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The Art of the Fact

An Afternoon Colloquy in a Tentative Key

by

Jethro K. Lieberman

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Imagine preparing to become a bookbinder. You take a professional course in the history and theory of binding. You examine historic books, study their design, read what others have said about them, see pictures of the tools, even investigate the chemical composition of the boards. But in this course you never actually bind a book. When you finish the course, though, the instructor hands you a piece of paper that says: “Congratulations, you are now a bookbinder.” I imagine you’d ask for your money back.

To our shame, that’s how we teach in the legal academy.

This observation is scarcely original. Fifty years ago, Jerome Frank, perhaps the fiercest critic of the conventional case method, wrote: “If it were not for a tradition which blinds us, would we not consider it ridiculous that . . . law schools confine their students to what they can learn about litigation in books? What would we say of a medical school where students were taught surgery solely from the printed page? No one, if he could do otherwise, would teach the art of playing golf by having the teacher talk about golf to the prospective player and having the latter read a book relating to the subject.”

Frank wanted students to learn by doing, by working in law offices, much as medical students learn by working in hospitals. I propose something much more modest, and therefore more important, because it is at least theoretically possible to accomplish what I aim to suggest and develop, with your help: teaching how to locate, assess, and draw inferences from facts.

A few years ago I concluded that something was drastically wrong with legal education—perhaps we all come to that con-

clusion sooner or later—and, more, I became convinced that I knew the source of the defect: We do not teach or even talk about the one thing on which lawyers spend most of their time, namely, ferreting out the facts. I began to talk about this problem with some of my colleagues, even to the point of hosting a lunchtime colloquium two years ago on teaching facts. I can confidently state that my enthusiasm for my discovery won me no converts.

I then realized that this problem, framed dramatically as "the failure of legal education," would make a dandy chapter in a book I have been claiming to be working on for the past ten years, on the problem of lawyers in America (with my authorial colleague and good friend Tom Goldstein, now dean of the Columbia Journalism School). When the opportunity for this talk arose, I decided finally to take the plunge and to begin to think systematically about this problem of our failure to talk about facts. That way I could give this talk and write a chapter and have two for the cost of one.

Almost as an afterthought, I decided I should make a brief excursion to the library. I'm old enough now to know that most of what I think I have dreamed up has already been voiced by others. So I suppose I should not have been surprised to discover a literature, albeit a small one, about this very problem. It's nearly a century old. It is even denominated by a set of initials, though I think these are perhaps only a few decades old: EPF, evidence, proof, and facts.

EPF appears to have started with John H. Wigmore early in the century. (I suppose I should say early in the 20th century, in case these remarks are actually preserved for another year or two.) Wigmore was, no doubt, reacting to the case method of teaching that by the beginning of World War I had certainly established itself in the American law schools. Wigmore proposed that something more was needed, not merely an analysis of legal rules, even if from original sources, but an analysis of the persuasive power of the facts themselves. Why do we accept a statement as fact? What constitutes sufficient
evidence? What makes a datum relevant to an issue? Wigmore devised a complex symbolism, with flow charts, that permitted the student to map the relationship between facts, and testimony about facts, and the likelihood that one assertion or another was true and "proved" some ultimate fact.²

Wigmore, because he was dean of Northwestern, could mandate that all students take a course in which he taught how to use his symbolic logic to reason with facts and draw inferences from them. When he was no longer dean the course was no longer required, and when he passed from the scene the course was not taught. Episodically during the intervening decades, other voices, some of them powerful, have suggested that Wigmore's idea, or something like it, must be revivified. About a quarter century ago, clinical courses gained a foothold in the legal academy,³ and they may be understood as one answer to Wigmore's call. My clinical colleagues tell me that fact issues are now taught to some degree, certainly more so than in the days when the case method was not merely the supreme method but the sole method of teaching. Clinical courses focus on pretrial litigation, trial advocacy, "skills" courses that teach interviewing (and perhaps negotiation), and various "live-client" clinics and subject-related workshops. These courses are important. But they are expensive and they do not reach very many students. The question I'm posing is whether we can do for the curriculum what research and writing courses have achieved during the past two decades. Can we design a course that will reach every student in the school?

We need to provide this course because the "case-trained lawyer is in danger of having a distorted picture of the world in


which the pathological and the exotic obscure the healthy and the routine." Mariana Hogan, the New York Law School externship director, reports that students sent out to work in law offices around New York City commonly complain that they rarely do the "real work" of lawyers. What do they do instead? Frequently, it seems, they are asked to sort through a file to uncover the facts! Real lawyers, they assume, know otherwise. Two decades ago, a well-known survey of the Chicago bar reported that only two "skills" of the practicing lawyer are really essential: "fact gathering" and "the capacity to marshal facts and order them so that concepts can be applied."

Commenting in the early 1990s on this survey, Abraham P. Ordover noted that what lawyers "do, day in and day out, is investigate, gather, research, assimilate, and understand the relevance of facts. This holds true for responses all across the lines of expertise in the profession. And yet this fact work is, by and large, not taught in our law schools."

Does this inattention to teaching about facts really make a difference? A half century ago perhaps it did not: when law school admissions were relatively low most young graduates received on-the-job training in firms or had the leisure in their own shops to learn it for themselves, and there was much less law. The difficulties that arise when schools ignore fact analysis were less apparent. Today I put it to you that we are verging on a crisis: After they graduate nowadays, law students do not get the personal training that their forebears received. The firms complain about it, the law offices complain about it, and woe betide the new solo practitioner who has no idea how to uncover or make much of the facts.


We call the places in which we work Law Schools. What we really mean is that they are Rules Schools. Law school teachers suppose, probably without thinking deeply on it, that they are masters of teaching “legal analysis.” But what we really teach is “rules analysis,” not all of analysis. And rules analysis, in the final analysis, is only a small part of the enterprise. We do it, I think, because it’s easy to do. We don’t have to get our hands dirty. We don’t have to go out and look very hard for anything. It’s all in the library or on line. We find the rules; we find articles about the rules; we find other people’s comments about how the rules work or not; and we intuit (we call it analyzing) their difficulties. We do not get grimy from researching in the real world.

This was the critique, in part, leveled by the legal realists, but most of them went off in the wrong direction, still worrying, in the end, about rules and what accounts for them and how they are interpreted. The more important question for our students is how the rules are to be used. One of the most prescient of the realists, Jerome Frank, did worry about this question. He described himself as a “fact skeptic,” but very few people have taken him up on the implications of his claims. Law schools, in the realists’ view, ought to be Schools of Legal Problem-Solving, not just Schools of Facts or Schools of Psychology. I agree but suggest that we need not be so much “practice oriented” as “lawyer centered.” I’m not concerned whether we teach the particular narrow technique of brief filing; the mechanics of practice are not the issue. But the theory of practice, as it were, is the issue. How a person carries out a profession ought to be central to our inquiry as teachers in schools. That says nothing about what we should engage in as

*Jerome Frank, Law and the Modern Mind* xi (6th printing, 1963 ed.).

scholars on our own. Individual professors should, of course, feel free to follow the muse, and hats off if they choose to write about economics or sociology or literature and law, or about law simpliciter. But when we consider what we are doing pedagogically we must do more and we must do it differently.

To this point I admit that I have been abstract. What facts? What about facts? We frequently bemoan the state of our students' knowledge about what we might call "college" facts or textbook facts. In constitutional law they demonstrate that they do not know how a bill is enacted or what impeachment means. In corporations, they do not understand the nature of the corporation or the stock it issues. We want students to come to law school with grounding in American government, economics, and history. We'd like them to know some psychology and sociology. Ignorance of these fields hampers efforts to learn many branches of law. But we do not seem to bemoan a more root ignorance: the ignorance of what the facts of the particular case are, or how to find them. At least we know where students can learn history and finance: the story of "history" may be found in textbooks. But there are no textbooks that can give us the "facts" of the cases we discuss beyond the meager statements contained in the casebooks we use. Graduate instruction in history presumably teaches the budding historian how to find the "facts" that will constitute a history: should we not do the same for the budding lawyer?

Consider an analogy to astronomy. We read that the universe is expanding. This "fact" is retailed to lay audiences in newspapers and news magazines when an astronomer discovers a far distant supernova with an unusual red shift. We are not told how the "fact" gets learned. It is not a fact like the fact that my car is parked outdoors, because we cannot observe it directly. Therefore it is a deduced or inferred fact, a conclusion drawn from data. The process of inference isn't given us. It's derived from smudges on a photographic plate, or lines of numbers in a statistical table generated by a computer. Can you imagine not teaching the astronomy student that these are the data bits from
which the inference to “facts” will become known? Yet that’s not how we teach our law students. Instead, we ignore how the data bits are to be found and largely overlook how they drive juries, judges, lawyers, and clients to their conclusions.

These deficiencies deeply affect us. Let me repeat some stories I have heard over the years from a friend who was once the director of a legal clinic at a well-known law school. (He forbids me from naming it.) One year he decided as an experiment to staff the clinic in the evening with well-known professors at this well-known law school. Here is how the professors handled their clients’ cases.

Client 1. The client wanted a divorce. The lawyer-professor grilled her extensively about her husband’s philandering, reducing her to tears. At the debriefing he suggested to my friend, the clinic director, that he had given his client sound advice about how to shape her pleading, by reciting the ample evidence of her husband’s infidelities. Unfortunately, it turned out the professor-lawyer did not know the law of the state in which his law school was located but had in mind instead a 1920s’ statute from a different state to aid him in his interrogation of a 1960s’ problem. He had the law wrong, although he was doing what a lawyer should be doing.

Client 2. The client announced that he had to be halfway across the state the next morning for a court appearance. The professor-lawyer reached into his pocket and handed the client $50 and sent him packing. At a debriefing later that evening, this second professor wanted to know whether the office would refund the $50. He made absolutely no attempt to find out what the client’s underlying legal problem was.

Client 3. The client lived in a building where electricity for her and a neighbor was billed to her on a single meter. She asked the professor-lawyer whether she could be sued if she withheld from her rent the amount of her neighbor’s electricity. The professor said “yes.” That was his whole answer. He did not ask for the landlord’s name or phone number; he had no instinct to call the landlord and say “cut it out.” He did not ask
about what kind of man the landlord was and whether he would cave in to pressure.

What's going on here? We see three characteristic errors of lawyer-professors who do not attend to the real job of solving a client's problem. The first lawyer had the wrong law. Using the right law is what we actually teach in the law schools and his was, of course, an elementary error. The second lawyer did not bother to ask about the problem. He arrogantly assumed that something else was at stake. He did not listen to the client or probe at all. He heard what he wanted to hear. This is a deeper mistake; one that we rarely dwell on in law school. The third lawyer did not derive from the given facts an operational plan. He failed to infer the solution from the factual statement. Here the professor presumably drew some of the facts out properly, but he did not draw them all out, and he did not do anything with them. Instead, he answered like a law school professor. He was not concerned about being a lawyer but about understanding the theory of the case.

The approach of these three lawyer-professors is characteristic, I submit, of the three ways in which we fail to teach about facts. First, we think we teach, though we do not do it well, that the facts we seek will be determined in no small part by the rules that are implicated in the problem. If you have the wrong law, as our first professor-lawyer had, then you will look for the wrong facts. Second, we do not teach students that it will be their job to probe for facts. Except perhaps for the limited enrollment clinical course, we do not explain how students can dig for pertinent facts. Third, we do not teach students that as lawyers they must infer from the facts how to proceed.

How can we teach the art of the fact? How can we go beyond the standard answer that we already teach the art of the fact when we teach, as we claim to do in all our courses, the art of analysis? One answer was given by an experimenter at UCLA in the early 1950s. A 44-hour summer course consisted of the following topics: eyewitness testimony; detection of deception; confessions and interrogation methods; "correlation of proof"
(we are told to read Commonwealth v. Wentzel, 360 Pa. 137, 61 A.2d 309 (1948), to make this clear); investigative accounting; photographic evidence; medico-legal subjects; documents; impressions and moulages; ballistics; fingerprints; spectrographic analysis; blood chemistry; alcohol effect and detection; sound and recording devices; general investigative procedures.9 Now there's a potpourri. That's not what I mean by a course in facts and fact analysis, though some of the items on the list would undoubtedly be considered in any course we might devise. What's wrong with this list? The problem is that it conceives of the problem of facts as a set of specific tasks and techniques rather than as a general issue that cries out for its own analysis.

The issue is the abstraction we call facts that in their concrete manifestation permeate everything that lawyers do. Mastering the art of the fact requires an underlying skill that Irvin C. Rutter, a professor at the University of Cincinnati Law School, in 1961 called the skill of “fact management.” As Rutter described it, various tasks of lawyers do not amount to different skills, but to operations requiring the exercise of the same skill: “In ordering the chaos, the lawyer proceeds by discovering relationships between initially unrelated segments of the picture and then placing these relationships in their further relationship to a total reality, so far as it can be seen.”10 Law, in this sense, is not a separate reality but a part of the total mass of facts, albeit a special kind of facts. . . . It is not a denial of the reality of language as a prime tool of the lawyer to say that with this intimate identification with the facts, the lawyer goes beyond the words in which they have been presented to him, penetrates to the reality behind those words, and emerges with words as he chooses them to describe the reality as he wants others


to see it. Of critical importance in guiding this process of selection and molding is that expertness in relevance to the purpose sought to be achieved, which is the crux of the "art" of being a lawyer.\textsuperscript{11}

Or, as William Twining, one of the most dedicated students of the problem, has put it: "[T]he serious study of reasoning in regard to disputed matters of fact is at least as important and can be at least as intellectually demanding as the study of reasoning in respect of disputed questions of law."\textsuperscript{12}

What, then, might such a course comprise? I tentatively suggest some possibilities, perhaps not ordered particularly usefully. I hope you will help me add to this laundry list and suggest how the laundry list can be transmuted into a complete fashion statement.

First, we must show students how difficult it is to uncover facts, and how testimony about an event is a "fact" of a very different kind. We can do the hoary demonstration, the one that sends someone rushing into the classroom and that asks students to say immediately what they saw. We can also ask the same question a day or a week later. Moreover, we can tape these encounters, and students might even realize the taping is going on. We might wait to see how long it would take for some student to point out that the recollection is unnecessary because a tape has captured it all. Of course then we need to unearth the "facts" from the tape.

Second, we should devise means of permitting students to efficiently extract facts from a situation. The "live-client" clinics do this in an expensive way when each student undertakes to interview a witness. But we can easily provide all sorts of canned records, transcripts of testimony, documents, police reports, and the like, from which the student must sift the relevant and material from the useless and redundant.

\textsuperscript{11}\textit{Id.} (emphasis in the original).

Third, we must force students to analyze the nature of facts and to learn that facts are like animals. They come not only in different species but in different genuses and families. For example, I use a simple exercise in an upperclass writing course in which students are told they are assistants to the mayor of a particular town. One of the mayor’s key assistants has been involved in an automobile accident. The assistant is the head of the Mayor’s Campaign against Drunk Driving, among other things. The students are given a file that consists of transcripts of an investigator’s discussions with each of the witnesses to and victims of the accident; the file also contains several newspaper accounts of the accident. One of the accounts is headlined: “Drinking and Driving?” The Mayor’s instructions are to write a memorandum detailing only the facts. The Mayor specifically instructs that he does not want to read speculation, rumor, and innuendo. Of course, it turns out that the transcripts are full of rumor, speculation, and innuendo. Moreover, the witnesses disagree on virtually everything. The record is, though, definitively devoid of any statements or other evidence that anyone had been drinking. The students have great difficulty writing this memorandum. They usually keep it very short, and predictably write in this form: “Mr. Mayor, Witness 1 says X. Witness 2 says Y,” etc. Over the years, I have discovered that few—less than 10 percent—of the students will tell the mayor that there is no evidence of drinking. When I ask in class after the papers are turned in why the students omitted this information, I am invariably told: “That wasn’t a fact.”

Fourth, we must consider the vastly difficult problem of assessing and evaluating facts. In this same exercise, students almost never tell the mayor that the accident itself was routine, though that is the only conclusion that can be drawn. Again, students resist, saying that a conclusion is not a fact. Why isn’t it? What is a conclusion, if not a fact, although a different kind of fact from, say, the fact that the cars crashed, or the recollection that one car was traveling at 50 miles per hour? This issue is either the same as, or closely related to, the problems of inference and proof. I will not detail those
problems here, but simply point to a current example: How does Microsoft's insistence that Internet Explorer be a part of the Windows operating system “prove” that the company has violated the Sherman Act? What is the connection between individual facts that allow them to be added up to a larger truth? How are inferences drawn? When are they valid? What kind of logic or logics are at work? What is proof, anyway? Is it merely the subjective reaction of the decision maker, so that we may appeal to his emotions to get a result? Or is it something else, and what?

Fifth, we should find better, more direct, and more structured ways of teaching students how the rules they analyze are to be used to extract the facts necessary to make the case, to avoid a bad result, or to accomplish a particular objective.

Sixth, we must persuade students that the facts are not merely irreducible elements of the universe, but shards and flashes of nuance that it is the lawyer's task to assemble into a story that will achieve the client's end? This last problem, I hope you will agree, is what allows us, as writing teachers, to claim this territory for ourselves, and to wrestle with a pedagogy of facts.

* * *

There have been powerful objections lodged against the suggestions that the EPF adherents and I have made. Twining discusses and answers them in his 1984 summary article, “Taking Facts Seriously.” I will not repeat his listing of the arguments and his counterarguments. Most criticisms of a proposed “fact syllabus” boil down to the claim that law schools have no time to teach “soft” skills or notions rooted in common sense that have been learned elsewhere. But these criticisms are almost wholly beside the point: They miss the distinction between a general skill and a particular practical requirement; they underestimate the difficulty inherent in the problem; they radically assume common sense for much that has not yet been investigated; and they assume without evidence that these things have been taught elsewhere. Moreover, the tables can be
turned: After all, isn’t rule handling a matter, ultimately, of common sense? Yet we spend most of three years on rules handling, of detecting, understanding, distinguishing, and applying rules. Why should we do less about fact handling?

To get a flavor of the general objection, consider a short article in 1955 by Jack B. Weinstein, then an associate professor of law at Columbia. He wrote that there was no need of a separate course on facts because this subject was being (or could be) taught in its appropriate place in other courses. Weinstein pointed to three meanings of “facts skills”: (1) “the ability to differentiate between facts which are and are not legally significant”; (2) “the knowledge of how courses of conduct may be planned to shape the material facts”; (3) “an awareness of how evidence of the facts may be gathered and used in litigation.”

On the first point he said: “Teaching a law student brought up on the case method the importance of differentiating the material from the immaterial would seem to be about as unnecessary as teaching an infant the importance of milk. The infant suckles to live, the student reads the facts—and I speak now of what the writer of the opinion says are the facts—and learns their relationship to the law in order to survive at the law school and later.... The case method is uniquely conceived and designed to build a foundation for an understanding of the relationship of facts to law and for skillful handling of facts.”

Weinstein’s fallacy is that it is not the student but the lawyer in the case who had to sort out the immaterial. If the lawyer was at all skillful, immaterial facts would not appear in the case at all. True, the lawyers and judges may debate about the materiality of what remains, but that’s not the whole of it. Weinstein comments: “For myself, if I were satisfied that our

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14Ibid. at 464-465.
students were fully trained to know what to look for in the way of law, and, therefore, in the way of fact, it would be enough.”

That’s a pretty big “therefore.” And, I believe, an illogical one.

On the second point, he said: “Are our law schools doing any good in [the area of teaching how to shape the facts]? To ask the question is almost to answer it. Lives there a student so dense that he leaves the course in contracts without understanding that an agreement must have consideration or equivalent if it is to have the legal effect that, presumably, he wants it to have?”

“What the student learns explicitly and implicitly is that he can control the facts in many cases to minimize the chances of litigation.” The fallacy here is that Weinstein stated an empirical proposition but, dare I say it?, offered neither evidence nor proof. He was content with a rhetorical flourish. At least in our era we might well wonder whether the student knows what the particular “thing” is that constitutes “legal consideration.” Sure, the student knows the rule, and that’s all that Weinstein points to. He avoids the issue of whether one party’s muttered “I’ll try to raise the money” amounts to a binding commitment. The issue for us isn’t whether the student knows that the abstraction “consideration” is required to cause a legal effect but whether the student recognizes the abstraction in the flesh amidst a jumble of bones.

On the third point, he said: “What concerns [many teachers] is the evidence of the facts. Here, as in Plato’s image of the cave, we deal not with the facts, but with the shadows and reflections of the real world. The problem is how to catch the few distorted rays of light available and focus them for the better education of courts and juries.” We might add that such a focus is needed not just for courts and juries, but for all those

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15 Ibid. at 465.

16 Id.

17 Ibid. at 466.

18 Id.
affected by the decisions for action for which a client seeks the lawyer's help. Weinstein says that this teaching is already being done, in civil procedure and evidence courses (and even in torts and contracts). He provides a long list of rhetorical questions, his answers to which are evidently quite different from mine. He asks, for example, "[w]hat does Hickman v. Taylor and its progeny mean to a student if he has no inkling of investigative procedure in large corporations and small?"19 Exactly, I say. We have no way of knowing whether much of what we teach means anything at all. Furthermore, as the rules have exploded in number we spend more and more time on that explosion and less and less, I venture to guess, on the underlying issues.

Now professors may think that they are spending time on fact analysis. But in a candid moment they would likely say that the time is mostly by implication. And they can have no assurance that the implications are being learned. After all, if implicit time is sufficient, why not spend that time implicitly on the rules, and explicitly on something else? Why not just assume knowledge of the rule and ask how a particular problem would come out? We don't because we believe that explicit discussion is imperative. No less should we be spending time explicitly discussing the nature of the facts that constitute the legal problem and its solution.

Weinstein says "to a large extent the burden of teaching the use of facts on trial is . . . on the evidence course. Much of the detail is adverted to during the course. But it is quite true that the evidence teacher does not purport to teach the art of advocacy; rather, he emphasizes the rules and some of their psychological, legal, and social genesthes and implications. An alert student will, however, undoubtedly get a good deal of practical insight from such traditional discussions."20 Why does the student have to be alert? What about those who are not alert?

Weinstein wrote of an evidence exam he gave "which

19Ibid. at 468.

20Ibid. at 469 (emphasis added).
consisted of the rambling story told by a client who had been injured in an automobile accident.” He “asked the class to outline its investigative steps and the impact of the rules of evidence on the way it would prepare for trial and present the evidence expected to be revealed by such investigation. The answers showed a surprising carryover into the practical world.”21 Apparently, not even Weinstein expected the carryover. Just what is it that we are afraid of that precludes law schools from delivering instruction on these issues explicitly?

A single course may not make a difference. But a single course conjoined with a reorientation of other courses might well. My proposal is, I suggest, the exact parallel to our current experience with the teaching of writing. Writing was once, perhaps, supposed to have been taught in the regular courses, or at least absorbed in them. That didn’t work, and almost every law school today has a formal first-year course in writing and research. But we are also hearing calls for “writing across the curriculum”; a single writing course is not enough. For the same reason, we need “facts across the curriculum,” as well as a facts course. Weinstein asked that those who advocate the teaching of facts “continue their earnest efforts to educate the teachers of the usual substantive and procedural courses.”22 We need both, and it is the writing professionals who might best be employed in the task.

I hope readers will join me in this endeavor. We need now a lively discussion about ways and means. What new course might address the art of the fact? What techniques and problems and readings can spread the inquiry across all the courses that law schools offer? How can we initiate the movement toward facts?

21Id. (emphasis added).

22Ibid. at 471.
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THE ART OF THE FACT

by
Jethro K. Lieberman

Every lawyer must learn to uncover, assess, and draw inference from facts, and then assemble them into a compelling narrative. Yet the law schools habitually fail to instruct their students in the art of the fact. This lecture is a plea to rethink this signal failure.