call them, and the content and order of the questions asked.

Much class time was devoted by the clinical instructors and class members to assessing the performance of the students doing the exercises. Camcorders, thought of at the time as a kind of movie camera, were just coming into use and provided an almost "instant replay" means to review and critique what students did right and wrong. Students who were not doing the exercise were required to lead the critique of a particular exercise, such as the direct examination of an expert. Forms were developed by some instructors to guide the students in providing a useful assessment.

In my twenty-seven years at Stanford, no period can compare with the late 1970s and early 1980s as a time when interest in experimenting with new teaching methods was paramount. Stanford was a recognized leader in pioneering the use of simulations in teaching advanced substantive courses. Although there was significant cooperation among the faculty teaching the clinical courses, neither the administration, the students, nor the professors viewed the courses as a distinct concentration. What was taught in a given year depended on the interest and availability of regular faculty, visitors, and the effectiveness of students lobbying for a particular course.

The dependence on the faculty's willingness to teach a clinical course proved to be a major weakness. The departure in the early 1980s of a number of instructors devoted to clinical teaching significantly reduced the number of clinical courses taught by tenure-line faculty members on a regular basis. The amount of time required to teach in the simulated mode further reduced the number of clinical courses. Those of us involved in clinical teaching soon discovered that it simply was not possible to teach in this mode and have the

time necessary to devote to scholarly endeavors. Stanford, in hiring and promoting faculty, did not distinguish between professors using traditional teaching methods and those employing clinical approaches, and therefore, many instructors gave up their clinical courses to free up time for their scholarly projects. Still, the success of the clinical courses had two immediate effects. First, it encouraged other professors to use some clinical methods, such as problem-solving and simulations, in their courses. Equally important, the success of the courses led Paul Brest, who had played a key role in founding the clinical courses, to convene a group of professors to explore new methods for teaching the first-year courses. The result was the "B Curriculum," an alternative to the traditional first-year curriculum at Stanford.

II. THE B CURRICULUM

The B Curriculum, which went into effect in the fall of 1979, was not designed to replace the courses taught in the traditional first-year curriculum, which now became known as the A Curriculum. Rather, a principal goal of the B Curriculum was to integrate the core first-year courses more fully and "to supplement these courses with shorter ones that provide[d] perspectives on the law from the social sciences, humanities and philosophy, as well as [an] economic and historical analysis of the law."[1] Another goal was to introduce first-year students to clinical instruction.[2] Civil Procedure was selected for clinical treatment because of the belief that abstract procedural rules could best be grasped by students required to use those rules in drafting exercises and performing other tasks requiring "basic lawyering skills."[3]

The integration of the core first-year courses took the form of extensive coordination among the instructors teaching Torts, Contracts, and Statutory Analysis.[4] Although the degree of coordination diminished over time, this goal was mostly achieved.[5] Within two years, however, the mini-courses exposing the students to legal history, jurisprudence, economics, and social science methodology had disappeared.[6] First-year students, anxious about whether they were mastering the doctrine in the core courses, found these courses too disruptive at this stage of their legal education.

The Civil Procedure course, however, proved to be highly successful. Eventually, it evolved into a separate course, Lawyering Process, that focused on interviewing and counseling clients, negotiating and mediating disputes,

1. *And Now for Something Academically Different . . .* , 15 STAN. LAW., Winter/Spring 1979–1980, at 46, 46.

2. *Id*.

3. *Id*.

4. Paul Brest, *A First Year Course in the "Lawyering Process,"* 32 J. LEGAL EDUC. 344, 349 (1982).

5. *See id*. at 350.

6. *Id*.

drafting documents, and examining issues of professional responsibility.[7] Over time, Lawyering Process mutated into several courses, some emphasizing the skills needed to represent subordinated groups and others concerned with the skills needed in a litigation setting.

An issue that perplexed the group planning the new curriculum from the beginning was what to do with the first-year course on Criminal Law. Tying the course to Torts by examining the legal response to injury was discarded as unworkable. My proposal to teach Criminal Law in its procedural context was accepted, and I have been teaching the course from that perspective since 1981, even though the B Curriculum was eventually abandoned in 1987.

III. B CURRICULUM CRIMINAL LAW

A. The Procedural Part

I begin with a confession: I resisted the invitation to teach Criminal Law. Before joining the Stanford faculty, I had served as a public defender, and in that capacity, had represented hundreds of clients at arraignments, preliminary hearings, motions to suppress evidence, and trials on misdemeanor and felony charges. Not once had an issue involving the substantive criminal law arisen in any of my cases or those of my fellow public defenders. What mattered most to a successful criminal practice was knowing how to investigate a case, suppress unfavorable evidence, and persuade jurors to return defense verdicts. Pretrial practice required a knowledge of criminal procedure, not criminal law. Moreover, knowledge of Fourth, Fifth, and Sixth Amendment jurisprudence, while necessary, was insufficient to a successful motion practice. Mastery of the rules of evidence and principles of trial advocacy mattered just as much in trials and preliminary hearings.[8] Still, the desire to examine the doctrinal and normative aspects of criminal law from a different perspective convinced me that I should attempt to teach the subject from a "procedural" perspective.

Fortunately, Professor Phil Johnson of Boalt Hall had just published the second edition of a casebook that examined criminal law from that perspective.[9] I adopted his book and have used it ever since, even though the procedural materials have been reduced substantially. Originally, about one-third of the book was devoted to exploring the role of counsel and the judge at

7. *Id*. at 344.

8. At the time I was a defense lawyer, the rules of evidence applied to California preliminary hearings. Today, hearsay can be received at preliminary hearings under some circumstances and limits have been imposed on the right of the defense to call and examine witnesses at preliminary hearings. *See* CAL. PENAL CODE § 872 (West Supp. 2004); CAL. EVID. CODE § 1203.1 (West 1995).

9. PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS AND TEXT ON THE SUBSTANTIVE CRIMINAL LAW IN ITS PROCEDURAL CONTEXT (2d ed. 1980).

arraignments, preliminary hearings, grand jury proceedings, trials, and sentencings. In later editions, most of these topics were condensed into a single chapter,[10] but the book still serves my goal of enabling the students to examine criminal law from a procedural, and especially, a trial perspective. But to achieve this goal, I now have my own supplement, which includes a description of how a criminal case is processed in California and, because of the centrality of the trial, a discussion of the stages of a trial. In addition, the supplement describes the dynamics that attend an adversarial proceeding and introduces the students to basic principles of trial advocacy.

One of my main goals is to help the students appreciate that it is the lawyers (and not, as they suppose, the judges) who play the principal role in how an American trial unfolds. Prosecutors decide who and what to charge, defense counsel decide whether to bring suppression and other defensive motions, and it is the lawyers who determine what will take place at each stage of a trial, from deciding which witnesses will be called to the questions that will be asked on direct and cross-examination. The importance of party initiative is driven home when the students realize that, as a general rule, the failure to object means that the erroneous receipt of evidence or improper argument can not be raised on appeal by the accused.

The importance of the role of the defense lawyer becomes apparent when we reach our first case, *Gideon v. Wainwright*.[11] I begin by asking one of the students to assume the role of Gideon at the trial. The remaining students are to play the role of the judge and rule on objections. I then make the prosecution's opening statement in which I include much inadmissible but damning matter. If "Gideon" fails to object to the opening statement or fails to come up with a specific objection, I then play the role of the judge and ask "Gideon" whether he wishes to make an opening statement or "reserve." By that time, the point is amply made. A defendant untrained in the law simply has no chance against a seasoned prosecutor, even if the defendant is innocent.

Gideon includes a quotation from Justice Sutherland's opinion in *Powell v. Alabama*[12] in which he notes that without the helping hand of counsel, "though he be not guilty, [the accused] faces the danger of conviction because he does not know how to establish his innocence."[13] This insight flies in the teeth of accepted doctrine, such as the presumption of innocence and the prosecutor's burden to prove guilt beyond a reasonable doubt. But because by now Justice Sutherland's observation seems "right" to the students, they must cope with a

10. *See, e.g.*, PHILLIP E. JOHNSON & MORGAN CLOUD, CRIMINAL LAW: CASES, MATERIALS AND TEXT 509-613 (7th ed. 2002).

11. 372 U.S. 335 (1963).

12. 287 U.S. 45 (1932).

13. *Id.* at 69.

troubling conflict between theory and practice. Justice Sutherland, I point out to the students, was a trial lawyer before accepting appointment to the bench.

I next have the students examine the role of defense counsel on appeal. To some, it is not apparent why the Supreme Court held in *Douglas v. California*[14] that an indigent is entitled to appointed counsel on appeals granted as a matter of right. After all, the trial courtroom has been left behind, and the issues on appeal simply call for the kind of legal analysis learned in law school. But perceptions change when I hand a student an imaginary transcript and ask the student to identify those errors that the student believes are most likely to persuade an appellate court to reverse the conviction. Students quickly realize that someone untrained in the law simply will have no basis for examining transcripts and preparing the kind of briefs and oral arguments that can lead to reversals.

Prosecutorial discretion in selecting targets and charges is the next topic. Because prosecutorial discretion is largely unreviewable, we spend time considering whether grand jurors or magistrates presiding over preliminary hearings serve as an effective check when prosecutors abuse their discretion. Phil Johnson has selected a wonderful Massachusetts case, *Myers v. Commonwealth*,[15] to explore the role of the magistrate. The defendant asked the appellate court to order a new preliminary hearing because the magistrate had prevented the defendant from cross-examining the state's chief witness and from adducing evidence in his case in chief because the prosecutor had made out a "prima facie" case.[16] The case introduces students to the concept of sufficiency and asks whether that standard is the appropriate one in assessing the prosecutor's exercise of discretion. Most students conclude that magistrates should be empowered to weigh the credibility of the witnesses if the preliminary hearing is to serve as an effective screen. But then I ask them to reconcile this position with the rule that applies at trial—to defeat the defense motion for a directed verdict of acquittal and get to the jury, all that a prosecutor needs to do is put on a prima facie case.

We spend some time on why appellate courts have gone to great lengths in protecting the plea bargaining process from judicial intervention. Because the vast majority of prosecutions are terminated by plea agreements, we question the claim sometimes made that the American model of criminal justice gives the accused the most ample pretrial and trial rights. Should the focus be on the processes that lead to plea bargains or on adversarial hearings that usually never take place? Or do the panoply of trial rights influence the plea bargaining process?

14. 372 U.S. 353 (1963).
15. 298 N.E.2d 819 (Mass. 1973).
16. *Id.* at 821-22.

We give considerable attention to the prosecution's burden of proof and the right to trial by jury. In considering the seminal case, *Duncan v. Louisiana*,[17] I ask the students to identify one disadvantage that Duncan could have avoided if he had been granted a jury trial. Because Duncan did not single out any such disadvantage, I press the students to point out the advantages that he could get from jurors at his retrial. That leads to a discussion about the advantages of having jurors rather than a single judge decide the question of the defendant's guilt. Our discussion is topped by Mirjan Damaska's excellent article on differences between continental and common law criminal trials.[18] The excerpt focuses on that part of the article in which Damaska compares the differences in voting rules and lay and professional predispositions to convict.[19] Because the students now appreciate the importance of selecting jurors who are favorably disposed toward the prosecution or the defense, we also explore the exclusion of women and people of color from venires, the right to voir dire venires on the race of victims and defendants, and the limits on the use of preemptory challenges.

Our discussion of the prosecution's burden of proof begins with the distinction between the production and persuasion burdens. Students need to know that a chief goal of prosecutors is to get the case to the jury by defeating the defense motion for a directed verdict of acquittal. To do so, prosecutors must make out a prima facie case. Students also need to know that whether particular jury instructions on offenses or defenses are given depends on satisfying a sufficiency standard. Because these concepts will not make sense in the abstract, my supplement includes a number of trial exercises requiring the students to rule on defense motions for directed verdicts as well as on defense and prosecution motions for particular jury instructions.

The trial exercises are based on cases in the casebook and in the supplement. Because the material is difficult for first-year students, the exercises capture in witness examination form the principal evidence offered by the prosecution and the defense. I also provide the students with simplified definitions of the offenses charged and of lesser offenses available in the relevant jurisdiction. The purpose is not to teach the subtleties of, say, common law murder, but to give as much of the definition as is required to understand the burden at issue. Each exercise requires the students to rule on motions for directed verdicts or motions for giving particular instructions. Students must explain each of their rulings.

17. 391 U.S. 145 (1968).

18. Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

19. *Id*. at 536-46.

A discussion of the prosecution's burden of proof would not be complete without considering the impact of *In re Winship*[20] on jury instructions involving presumptions and inferences. Although this material is particularly difficult for students who have not taken Evidence, I have found that the use of the trial exercises enables the students to understand these concepts. Special attention is devoted to *Mullaney v. Wilbur*[21] and *Patterson v. New York*.[22] The students need to understand why the Court in *Patterson* retreated from the position it took in *Mullaney*, where it held that a legislature could not circumvent *Winship* simply by reallocating to the defense some elements that previously had to be proved by the state.[23] Students must understand why under our system of government legislatures are given significant latitude in defining criminal conduct. To introduce students to some of the constraints on the legislative prerogative, they are assigned the recently decided case, *Lawrence v. Texas*.[24]

To give meaning to the right of trial by jury, the relationship between confrontation and cross-examination is explored. The principal case considered, *Pointer v. Texas*,[25] leads to a discussion of why the hearsay rule exceptions pose a confrontation problem whenever the prosecution fails to produce the declarant for examination. A complete discussion of hearsay and its exceptions is unnecessary. Students can readily grasp the problem by attempting to cross-examine the witness who is reporting the hearsay declaration. By this time, students also understand the goals of a cross-examiner, and can appreciate why none of the goals can be achieved if the hearsay declarant is not produced for cross-examination under oath in the presence of the jury.

The final topic in the procedural part of the course is the privilege against self-incrimination. Both the defendant's privilege not to take the stand and a witness's privilege not to answer incriminating questions are explored. For comparison purposes, the students must read another excerpt from Mirjan Damaska's article. This one focuses on the Western European practice of allowing prosecutors to call the accused as a witness (usually as their first witness) while permitting the accused to decline to answer any question that might incriminate him.[26] The question I raise is whether a true adversarial proceeding must include the accused's privilege not to be called as a witness if the "right" goal is to force the prosecution to prove its case, if necessary, without any testimonial assistance by the defendant.

20. 397 U.S. 358 (1970).
21. 421 U.S. 684 (1975).
22. 432 U.S. 197 (1977).
23. *Id.* at 215-16.
24. 539 U.S. 558.
25. 380 U.S. 400 (1965).
26. Damaska, *supra* note 18, at 526-30.

It usually takes me about twelve hours to cover the procedural aspects of the course. By the time we complete this part, students are prepared to apply their knowledge of trials to the substantive part of the course.

B. The Substantive Part

One thing I have learned during my many years of teaching Criminal Law is that it is better to cover a few topics well than many poorly. By the time I taught the course for the third time, I no longer attempted to cover most of the topics in the book. In addition to the concepts of vagueness and the principle of legality, I now limit the substantive part of the course to one major crime, homicide, the basic culpability doctrines, the inchoate offenses, complicity, and the role of mental illness. I discuss self-defense briefly in connection with voluntary manslaughter and omit other aspects of justification and excuse. While I do cover some aspects of sentencing, I skip the death penalty.

Phil Johnson provides a number of excellent cases for exploring the shortcomings of the common law's attempts to define with precision the criminal mental states. The first case, *Regina v. Faulkner*,[27] gives students an opportunity to see how a number of appellate judges succeeded in creating almost total confusion in determining the mental state the prosecution had to prove in a case that charged the defendant with "feloniously, unlawfully, and maliciously" burning a ship.[28] Although I have to help the students distill the mental state or states each judge believed the prosecution must prove, any comfort the students derive from knowing that we are dealing with an old English case is dispelled by the next case. *United States v. Yermian*[29] is a 1984 opinion in which the sharply divided Supreme Court disagreed on the mental state required to convict someone of "knowingly and willfully" making false statements within the jurisdiction of a federal agency.[30] Other cases explore the materiality of intoxication and mistake in disproving the mental element of the crime charged.[31] One case tries without much success to fathom what Congress had in mind when, in a single statute, it chose to punish some violations when made "knowingly" but others only when made "willfully."[32] Still other cases try to define the appropriate mental state when the legislature fails to specify one[33] or when the conduct banned does not constitute the kind of misconduct typically punished by the criminal law.[34]

27. 13 COX CRIM. CASES 550 (Cr. Cas. Res. 1877).

28. *Id.* at 550.

29. 468 U.S. 63 (1984).

30. *Id*. at 69.

31. *See, e.g.*, People v. Hood, 462 P.2d 370 (Cal. 1969) (discussing intoxication); Garnett v. State, 632 A.2d 797 (Md. 1993) (discussing mistake).

32. *See* Bryan v. United States, 524 U.S. 184 (1998).

33. *See* United States v. Garrett, 984 F.2d 1402 (5th Cir. 1993).

34. *See* Lambert v. California, 355 U.S. 225 (1957).

The students' frustration in attempting to arrive at sensible principles that explain the courts' construction of the statutes is palpable. I choose that moment to introduce them to the revolutionary approach to culpability provided by the Model Penal Code (the Code). To make sure that the students spend time trying to understand the Code, I have them prepare written jury instructions defining the mental elements of some of the more troublesome cases by using the Code's approach. They must prepare two copies, one for my review and one for their use in class. I call upon students at random to read and defend a particular instruction. To make sure they understand the assignment, the supplement contains detailed instructions on writing the jury instructions. At the end of the exercise, I provide the students with model instructions based on the Code. Because our classrooms were recently remodeled to include high-tech gadgetry, I am now able to display my instructions on screens that all students can see.

Forcing the students to use the Code also helps them appreciate some flaws that otherwise would not be apparent. In drafting the instructions involving mistake, for example, the students have to contend with the Code's perplexing positions on mistake. On the one hand, the Code takes the pragmatic approach that evidence of mistake should be admissible when it disproves the mental state of the offense charged.[35] On the other, it bars the use of the evidence if the accused would nonetheless be guilty of another offense had the situation been as he mistakenly supposed.[36] But in such a case, the Code provides that the mistake of the accused "shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed."[37] Left unanswered is who should decide whether the defendant's claim of mistake should be believed. If the jury decides, then it would appear that the evidence of mistake would have to be admitted with instructions directing the jurors to disregard it only if they disbelieve the defendant. The framers of the Code were unable to agree on how the provisions on mistake should be implemented.

In drafting the jury instructions on intoxication, the students encounter some of the difficulties they found in applying the general or specific intent formulation to determine the admissibility of intoxication under the common law. The leading common law case, *People v. Hood*,[38] teaches them that whether the crime charged qualifies as a specific intent offense—thereby allowing the accused to disprove the mental element with evidence of his voluntary intoxication—presents both definitional and policy questions that ultimately must be answered by the appellate courts. But as a result of recent

35. MODEL PENAL CODE § 2.04(1)(a) (1985).

36. *Id.* § 2.04(2).

37. *Id.*

38. 462 P.2d 370 (Cal. 1969).

amendments to the California Penal Code, when the state prosecutes a defendant for murder on the theory that he intentionally killed, the defendant may offer his intoxication to disprove that mental state. However, the defendant may not do so when the state proceeds on the theory that the defendant acted only recklessly.[39] That position turns conventional concepts of blameworthiness on their head, an unfortunate result that can also occur under the Code.[40]

Nonetheless, introducing the Code at this juncture is on balance quite beneficial. Despite the Code's flaws, the students appreciate its superior approach to defining the mental states for the "material" elements of the offense charged. The students learn that the Code is an excellent point of departure for assessing the common law approach to homicide (including the felony-murder rule), to inchoate offenses (especially attempts and conspiracy), and to accomplice liability. Contrasting the California approach to complicity with that of the Code is especially useful. The students can see how California's approach to liability for collateral offenses committed by accomplices to the target offense opens the door to liability almost as wide as does the felony-murder rule in cases involving homicides. Although the leading California case on accomplice liability insists on proof that the accomplice lend aid or encouragement with the purpose of promoting or facilitating the commission of the target offense,[41] no such limitation is imposed for liability for collateral offenses. Because negligence suffices, California juries have been allowed to convict defendants of murder even when they were accomplices only to such trivial crimes as the misdemeanor of brandishing a weapon.[42]

The Code confers an additional pedagogical benefit. It provides us with a common language and framework when discussing the concepts covered under the substantive part of the course. We know the importance of distinguishing purpose from knowledge, and knowledge from recklessness, and recklessness from negligence. We know that recklessness is the default mental state where the legislature has failed to specify any state.[43] And we know that in the absence of due process concerns, unless the legislature has specified otherwise, neither knowledge nor recklessness nor negligence as to whether conduct constitutes an offense is an element of the offense.[44] We also know that in ruling on objections on irrelevance grounds, as an evidentiary and Code matter,

39. *See* CAL. PENAL CODE § 22(b) (West 1999).
40. *See* People v. Register, 457 N.E.2d 704 (N.Y. 1983).
41. *See* People v. Beeman, 674 P.2d 1318 (Cal. 1984).
42. *See* People v. Solis, 25 Cal. Rptr. 2d 184 (Cal. Ct. App. 1993).
43. MODEL PENAL CODE § 2.02(3) (1985).
44. *Id.* § 2.02(9).

evidence of a higher mental state may always be offered as proof of a lower mental state.[45]

The latter point merits discussion. Because the first part of the course prepares students to think of criminal law from a trial perspective, we often begin our case analysis by constructing the witness examination that gave rise to the issue pressed on appeal. Determining, for example, whether the judge should sustain the prosecution's irrelevance objection to the defendant's testimony regarding his intoxication requires us to examine the jurisdiction's rule on the use of intoxication to disprove mental states. If the jurisdiction follows the prevailing common law rule, then we need to determine whether the crime charged has been or can be defined as a specific or general intent offense. If a general intent offense is charged, the objection must be sustained. If the jurisdiction follows the Code, we know that the evidence would be admissible to disprove purpose or knowledge. But we also know that if the offense charges a crime of recklessness, then the evidence would still be admissible, but subject to a limiting instruction telling the jurors to disregard the defendant's evidence if they find that the defendant would have been aware of the risk if sober. Knowing precisely how the rules operate allows us to move with greater clarity to a consideration of important normative questions.[46]

C. First-Year Appellate Advocacy

Stanford requires all first-year students to take a one-year course on legal research and writing. The second semester is devoted principally to preparing briefs in support of an appellate oral argument. Curriculum B did not change this requirement. However, in the first years that I taught Criminal Law in the B Curriculum there was one change. The Legal Research and Writing course had been associated with a small section of about thirty students taking one of the required first-year courses. With the advent of the B Curriculum, the second semester was attached to my sixty-student Criminal Law section—Criminal Law in the B Curriculum was taught in the spring term.

Because of the students' familiarity with trials, the writing instructors and I decided to embed appellate issues that could be detected through a careful examination of the trial record. Of course, we had to create that record, and that meant drafting the witness examinations in which the claimed errors took place. I no longer recall exactly which issues we built into the trial, but my experience as a defense lawyer and in preparing materials for the clinical course in Advanced Criminal Procedure allowed me to craft the transcript with ease. We selected a case then pending before the California appellate courts

45. *Id.* § 2.02(5).

46. Using the Code also introduces students to the importance of and difficulties encountered in statutory analysis and interpretation.

that presented interesting criminal law issues. Because we did not have access to the actual transcript, I constructed the examinations and trial court rulings. I no longer recall whether the transcript included the opening statements, closing arguments, and jury instructions. I hope that it did, because such a transcript would have given the students a realistic view of a trial. I am sure that we included some erroneous but trivial rulings to test the students' ability to distinguish between serious and unimportant errors. After reviewing the student's preliminary assessment, the professors instructed the students on the issues to be briefed and argued.

The writing instructors reported great success with the assignments. The students especially appreciated the close connection between the writing course and Criminal Law. A side benefit was that the actual crime took place in one of San Francisco's major parks, and the writing instructors were able to take the students to the crime scene.

IV. SOME AFTERTHOUGHTS

Despite strong approval by the students, the B Curriculum ended in 1987. Because I was visiting another school at the time, I was not present at the meeting where the faculty chose to end the experiment. The Lawyering Process course survived and was successfully incorporated as a foundation course for students enrolled in upper-division courses concentrating on representing subordinated populations. But with the departure of the professors who taught in that concentration, the Lawyering Process course, too, disappeared from the curriculum in the mid-1990s.

Only my Criminal Law course survives. Other criminal law professors have not chosen to follow my model. Experience in trying criminal cases, while not indispensable, does help in using a trial approach to teach Criminal Law. I am currently the only criminal law instructor with substantial experience trying criminal cases.

Student response to the course has been mixed. Some years, the student evaluations are almost perfect. Other years, the students rate the course no better than average even though I can perceive no change in the way I teach the course. Each year, some students rate the course as the best they have had. Perhaps, these students find that my approach most closely approximates their expectations of what they thought they would learn in law school—analyzing law from a trial lawyer's perspective. But each year, a small group of students disapproves of the course. It does not take many strong negative evaluations to bring down a course's overall ratings. I cannot tell from the evaluations whether these students dislike my approach, my style of teaching, or my politics. Though I inform the students at the outset about my experience as a defense lawyer, I might not succeed as much as I would like in keeping my biases in check.

The course works well for almost all students, so I intend to continue to offer the course as an alternative to the traditional Criminal Law course. I look forward to reading the articles in this issue by other professors on the methods they employ in teaching Criminal Law. Teaching is a dynamic enterprise and new ways should be considered even when teaching such core courses as Criminal Law.