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POSNER ON TEACHING EVIDENCE

By Roger C. Park*

Judge Posner’s essay describes how he teaches an evidence and advocacy course with trial simulations using the National Institute of Trial Advocacy ("NITA") materials. This comment states reservations about imitating his method, and argues that the case method is a good way of teaching the basic evidence course.

I. LEGAL REALISM AND THE SIMULATION METHOD

Judge Posner says that his approach,

[R]eflects a more general view of law that I hold and that is at odds with the view held, I believe largely for career reasons, by most law professors. I am an unrepentant legal pragmatist or if you will, legal realist who believes that doctrine is overemphasized as a determinant of case outcomes.2

Judge Posner is probably right about law professors. Although many law professors are realists or hyperrealists in theory, in classroom teaching we are prone to give a lot of attention to doctrine. However, teaching evidence by simulation would not cure the problem, and might aggravate it.

Many realists have found the case method to be a congenial tool for encouraging a skeptical approach to the study of law and demonstrating the fallacies of formalism. Duxbury even states that “[l]egal realism itself seems largely to have been responsible for the longevity of the case method.”3 The case method keeps us honest, at

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* James Edgar Hervey Professor of Law, University of California, Hastings. I benefitted from the comments of Fred Moss and Roger Kirst, and owe special thanks to Eileen Scallen. I may be prejudiced in favor of the case method because I am co-author of a casebook, JON R. WALTZ & ROGER C. PARK, CASES AND MATERIALS ON EVIDENCE (9th ed. 1999).


least when the cases are chosen in a way that gives an accurate reflection of legal uncertainty. Students pick up lessons of realism in seeing how important situation-sense is to judges in interpreting precedent. I remember my own first year of law school, which was taught exclusively by the case method, as a constant lesson in how abstract statements of legal rules are less useful than we had expected them to be.\(^4\) In fact, one of the reasons why some students find the case method frustrating is that it forces them to face uncertainties of the law in a way that prepackaged texts and annotated codes do not. The case method teacher may find herself responding to students who are disturbed by uncertainty by saying, "the law is not just a mechanical application of rules, judges are reacting to the situation before them" or "I can't make things simpler than they are."

When cases are discarded in favor of fact scenarios and bare statutory materials, students will ask the teacher to become the oracle of evidence law. The ordinary professor would be tempted by the siren song of certainty. Students constantly hope that the professor will stop hiding the ball and state the black-letter principles more clearly. This tempts us to make the law simpler than it is, to state doctrine that solves problems instead of creating them. Good casebooks act as a counterweight, presenting cases with all their doctrinal warts. The case method puts the propensity of law professors to puncture the pretenses of others to work in the cause of realism.

Judge Posner gives a conventional law school exam at the end of his course.\(^5\) He assigns as reading the NITA files of mock cases, the Federal Rules of Evidence, and "some very limited secondary material."\(^6\) If I imitated his approach, I would wonder what else my students were reading. Almost no one learns a code from raw materials, and students frequently prepare for exams by reading outlines and texts recommended by their peers. The popular exam-cramming books tend

\(^4\) For example, my Civil Procedure professor, Paul Bator, used what was then the Field & Kaplan casebook, starting with the *Schlagenhaft* case and proceeding through a series of cases on the concept of transaction and occurrence, whose apparent point was to rid us of exaggerated ideas of the role of abstract legal concepts in determining outcomes.

Evidence casebooks reinforce this lesson even when that is not their main purpose. For example, students realize that the definition of hearsay has fuzzy edges when they reach cases dealing with use of out-of-court statements as circumstantial evidence—for example, *United States v. Zenni*, 492 F. Supp. 464 (E.D. Ky. 1980) and *United States v. Jaramillo-Suarez*, 950 F.2d 1378 (9th Cir. 1991).

\(^5\) Posner, *supra* note 2, at 733.

\(^6\) *Id.* at 732.
to be black-letter guides that cater to the desire for heavy doses of fixed, certain rules. (I suggest that evidence teachers, whatever their teaching method, make a visit to their law school bookstore to see what their students are buying.) In a case method course, one can at least hope that the students will also read the assigned cases and grapple with the problems raised by them.

It may be that I am overemphasizing the question whether simulation instruction inculcates legal realism, and that Judge Posner’s main interest is to avoid personally teaching doctrine. Whatever the rationale, the fact that the method works for him doesn’t mean it will work for others. Law professors who overemphasize the effect of predetermined rules in making evidence decisions will do so when they teach by the simulation method just as much, or more, than they do when teaching by the case method. Students who are given conventional law school exams will study doctrine, if not in the case law, then in texts and commercial outlines that purport to make the doctrine simpler, more consistent, and easier to understand than the raw material presented by the case law.

II. ECONOMICS AS THE UNIFYING FRAMEWORK

Judge Posner plans to add a theory segment to his simulation teaching, and favors an economic approach as providing “a unifying framework in which to draw together the various strands of theoretical (and empirical) reflection on the law of evidence.”7 To add economic theory to the atheoretical simulation experience, he needs to have more time than his current thirty-six hour allotment, though he would not need seventy-two hours.8

I can understand the appeal of economic analysis. No other respectable body of knowledge purports to explain so much and yet could be taught in so little time. But my brand of legal pragmatism is more humble, or perhaps more disjointed. I don’t think that the evidence course needs a synthesizer any more elaborate than Rule 403 itself, along with the guidelines for using it set forth in dictum in the Old Chief case.9 Like Judge Posner, the professor will constantly go back to

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7. Id. at 736.
8. Judge Posner teaches two two-hour classes a week for nine weeks. Id. at 733. He estimates he would need more time than this to add an economics overlay, but not twice as much time. Posner, supra note 2, at 736.
ideas of prejudice, cost, and alternatives, but the apparatus presented in Judge Posner's evidence article is not needed for that.\(^{10}\)

I don't mean to say that the evidence course should be wholly doctrinal. Admittedly, I do think students benefit from some of the standard features of doctrinal analysis, such as interpreting rules in light of rationale and interpreting statutory provisions in light of each other. And I have nothing against fireside policy analysis; all lawyers need practice in that. But the evidence teacher should certainly aim at incorporating a degree of systematic learning from non-law fields. Some possibilities are: character evidence (personality theory), rules 412-415 (feminist theory, criminology), impeachment with prior convictions (informal Bayesianism, psychology), the values behind the Confrontation Clause (history, fireside policy analysis), Daubert issues (scientific method, statistics), and forensic evidence in general (various lessons about probability, e.g., assessing error rates, testimony in Bayesian and frequentist forms, "prosecutor's fallacy," "defense counsel's fallacy," "source probability error," using base rates in arriving at predictive value). Cases will sometimes also raise overtly nondoctrinal issues, such as the utility of expert testimony by psychologists about eyewitness identification. I think it is better to go straight to these bodies of knowledge without a more formal economic overlay.

Judge Posner says that Rule 403 has the centrality of Learned


Judge Posner graciously praises part of my oral presentation at the AALS conference, but takes exception to the way I described his article on an economic approach to evidence law. He writes:

Professor Park suggested yesterday that my article on evidence focuses unduly on the effect of evidence law on behavior outside the courtroom. That is not correct. I touch on that effect, but my focus is on the effect of the law on the trial process itself; hence the centrality of Rule 403 to my analysis.

Posner, *supra* note 2, at 737. Judge Posner has a valid point. For my oral presentation at the conference, I had originally planned to comment on things I liked about his evidence article (e.g., most of its discussion of Blue Bus issues) and things I didn't like (e.g., certain flights of fancy about *ex ante* effects), but I was pressed for time and ended up merely noting the importance of the article, and criticizing some of its speculation about extrinsic effects. This approach may have misled some listeners about the scope of his evidence article. For a fuller statement of my views, see Park, *supra*. Readers who are online may want to click on my one-page description of his article, written for the AALS Newsletter in 1999, at [http://www.law.umich.edu/thayer/parkposn.htm](http://www.law.umich.edu/thayer/parkposn.htm).
Hand's tort law formula. I think he is right, but that he has yet to come up with a formula that is a good substitute for the words of Rule 403. His equation modeling the benefit of evidence would be a headache to teach. Here is the equation, from Judge Posner's article An Economic Approach to the Law of Evidence: \[ B(x) = p(b_1x - b_2x^2)S - c(x). \]

The equation tells us that the net benefit of evidence, \( B(x) \), is equal to the net probability that evidence will help or hurt the search for truth, \( p(b_1x - b_2x^2) \), times the stakes in the case, \( S \), minus the cost of the evidence, \( c(x) \). The help/hurt probability is derived by subtracting harmfulness \( b_2x \) from helpfulness \( b_1x \). The hurtfulness effect is squared on grounds that "the latter effect [confusing or overloading the jury] will increase at an increasing rate with increases in the amount of evidence . . . "

In class, it would take a bit of time just to lay out this formula. If I were to do that, I would be at a loss to answer certain questions about it. Does the hurtful effect of prejudicial evidence really continue to increase at a geometric rate instead of leveling off and becoming cumulative? Is the equation pure metaphor or can actual numbers be inserted? If numbers can be used, why does half a unit of prejudice become a quarter unit, while ten units become a hundred units? \((.5^2 = .25, \text{while } 10^2 = 100)\).

I'd rather just tell students that harm (prejudice, confusion, waste of time) needs to be weighed against probative value, while taking into account alternative ways of proving the proposition. This words-only guideline is not as obvious as it seems, and it applies whether one is considering the admissibility of an emotional videotape or the admissibility of an out-of-court statement purportedly offered to throw light on subsequent conduct.

III. PRACTICAL TEACHING ISSUES

To some extent, the lively and talented performances that Judge Posner has observed in his simulation class may be due to the Posner Factor, a combination of student self-selection and observer effect. If I were a student at the University of Chicago Law School, I would

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11. Judge Posner does not say that he plans to use this equation in class, but equations do play a significant role in his evidence article, so I assume he would at least consider using this way of elaborating on Rule 403.

hesitate to take Judge Posner's thirty-student course unless I were prepared to work hard and was confident of my abilities. And if I got into his course, I would do my best to shine, even if it meant studying a little less in my other courses.

I do, however, think that other teachers would see an increase in liveliness and effort if they adopted his approach. The NITA materials are well done. Students using them easily see the relevance of what they are doing to their professional aspirations, and view their class performance as a predictor of how well they will do in practice. In contrast, in the large Socratic method class, the chance of being called upon to perform on any particular day is relatively small, the role of preparation in ensuring good performance uncertain, and the connection between good performance in class roles and in lawyer roles debatable.

I've also used NITA materials to teach Trial Advocacy and Evidence, and I can confirm Judge Posner's observation that classes were livelier. Admittedly, my classes were not quite as electric as Judge Posner's. None of my students ever cried on the stand, while it is not unusual for his students to do so when playing the role of a plaintiff or a member of a plaintiff's family. So my guess is that the Posner Factor adds something. But my students also turned in good performances.

Despite the advantage of livelier classes, I don't think that the trial simulation method should become the standard way of teaching the basic evidence course. In fact, after teaching the basic evidence course several different ways (with trial simulations, with the case method, with different versions of the problem method, and even with a computer-aided self-instruction frequent-exam method), I've become quite happy using a version of the case method for my basic evidence course.

One reason is that the case method works for large classes. Judge Posner limits his class to thirty students, and for good reason. With a larger class, it would be harder for every student to do a substantial performance. Worse, the students who were not performing would be detached from the enterprise while others were doing the motion in limine assignments that Judge Posner uses. If students are bored by short hypotheticals, surely they will be even more bored by hearing other students argue motions for which the participants have prepared

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13. I taught trial advocacy at the University of Minnesota for several years using NITA materials. I also taught a combined evidence-trial advocacy course using the materials and McCormick on Evidence.

extensively, but the listeners have prepared minimally or not at all. In contrast, in a large class taught by the dialogue method, students have a realistic opportunity to participate in almost every class and an equal chance to participate vicariously.

In the school at which I teach, almost every student takes the evidence course, even though it is not a required course. Typically, my evidence class has about 100 students. If I am right in thinking that the trial simulation method would not work well in that large a class, then an economic approach to teaching method would call for comparing the benefit of reducing class size in the evidence course to the benefit of reducing it in other courses. In the litigation area alone, there are other courses that have a stronger claim to small-class status than the basic evidence course. The trial simulation method simulates what is becoming an increasingly rare activity for lawyers (participating in full-blown trials). This form of simulation should not be given a higher claim to small-class resources than courses that involve more common lawyer activities (e.g., pretrial practice, negotiation, mediation), especially where the course cannot feasibly be taught in a large class (e.g., clinical courses with real clients).

A variety of the trial simulation approach could be used in a large class. Witness testimony could be simulated, and students could call out objections. I do that two or three times in my own large-class evidence course, and it makes a nice change. It is not, however, a cure-all. The reason is that stand-up-and object exercises, particularly if they are performed naturalistically by having students frame questions, lead to spending too much time on trivial objections to form. Since these objections rarely result in exclusion of evidence (because questions can be rephrased) or reversal on appeal (because error is harmless), they are of limited practical importance and barren of theoretical interest. For more complicated problems, such as the exclusion of hearsay, constant use of trial simulation exercises is awkward and time-consuming. For example, when hearsay evidence is offered, the judge normally needs to know the contents of the out-of-court statement in order to rule, but the jury should not know its contents until the judge has determined that it is admissible. Going through the process of objection, sidebar, offer of

15. See Hope Viner Samborn, The Vanishing Trial, A.B.A. J. 24, 24, October 2002. The proportion of federal civil cases resolved after either bench or jury trial dropped from 10% in 1970 to 2.2% in 2001, and that there is a similar trend in the state courts. Id. In federal criminal cases, 85% of defendants in 2001 pled guilty and waived trial, compared to a low of 62% in the 1970s. Id.
proof, ruling, and re-asking the question is cumbersome. Nor is it obvious what students get out of reiterations of "Did you then have a conversation with X," and "What did X say?" Finally, trying to put everything into the simulated-case format can be awkward, because the fictional cases have to be twisted if they are going to raise a spectrum of hearsay points. It is better to ask fifteen hearsay hypotheticals than use a transcript that attempts to cram fifteen hearsay problems into one "case."

Of course, a milder form of simulation can be built into any Socratic method class, simply by framing a hypothetical as a trial problem and asking the student whether they would object to the evidence (or sustain an objection if they were the judge). Some of the flavor of a real trial is lost, but less time is wasted on reiterations of trial formalities. Also, an in-depth discussion of interpretive issues is possible, without having to jump in and out of a fictional trial.

For many evidence issues, it is awkward to use a trial objection format, and presenting the issues this way does not mimic reality. Consider issues involving prior convictions, privileges, and screening under Daubert. Important issues of this nature are usually handled before trial or in separate hearings during trial. The solution, of course, is to simulate motions in limine, as Judge Posner does, but in a large class this would raise the boredom problem he tries to avoid, as students do not feel very involved when they watch another student doing an extended argument.

Finally, not all evidence law problems arise in the courtroom. Lawyers also plan how to argue for and against the admissibility of evidence. Ordinary class discussion simulates this activity, sometimes fairly realistically.

The trial simulation method, like the problem method to which Judge Posner gives a more tepid endorsement, carries a bit of excess baggage, which is that students have to keep track of the hypothesized facts, sometimes-complicated constellations of them, in order to perform effectively. In using the case method, I often strive for hypotheticals whose facts are short and simple, so that students can grasp them easily and focus on issues of policy and interpretation.

If an instructor using the trial simulation method tries to fit all of the evidence issues into one or two mock cases, realism is lost in another way. The facts of the fictional cases have to be constructed so that they will raise disparate evidence issues, and this can make those cases less realistic. By contrast, the case method affords the luxury of
being able to move from a corporate tax case to a drug conspiracy to a medical malpractice action in the same class hour, putting the evidence issues in factual contexts in which they more often arise naturalistically.

It would be hypocritical of me to get carried away in criticizing Judge Posner's method, because I teach a course, listed in the catalogue as Trial Objections, in which students also perform courtroom roles and argue motions in limine. It is a practical evidence course designed as a bridge between the large-class basic evidence course and the trial advocacy. Enrollment is limited to sixteen students who have already taken the basic evidence course. Students start by doing on-your-feet objections, progress to short exercises in which they argue about the admissibility of exhibits, and then argue a major motion in limine, usually one that involves expert or scientific evidence. I use class materials specifically designed for the course. Students are graded on written and oral performance; there is no final exam. There is nothing I can point to about my course that shows it to be better than the one Judge Posner now teaches. I like teaching the course and it finds a market among students who intend to specialize in trial work. But I don't think it would be a feasible substitute for the basic evidence course.

The basic evidence course will probably continue to be taught in large classes, using casebooks and problem books, with only occasional trial simulations. Judge Posner's second choice, after the simulation method he now uses, would apparently be the problem method.¹⁶

I'm not sure I know exactly what the difference between the "case method" and the "problem method" is. But let me briefly comment on two possible differences: (1) case method teachers require the students to read actual cases and then ask questions about those cases in class, whereas problem method teachers, to a greater degree, require students to read text and fictional fact scenarios, and ask questions about the fact scenarios, and/or (2) case method teachers use oral questions and hypotheticals that are not revealed to the students ahead of time, whereas problem method teachers more often use pre-set problems.

¹⁶. "[L]et me acknowledge that a modern problem-oriented evidence course with dollops of theoretical materials may do the trick as well as the kind of expanded clinical course that I envisage. But I have my doubts, because problems don't give the student a sense of a trial as a distinctive, organic whole." Posner, supra note 2, at 736.
A. On Assigning and Using Case Opinions

In comparing the methods, I’ll start by noting that cases are problems. Not only are they problems with a full factual context, but also they are problems based on events that actually occurred (or at least were determined to have occurred). The fact-not-fiction aspect of case law gives students more incentive to pay attention to the facts and makes the facts more memorable. Furthermore, the facts in a casebook serve double duty. Like the facts in a problem book, they provide a background context that gives a realistic flavor to evidence issues. But they are also legal precedent. When students learn the facts of the Upjohn case and its result, they are learning the precedent established by the Upjohn case. Doctrine isn’t everything, but it is something. The cases students study can become a part of their common vocabulary, something they come back to later in their careers. Finally, cases are raw materials, and there is some advantage in training students to use raw materials rather than pre-digested text.

The professor who uses a casebook doesn’t have to use a Kingsfield-like case method. I rarely ask my students to state the holding of a case or to distinguish two cases. Sometimes I state the facts myself and ask students to argue for admission or exclusion of the evidence. Sometimes I note that the case was not decided under the Federal Rules of Evidence and ask how a case with the same facts should be decided in a Federal Rules jurisdiction. Often, I pose hypotheticals that are variations on the case facts. I really fail to see how this is very different from the problem method, except that the basic core of facts comes from a case report.

B. On Using Oral Hypotheticals

First, it is doubtful that anyone uses either all oral questions or all pre-set problems. Casebooks, like problem books, include questions for students to study before class, and problem method teachers ask questions not included in the materials assigned, just as case method teachers do. But I will assume, for the purpose of creating some difference between the two methods, that problem method teachers are more prone to using pre-set questions than are case method teachers, with the latter being more prone to using oral hypotheticals.

Each has its advantages. Pre-set problems allow time for thought and use of a richer factual context. Oral class hypotheticals are fresher. Problems can get stale, both for students and professors. Canned
answers may even appear in the electronic outlines passed from class to class, just as canned case briefs appear in commercial outlines. The element of surprise inherent in oral hypotheticals calls for trial-like skill in applying knowledge to new situations on the fly, though it can also slow down class discussion and cause anxiety.

I believe that the learning experience of students depends mainly on their own motivations and abilities, and secondarily on the talent and dedication of the teacher. Course materials help when they are done well. If the course materials fit the teacher’s style and are prepared with skill and care, it matters little whether they are “case method” or “problem method” materials.