# Psychology, Society and the Development of the Adversarial Posture

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Solving a problem in a way that benefits both sides is such a logical and rational concept that one wonders why academics have to teach it and lawyers and business people have to learn it. Why has such a simple idea been so long in coming into use in the legal profession, and so many lawyers still resist?

Psychological studies of American children suggest that the notion of creating a cooperative "win-win" situation is hard to accept in the United States because competition is so firmly rooted in our culture and our cognitive development. These studies reveal that given the choice between cooperation for mutual gain or competition resulting in no gain, American children prefer to compete. In fact, the competitive nature of some of these children is so high that some are likely to try to reduce another's gain if they themselves cannot succeed.

Part I of this Article reviews the findings from psychological studies about what American children do, compared to children of other cultures, to resolve conflict. Part II discusses why the cognitive orientation of American lawyers may present a barrier to appreciating the value of a cooperative solution. Part III describes how the social environment alters that orientation in rural legal practice, in which cooperative settlements are the norm. Part IV suggests several forces which may further the use of cooperative settlements in the legal profession. Finally, this Article concludes that American lawyers need more training in alternative means of solving disputes to benefit society, enhance public perception of the bar, and to stay in business.

## I. NURTURING TOMORROW'S LAWYERS

In 1967, Millard C. Madsen, of the University of California, Los Angeles, began a series of psychological experiments[1] to supplement

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1. Millard C. Madsen, *Cooperative and Competitive Motivation of Children in Three Mexican Subcultures*, 20 PSYCHOL. REP. 1307 (1967).

earlier anthropological studies[2] on child-rearing in different Mexican cultures. Those earlier studies showed rural Mexican families raised their children not to fight back when attacked and punished their children for aggressive behavior. When the rural children reached school age and interacted with children from an urban setting, the rural children could not stand up for themselves because they could not adjust to the aggressive nature of these new classmates.

Madsen compared the problem-solving abilities of Mexican children from a rural village and children from a middle-class urban school. The children were required to solve problems through cooperative behavior when competition minimized reward and when it maximized reward.[3] The results showed rural Mexican children would adopt a cooperative posture even when competition would maximize individual gain. The urban Mexican children would cooperate when gain was distributed evenly to the group. But when individual achievement was suggested, they would compete even if continuing to cooperate would be more beneficial.

Working with other researchers, Madsen conducted similar tests[4] comparing the rural Mexicans with children in the United States and comparing urban Israeli children with those raised on a kibbutz.[5] The studies consistently demonstrated that children from backgrounds which required cooperative behavior for survival, such as an agricultural community, worked together for group gain even when individual gain might be greater. Children from urban and middle-class backgrounds, regardless of race or nationality, would cooperate when cued to do so. But if the researcher suggested competition and individual achievement, urban and middle-class children would compete irrationally, even to the point of

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2. OSCAR LEWIS, LIFE IN A MEXICAN VILLAGE: TEPOZTLAN RESTUDIED (1961); KIMBALL ROMNEY & ROMA E. ROMNEY, *The Mixtecans of Juxtlahuaca, Mexico, in* SIX CULTURES 541 (Beatrice B. Whitney ed., 1963).

3. Children from low income urban backgrounds were also part of the study, but they were represented only by girls and were a much smaller number than the other two groups. Because of the inadequate representation, Madsen concentrated on the rural and middle-income children in his analysis. Madsen, *supra* note 1, at 1308-09.

4. Ariella Shapira & Millard C. Madsen, *Cooperative and Competitive Behavior of Kibbutz and Urban Children in Israel*, 40 CHILD DEV. 609 (1969); Millard C. Madsen & Ariella Shapira, *Cooperative and Competitive Behavior of Urban Afro-American, Anglo-American, Mexican-American and Mexican Village Children*, 3 DEV. PSYCHOL. 16 (1970); Spencer Kagan & Millard C. Madsen, *Cooperation and Competition of Mexican, Mexican-American and Anglo-American Children of Two Ages Under Four Instructional Sets*, 5 DEV. PSYCHOL. 32 (1971).

5. A kibbutz is an Israeli communal farm or settlement on which generosity and cooperation are rewarded and selfishness and failure to cooperate are punished. *See generally* A.I. RABIN, GROWING UP IN THE KIBBUTZ 5-8 (1965). One study found kibbutz children accept cooperative behavior as a socially desirable norm and dislike those who try to excel over other members of the group. The study said some students are actually ashamed of being at the top of their class. MELFORD E. SHAPIRO, CHILDREN OF THE KIBBUTZ 404 (1965).

forfeiting any gain.[6]

Madsen's studies[7] focused on culturally homogenous groups of children between the ages of 7 and 11.[8] The researchers never mixed the various groups of Israelis, Mexicans, Anglo-Americans, Mexican-Americans and African-Americans for interaction.

Madsen developed the "cooperation board" (Figure 1) for the testing. One child sat at each corner of an eighteen-inch square board. In the center of the board was a weighted pen attached to four strings. The four strings ran through eyelets at each corner of the board, allowing the children to pull and move the pen across the board. A sheet of paper on the board recorded the pen's movements when the children pulled on the strings. Madsen numbered four circles one through four and pasted one on the paper between each child. The effect of having the circles between each child rather than directly in front of them was to force the children to cooperate in order to draw the pen across the circle.

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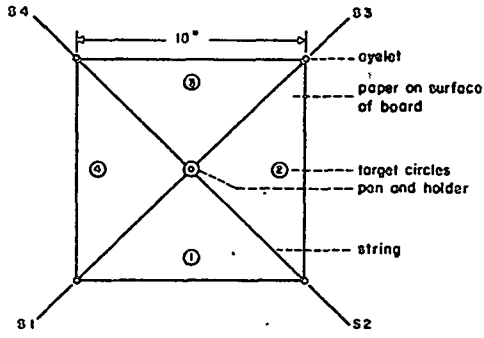
6. Subsequent research by psychologists among European, Korean, Columbian, East African, and Polynesian children supports Madsen's original findings. *See generally* Marida Hollos, *Collective Education in Hungary: The Development of Competitive, Cooperative, and Role-taking Behaviors*, 8 ETHOS 3 (1980) (studying Hungarian children ages 6-8); Millard C. Madsen & Sunin Yi, *Cooperation and Competition of Urban and Rural Children in the Republic of South Korea*, 10 INT'L J. PSYCHOL. 269 (1975) (studying South Korean children ages 8-9); Gerardo Marin and Beatriz Mejia, *Cooperation as a Function of Place of Residence in Columbian Children*, 95 J. SOC. PSYCHOL. 127 (1975) (studying first grade Columbian children); Robert L. Munroe & Ruth H. Munroe, *Cooperation and Competition Among East African and American Children*, 101 J. SOC. PSYCHOL. 145 (1977) (comparing children ages 5-10 from Kenya with same aged suburban children from the United States); David R. Thomas, *Cooperation and Competition Among Polynesian and European Children*, 46 CHILD DEV. 948 (1976) (studying groups of children ages 7-8, 9-10, and 11-12 from three different Polynesian islands).

7. Madsen, *supra* note 1, at 1308-09; Ariella Shapira & Millard C. Madsen, *Cooperative and Competitive Behavior of Kibbutz and Urban Children in Israel*, 40 CHILD DEV. 609 (1969); Millard C. Madsen & Ariella Shapira, *Cooperative and Competitive Behavior of Urban Afro-American, Anglo-American, Mexican-American and Mexican Village Children*, 3 DEV. PSYCHOL. 16 (1970); Madsen, *supra* note 4.

8. Two of the studies also involved groups of 4 and 5 year-olds who proved to be more cooperative than their older counterparts. This may be a function of the cognitive development of these children in that they have not reached a stage where they distinguish individual goal orientation to make them compete. *See* Kagan & Madsen, *supra* note 4, at 37.

FIGURE 1[9]

(S1-S4=position of each of the four children.)




After the children learned how to manipulate the pen, they were told to move the pen so it crossed the four circles, in numerical order, as many times as possible in one minute. Every time they completed a round the children would each get a piece of candy. Thus, in order for any individual child to get a piece of candy the four children had to work together to get the pen around the board. The children had several chances to improve their performance. They had an equal number of trials as a group and as individuals.[10]

After the fifth trial each child's name was written on a circle. The children were then told they would each get a piece of candy for every time the pen crossed the circle with their own name. They then underwent another set of five one-minute trials.

To maximize individual gain in trials six through ten, the children should have continued to cooperate as before, because no one child could reach her[11] circle without the help of the others. By working together they could draw the pen across their own circles and each other's several times before time expired.

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9. Reproduced with permission of the Estate of author and publisher from Millard C. Madsen, *Cooperative and Competitive Motivation of Children in Three Mexican Subcultures*, 20 PSYCHOL. REP. 1307, 1312 (1967).

10. The actual number of trials the children underwent in the four studies cited varied between six and ten, *supra* note 6.

11. Madsen notes that although the results varied slightly between boys and girls, these distinctions were statistically insignificant. He does suggest that the urban Mexican boys' higher rate of success in cooperative situations may be due to their greater participation in team sports. *See* Madsen, *supra* note 1, at 1316-19. Because the distinction is immaterial for this paper, however, both male and female pronouns are used in the discussion.

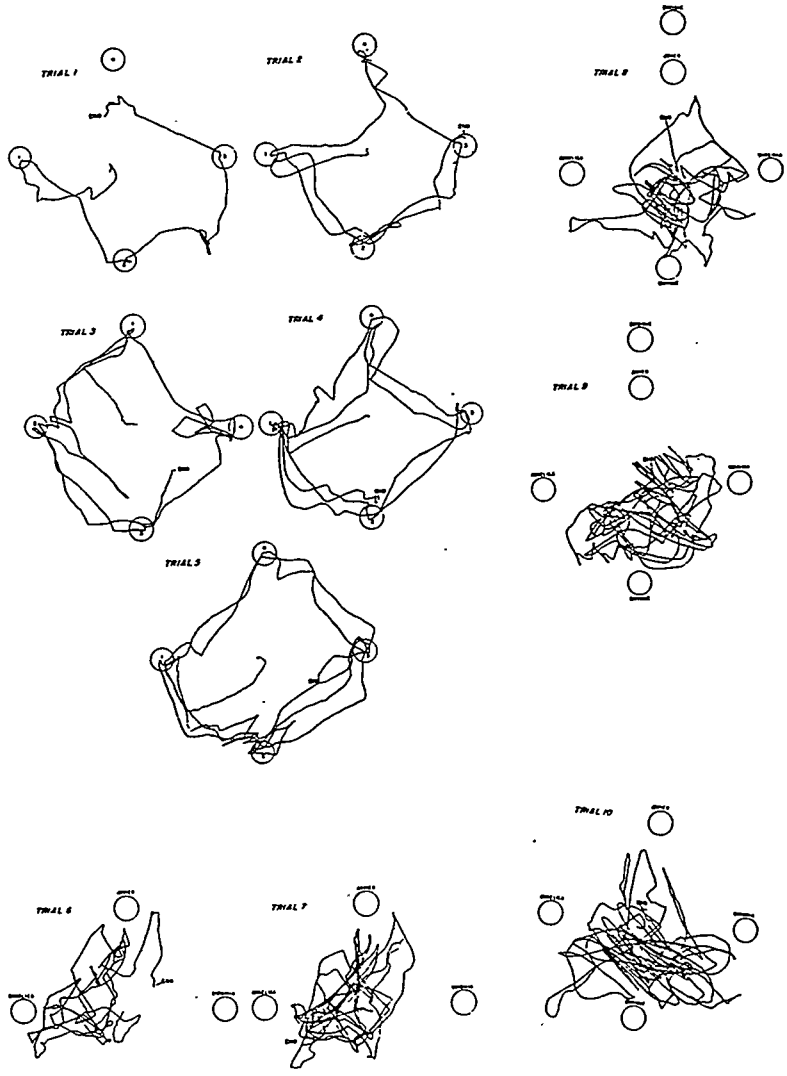
The studies showed that by the end of the first five group-oriented trials the urban and middle-class Mexican and American children[12] had surpassed the rural Mexican children in their ability to acquire the candy.[13] But on the sixth trial, when the individual element was introduced, the success of all the urban and middle-class children dropped drastically, as they competed to draw lines over their own circles. Their rural counterparts showed only slightly less, and sometimes even greater, success than on trial five. Madsen suggests that the rural groups, which scored slightly lower in the first five trials, did not begin to compete individually in trial six as the urban children did. Instead, they slowed down in an effort to avoid competition. By the end of the tenth trial the urban and middle-class children were still well below the rate of their cooperative fifth trial. The rural children, however, showed a steadily increasing success rate through the end of the tenth trial. The results of one of the urban middle-class groups of Mexican children (Figure 2) vividly illustrate the breakdown in cooperation.

The second experiment involving the cooperation board analyzed how the children behaved when competition rationally appeared to maximize reward even though cooperation produced greater actual gain.

12. The same trends in competitive versus cooperative results were found in all three American subcultures, though the Mexican-American children were slightly less competitive than the Afro-American and Anglo-American children. Nevertheless, Madsen and Shapira did not find any statistically significant differences among the three American groups. *See* Millard C. Madsen & Ariella Shapira, *Cooperative and Competitive Behavior of Urban Afro-American, Anglo-American, Mexican-American and Mexican Village Children*, 3 DEV. PSYCHOL. 16, 17 (1970).

13. The kibbutz children actually did better than their urban Israeli counterparts during the cooperative stage, perhaps because the four kibbutz children were always from the same *kvutza*, a subgroup within the kibbutz that works, eats, and sleeps together every day. *See* Ariella Shapira & Millard C. Madsen, *Cooperative and Competitive Behavior of Kibbutz and Urban Children in Israel*, 40 CHILD DEV. 609, 614 (1969). The rural Mexican children, on the other hand, simply came from the same small village and may have been a little slower becoming familiar with one another during the cooperation phase. *See* Madsen, *supra* note 1, at 1308.

FIGURE 2[14]




14. Reproduced with permission of the Estate of author and publisher from Millard C. Madsen, *Cooperative and Competitive Motivation of Children in Three Mexican Subcultures*, 20 PSYCHOL. REP. 13020 PSYCHOL. REP. 1307, 1314-15 (1967).

Madsen moved the circles to the corners of the board, directly in front of each of the children. Thus, a child pulling the string would bring the pen across his circle. Whoever pulled the pen to his corner in the one-minute time limit would get a piece of candy. Under these circumstances, successful competition appeared to be the best strategy to get candy. The children were also told in advance that they would have four trials, leaving an unexpressed option for one piece of candy per child, if they cooperated, or as many as all four to one highly competitive child.

This change in the design of the experiment showed that the Mexican village children could be aggressive about getting the candy, but the more typical reaction was for two children to pull simultaneously, creating a deadlock. At this point, one child would let go and let the other calmly pull the pen toward himself. At no point was there confrontation, and in some cases the children did work out an equal division of the four possible rewards.

The level of competition among the urban Mexican children, on the other hand, is better told in anecdotes than statistics:

> The extreme competitiveness of the urban middle-class sample was attested to by the fact that on seven occasions these children broke 50-lb. test lines by pulling against each other in an attempt to win a piece of candy. . . . It appears that the motivation of the rural . . . children was to avoid direct conflict, while the urban middle class children did not appear to mind and even seemed to enjoy conflict. This was illustrated by one boy who was pulling as hard as he could with one hand while flipping some of his accumulated candy [with the other] to a janitor who happened to be passing. . . . It was the winning and not that candy that mattered.[15]

Madsen also points out that the most frequently heard phrase among the urban middle-class Mexican children was *para mi* (for me) while among the rural children it was *para tu* (for you).[16]

Among the American children, the story was no different. Competition for individual prizes often became violent, and the researcher frequently had to hold the board down to keep it from flying through the air.[17]

> The often aggressive, wild shouting matches among the children in the United States, who were desperately but unsuccessfully trying to cross their circles, was in contrast to the rather slow, quiet, and

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15. Madsen, *supra* note 1, at 1316, 1318.

16. *Id.* at 1318.

17. Millard C. Madsen & Ariella Shapira, *Competitive & Cooperative Behavior of Urban Afro-American, Anglo-American, Mexican American and Mexican Village Children*, 3 DEV. PSYCHOL. 16, 19 (1970).

> deliberately cooperative behavior of the Mexican village children. It should be noted, however, that urban children in Mexico (Madsen, 1967) performed on the cooperation board in much the same manner as the competitive groups in the United States.[18]

These studies suggest that children in the United States will, to paraphrase Madsen, compete irrationally when cooperation is the rational solution. While not making any conclusive findings, Madsen suggests the children's reactions are products of a non-agricultural and achievement-oriented environment where "winning" is the goal. Further experimental comparisons between Mexican village children and American children suggested "winning" means different things to these two groups.

A comparison of Mexican village children and Anglo-American children from the Los Angeles area,[19] sought to refine the cooperative and competitive natures of both groups by eliminating a choice through three experiments.[20]

*Experiment 1*: The children were given a cooperation box, which was essentially a small toy chest with four spring locks (Figure 3). In order to open the box so the two children could get to the toys inside, both children had to simultaneously pull back the four latches and lift the lid. The children first practiced on a training box with only two latches to make sure they understood the mechanism.

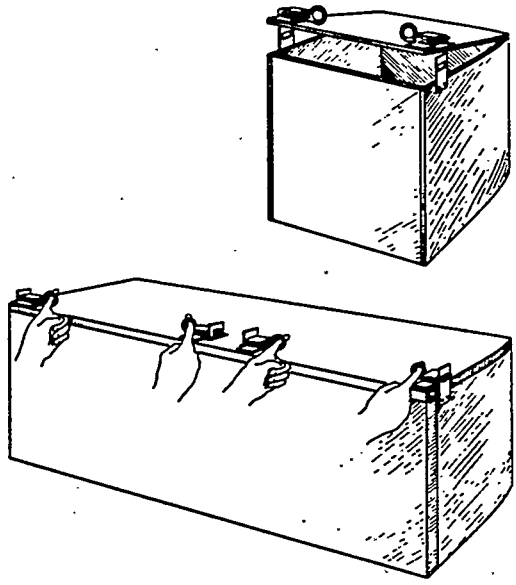
18. *Id.* at 20.

19. Spencer Kagan & Millard C. Madsen, *Experimental Analyses of Cooperation and Competition of Anglo-American and Mexican Children*, 6 DEV. PSYCHOL. 49 (1972).

20. A fourth experiment in the study is omitted from this discussion.

FIGURE 3[21]

(Top, training box with two latches; bottom, cooperation box with four latches.)



The children faced two situations, one in which their cooperation would result in a toy for each of them, and one in which helping a partner would result in a toy for that partner. The study found no significant difference in the Anglo-Americans' or the rural Mexicans' willingness to cooperate for mutual gain or to help for another's gain. The willingness of both groups to cooperate for mutual gain is not a surprise in light of the earlier experiments with the cooperation board. The willingness of the American children to help their partner, however, adds a new dimension to the Anglo-American children's ability to cooperate altruistically.

*Experiment 2*: This test utilized a board with circles running seven across by seven down (Figure 4). No diagonal movement was permitted.

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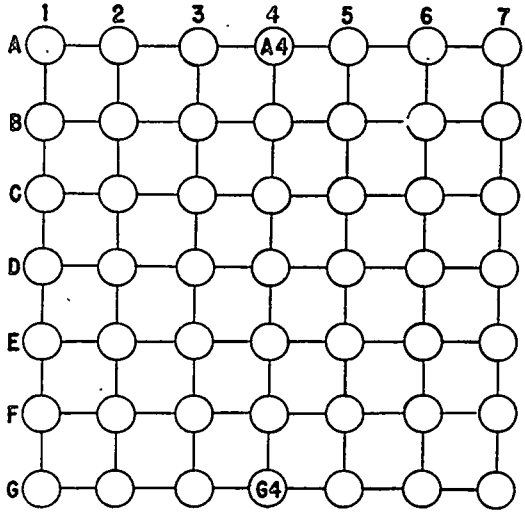
21. Copyright 1972 by the American Psychological Association. Spencer Kagan & Millard C. Madsen, *Experimental Analyses of Cooperation and Competition of Anglo-American and Mexican Children*, 6 DEV. PSYCHOL. 49, 50 (photo reprinted with permission of the Estate of Millard C. Madsen and the publisher from 6 DEV. PSYCHOL.) (1972).

FIGURE 4[22]

(A4=Child A; G4=Child B; D4=Marker starting point.)




One child was seated at one end of the table and another child across from her. The tester gave Child A a toy, such as a magnifying glass or whistle, and told Child A it was hers. The tester then asked Child A to lay the toy down next to the board.

A marker was placed in the center of the grid of circles (D4). The tester told Child B she could move the marker six times. If the child moved the marker to the circle in front of Child A (A4), Child B could take Child A's toy. If, however, Child B moved the marker to the circle in front of herself (G4), she was told Child A would get to keep the toy. Child B also had the unexpressed option to move the marker to neither of those two circles, thus avoiding any decision. To cover the distance from the center of the board to Child A, Child B needs only three moves. So Child B had more than enough moves to reach either goal. This first test was called the "competition condition."

A second group of children received different instructions. If Child B moved the marker to Child A's circle, Child A would still lose the toy, but no one would get it. If Child B brought the marker to his circle, Child

22. Copyright 1971 by the American Psychological Association. Spencer Kagan & Millard C. Madsen, *Cooperation and Competition of Mexican, Mexican-American, and Anglo-American Children of Two Ages Under Four Instructional Sets*, 5 DEV. PSYCHOL. 32, 33 (photo reprinted with permission of the Estate of Millard C. Madsen and the publisher from 5 DEV. PSYCHOL. 32) (1971).

A would keep the toy. Again, Child B could do neither, leaving the toy where it was. This was called the "rivalry condition."

The two tests compared a child's desire to take the toy from another for himself (competition condition) with a child's desire to deprive another of a toy he can not have (rivalry condition).

In the competition condition, the results indicated the American children were more likely to take the toy (92 percent) than the rural Mexican children (77 percent). That, in turn, made them less likely to affirmatively let Child A keep the toy by returning to their circle (5 percent compared to 14 percent) and less likely to avoid the problem (3 percent compared to 9 percent).

In the rivalry condition, however, the American children deprived the other child of the toy more than *twice as often* as the rural Mexican children (78 percent compared to 36 percent). The rural Mexican children were more likely to affirmatively let the child keep the toy by returning to their circle (42 percent compared to 14 percent) or avoid a decision (22 percent compared to 8 percent). Kagan and Madsen point out the low level of avoidance among the American children in both situations "suggests that they experienced little conflict in moving to separate another child from his toy."[23]

*Experiment 3*: In the final test the children used the same board, but this time with two markers, starting at points A4 and G4. The children alternated turns, and the first child to reach the other child's starting point within twenty-four moves would win a toy. Of course, as soon as the children began moving straight across the board they ran right into each other. Because they could not occupy the same space at the same time and could not move diagonally, one child had to "step aside" to let the other go past to win the toy. Or, the child could say "pass" on her turn and hold the position. Both children were told they would play eight rounds, so there was the unexpressed possibility of alternating winning the toy.

Of the sixteen pairs of American children and sixteen pairs of rural Mexican children, all of the Americans ran into a blockade compared to only five pairs of rural Mexicans. Yet, of those five pairs of rural Mexicans, the blockades never lasted longer than two turns while ten of the American pairs averaged more than that.

Eleven rural Mexican pairs split the toys evenly while only two American pairs reached this goal. Twelve of the sixteen American pairs upheld the blockade at least once by passing their turns so that neither got the toy; seven pairs of the sixteen lost more than one toy for a total loss of twenty-two toys. Not one rural Mexican pair lost a toy by blocking.

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23. Kagan & Madsen, *supra* note 19, at 54.

> In this experiment Anglo-American pairs tended to remain in conflict even when to do so prevented them from getting as many toys as possible. The number of trials in which neither child obtained a toy may be seen as a measure of the pair's inability to avoid conflict when to do so is in their interest. Given this measure, Anglo-American children are significantly more irrational than Mexican children. The Mexican children, however, tend to move aside even in the cases when to do so is irrational in terms of their individual interest. . . . Given this measure, Mexican children are irrationally avoidant. The blocked Mexican child appeared to move aside automatically. In two Mexican pairs, both children moved aside even though it was necessary for only one to do so.[24]

From this series of experiments we see the extremes of competition and non-competition. At one end the rural Mexican children would rather not compete and would sacrifice any gain if confrontation is involved. As Kagan and Madsen point out, such behavior against self-interest is irrational. At some point one must make a move to reach a goal if one wants to achieve anything.

Kagan and Madsen's definition of "self-interest" is suspect, however. As Eve Hill points out,[25] male-oriented criteria are not absolute. For instance, what if a child's "self-interest" was not to accumulate toys, but to please another child? Unless Kagan and Madsen can show that at this stage of cognitive development every child's self-interest includes increasing material possessions, their argument about what is "rational" or "irrational" among extremely cooperative cultures is flawed. A child from such a background might have more self-interest in maintaining harmony among her peers than getting a magnifying glass or whistle.[26]

The American children, however, would rather hold onto the string on the cooperation board, keep their marker blocking another child's marker or, in the rivalry condition of Experiment 2, take another child's toy even though it benefits no one. Kagan and Madsen note, "[T]he fact that almost all Anglo-American children find it reinforcing to lower the outcome of their peers, throws into question the quality of peer interaction in the Anglo-American culture."[27] "Winning" in Experiment 2 meant reducing the other child's gain, or what Kagan and Madsen call "relative

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24. *Id.* at 57-58.

25. Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 OHIO ST. J. DISP. RESOL. 337, 338 (1990).

26. For another example of such "irrational" behavior, *see infra* note 57 and accompanying text.

27. Kagan & Madsen, *supra* note 19, at 58.

gain" as opposed to "absolute gain."[28]

If American children develop in this combative manner, it is not surprising that American lawyers and businesspeople need to be retrained

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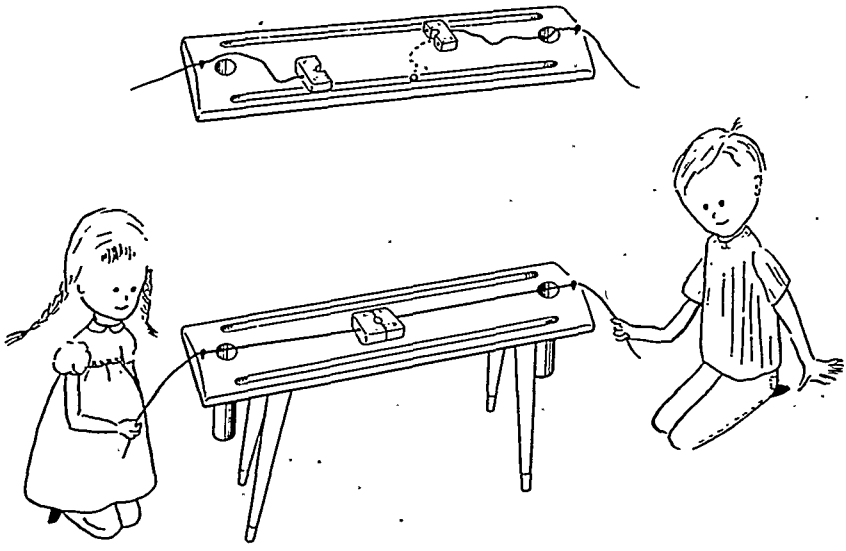
28. At least one other study, Millard C. Madsen, *Developmental and Cross-Cultural Differences in the Cooperative and Competitive Behavior of Young Children*, 2 J. CROSS-CULTURAL PSYCHOL. 365 (1971), shows the overpowering sense of "winning" among American children. Two children were seated at either end of a long, narrow table. In front of them were small holes with cups under them (Figure 5). The children were each given a string attached to an doughnut-shaped container with a marble inside.



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The children could pull the container toward them and let the marble drop into their cup. But if the other child pulled at the same time, the container, held together by magnets, would break apart and the marble would roll off the table so no one got it. The children had ten trials to get the marble, after which the tester showed them how cooperation would result in five marbles each. Then the children had another ten trials. Madsen reports that the competition among the American children was so high that even after the children told each other they should take turns and received a demonstration to that effect, they still competed. *Id.* at 369. Madsen says it is obvious the children were not trying to "get" the marbles but wanted to "win" the marbles. *Id.*

to find more efficient and productive ways to settle disputes.

## II. BARRIERS TO ALTERING CONFLICT ORIENTATION

Motivations influence the actions of American attorneys. In the practice of law, motivations may take the form of financial incentives, peer acceptance or satisfaction from a job well done.[29] An individual attorney's motivations and perceptions about winning are initially shaped by parents[30] and teachers.[31] In order to alter the attorney's perception of

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29. In many of his studies Madsen found the competitive quality in children increased with age. *See* Madsen, *supra* note 28, at 369. Couple that with the emphasis on achievement American mothers exhibited, *infra* note 30, and then consider the methods used in American legal education:

> The training of thinking in law school is pervasively a unidimensional process with fringe consideration of methods, other than the dialectical case method, of organizing and interpreting experience. It essentially fits and suits the operative juridical system though it may be prejudicial in the way it operates in other contexts, such as the law office practice. The thinking style is incisive but narrow. It encourages focused decision, but does not encourage open minded inquiry. . . . It is inimical to dimensions of experience that are "unruly" or irrational, and hence can display no deference toward or consideration of emotional or partly formed experience. It is indifferent to moral expression. It cannot regard single or personal events with adequate individualized concern and consideration. It is, in sum, a sharply honed method that tends to characterize its practitioner, the lawyer, as a person with practiced technique in a certain style of analysis but not much else.
>
> The cultivation of narrow gauged, unidimensional thinking capacity enjoys a remarkable degree of acceptance in legal pedagogy. Llewellyn, in a short book explicating the teaching and learning process in law, said: "The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice -- to knock them out of you along with woozy thinking, along with ideas all fuzzed along their edges." It apparently did not occur to Llewellyn, as it may not occur to others, to question whether such pain in learning and sacrifice in humane values, even as a temporary expedient, is necessary to the teaching of thinking. If, in fact, legal education did *all* that Llewellyn proposed, would it not be a disaster? Are there not alternative ways of thinking in relation to law and alternative modes in teaching and learning thinking?

Robert S. Redmount, *Law Learning, Teacher-Student Relations, and the Legal Profession*, 59 WASH. U. L.Q. 853 at 872-73 (1981) (citing KARL LLEWELLYN, THE BRAMBLE BUSH (1930) (italics in original)).

30. Madsen and Kagan found a great disparity in the way mothers reward their children for their successes and failures. In their study, the children were told to throw a beanbag at a row of squares that got progressively further away. The American mothers would only give their child a reward when the child succeeded in hitting the target. A failure earned the child a word of encouragement. Mothers from a rural Mexican town, however, rewarded effort, whether it resulted in success or failure. In addition, American mothers would not let their children drop backward to an easier target (throwing a beanbag at a closer square) because the child had hit that goal and had to go on to a higher one. The rural Mexican mothers frequently let their children go back to an earlier square if the higher goal became too difficult. American mothers, however, rewarded success more richly than did rural Mexican mothers. Millard C. Madsen & Spencer Kagan, *Mother Directed Achievement of Children in Two Cultures*, 4 J. CROSS-CULTURAL PSYCHOL. 221 (1973).

"winning" one must not only teach an alternative, but provide a motivation to practice it.[32]

Such a motivation may be hard to develop. By the time an individual becomes a practicing attorney he or she is already oriented toward some method of settling disputes that comes from a lifetime of development and reinforcement. The legal profession has always been slow to make change. A study by Lawrence J. Landwehr suggests that the problem may be both an institutional and individual one.[33]

Landwehr conducted a survey of randomly chosen lawyers in New York, California, and Wisconsin using a technique developed by psychologist Lawrence Kohlberg. Kohlberg's theory is that individuals develop along a psychological continuum of six advancing stages.[34]

Landwehr sent questionnaires to the attorneys using two of Kohlberg's ethical dilemmas. The way in which the lawyers responded to the questions indicated what stage they had reached.[35] Of the 195 lawyers who responded, 90.3 percent displayed what Kohlberg calls "the law and order orientation." This orientation is Stage Four, in which there is, ". . . orientation toward authority, fixed rules, and the maintenance of the social order. Right behavior consists of doing one's duty, showing respect for authority, and maintaining the given social order for its own sake."[36]

This stage indicates lawyers do not think about revising the law, but merely work within its boundaries and principles.[37] Law and order oriented people will not change from a competitive posture to a cooperative one for the good of the law or society because they fail to recognize when the system is not functioning as it was designed to function.

The concept of change for the good of a larger body is complicated in the legal setting because there are so many "larger bodies" to consider. For example, consider a law school classroom exercise in competitive/cooperative behavior. The scenario is based on the classic Prisoner's Dilemma in which two people (A and B) are being coerced to

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31. Madsen illustrates the attitudes of urban Mexican teachers through one teacher who, while observing some highly competitive behavior during a testing session, exclaimed, "Ah, that is the new spirit of Mexico." Madsen, *supra* note 1, at 1319.

32. As Madsen has shown, teaching the method is not always effective in getting children to practice it because of the overpowering desire to "win." *See supra* note 28.

33. *See* Lawrence J. Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 LAW & PSYCHOL. REV. 39 (1982).

34. *Id.* at 40 n.2 (citing LAWRENCE KOHLBERG, THE COGNITIVE-DEVELOPMENTAL APPROACH TO MORAL EDUCATION, 50-51 (1978)).

35. *See* Landwehr, *supra* note 33, at 43-44.

36. *Id.* at 40 n.2.

37. Landwehr contrasted the results of the lawyers with that of the general public, where typically 30 to 50 percent are concentrated at Stage Four and the rest are spread across Stages Two through Six. *Id.* at 44-46.

confess to a crime. If A and B both remain silent, they cannot be prosecuted. But A is told if she confesses she will go free and B will be prosecuted based on A's evidence. If both confess, however, they will both be prosecuted. The choice is stick together or try for self-preservation.

In the classroom exercise,[38] two companies are negotiating prices for their product, a peculator. A large class of students is divided into groups A, B, and C. Within each group there are two companies, Pulsar Pepulator and Consolidated Pepulator, and four student-directors for each company. The exercise is intended to see how well the two companies can cooperate in coming up with a price that will maximize shareholder profits.

The pepulator can be priced at $10, $20, or $30. If both companies agree to price the product at $30, each will earn $11 million a year.[39] But if Pulsar Pepulator prices the product at $30 and Consolidated Pepulator undercuts Pulsar at $20, Consolidated will make $18 million while overpriced Pulsar earns only $2 million. So there is a motivation for short-term profits or a chance to "beat the other guy." The mathematics work out such that cooperating at $30 will produce the most gain for both companies because once a company gets stung by the other, both companies drop their prices to $10, which provides only $5 million to each.

Within the exercise there are actually three levels of interaction. The first level is among the four directors who must agree on a price to present to the other company. The second level is between the two companies who will either agree or try to undercut each other's price. The third level is among the whole class, now divided into groups A, B, and C.

In this exercise, cooperation is critical in the first level because the four students are part of the same company. Those students must cooperate to reach a price to present to the other company. At the second level the choice between cooperation and competition is the focus of the game. Cooperation yields mutually maximized gain ($11 million each) while competition creates lopsided gain ($18 million versus $2 million). The third level assesses how well group A did compared to groups B and C in its ability to cooperate and maximize gain. The students realize after the game is over how well or how poorly their game went compared to the other two. There is another way to play the game.

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38. STEPHEN B. GOLDBERG, ERIC D. GREEN & FRANK E.A. SANDER, DISPUTE RESOLUTION 21 (Supp. 1987).

39. The instructions state that anti-trust laws are suspended for the exercise. *Id.* at 22.

Shapira and Madsen, in their study of children living on a kibbutz,[40] showed the tremendous cooperation among the children of the kibbutz, but they also found that kibbutz children were not without a competitive edge. Within the *kvutza*, or sub-group, children worked together, setting aside individual gain for group gain.

But each *kvutza* competed with the other *kvutzas*. So if Pulsar and Consolidated were told that their results were not compared against each other, but against groups B and C, the students in Pulsar and Consolidated would be more likely to cooperate because they wanted to beat groups B and C. Group A would be like a *kvutza* competing with two other *kvutzas*.

Law firms function along the same lines. Partners do not compete with each other because they share each other's gain, like the *kvutzas*. But law firms do compete with other law firms. The ideal is to make all law firms feel like they are part of one group, the legal community, which is competing with other groups, such as the business community or medical community, to show the intelligence and efficiency of the legal community.

The problem, which completes the circle from Kohlberg's perspective, is that the legal profession has tried to get lawyers to change the way they act for the greater good of the system or society but has been unsuccessful. Landwehr's research suggests[41] most lawyers' cognitive framework may be stuck at a stage where they cannot look beyond the status quo to see the future benefits derived from more cooperative dispute resolution processes. Lawyers generally are not trained to see how cooperation could benefit the legal community as a whole by reducing transaction costs and increasing the number of cases handled and improving public opinion.

William J. Goode suggests such a community of lawyers could exist.[42] According to Goode's theory, professionals such as lawyers are a homogenous group which share a common set of values. Thus, lawyers form a legal community within the larger community in which they practice. Goode's theory is undercut, however, by the work of John P. Heinz and Edward O. Laumann, which indicates that urban bar associations tend to be fragmented and culturally diverse.[43] In addition, legal specialization may create a "community" of lawyers within a

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40. Ariella Shapira & Millard C. Madsen, *Between- and Within-Group Cooperation and Competition Among Kibbutz and Non-Kibbutz Children*, 10 DEV. PSYCHOL. 140 (1974).

41. Landwehr, *supra* note 33.

42. *See* William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194 (1957).

43. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982). *See also*, DONALD D. LANDON, COUNTRY LAWYERS, 119-120 (1990).

specialty, but such specialized communities represent insular units within the whole bar. Formulating some kind of unitary notion of a "Legal Community" to promote efficiency for its own gain is unlikely.[44]

The situation is not hopeless. Kohlberg notes that a Stage Four "law and order orientation" individual can understand the rationale of the next level, Stage Five. Kohlberg describes Stage Five as "the social contract, legalistic orientation, generally with utilitarian overtones."[45] Moving the individual's cognitive orientation from Stage Four to Stage Five, which emphasizes changing the law for rational considerations, would enable lawyers to understand why cooperation can provide greater gains. Such a change will only come with some form of relearning and change in motivation.

## III. THE COOPERATIVE COUNTRY LAWYERS

In one context, lawyers have shown they can learn to change their attitudes about settling disputes: rural communities. Much like the children of rural Mexico or the kibbutz, the country lawyer works in an interwoven social structure where clients are friends. When rural clients have disputes, they typically do not seek lengthy litigation because it means disapproval from the community, which may view them as greedy or hard-nosed.[46]

Donald D. Landon interviewed 201 small-town lawyers and 77 urban lawyers in Missouri for their perspectives on the adversary system in those two settings. The language and reasoning used by the rural lawyers he spoke with mirrors the logic one would have to use on Madsen's cooperation board.[47] As one lawyer in a town of 4,000 said: "Attorneys here get along well. That seems to reduce the volume of litigation. No one is trying to make a 'loser' out of another lawyer by

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44. *See* LANDON, *supra* note 43, at 4.

45. Landwehr, *supra* note 33, at 40 n.2 (*citing* LAWRENCE KOHLBERG, THE COGNITIVE DEVELOPMENTAL APPROACH TO MORAL EDUCATION, 50-51 (1978)).

46. Leonard Riskin says that litigation is viewed as a "shameful last resort" in parts of the Orient as well. In the Confucian view:

> [a] lawsuit symbolized the disruption of the natural harmony that was thought to exist in human affairs. Law was backed by coercion, and therefore tainted in the eyes of Confucianists. Their view was that the optimum resolution of most disputes was to be achieved not by exercise of sovereign force but by moral persuasion. Moreover, litigation led to litigiousness and to shameless concern for one's own interest to the detriment of the interests of society.

Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 29 (1982) (*citing* Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1201 (1966)).

47. LANDON, *supra* note 43.

converting a case into a win-lose situation."[48] A country practitioner of 25 years pointed out why a more cooperative attitude prevails amongst rural lawyers: "Lawyers protect each other in the country. They will need each others' support over the years since in small town practice the shoe changes foot frequently. If you take advantage of a lawyer's lapses or exploit something that reflects on him, he will get you the next time."[49]

The lawyers explained that they had to learn new ways to solve disputes in their small community not provided in their traditional law school advocacy training.[50] A client coming to a lawyer following an accident may not want to sue because the other driver is an acquaintance. Likewise, the local attorneys work well together and do not try to take advantage of one another. Any new attorney who steps out of line, say by pushing for unnecessary discovery, gets swamped by every other attorney with frivolous demands until he or she gets back into line.[51] This is much like the peer pressure Madsen and Shapira observed among the kibbutz children when one child tried to manipulate the cooperation board for greater individual gain.[52]

The two incentives for lawyers to act cooperatively are community/peer acceptance and economic well-being. No one wants a win-lose situation because over a prolonged period it will destroy professional relationships. Those professional relationships usually involve numerous personal relationships, such as membership on the school or church board, children enrolled in school together or membership in the local chamber of commerce. One lawyer said:

> In a small town, you know everybody, their kinfolk and their histories. The town is like a fabric - you know pretty well how the threads are woven together. You have a mental picture of how the machinery of life operates here, and you get updated every morning at coffee.[53]

The small-town attorney not only finds friendly solutions, he declines to take confrontational cases, much like the rural Mexican children Kagan and Madsen observed. Confronting a community icon can spell disaster, as one attorney told Landon, "Recently, I took on a medical

48. *Id.* at 140.

49. *Id.* at 143.

50. Country lawyers agree that law school does little to prepare students for dealing with clients. One practitioner wrote: "Law school was about learning the law, not about people. Practice is about people." Joseph M. Wolczyk, *In Search of a General Practitioner: Small Town Solo Celebrating Family Ties and Community Bonds,* 5 COMPLEAT LAW. 24, 25 (1988).

51. *See* LANDON, *supra* note 43, at 142.

52. *See* Shapira & Madsen, *supra* note 13.

53. LANDON, *supra* note 43, at 127.

malpractice suit against a local doctor. It was a bad mistake. I think I'm finished in this community."[54]

Landon's interviews indicate the type of case is a critical factor in the country lawyer's decision of whether to accept potential representation. Certain types of cases can hurt the community and, in turn, the lawyer. For example, one attorney noted the community's negative reaction to a civil rights action: "I represented a family in a civil rights matter against the school district. It was the worst mistake of my career! The community held that against me for ten years!"[55] Similar attitudes were expressed towards other controversial cases: "I'll never take on a sexual abuse case in this town. It's one of these matters you quickly refer to an outside attorney."[56]

The method of avoidance among the country lawyer is simply to refuse the case and refer the client to a lawyer in the next county.[57] One lawyer in a town of 3,000 explained:

> The tradition in this town is to settle matters short of litigation. This firm has been here for two generations and it has never been what you might call "adversarial." If people want to fight, they go 25 miles north to _____for an attorney. There hasn't been a jury trial in this town for two years.[58]

The country attorney's economic well-being may be the greater incentive of the two for cooperative behavior.[59] Small-town lawyers make their living off of a large number of individual cases. They get cases by referral from other work they have done and must dispose of matters

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54. *Id.* at 137.

55. *Id.*

56. *Id.*

57. This example further exemplifies why Kagan and Madsen's definition of irrational avoidance, *supra* note 24 and accompanying text, is unsound. According to their principles, an attorney who turns down possible economic gain from a client because he fears confrontation is akin to the Mexican child who turns down the toy. Yet the attorney is looking to the long-term effect, as might be the Mexican child.

Despite the immediate benefit to the community by avoiding such difficult litigation, however, long-term injury may result from refusal to take these cases. A negligent doctor may continue to practice, the school system, will keep violating civil rights or a defendant will not get local counsel because of the nature of his crime. These are the types of cases critics say must go to trial to establish public norms. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

58. LANDON, *supra* note 43, at 131.

59. While economics may be an incentive it is by no means the only reward, as one lawyer in a small town in upstate New York explains: "My first criminal case was an arson. I still have the thank you note the client's mother sent me. It meant more to me than the fee I got from the county." Wolczyk, *supra* note 50, at 25.

quickly if they want to keep costs down.[60] The legal community, therefore, has a vested interest in cooperation because it means faster settlement and more gain for everyone.

The 77 urban lawyers interviewed expressed the impersonal nature of practicing law. They litigated more[61] and fought harder[62] because it was not as likely they would face the same adversary. They did not spend as much time giving personal advice as the country lawyers[63] because the majority of urban clients are businesses.[64] This difference in clientele is an obstacle to reform. If urban lawyers do not face the same community conflicts rural lawyers do, they will not be influenced by the same social factors. They are, however, as easily influenced by education and money.

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60. Despite the seemingly good-natured interaction among these attorneys, they agree one needs good trial skills for two reasons: first, when a new attorney comes to town, the established practitioners will take her to court on anything just to test her mettle; second, in a small town reputation is important and one wants to be known as a tough advocate to get more clients and as leverage to keep cases out of court. *See* LANDON, *supra* note 43, at 89-90.

61. Fred H. Bartlit Jr., a Chicago trial lawyer, has a view of the role of settlement in cases he handles that provides a striking contrast to the country lawyer's view:

> Bartlit likes to do battle; in fact, he doesn't want any part of cases he thinks might settle before trial. "Doing well in big cases requires a lot of hard work and long hours. It's difficult to get yourself in the mental state if you basically think the case is going away," he says. "Who would climb up those cliffs on Normandy beach if they knew the war was going to be over anyway?"
> . . . Still, if a client or the client's opponent wants to settle, Bartlit suggests that another lawyer in the firm handle those discussions. "I don't think a good trial lawyer can be a good negotiator," he explains. "I think cases should be settled -- but I'm not a settler."

EMILY COURIC, THE TRIAL LAWYERS 2 (1988).

62. The fact that attorneys feel they must be tough to impress the client is a by-product of their law school training. One commentator has said: "The virtues of the adversary system are so deeply engrained in the American legal psyche that most lawyers do not question it." Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989).

Teachers in courses on trial advocacy do not emphasize that an all-out fight frequently is not in the client's best interest. *See, e.g.*, Kenney Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69 (1982). Once out of school, public perception and the practicing bar foster the belief that a good lawyer is a tough fighter. One judge has observed:

> . . . [G]ood counselors are rarely honored for their achievements. While stellar advocates are lionized by the profession and the public, the best counselors work in obscurity. [Citation omitted.] This circumstance "misleads the public and attorneys into believing that the lawyer's only, or principal, function is representation in the adversary process."

Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 691 (1982).

Riskin, says a lawyer may fear that by not acting tough, clients may no longer view her as a "valiant champion." *Supra* note 46, at 49.

This fear is apparent in the rural bar as well. The country lawyers indicated that a practitioner must establish the ability to try a case in order to earn public respect and as leverage to settle the case. *See supra* note 60.

63. *See* LANDON, *supra* note 43, at 90.

64. HEINZ & LAUMANN, *supra* note 43, at 54.

## IV. WHY URBAN LAWYERS SHOULD (AND WILL) COOPERATE

The country lawyers behave cooperatively not only for themselves, but for the good of the profession in their community.[65] They expressed some of the cooperation ideals one would hope to pervade the legal system.[66] Because the vast majority of lawyers practice in urban settings,[67] however, it is unlikely this cooperative ideal will easily cross the city lines.

One effective method of introducing the benefits of cooperative negotiation to lawyers is through their education.[68] Chief Judge Edward D. Re of the U.S. Court of International Trade says classes in counseling

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65. Landon found that rural lawyers are also more likely than urban lawyers to be concerned about the community's economic and social health because they recognize it impacts on their practices:

> They clearly understood the tie between the welfare of the community and their own professional welfare. There was little reluctance to head -- say -- the chamber of commerce committee working to bring into the community a Banquet Foods plant that would employ 160 people. Nor would there be any doubt about involving themselves in a program to develop a new sewage waste treatment plant that carries with it a generous infusion of federal dollars.

LANDON, *supra* note 43, at 92.

66. *See supra* note 40 and accompanying text.

While evidence shows urban lawyers are more adversarial, some lawyers sense that practitioners have confused rudeness with advocacy. One author points out that lawyers are required by Canon 7 of the Code of Professional Responsibility to be zealous advocates, so no one should have anything to prove. *See* James L. Bush, *Courtesy and Advocacy: Thoughts of a Small Town Lawyer*, 23 ARK. LAW. 3, 5 (Jan. 1989).

Another author says his colleagues think the public wants their lawyer to be mean and ruthless in fighting their cause. But these attitudes are posing barriers to solving the underlying disputes:

> Fears that clients will question a lawyer's aggressiveness if the lawyer is not mean, uncooperative and condescending are unfounded. If a client requires that kind of behavior from its lawyer, do we want that client? Is this the kind of system we want to promote? Is that the kind of system the public deserves?

Larry W. Hicks, *Restoring Civility to the Practice of Law*, 52 TEX. B.J. 586, 586 (1989).

67. Statistics show 88 percent of the practicing bar is located in metropolitan areas of 50,000 people or more, and the remaining 12 percent are in towns ranging in size from about 250 to under 50,000 people. *See* LANDON, *supra* note 43, at xvii, (citing BARBARA CURRAN, LAWYER'S STATISTICAL REPORT 243 (1985)).

68. Riskin suggests that law school training, in fact, strips students of whatever knowledge they may already have had of settling disputes in a nonadversarial way. *See* Riskin *supra* note 46, at 43-51. To make his point, Riskin relates a story told by Kenney Hegland.

Hegland had offered a hypothetical to his first-year Contracts class in which Buyer was furious with Seller for sending only 999 widgets when the contract called for 1000. Buyer had announced he was not going to accept any more widgets and would not pay for those received. Hegland asked for a volunteer as to what Seller should do in the face of Buyer's responses to the error. He wanted a discussion of the common law theories in this setting that would allow Seller to force Buyer to pay. None of his students volunteered.

Then, he saw the hand of an eight-year-old boy who was visiting the class with his mother, a student.

> "Ok," Hegland said to the boy. "What would you say if you were the seller?"
> "I'd say, 'I'm sorry.'"

Riskin, *supra* note 46, at 46, (citing Kenney Hegland, *Why Teach Trial Advocacy? An Essay on Never Ask Why*, HUMANISTIC EDUCATION IN LAW, Monograph III, at 68-69 (1982)).

are essential for a complete education in law:

> The teaching of nonadversarial legal skills needs to be conducted with the same thoroughness and effort which now characterize the teaching of legal advocacy, and the adversary system. Interviewing, counseling and negotiating skills are not possessed in equal measure by everyone, but they are skills which can be learned. If law schools were to include in the curriculum courses devoted to interviewing and successful counseling, society could reap tremendous rewards in terms of the number of disputes which could be avoided, settled and kept out of court.[69]

No one would suggest such training should replace traditional advocacy classes. But with nonadversarial legal skills lawyers also can consider a variety of solutions to incidental problems within the adversarial contest. For example, Mahatma Gandhi, as a young lawyer, was surprised by the benefits of mediation even after he had won a judgment for his client. The issue was how his client could collect the whole judgment. Gandhi suggested installment payments to his client, because the defendant could not afford to pay a lump sum. His client agreed:

> [B]oth were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of the law. I had learnt to find the better side of human nature and to enter men's hearts. I realized that the true function of the lawyer was to unite parties riven asunder.[70]

Regardless of prior education in advocacy, urban lawyers are sensitive to the needs of their clients, and businesses are expressing greater interest in less-costly alternatives to solving disputes. For example, the Center for Public Resources, which settles conflicts among businesses, was started by Fortune 500 companies, not law firms. The Rand Corporation and the National Institute for Dispute Resolution are also researching better ways to solve civil disputes.[71]

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69. Re, *supra* note 62, at 696-97.

70. Riskin, *supra* note 46, at n.153 (*citing* MAHATMA GANDHI, AUTOBIOGRAPHY, THE STORY OF MY EXPERIMENTS WITH TRUTH 168 (1948)).

71. STEVEN B. GOLDBERG, ERIC D. GREEN & FRANK E.A. SANDER, DISPUTE RESOLUTION 5 (1985).

Some of the solutions those groups suggest could include completely eliminating lawyers from the process. A study by Carol J. Greenhouse of a small Georgia town illustrates the force and techniques a local church community can develop for solving disputes without lawyers. CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER AND COMMUNITY IN AN AMERICAN TOWN 110-122 (1986).

Landon also points out that some American rural communities in Missouri get along without any lawyers whatsoever, relying instead on local businessmen for advice and their own family networks or the church to settle disputes. One attorney, struggling to open a practice in a town of 2,500, said the future looked bleak for him because the town hadn't had

Entrepreneurs have already established businesses to meet the need for less expensive methods of dispute resolution. Large corporations, including Standard Oil, American Can Co., Borden, TRW, Telecredit, Texaco and Gillette are turning to organizations such as EnDispute, Judicate Inc., Civicourt, and Washington Arbitration Services Inc. to work out their disagreements.[72] Companies have changed internal structures to reflect a new attitude. Xerox, for example, renamed its litigation department the "dispute resolution group."[73] Motorola Inc. has cut litigation costs by 75 percent by requiring its in-house attorneys to seek an alternative form of settlement before resorting to litigation.[74]

These developments, however, have made some of the nation's most prominent law firms take notice of their clients' desires for more efficient dispute resolution. The Center for Public Resources announced that 600 top corporations and almost 800 firms have signed the Center's "Law Firm Policy Statement on Alternatives to Litigation."[75] The Center estimates that avoiding court has saved companies more than $100 million in 1991.[76] The statement, developed by a national committee of litigators and corporate counsel, says the firms agree to advise their clients and educate their attorneys about alternative dispute resolution.[77] Former American Bar Association president and committee member Robert D. Raven said law firms must come to understand that alternative dispute resolution is good for their business: "People may . . . assume that this policy goes against a law firm's financial well being. . . . [T]he opposite is true. In tough competitive times, law firms that can reduce clients' costs and improve results through ADR are more apt to sustain long-term relationships."[78]

The other end of the economic spectrum presents more troubling

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a lawyer for 20 years and didn't seem to need one. Another attorney was the only one in a town of 1,000 and said he spent most of his time as a mediator between the disputing parties because no one could represent the other side. LANDON, *supra* note 43, at 131.

This adds some truth to the joke about the lonely lawyer with no work. When the second lawyer came to town, they both had more work than they could handle!

72. *See* Richard Koenig, *More Firms Turn to Private Courts to Avoid Long, Costly, Legal Fights*, WALL ST. J., Jan. 4, 1984, at 27. *See also* Jane Birnbaum & Morton D. Sosland, *Coming to Terms - Without Bringing the Lawyers*, BUSINESS WEEK, April 13, 1992, at 63, describing the success of Judicial Arbitration & Mediation Services, Inc. in Orange, California. The organization expects to hear 14,000 cases this year with sales of $30 million, up 25 percent from 1991.

73. Koenig, *supra* n.72 at 27.

74. *See* Michele Galen, Alice Cuneo & David Greising, *Guilty! Too Many Lawyers and Too Much Litigation. Here's a Better Way.* BUSINESS WEEK, April 13, 1992, at 60.

75. *Id.* at 63. *See also* Rorie Sherman, *Big Firms Join ADR Signathon*, NAT'L L.J., Oct. 28, 1991, at 2.

76. *See* BUSINESS WEEK, *supra* note 74 at 63.

77. *See* Sherman, *supra* note 75.

78. *Id.*

examples of the shortcomings of the litigation model. An increasing number of small-business people and middle-class families who cannot afford a lawyer or the cost of a full-blown trial are trying to represent themselves in court. But the real concern is not that lawyers have priced themselves out of that market; it is the number of people who are denied justice on potentially valid claims because of procedural errors that a lawyer would have avoided.[79]

The other forces toward change have started to come from within the legal system. Judges at the federal and state levels increasingly are encouraging and mediating settlements.[80] And, in 1983, the American Bar Association adopted the Model Rules of Professional Conduct, in which the role of a lawyer as an adversary was deemphasized.[81] The ABA now describes the lawyer as a counselor, negotiator, and mediator.

## V. CONCLUSION

Widespread use of cooperative settlements in the legal community offers social and economic benefits that litigation does not provide. But psychological studies demonstrate how competition is engrained in the development of American children, even when competing prevents the child from reaching his or her goal. Later, competition is reinforced in American law schools. And further studies show that lawyers do not see the benefits of considering new rules other than those they learned in law school.

Educators and practitioners agree that law schools must introduce classes in counseling and alternative dispute resolution into their programs. People with legal problems do not always want a fight. Often, they just want a solution. Lawyers need to know more techniques to find those solutions.

Besides the social gains, such as preservation of resources, greater client satisfaction and increased respect for the bar, lawyers may find it makes their work more fulfilling.

From an economic view, if law schools do not train future lawyers

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79. *See* Amy Stevens, *Self-Representation in Court Can Save Money, But Often at the Cost of Success*, WALL ST. J., June 3, 1991, at B1.

80. Some state courts have found success by requiring arbitration or mediation for certain types of cases. *See* Randall Samborn, *Courting Solutions: Rising Caseloads Spur Judiciaries to Seek Solutions*, NAT'L L.J., July 1, 1991, at 1. These, then, are two forms of dispute resolution that law schools may have to include in advocacy training to fully prepare their students for practice. In fact, a Colorado lawyer who fails to inform a client about alternative dispute resolution can be disciplined for a breach of ethical duties. *See* BUSINESS WEEK, *supra* note 74 at 64.

81. *See* LANDON, *supra* note 43, at 124-25.

in these techniques, developments suggest their livelihood may be in jeopardy. Studies on small towns and the blossoming of dispute resolution enterprises show that if the public has to, or if businesses want to, they can both get by without lawyers. Those who are paying to solve disputes will continue to find more efficient techniques and the lawyers, if people still want to use them, will have to comply.