

THE LAWYER'S APPROACH TO CRITICAL THINKING

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I

Any teacher who honestly looks at a classroom of students "learning facts" must realize that the students are not necessarily thinking. A fact is, of course, important, but only to a point, for whatever a fact is, it is not a living presence, nor, is it, in itself, a prod to inquiry or a challenge to preconceptions. Facts, rather, are there to be learned and used as test answers: American independence was declared July 4, 1776; President Kennedy was assassinated November 22, 1963. World War II ended in 1945; Albert Einstein developed the theory of relativity; Giuseppe Verdi wrote *Aida*. These, we say, are fundamental facts which an "educated" person should know in order to be able to place historical events in a proper framework. That is all these facts do: they do not teach, nor do they encourage the student to seek more knowledge.

Facts cannot stand in isolation—they must be connected to the underlying forces which shape history or science. One might say, for instance, that the assassination of Archduke Ferdinand of Austria was the instant cause of the First World War as it set in motion a complex of secret treaty agreements. However tragic this was, though, it must also be connected with subsequent events.

Yet, even presenting factual information in relationship to other such information misses the key element of critical thinking. "The assassination of Archduke Ferdinand of Austria set in motion forces which led to the outbreak of World War I." Now what? Now let the student learn about these forces, about all the gory details of the assassination and the conduct and outcome of World War I. Even so, the student can do all this and still not be thinking critically about the whys and wherefores of World War I.

Critical thinking is not about a fact or an issue. It is a way to approach the world. Critical thinking challenges all underlying assumptions and requires us to create anew the world we are learning about. What is war? Why is war caused? What does a war mean to generals and political leaders? What does war mean to sweethearts and lovers and soldiers? Is history only the procession of warfare? Why does war end? Why are there periods of peace?

II

How can a lawyer's approach to learning help students develop critical thinking skills? The lawyer takes absolutely nothing for granted; he is, one might say, the ultimate nihilist. Nothing matters at all. There are no facts. There is no evidence nor case, no assump-

tions nor presumptions. There is simply the raw data composing the case. The lawyer must take this data and create an argument. He cannot afford to wear theoretical blinders or view facts in isolation without risking losing the case.

What, specifically, does the lawyer do which a student should do? First, she remembers that there are only neutral principles, that is, principles applicable in all situations. Defendants who are tried and convicted are sentenced by principles as applicable to one as to another. Hearsay evidence is hearsay evidence no matter how apparently significant it may be in a particular case.

Second, facts are not established—they must be proven. A lawyer would not say that President Kennedy was assassinated by a lone gunman; he would first ask how and why and when and where. Without proof beyond a reasonable doubt (in a criminal case) or without proof based upon a preponderance of the evidence (in a civil case) there is no case of guilt—there are only assertions of guilt. A lawyer would not say that Shakespeare was the greatest English playwright. He would do what lawyers do best: draw comparisons, make analogies, examine precedents, establish standards of proof, call in experts, engage in cross-examination. A fact is never taken as a given, however appealing that fact might be.

Third, scholarship must be practical. The case should fit the facts; the facts are not used to fit the case. Legal scholarship begins with the assumption that there are first principles but that they do not apply equally in all situations. The theory must explain all relevant facts or it is no theory. A student might say that nationalism destroyed European colonialism; a lawyer would say that nationalism and European colonialism are two separate facts not necessarily connected. General statements must be confined to the circumstances under which the statements have applicability.

Fourth, the lawyer is Socratic: she asks the question but never gives the answer. If...then is the formulation; hypotheticals replace pure questions. The lawyer does not ask, "Did Columbus discover America?" She asks, "What if Columbus did not discover America?" "What is meant by discovery?" The lawyer is not interested in proving that Columbus discovered America; she is interested in proving that America was not discovered by someone else. Or she is interested in proving that the Native Americans discovered America. The lawyer is interested in the context—discovery in what sense? The lawyer assumes that obvious facts are not obvious.

The lawyer lives by opposites. He lives in negation. He is the ultimate skeptic, always seeing another side or the exception. The lawyer knows that proving the case is not as important as disproving the opponent's case. If a civil defendant can only be found guilty by a preponderance of the evidence and if a criminal defendant can only be found guilty beyond a reasonable doubt, then the lawyer looks for the weakness in the case. A good plaintiff's lawyer and a good defendant's lawyer think and work the same way—the strength of a case rests on the weakness of the other side. The lawyer must anticipate all defenses of the other side, all accusations, all assertions, all arguments. Otherwise, he goes to court ill-prepared to argue his own side. Lawyers are advocates—they do not presume to know any ultimate truth. They know only that there can be two sides to a question, or three sides, or no sides, or many, many sides.

To lawyers, facts contain the seeds of their own destruction. "Water freezes at thirty-two degrees Fahrenheit," is irrelevant. What if the water is sea water? What if the water contains anti-freeze? What if the water is measured in centigrade? Lawyers see facts quite differently from the advertiser who proclaims that Ivory Snow is 99.9% pure. Pure in what sense? For what purpose?

Are there no truths at all, then, no absolutes a student can learn? Truth, in a fundamental sense, is concerned with what data means. To say, for example, that New York State was one of the original thirteen colonies is only raw data. "New York State was one of the original thirteen colonies joined in a declaration of independence against colonial British rule," is a proper context for saying that New York State was one of the original thirteen colonies. But the lawyer would not be satisfied even with this; she would point out that New York State is composed of residents and citizens only some of whom wanted independence.

The lawyer says a house is not worth \$300,000. She says that the worth of a house depends upon the purpose of the evaluation. To an insurance company, that house is worth \$220,000, to the tax department, \$400,000. To the mortgage bank, the house is worth \$250,000, to the seller, \$500,000. To the buyer the house is worth \$200,000.

The lawyer does not say the client is guilty. Guilty of what? Burglary? Criminal trespass? Conspiracy to commit burglary? Attempted burglary? Can I get the defendant off by plea bargaining? Can I make the defendant a state's witness to get him off? Even if the client says he committed the crime, how does he know? What technical rules and regulations were violated by the police department in arresting him? Is there any defense? Are there any facts I can use to

defeat the prosecution's case?

Is it intellectually dishonest to say that there are no facts when there are facts? Is this not simply intellectual posturing so that the lawyer can win an otherwise no-win case? In truth, there really are no facts which matter. The human mind does not remember facts in isolation—facts must be connected in long strands of thought. The mind is a series of interconnections of a complexity which defies human comprehension. Facts are not remembered—questions are remembered, conceptions are remembered, theories which connect and explain disparate and seemingly unrelated facts are remembered. A rose by any other name is not a rose—by any other name the rose would evoke a different psychological response. A rose called a zinnia does not suggest the same feeling as a rose called a rose.

III

I contend that the classroom should be conducted like the courtroom—the students acting the part of jury and the teacher playing the judge, telling the jury to forget about all preconceptions and all positions. The student must do what the jury does: receive data, think about it, argue, reject and evaluate it according to logical standards of reasoning and legal principles set down by the judge. The student should apply principles of analysis and reject certain evidence—such as hearsay—as irrelevant to the deliberations.

The difference between the classroom and the courtroom is that even logical standards of reasoning and legal principles are to be challenged in the classroom. In a sense, the classroom goes further than the courtroom or the jury room—there is nothing inviolable in the classroom other than the idea of critical thinking.

The mistake is to teach students facts and not require them to ask questions. Better than an examination asking answers of students would be an examination asking for questions. Have the student create the examination; grade the student on the questions asked and not on the answers given. Asking a question is far more difficult than giving an answer. "Who is God?" is more conceptually profound than "God is..." "Who was Plato?" is more challenging than "Plato was the originator of the idea of the philosopher-king who had such and such a view and proposed solutions for this or that problem in the declining years of the ancient Greek city-state." "Why would Columbus leave the security of Spain for the uncertainties of the high seas?" is a more intriguing question than the answer "Columbus crossed the Atlantic Ocean to find a new route to India." "Why did Edison discover the electric light

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