Clinical Realism: Simulated Hearings Based on Actual Events in Students' Lives

Samuel R. Gross
University of Michigan Law School, srgross@umich.edu

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Clinical Realism: Simulated Hearings Based on Actual Events in Students' Lives

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This essay describes a novel clinical format, a simulation course that is based on students' testimony about actual events in their own lives. The two main purposes of the course, however, are not novel. First, I aim to teach the students to be effective trial lawyers by instructing them in the techniques of direct examination and cross-examination and by making them sensitive to the roles of the other courtroom players: the witness, the judge, and the jury. Second, I hope to encourage the students to think about the social and ethical consequences of our method of trying lawsuits.

Traditionally, clinical law exercises come in two distinct formats: those that employ real cases and those that use simulations. There is, of course, enormous variation within each type. A "real case" can be the routine filing of a homestead exemption or a ten-year-long test-case battle. A law student working on a real case might be the sole representative of the party or one of dozens of privates in a small legal army. A "simulation" can be anything from an unprepared fifteen-minute interview to a two-day trial that is the culmination of a semester of work and preoccupation. Despite this range, the line between the two categories seems clear. "Real cases" have outcomes that determine the interests of real clients; they are driven (or ought to be) by the interests of the clients, and their timing is set primarily to suit the convenience of the parties and of the court or agency involved. "Simulations" have no significant consequences except to the students and their instructors; they are driven (or ought to be) by the interests of the class, and their timing is designed to fit the calendar and the pedagogical goals of the course.

Each method has adherents, and the arguments on each side are undoubtedly familiar. The advocates of real cases say that even "[a]t best, simulated litigation offers verisimilitude rather than verity"1 and that some of the most important components of the practice of law cannot be reproduced at all: the responsibility of the lawyer to the client, the unpredictable emotions of parties and witnesses, the surprising malleability of human memory, etc. As a result, simulations provide a distorted image
of litigation. Because they include no witnesses with real memories and no parties with actual interests, they inevitably overemphasize the game-like aspects of litigation and teach students that truth is unimportant or nonexistent and that accommodation and reconciliation are boring.\(^2\)

The advocates of simulation, however, argue that in practice real-life clinics are limited, expensive, and unreliable. Students can be given primary responsibility for simple, routine cases, but focusing on such “small” cases limits the range and the depth of the learning experience. Worse, small cases are notoriously unpredictable. As often as not, trials are postponed beyond the end of the semester, clients disappear, claims settle, and the students never get a chance to try their wings.\(^3\) Larger cases, in contrast, often include novel and challenging intellectual issues. They are also generally more predictable, but only in the sense that they predictably outlast the tenure of any particular law school class. Students cannot be given substantial responsibility for such cases, and any individual student is likely to become acquainted with no more than a small happenstance portion of the entire history of a big case.\(^4\) Simulated cases, however, can be designed to fit educational goals, and to start after the beginning of the term and end before finals. More important, students can be given complete responsibility for even the most complex simulated problems, because only they stand to lose by their errors, and not badly at that.

Both sets of criticisms appear to be correct. Indeed, because the range of quality within each category is greater than any possible overall difference between them, I see no general reason to prefer one bundle of advantages and disadvantages to the other. Nor are the two approaches mutually exclusive; most real-case clinics include some simulated instruction, and some teachers try to give equal weight to both elements.\(^5\) From what little I have seen, however, it seems to me that elaborate and sophisticated clinical simulations cannot even be attempted with real cases waiting in the wings, and that, under any circumstances, the real always tends to undercut the make-believe.

My own experience in clinical teaching is entirely with simulated cases, but the cases are in one respect unusual. Unlike most other clinical simulations, mine include no scripted witnesses. In one form or another, I have always devised exercises that make use of the actual memories and experiences of the people whose role it is to testify.

The course in which I first tried out this format focused on the use of expert testimony. The hearings—change of venue motions and motions to suppress identification in simulated felony prosecutions—were based on

\(^{2.}\) Kenney Hegland, Moral Dilemmas in Teaching Trial Advocacy, 32 J. Legal Educ. 69, 73–81 (1982); Steven Lubet, What We Should Teach (But Don’t) When We Teach Trial Advocacy, 37 J. Legal Educ. 123 (1987).


\(^{5.}\) See, e.g., Meltsner & Schrag, supra note 3, at 592–96.
files of actual criminal cases. The experts who testified (psychologists, sociologists, and statisticians) were people who were (or soon would be) qualified to testify in real cases. Their testimony was based on documents and other information that was similar to material they might receive in preparation for actual pretrial hearings; their relationship to the issues and the attorneys was very similar to that of experts who testify in real courts.

The course on which I intend to focus—somewhat arbitrarily titled Evidence Workshop—differs from the expert witness course in several ways. It focuses on the testimony of ordinary lay witnesses—the students in the class themselves. It is a far less taxing course. In some respects it is less predictable. Evidence Workshop does, however, preserve the central structural feature of the earlier course: simulated litigation with witnesses who testify from their own actual knowledge and experience. This format captures many of the virtues of instruction with real cases, while preserving the control and the freedom that are only possible with simulations.

I have taught the course three times, once at Stanford and twice at the University of Michigan. It has been a success at both schools. For a clinical course, it is relatively easy to stage. It is a ten-student seminar that requires one instructor, the use of a moot courtroom, and video equipment and personnel adequate for split-screen taping of two people at one time. It takes relatively little of the instructor's or the students' time (as clinical courses go)—on each side, about as much as a substantial lecture course. The format is both economical and uncommonly useful for clinical teaching.

I. The Structure of the Course

The course has three main features. First, it centers on a series of courtroom simulations (ten in all), each of which consists of a vignette from a trial or hearing: the testimony of a single witness on direct and cross-examination, based on some actual experience of the person in that role. The simulations are open-ended and range in length from half an hour to more than an hour and a half. Second, all roles in the simulations—direct examiner, cross examiner, witness, judge, and jury—are played by students in the course; each student occupies each of the speaking roles once and sits in the jury box the rest of the time. Third, each simulation is reviewed by the entire class, once in court immediately after the hearing and then again several days later, in class, with the help of videotapes. How these elements fit together should become apparent in the following discussion of the exercises.

A. Devising the Simulations

1. Finding Appropriate Experiences for Student Testimony

The central problem in teaching the course is to find an experience in the life of each student that will serve as the basis for a simulation. What I look for is an event that the student participated in or witnessed that might
have become the subject of litigation. In one of the twenty-nine simulations I have organized so far, the student had in fact testified about the event in court (he was the complaining witness in a criminal prosecution for assault and battery); in a few others, it would not have been surprising if the story had ended up in court. For the most part, however, the events held no realistic potential for litigation—typically because the stakes were too small.

To make the simulated litigation more plausible, I frequently alter facts. Thus, if the student has witnessed a potentially serious accident that did not actually result in significant injuries—a seeing-eye dog of questionable disposition knocked down a baby on hard pavement, an amusement park boat went down a water ride the wrong way—I will assume that the victim of the mishap was injured, but in a manner that would not have been apparent to the observer. However, because one of the major objectives of the exercise is to work with the student witness's own memories, I never change facts to which the witness could actually testify. In particular, I am careful not to alter the dates of events; if something happened five years ago, that is how it will be described in testimony. Most gaps of this sort are within the range of delay that is common in American litigation; occasionally, however, it helps to devise an explanation. In one criminal case, for example, I explained a seven-year delay between the alleged crime (drug dealing) and the simulated trial by assuming that although the defendant had been indicted promptly, he had fled and was only arrested within the year preceding the exercise.

The process of finding testimonial events is the single most challenging task I face as instructor. The basic method, of course, is to interview each student and ask about his or her past. In the interviews, I look for experiences that meet three criteria: (1) the student must have done or seen something that could have been of significant importance in a plausible lawsuit; (2) the testimony that the student could present must be of reasonable scope—roughly between fifteen minutes and one hour on direct examination; (3) there must be some basis for impeaching the witness. Thus, for example, I could not use the evidence of a student who happened to see a man shot by a gunman in a passing truck, apparently as part of a gang war, because he could not identify the killers, and contested identification of an absent person would not work in these exercises in any event. If the murder had come to trial, this student's testimony about the time, place, and manner of the shooting might have been extremely important, but it would not have been open to any realistic challenge.

The interviews that uncover the students' experiences are open-ended events. The students are told about the structure of the simulated hearings before the semester begins, first in the course description and then by memo. At the first class meeting, I expand on the descriptions and talk about the interviewing process through which the problems are designed. I ask them to try to remember events in their lives that might be appropriate for testimony, and I mention types of incidents that have worked in the past: automobile accidents, other accidents, assaults, employment discrimination, etc. I then schedule individual meetings with the students, which last anywhere from half an hour to an hour and a half.
About half the students come prepared with one or more perfectly suitable vignettes. Most of the rest remember an equally usable event after some probing. I go through their adult lives stage by stage, asking questions that might lead to something useful: Where did you work that summer? Did you get into any disputes with your employer? Did anybody else who worked there? Where did you live? Did you have any problems with your landlord? And so forth. Once or twice a semester the initial interview fails and a follow-up interview does not solve the problem. When that happens I swallow my anxiety, schedule the student to testify late in the semester, and put the problem off until a second set of interviews three or four weeks before his or her appearance as a witness. So far, this delaying tactic has been successful—perhaps because the experience of seeing the first several hearings has jogged the students' memories or stimulated my inquisitorial imagination.

One special danger is the possibility of invading the students' privacy. Litigation, as we know, tends to focus on unpleasant events—accidents, fights, family disputes, misunderstandings, frauds, crimes—a catalogue of misconduct, failure, and abuse. It can be very unpleasant for some students to be interviewed—much less to testify—about some of the foolish, illegal, or embarrassing things that they have done or that others have done to them. Fortunately, this does not apply to a large range of litigable events. Most students are perfectly happy to talk about common failures and crises: being tricked by a salesman, for example, or rear-ending another car at rush hour. In fact, the experience of testifying in public about one's own stupidity is one of the peculiar values that the course can confer: many (perhaps most) witnesses learn what it feels like, but few lawyers have shared their predicament. Some obvious subjects for realistic testimony, however, are extremely painful for the students involved—their parents' divorce or the death of a sibling, for example—and talking publicly about other incidents, such as drug use in college, can also pose a real risk of self-incrimination.

I did not foresee this problem. I learned about it the first time I taught the course, when a student was upset by the interview I conducted (although not by the testimony she ultimately gave). Since then, I have taken great pains to avoid the danger. I describe the probing nature of the interviews at the initial class meeting, warn the students that this is a potentially intrusive process, and tell them that there is no reason to talk about anything that they would rather avoid. I remind each student of the issue when I meet with them individually (except for those who come prepared with trouble-free experiences to use as the basis for their testimony). Finally, I bring the problem up again whenever an interview produces a possible subject for testimony that strikes me as touchy. In such cases I ask the students to consider whether they would be comfortable talking about the matter in front of their classmates. I tell them a bit about the process of discovery and preparation that leads up to the hearings and emphasize that it is their decision. Sometimes I advise them against using a
particular experience; otherwise I suggest that they take a couple of days to think it over. Some students have chosen to go ahead; as far as I can tell, they have not regretted it.

My method of assigning students to their roles as witnesses is not an easy one. Handing out scripts would be much more convenient. But the benefits are more than adequate compensation. The students' lives are an endless source of new issues and interesting contexts for courtroom problems. The scenes they describe are both real and accessible to their fellow students. Some clinical teachers report that their law students are reluctant to play the role of witness in simulations, or incompetent to do so, or both; neither problem arises in this course. Most important, the students' performances as witnesses are extremely useful to themselves and to the class as a group.

2. Framing the Hearings

After I have found an appropriate event for a hearing, I ask the student to write a short (200–700 word) "witness statement" describing the event. I tell the students that their statements should be based on their current memories and dated when they are actually written; beyond that, I give them no guidelines on form or content. Occasionally, I have to ask a student to rewrite the initial witness statement; once or twice I have realized after reading such a statement that the proposed hearing would not work after all. Otherwise, the statement becomes the starting point for the exercise. Working from it, I write a memorandum to the class in the following form:

Memorandum

TO: Class, Evidence Workshop
FROM: Sam Gross
RE: Hearing No. 1

The first hearing in this course will be in the case of Romano v. Slayton, Civ. No. 88-1031. This is a lawsuit by Ms. Joyce Romano against Ms. Maureen Slayton for $2000 in property damage resulting from a car accident in which Ms. Romano's car collided with the rear of a car driven by Ms. Slayton. Ms. Slayton has counterclaimed for personal injuries and asked for $25,000 in damages. Both parties left the scene of the accident without identifying themselves to each other. Ms. Romano later hired an investigator who determined Ms. Slayton's identity, and she filed the complaint.

The substantive law of the state of Michigan applies to this trial, except for its no-fault auto insurance provisions. In other words, the case is subject to ordinary rules of negligence, including a rule of comparative negligence. The Federal Rules of Evidence apply.

The jury has been selected, and opening statements given. The presentation of evidence will begin on Thursday, February 11, at 9:30 a.m., in the Washtenaw County Circuit Court, Ann Arbor Division, sitting in the University of Michigan Moot Courtroom, the Honorable Teresa Freedhof presiding. The first witness will be Joyce Romano, who will be called by her own attorney, Ms. Nancy Hostler, and cross-examined by the attorney for Ms. Slayton, Mr. Robert Marlow.

6. Id. at 596.
A couple of aspects of the memorandum deserve brief mention. First, it is helpful (but not essential) if the witness can be described as the first witness in the case—not necessarily an inevitable or even a likely first witness, but a plausible one. I have almost always been able to achieve this, in part by case selection and in part by the manner in which I structure the cause of action. Sometimes, however, it is necessary to provide a summary of the testimony that preceded the witness—typically, the plaintiff's case in situations in which the witness would only be called by the defense. Second, I generally specify that the hearings are governed by the Federal Rules of Evidence and by the substantive law of the jurisdiction in which the events at issue occurred. I am perfectly willing, however, to alter the substantive law (as I did in the memorandum) if it helps the simulation. I am even prepared to write special simulated statutes, as long as the rules I create are reasonably similar to some body of American law.

When I have witness statements from all or most of the students, I schedule the hearings and assign the roles for the entire semester. This is a short-term headache, dominated by three competing goals: (1) simpler simulations and more experienced students should come first; (2) students should not be assigned two demanding roles (direct examiner and cross-examiner, and, to lesser extent, witness) on successive weeks; (3) the same two or three students should not work together repeatedly in different exercises.

The cases have been quite varied. The list includes four automobile accidents, five other accidents, three employment discrimination complaints, five assaults (four criminal, one civil), three other criminal prosecutions (a liquor law violation, a trespass charge stemming from a political demonstration, and a drug case), two landlord-tenant cases, and several miscellaneous cases (a search-and-seizure motion, a consumer-fraud case, an invasion of privacy case, a hearing on the competency of the student's grandmother, and so forth).

B. Preparing the Hearings

1. General Preparation

The hearings begin in the fifth week of the semester. The first four weeks are taken up by the process of constructing the exercises and by a series of introductory classes. Evidence is a prerequisite for the course; nonetheless, I give the students a set of readings on the law of evidence, primarily as a form of review. I invite a series of guest speakers: a trial-court judge and two or three attorneys who describe and demonstrate aspects of litigation that we do not cover, such as opening statement, closing argument, and, if possible, jury selection. Finally, I put on a series of quick and lightly prepared exercises on such basic courtroom techniques as developing a story on direct examination, using leading questions on cross-examination, stating objections, marking exhibits and introducing them in evidence.

7. To the extent that I accomplish the first goal, I also try to balance the tasks by giving those experienced students more challenging exercises in their later appearances.
For the most part, I use myself as the witness in the preliminary exercises. I do so in part because I am available, but mostly in order to be the first person in the class to be put in that uncomfortable position. I give the students a witness statement that describes several arguable misrepresentations by the seller of a house that I once bought, the negotiations in which they occurred, and the troubles that followed. (To simplify the preparation for these exercises, my statement is much more detailed than those I ask the students to produce.) We meet as a group in the moot courtroom, and the students take turns conducting short pieces of direct examination and cross-examination, objecting to questions by other students, presiding as judge, and sitting in the jury box. During the two or three classes in this stop-and-go format, I make comments and suggestions between segments and begin to involve the class as a group in the process of review and evaluation.

2. Discovery and Witness Preparation

The specific preparation for each hearing begins about two-and-a-half weeks in advance, when I circulate a memorandum to the class describing the hearing (see the “Hearing No. 1” memorandum, reproduced earlier). In addition, the two students in the roles of direct examiner and cross-examiner each get a copy of the “witness statement,” which is described in a cover memorandum as a statement given by the witness to an investigator working for the direct examiner and provided to the cross-examiner on discovery. The examiners can use the statement to prepare for the hearing and in court. In addition, each attorney has an opportunity to conduct a formal interview of the witness, a procedure with no precise equivalent in American trial practice but which is designed to function somewhat like a deposition.

Each attorney is entitled to conduct one formal interview with the witness at any mutually convenient time after preparation for the hearing is underway. The opposing counsel has no right to attend the interview—in fact, the interviewing attorney has the right to exclude her—although opposing attorneys are generally told when the interviews are scheduled. The interviews are tape-recorded. If the interviewing attorney wishes to use any part of the record of the interview in court, then she must prepare a transcript of that portion of the interview and give the transcript and the tape to the witness; the witness must sign the transcript after verifying that it is accurate, i.e., that it reflects what the witness said, regardless of what he may have meant. (The purpose of the procedure is to avoid the cumbersome process of impeaching a witness with a tape recording of a prior oral statement). If the interviewing attorney does transcribe some portion of the interview for possible use in court, she must also give the transcript and the tape to her opposing counsel sufficiently in advance of trial so that her opponent can transcribe any other portions of the tape and have them signed by the witness as well. The attorney who conducts the interview may transcribe portions of it or all of it; or she may transcribe none of it—in which case her opponent will have no access to the tape. These options, of
course, open up opportunities for tactical maneuvering. (In practice, transcribing all is much more common than transcribing none).  

In addition to the formal interviews, the witnesses are free to do anything they want to help either attorney (or both), or they may do nothing more in advance of the hearing. I tell the witnesses to prepare for trial and to deal with the attorneys as they would if they were testifying in a real case—which is relatively easy because the testimony concerns real events in their own lives. Several common patterns of preparation emerge, of which the most frequent is the simplest. About half the time the witness is a party or is otherwise closely identified with the direct examiner; if so, the cross-examiner will conduct a formal interview but the direct examiner will not, and the witness will prepare informally with the direct examiner but have no informal contact with the cross-examiner. Sometimes, however, the witness is essentially neutral and equally available (or unavailable) to both sides; sometimes the witness's allegiance is affected by the process of pretrial preparation itself (a useful lesson). Occasionally, the witness is hostile to the party represented by the direct examiner and correspondingly friendly to the opposing side; other times, he is hostile to both sides. Each combination has significant (and usually predictable) consequences for the pattern of pretrial discovery and preparation.

3. Documents

Each examining attorney is required to prepare two documents before trial. The first is something I call a “statement in lieu of an opening statement.” The purpose of this document is to provide a context for the testimony of the witness who will actually appear—to present the attorney's theory of the case as a whole so that the judge and jury can follow what she is attempting to do in this piece of it. The statement is supposed to be short, 500 words or less. Its purpose (as far as I am concerned) is simply to provide a backdrop for the action and not to attempt some written equivalent of the art form of the opening statement. (Most students, however, err—harmlessly—in that direction.) The statements are distributed to the entire class, including all participants in the hearing, the day before the court date. I review the statements in advance to make sure that the attorneys have not gone overboard in one direction or another—typically by assuming the existence of evidence outside the scope of the simulation that materially affects the nature of the case.

The second document is a confidential description of what the attorney actually hopes to accomplish in her examination of the witness and how she plans to do so. These goals might range from straightforward and central

8. Some students are able to hire or persuade other people to do the transcribing, but most have to cope with the chore on their own. Some complain about the amount of work involved, which can be considerable, varying in proportion to the thoroughness of the interview. On balance, however, I think the annoyance teaches them a good deal more than they realize. Lawyers often seem to think that witness statements and similar documents arrive on their desks with no human intervention. This attitude is not merely insensitive to the roles of investigators and typists, it also reduces the lawyers' feel for the information they receive and for the witnesses behind it. Doing the scut work oneself, even once or twice, is an effective cure for that sort of myopia.
purposes (presenting a useful story, establishing or undercutting the credibility of the witness, etc.) to tactical manipulations (confusing the jury, provoking the witness or the opposing attorney, and so forth). The statements are supposed to be completed a day before the trial, copied, and kept by their authors for distribution after the witness has testified.

One final category of pretrial document is optional. The attorneys are permitted—indeed, encouraged—to deal with evidentiary issues by way of motions in limine, when appropriate, or to make other preliminary motions, and they are allowed to submit written motions and memoranda in support of such motions. Any written documents that an attorney intends to use in court, however, must be served on the opposing attorney and filed with the judge by the end of the day before the hearing. In practice, this option is used only rarely.

4. Advice and Instruction

I meet with each attorney twice before the hearing—generally, once before the formal interview, if any, and once after. (I do not meet individually with the witnesses or the judges.) I conceive of my role as that of an experienced attorney helping a junior colleague handle one of her own cases. Although I make suggestions, point out issues and problems, and answer questions, I make no elaborate effort to think through each case as though I were preparing it myself. The responsibility for gathering the information that they will need, for making choices, and for preparing and conducting the examination rests with the student lawyers.

Occasionally the students are tempted to try to do too much. Most legal cases depend on the testimony of several witnesses, and sometimes even the most important witness can only present a fragment of the story the attorney wants to tell. In the confined context of these exercises, the students may “reach” and try to cover more ground with the single witness than they would ever do in a real case. I instruct them not to do this, but to restrict themselves to the testimony that they would actually want to elicit from the witness if they were putting on the entire case for the side they are assigned to represent. The students are, however, instructed to hold back nothing on the quality of their preparation. They are told to prepare their examinations exhaustively—not merely as well as they would do in a real case, but better. Given that they have no other obligations in these hearings, this is a realistic demand and it is met.

There is one peculiar difficulty in my role at the preparation stage. Because I act as advisor to both sides, I have to be careful not to pass information from one side to the other inadvertently, or offer advice to one attorney that is based on confidential information about her opponent’s plans. I think I do a passable job of maintaining this schizophrenic separation, in part because I avoid taking notes during my meetings with

9. Once in a while the format requires making some reasonable assumptions about other evidence that may be available, which the attorneys can then use in their quasi-opening statements.
the attorneys. The problem could be eliminated entirely—and the course could be changed and improved in other respects—if it were cotaught by two instructors.

C. Conducting the Hearings

The hearings are formal affairs. The attorneys and the witness are expected to dress and behave as they would in court. The judge wears a robe. I take the role of clerk; there is no court reporter (although there are two camera operators). The procedure at the hearing is simple. The jury assembles in the jury room; the other participants gather in court. The camera operators start taping; the judge calls the case; the attorneys state their appearances; and the judge asks if there are any motions to deal with before the jury is brought in. After the motions (if any) are heard and decided, the clerk brings in the jury and the judge asks the direct examiner to call her first (or next) witness. The witness is called, sworn, and examined following the usual rules of evidence and procedure. Occasionally, the jury may be excluded while the judge hears extended argument on an objection, or an offer of proof.10 At the conclusion of the witness's testimony the judge calls a recess, and the hearing is over.

The length of the hearings is indeterminate. There is usually at least one motion in limine or other preliminary motion at the outset; typically the motions take ten or fifteen minutes, but occasionally they last most of an hour. The length of the testimony is extremely variable. Some witnesses are off the stand in about half an hour; some are kept there for nearly two hours. I schedule the exercises for blocks of three-and-a-half hours to ensure enough time to complete the hearings and to review them, but we rarely use the entire period.

D. Reviewing the Exercises

We review each exercise twice. The first review follows the hearing directly. As soon as the examination of the witness is over the attorneys distribute copies of the confidential descriptions of their goals, which everyone reads during a ten-minute recess. We then reassemble for a general discussion, and the participants resume their original positions (the cameras remain off). I usually structure the discussion to some extent by asking each student for his or her impressions, moving in turn from the most passive participants to the most active—jury, judge, witness, cross-examiner, direct examiner. The review is informal, and the attorneys and

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10. I followed a slightly different procedure the first two times I taught the course: The jury would be seated in the jury box throughout the exercise and would hear arguments on motions in limine, etc., but the judge and the lawyers would pretend that the jurors were absent at the appropriate times. Eventually I decided that it added to the value of the exercises to limit the jurors view to what they would actually see at trial, and to subject them to the annoyance of temporary exclusions from the courtroom. To the extent that the arguments the jury misses are important, we review them orally and on tape; see section I(D). In the few nonjury hearings I have had, the would-be jurors are simply a courtroom audience, but they are seated in the jury box.
witnesses often respond to comments or questions from the others. I frequently add my thoughts on issues that students bring up; occasionally I will demonstrate how some aspect of the hearing could have been handled or suggest that the participants redo a two- or three-minute segment in a different manner. If I notice any significant issues that have not been discussed, I mention them in closing and offer my overall impression of the students’ performances.

The second review takes place several days after the hearing. The class meets for an hour and a half to watch and discuss sections of the videotape. We start at the beginning, look at the first several minutes, and then focus on three or four segments that I cull from the notes I take in court or that the students suggest, stopping the tape repeatedly to discuss what we see. We rarely get through the whole tape and usually see only a small portion. Because the attorneys were in no position to see most of what was going on at the hearing itself, they are required to watch the entire tape before the second review, preferably together; the judge and the witness are encouraged to do the same.11

II. Discussion

The course that I have described has obvious limitations. It only covers one aspect of trial practice, the preparation and examination of witnesses. Other trial tasks—jury selection, opening statement, argument—are discussed but not attempted. Other basic functions that lawyers fill—negotiating, drafting, counseling—are neglected entirely. The realism of the course, one of its strongest points, is also limited. The witnesses are real—that is, their testimony concerns real events in their lives—but there are no parties with real interests to pursue, and the judges and jurors are not the real functionaries who fill those roles. In fact, except for guest speakers, the students never come in contact with any people outside the closed group of the class itself. Finally, restricting each hearing to a single witness limits the range of issues that can be pursued. In an actual trial, the examination of a particular witness is often planned with a view to the testimony of other witnesses—to support them, to impeach them, to fill in gaps, etc. Such strategic planning is not possible within the confines of the course.12

These are limitations, not faults. No course can accomplish everything. Despite the limitations (and to some extent because of them), I believe this is an excellent clinical format. It introduces elements of real cases into a

11. I should say a word about grades, because even in clinical courses students care deeply about them. My policy has been to give letter grades based on my assessment of the effort the student put into the course, which so far has meant that all the students have received high grades. I am not sure I like this system. Pass/fail grading might be a more honest approach. Several students, however, have urged me to retain letter grades in order to ensure that all members of the class put in the necessary effort. In general, I dislike that sort of coercion, but I think it may be justified in this context because a single unprepared student can spoil the work of several others.

12. The course is also less predictable than traditional simulation clinics. Although the unpredictability may make the course more taxing for the instructor, I believe it is a virtue.
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simulation course in a manner that is, in some respects, an improvement on both traditional methods. In addition, it is a relatively cheap form of clinical teaching—always a virtue—and, I expect, a flexible one as well. Other clinical teachers could use elements of this method in clinical courses that have an entirely different focus.  

The most obvious virtue of the course is that the students learn the techniques of preparing and presenting evidence very well. My own judgment is that all but one or two students a semester are transformed over a period of ten weeks from absolute neophytes to competent beginners. The students unanimously concur.

Several features of the course make it an efficient vehicle for skills training. First, the students participate in the presentation of evidence from all sides. They try out the familiar role of the active manipulator (lawyer), but they also experience the position of the presumably passive object (witness), and those of the professional and the nonprofessional audience (judge and jury). In litigation (as in life in general), it is an enormous advantage to learn how things look from other people's points of view. In this format students get a chance to see for themselves how hard it can be to follow testimony from the jury box or arguments from the bench. For example, one of the conspicuous trends in the course is a visible improvement in the quality of the judging from the first hearing through the fourth or fifth: the students learn from each others' mistakes to avoid common judicial pitfalls (e.g., cutting off argument by the attorney you are predisposed to rule against). A parallel trend is less visible on the tapes but ultimately more important: the students learn to be more effective at framing arguments from the podium.

Second, although the tasks the students face are interesting and difficult—at least for beginners—they are also circumscribed and manageable. Thus, the students can prepare their examinations with extreme care and conduct them as well as their skill permits. I believe that this is more

13. Indeed, it would probably be a good thing if clinical instructors used real witnesses of any sort in simulation exercises. Expert witnesses, of course, can come very close to providing actual testimony in simulated settings, but other witnesses who testify frequently about experiences in their work might do just as well. A few years ago, for example, I organized a simulation based on testimony by a police officer about the arrest of a drunk at a football game—an actual case in which charges were ultimately dismissed. Although instructors who use exercises of this sort will have a hard time replicating all the procedural steps of a trial (see, e.g., Hegland, supra note 2, at 70–72; Kenneth S. Broun, Teaching Advocacy the N.I.T.A. Way, 63 A.B.A.J. 1220 (1977)), for most purposes the gain in verisimilitude will greatly outweigh the cost in completeness, especially for exercises that are embedded in real-client clinics.

14. The final assignment of the semester is to write an evaluation of the course in as much detail as each student wishes. Although the reports are not anonymous—that is impractical in a group of this size and nature—I do not look at them until after I have handed in the grades. Most (if not all) of my observations about the value of the course are reflected repeatedly in the students' comments (e.g., "One of the most frustrating things about being a witness is feeling rushed and irrelevant . . . . I was being asked to tell my story and then no one really wanted to hear it . . . . I also didn't realize I was capable of the same behavior until the next exercise when I was the attorney and I found myself cutting my own witness off in mid-sentence during our interview.").

15. Hegland, supra note 2, at 77 n.15, suggests that students in clinical simulations should be required to play the part of jurors. This format incorporates that suggestion and carries it further.
useful for the students than giving them tasks that are larger and more complex, but which they cannot prepare exhaustively in the time available. Student attorneys seem to learn more from doing things well than from making mistakes (and they make quite enough mistakes to learn from in any event). Painstaking work on the part of the student attorneys is also important for the students who take the role of observers, the jury. They learn much more from the reviews when the attorneys (whether they perform well or not) have lavished their time on thinking about the hearing in advance. But the most important benefit may be the habits that this approach teaches. A student who conducts an excellent examination of a witness learns that she is capable of that quality of work; she learns what it looks and feels like and sounds like, and perhaps she begins to learn to expect it of herself.

Third, the form of review in the class is extremely useful. Using videotapes to review courtroom exercises is invaluable. Nothing else serves nearly as well to help us see ourselves as others see us. Instant in-place reviews add another dimension: the reactions of the participants and the audience are first obtained when the hearing is fresh in their minds, and in a setting in which parts of it can be redone. Ultimately, however, the most important feature of the reviews is not their technology or their setting but their social context. Over the course of the semester the students spend a lot of time observing and commenting on the trial work of other students at about their own level of skill and experience. The class provides a natural and safe context for this process: the group is small and reasonably intimate; the tasks of the active participants are well known to everyone; and everyone goes through the process in every role. One of my fondest hopes for the seminar is that the experience teaches students to continue to do as practitioners what most litigators never do: to learn by watching and listening to other attorneys.

Finally, the course is a useful vehicle for teaching trial skills because the opportunities for control and review that are unique to simulations coexist with testimony from real witnesses to actual events. Unlike scripted actors, the student witnesses in the course testify from their own memories, with all the attendant strengths and weaknesses. A witness’s recollection sometimes fails in the interval between her pretrial statement and her testimony; more often it improves (or seems to). Unanticipated details and lines of inquiry can be pursued, if the witness remembers. Because the witnesses are not role-playing but testifying about their own experiences, their emotional reactions are genuine. The biases, allegiances, and preferences that a witness displays are her own; her personality and her manner are facts to use or to contend with, as they would be in a real trial. Even the type of anxiety the witnesses face—testifying about their own lives, in front of an instructor and a group of fellow students in a serious professional exercise—is not far removed from what they might experience in a real court. As a result, their testimony has the feel of truth. More important, there is a truth underlying their performances, and the attorneys preparing
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the hearings are able (within limits) to investigate it, to probe it, to develop theories based on it, and to shape it.\(^1\)

Clinical simulations have been criticized for inadvertently teaching students that truth is nonexistent or unimportant; that litigation is a world of make-believe in which facts are infinitely manipulable.\(^2\) In the simulations I have described, however, truth is as it is found in the world at large, and the testimony of the witnesses is manipulable only to the extent that it could be manipulated in real litigation, neither more nor less.

The intrinsic reality of this form of simulation also improves the course in another and more basic manner. Simulation clinics are sometimes compared unfavorably with real-life clinics because students are less likely to approach them seriously and to invest the time and effort that are necessary to learn trial skills effectively. In extreme cases, this is said to breed apathy; and even in less troubling circumstances, working on real cases is supposed to make an imprint on the student's mind that will inevitably outlast the mark of any simulation.\(^3\) My experience in this course is to the contrary. I have seen no evidence of apathy—quite the opposite. The students work hard and take their tasks very seriously; for what it is worth, several students who had previously participated in real-life clinics have told me that they learned more in these simulations.

Although, as I have said, the title of the course—Evidence Workshop—is largely arbitrary, the course is in fact an effective context for teaching the substantive law of evidence. It is hardly news to clinical teachers that the basics of the structure and use of the law of evidence are far more easily learned (or relearned) in a clinic (any relevant clinic) than in a classroom. This clinical format has the additional advantage of generating a steady stream of more complex evidence problems: What sort of evidence of a conspiracy is necessary to permit the use of a hearsay statement as an admission by a co-conspirator?\(^4\) What facts will support an argument that a former employee of the defendant is a witness “identified with the opposing party” who may be interrogated with leading questions on direct examination by the plaintiff?\(^5\) May portions of an out-of-court statement that have no bearing on the interests of an unavailable declarant be admitted in evidence over a hearsay objection because the statement as a whole is a “statement against interest”?\(^6\) And, of course, there are endless variations on the most common problem of all: Does the likely prejudicial impact of some item of evidence “substantially outweigh” its probative value?\(^7\)

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16. See Lubet, supra note 2, at 137–38.
17. Hegland, supra note 2; Lubet, supra note 2. Hegland suggests mitigating the problem by “put[ting] some truth into the problems”—by having the instructor provide scripted witnesses and parties with secret information about the case or about their biases. Hegland, supra note 2, at 77 n.15. It is not clear to me how this suggestion differs from current practice, or how it would bring simulations any closer to the truth.
20. See Fed. R. Evid. 611(c); McCormick, supra note 19, § 27 at 825–26.
If the course did nothing more than teach aspects of trial advocacy, it would be worth the effort because it fulfills the purpose effectively and (relatively) inexpensively. But that is not its only value; it also generates lively discussions about the ethics and the social consequences of adversarial litigation. Client-oriented clinics provide the material for this sort of critical reflection, but they sometimes fail to provide the forum, because the interests of the clients often dominate to the exclusion of other considerations. Traditional simulation clinics have the freedom to accommodate this objective, but they may be too remote from reality to reach it. In simulations using actual witnesses, the manipulations and distortions of trial practice are real and palpable, and yet the format permits the participants to stop, to step out of role, and to think about what they are doing.

One advantage of this format is that the group includes all the participants in the process of trying cases. When the issue is the ethics or the impact of some stratagem (failing to disclose information that would aid the opposing party, for example, or asking a witness a question that the lawyer knows will elicit an inadmissible answer), it is useful to hear directly from the opposition, the judge, and the jury, and to find out how it affected them. In addition, the students experience the consequences of the professional conduct of the attorneys from the nonprofessional point of view of the witnesses, and that more than anything else adds depth to their perspective. Some of the lessons they learn this way are not only useful but chastening.

The most basic lesson about being a witness that the students learn time and again is the inevitable and often oppressive passivity of the role. For example, when I taught Evidence Workshop for the second time, I assigned one of the more promising students to be the witness at the first hearing, a personal injury case in which she was the plaintiff. She worked hard to prepare her testimony and gave a completely realistic performance. This is hardly surprising—she was herself, and she displayed a personality that may serve her well as a trial lawyer: intelligent, emotional, quick, involved, argumentative. In the process, however, she hurt her own case severely, as

24. See Hegland, supra note 2; Lubet, supra note 2.
25. Robert Condlin argues forcefully that clinical education has failed to meet the objective of teaching professional ethics to students because it has not succeeded in exposing the two core ethical problems faced by lawyers: the manipulation of third parties by the attorney in the service of the client's ostensible goals; and the domination of the client by the attorney in their own interactions. Robert Condlin, The Moral Failure of Clinical Legal Education, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics, ed. David Luban, 317, 319 (Totowa, N.J., 1983). According to Condlin, the central reason for this failure is that clinical students learn primarily by emulating their teachers' interactions with the students, and not from their own interactions with an outside "cast" (clients, adversaries, witnesses, judges, juries) or from observing the instructor's dealings with that "cast." Id. at 324–32. Although Condlin's criticism is undoubtedly overdrawn (see Norman Redlich, The Moral Value of Clinical Legal Education: A Reply to Professor Condlin, in Luban, supra, at 350), it does highlight one of the advantages of the format I have described. In this course the students learn in part by being the "cast" of outside characters and by reviewing their experiences with those who manipulated and dominated them.
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she and everybody else agreed—a clear example of the common observation that lawyers make lousy witnesses. Needless to say, the whole class learned an important lesson from her experience: in general, a witness in a common-law trial is not supposed to appear to be that sort of person. Those who followed her avoided this trap. At the same time, however, several students also expressed their doubts about a system of adjudication that penalizes a witness for appearing to be the complex, honest, and interesting person that she really is, and this led to an active debate.

The costs of failing to fit the prescribed role of witness are often visible (at least in part) to everyone in court. The costs of conforming to the role, however, are rarely seen or discussed. One of the fascinating lessons that has emerged repeatedly from the exercises is the common disjunction between success as a witness and satisfaction.

For example, one of my students at Stanford testified for the plaintiff in an employment discrimination case and did an excellent job. The student attorney who prepared her was very skillful in shaping her testimony into a low-key, factual, and detached presentation; it was extremely effective. The witness, however, was appalled by her own performance—and she was angry about it—because the picture that was presented distorted her personality and her feelings. In fact, she was much more involved in the development of the case than her manner implied, and she is not (and would not want to be) the detached and cool person that the jury saw. By the end of the course the class had also seen and discussed an interesting example of the opposite problem. Another student, testifying for the prosecution in a criminal assault case, came across just as he is and gave the jury an accurate picture of his personality (at least in this context) and of his views of the events he had witnessed. He was completely satisfied with his testimony, even though he had to admit what was obvious to everyone else: he had made the conviction he would have liked to see all but inconceivable.

There is an inevitable tension in clinical teaching between technical training and critical reflection. Unless students are given the training and the opportunity to become adept and independent in their professional roles, they will lack the experience that is necessary for any serious discussion of the ethical and social consequences of trial practice. Technical training can, however, easily be given too large a role. Technique is concrete and practical and tends to dominate whatever space it can fill; preoccupation with learning the skills of practice can choke off any attempt to consider the nature of the enterprise with detachment. The course I have described brings together different elements in a fashion that makes critical examination effective, necessary, and natural.

My own view of adversarial fact finding is decidedly skeptical. A few of my students may absorb some of this outlook, but not many. In general, the students who take Evidence Workshop are intensely interested in trial work; their goal is to learn how to do it as quickly and as well as they can. I am familiar with this attitude: it is exactly how I felt when I was in law

school. My main aim is to help the students achieve this goal. In the process, however, I also hope to get them to think about what they do from different points of view, and with open minds. So far, my most apparent success is with myself. In the process of teaching this course I have learned a great deal about the operation of our system of adjudication, and about its consequences.