Advance Sheet

# WHAT LITIGATORS CAN TEACH AMERICANS ONCE THEY (RE-)LEARN IT THEMSELVES

ROBERT E. SHAPIRO

**The author, an associate editor of LITIGATION, is with Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago.**

We all heard the very first day of law school exactly the same spiel, often multiple times. You remember: "We are going to teach you here to think like a lawyer." So said some stern administrator at an initial gathering designed to map out your three-year future. Or perhaps an exuberant professor enthused to the same effect at a first class meeting as he gleefully bore down on you with the Socratic method. Was it promise or threat? We hardly knew, though we expected it to be true. Law school, we were sure, was to begin with some kind of intellectual deconstruction process whereby our brains would be scraped down to their bare foundations, leaving us uncertain how, not to mention what, we were to think. Then would follow the building up of a new mental structure, the columns and beams of which were to comprise a unique form of logic and reasoning, and the rooms fitted out with the substance of the law. The result, we knew, would distinguish us throughout many subsequent decades of practice, a mark of our proficiency and professionalism, the substantive meaning of the "Esq." we were to be entitled to append to our names.

And so it seemed to happen, didn't it? By law school's end, or at least soon thereafter, the results vindicated the prediction, however exhilarating or sinister. Going to law school, taking the bar, and beginning practice may have started in a panic-inducing loss of one's bearings, but they were replaced over time with a new confidence and skill. We pursued a new way of life, where thinking about what we were doing, inside and outside the courtroom, became one of spotting problems, calm logic, a demand for evidence, analogic thinking, narrative facility, and coolness under rhetorical fire. At a minimum, our mental processes became less flaccid. We became better able to *see* clearly, grasping facts and circumstances at a glance, reducing complexities to simple ideas, and recognizing those less obvious relationships among things. To others we became insufferable in argument—often dismissed as "such a lawyer"—which, however irritating in general, was still a point of pride.

## American Legal Thinking

There's only one difficulty with this happy storyline: It's untrue. Or at least radically incomplete. It contains what during that process we learned to describe as a "material omission," one so significant as to cause a major misunderstanding of the whole undertaking. What we were actually taught to do in law school is to think like an *American* lawyer. This is no mere quibble. Its significance for American life, past and perhaps future too, cannot be overstated.

Why should the special character of American legal thinking even matter, you may ask? After all, our everyday practices concern American law in American courts. In neglecting to tell the whole story, the law schools seem to doubt its importance too. But three characteristics of our law's uniqueness bear mentioning. First, and most obviously, there is the residual common-law element of our practice, which requires a kind of analogic thinking altogether foreign (literally) to lawyers not familiar with the Anglo-American legal system. Foreign lawyers are not trained to and do not look for scenarios that are similar, but rather for statutory rules that govern. They seek and expect certainty, whereas American lawyers know that every case they might offer as analogous authority can be countered by another going the other way.

A second and related distinction is that our system is an adversary one rather than inquisitorial. In our courtrooms, opposing sides vie in real time for the upper hand by using the facts and the case law to create opposing narratives, more or less persuasive to a neutral third party. Other systems of law have some adversarial processes,

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not least in the sense of opposing parties who present to the court the arguments and the evidence that support their own client's point of view. But the system usually depends not on those arguments and evidence being thrashed out before a disinterested party such as one of our judges or juries. Rather the case is taken by a magistrate whose job it is to sort through the circumstances herself, doing whatever other inquiry she thinks is necessary, and rendering a decision based on her own investigation rather than what has been presented or elicited by the parties.

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Third, at the deepest theoretical level, the difference in legal systems reflects a fundamentally different notion of law and even the truth. "The law wishes to be the discovery of what is," said Socrates, finding that it falls short of the truth, in his view of the matter, not least because the true or best way of seeing things is unavailable to the human mind. American law thinking seems to agree, at least in part. The so-called "Socratic method" in American law schools, and the analogic thinking it promotes, draws its force from this fundamental element of our legal system, believing that absolute truth may be beyond our reach, that there remain advantages and possibly greater perspective in other ways of thinking. The essential uncertainty of the matter belies the alternative assumptions in the inquisitorial method that statutes can fix the applicable principles or that magistrates and judges can reach and find simple answers there.

## Understanding Multiple Perspectives

For this reason, the "thinking" that is characteristic of lawyers taught by American law schools and United States law practice requires an ability to see and understand perspectives other than their own. With certain truth beyond our ken, there is always more than one perspective to go on, different ways of understanding the facts, more or less near to the truth. There may be cases in which the facts alone determine the outcome. But the complexity of litigation, even in ordinary cases, derives less from arguments about what the facts *are*, and more from arguments about what the facts *mean*.

This is more true today than ever before. Particularly in a world dominated by electronic media, there are few of the quotidian facts of life that can remain unknown in American litigation. All or most of what happened is usually found out in discovery. Having sifted through the inevitable mountain of emails and other electronically stored information obtained from the other side, a diligent litigator can usually piece together what a relevant witness said and did throughout any particular day, including what he decided to order for dinner. But such things generally do not determine outcomes, at least not by themselves. Instead, it's how an able lawyer will characterize the facts, what narrative those facts are made part of, and how the law is developed and applied that are critical to success or failure.

Knowing all possible narratives, or as many as possible, along with the ability to test their strengths and weaknesses, is essential to the art of American litigation and critical to success. Without at least roughly comprehending your adversary's alternative perspective, you run a high risk of failure. Rely solely on your own understanding, plan in a vacuum, and you'll likely lose. As Mike Tyson bluntly put it, "everyone has a plan until he's punched in the face." Your plan is only as good as it proves to be by comparison with your adversary's, and you must know that other perspective to develop and protect your own.

To the same effect, if a bit more graciously, Abraham Lincoln was known to have remarked that the only thing he ever studied was the other side's case. It is a relatively straightforward exercise to develop your own client's narrative, particularly as she will have told you and provided the evidence from her own perspective. You can then match it with other evidence you collect and make adjustments in your narrative to account for wayward facts, credibility, and other problems of persuasiveness or proof. It is quite another matter, and a critical and more difficult one, to understand how the other side sees the facts, what account your adversary will give of the most relevant circumstances. Luck aside, you are likely to come to grief if you fail to engage in this process.

Partly because American law schools give less and less emphasis to this distinctiveness of our practice, today's civil lawyers are not as attuned to or adept at this challenging process as they should be. We think we know what cannot be simply known, believe our own narrative is the exclusively sound one, and increasingly deem our adversaries malicious, irrational, or just plain dumb. In most cases, none of these descriptions is apt. The other side *sees* the matter differently, to a greater or lesser extent. It is of paramount importance to understand exactly what this alternative vision is and how it may be appealing to a trier of fact. Without such an understanding, one is left with no sound way of assessing likely outcomes, let alone ensuring as best we can that ours is more likely to prevail.

In earlier times, respect for other possible narratives, Lincoln's "other side's case," was part and parcel of the professionalism of the lawyer too, his commitment to his

larger role as an officer of the court. The opposing party was in no way an enemy, but someone with a different vision or point of view. Its lawyer was defending only a different perspective, where the job was to present that perspective in as persuasive a way as possible. The choice was not one between good and evil but of different understandings of what was known to have happened. No hard feelings because none was justified. And, respecting the other side's point of view and an opposite number's skill in presenting it, the lawyers worked together to get the matter fairly presented and then walked off arm-in-arm toward a local watering hole when the case was concluded.

## Where Things Stand Today

Less so today. The common enterprise of truth-finding and the vetting process of persuasive proof has given way to a new and far less cooperative world. One Midwestern firm is notorious for viewing litigation as so fundamentally adversarial that its lawyers are instructed upon penalty of dismissal not even to say "good morning" to the lawyers for the opposing party. This in fact seems a violation of professional ethics, undermining the core principle that, as officers of the court, all lawyers are engaged in a joint undertaking of helping to make the system of justice run smoothly and cooperatively. Today, senior litigators are wont to teach their younger colleagues that litigation is war. It's not. It's a fundamentally cooperative, if competitive, collaboration in which the opposing points of view are considered and tested with fairness and discretion by an informed trier of fact.

Consider a similar development in our political lives. Lively debate and rhetorical skill were once the lifeblood of American politics. To be sure, appeals to prejudice, or worse, were hardly unknown and often infected and distorted the matter. But a contest of narratives was the essence of electoral and political success. How different our politics have become today. It is frequently remarked in the political press how polarized the American electorate is. Convinced of their own opinions, many people have lost the ability to understand that others' opinions might have to them an equal or even superior sense. Particularly at the extremes, but certainly not just there, those with political opinions to express seem frequently not to have any ability to accept a different account, a different understanding, from their own. It's my way or the highway; if you are not in agreement with me, you are my enemy. And the rhetoric of political debate, among the candidates and the public alike, is one of dismissing one's political adversary as dumb, malicious, or irrational.

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And therein lies an opportunity for America's lawyers, especially the litigators. Famously, Alexis de Tocqueville identified American lawyers as a possible source of a natural aristocracy in American democracy. That seems almost laughable today. But the point was that American lawyers were in a position to understand both the higher purpose in upholding the law and the essential uncertainty about what the right outcome should be. This is true of democracy more generally too, which requires that we as citizens should learn not just to be tolerant of the other side's point of view but to genuinely respect other points of view, perhaps with an awareness, however grudging, that we may prove wrong ourselves. Just as the American legal system teaches us that there is more than one way to understand what occurred or what is true or best, at least within the natural limits of the human mind, democracy calls upon us to treat each other's opinions with acceptance, if not exactly grace. Lincoln insisted that all our fellow citizens should be approached "with malice toward none, and charity for all," with humility, understanding, and respect, if not agreement. He was referring to a society torn apart by the fraught issue of slavery. We seem unable to do as much even in the case of the less weighty issues that frequently separate Republicans and Democrats.

We as litigators need to recapture the true sense of "thinking like a lawyer," while undertaking that joint endeavor of fairly and cooperatively presenting the opposing viewpoints to a common arbiter, unprejudiced by any assumptions that would cripple the deliberation about the best or right outcome. So, too, Americans need to be re-taught the virtues of accommodating opposing viewpoints, vigorously presenting their own point of view while still acknowledging the possible deficiencies of their own understanding and the respectability of opinions on the other side. The former seems far off given the current trends in the litigation world, the competition for clients, and the decisive role played by moneymaking in our system. The latter is becoming almost hopeless. But democracy may benefit should lawyers better recognize their own best way of doing things. Perhaps if we litigators recapture that true sense of "thinking like a lawyer" our mentors had in mind, or at least invoked, we may have some role in teaching genuine open-mindedness to the American people more generally too. ■