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A Modern Approach to Evidence

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Recent Books

Book Reviews

A MODERN APPROACH TO EVIDENCE. By *Richard O. Lempert and Stephen A. Saltzburg*. St. Paul: West. 1977. Pp. lvi, 1231. \$21.95

Teaching law through the use of appellate court opinions was pedagogically sound in Langdell's day. It is still sound. Its basic objectives remain the same: to force the student to think, to analyze fact situations and decisions based on those situations, and to synthesize rather than repeat rules.¹ The student is encouraged to state clearly and concisely complicated statements of fact and to separate habitually the material from the immaterial, the significant from the superficially relevant. In short, in the best sense of that much overworked and abused phrase, the student is encouraged to "think like a lawyer."²

The skilled case-method teacher uses cases to acquaint the student not only with characteristic legal problems and with the principles upon which the courts rely or purport to rely, but also with the methods which judges and lawyers use in dealing with fact situations and in reaching decisions usable as precedent. The effective case-method teacher places the student in the position of the lawyer presenting the facts giving rise to the decision and of the judge who must decide that case or the next one.³

When used in some courses and taught by one skilled in its use, the case method accomplishes its objectives. Sometimes, and with greater frequency in some courses than in others, it fails miserably. One of the courses in which it frequently fails is Evidence. Perhaps evidence teachers as a rule are not as good at the case method as their colleagues. This is an unlikely explanation and one that is not

1. Langdell himself viewed law as a science, consisting of principles and doctrines. "To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law." C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871).

2. "[I]t is by the study of cases that one is to acquire the power of legal reasoning, discrimination and judgment, qualities indispensable to the practicing lawyer . . ." Keener, *The Inductive Method in Legal Education*, 17 A.B.A. REP. 473, 489 (1894).

3. See discussion in Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 384 (1952).

satisfactory, at least to an evidence teacher. There are other, more likely to be controlling, reasons for its ineffectiveness.

First, there are relatively few meaty appellate court opinions dealing with questions of evidence. Most evidentiary questions are decided, finally and irrevocably, at the trial court level—almost invariably without written opinion. Many evidence decisions are within the discretion of the trial judge and are unlikely to be disturbed by the appellate court. Many evidentiary rulings, although on nondiscretionary matters, involve too little of the total picture of the trial of the case to be of controlling interest to the appellate court. Perhaps more significantly, many of the critical evidentiary decisions are not made by judges at all. They are made by trial lawyers who must, at least initially and often finally, decide what role the rules of evidence are to play in the trial. A lawyer may decide not to bother to object to leading questions, opinions, or even hearsay, simply because the answers elicited from the witness are causing no harm. He or she may carefully lay a foundation for the introduction of a document, knowing all of the requirements necessary for admission, so as to avoid dispute in the courtroom. If the foundation is incomplete and an objection is made, the lawyer may be able to supply the missing links without the need for a determinative court ruling, thus eliminating any need for appellate court supervision.

Second, those appellate court opinions which may be useful to a case method teacher may not be used by the teacher in a way that emphasizes the significance of the methodology of the trial lawyer. Edmund M. Morgan, a great evidence teacher and scholar, commented:

[A] proper use of the case method will make the student realize that the reported case is a refined product, and that much, if not most, of the lawyer's effective work must be done before and at the trial. The instructor may put, and should encourage the student to construct and consider, numerous situations that might have been shown to exist upon proper investigation or that might have been created at the trial.⁴

Morgan was surely right, and yet it is enormously difficult to put a student into the role of the trial lawyer when the decision of the appellate court appears in front of him or her. It takes an evidence teacher of considerable skill consistently to take the student out of the appellate court and into the trial and pre-trial decision stage.

Third, evidence taught by the case method is usually not as exciting as it should be. The courtroom is a fascinating place, both to those who have been lucky enough to have been there as advocates and to those who see themselves as being there in the future.

4. *Id.* at 388-89.

That fascination, and its impact on student motivation, is a factor which should not be ignored in an evidence course. Again, the skillful case-method teacher can make anything interesting. Yet, most law students tend to treat the matter just as any other case material and fail to see the drama of the courtroom emerging from it.

Finally, the case method is a poor mechanism for dealing with the questions of advocacy inherent in an evidence course. Dean Leon Green said that "advocacy is the lawyer's distinctive power" and has emphasized the usability of cases to aid in the development of advocacy skills.⁵ Indeed, appellate advocacy is in fact emphasized by the traditional use of cases. But advocacy at the trial level is seldom considered in a case-method course. Trial advocacy is more than mere marshaling of facts and legal arguments. It involves certain distinctive skills in the presentation of evidence through the testimony of witnesses and through tangible exhibits. Trial advocacy cannot and should not be fully taught in an evidence course. Nevertheless, an exposure to advocacy skills can only serve to enhance the students' appreciation of evidentiary issues.

One solution to the deficiencies of the case method in evidence courses is the use of problems—written hypothetical fact situations usually set in the trial court. Carefully constructed problems should pose for the students questions of the same nature as those that might be answered in a series of cases. What are the legal principles involved? How do judges and lawyers go about resolving the issues raised? Indeed, the ultimate goal of the problem method is the same as that of the case method—teaching legal principles and methods and developing legal reasoning, discrimination, and judgment. But problems place the student in the trial court setting and can simulate the excitement of the trial court, thus raising questions of both evidence and advocacy from the perspectives of the trial lawyer and judge.

The most difficult problem with the problem method is providing the student with enough information about the relevant legal rules. Just having the students create legal rules and develop what in their minds is the ideal trial might be interesting, but would not be useful in getting the students to know some legal principles and in causing them to appreciate the existing system. Information about the current state of the law must be provided. This, of course, is a problem not faced by the case method. Enough information is contained in the opinions from which the standardized rulings of the courts can be synthesized. Cases can be supplemented by court rules and statutes.

The information dilemma inherent in the problem method can be solved in a number of ways. Students can be sent to the law

5. Green, *Advocacy and Case Study*, 4 J. LEGAL EDUC. 317 (1952).

library to research each problem. Although this method may be ideal from a standpoint of learning the material involved in a single or small group of problems, it is entirely too time consuming to be workable in teaching a broad body of legal principles. Moreover, most law libraries simply do not have the facilities to permit such a method to be used by more than a handful of students.

Another technique, which this author believes he uses with some success, is to use a standard text, McCormick's second edition, and a copy of the Federal Rules of Evidence as source materials.⁶ Students can acquire enough information from these sources on how courts have treated and will treat various evidentiary problems to have an authoritative basis for answering the questions posed. The hornbook and rules can be supplemented by photocopies of a few key cases.

Lempert and Saltzburg use still another approach to presenting the student with information to be used in the solution of problems. The idea is both sound and ambitious. Not only are the students given an exhaustive set of problems dealing with most of the critical points in the law of evidence, but the book also contains enough other material for the student to base his or her answer on established authority. The authors have carefully written an excellent text. Where useful court decisions exist, they have made use of these decisions as the basis for analysis and synthesis of legal doctrine. The student need not ever leave the book itself to have a sufficient background to resolve the issues raised in the problems.

The problems are appropriate. The student is usually placed in the position of the trial lawyer or judge. Most problems are difficult in the sense that the answer is not obtained simply by reference to a single line of text or a single phrase in an opinion set out in the text. Many of the problems contain no "right" answer, but much room is left for discussion. The authors do take positions with regard to several controversies existing among evidence scholars. However, nowhere are those positions presented in such a way as to lull an alert student into an unquestioning acceptance of the "house" solution.

The authors also make effective use of actual court transcripts and pose many problems based upon these records. This approach permits the student to see problems as they arise in the context of an actual trial. The use of records also takes maximum advantage of the motivational aspects of the problem method. Students reading a full court transcript can see the development of an entire case and are better able to observe the lawyer's role in the proceedings. The transcript contained in Chapter Nine dealing with the develop-

6. K. BROUN & R. MEISENHOLDER, PROBLEMS IN EVIDENCE (1973).

ment of a record—aptly subtitled “The Lawyer as an Artist”—is particularly useful. The transcript is of a rape prosecution, and it presents challenging constitutional and nonconstitutional evidentiary questions. Both witness testimony and argument by counsel are included. Its placement in the book calls for its consideration after the student has been exposed to many of the significant evidentiary issues. It should be used as placed in order to permit the student to reinforce and build upon his or her understanding of those issues.

There will be some difficulties with this book for less experienced law teachers. First, the problem method itself necessarily demands maximum preparation. The ideal case-method teacher prepares for his or her class by considering all of the problems that may be raised, by mentally quarreling with all of the opinions, and by placing himself or herself in the position of the lawyers who brought the case either at trial or on appeal. However, sometimes a particular opinion will be so obvious in its statement and the reasoning so succinctly laid out that the temptation exists simply to prepare to present that reasoning. All law teachers would concede the inadequacy of that kind of preparation; all of us have done it to one degree or another in the course of any semester. In contrast, the problem-method teacher must prepare to solve each problem. An excellent teacher's manual such as the one prepared by Lempert and Saltzburg is a useful crutch. However, it is unlikely that the teacher can fully appreciate the authors' suggestions without first engaging in a diligent, searching inquiry into the issues raised.

Lempert and Saltzburg, as is the case with many good casebooks and most problem books, also presents difficulties of selection, organization, and time management. The book contains a great many problems, far more than could ever be fully covered in a three- or even four-hour course. The teacher must carefully select the problems to be covered and the text to be discussed. Some of the subject matter dealt with in the book should be covered outside of class by having the students read the material and work the problems to their own satisfaction. Other problems must be covered in detail by class discussion.

The very effectiveness of the problem method makes the selection and organization process even more perplexing. The students will be motivated; they will come up with their own answers to problems rather than simply repeating some textbook answers. All of this will be time consuming. Some of the discussions will take far longer than the teacher will anticipate. The instructor must recognize that if permitted to get out of hand and to lose its structure, a problem-method class can go on forever. Careful time management, however, can minimize these difficulties.

The first chapter in Lempert and Saltzburg presents difficulties

beyond those inherent in the problem method. In this chapter, the authors attempt to provide an overview of the law of evidence by the use of a transcript. Extensive textual footnotes supplement the transcript. Following the transcript is a series of problems based upon the principles involved. The central difficulty with this approach is that the problems raised are too complex to be handled in the cursory fashion intended by the authors. The authors obviously intend only to introduce the issues. Yet the student, because of the very nature of the problem, is likely to become bogged down in the detail involved. On the other hand, if he or she does not become bogged down, it is unlikely that enough of an impression about the evidentiary point raised will be made to be of any real assistance.

Perhaps the first chapter is simply too ambitious. A transcript might have been used; indeed, the existing transcript might still be used, without an attempt to deal with the evidentiary issues. It is useful at the beginning of the course for the student to see what testimony looks like (at least in writing), to see what objections look like, and to see what the trial as a whole involves. Reference back to the transcript could then be made at other points in the course.

Another difficulty is the absence of a separate treatment of direct examination. Most of the issues involved in direct examination are taken up in connection with other topics. Yet, the failure to emphasize direct examination as a separate subject regrettably diminishes the importance of that critical aspect of the trial. The separate treatment of issues like leading questions and opinion is good but meets only part of the need. The student does need to deal with a direct examination as it might be approached by a trial lawyer. Somewhere in the book that specific problem should have been raised.

Neither of these criticisms is intended to detract from the basic validity of Lempert and Saltzburg as an effective tool for teaching evidence. The idea of a self-contained problem, text, and casebook is a brilliant one. It is executed by the authors with extreme care. The book is a highly usable product.

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