

1991

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Recommended Citation

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What We Don't Teach in Trial Advocacy: A Proposed Course in Trial Law

J. Alexander Tanford

For several years I have been teaching a course called Trial Law and Procedure. This is not a simulation course in trial advocacy. It is a traditional classroom offering in which students read and discuss a collection of cases, materials, and problems that focus on the jurisprudence, principles, and doctrines of trials.¹ To my knowledge, no other law school regularly offers a basic trial law course.² This is a curious deficiency, given the centrality of the trial to our conception of the legal universe. In this article, I will explain why I think a trial law and procedure course would be a useful addition to the crowded curriculum.

I. Why Teach Trial Law?

Just because one could put together a set of cases and materials on trial law does not necessarily mean it is useful to teach such a course. We do not teach every conceivable legal subject.³ We assume (somewhat optimistically) that our graduates will have the basic research skills to go to the library and find their own cases and materials. We also assume (even more optimistically) that they will have learned to think critically enough about law and legal institutions that they can teach themselves subjects not covered in law school, such as the law of salmon farming.⁴ I think there are, however, two

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1. J. Alexander Tanford, *Trial Law and Procedure: Readings, Cases, Problems and Other Materials* (1991 mimeo) (approx. 500 pp.). Copies are available by writing to the author at Indiana University School of Law, Bloomington, IN 47405.
2. A few similar courses may exist of which I am unaware. Cf. Kenney Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 *J. Legal Educ.* 69, 69 (1982) (skills courses spend little time grappling with jurisprudential theory).
3. Animal law comes to mind. See Erik M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 *U. Kan. L. Rev.* 433, 434 (1990) (lamenting absence of scholarly attention to the legal status of both new and old buffaloes). Although animal law is the subject of treatises, e.g., David S. Favre & Murray Loring, *Animal Law* (Westport, Conn., 1983) and a periodical (*Animal Law Report*), I am not aware of any courses being taught on it.
4. See William Howarth, *The Legal Status of Fish Farming*, 1987 *J. Plan. & Envtl. L.* 484; Michael C. Blumm, *Why Study Pacific Salmon Law*, 22 *Idaho L. Rev.* 629 (1986). The

sound pedagogical reasons for teaching trial law: The course contributes something meaningful to the core education of law students, and there are educational costs associated with not teaching it.

A. Trial Law Contributes Something Educationally Meaningful

The litigation paradigm dominates legal discourse. The idea that disputes will be resolved in courtrooms (or in anticipation of going to trial) pervades the structure of much of the law, especially the subjects taught in the first year of law school. Our litigation focus also is apparent in our choice of the appellate case teaching method. A trial law course can provide an opportunity for students to develop their critical thinking about fundamental aspects of the trial system, such as the relative merits of the adversarial structure of the trial, its truth-determining capabilities, efficiency, and social role.⁵

The constitution includes a number of provisions that address trial procedure. Some may have been discussed briefly in other courses: the right to a jury trial in civil⁶ and criminal cases⁷; jury size, unanimity, and composition⁸; the right of confrontation and compulsory process⁹; and prosecutorial comment on the defendant's decision not to testify.¹⁰ In Trial Law, relevant Supreme Court cases can be placed in their trial context. For example, *Batson v. Kentucky* may have been discussed in Constitutional Law as a logical extension of constitutional doctrine promoting racial equality. In Trial Law, the *Batson* decision can be discussed at a more complex level, focusing not only on whether race-based peremptory challenges are consistent with equal protection doctrine but also on whether they are consistent with surrounding rules of jury selection, the adversary balance, principles of attorney tactical latitude, and the psychology of juror behavior.

examples are drawn from Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 Harv. L. Rev. 926, 930 (1990).

5. The pros and cons of the adversary system are mentioned only briefly if at all in other coursebooks. In *Criminal Procedure*, for example, Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, *Modern Criminal Procedure* 1358–64, 7th ed. (St. Paul, Minn., 1990) include only four pages of relevant materials; James Haddad, James Zagel, Gary Starkman & William Bauer, *Criminal Procedure*, 3d ed. (Mineola, N.Y., 1987) do not mention it at all. In *Evidence*, Edward W. Cleary, John William Strong, Kenneth S. Broun & Robert P. Mosteller, *Evidence* 48–80, 4th ed. (St. Paul, Minn., 1988) include materials on it, while Eric D. Green & Charles R. Nesson, *Evidence* (Boston, 1983) do not. In *Civil Procedure*, David W. Louisell, Geoffrey C. Hazard, Jr., & Colin C. Tait, *Cases and Materials on Pleading and Procedure* 29–51, 6th ed. (Mineola, N.Y., 1989) discuss it, but Jonathan M. Landers, James A. Martin & Stephen C. Yeazell, *Civil Procedure*, 2d ed. (Boston, 1988) do not.
6. See, e.g., John J. Cound, Jack H. Friedenthal, Arthur R. Miller & John E. Sexton, *Civil Procedure* 876–913, 5th ed. (St. Paul, Minn., 1989); Louisell, Hazard & Tait, *supra* note 5, at 1001–62; Landers, Martin & Yeazell, *supra* note 5, at 703–35.
7. E.g., Kamisar, LaFave & Israel, *supra* note 5, at 1288–91; Haddad, Zagel, Starkman & Bauer, *supra* note 5, at 1080–89.
8. See, e.g., Kamisar, LaFave & Israel, *supra* note 5, at 1291–94, 1299–05, 1310–28; Haddad, Zagel, Starkman & Bauer, *supra* note 5, at 1089–1126.
9. E.g., Cleary, Strong, Broun & Mosteller, *supra* note 5, at 716–42; Green & Nesson, *supra* note 5, at 495–517; Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 551–609, 2d ed. (St. Paul, Minn., 1982).
10. Kamisar, LaFave & Israel, *supra* note 5, at 1384–89; Haddad, Zagel, Starkman & Bauer, *supra* note 5, at 1270–75.

Trial Law cases can also provide new insights on familiar jurisprudential themes that cut across the curriculum. One good example is the debate over the role of original intent and precedent in constitutional adjudication. The debate is often cast in terms that equate judicial activism with justices on the political left. In decisions concerning juries of fewer than twelve persons, however, the sides have been reversed. In *Williams v. Florida*,¹¹ it is the conservative justices who ignore the framers' intent¹² and clear precedent¹³ and argue that constitutional interpretation has to take contemporary social needs (in this case, efficiency) into account.¹⁴

Of course, trial law also introduces a host of new legal issues, principles and rules unlikely to have been mentioned in other courses. Some have constitutional dimensions, such as inadvertent waiver of the right to a jury; the meaning of the phrase "shall be preserved" in the Seventh Amendment; the "material and favorable" test for triggering compulsory-process clause protection; the distinction between impartial jurors and an impartial jury; whether the right to counsel means the right to present a strategically advantageous defense; whether defense evidence may be excluded as a penalty for violations of rules of trial procedure; the right to argue; the effect of prosecutorial arguments that the jury should ignore constitutional standards (jury nullification arguments); and whether the due-process clause gives civil litigants any right to present evidence, cross-examine witnesses, or make arguments. An even broader array of trial law issues are matters of state law.¹⁵

Finally, trial law presents a rare opportunity for direct comparison between civil and criminal cases. Trials are a common element of civil and criminal procedure. Therefore, they are a good vehicle for facilitating discussion about similarities and differences between civil and criminal systems¹⁶ in a curriculum that otherwise treats them separately.¹⁷

B. The Incompleteness of the Current Approach to Trial Practice

The existing trial practice curriculum generally consists of a single simulation course called Trial Advocacy, which focuses on trial skills and tactics. Mauet's leading textbook summarizes its agenda as follows:

11. 399 U.S. 78 (1970).
12. *Id.* at 98–99, 103.
13. See *Thompson v. Utah*, 170 U.S. 343 (1898) (accused cannot be deprived of right to twelve-person jury).
14. 399 U.S. at 99–103; *id.* at 137 (Harlan, J., concurring).
15. See J. Alexander Tanford, *An Introduction to Trial Law*, 51 Mo. L. Rev. 623, 626–28 (1986).
16. *Compare*, e.g., *Ballew v. Georgia*, 435 U.S. 223 (1978) (juries of fewer than twelve in criminal cases) *with* *Colgrove v. Battin*, 413 U.S. 149 (1973) (juries of fewer than 12 in civil cases); or *compare* *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth-amendment right to jury trial incorporated in fourteenth amendment and applies to states) *with* *Beacon Theaters v. Westover*, 359 U.S. 500 (1964) (seventh-amendment right to jury trials is not incorporated, does not apply to states).
17. But see Robert M. Cover, Owen M. Fiss & Judith Resnik, *Procedure* (Westbury, N.Y., 1988) (valiant effort to combine civil, criminal, and administrative procedure into one mega-procedure course).

[T]he effective trial lawyers always seem to have two complementary abilities. First, they have developed a methodology that thoroughly analyzes and prepares each case for trial. Second, they have acquired the technical skills necessary to present their side of a case persuasively in court. It is the synthesis of both qualities—preparation and execution—that produces effective trial advocacy.¹⁸

Other trial practice texts share this skills-and-tactics agenda. Marilyn Berger, John Mitchell, and Ronald Clark state that their “sole goal is to present [the student] with a systematic way of acquiring a set of professional skills.”¹⁹ Joseph Howe and Walker Blakey “focus [their] course . . . on trial tactics and techniques.”²⁰ James Jeans²¹ and Robert Keeton²² add some discussion of trial ethics. Ronald Carlson and Edward Imwinkelried include psychology.²³

None of these books discusses law or the role of the adversary trial system in society.²⁴ For example, Mauet does not discuss or allude to trial law except for occasional vague warnings that some judges might not allow certain tactics.²⁵ Only occasionally does he even suggest that a judge might make a decision because a statute or appellate case limits the judge’s discretion rather than because it is the judge’s personal rule. Even then the importance of the law is downplayed: “How jury panels are examined and selected is controlled by statute, court rules, local practices, and the judge’s preferences. Your first step must always be to determine how a jury is selected in your judge’s courtroom. When in doubt, ask the judge or his court personnel.”²⁶ I would have thought the first step for an attorney in doubt about proper procedure would be to research the law.

I do not mean to suggest that we stop teaching Trial Advocacy. Rather, an agenda that focuses *exclusively* on skills and tactics is pedagogically unwise. It gives students an incomplete picture of what they need to know about trials. Trial skills courses rarely present opportunities for students to think critically about the adversary trial system as an institution. Students from the beginning are asked to operate within the principles and assumptions of the existing system rather than question them. In some cases,

18. Thomas A. Mauet, *Fundamentals of Trial Techniques* at xix, 2d ed. (Boston, 1988). Astute readers will undoubtedly notice that I do not cite my own book, *The Trial Process: Law, Tactics and Ethics*, as the leading text. I am proud of my book, but I am not naive. Even my own students surreptitiously carry copies of Mauet in their backpacks.
19. Marilyn J. Berger, John J. Mitchell & Ronald H. Clark, *Trial Advocacy: Planning, Analysis, and Strategy I* (Boston, 1989).
20. Joseph D. Howe & Walker J. Blakey, *Assignments in Trial Practice* at v, 5th ed. (Boston, 1986).
21. James W. Jeans, *Trial Advocacy* at iii (St. Paul, Minn., 1975) (students must learn tactics and ethics).
22. Robert E. Keeton, *Trial Tactics and Methods* at ix–xi, 2d ed. (Boston, 1973) (trial practice is matter of learning tactics and methods, with tangential reference to ethics).
23. Ronald L. Carlson & Edward J. Imwinkelried, *The Dynamics of Trial Practice* 6–8 (St. Paul, Minn., 1989) (students study psychology, mastery of facts, and strategic and tactical planning).
24. But see J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* at vii (Charlottesville, 1983) (criticizing existing trial advocacy texts for ignoring trial law).
25. E.g., Mauet, *supra* note 18, at 47 (on opening statements, “judges differ widely in their interpretation of what constitutes impermissible argument. . . . The only solution is to learn what your particular judge’s attitude is.”).
26. *Id.* at 26. See also Paul Bergman, *Trial Advocacy* 288, 2d ed. (St. Paul, Minn., 1989) (one trial judge’s proper opening statement may be another’s improper argument; no suggestion that the issue might have been addressed by appellate courts).

students may hear the message that obedience to tradition is preferable to critical thinking.²⁷ This is somewhat antithetical to the law school's general intellectual mission.

Offering a trial advocacy course without also including a trial law course in the curriculum may cause students to misconceive the legal universe. No matter how much we deny it, our curriculum implicitly promises to cover, at least superficially, all the basic information about law that our students will need to begin practicing it. Therefore, if trial law were important (or existed at all), surely it would be taught. By offering Trial Advocacy but not Trial Law, we create the erroneous impression that trial practice somehow does not involve a significant body of law of its own (other than evidence) and that trials are regulated solely by judicial discretion and attorney tactical decisions. I fear that this lawless image may aggravate students' tendencies to equate trials with the Old West and envision themselves as gunslingers.

Further, we may be giving students tactical advice that misleads them about what they will be allowed to do in a courtroom. When we recommend a trial tactic or tell students it is practiced by experienced litigators, we implicitly assert that such a tactic is consistent with the rules of trial law. To the extent that this is not the case, we are misleading our students. The following examples, drawn from several trial practice texts, demonstrate the potential danger.

In voir dire, students may be told that "[a]ll commentators agree that you should always save at least one peremptory challenge—you never know who will be the last person called to the box."²⁸ This may be good tactical advice for picking the jury, but it could have unanticipated legal consequences. The procedural default doctrine requires an attorney to exhaust *all* peremptory challenges in order to appeal an erroneous ruling on a challenge for cause.²⁹ An attorney who has saved her final peremptory challenge for tactical reasons may find that she has waived the right to pursue an otherwise meritorious appeal.

When they study opening statements, students may be advised that they usually should give one, although "[t]he right to make an opening statement is a right you can waive."³⁰ This misinforms students. Opening

27. The most famous example is Irving Younger, *The Ten Commandments of Cross-Examination* (videotape), in which Younger yells, "Never, never, never ask anything other than a leading question" during cross-examination. See also Joseph Kelner & Francis E. McGovern, *Successful Litigation Techniques: Student Edition* § 1.03 (New York, 1981) (students must learn to use techniques "that have proven successful to other litigators").
28. Kenney F. Hegland, *Trial and Practice Skills* 97 (St. Paul, Minn., 1978). See also Mauet, *supra* note 18, at 27: "[N]ever run out of challenges. . . . Always save at least one peremptory challenge. The cases are legion in which one lawyer used all his challenges before the complete jury was picked only to discover that the last juror seated was disastrous for him. Save your last challenge for such an emergency."
29. E.g., *Hopkins v. State*, 429 N.E.2d 631, 635 (Ind. 1981); *Williams v. State*, 146 Ga. App. 543, 544, 246 S.E.2d 729, 731 (1978); *Lambert v. Sisters of St. Joseph of Peace*, 277 Or. 223, 229, 560 P.2d 262, 265 (1977). See Tanford, *supra* note 15, at 637.
30. Mauet, *supra* note 18, at 51.

statements are waivable only in some jurisdictions.³¹ In others, an opening statement by the plaintiff is mandatory: plaintiff must describe a prima facie case or the defendant is entitled to a directed verdict.³² Students also may be advised to disclose weaknesses during opening statements: "Often a difficult decision in opening statements is whether . . . to volunteer weaknesses. This involves determining your weaknesses and predicting whether your opponent intends to use them at trial. . . . [If the weakness is] known to the opponent, you should volunteer it as soon as possible."³³ Following this advice can have unanticipated legal consequences. Factual concessions made in opening statement may constitute binding judicial admissions that not only relieve the opponent of proving the fact but may even preclude the party making the concession from contesting the facts admitted.³⁴

For cross-examination, students will undoubtedly hear the conventional wisdom that they should try to control witnesses and prevent evasion and explanation: "The explaining or arguing witness presents [a problem on] cross-examination This witness wants to expound on everything. . . . The key to such a witness is control. When the witness . . . keeps on talking, cut him off by asking your next question."³⁵ Although the attorney may be able to prevent a witness from giving unresponsive answers or volunteering information that was not requested,³⁶ most courts have held that the attorney has no right to prevent a witness from giving a responsive explanation. To the contrary, the rule in almost all states is that the witnesses are permitted to explain their answers, even to questions that called for only a yes or no answer.³⁷

When they read about closing arguments, students may see the assertion that "[t]he plaintiff always has the right to open and close the arguments."³⁸ However, in several states, the parties are entitled to only one argument each.³⁹ In others, the defendant can earn the right to argue first and last by

31. E.g., *Winter v. Unaitis*, 189 A.2d 547 (Vt. 1983) (no statute or case law in Vermont requires an opening).
32. E.g., *Fleetwood v. State*, 168 Ind. App. 545, 549, 343 N.E.2d 812, 814 (1976) (opening mandatory); *Slade v. City of Phoenix*, 112 Ariz. 289, 299, 541 P.2d 550, 551 (1975) (defendant entitled to directed verdict if plaintiff's opening inadequate); *State v. Shaffer*, 260 La. 605, 632, 257 So.2d 121, 130 (1971) (opening mandatory); *White v. State*, 11 Md. App. 423, 428, 274 A.2d 671, 674 (1971) (defendant entitled to directed verdict). See Tanford, *Trial Law*, *supra* note 15, at 647.
33. Mauet, *supra* note 18, at 50. See also Bergman, *supra* note 26, at 296 (advising students to disclose weaknesses).
34. E.g., *Lystarczyk v. Smits*, 435 N.E.2d 1011, 1014 (Ind. Ct. App. 1982) (must be "clear and unequivocal" admission of fact); *Miller v. Johnston*, 270 Cal. App. 2d 289, 75 Cal. Rptr. 699, 705 (1969). See Tanford, *supra* note 15, at 648.
35. Mauet, *supra* note 18, at 261. Cf. Bergman, *supra* note 26, at 215-17 (some judges permit explanations).
36. E.g., *Mullins v. State*, 157 Ga. App. 204, 206, 276, S.E.2d 877, 879 (1981).
37. E.g., *State v. Marshall*, 571 S.W.2d 768, 772 (Mo. Ct. App. 1978); *State v. Rouse*, 256 La. 275, 287, 236 So.2d 211, 215 (1970); *Bank v. Egan*, 240 Minn. 192, 200, 60 N.W.2d 257, 262 (1953). See Tanford, *supra* note 15, at 668-69.
38. Kelner & McGovern, *supra* note 27, at § 17.01; Mauet, *supra* note 18, at 278.
39. E.g., Ky. R. Civ. P. 43.02(e) (1990) (defendant first, plaintiff concludes); Minn. R. Crim. P. 26.03(11)(h-i) (1979) (prosecution first, defendant concludes). See J. Alexander Tanford, *Closing Argument Procedure*, 10 Am. J. Trial Advoc. 47, 76-77 (1986).

presenting no evidence in its case-in-chief⁴⁰ or by conceding a prima facie case and proceeding solely on an affirmative defense.⁴¹

For the content of argument, students may encounter the following example of a damages argument:

In a land of normal people, what is it worth to be able to walk, stand, and lead a normal active life like everyone else? May I suggest the sum of \$40,000 as a fair figure? . . . If [opposing] counsel thinks \$40,000 is too high . . . , let the defense tell you why it is too large.⁴²

Students might be led to believe that attorneys may tell the jury their personal opinions as to what constitutes a fair damage award. This is inconsistent with case law that holds that specific suggestions about damage amounts must be derived from evidence and common experience⁴³ and that attorneys are not permitted to state their personal opinions.⁴⁴

The net result of the dominant skills-and-tactics approach may be that we inadvertently teach students bad law while erecting roadblocks to their ability to recognize it as such. I believe, therefore, that we should supplement Trial Advocacy with a course in Trial Law.

II. Course Description

My Trial Law course covers five aspects of trials: their historical context and development, contemporary theoretical debates about what trials should be, the conflicting jurisprudential principles that shape trials, relevant Supreme Court opinions, and the complex body of doctrine that purports to regulate trials.

In the first part of the course, I provide students with an overview of the long history of trials. I use Wigmore's marvelous description of ordeals, compurgations, and other early forms of dispute resolution,⁴⁵ and excerpts from Landsman's history of trials in the United States.⁴⁶ Alternative choices of readings abound that are more detailed or that more explicitly address the earlier political context in which trial law developed.

After the historical introduction, students read selections from the substantial body of literature on the theory of trials. The centerpiece is the classic debate between Lon Fuller and Jerome Frank over the relative

40. E.g., Ga. Code Ann. § 17-8-71 (1990).

41. E.g., *Silver v. New York Life Ins. Co.*, 116 F.2d 59, 61 (7th Cir. 1940) (defendant earned right to open and close by substantially admitting all major allegations). See Tanford, *supra* note 39, at 77–80.

42. Mauet, *supra* note 18, at 293–95.

43. E.g., *Levin v. Ritson*, 179 Conn. 223, 226–27, 425 A.2d 1279, 1281 (1979); *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291, 321 (Mo. 1978) (en banc) (fair and reasonable standards; attorney cannot state personal opinion about damages).

44. E.g., *Boyd v. State*, 643 S.W.2d 700 (Tex. Crim. App. 1982). See Tanford, *supra* note 15, at 690, 692. See also Model Code of Professional Responsibility DR 7-106(C)(4) (1980) (improper for attorney to express personal opinion on merits of case).

45. John Henry Wigmore, *A Kaleidoscope of Justice* 5–42 (Washington, D.C., 1941).

46. Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St. L.J. 713, 720–36 (1983).

merits of adversariness and truth seeking.⁴⁷ The debate has remained lively and continues to generate heated discussion.⁴⁸ Other readings examine trials from more contemporary theoretical perspectives: economic efficiency,⁴⁹ communitarianism (both conservative⁵⁰ and progressive⁵¹ formulations), law as political ideology,⁵² and the role of trial courts in society.⁵³

The third part of the course uses trials as vehicles for discussing several catholic jurisprudential issues. Prominent among these are the myth of judicial neutrality⁵⁴ and the concomitant problem of the politically influenced exercise of discretion,⁵⁵ the appropriate role of social science in formulating legal policy,⁵⁶ and the problem of racism and sexism in the legal system.⁵⁷

Other familiar jurisprudential and policy issues arise throughout the course. Cases such as *Williams v. Florida*⁵⁸ on six-person juries and *Johnson*

47. Compare Lon L. Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159 (1958) with Jerome Frank, Courts on Trial: Myth and Reality in American Justice 80-102 (Princeton, 1949).
48. See, e.g., Note, Restraining the Overly Zealous Advocate: Time for Judicial Intervention, 65 Ind. L.J. 445 (1990); Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 Minn. L. Rev. 1 (1984). Compare Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1032-41 (1975) with H. Richard Uviller, The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea, 123 U. Pa. L. Rev. 1067 (1975); Monroe H. Freedman, Judge Frankel's Search for Truth, 123 U. Pa. L. Rev. 1060 (1975).
49. See, e.g., Samuel R. Gross, The American Advantage: The Value of Inefficient Litigation, 85 Mich. L. Rev. 734 (1987); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983).
50. See, e.g., Victor Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom, 65 N.C.L. Rev. 481, 498-502, 513-14 (1987).
51. J. Alexander Tanford, Racism in the Adversary System: The Defendant's Use of Peremptory Challenges, 63 S. Cal. L. Rev. 1015, 1055-57 (1990).
52. See, e.g., Mirjan Damáska, Structures of Authority and Comparative Criminal Procedure, 84 Yale L.J. 480 (1975); William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29.
53. See, e.g., Peter Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 Geo. L.J. 185, 197-202 (1983); C. K. Rowland, Donald Songer & Robert A. Carp, Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges, 22 Law & Soc'y Rev. 191 (1988); Lynn Hecht Schafran, Women in the Courts Today: How Much Has Changed, 6 Law & Ineq. 27 (1988).
54. E.g., Marvin Frankel, Partisan Justice 39-51 (New York, 1980). See also *United States v. Dellinger*, 472 F.2d 340, 385-91 (7th Cir. 1972) (trial of "Chicago Seven" antiwar protestors).
55. See, e.g., George C. Christie, An Essay in Discretion 1986 Duke L.J. 747, 747; Ronald Dworkin, Taking Rights Seriously 31-39 (Cambridge, Mass., 1977).
56. See, e.g., J. Alexander Tanford, The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology, 66 Ind. L.J. 137, 144-50 (1990). See also *Lockhart v. McCree*, 476 U.S. 162, 202 (1986) (empirical data showing that death-qualification produces biased jury); *Ballew v. Georgia*, 435 U.S. 223 (1978) (empirical data showing smaller juries produces less reliable verdicts).
57. See, e.g., Report of the New York Task Force on Women in the Courts, 15 Fordham Urban L.J. 11, 113-26 (1986-87) (experiences of women litigants); *id.* at 126-46 (women attorneys in court); *id.* at 154-61 (women court employees); Tanford, *supra* note 51 (racially motivated jury selection).
58. 399 U.S. 78 (1970). See also *Ballew v. Georgia*, 435 U.S. 223 (1978).

*v. Louisiana*⁵⁹ on nonunanimous verdicts provide fertile ground for discussing the role of precedent and the intent of the framers in constitutional interpretation.⁶⁰ *Coy v. Iowa*⁶¹ and *Booth v. Maryland*⁶² implicate the appropriate role in the criminal justice system for victims and their families. *Lockhart v. McCree*⁶³ contributes to the debate over whether it is possible to have a fair death penalty. *Batson v. Kentucky*⁶⁴ is a natural vehicle for discussing the role of legal institutions in combatting racism.

The fourth part of the course presents a wealth of Supreme Court cases announcing the broad principles of trial law. Many opinions involve interpretation of the Sixth and Seventh Amendments, articulating a basic conception of a fair trial. These include the scope of the right to a jury trial⁶⁵; jury size⁶⁶; the meaning of the right to counsel during trial⁶⁷; the meaning of the guarantee of a public trial, including free press/fair trial issues⁶⁸; and the various meanings of the impartial jury requirement.⁶⁹

Other constitutional issues are deferred until the final section of the course, when they can be considered in the context of the common-law doctrine of trials. For example, the scope of the right to compulsory process⁷⁰ and confrontation⁷¹ in criminal trials is included in the discussion of direct and cross-examination so that a criminal defendant's rights can be compared with the ability of other litigants to participate in witness examination. *Batson v. Kentucky*'s prohibition against exercising peremptory challenges against African-Americans to create all-white juries⁷² is discussed in the context of jury selection as a whole.

The fifth part of the course introduces students to the doctrinal principles and rules that regulate all aspects of trials from jury selection to deliberations.⁷³ The material is extensive and comes from a wide variety of

59. 406 U.S. 356, 364 (1972).

60. Compare, e.g., *Thompson v. Utah*, 170 U.S. 343, 344 (1898) (jury referred to in constitution is twelve persons, neither more nor less) with *Williams v. Florida*, 399 U.S. 78, 99 (1970) (there is absolutely no indication that framers meant a jury to comprise twelve persons).

61. 487 U.S. 1012, 1019 (1988) (protecting child-abuse victims at the expense of a defendant's right to confrontation).

62. 482 U.S. 496, 502-03 (1987) (whether jury should consider statements about effect of crime on victim's family). See also *South Carolina v. Gathers*, 490 U.S. 805, 810 (1989) (whether jury's decision to convict and sentence should be based in part on the victim's personal characteristics).

63. 476 U.S. 162 (1986).

64. 476 U.S. 79 (1986). See *People v. Kern*, 545 N.Y.S.2d 4 (App. Div. 1989) (Howard Beach trial). See also Tanford, *supra* note 51, at 1017 (extension of *Batson* to defense attorneys).

65. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (criminal cases); *Beacon Theaters v. Westover*, 359 U.S. 500 (1960) (civil cases).

66. E.g., *Ballew v. Georgia*, 435 U.S. 223 (1978).

67. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

68. See, e.g., *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976).

69. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (fair cross-section requirement); *Ham v. South Carolina*, 409 U.S. 524, 530 (1973) (impartiality requirement).

70. See, e.g., *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866 (1982).

71. See, e.g., *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

72. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

73. See Tanford, *supra* note 15 (synthesizing trial law doctrines and principles).

legal sources: state constitutions,⁷⁴ statutes,⁷⁵ case law,⁷⁶ and court rules.⁷⁷ This body of law contains all the necessary elements for a challenging learning experience: illogical rules⁷⁸ and bad Supreme Court decisions to criticize,⁷⁹ fundamental conflicts between jurisdictions to resolve,⁸⁰ cases with well-reasoned opinions and dissents to ponder,⁸¹ and unresolvable dilemmas in public policy to debate.⁸² Studying this stuff might even improve a student's ability to competently try cases.

III. Conclusion

Teaching Trial Advocacy apart from its legal context transforms lawyers' litigation decisions into purely tactical ones. This oversimplification deprives students of an opportunity to think critically about one of the central institutions in our legal system; the narrow focus misleads them about the existence and importance of trial law. In practice, if lawyers make decisions without understanding relevant legal limitations, they are courting disaster.⁸³ I think we have an obligation to do a more complete job of teaching about trials than we now do.

I do not think we can solve the problem by just adding a trial law component to existing advocacy courses. I tried that in *The Trial Process: Law, Tactics and Ethics*, and trial advocacy teachers have been staying away from the book in droves. Learning basic trial skills and tactics is time consuming enough without adding extensive materials on trial law.⁸⁴ Even

74. E.g., Conn. Const., art. I, § 19 (party's right to question each juror personally during voir dire shall be inviolate).
75. E.g., N.C. Gen. Stat. § 15A-1212 (1990) (statutory grounds for challenges for cause).
76. E.g., *State v. Thomas*, 307 Minn. 229, 230, 239 N.W.2d 455, 457 (1976) (propriety of explaining burden of proof in language that deviates from jury instruction).
77. E.g., Mich. Gen. Ct. R. 507 (1963) (covering procedure for opening statements, order of presentation, and right to make a closing argument).
78. E.g., *United States v. Hooper*, 575 F.2d 496, 499 (5th Cir. 1978) (jurors may *not* see a written copy of their jury instructions). See Amiram Elwork, Bruce D. Sales & James J. Alfini, *Making Jury Instructions Understandable* 18-20 (Charlottesville, 1982) (research on educational and cognitive psychology shows that written instructions are more easily understood than oral instructions).
79. Take your pick. My favorite is *Tanner v. United States*, 483 U.S. 107, 127 (1987) (conviction affirmed despite fact that jurors used cocaine and drank liquor during the trial).
80. *Compare Slade v. City of Phoenix*, 121 Ariz. 298, 299, 541 P.2d 550, 551 (1975) (judge may grant directed verdict based on opening statement) with *Goff v. Richards*, 19 Md. App. 250, 252, 310 A.2d 203, 204 (1973) (judge may not grant directed verdict based solely on opening statements).
81. E.g., *Roman v. Mitchell*, 413 A.2d 322, 328 (1980) (propriety of voir dire questions concerning insurance coverage).
82. E.g., *McDonough Power Equip. Co. v. Greenwood*, 464 U.S. 548, 555 (1984) (what happens when a juror is dishonest during voir dire, hiding information that would probably have led a party to remove him peremptorily).
83. See the movie *Body Heat*, starring Kathleen Turner and William Hurt, in which a lawyer tries to draft a will without understanding the rule against perpetuities, which leads to sex, murder, and a prison term. As to the propriety of citing movies, see Jensen, *supra* note 3, at 433 n.2 (citing famous airport scene in *Casablanca*); Robert Laurence, *Last Night While You Prepared for Class I Went to See Light of Day*, 39 J. Legal Educ. 87 (1989).
84. See Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. Legal Educ. 123, 134 (1987) (present trial advocacy agenda is already crowded).

if we were to include some rudimentary information on trial law along with skills and tactics, I am not sure we could find the time to reflect on the jurisprudence of the adversary system and to dissect Supreme Court cases on juries. The conclusion I have reached is that we should offer a new course on Trial Law and Procedure.⁸⁵

85. A detailed outline of the course and/or a set of readings and problems is available. Address requests to J. Alexander Tanford, Indiana University School of Law, Bloomington, IN 47405.

