Shakespeare in Law: The Use of History in Shattering Student Credulity

Ellen Wertheimer
Essay

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THE USE OF HISTORY IN SHATTERING STUDENT CREDULITY

ELLEN WERTHEIMER*

INTRODUCTION

LAW students read legal opinions. These provide various components of legal education, including the law itself and (perhaps more importantly) the techniques of analysis that law students need to learn. There is, however, at least one aspect of the law that is not included in this curriculum. The opinions of course include facts. But these facts are set, unquestionable and beyond research. This Essay examines whether this signal omission makes sense.

I. Do Facts Matter?

A. In General

Facts of course matter. They are the basis for any lawsuit, the cause for its existence and the platform on which any decision rests. At the start of most lawsuits, the various parties will have their own versions of what occurred, and part of the resolution of the suit lies in reaching conclusions about what really happened. This can be a lengthy, complex and messy process, and there is no guarantee that the final version in the courts sets forth the actual course of events.

Once a case has been completely decided, however, and all appellate opinions written, the facts of that case matter only insofar as they are included in the opinions. An appellate opinion includes facts and the application of the law thereto. The process by which the facts were decided vanishes from the case. The law may be developed or changed in the course of the opinion. The opinion may be cited in the future. But no one will ever know what really happened. Nor will anyone care. The opinion does not depend on the real course of events, but rather upon what the court includes in its recitation of the facts. What really happened ceases to count. We will never know what really happened to Mrs. Palsgraf on her fateful journey into legal lore. Nor does the court’s opinion hinge in any way upon the actual happenings on that train platform.

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This truth was brought home to me in my law school Property class. The materials for that class included *Otero v. New York City Housing Authority*, an opinion by a court I had already been taught to view as august, the United States Court of Appeals for the Second Circuit. As it happened, I grew up across the street from the site upon which the building at the center of that case was constructed, and I watched the entire process unfold. The facts as recounted in the opinion bore no discernible resemblance to the actual history and course of events. But for my purposes as a law student, and ultimately as a lawyer, this dissonance had no importance. The facts as included in the case became just another hypothetical. It just happened that this was the hypothetical upon which the result came to rest, and that this hypothetical had nothing to do with the actual state of affairs.

History is the opposite. When the dust has cleared, historians pounce on the various events, seeking to uncover the truth. The focus is on what really happened. It is possible that the truth will never be known; in the absence of time machines, it is philosophically arguable that we can never know the truth of what happened. But historians have a lot of fun trying to uncover the truth and arguing that the version they espouse is the only one with any claim to accuracy or legitimacy. They also enjoy debating the process of weeding the facts out from amidst the often intense biases of those who recount them.

Perhaps the classic example of this phenomenon is the debate over whether Richard III had his nephews murdered in the Tower of London.

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2. 484 F.2d 1122 (2d Cir. 1973).

In contrast, in *Rice v. Cayetano*, 120 S. Ct. 1044 (2000), the Supreme Court of the United States recounted a portion of the history of Hawaii, specifically noting (somewhat ahistorically) that the Court needed to "recount events as understood by the lawmakers [at the time]," and not as understood by "[h]istorians and other scholars who write of Hawaii." *Id.* at 1048.

This opinion contrasts sharply with the painstaking effort at historical accuracy presented in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374-84 (1980).


What makes this debate particularly entertaining is that who (if anyone) murdered the Princes can have no impact on life today, although this was not always the case. Sir Thomas More wrote his 1513 “biography” of Richard III (if he wrote it), from the perspective of a rising lawyer during the reign of Henry VIII, whose father was the man who had overthrown Richard III and who himself felt notori-
There were, of course, no known eyewitnesses. If one were to believe the sources closest in time to the actual events, one would conclude that Richard III was the most evil of uncles. As it turns out, however, those sources are among the most biased, having been written by persons dependent for their livelihood on the dynasty that overthrew Richard and usurped the throne of England. Indeed, a strong argument can be made for the proposition that Richard III’s worst mistake was to lose the Battle of Bosworth, because he lost control both of England and of those who would write the history of the period.

In law, then, facts cease to matter once they have been engraved in the stone of an appellate opinion. To the historian, facts always matter. In neither profession can we ever know with certainty what really happened. In law, this breeds indifference. In history, this breeds debate.

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5. The earliest source is Sir Thomas More, who wrote (maybe) a biography of Richard III in 1513, some 28 years after Richard’s death. In what is perhaps an excess of credulity, the eminent John Julius Norwich points out that the “trouble about this second legend [i.e., of a non-guilty Richard] is that it flies in the face of our best witness, Sir Thomas More.” JOHN JULIUS NORWICH, SHAKESPEARE’S KINGS 356 (1999). Sir Thomas More was seven years old in 1485, when the Battle of Bosworth Field put Henry VII on the throne. Calling him a witness to the stirring events of 1485-85 seems something of an overstatement. “Thomas More gathered most of his information by word-of-mouth.” PAUL MURRAY KENDALL, RICHARD III: THE GREAT DEBATE 24 (1965). Kendall also attributes some of More’s information to what More heard some six years after Bosworth as a page in John Morton’s household. John Morton, who was Henry VII’s Archbishop of Canterbury, had worked hard for Richard’s demise. It is of course the case that any information More obtained would have been generated during the era of Richard’s successors, and word of mouth has never been a particularly reliable source of data. Indeed, its unreliability spawned the world of hearsay.


7. Another king who lost a critical battle, and ended up traduced by Shakespeare and historians generally, was Macbeth. It comes as a surprise to those familiar with Shakespeare’s play that Macbeth ruled Scotland well and fairly for some 16 years, and was known as “Good King Macbeth.” When Malcolm defeated Macbeth, he defeated both Macbeth and Celtic Christianity. Thus, when Malcolm took over the country, persons loyal to him and to the church he established took over the task of creating the history that in turn led to Shakespeare’s play. See generally PETER ELLIS, MACBETH (1980).

8. This is particularly true, of course, the further back in time one proceeds.
Another difference between law and history lies in the nature of the facts at issue. Mrs. Palsgraf was herself a supremely unimportant person, and the explosives toppled a scale, not a throne. History is not interested in people like that, or at least it was not until the study of Everyperson came into vogue. In this connection, it is perhaps worth noting that Everyperson is a hypothetical individual, invented to represent a generation of nonentities. Mrs. Palsgraf was a real person who became a hypothetical. Everyperson began and ended existence as a hypothetical. 9

But it seems to me that the callings of law and history are different at a more fundamental level. After all, occasionally an already important person appears in a legal case, or a famous person is tried. 10 In a way, the facts are history, or part of it. It seems to me that the difference lies in the

9. The notable exception to this is the journal-keeper or letter-writer. This person need not be him or herself of historical importance. The Everyperson who happened to keep a journal opens a window on events. Arguably, however, that person remains historically unimportant, even though the contents of the materials may be crucial. See, e.g., ANNE FRANK, THE DIARY OF A YOUNG GIRL (B. M. Mooyaart trans., 1967) (1947); FRANCES & JOSEPH GIES, A MEDIEVAL FAMILY: THE PASTONS OF 15TH CENTURY ENGLAND (HarperCollins 1998).

10. See generally United States v. Burr, 8 U.S. 455 (1807). The career of Aaron Burr serves as a case in point. Aaron Burr was the third Vice-President of the United States, serving in Thomas Jefferson's first term. He failed to win renomination in 1804 as Vice-President. He also failed to win the governorship of New York, largely because of opposition by Alexander Hamilton. Burr, a member of the Old Republican Party (which later became the Democratic-Republican party) and Hamilton, leader of the Federalist party, were publicly and privately at odds over their political differences. Burr challenged Hamilton to a duel in Weehawken, New Jersey, on July 11, 1804. Hamilton was killed in the duel, but Burr was never criminally charged with his death. Warrants were issued for Burr's arrest, but no attempt was made to bring him to trial. Burr, however, was indicted for treason in 1807 in a plot that involved the Louisiana territory and seizing Mexico from Spain. The Burr Conspiracy, as it was called, remains largely a mystery. Burr was acquitted in 1807 after a six-month trial, but his career was ruined. For a discussion of the Burr Conspiracy, see RICHARD BROOKHISER, ALEXANDER HAMILTON: AMERICAN 208, 210-13 (1999); GORE VIDAL, BURR (1989).

Another example of history and legal case joining in significance is John Adams' defense of the British soldiers charged with murder after the Boston Massacre of 1770. The Townshend Acts had been enacted by the British Parliament in 1767. These Acts suspended the New York Assembly for not complying with the law requiring the colonies to provide adequate quartering of British troops and also imposed customs on colonial imports of glass, red and white lead, paints, paper and tea. Demonstrators protesting these Acts provoked British soldiers into firing at the crowd. Five men in the crowd were killed and the soldiers were tried for murder. John Adams defended the British soldiers because he believed every person was entitled to a fair trial. See generally Rex v. Preston, 63 (Suffolk Sup. Ct. 1770); JOHN E. FERLING, JOHN ADAMS: A PUBLIC LIFE, A PRIVATE LIFE 379-81, 384 (1997).

The Adams family provides yet another example. John Quincy Adams, the sixth President of the United States, argued the fate of slaves aboard L'Amistad before the United States Supreme Court. John Q. Adams, who had already served as diplomat, senator, secretary of state, president and congressman, was an avid abolitionist. He argued for the return of the slaves to Africa and won. See United States v. Amistad, 40 U.S. 518, 518 (1841); PAUL C. NAGEL, JOHN QUINCY ADAMS: A PUBLIC LIFE, A PRIVATE LIFE 379-81, 384 (1997).
profound irrelevance of facts after a case is over, as opposed to their supreme importance to the historian.

B. In Law School

For a legal system to work, the principles upon which it rests must be impervious to factual challenge. In other words, the concept of duty set forth in the *Palsgraf* opinion may be subject to analytical challenge, but is not subject to challenge based upon what really happened to that scale. Nor should it be. We can frame hypotheticals and examine what the reasoning would have been in the face of those hypotheticals. But the facts are as set forth in the opinion and could not be changed, even if we did discover irrefutable evidence that they were not as stated.

Does this phenomenon create problems for the law student? It does not create problems in terms of success in law school itself, because law school is based on materials in which the facts are not subject to debate. Hypotheticals are, of course, a familiar tool, but they cannot change the facts as set forth in the opinion. They begin with “assume that . . .”; the debate is not an argument about what really happened.

This approach to facts may create risks outside the scope of success in law school, however. One risk is that students become credulous. Students are all too inclined to take legal opinions at their face value as it is. They want to learn “the law,” but not to question it in either its formative or final stages. If students are taught that the facts in a legal opinion are inevitably beyond question, with the implied imprimatur of accuracy upon them, their already excessive deference to legal opinions becomes enhanced.

The assumption of accuracy creates another problem that may not surface until the student has been graduated to the real world. If facts are consistently ignored as facts, and only studied as platforms for legal analysis, the importance of facts in the phases of a case that precede appellate opinions may well be forgotten. Our system of legal education has a strong tendency to understate the importance of the facts in a case, simply because they are not subject to debate as facts. The legal arguments are all-important; the facts not important at all. To the protagonists, this of course was not the case at the time of trial, nor was it the case for their attorneys or for the judge and jury. The emotional content of a case may be substantial. Moreover, all the litigants may be telling the truth—but their versions may also be mutually exclusive. The fact that a recollection may be inaccurate or that a recollection may change does not mean that the recollector is lying. In addition to realizing how nebulous and evasive the factual truth can often be, many students are genuinely shocked by the extent to which unwritten rules and local customs—including relationships, power dynamics and shared understandings between certain participants in the legal process—play a role in American judicial systems. This
is particularly the case if the students have not been adequately prepared in advance for the reality of law in action.\textsuperscript{11}

The first task an attorney must confront is to figure out what happened. At some point, the attorney is going to need to present the facts as well. This may be a highly complex process, combining detective work with discovery. The fact that what really happened ceases to matter once an opinion becomes final, however, encourages the view that the facts are unimportant before the opinion becomes final as well.\textsuperscript{12} This view threatens the quality of representation and also embodies risks for attorneys in legislative or administrative roles who are charged with developing policies and statutes that respond to various needs and crises.

There is not a lot one can do to research the facts contained in an opinion, both because the protagonists are often so unimportant, and also because the facts no longer matter once the case is final and thus will go unpreserved. But one can encourage students at least to think about, if not to challenge, the material they are given. One way to accomplish this is to establish clinical, client interviewing, and advocacy programs in which students will learn the importance of facts to representation. Another way is to inject an element of history into the law school curriculum. Introducing students to Richard III will persuade students to think about the facts, both as recited and as they might have been. The facts are important as bases for legal opinions, but also as facts, the products of intense research, interviewing, discovery and questioning.

Our legal system is based upon the premise that the adversarial process uncovers the facts. The theory of the adversary system is that if two (or more) opposing parties engage in legal battle, eventually the truth will come out. There is little evidence beyond intuition to support the validity of this premise.\textsuperscript{13} But in a way, the legal system is designed to make asking certain types of questions completely irrelevant. One such type of question is epitomized by the query: What really happened? Because the answer does not matter, once the case is over, no one asks. Because no one asks, the vitality of the adversary system goes unquestioned.

To re-instill a sense of the importance of facts, or at least to make sure that their importance is not completely forgotten, one must turn to history. Historians question facts. Lawyers, once a case is over, don’t. Historians may or may not uncover the "true" facts. We cannot know. But at least they ask. They check perspectives, comparing different versions. They don’t accept anything at face value. They ask why. They look at

\textsuperscript{11} See Andrea M. Seielstad, Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education, 6 CLINICAL L. REV. 127, 129 (1999).

\textsuperscript{12} See Fred Rodell, Woe Unto You Lawyers! 157-79 (1939).

motivation and its ability to help uncover the actual course of events. They look at people.

Because appellate decisions are tied up so neatly, law students rarely think about the impact on real people that a case might have had. This focus away from real-life facts creates the risk that the study of law will be dehumanized. This risk is particularly decried by those who teach simulation courses like trial practice, by clinicians and by scholars of storytelling—feminist law and critical race theory.

Not only do cases have an impact on the protagonists. They also affect different groups differently. Law school curriculum tends to lack a discussion of differences because our legal system makes the questioning of differences irrelevant. Much of feminist legal methodology considers the issue of differences. Because so many factors—race, gender, class, disabilities, etc.—make experiences different, it makes sense to consider how outcomes affect people differently. The protection of human dignity requires a willingness to acknowledge different personal and group experiences, perspectives and values. Legal decisions, in other words, have consequences for the people affected by them, both as individuals and as members of various groups. These consequences, especially when they are negative or painful, require justification.

Different voice theory, also referred to as connection theory or cultural feminism, views women's differences as potentially valuable resources that might serve as a better model of social organization and law than existing "male" characteristics and values. Another method useful to convey different experiences is storytelling. In storytelling, the emphasis is on the connection between stories and emotion, something the law does not recognize. The point of these stories, in many instances, is to demonstrate the gap between the reality of the described experiences, on one side, and existing legal doctrine, on the other. Ideally, exposing this gap points the way to change: reformed and transformed law will better reflect the reality of the experiences of those subject to it. The point of "what

14. One of the prime bases for the conclusion that Richard III did not murder the Princes in the Tower is that he had no reason whatever to do so.


19. For an exposition of storytelling, see Baron & Epstein, supra note 17, at 142.


21. See id. at 282 n.177.
really happened” and “many realities” stories is to improve law’s information base. Reformed or transformed law can never rest on a complete picture of reality, but it can acquire a fuller, more accurate vision by accumulating stories that widen the horizon. 22

Storytelling may help with this process. 23 Legal storytelling provides a framework for study of the negative impact of the law on certain non-majority groups. 24 The idea behind storytelling is that most people associate with those who are similar to themselves and are therefore unfamiliar with the experiences of members of other groups. Thus, the needs of minority groups are overlooked. Storytelling could alert the majority to the needs of the minority. 25 Perhaps the best way to overcome the bias is the simplest: for “legislators and courts . . . (to) consider race, age, and other socioeconomic factors when evaluating the reasonableness and desirability of practices and policies.” 26

Policymakers, who are often lawyers, may fail to see past the issue at hand. This shortsightedness is especially common when those whom the decision will affect most are racial minorities. 27 There are several areas of law where the impact affects racial minorities disparately. One example is in the area of managed care law. The current trend of healthcare is toward HMOs or managed care, but there is little research to provide data on the effectiveness of managed care in dealing with special populations, especially the poorer populations such as minorities and the elderly. 28 Cost is a factor in switching to a managed care provider, and therefore any changes in managed care law or in any type of health care reform curtailing access to care are more likely to affect those who cannot pay for the treatment their HMO denies them. A greater understanding of the im-

22. See id. at 284 n.185.
24. Storytelling has its detractors as well as its advocates. For a dissection of these detractors and their objections to storytelling, see Baron, supra note 20, at 255. One of the bases for objecting to storytelling is that it bears little resemblance to conventional legal scholarship. See id. at 256-57. This objection, of course, misses the point of the concern that motivated this article: the concern that law school, with its focus on appellate opinions, trains attorneys who are unaware that their jobs may—and probably will—center on facts.
25. See id. at 282-85 (arguing that storytelling fails because bias against racial minorities is much more serious than simple ignorance).
27. See Benjamin A. Doherty, Creative Advocacy in Defense of Affirmative Action: A Comparative Institutional Analysis of Proposition 209, 1999 Wis. L. Rev. 91, 97-99 (1999) (noting that decision to adopt Proposition 209, which prohibits preferential treatment based on race, gender, ethnicity or national origin, was made by majority, although it was evident that impact of Proposition 209 would only be shouldered by discrete, insular minority).
28. See McClellan, supra note 16, at 253 (noting studies have shown that many people leave their managed care providers, but these studies do not discuss whether race, ethnicity, culture or class affect whether individuals are more likely to leave managed care providers).
pact upon such groups might contribute to more humane policymaking. Another area of law where there is a disparate impact on minorities is the area of tort law. Unless one studies this impact, one cannot help in its eradication.

C. Can Facts Matter?

The adversary system is based on the premise that the truth is likely to emerge from presentations by each of the interested parties to the disinterested fact finder. After this presentation, the fact finder decides what really happened. Little except intuition, and perhaps a sense that there are no better alternatives, supports this system.

Law students spend much of their time reading appellate opinions and analyzing the law these opinions expound. We teach them that the "real" facts do not matter, but rather the facts as set forth by the court, because those are the facts upon which the opinion rests. Could the scales really have fallen on Mrs. Palsgraf? More importantly (for Mrs. Palsgraf), how did she manage after the court threw out her case? Casebooks often contain edited versions of the "real" events of that stirring occasion. These versions are of course fun to read, but they have no impact upon the opinion. In other words, even if the facts as set forth by the court are completely inaccurate, the court's opinion cannot be affected. Nor should there be an impact upon the opinion; finality is an end in itself. But it is not the only end.

29. See Frank M. McClellan, The Dark Side of Tort Reform: Searching for Racial Justice, 48 Rutgers L. Rev. 761, 772 (1996) (noting "that the race problem impacts on every aspect of a tort claim, adversely affecting lawyers, clients, and the public conception of justice"). Moreover, the approach of pretending that race has nothing to do with tort law compounds the evil by allowing private bias to control.

30. Indeed, other countries, such as France, do not use the adversary system, at least in criminal cases. See Abraham S. Goldstein & Martin Marcus, The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany, 87 Yale L.J. 240, 266 (1977).


33. See, e.g., Taylor v. Johnston, 539 P.2d 425 (Cal. 1975). Taylor involved the breeding and racing of thoroughbred horses. See id. at 427. The court carefully analyzed whether there was an anticipatory breach of contract by the defendant or whether the plaintiff had made performance by the defendant impossible. See id. at 430-32. For anyone with any knowledge of the thoroughbred racing industry, the analysis by the appellate court, which reversed the court below, makes no sense whatsoever. It only requires knowledge of two facts—that all thoroughbreds are treated for racing purposes as having been born on January 1 and that all thoroughbred brood mares are bred every year—to render the opinion completely baffling. This does not, of course, help the plaintiff, but it shows what can happen when the parties have inadequately educated the judges.
One reason why factual inaccuracy (or even impossibility) cannot be corrected after the opinion has become final is simply that the opinion has to be final at some point. This means that the facts not contained in the opinion are not verifiable because they are not in the opinion (as though their inclusion would constitute verification). The only true version is the one to emerge from the adversary process, not the version reported elsewhere. Thus, unlike the court's version, anything else is a matter of speculation. Clearly, law professors (myself included) prefer inaccuracy to speculation. Philosophically, speculation can be useful, but it has no legal effect.

The second reason why facts outside those stated in the opinion cannot matter is that the court bases its legal analysis and conclusions on the facts as set forth by the court, and not on what might or might not have "really" happened. Thus, in analyzing the court's opinion, what is important about the facts is not what actually happened, a determination that may or may not have emerged from the adversary process, but rather what the court chose to recount as the facts. The accuracy of the facts has no place in an opinion's role as precedent.

This leads to the third reason. The adversary process is based on the assumption that the truth will emerge from the highly regulated conflict-cum-dance presented to the trial judge or jury. In our legal system, no one really cares what actually happened. What matters is what one can prove (or disprove). As a person fascinated by history, this approach, which I, as an attorney, follow, seems to me to be completely out of touch with reality, or rather in touch with a reality defined in terms that the historian would find completely baffling. The adversary system bears a strong resemblance to the approach to war taken by medieval monarchs.

34. There are, of course, exceptions, but for the most part these lie in the area of criminal law. Even there, the United States Supreme Court has elevated finality above innocence, at least in some cases. For example, the Court ruled, in a 6-3 decision, that a state death row inmate who presents belated evidence of innocence is not usually entitled to a new hearing in a federal court before execution. See generally Herrera v. Collins, 506 U.S. 390 (1993); Linda Greenhouse, Court Discourages Late Claims of Innocence From Death Row, N.Y. TIMES, Jan. 26, 1993, at A1. In another case, a man was convicted of shooting an officer in 1981, but new evidence discovered in 1991 substantially discredited the verdict. One commentator pointed out that "at this stage, the high court is not interested in guilt or innocence, just procedural questions on whether defendant received all of his constitutional rights." Tim Chavez, First Man to be Executed in 40 Years in the State of Tennessee May Well be Innocent of a Capital Crime, NASHVILLE TENNESSEAN, Oct. 4, 1999, at A1 (discussing case of Philip Workman); see also Workman v. Tennessee, 510 U.S. 1171 (1994).

35. The Supreme Court of the United States carries finality to its ultimate point in its "two-court rule." If two courts below have agreed on the facts, the Supreme Court will accept them as correct. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 158-61, 189-91 (7th ed. 1993).

36. Except the actual protagonists, of course.

If God was on your side, you won. The fact that God tended to favor the side with the larger army, the better tacticians and the stronger supply lines, was completely coincidental.

This is not to say that the facts are unimportant. At least before a decision becomes final, and as in medieval warfare, the facts—of terrain, supply, dexterity—are extremely important. Indeed, one risk of the law school approach is that students will fail to realize just how important facts are before a decision becomes final. Facts are particularly important in the common law areas like torts and contracts. The adversary process may or may not end with a correct version of the facts, however, and it is that final version of the facts that goes down in posterity as the "correct" one.

Conversely, there are times when the facts are not important, as the Supreme Court of the United States shows when it refuses to hear cases that have been decided incorrectly because they do not involve legal issues sufficient to trigger the Court's waning interest in hearing cases. The Supreme Court may also dehumanize the facts before it in the interest of legal theory. There are also times when the facts are manifestly improbable.

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39. Occasionally, a battle would be won by what was apparently the less well-equipped side. The Battle of Agincourt, fought in France on October 25, 1415, between an English army under Henry V and a French army under Charles D'Albret, is an example of a conflict in which God apparently sided with the English. Henry's army of 6000 was on route back to England via Calais when they were confronted by the French army of 25,000. At that point, Henry sought a truce with France. The truce was rejected. Perhaps to everyone's surprise, the English won a resounding victory in a heavy rainstorm. Subsequent analysis demonstrated the superiority of mobile troops over heavily armored cavalry, which became completely mired in the mud. See generally Chris Roth & Christopher Rothero, The Armies of Agincourt (1998).

40. See, e.g., Steven Keeva, Profiting from Experience, 85 A.B.A.J. 56 (1999); Nancy M. Maurer & Linda Fitts Mischler, Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals, 44 J. LEGAL EDUC. 96 (1994).

41. During the 1998-99 term, the Supreme Court heard 75 cases, half the number of cases decided in the mid-1980s. In 1999, the Court's closing date was June 23, 1999, the earliest in 30 years. See Linda Greenhouse, The Nation: Supreme Court; Justices Decide Who's in Charge, N.Y. TIMES, June 27, 1999, § 4, at 1. An example of a case with terrible facts but insufficient to raise the Supreme Court's ire is Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981). In that case, students were subjected to searches when drug-sniffing dogs were brought into school. See id. at 91-92. A dog "alerted" on the plaintiff, and she was strip-searched, examined, patted down and generally humiliated, but no drugs were found. See id. As it later turned out, the plaintiff's own dog was in heat, and the police dog was responding to this fact. See id. at 95 (Fairchild, C.J., dissenting). We know the facts here solely because a lone Justice Brennan dissented from denial of the petition for certiorari and argued to reverse the Court of Appeals on the basis that the Fourth Amendment does not authorize local school and police officials to detain students in the public schools and conduct warrantless drug searches. See Doe, 451 U.S. at 1022 (Brennan, J., dissenting).

able, as in Mrs. Palsgraf's case. In any event, once the case has been decided by the fact finder, the facts completely lose their importance in favor of what the fact finder decrees "really" happened. This is justifiable largely because there may be no way to determine what really happened. Court decisions cannot remain in limbo; they must become final at some point. So the facts of what happened are relegated to the realm of the unknowable and undiscoverable for the very good reason that it is impossible ever to reconstruct them with any assurance of accuracy. This is, perhaps, the real justification for the adversary system.

It is not this aspect of the legal system that merits challenge from the historian. Rather, it is the position taken by the legal system that the adversary system can reconstruct what really happened, and that facts can ever become truly final, that historians would find troubling. In history, what really happened matters, at least in theory. It may not be possible to figure out what happened, but a reliable historian should refuse to pretend knowledge where that knowledge is unobtainable. Every appellate opinion recounts history, in the form of the statement of the facts. To evaluate this historical piece, students should look at opinions through the lens that the study of history provides.

There are of course more conventional ways to acquaint law students with an awareness of the importance of both facts and the need for skepticism about them. One such method is through clinical education. Externships and clinics provide a contextual basis for the learner. Clinical legal education attempts to find ways to help law students exercise better judgment in order to create better future lawyers and to encourage students to be responsible and thoughtful practitioners. Much of the pedagogical goal of and philosophy behind clinical education—i.e. clinics that train advocacy and counseling—is to teach students judgment. This judgment also covers learning to deal with the emotional content of cases, both the clients' and their own. The general sentiment is that judgment is not something implicitly taught in law school, nor is it easily learned by students. Problems abound when lack of judgment makes people blind to

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Supreme Court granted certiorari, reversed the appellate court and held that escapees were not entitled to the claim of defense or necessity unless they demonstrated that they had no alternative to violation of the escape statute. See Bailey, 444 U.S. at 410-11. In his dissent, Justice Blackmun (joined by Justice Brennan) famously decried the conditions of prisons and criticized the Supreme Court for its lack of human perception. See id. at 420 (Blackmun, J., dissenting). Justice Blackmun believed the Supreme Court's decision was inappropriate; he felt the issue of escape was better suited for a jury to decide in light of all of the evidence. See id. (Blackmun, J., dissenting). He also felt the decision was intellectually dishonest given the abominable state of American prisons. See id. at 421 (Blackmun, J., dissenting).


others’ perspectives.45 Simulation courses can serve a similar role. Good business lawyers never stop at the point where they have spotted the problem—they go on to solve it. Lawyer-negotiators do not allow a seeming impasse to sabotage an otherwise viable deal; rather, they devise a favorable compromise, which fulfills the basic needs of both sides without subjecting either to serious adverse consequences.46

As mentioned above, however, history can also function as a tool for analyzing the factual piece of appellate opinions. It is to this technique that this essay now turns.

II. FACTS, HISTORY & SHAKESPEARE IN LAW

Turning to the historian, a different view of the importance of facts emerges. Facts are vital to the historian. The historian may be as unable to ascertain the truth as the attorney. That has never stopped an historian from trying, whether by primary research or by dissecting already existing materials.

One of the most important truths a historian faces is that of bias. Historical truth is itself subject to corruption.47 This corruption takes two forms. One is that the sources the historian studies are themselves certain to be biased, at least as biased as the parties in a legal case. The other is the bias of the historian. In the adversary system, the parties are themselves biased, and their attorneys are obligated to be. The judge and jury are supposed to be disinterested. But the judge and jury bring their own minds and experiences to the process. This is also the case for the historian, whose worldview inevitably colors his or her perceptions of reality. It may be the case that the adversarial system, which at least subjects the final version of the facts to the test of opposition, is more reliable. There is no way to know, because there is no way to find out what really happened. It is all a matter of theory and intuition, that the declaration of what really happened is more likely to be accurate in one discipline than in another.

The adversarial approach, as well as the law school approach to facts, create several risks to the intellectual integrity of a legal education. One risk is the enhancement of the already excessive credulity law students exhibit. Law students need to learn the fictional aspects of the system they are being taught, as well as how to operate within that system. One way to accomplish this end may be to use history to provide case studies of how difficult it is to find out what really happened and how important the eyes through which we perceive events truly are. One case study, exemplary both in content and in ready access to material, is the case of Richard III

45. See id. at 249.
46. See James C. Freund, Teaching Problem Solving, 8 AUG BUS. L. TODAY 32 (1999).
47. These forms of corruption are in addition to the self-evident problems presented by the obvious facts that history is in the past and that there is a paucity of eyewitnesses to events in the fourteenth century (even if eyewitness testimony were reliable, which it is not).
and the Princes in the Tower. A crime was (probably) committed. The process of examining who might have committed it can teach students a great deal about the pitfalls of credulity. This process can also teach students about the emotional content of recollection and its impact upon that recollection.

An additional risk of the law school approach to appellate case law is that it can allow students to forget that there are at least two sides to each question. In their credulity, students attribute a level of authority to courts that only a deity should receive. The case of Richard III—to say nothing of Mrs. Palsgraf—encourages the questioning of sources, one a Catholic saint, the other an opinion by a judge accorded almost equal reverence in the legal world. Facts look neat and well-organized in an appellate opinion (at least compared to reality), and it is helpful to provide a vehicle that requires students to recognize that this neatness is itself an illusion.

Little has been written about the facts of the Palsgraf case, although fathomless quantities of ink have been spilled on the law.48 This is in itself interesting, as further proof that the facts cease to matter as soon as the opinion is issued. The law, analysis and theory in the opinion, and the precedent it sets, have nothing to do with what really happened. But to the historian, what really happened is the most important aspect of the analysis of sources. Law has to be unique—the only field in which what really transpired ceases to matter as soon as the opinion is final.

The importance of the facts emerges from the undergrowth of the forgotten and ignored in the course of teaching by hypotheticals. Law teaching is based upon hypotheticals, and so is its practice. Hypotheticals are a teaching device that is all too familiar to students. What would the court have said, if the facts had been changed in this regard or that? This teaching device moves into the real world in the form of the requirement that attorneys persuade courts that the facts in their cases are sufficiently similar to the facts in an already decided case to warrant applying the same rule, or evolving an old rule just a little to fit the new case. Maybe facts are not unimportant after all.

It is perhaps worth noting that one of the strongest arguments against the death penalty lies with those who contend that the risk of executing an innocent person outweighs the need for capital punishment.49 This argument shows the powerful effect of imagination in the form of an ultimate


"what if," but also shows that what really happened retains some vitality, even after a case has become final. It is the impact of imagination on analysis that leads us back into history, where the imagination of the author and of the historian meet.

And now we wander into the subject of Richard III. Perhaps because he was never tried, his case exerts a potent effect on those who read about it, particularly lawyers.\textsuperscript{50} It is clear that history and law meet each time Richard is retried for the murders of the Princes.\textsuperscript{51} It is also clear that facts—or the endeavor to uncover them—retain their fascination for the legal profession. We can never know what really happened, in the numerous mysteries that receive attention from the past. But we can seek to reason our way to what really might have happened, a game that never loses its vitality.

This leads to the idea of a course on Richard III and other historical mysteries as an exercise in teaching the intractable difficulty of ascertaining the facts.\textsuperscript{52} As an exercise in hypotheticals, trying to uncover and put

\textsuperscript{50} Much of the recent literature about Richard III has been authored by attorneys. \textit{See}, e.g., \textsc{Bertram Fields}, \textit{Royal Blood: Richard III and the Mystery of the Princes} (1998); \textsc{Sharon Kay Penman}, \textit{The Sunne in Splendour} (1990). Bertram Fields and Sharon Kay Penman are both attorneys. It is worth noting that Sir Thomas More was a lawyer as well.


Richard III and the murder of the princes has sparked controversy for 400 years. \textit{See generally} \textsc{Samuel Daniel}, \textit{The Civic Wars Betweene The Howses of Lancaster and Yorke} (London, H.Lownes for S. Waterson, 1609); \textsc{Raphael Holinshed}, \textit{Chronicles of England, Scotland, and Ireland} (London 1807-1808). For an excellent bibliography of primary and secondary sources, see <http://www.r3.org/biblio.html>. In the 1950s, Josephine Tey’s, \textit{The Daughter of Time} (1951), unleashed a new fury of debate over Richard’s guilt when she concluded Richard III was innocent. \textit{But see} \textsc{Alison Weir}, \textit{The Princes in the Tower} (1995) (arguing as adamantly about Richard’s guilt as Tey does of his innocence).

\textsuperscript{52} There are other historical mysteries suitable for such a course. One such is the murder of Lord Darnley. \textit{See} \textsc{Caroline Bingham}, \textit{Darnley: A Life of Henry Stuart, Lord Darnley Consort of Mary Queen of Scots} 178, 180-88, 192, 195-96 (1995); \textsc{Ann Dukkhas}, \textit{A Time For The Death of A King 1-18} (1994); \textsc{Antonia Fraser}, \textit{Mary Queen of Scots} 289, 303-08, 343 (1969). Mary married her cousin, Lord Darnley, in 1565, without the consent of Queen Elizabeth, another cousin. In Mary’s mind, this solidified her claim to the throne, because she and Darnley were both grandchildren of Henry VII. Lord Darnley’s mother was the Countess of Lennox, the daughter of Margaret Tudor by her second husband, and granddaughter of Henry VII. Mary was descended from Margaret Tudor by her first marriage, but she was “foreign born,” having being born in Scotland. Lord Darnley was arrogant, drunk and generally despicable. Although his murder remains a mystery, it has not generated as much interest as the deaths of the Princes in the Tower because he was so disliked and because his only importance was dynastic.

Amy Robsart’s mysterious death has sparked several different theories. Robsart was the wife of Robert Dudley, Queen Elizabeth I’s close confidante and, many believed, intended husband. Constant rumors circulated in court that Robert intended to poison his wife so he could marry Elizabeth. Amy Robsart was found
together a coherent version of events out of the past is unsurpassed as an exercise in factual analysis. There are more than two sides to the question of who killed the Princes in the Tower. The facts can never be known, nor can they be finally resolved. Their study is rather a study in the art of biased reporting. Indeed, one of the most biased versions of the life of Richard III is also one of the most famous of all purportedly historical writings: the version promulgated by William Shakespeare. Richard III can provide students with the opportunity to exercise their common sense, which tends to atrophy with excessive acceptance of authority, by providing a forum for teaching about the evaluation of sources, all of which claim to be factual, but all of which are also mutually inconsistent.

The question of whether Richard III was responsible for the deaths of the Princes in the tower can thus help illuminate the lawyer's task in weeding out the truth from fiction, perception from reality. Additional advantages to using Richard III as a case study include: ready access to materials, representation of numerous conflicting viewpoints through five hundred years of history, a high level of current interest and modern writings and general entertainment value.

dead at the foot of her stairs in 1560. The coroner's report ruled her death accidental, although speculations continue as to the real circumstance of her death. Her death made marriage between Queen Elizabeth and Dudley impossible. See, e.g., Fiona Buckley, To Shield the Queen 65-124 (1997); J.E. Neale, Queen Elizabeth I 78-84, 100, 147 (1992).

The identity of Christopher Marlowe's murderer is known, but why he was murdered remains a mystery. Theories abound, among them accident or self defense, although some have concluded he died of political necessity. See, e.g., Charles Nicholl, The Reckoning: The Murder of Christopher Marlowe 17-21, 59, 72-73, 328-29 (1992).

33. The Richard III website, http://www.r3.org, is an excellent resource. It is easy to access and free, and it includes links to numerous other websites as well as full text versions of all original sources.

54. People started producing materials about Richard III shortly after Bosworth in 1485; his plight grasped the imagination from the start. See, e.g., Anthony Cheetham, The Life and Times of Richard III (1972); Samuel Daniel, The First Foure Bookes of the Civile Wars Between the 2 Houses of Lancastre and Yorke (1595); Edward Hall, The Union of the 2 Noble and Illustre Families of Lancastre and Yorke (1548); Paul Murray Kendall, The Yorkist Age (1962); T. Littleton & R. Rea, To Prove a Villain (1964); John Stow, The Annals of England (1605).

If a student has not learned skepticism about facts after exposure to the Richard III controversy, perhaps he or she should stay away from litigation.

III. DECISIONMAKING & REAL LIFE

Before a case appears in appellate form, the lawyer must deal with the facts. The facts are not always (and maybe not ever) clear from the outset. Even though one is entitled to believe one’s client, an attorney who fails to uncover the alternative versions that will appear in court may not be doing his or her job. The client, as a participant in the events at issue, is automatically biased in recounting the relevant events. Of course, some clients lie, and an attorney needs to be aware of this risk. More often, however, the client is not lying, but is rather seeing the facts at issue through the glasses of that client’s particular viewpoint. There may, in fact, be at least two sides to each question, each side truthfully recounted (in the sense of an absence of conscious lies), and both sides completely inconsistent with each other. Stories may also change. Figuring out one’s client’s story is difficult enough. The lawyer, however, also needs to figure out the opposition: detecting and preparing to confront the point of view of one’s opponent is a critical part of case preparation. Many scholars stress that a good lawyer needs to develop and exercise “situation-sense....”

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56. See, e.g., LOOKING FOR RICHARD (Searchlight Pictures 1996); RICHARD III (MGM/UA 1995); RICHARD III (Nelson Entertainment 1955). Shouldn’t law school sometimes be fun?

57. Another exercise in perspective appears in the study of the four Gospels in the New Testament. In their case, what really happened matters, at least to theologians, and there is a long history of dialectical gyrations dedicated to the impossible task of making the versions consistent. Scholars have long debated the differences in the four gospels and why there are even four “official” versions in existence. Several incongruities appear. For instance, in the case of the cleansing of the Temple, Matthew 21.12-13, Mark 11.15-17 and Luke 19.45-46 put it at the end of Jesus’ ministry as one of the last straws in his struggle with the Jewish authorities; John 2.13-17 includes it at the beginning. To set the tone of the trial of Jesus before the Sanhedrin, Matthew 26.57-68 and Mark 14.53-65 have it taking place at night, contrary to Jewish law, and Luke 22.65-71 has it after daybreak. See, e.g., New Catholic Encyclopedia (1967); Charles H. Talbert, What is a Gospel? (1977); Peter Vardy & Mary Mills, The Puzzle of The Gospels 21-77 (1995).

The story of Noah and the Ark is another example of different versions of the same story. God first tells Noah to bring two of every animal to the ark, and in the next chapter God tells Noah to bring every clean beast by sevens and to bring beasts that are not clean, by two. See Genesis 6:19-20 and Genesis 7:2-3. These inconsistencies are, of course, insoluble, although one would think that some resolution would be important to anyone who believes in the literal truth of at least parts of the Bible.
ing law responsively requires both a grounding in practice and a willingness to be understanding and flexible in dealing with circumstances.\textsuperscript{58}

The first step in all this is awareness that the various points of view are there. In law school, students learn about alternative legal arguments; they only discuss alternative factual viewpoints as hypotheticals that are by definition not "real." A course centering around Richard III, whose villainy (if any) depends upon the perspective of the historian, can begin to teach an appropriate skepticism.

Skepticism is only part of this exercise, however. Appellate opinions, in their neat packages, are far removed from the passions and turmoil that may have surrounded the events as they occurred. This has several implications. Law students inadequately appreciate the difficulties that trial judges confront in trying to unravel what happened in the context of a trial. It is a challenge for the attorneys, but they at least are entitled to believe what their clients have told them. The trial judge and/or jury have no such entitlement.\textsuperscript{59}

A trial, however, is a model of neatness compared with the general chaos that can erupt in the legal system, for example when a judge is asked for an emergency order. It is easy to portray Judge Skelly Wright's order in the famous \textit{Application of President & Directors of Georgetown College}\textsuperscript{60} case as officious and intellectually dishonest.\textsuperscript{61} Maybe it was.\textsuperscript{62} But it can be helpful to visualize the scene that confronted Judge Skelly Wright as he


\textsuperscript{59.} Appellate courts sometimes fail to appreciate the difficulties faced by trial judges. An example of this is the opinion of the United States Court of Appeals for the Fifth Circuit in \textit{Borel v. Fibreboard}, 493 F.2d 1076 (5th Cir. 1973). In its opinion, the Fifth Circuit somewhat unsympathetically threw out the system that a wildly overworked trial judge had put into place for dealing with the intractable problem presented by the number of asbestos cases being filed and, once filed, delayed.

\textsuperscript{60.} 331 F.2d 1000 (D.C. Cir. 1964).

\textsuperscript{61.} See id. at 1006-010. This case arose out of an application for permission to administer blood transfusions to an exsanguinating emergency patient. See id at 1001. "[The patient] was brought to the hospital by her husband for emergency care, having lost two-thirds of her body's blood supply from a ruptured ulcer." Id. at 1006. Both she and her husband were Jehovah's Witnesses and therefore rejected any blood transfusion. See id. Her death without blood seemed certain, and the hospital went to court for permission to administer blood. See id. The District Court denied the application, and the hospital turned to Judge Skelly Wright of the District of Columbia Circuit. See id. After conferring with the patient's husband, who refused to approve a transfusion, 10 doctors who urged the transfusion, and the patient, Judge Wright approved an order allowing the hospital to administer transfusions. See id. at 1007. Judge Wright somewhat desperately reasoned that the patient's voluntary presence at the hospital testified to her desire to live, and that her statement that a transfusion would be "against my will" meant that it would be all right if someone else ordered the transfusion. Id.

\textsuperscript{62.} The court, sitting en banc, denied a petition for rehearing. See President & Directors of Georgetown College, 331 F.2d 1010 (D.C. Cir. 1964) (en banc). For an extensive discussion of the procedural and substantive issues, see the dissenting opinion of Judge Miller, 331 F.2d at 1011-16.
arrived at the emergency room: a young woman bleeding to death, a dis-
traught emergency room staff, what looked like complete chaos to the out-
sider, and Judge Skelly Wright, an outsider, being told that if he signed
the order, the patient would live, and if he did not, she would die.

There is, of course, an advantage for the legal system generally in
having appellate opinions written when the passions and chaos are over.
The law should not be set in the heat of an emergency. The emergency,
long over, can provide the appellate court with the opportunity to decree
how such emergencies should be handled in the future. That is clearly
what the court had in mind in In re Estate of Brooks in which the appellate
court wrote a careful after-the-fact opinion applying the First Amendment
in the context of what had been a dire medical emergency in the trial
court.63 But law students need to know that the chaotic piece of the case
once existed. There were lawyers in the Georgetown University Hospital
emergency room, too, arguing different points of view over the person
exsanguinating on the gurney. A law student needs to be prepared to deal
with the chaos of real life. Too many students graduate with a view of the
law as expounded by appellate judges, and they forget that the case had to
arrive in the appellate court first, with all of the inelegance of real life,
before the appellate court could decide it. An exclusive focus on appellate
opinions cannot teach a good conceptual grasp of the advocate’s role in
the resolution of disputes.64 Once the case is at the appellate level, the
facts are neatly packaged, but they did not start out that way. A course on
Richard III will not change the basic legal curriculum, nor is it intended to
do so. It may, however, serve to remind students that the appellate opin-
ions they read began as slices of real life, with all the ambiguity and lack of
clarity that that entails.

IV. Conclusion

What do Mrs. Palsgraf and Richard III have in common? Richard III
lived in fifteenth-century England, Mrs. Palsgraf in twentieth-century
America. Scales fell on Mrs. Palsgraf; the Tudors fell upon Richard III.
What they share, however, is fundamental. We know Mrs. Palsgraf
through the eyes of Judge Benjamin Cardozo, who knew the facts of her
case only from having read them in other documents. His rendition of
the facts was either third or fourth (maybe fifth) hand; they came through
Mrs. Palsgraf and other witnesses, through the lawyers, through the lower
court fact finding process, through an intermediate appellate court, and
finally to him. We know Richard III through the eyes of Shakespeare, who
knew the facts about Richard III only from a sequence of non-eyewitness
sources that were themselves shamelessly biased. No one knows what re-
ally happened either to Mrs. Palsgraf or to the Princes in the Tower. This

64. See Jerry P. Black & Richard S. Wirtz, Training Advocates for the Future: The
Clinic as the Capstone, 64 Tenn. L. Rev. 1011, 1012 (1997).
is what they share. And this is what they can teach today’s law students. The facts of a case look neat and tidy through appellate eyes. They did not, however, start out that way. They never do.