

# Voices Heard In Jury Argument: Litigation And The Law School Curriculum

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Why does *Hawkins v. McGee*<sup>1</sup> really belong in casebooks? Not, I suggest, because poor young Hawkins—whose doctor botched the operation and left him with a hairy hand—could care less whether the damages for breach of the contract to give him a “like new” hand were a pittance or some fraction of a pittance. Yet this is why *Hawkins* is a favorite in contracts courses. No, the real reason can be found hidden in the notes to the case in the Hamilton, Rau & Weintraub contracts casebook.<sup>2</sup> Hawkins’s lawyer lost his negligence claim because he could not find a medical expert to testify for the plaintiff, so he had to settle for contract damages.

The following tale illustrates what is missing in legal education. My mentor, Edward Bennett Williams, told me of a motion argument he made as a young lawyer. He staggered into the old District of Columbia Court of General Sessions with two books under each arm. (This was before the days of photocopiers, when law books had to be carted to court.) A courthouse habitué, a lawyer whose office was no doubt the telephone booth in the courthouse hall, looked at him disdainfully and intoned, “Throw away those books, boy. Get yourself a witness.”

I am going to talk about facts. I want to gather up some strands of discourse and weave them into an argument that law schools should be doing more teaching about litigation. Just recently, 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

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1. 84 N.H. 114, 146 A. 641 (1929).

2. R. HAMILTON, A. RAU & R. WEINTRAUB, *CASES AND MATERIALS ON CONTRACTS* 5-6 (1984).

shadows on the courthouse wall. The witnesses recount: 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 alone can 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.

Legal ideology, in the form of statements called rules, is more or less flexible depending upon the legal issue at stake and the fineness with which lawgivers have woven. An advocate must appreciate how large are the open spaces in the rules at issue, and have at hand alternative formulations to match the adversary's—and the judge's—moves.<sup>3</sup>

The openness or malleability of legal rules is the essence of traditional law teaching. It was and is the battleground of debate among schools of jurisprudential thought: the fact of "what is" and the postulate of "what ought."<sup>4</sup> Professors struggle in basic courses to give students the skills with which to weave arguments and analyses of where the law might go and of what it might do. In practice, litigators can and do criticize rules from stances within and without the rules' ideological framework. But usually they do so only after they figure out what the rules really mean.

Something is missing from our teaching, and we sense it. Students are weak on analysis of facts, even when the facts come partly predigested in a case file or memorandum assignment. (My colleagues remark on examination performance in a similar vein.) I believe that law schools are turning out students who cannot deal well with facts because the dominant teaching method gives the students no appreciation of how facts are captured and of how their evidences are brought to court. If all we see in the trial process are the shadows of facts in the past, then appellate opinions in the casebooks give us only the trial facts put through a judicial Cuisinart to adorn the judges' opinions.

I have come to this view gradually since joining a law faculty. Several years ago, I taught an appellate practice seminar. In one

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3. Tigar, Book Review, 90 COLUM. L. REV. 255, 256-57 (1990) (reviewing J. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (1988)).

4. See Tigar, *Crime Talk, Rights Talk, and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice*, 65 TEX. L. REV. 101 (1986). A deservedly well-known essay on the distinction is Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

of our cases, the Ninth Circuit had reversed a judgment of dismissal and sent the case back for trial.<sup>5</sup> The defendant, Francisco Martinez, asked me to represent him at the trial.

Martinez, a native of Southern Colorado, received his law degree from Minnesota in 1971 and became a Reginald Heber Smith Fellow in his hometown of Alamosa. As a result of his militant activity on behalf of Chicanos and Native Americans, he was subjected to threats and his office was burned. In 1973, he was indicted on seven counts related to possessing unregistered explosives and mailing letter bombs. Before Martinez was brought to trial, however, he left Colorado to live in Mexico under the name Jose Reynoso-Diaz.

On September 3, 1980, Martinez crossed the border at Nogales, Arizona, using his Reynoso-Diaz identity. He was arrested on immigration charges. He told the arresting and processing officers his name was Reynoso-Diaz, and he may have repeated this statement to the magistrate at arraignment. Martinez pleaded guilty to the petty immigration offense and was sentenced to ten days in jail and return to Mexico. The immigration officers checked his fingerprints while he was serving the ten-day sentence. When they discovered that he was wanted in Colorado under the name of Francisco Martinez, he was sent there to face the bombing charges.

Martinez went to trial on three counts.<sup>6</sup> During the trial, the judge suspected that certain individuals were conspiring to intimidate the jurors, so he held a clandestine meeting in his hotel room one night with the prosecutors and several government witnesses.<sup>7</sup> He urged the prosecutors to provoke a motion for a

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5. *United States v. Martinez*, 785 F.2d 663 (9th Cir. 1986), *appeal after remand*, 837 F.2d 900 (9th Cir.), *opinion superseded by* 855 F.2d 621 (9th Cir. 1988). The court of appeals panel in the initial opinion had little doubt that Martinez was guilty. However, in the later opinion, the jury found otherwise on two of three counts, and the court of appeals found insufficient evidence on the third count.

6. *See United States v. Martinez*, 667 F.2d 886 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982). In January 1981, the district court severed four of the original seven counts. Martinez went to trial on three unsevered counts, one alleging conspiracy and the other two alleging possession of explosives and mailing of explosives.

7. *Id.* at 888. The judge believed that certain spectators, sympathetic to the defendant, were conspiring to create an atmosphere of intimidation in the courtroom. His reason for not inviting defense counsel to the meeting was his suspicion that one of the defense counsel might be involved in the conspiracy to intimidate the jury. *Id.* The Tenth Circuit found the judge's "belief" to be totally unfounded. *Id.* at 890 n.6.

mistrial from the defense. The prosecutors obliged and the judge granted the motion. Unfortunately for the judge and the prosecutors, the meeting did not remain secret, and, on appeal, the Tenth Circuit held that the prosecutors could not retry Martinez on the first three charges.<sup>8</sup>

Martinez was tried in Colorado for a second incident of mailing a letter bomb, and the jury acquitted him. The government then charged him with mailing a third alleged letter bomb, but the district court eventually dismissed the charge on motion of the government.<sup>9</sup> Two weeks after the third case was dismissed, the government brought the Arizona indictment, charging that Martinez's use of the name Jose Reynoso-Diaz was a false statement when made to government agents and a perjury when repeated to the magistrate. The district court dismissed the indictment as a vindictive prosecution, and my seminar unsuccessfully fought the government's appeal in the Ninth Circuit. Now what were we to do?

With the Dean's approval, I took a band of five law students to Tucson for the trial. Our defense was to be that Martinez adopted the Reynoso-Diaz identity to live in Mexico until the furor died down in Colorado and he stood a chance of getting a fair trial on charges of which he was innocent. You can characterize this defense as "necessity," but we preferred to speak of lack of criminal intent, since the standard was easier to meet.

As we waited for the prospective jurors to file into the courtroom the morning of trial, the prosecutor moved *in limine* to exclude all references to Martinez's desire to avoid an unfair trial in Colorado; the trial judge granted the motion. My students, who had labored over the legal theories and who had helped prepare the witnesses we were going to use, were aghast.

"Can he do that?" one of them asked.

"Well," I said, "he is a federal judge. He has the only handle on the jack."

"What are we going to do?"

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8. *Id.* at 890. The court of appeals found that since the defense was induced into joining the motion for mistrial by judicial and prosecutorial misconduct, double jeopardy precluded further prosecution on the three charges.

9. *See* Martinez v. Winner, 771 F.2d 424, 433 (10th Cir. 1985), *modified in part and rehearing denied in part*, 778 F.2d 553 (10th Cir. 1985).

“We are going to pick a jury and try this lawsuit. We need jury instructions on the elements of the offenses.” (For this, law school teaching had prepared our band of warriors.) “And we are going to look to the jury and the court like we deserve to win. We will rest right after the government. I will sum up the government’s failure of proof. But more than that, I need to prove from the government’s witnesses that Martinez really lived the Reynoso-Diaz identity, that it was reasonable for him to use that name, and therefore that the name was not ‘false.’ We want jurors who will forgive us for not putting the defendant on the stand. We will hope that the prosecutor undertries his case. I am going to bet he thinks we will put on a defense and that he can come back on cross-examination or rebuttal and fill in the gaps in his proof. We will encourage him in that view.”

We went to trial. During the cross-examination of government witnesses, most of whom were immigration and other law enforcement officers, I brought out facts that we needed to argue. For example, the witnesses testified that Martinez had a Mexican passport in the name Jose Reynoso-Diaz and a Mexican *cartilla militar* and that the United States Embassy in Mexico had issued him an entry visa one year before. These facts bolstered the idea that he was using the Reynoso-Diaz name consistently.

The legal rules at issue in this case were fairly clear: falsity, criminal intent, and hornbook law on using another name. In addition, the defendant had the right not to testify, and the judge would tell that to the jury. I cannot recreate for you the atmosphere in that courtroom. Martinez and I had almost waived a jury, thinking that the judge who had earlier dismissed the indictment would be favorably disposed. His grant of the motion *in limine* was only the first evidence that waiving a jury would have been a major error on our part.

When we rested and the judge told us what instructions he was going to give to the jury, the prosecutor’s confidence rose even higher. My summation was dominated by the theme of jury empowerment, woven into different arguments. I wanted to impress upon the jurors the importance of analyzing the government’s case. I had three major objectives as I stepped before the jurors for the last time. First, I had to gain the jurors’ attention. Second, I had to put forward the facts that bespoke reasonable doubt. Lawyer rhetoric may carry jurors for a half hour of

deliberation, but beyond that jurors need solid arguments on which to rely. An effective summation dredges up pieces of evidence from the trial and little nuggets from the jury instructions and sets them out for jurors to take back to the jury room with them. Third, I had to explain why Martinez did not take the stand.

I have used themes from my summation in an earlier article on jury argument and will not repeat them here.<sup>10</sup> I began something like this:

Members of the jury, the prosecutor summed up to you in so matter-of-fact a tone of voice that it sounded like this case leaves little room for you to wonder. And the interesting thing is that when I get done, and after the prosecutor talks some more, the judge is going to tell you about the law. And he will use that same matter-of-fact tone of voice. Now I do not blame the judge. He sees a lot of trials. It is like the famous English author G.K. Chesterton said about the English judges, "They are not cruel. They just get used to things."

But you and I know that there is something very important and special about this case, and that when all the talking is done you are going to decide the fate and future of this young man, Francisco Martinez.

After two and one-half days of deliberation over evidence that had taken less than two days to put on, the jury acquitted on the two felony counts of making a false statement. They convicted Martinez of perjury, but the prosecutor had failed to introduce any evidence that the alleged falsehoods were material, and the Ninth Circuit reversed on a brief written by my students.<sup>11</sup>

Was this "jury nullification"? I do not think so. The legal rules at issue had enough flexibility that a not guilty verdict is plausible and defensible. One might ask, echoing Dean Mark Yudof's concerns in a recent article, whether a "genuine" but "wrongheaded" voice—mine—had persuaded the jurors to act in a way that diluted legal rules.<sup>12</sup> Again, I doubt it. In my experience, supported by some academic studies, jurors bring to their task a great sense of responsibility that able advocates and careful

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10. See Tigar, *Jury Argument: You, the Facts, and the Law*, LITIGATION, Summer 1988, at 19.

11. In addition, we proved systematic exclusion of Hispanics from federal juries. Although the court of appeals did not address this issue, the district judges in Arizona have changed their system as a result of our challenge and others like it.

12. Yudof, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988).

judges can enhance.<sup>13</sup> Would the trial judge have decided the case differently? You bet. Indeed, those who remember Harry Kalven's and Hans Zeisel's trailblazing work, *The American Jury*,<sup>14</sup> know that juries often acquit when judges would not, although the frequency of this jury behavior varies with the type of offense.

To some commentators, this observed gap between the way that judges and juries typically behave means that juries are more lawless, or less smart, than judges. In terms of ultimate results, trial courts have at their disposal certain legal devices to help ensure that juries' decisions are not totally arbitrary: directed verdicts, j.n.o.v.'s, and new trials are available to judges in all instances except acquittals in criminal cases. But these devices are phrased in terms that leave no doubt that under most circumstances the jury is given a broad range of permissible discretion.<sup>15</sup> This discretion is reinforced by substantive law rules phrased as "good faith," "ordinary prudence," or "meeting of the minds."

Anyone who thinks otherwise should look to the *Texaco, Inc. v. Pennzoil, Co.*<sup>16</sup> jury instructions, which an appellate court has blessed and in which renowned scholars of the law had a significant hand. The jury could find that there was a contract to buy Getty Oil without there having been a formal memorandum containing all the terms. Although the court gave the jury only the most general sort of guidance in its task, that generality was compelled by the flexibility of the Uniform Commercial Code.

Two truths—that most of the rules governing ordinary litigation are flexible and that the jury has discretion—are significant because these two issues make up much of the litigation that most lawyers do. Yet these twin truths are downplayed in most law school curriculums. Why is this so?

Legal commentators offer two possible answers. First, most lawyers are not litigators; second, ninety percent of civil cases and nearly that many criminal cases settle.

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13. See, e.g., Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).

14. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

15. See M. TIGAR, *FEDERAL APPEALS: JURISDICTION & PRACTICE* §§ 5.03, 5.06 (1987).

16. 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), cert. denied, 485 U.S. 994 (1988). Dean Mark Yudof was foremost among the scholars.

I have two responses to these arguments. First, lawyers who only “do deals” and ignore the prospect of litigation do not serve their clients. Lawyers should ask if the file provides a means by which the lawyer can recreate the negotiations should the whole deal wind up in court. A dramatic example of just what can happen in negotiations occurred when the Texaco board of directors met several times to discuss Getty Oil. During these meetings, some directors took notes containing such phrases as “derail this train” and “get Liedtke.”

“These were not,” as I argued during a mock retrial of the case, “the scribblings of Mafia chieftains assembled in the tasteless splendor of a Vegas hotel. No, this all took place in the august and serene precincts of Texaco’s boardroom. These were ‘respectable’ gentlemen. And of course, there might have been more of these traces of intention to interfere had not somebody at Texaco decided to help things along by shredding a batch of vital documents *after* they had been called for by the lawyers on the other side.”

Second, the often-quoted figure—I have used it myself—that ninety percent of civil cases settle is seriously misleading. Settlements do not take place due to sudden outbreaks of lawyer good will. Lawyers settle cases intelligently only if they have evaluated the range of risk of plausible jury verdicts, and this requires having thought the case through. I tell young lawyers that in order to keep in mind the facts and legal theories they know and the ones they need to find, they should write out a draft summation as soon as they are retained on a case.<sup>17</sup>

More significantly, the ninety-percent settlement figure includes cases that are not “true” litigation.<sup>18</sup> United States District Judge John Coughenour has examined his own docket and eliminated such things as student loan cases, in which the court is being used as a collection agency; the spate of Social Security administrative law judge review proceedings provoked by the Reagan administration; meritless prisoner petitions; and civil forfeiture cases, in which the outcome is foreordained but in which there must be a judicial order. Of the cases that remain—the real cases—two-thirds settle and one-third will be tried. Attorneys

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17. See Tigar, *supra* note 3, at 256.

18. Presentation by Judge John Coughenour to the Section of Litigation, American Bar Association (Aug. 3, 1989).



often wait until the conclusion of discovery and dispositive motions before settling—that is, until both sides have constructed litigation models.

Not all cases that are tried will be appealed. Of the cases that are appealed, most will be affirmed, and almost all the jury verdicts that are challenged for want of evidence will be affirmed.

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. The rules help predict a result. But for the lawyer in an office faced with a client sobbing out a story, some other truths make a greater difference.

You must realize that the facts that matter will not announce themselves, either in the office or later in court. A lawyer must find facts 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. Usually you must leave your office to get them. And 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. I say "arguably" admissible because the so-called rules of evidence are themselves overlapping and open textured, and appellate courts give trial judges great deference in applying them.<sup>19</sup>

Only after you have taken this process of searching and analyzing quite some distance will you be able to *apply* legal rules in the sense that traditional law school teaching emphasizes. You will be able to take out your initial draft of a summation and work it over. Only then can you say with Oliver Wendell Holmes that you "know" the law. Indeed, you will be able to say that you have a brighter, better, and surer view of the law than Holmes and most of the legal realists who were his early, summer friends and sunshine admirers. And you will have gained a set of insights about the range of plausible results under ostensibly consistent legal rules that the traditional law school curriculum does not provide.

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19. M. TIGAR, *supra* note 15, §§ 5.05, 5.08.

Most of us know by heart Holmes's most famous aphorism: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."<sup>20</sup> In the same 1897 address, Holmes also paraded his "bad man" theory of the law, arguing that, while legal rules rest on moral principle, the function of the law as such is not to make moral judgments. The rules are erected for a bad man, who keeps his bargains only because state power will make it unpleasant for him not to.

The asserted moral relativism of this position has been castigated. In revisionist circles, there is a lot of Holmes-bashing going on.<sup>21</sup> It is certainly true that viewing rules as disjointed entities apart from their human consequences "can make a stone of the heart."<sup>22</sup> The obvious corollary of Holmes's observation is that if one can be sure the state will not make unpleasant consequences, one is free to act as one pleases. From such a world view comes Carl Sandburg's remark that the hearse horse snickers at the lawyer's funeral.<sup>23</sup> I will return to this theme later. We need more talk about legal ethics in law schools and in less hallowed places.

Holmes's words revive our foreboding that Bentham was right in saying: "It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it."<sup>24</sup> In more ex-

20. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

21. See Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) (arguing that the different elements of Holmes's work come together as pragmatism); Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343 (1984) (reviewing the erosion of Holmes's reputation as a liberal-minded realist). The view of law as morally relativistic fits nicely with the idea that lawyers are entitled to assert their client's "legal" claims by abusing rules that are difficult to enforce, heedless of other consequences. More subversively, if one can be sure that the state will not make unpleasant consequences, one is free to act as one pleases. This freedom in turn leads to discovery abuse in busy courts and "sewer service" in debt actions. See Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847, 848 (1972) (defining "sewer service" as the process whereby false affidavits of service are filed in court). Hence there is the smug confidence that the law will never touch the white collar criminal.

22. W.B. YEATS, *Easter 1916*, in THE COLLECTED POEMS OF W.B. YEATS 179 (1977).

23. Why is there always a secret singing  
When a lawyer cashes in?  
Why does a hearse horse snicker  
Hauling a lawyer away?

C. SANDBURG, *The Lawyers Know Too Much*, in THE COMPLETE POEMS OF CARL SANDBURG 189 (1963).

24. J. BENTHAM, *Truth versus Ashhurst*, in 5 WORKS 231, 235 (1843).

treme form, the critical legal studies view is that judges wear robes because they have nothing on underneath them.

The legal realists, however, made a great deal of Holmes's words.<sup>25</sup> Llewellyn embraced Holmes's theory, 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."<sup>26</sup> In *The Bramble Bush*, Llewellyn was more blunt: "If wishes were horses, then beggars would ride. If rules were results, there would be little need of lawyers."<sup>27</sup> 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."<sup>28</sup>

Llewellyn and the other legal realists had strong views on what the rules should be, but they insisted that you first had to find out what the rules were.<sup>29</sup> Jerome Frank, when he became a judge, often made this distinction as he struggled to apply principles with which he disagreed but that his oath compelled him to respect. "[O]ur private views," he said, ". . . are as irrelevant as our attitudes towards bimetallism or the transmigration of souls."<sup>30</sup>

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;<sup>31</sup> second, legal ideology is more flexible 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.

25. See Vetter, *supra* note 21, at 345-46.

26. Llewellyn, *supra* note 4, at 1241.

27. K. LLEWELLYN, *THE BRAMBLE BUSH* 18 (2d ed. 1951). Were time no object and discursiveness thought a virtue, I would compare—as others have—legal realism and critical legal studies, even to the similarity of academic response to these two movements.

28. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 662 (2d Cir. 1946) (Frank, J., dissenting).

29. See Llewellyn, *supra* note 4, at 1223 ("But there is no reaching a judgment as to whether any specific part of present law does what it ought, until you can first answer what it is doing now.").

30. *Antonelli Fireworks*, 155 F.2d at 666 (Frank, J., dissenting); see also *Skidmore v. Baltimore & O. R. Co.*, 167 F.2d 54 (2d Cir. 1948) (majority opinion written by Judge Frank). In his Harvard article, Llewellyn counts Leon Green among the realists. See Llewellyn, *supra* note 4, at 1226 n.18. Green, of course, thought the jury a malign institution that should be abolished. See L. GREEN, *JUDGE AND JURY* 395-417 (1930). Still he would not have doubted that the study of litigation was important.

31. See, e.g., T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

The realists made us ask which of the many voices that purported to describe 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."<sup>32</sup>

In a provocative essay, Professor Julius Getman has taken this discussion a step further.<sup>33</sup> He asks us to consider the tone of "voices" as well as the words they speak. He tells us of the lawyer's "professional voice," the language of legal argumentation to tribunals. This voice pays the law the compliment of taking its verbal forms seriously. He tells us of "critical voice," which perhaps echoes Llewellyn and Frank. This voice knows that legal rules are not all they seem. "Scholarly voice" ranges wider for its insights, perhaps even to nonlegal disciplines, yet remains objective. "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."<sup>34</sup>

In his essay, Professor Getman tells us of *State v. Williams*,<sup>35</sup> "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."<sup>36</sup> In a law school class discussion of the case, a black female 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 thought was how little law school teaches students about the importance of presenting the client's case in human voice."<sup>37</sup>

Dean Yudof, responding to Professor Getman, sums up his argument this way, "The Indian child is dead, and the parents could have prevented this calamity by ordinary prudence."<sup>38</sup> Dean Yudof

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32. Llewellyn, *supra* note 4, at 1223.

33. See Getman, *Voices*, 66 *Tex. L. Rev.* 577 (1988).

34. *Id.* at 582.

35. 4 *Wash. App.* 908, 484 P.2d 1167 (1971).

36. Getman, *supra* note 33, at 583.

37. *Id.*

38. Yudof, *supra* note 12, at 601.

worries that a “genuine but wrongheaded human voice” might persuade a jury to acquit and thereby weaken the legal principles that deter and punish negligent homicide. He also argues, “The problem is not just to do justice in this particular case by taking account of sympathetic human voices; the problem is to articulate a legal standard that transcends the particular case and to examine the particular circumstances of the defendants within the context of that standard.”<sup>39</sup>

I suggest that Dean Yudof and Professor Getman are debating a closed issue, and that the *Williams* case can help us see why this is so. Professional, critical, scholarly, and human voice all find a place in law teaching today. A diverse faculty contains embodiments of all these voices. In different ways, we give our students the realist’s gift of parsing statutes and appellate opinions to discover the rules and doctrine that lie beneath the rhetoric. We often, although perhaps not often enough, discuss the human consequence of rules. We pull and twist the facts around, compelling our students to confront the 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 Llewellyn’s “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 case about which Dean Yudof and Professor Getman traded words. The *Williams* couple were Native Americans in King County, Washington, which includes Seattle. Mr. Williams was the stepfather of his wife’s child by a former marriage, a seventeen-month-old boy. Mr. Williams had a sixth-grade education; Mrs. Williams had completed eleven grades. They both worked while Mr. Williams’ eighty-five-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

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39. *Id.* at 601-02.

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, therefore, repay one's effort to probe the wisdom of these settled and noncontroversial rules.

The appellate case report does not say whether the Williams 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 appellate court, on its own motion, made such inquiries on its way to affirming the trial court.

If the Williams were suspicious of authority figures like doctors and hospitals before this litigation began, their tableau of alienation now must 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. As Dean Yudof starkly reminds us, the irrefutable core of fact is that the child is dead. It also is irrefutable that the State wants to impose a criminal sanction. However, it is *not* irrefutable that the parents could have prevented that death by ordinary prudence. This conclusion is simply one reached by a trial judge confronted with inadequate advocacy.

The first lesson law students need to learn 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 flexible enough; we can resist Dean Yudof's call to re-examine them. Kalven and Zeisel have told us that the range of jury results in homicide cases is wider than in other offense categories.<sup>40</sup> And while "human voice" surely will find its way into a summation, the advocate cannot get by with an abstract reference to her own world view. Instead, the advocate must evoke the client's and the jurors' human concerns.

I prepared a mock summation for the *Williams* case that emphasizes how one could moderate the Washington negligent homicide law by the use of effective advocacy:

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40. H. KALVEN & H. ZEISEL, *supra* note 14, at 68-75.

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 in which an eighty-five-year-old grandmother, who has great love but sometimes flagging strength, must look 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 in order to make a point. But human voices heard in jury

argument must be designed for twenty-four human ears and disciplined in ways that the realists largely ignored, that Professor Getman has glimpsed, and that critical legal studies commentators have derided.

A colleague, after reading a draft of my mock summation, wondered if it were "an appeal for jury nullification." "No," I say, "and this is the point: the rule itself is so crafted that an acquittal is defensible in a broad range of factual settings." This insight and what it truly means to law and lawyering will not emerge from study of the rule itself or from any imaginable permutation of imagined facts. It emerges only as the rule bursts through the screen of action.

The realists were concerned with small numbers of ears, two for trial courts, six for courts of appeals, on up to eighteen for the Supreme Court of the United States. The realists wanted to know what "courts" would do; they wanted to reform rules and judgments. They paid little attention to juries, and indeed there was dissension within realist ranks as to whether there should be jury trial at all, at least in civil cases.<sup>41</sup>

Professor Getman has given us a taxonomy of voices, but with the exception of a couple of references to clinical education and his own experience, these voices are for professors to use in talking to their colleagues, students, or the practicing bar. The use of all these voices prepares students to talk back to their professors, and in some measure to argue to judges about points of law, but that process is inherently incapable of breaking through the screen of action.

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

The voices heard in jury argument treat legal rules holistically, as part of the social structure, and concretely, as they address the lives of individual people. Legal rules bursting through Llewellyn's screen of action show us the diversity of human experience. While we have not done so well in diversifying the

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41. At least some realists thought jury trial a peculiar institution, and this may have led them to undervalue its importance as an object of study. See *supra* note 30.



federal bench or the courts of general jurisdiction, jury selection law has dramatically changed the picture of litigation from forty years ago. Juries have become more representative. Therefore, preparation for jury advocacy is necessarily a study of many voices. As law schools strive towards diversity in the ranks of students and faculty, they do well to remind themselves of the pressures for diversity in the legal system as a whole.<sup>42</sup>

This point was driven home to me as I reread Lloyd Paul Stryker's classic book, *The Art of Advocacy*,<sup>43</sup> based on a series of fourteen lectures this celebrated advocate delivered at Yale Law School in 1952-53. Styles of advocacy have surely changed, although the core of Stryker's message remains valuable. Still, all of Stryker's examples feature white male advocates, politicians, judges, and (mostly) jurors. Painting a picture of advocacy today demands a more varied palette.

In speaking of voices heard in jury argument, I am neither urging that law schools jettison the traditional curriculum nor counseling that they embrace the now-dominant 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 or to build their factual and legal arguments with primitive but still-useful tools. Much trial advocacy teaching also had 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 shortcomings, cited them as reasons to paint trial advocacy teaching and teachers into a corner of the curriculum.<sup>44</sup>

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42. See Tigar, *Opening Statement: Lawyers, Money, Race, and Gender*, LITIGATION, Fall 1989, at 1.

43. L. STRYKER, *THE ART OF ADVOCACY: A PLEA FOR THE RENAISSANCE OF THE TRIAL LAWYER* (1954).

44. The partial and inadequate approach to teaching litigation may be responsible for the rather negative impressions of the value of such instruction. This means that articles, such as Cramton & Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253 (1979), may not have much to tell us. I must, however, acknowledge the value of Carlson, *Competency and Professionalism in Modern Litigation: The Role of the Law Schools*, 23 GA. L. REV. 689 (1989), which argues for the place of litigation study in the law school curriculum and also takes the view that ethical and historical insight may be deepened by such study. I read the Carlson article at a time when this essay was well along. While Carlson and I agree on certain basic matters, I

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 also would excel in this other realm. But many others will find that learning and listening to voices heard in jury argument, and seeking a voice of one's own, requires different talents. Adding this dimension to the law school curriculum gives a new means by which success can be measured and permits more students to do well at more things.

I am convinced, as Professor Carlson has argued, that litigation insights deepen the meaning of lawyers' ethical and professional responsibilities.<sup>45</sup> Law schools have largely walled off ethics teaching into a separate course; as a consequence, students constantly struggle in their attempts to relate rules to reality. The students' confusion is inevitable if law schools are going to 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, and law schools are now compelled to offer them in order to remain accredited. But if we look at the principal criticisms of lawyer behavior today, it becomes clear that someone is failing somewhere. Lawyers are so anxious to branch out into business enterprises that they ignore the inherent conflicts thus created. From American Bar Association debates over ancillary business activities to suits against Texas lawyers in the wake of bank failures, this behavior cannot be ignored. In addition, representing defendants whose interests may conflict is a continuing and serious concern in criminal litigation. Perhaps the most common causes of lawyer disciplinary referral are ignoring client welfare through delay and failing to explore legal theories of recovery. Lawyer incompetence (by which I mean failure to keep up with developments in the law) has become a subject of major American Bar Association concern as well.

Judging by the amount of ink and noise, lawyer litigation tactics have degenerated seriously. Sanctions against lawyers for meritless pleadings, discovery abuse, and related misconduct have

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attach little significance to the views of Burger and Kaufman, which he discusses. I have a rather different view of the nature and function of legal rules, and I take a somewhat different tack in discussing the significance of ethics, "professionalism," and legal history.

45. See Carlson, *supra* note 44, at 699-712.

increased. Courts and bar associations have responded with codes of lawyer civility.<sup>46</sup> I seriously doubt the wisdom or utility of some remedies that have been proposed, but no one rationally can deny the mounting evidence of these professional lapses. Law schools should not shoulder all the blame for, nor accept the burden of correcting, this situation. But they surely have helped create the problem. We are the ones who introduce students to the two elements of professional judgment about their behavior as lawyers. First, we tell them about the nature and function of legal rules. Second, we describe for them the role of lawyers in putting those rules into practice.

Traditional legal education still is rooted firmly 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 the rule and its application; in the alembic of Socratic discourse, law teachers often boil out human feelings and concerns. On that point, surely, Professor Getman is right. To the extent that this is a dominant theme of legal education, particularly in first-year courses, law schools seem to embrace Holmes's moral relativism. This relativism is, in turn, disempowering in the sense that it denies that rules may be moderated through effective advocacy. I submit that relativism is an inherent flaw of legal education that focuses on rules and doctrine to the exclusion of what lawyers really do and can do.

Traditional legal education is about rule makers and rule givers. Therefore, it cannot give students the sense of being in a "profession." There was a time, and John Fortescue wrote of it in his fifteenth-century treatise, *De Laudibus Legum Angliae*,<sup>47</sup> 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.<sup>48</sup> Expanding law school

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46. See, e.g., *Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988); SUPREME COURT OF TEXAS AND TEXAS COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (Nov. 7, 1989).

47. J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (S. Chrimes rev. ed. 1986) (1st ed. 1545).

48. See Friedman, Gordon, Pirie & Whatley, *Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555 (1989); Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1 (1988).

teaching to embrace the sense of "lawyering" as a profession is indispensable.

Most tellingly, the resolution of ethical problems is best studied 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, what it means to have that single-minded devotion to a client's cause of which Lord Brougham spoke:

"I once before," he said, "took leave to remind Your Lordships—which was unnecessary, but there are many whom it may be needful to remind—that an advocate by the sacred duty which he owes his client knows, in the discharge of that office, but one person in the world, *that client and none other*. To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties."<sup>49</sup>

Perhaps it is a myth that people can make and exercise 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.<sup>50</sup>

You cannot decide to delve for the fossil remains of facts without a sense—whether right or wrong—of the limits of advocacy. Have you an honorable cast of mind or a paper-shredder mentality? My first week in Washington, D.C., Edward Bennett Williams told me, "All the canons of ethics can be boiled down to one: When things are tough, and it looks like somebody is going to jail, make sure it's your client."<sup>51</sup> I do not think I could

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49. This famous statement continues. It is reprinted in full in L. STRYKER, *The Trial of Queen Caroline*, in 2 THE WORLD OF LAW: THE LAW AS LITERATURE 176, 210 (E. London ed. 1960). My own views were set out in a trial discussed in DISORDER IN THE COURT 147-48 (N. Dorsen & L. Friedman eds. 1973).

50. I do not mean to endorse the artificial idea of autonomy expressed in *United States v. Martinez*, 883 F.2d 750, 761 (9th Cir. 1989). For thoughts in line with my own, see *id.* at 761-74 (Reinhardt, J., dissenting) (citing Tigar, *Foreword—Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 16 (1970)).

51. Edward Bennett Williams's view of the legal profession is set out in E. WILLIAMS, *ONE MAN'S FREEDOM* (1962).

fully appreciate that aphorism outside the context of lawyers in litigation.

There is a practical side to this. You, the lawyer, are always being looked at by the jury. You cannot 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 suffers the consequences.<sup>52</sup>

Ethics dead and in books are artifacts. The only ethics that matter are ethics alive<sup>53</sup> and in use. The only way to make ethics live is to recreate for students what lawyers do and what choices lawyers make. What will be the portion of legal ideology, expressed as rules, that you invoke for your client's protection? What theories of the case will you pursue? With what diligence will you seek them out?

In the end, of course, adherence to these rules will either be a matter of internal compulsion or will have little if any meaning. Discovery abuse, misuse of client confidences, leaning on witnesses, and even shredding the occasional document are largely invisible because the courts and bar associations—from surfeit of work or absence of concern—are doing so little about them. Holmes's bad man theory arises once again: If the only principled basis for obeying rules is to avoid unpleasant consequences, then ethical rules mean nothing and one can argue with a straight face that one is free to act as one pleases.

Teaching ethics alive in the work of lawyers gives students a deeper sense of the adversary system's built-in correctives. Perhaps the bar association will not intervene, or the judge's discovery docket may be too crowded to provide relief from Punic Wars deposition tactics. Unearthing and combatting an opponent's unprofessional conduct is a lesson learned early in the study of what lawyers do, and arguing the inferences to be drawn from spoliation is one of the things voices in jury argument do well.<sup>54</sup>

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52. See Tigar, *supra* note 42, at 1.

53. B. DUNHAM, *ETHICS DEAD AND ALIVE* (1971).

54. Along this line, I moderated a program entitled *Dealing with the S.O.B. Litigator* in 1989, available on videotape from the Consortium for Professional Education Videolaw Seminars of the American Bar Association. This program addresses the problem of unprofessional conduct. For similar discussions in the evidentiary context, see 2 J. WIGMORE, *EVIDENCE* § 278 (J. Chadbourn rev. ed. 1979) ("[A] party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence

This is a truer response to ethical obligation than simply answering the current calls for professionalism. It unites specific principles with the legal and professional ideology of which they form the most important part. One may believe or not that the state and its legal ideology are neutral. But few people, whatever their jurisprudential outlook, doubt that the maintenance of lawyer independence holds some promise that the state will obey such promises of freedom and fairness as its ideology may contain.

The ideology of which these professional rules are a part is the product of specific social struggles in which lawyers have participated. The ideology cannot be understood well and certainly cannot make a coherent professional ethos for the lawyer-in-training, without an appreciation of this historical and social context. Professor Ronald Carlson has spoken of the value of tradition, and of the example to be drawn from the "heroic tasks" performed by "litigants and their lawyers."<sup>55</sup> I have tested the proportions in which clients and lawyers should share the accolades for historical victories in two plays.<sup>56</sup>

Indeed, litigation is the ideal arena in which to confront the legal profession's ideological relativism. Litigators, particularly in cases touching social issues, see and deal with the ethical implications of conduct—including their own—in a special and informative way. Professor Guyora Binder's brilliant essay on Jacques Verges, the French *avocat* who defended Klaus Barbie, the

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by bribery or spoliation, . . . is receivable against him as an indication of his consciousness that his case is weak or [an] unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth or merit."); 2 *id.* § 291 (contents of a document may be inferred from spoliation or suppression); 7 *id.* § 2132 (J. Chadbourne rev. ed. 1978) (opponent's destruction or suppression of a document uniformly held sufficient evidence of execution to go to the jury).

55. Carlson, *supra* note 44, at 715.

56. See *Haymarket: Whose Name the Few Still Say with Tears* (initial performance at Thome Hall, Northwestern University (Oct. 23, 1987)); *The Trial of John Peter Zenger* (initial performance at the Annual Meeting of the American Bar Association (Aug. 10, 1986)). In the *Haymarket* play, Lucy Parsons rebukes Clarence Darrow:

Your lawyer's ego wants you to think you stand at the center of every event by which the world is changed. Your right to stand there is only because some brave soul has risked death or prison in the people's cause and you are called to defend him—or her. When you put law and lawyers at the center of things, you are only getting in the people's way, and doing proxy for the image of the law the state wants us to have. The law is a mask the state puts on when it wants to commit some indecency upon the oppressed.

“Butcher of Lyons,”<sup>57</sup> illustrates this point. Verges had served as counsel to leftist political figures and had authored texts on political case defense. His acceptance of the Barbie case, his courtroom tactics, and his seeming wish to expiate Barbie’s crimes by comparing them to those of imperialist France, raise serious issues for lawyers—especially for those who profess a radical point of view. For Verges to step into a courtroom and defend Barbie requires him to *seem* to accept many assumptions about the judicial system. Which assumptions must a litigator *truly* accept?

Without for now answering this question, I say that the advocate clearly risks trivializing evil by putting it “in context,” or of recapturing Pogo Possum’s unhappy malapropism, “We have met the enemy and he is us.” To litigate means learning to face choices, not necessarily to make them in a certain way.

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 bravura performance of JoAnn Harris prosecuting Reverend Moon, or the wily Malone springing the suffragettes from the red-hot coop of a workhouse in Occoquan. Quietly, and more gently, we walk with Sir Thomas More as he counseled his successor:

“Master Cromwell, you are now entered into the service of a most noble, wise and liberal Prince; if you follow my poor advice, in your counsel-giving unto His Grace, ever tell him what he ought to do, but never what he is able to do. . . . For if a lion knew his own strength, hard were it for any man to rule him.”<sup>58</sup>

I limned the distinction between technical proficiency and commitment to principle in an article I wrote a few years ago:

I tremble for my profession when I see it inundated by suggestions that advocacy can be reduced to a series of formulae about lawyer behavior, divorced from the merits of one’s cases and the ideology of the adversary system. I tremble because such suggestions trivialize the role and social responsibility of lawyers and because the great advocates of this and every other

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57. Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 *YALE L.J.* 1321 (1989).

58. M. TIGAR, *LAW & THE RISE OF CAPITALISM* 194 (1977).

time in recorded history have been students of society and not carnival barkers.<sup>59</sup>

What lawyers do and have done, so far as it merits retelling, helps law students to place themselves in a profession that does more than maximize its income. We are helped by vivid instances in recent memory of lawyers who decided that money was the only goal worth chasing. Some of these lawyers dabbled in investment banking or forgot that public service is not a right to sup at the public trough, and now they live in Club Fed.

I have gone this far without saying much about the perceived crisis in litigator competence. The legal education journals have been full of studies and speeches, referring back to former Chief Justice Burger and former Chief Judge Kaufman's melancholy appraisal of trial lawyer quality.<sup>60</sup> This complaint has been echoed by other judges and lawyers. I think much of the criticism is misplaced, and that the judiciary bears at least as much responsibility for the perceived problems as lawyers do.<sup>61</sup> A federal judiciary that bewails the state of lawyering, but which in the next breath trivializes the constitutional right to effective counsel and forgives the most egregious sort of prosecutorial misconduct, is not the most reliable guide to the ills of legal education in litigation skills.

Helping students learn to listen well, so that each may discover a voice within that will do for jury argument, must justify its place in the law school curriculum on broader terms than "trial competence." Law schools' hurried curricular responses to particular crises have not been notably popular or successful. More significantly, I hope I have shown that the litigator's approach to

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59. Tigar, *Talk-Show Advocacy* (Book Review), *LITIGATION*, Fall 1985, at 61, 62 (reviewing S. HAMLIN, *WHAT MAKES JURIES LISTEN: A COMMUNICATION EXPERT LOOKS AT THE TRIAL* (1985)).

60. See, e.g., Carlson, *supra* note 44; Cramton & Jensen, *supra* note 44.

61. See, e.g., *Darden v. Wainwright*, 477 U.S. 168 (1986) (prosecutor's improper, inflammatory closing argument did not warrant issuance of habeas corpus because defendant was not deprived of fair trial); *United States v. Cronin*, 466 U.S. 648 (1984) (fact that counsel was given only twenty-five days to prepare for trial, that counsel was young and inexperienced in criminal matters, and that charges were complex and serious did not warrant finding of ineffective assistance); *Strickland v. Washington*, 466 U.S. 668 (1984) (standard of "reasonably effective assistance" and restating requirement of prejudice for award of relief from ineffective assistance). Cases such as these trivialize not only the importance of advocacy skills, but also adherence to elementary ethical standards.



legal rules provides valuable professional, scholarly, critical, and human insights into the actual content and action of legal ideology.

I confess that some of this is wistfulness, brought on by looking out at student faces seemingly frozen in attitudes of torpor—for the first canon of trial tactics is alertness. Lloyd Paul Stryker tells of Sir Charles Russell, K.C., rebuking a junior barrister in court:

“What are you doing?”

“Taking a note.”

“What the devil do you mean by saying you are taking a note?”

“Why don’t you watch the case?”<sup>62</sup>

I tell students in South Africa, where there are no jury trials, “Watch his Lordship’s pencil. Even when there is no pencil and no lordship.”

What, then, are our tasks? The University of Texas has an impressive array of litigation offerings. Courses, seminars, intramural and intermural advocacy competitions—all are supported at levels that compare favorably with any law school in America. We must maintain and enhance these endeavors and learn from their successes. I suggest, however, that we must take three further steps.

In the first year of law school, all students must acquire the view of law that comes only from appreciating the litigation process. Some law schools have a course with such a title, for which Professor Anthony Amsterdam has developed extensive materials.<sup>63</sup> This course may put too much pressure on the already overburdened first-year curriculum. I believe that our law school could profitably divide its five-unit Civil Procedure offering into two courses of two and three units. The two-unit Fall course would focus on the voices of litigators and the ears of juries, while tracing the rule-bound structure of the litigation process. The three-unit Spring course would cover personal jurisdiction, *res judicata*, the *Erie*<sup>64</sup> doctrine, and the other parts of civil procedure that more closely resemble the “stuff” of traditional first-year teaching. If we do not identify litigation as the basic substance of civil procedure, we are in danger of falling into the trap that

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62. L. STRYKER, *supra* note 43, at 45-46.

63. A. Amsterdam, *Materials for the Lawyering Program* (Spring 1989) (unpublished manuscript).

64. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

other law schools have dug for themselves. They have a course by that name, to which are assigned people who would rather be teaching constitutional law, and who therefore do so when they think no one is looking.

Were this proposal thought too intrusive, students could be offered a series of lectures discussing the litigation process in addition to their legal research lectures. In five fifty-minute sessions, we might at the very least have a decent claim to supplant the impenetrable prose of *The Bramble Bush* and the dated rhetoric of Lloyd Paul Stryker. As part of this process, and to develop the idea that good lawyers learn to listen well before they try to talk, at least one legal writing assignment should involve a witness interview.

From this modest beginning, we could construct a "litigation track" or group of courses that emphasize not only useful skills, but also the genuine insights into the legal process that litigation provides. Included within these insights is the need of every litigator for a broad general and legal education. Such an approach distinguishes us from those who would uncritically embrace advocacy training as something divorced from the ideological, social, and historical context in which the adversary system has developed.

I would not try to draw a map until I thought there were at least a few who wanted to brave the journey. Above all else, I want legal teaching to convey the excitement of this profession of ours. For me, that excitement has never consisted solely in the desire to learn technique. I have often thought that our profession should forswear its Olympian pretensions, perhaps borrowing Lear's words on seeing the poor and homeless: "O, I have ta'en/ Too little care of this!"<sup>65</sup>

I was once taken to task for my rather old-fashioned and "philosophical" view of litigation training. I replied to my critic, and I say to you in closing, "I was trying to say that in litigation as in love, technical proficiency without passion is not wholly satisfying."<sup>66</sup>

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65. W. Shakespeare, *King Lear*, act III, sc. iv, lines 33-34.

66. Response from Michael E. Tigar to Fred H. Bartlit, Jr., reprinted in *LITIGATION*, Winter 1986, at 62.