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TRAINING LAWYERS TO BE MORE EFFECTIVE DISPUTE PREVENTERS AND DISPUTE SETTLERS: ADVOCATING FOR NON-ADVERSARIAL SKILLS

PAUL L. TRACTENBERG*

I. INTRODUCTION

What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential; disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of the law.¹

In recent years there has been a crescendo of criticism of law and lawyers. One of its themes has been that law and lawyers have prompted people to be too litigious, and that litigation processes are too complex, costly and inefficient.² This has led to calls for judicial reform³ and for development of alternate or complementary systems of dispute resolution.⁴

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1. K. LLEWELLYN, *THE BRAMBLE BUSH* 12 (1951).

2. See, e.g., Bok, *A Flawed System of Law Practice and Training, Report to Harvard Overseers for 1981-82*, reprinted in 33 J. LEGAL EDUC. 570 (1983). But see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4. (1983). Professor Galanter's article is a rich resource for references to the relevant literature, as well as a provocative challenge to its validity. See generally Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72 (1983).

3. See, e.g., BURGER, 1983 YEAR-END REPORT ON THE JUDICIARY; Address by Justice William Rehnquist, Saint Louis University School of Law Jurists in Residence Program (April 7, 1983), reprinted in 28 ST. LOUIS L.J. 1 (1984); Address by Chief Justice Warren Burger, Midyear Conference of the American Bar Association (Feb. 6, 1983), reprinted in 69 A.B.A. J. 442 (1983); Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231 (1976).

4. For an extensive bibliography, see ABA COMMITTEE ON RESOLUTION OF MINOR DISPUTES, *ALTERNATIVE METHODS OF DISPUTE SETTLEMENT—A SELECTED BIBLIOGRAPHY* (F. Sander & F. Snyder compilers, 1982); see also S. Jaffee & L. Stamoto, *Dispute Resolution: Complementary Programs and the Courts* (Jan. 1983) (an

Another theme has involved criticism of the competency of practicing lawyers. Chief Justice Burger has focused attention on one aspect of the problem—competency in the courtroom.⁵ Others have raised broader concerns: that the preparation of lawyers is fundamentally deficient in important respects. A trilogy of these asserted deficiencies is especially central to my concerns. First, critics have charged that legal education has been focused on a limited set of lawyering skills, and not even the ones many lawyers consider to be of greatest relevance and importance.⁶ Second, by focusing legal education on the study of appellate court decisions, law schools have oriented their students toward the extended use of adversarial processes, and toward the view that the most glamorous, if not the most important, skills are those which permit imminent humiliation to be turned to victory.⁷ Finally, legal education has exalted dispassionate intellectual analysis over humane, empathetic interpersonal relationships.⁸

Both critical themes are consistent with greater emphasis in the legal system and in legal education on dispute *prevention* and preventive law,⁹ but neither has particularly stressed it. That may be natural. Disputes which are ripe for resolution lay first claim to the lawyer's attention. They have immediacy and concreteness. In Llewellyn's words, "Actual disputes call for somebody to do something about them."¹⁰ In my view, though, reforming the legal system and legal education to improve the way in which disputes are resolved is an incomplete answer. Indeed, it may even be illusory. There is insufficient evidence to support the hypothesis that alternate or complementary mecha-

unpublished paper prepared for the New Jersey Supreme Court and the Administrative Office of the Courts).

5. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

6. See, e.g., F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 135 (1981).

7. The skills exalted in law school appellate moot court competitions—calmness under fire, the ability not only to respond to a difficult question but to turn it to one's advantage—are, not coincidentally, the same skills that permit students to survive the "Socratic" classroom approach. In most law schools, demonstrations of those skills rank, with law review accomplishment, at the apex of the status hierarchy.

8. Himmelstein, *Reassessing Law Schooling: Towards a Humanistic Education in Law*, HUMANISTIC EDUCATION IN LAW 1 (Project for the Study and Application of Humanistic Education in Law at Columbia University School of Law, Monograph I 1980); Berger, *The Heart of the Law is the Heart of the Lawyer*, N.Y. Times, July 9, 1976, at 25, col. 1.

9. Professor Louis M. Brown, the creator of the National Client Counseling Competition, has been a leader in advocating that preventive law be incorporated into law school curriculums. See, e.g., BROWN, *PREVENTIVE LAW* (1950); Brown, *From Preventive Law to Mock Law Office Competition*, 51 OR. L. REV. 343 (1972); Brown, *Experimental Preventive Law Courses*, 18 J. LEGAL EDUC. 212 (1965).

10. K. LLEWELLYN, *supra* note 1, at 12.

nisms will render dispute resolution so much more efficient and effective that we can continue to process the same number of disputes with markedly lower societal costs. Nor is it clear that improving the competency of trial attorneys will move us substantially forward.¹¹

These and related issues warrant serious study and discussion. In this article, I leave the study and discussion to others. My focus will be on the training of lawyers to be more effective dispute preventers and dispute settlers. I will look primarily at lawyers' roles outside of courtrooms, where in fact most of them spend most of their time,¹² and consider the role of law schools, the organized bar and lawyers themselves.

After briefly recounting some milestones in the history of legal education, and especially efforts to train lawyers in non-Langdellian techniques, I will explore re-orientation of lawyer training, first globally and then more specifically. Most of the ideas in this article are not new. Many of them date back 50 years and more. Articles by Llewellyn and Frank in the 1920's and 1930's could be reprinted with modest changes and seem totally relevant.¹³ This in itself bears serious pondering. We do have the advantage of some relatively recent studies which, in the main, tend to support Llewellyn's and Frank's intuitions. In the final portion of this article, I will describe some legal educational ventures I have been developing which represent a further step toward the kind of legal education which I believe must be embraced into the core of American legal education if we are to respond to the needs of lawyers and to the broader society.

II. HISTORY OF LEGAL EDUCATION IN A NUTSHELL

Applying the carbon test to modern legal education would quickly yield up the date 1870. That was when Langdell's "case-method" approach was instituted at Harvard Law School.¹⁴ Before then, legal education consisted of a welter of competing ideologies and institutions. The apprenticeship approach,

11. Chief Justice Burger's comments about the competency of trial attorneys and the importance of major efforts to upgrade their competency have been sharply challenged by some leading practitioners. See, e.g., Toll, *A Modest Suggestion for Chief Justice Burger*, 66 A.B.A. J. 816 (1980). But cf. Law Poll, *Burger not all that wrong?*, 64 A.B.A. J. 832-33 (1978) (fifty-one percent of attorneys polled agree "that one third to one half of American lawyers are not properly qualified for trial advocacy").

12. See, e.g., Brown, *From Preventive Law to Mock Law Office Competition*, 51 OR. L. REV. 343, 344 (1972).

13. Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Llewellyn, *Some Realism About Realism—Responding to Dean Pound* 44 HARV. L. REV. 1222 (1931).

14. Frank, *supra* note 13, at 908. Frank takes particular umbrage at the use of "case-method" to describe Langdell's approach. For him, an appellate opinion is not even the decision in the case, let alone the *case*. *Id.* at 910, 916.

“reading law,” was still in wide use, at least as an alternative to more formal education; local “trade schools,” usually privately-operated, were establishing their footholds; and “university law schools” were struggling to enhance the professionalism and academic status of legal education.

The genius of Langdell’s approach was that it provided a cost-effective pedagogical technique for teaching what is undeniably a core legal skill, and for emphasizing, at the same time, the intellectual, analytical properties of legal study. The “case-method” moved legal education toward expensive libraries and cheap teaching,¹⁵ a course it is still largely on.¹⁶

The “case-method,” and its frequent companion the “Socratic dialogue,” quickly achieved dominance in legal education, and became the vehicle by which national law schools assumed preeminence.¹⁷ For 50 years these developments went effectively unchallenged.

In the 1920’s and 1930’s the first serious challenges were heard. In 1921, Alfred Reed wrote that, “The failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly.”¹⁸ Reed conceded that the case-method was practical, in a way that more dogmatic teaching was not,¹⁹ but he was highly critical of training the student “in this one out of the many activities in which he will later engage.”²⁰ In his view, the practical aspect of the case-method “by no means closes the gap that divides the theoretical law school from the realities of actual practice.”²¹ A possible solution, then beginning to be considered, was a clear forerunner to latter-day clinical programs

15. The case-method permitted instruction to take place in large classes. Most law schools continue to function with student-faculty ratios two to three times greater than those in other graduate or professional programs.

16. The major pedagogical deviation from the case-method has been clinical education. Among the significant constraints on its expansion and incorporation into the mainstream curriculum have been cost concerns. See Swords & Walwer, *Cost Aspects of Clinical Education* in AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, GUIDELINES FOR CLINICAL EDUCATION 133 (1980) [hereinafter cited as GUIDELINES FOR CLINICAL LEGAL EDUCATION]; ABA SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION, LAW SCHOOLS AND PROFESSIONAL EDUCATION 95-101 (1980) [hereinafter cited as FOULIS REPORT]. Increased funding has been recommended by influential bodies. See, e.g., *id.* at 105.

17. Local law schools have continued to play a significant educational role but they have lower status and somewhat different goals than the national law schools. ZEMANS & ROSENBLUM, *supra* note 6, at 52-63. The apprenticeship/clerkship alternative to law school education continued to be available for some decades but has now been eliminated in every state.

18. A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 281 (1921).

19. The lecture stressing blackletter legal doctrine was the predominant law school pedagogical approach prior to the case-method. *Id.* at 376-77.

20. *Id.* at 285.

21. *Id.* at 285-86.

—expanded legal aid societies which could provide law students with more substantial practical training in cooperation with law schools.²² Reed's shorter-term solution was to introduce a second, more practice-oriented track into law schools.²³

At about the same time that Reed laid down the gauntlet, the legal realist movement was beginning to assert itself. Fueled by the view that it is artificial to divorce legal rules from the social context, the realists challenged the case-method's dominance and sought to introduce the social sciences into legal education.²⁴

In 1933, Jerome Frank, a leading legal realist, reiterated the call for a clinical approach to legal education.²⁵ Following an *ad hominem* criticism of Langdell's idiosyncrasies and how they led inexorably to the case-method,²⁶ Frank advocated that law schools and their faculties, and legal education, had to be re-connected with the practice of law. Among Frank's specific recommendations were that: (i) "[a] considerable proportion of law teachers in any law school should be men²⁷ with not less than five to ten years of varied experience in the actual practice of law";²⁸ (ii) the case-method should become a true, not sham, case-method by having students examine and analyze the complete records of cases, not just the appellate decisions;²⁹ (iii) law students should observe actual legal "operations," in courtrooms and elsewhere;³⁰ (iv) by analogy to medical education, legal clinics should be established in every law school;³¹ and (v) law teaching should be integrated with the social sciences.³²

22. R. SMITH, *JUSTICE AND THE POOR* (Carnegie Found. Bulletin No. 13, 1919); Rowe, *Legal Clinic and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591 (1917); Wigmore, *The Legal Clinic*, 12 ILL. L. REV. 35 (1917).

23. See Gorman, *Legal Education at the End of the Century: An Introduction*, 32 J. LEGAL EDUC. 315 (1982).

24. For an interesting analysis, see Woodard, *The Limits of Legal Realism: An Historical Perspective*, reprinted in H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 329 (1972).

25. Frank, *supra* note 13.

26. Among other things, Frank referred to Langdell's alleged penchant for spending nights sleeping on a table in the law library, and for wishing that he "could have lived in the time of the Plantaganets." *Id.* at 907.

27. I suppose that the times explained, and perhaps justified, Frank's choice of noun.

28. Frank, *supra* note 13, at 914.

29. *Id.* at 916.

30. *Id.* at 917.

31. *Id.* at 917-20. Medical education has frequently been put forward as a model for reformed legal education. But for a recent criticism of medical education, see Bok, *Needed: A New Way to Train Doctors*, HARV. MAG., May-June 1984, at 32.

32. Frank, *supra* note 13, at 921-22. Frank subsequently reiterated many of these recommendations in other writings. See, e.g., Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303 (1947).

Even at the time of Frank's article, there were some limited experimental clinical programs in existence. They were clearly on the periphery of mainstream legal education. Despite the recent impressive growth of clinical legal education, it has still not penetrated to the curricular core of most American law schools.³³

The next chapter in our history is the "neo-realism" of the 1940's. The lawyer as societal policy-maker was the focus. This resulted in some renewed attention to clinical education, but no real momentum for change.

Again, in the 1950's, there was an effort to revive practical legal training in the law schools. The law schools resisted strongly, and were largely successful, in the view of at least one commentator, because the reform proponents had lost sight of Frank's view that practical training was a means to deeper understanding of legal *theory*, among other things.³⁴ The effort of the 1950's did make some inroads into legal education. "Practice courts" were instituted at many law schools, focusing on trial as well as appellate-level simulations; "law centers" for law reform research and continuing education were created at a number of law schools; a negotiations course was introduced at one law school and a professional relations course at another.

The early to mid-1960's were years in which the teaching of professional responsibility became a focus of reform. Although practical training was the vehicle in some law schools,³⁵ in most schools the "pervasive" method was adopted.

Hard on the heels of this development, clinical programs with "live" clients began to find their way into law school curricula. Much of the direct impetus was provided by the establishment of CLEPR in 1967.³⁶ The clinical legal education movement must be seen as a natural expression of the broader societal activism of the mid-to-late-1960's. The tension between law school clinics serving the poor and clinical education as a pedagogically important development surfaced early and has continued to be a fundamental, if less frequently debated, bone of contention.³⁷ Even in the halcyon days of clinical

33. *But see* Conklin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604 (1983) (tremendous increase in acceptance of clinical education since early 1970s).

34. *Id.* at 607-10. One of the most effective defenses against incorporating practical training, including clinical education, into the mainstream curriculum has been to demean and trivialize it.

35. This was another of Frank's suggestions. *See* Frank, *supra* note 13, at 917 - 21.

36. The Council on Legal Education for Professional Responsibility was established, with Ford Foundation support, to fund programs in clinical legal education. For additional background about CLEPR and for references to some of its surveys of clinical education, see GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 16, at 7.

37. *See* Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 173-80 (1974). *See generally* R. STEVENS, LAW SCHOOL: LEGAL EDU-

education, questions also were raised about its cost-effectiveness and pedagogical soundness.

An alternative approach to practical legal training was the simulation course. Simulations had been used in law schools for decades,³⁸ but they began to receive broader attention. A 1964 study had revealed that less than 12% of American law schools were offering courses in legal interviewing and counseling (and presumably not all of them used simulations);³⁹ by 1973, 26% were offering such courses (and another 22% covered those subjects in other courses).⁴⁰ Cost-effectiveness and the difficulties of teaching through representation of actual clients were at the center of the debate. Though the debate remained at a relatively low level of intensity during the 1970's, with educational resources scarcer in the 1980's, it has sharply intensified.⁴¹

If the 1960's was the decade of curricular breakthroughs, the 1970's was the decade of curricular and broader lawyer training studies and recommendations: the Carrington Report for the AALS was issued in 1971;⁴² the Packer-Ehrlich Report for the Carnegie Commission on Higher Education appeared in 1972;⁴³ the Cramton Report for the ABA Section of Legal Education and

CATION IN AMERICA FROM THE 1850'S TO THE 1980'S 214-16; CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE (E. Kitch ed. 1969).

38. One of the earliest references appeared in *THE CENTENNIAL HISTORY OF HARVARD LAW SCHOOL* 84 (1918), quoted in Frank, *supra* note 13, at 916-17:

Efforts have been made from time to time to give students some experience in the trial of cases by substituting a trial of the facts before a jury for the argument of questions of law, whether in the law clubs or in the obsolete moot court. Interesting experiments have been made in acting out a legal injury and summoning the witnesses of the event to testify; and on the other hand in coaching witnesses on the points of actual testimony in their reported trial and having them reproduce the testimony in the Practice Court. *Such experiments have been more successful, in affording amusement than in substantial benefit to the participants. A fact trial now and then is well worth while, but only as a relief to the tedium of serious work.*

39. H. FREEMAN, *COUNSELING IN THE UNITED STATES* 91 (1967).

40. Galinson, *Interviewing, Negotiating and Counseling*, 27 *J. LEGAL EDUC.* 352, 353 (1975). Negotiations courses and seminars, and clinical programs, were the other enterprises in which interviewing and counseling skills were most commonly included. *Id.* at 354.

41. At the October 1982 conference on negotiation and alternative dispute resolution, co-sponsored by the American Association of Law Schools (AALS) and the Harvard Law School Program on Dispute Resolution, several law school deans expressed serious interest in simulations because they had some of the advantages of clinical education and were likely to be significantly more cost-effective.

42. AALS, *Training for the Public Professions of the Law: 1971*, Proceedings Part One, Section II (AALS 1971 Annual Meeting), reprinted in H. PACKER AND T. EHRLICH, *supra* note 24 at 95 [hereinafter cited as CARRINGTON REPORT].

43. H. PACKER & T. EHRLICH, *supra* note 24.

Admissions to the Bar was added in 1979;⁴⁴ and in 1980 the Report of the AALS/ABA Commission on Guidelines for Clinical Legal Education and the Foulis Report for the ABA's Special Committee for a Study of Legal Education were issued.⁴⁵ In addition, many books and articles, dealing with the same issues, appeared.⁴⁶

The dominant themes of this formidable body of literature were remarkably consistent. They constitute an almost unbroken, if hyphenated, line from the Reed and Frank writings of 40 to 50 years earlier. Much as Reed commented from the perspective of 1921, they document the remarkable resistance of mainstream American legal education to basic change.

The first part of the 1980's has continued the barrage of criticisms of legal education.⁴⁷ Paradoxically, it also has augmented the relatively meager literature about what lawyers actually do and how their training relates to that.⁴⁸

44. ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, REPORT & RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) [hereinafter cited as CRAMTON REPORT].

45. GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 16, FOULIS REPORT, *supra* note 16.

46. See, e.g., Cramton, *Rising Expectations in Law Practice and Legal Education*, 7 N. KY. L. REV. 157 (1980); Cramton & Jensen, *The State of Trial Advocacy & Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253 (1979); Carrington, *The University Law School and Legal Services*, 53 N.Y.U. L. REV. 402 (1978); Gee & Jackson, *Bridging the Gap: Legal Education & Lawyer Competency*, 1977 B.Y.U. L. REV. 695; Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y REV. 257 (1976); Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221 (1974).

47. See, e.g., ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, ENHANCING THE COMPETENCE OF LAWYERS: THE REPORT ON THE HOUSTON CONFERENCE FEBRUARY 3 THROUGH 5, 1981 (1981) [hereinafter cited as REPORT OF HOUSTON CONFERENCE]; Bok, *supra* note 2; Mudd, *Thinking Critically About "Thinking Like a Lawyer,"* 33 J. LEGAL EDUC. 704 (1983). See generally Bok, *supra* note 2, at 604; Gee & Jackson, *Current Studies of Legal Education*, 32 J. LEGAL EDUC. 471 (1982); Klare, *The Law Curriculum in the 1980's: What's Left*, 32 J. LEGAL EDUC. 336 (1982); Vernon, *Education for Proficiency: The Continuum*, 33 J. LEGAL EDUC. 559 (1983).

48. F. ZEMANS & V. ROSENBLUM, *supra* note 6; L. BAIRD, A. CARLSON, R. REILLY & R. POWELL, DEFINING COMPETENCE IN LEGAL PRACTICE: THE EVALUATION OF LAWYERS IN LARGE FIRMS & ORGANIZATIONS (ETS Research Report, 79-18, Dec. 1979) [hereinafter cited as L. BAIRD]; R. POWELL & A. CARLSON, DEFINING COMPETENCE IN LEGAL PRACTICE: REPORT OF A NATIONAL SURVEY OF SOLO & SMALL FIRM PRACTITIONERS (ETS Research Bulletin 78-3, Feb. 1978). For references to earlier studies, see L. BAIRD, *supra* at 58; Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 265-67 (1978). An interesting law school effort to define lawyering competencies for purposes of formulating a responsive curriculum was carried out by Antioch Law School. ANTIOCH LAW

Finally, in 1984, we may be in a position to take stock and ponder the future of legal education and its relationship to the legal system. Just as the history of legal education is revealing, so is that of the legal system outside the academy door. The more recent criticisms of the legal system threaten changes in it which may have profound direct and indirect effects on legal education.⁴⁹ Pressures toward alternate or complementary forms of dispute resolution, enhanced lawyer competency, and especially, emphasis on the lawyer as dispute avoider loom large in that picture.

III. RE-ORIENTING LAWYER TRAINING

For more than 60 years, proposals have been advanced for reforming the training of lawyers as part of broader reforms in the legal system. Among the many ironies in that history is that a recent criticism, which has attracted especially widespread attention, emanated from the same hallowed halls as the case-method itself. Derek Bok, President of Harvard University and former Dean of its law school, castigated the profession and its training grounds.⁵⁰ His criticism of legal education and his valedictory charge to the law schools encapsulates many of the criticisms of these 60 years. He faults law schools and their faculties for having failed to provide the empirical base upon which effective reform of the legal system could take place.

Scholars have shown little interest in the theories of cognition that might help decide whether rules of evidence permit judges to make more accurate decisions or merely accumulate useless data that add to legal expenses and delays. Nor has anyone done much to explore the forces that encourage or inhibit litigation so that we can better predict the rise and fall of legal activity.

Our limited knowledge seriously inhibits efforts to increase efficiency and access in the legal system. . . . [I]t will be impossible ever to develop more sensible theories of the appropriate role of the law if we do not make greater efforts to examine the effects of the laws we already have.

Although these points seem obvious enough, law schools have done sur-

SCHOOL COMPETENCY-BASED TASK FORCE, CATALOGUE OF DEFINITIONS OF GENERIC LAWYERING COMPETENCIES (May 1978).

49. One important example of a change with potentially significant indirect effects on legal education is the inclusion in the California Bar Examination during 1983 and 1984 of two three-hour performance tests. These tests will measure analytical and other lawyering skills "in practical, real-life situations, requiring the applicant to deduce applicable principles from decisional and statutory materials and to apply them to facts similarly extracted from actual sources." California Committee of Bar Examiners, *Announcement of Changes in California Bar Examination* (Dec. 15, 1982). In subsequent examinations, the performance tests may be extended to other practical skills, including negotiations. If the performance test component continues as part of the bar examination, perhaps even in expanded form, and if candidates have some difficulty in passing it, there is a strong likelihood that law schools with significant numbers of graduates sitting for the examination will make some curricular adjustments.

50. Bok, *supra* note 2.

prisingly little to seek the knowledge that the legal system requires.⁵¹

Implicit in Bok's criticism is that most law professors continue to be captives of doctrinal analysis and have relegated serious studies of how law and the legal system function to the social services. But, says Bok:

Law professors cannot stand idly by and expect others to investigate their problems. . . . If the necessary research is to go forward, legal scholars must help organize it and participate in it, albeit with the aid of interested colleagues from other disciplines.⁵²

The other main theme of Bok's criticism of law schools is that teaching as well as research must be adapted to attacking the basic problems of the legal system. The law schools' emphasis on teaching students "to think like lawyers," although undeniably important, is not sufficient. "[T]he times cry out for more than these traditional skills."⁵³ The curriculum is tilted "toward preparing students for legal combat,"⁵⁴ with relatively little curricular attention to mediation and negotiation. Lawyers need to be grounded both in the theory and the skills of dispute avoidance and informal dispute settlement. Yet, according to Bok:

[E]veryone must agree that law schools train their students more for conflict than for the gentler arts of reconciliation and accommodation. This emphasis is likely to serve the profession poorly. In fact, lawyers devote more time to negotiating conflicts than they spend in the library or the courtroom, and studies show that their bargaining efforts accomplish more for their clients. Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiment of our time.⁵⁵

Bok has underscored the quite extraordinary consensus among critics of legal education and its relationship to producing effective lawyers. They have agreed over the decades that law schools have done reasonably well in enhancing critical thinking about legal issues and in helping students to acquire substantive legal knowledge,⁵⁶ but they have left largely unaddressed many of the

51. *Id.* at 581. But see Trubek, *A Strategy for Legal Studies: Getting Bok to Work*, 33 J. LEGAL EDUC. 586, 586-91 (1983) (agrees with Bok that law schools and law faculties have not done enough to explore such questions, but criticizes Bok for failing: (i) to recognize work that has been produced; and (ii) to articulate "a concrete strategy to overcome the barriers that have impeded its growth").

52. Bok, *supra* note 2, at 582.

53. *Id.*

54. *Id.*

55. *Id.* at 582-83.

56. Some distinguished legal educators have argued in defense of an intellectually-based approach to professional education. See, e.g., F. ALLEN, LAW, INTELLECT AND EDUCATION (1979).

skills which practicing lawyers, law students and even some law faculty have consistently identified as areas of primary interest and concern: fact-gathering and use; interpersonal skills involved in relationships with clients, other attorneys and a variety of other actors in the unfolding legal drama; effective oral communication; and legal drafting.⁵⁷

More specifically, reform should reflect the following:

1. The primary focus of legal education should be shifted from training the "Olympian appellate judge,"⁵⁸ law professors, or associates for large corporate law firms to the broader needs of the profession;

2. Law schools must elevate lawyering skills, other than legal analysis and professional responsibility, from the periphery to the core of legal education;⁵⁹

3. In particular, fact-oriented and "human" skills, not just intellectual "thinking like a lawyer" skills, must be emphasized;⁶⁰

4. This is especially important for law schools from which many graduates enter small firms or sole practice since the smaller the law firm a new lawyer joins, the more important law school education is in developing necessary skills, and the more likely the lawyer will deal in "human" work;⁶¹

57. The studies draw a distinction between legal drafting and legal writing; the former tends to relate to nonlitigation documents, such as wills, leases and contracts, and the latter to litigation-oriented documents, such as briefs, pleadings and memoranda of law. For example, in one study "drafting legal documents" is noted separately from and rated much higher in importance than "writing briefs." F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 125.

58. Macaulay, *Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar*, 32 J. LEGAL EDUC. 506, 512 (1982).

59. See, e.g., F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 139; REPORT OF HOUSTON CONFERENCE, *supra* note 47 at 98; Mudd, *supra* note 47, at 708-09. Of course, this view is premised on a broad definition of lawyer competency, see, e.g., Vernon, *supra* note 47, at 560, and on the importance of the law schools' contributions to that broadened notion of competency.

60. See LEGAL EDUCATION & LAWYER COMPETENCY 121-22 (F. Dutile ed. 1981); Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 11 (1975); see also L. BAIRD, *supra* note 48, at 36-38 (stressing the importance of interpersonal skills in employer evaluations of attorneys).

61. See, e.g., FOULIS REPORT, *supra* note 45, at 83-84; F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 131. "National" law schools are thought to educate their students substantially for large-firm practice, see Goodpaster, *supra* note 60, at 16, and those firms to provide effective training in the practical skills, Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 326 (1982). Both aspects of that proposition can be questioned. As to the former, the demographics of law practice may be changing in the direction of more law school graduates, especially outside urban areas, entering individual or small firm practice. F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 155. As to the latter, there is a growing impressionistic view that large law firm training is very uneven; beyond that, "the large law firms given most credit for

5. Law schools must not only teach more of the skills actually used in practice, but also introduce students to what goes on in practice and how law is actually used in American life;⁶²

6. To the extent law schools have sought to teach core skills other than legal analysis, such as advocacy and legal writing, they have done so inadequately and must improve;⁶³

7. Learning important skills in practice by trial-and-error creates serious professional and ethical problems regarding clients who represent the "errors;"⁶⁴

8. Law students may be voting on the law school curriculum with their feet by opting increasingly for part-time jobs where they encounter reality and begin to develop some of the necessary fact and interpersonal skills;⁶⁵ and,

9. Law schools and the bar must give careful consideration to bar admission and continuing education requirements as a means to improve the skills of new and older lawyers.⁶⁶

contributing to skill development tend to specialize in particular areas of the law and consequently serve particular segments of the society." *Id.* at 154.

62. *See, e.g.*, F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 141, 143; Trubek, *supra* note 51 at 587, 588.

63. *See, e.g.*, FOULIS REPORT, *supra* note 45, at 10-13, 44-45. Although a substantial percentage of lawyers and law students have consistently indicated that legal education is too theoretical and insufficiently practical, *Id.* at 41, 43, some critics consider mainstream legal education to be neither theoretical nor practical. Rather, they see it functioning at "an intermediate level of abstraction." Cramton, *supra* note 61, at 331.

64. F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 150; LEGAL EDUCATION & LAWYER COMPETENCY, *supra* note 59 at 122; *see* Goodpaster, *supra* note 60, at 14 (difficulties of acquiring good lawyering skills through on-the-job experience). The problem may be more acute regarding nonadversarial matters than litigated ones. According to one commentator:

It is possible, and I think likely, that more damage is done to clients by lawyers who draft inadequate documents, negotiate poor settlements or plea-bargains, and place their own interests before those of their clients, than is done by poor trial lawyers.

Macaulay, *supra* note 58, at 513. Henry Ford supposedly put it more trenchantly: "The school of experience is the best school there is, but its graduates are too old to go to work."

65. *See, e.g.*, CRAMTON REPORT, *supra* note 44, at 19; F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 158.

66. The role of continuing legal education in upgrading professional competency has been extensively discussed for decades. *See, e.g.*, ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, CLE AND THE LAW SCHOOLS (1975); ALI-ABA JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, GOALS FOR CLE AND MEANS FOR ATTAINING THEM (1969); ALI-ABA JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE & RESPONSIBILITY (1959). For a more recent overview, *see* F. ZEMANS & V. ROSENBLUM,

III. THE CONTOURS OF REFORM

The criticisms of legal education and the correlative recommendations for reform have focused not only on the law schools, but on the profession as a whole. After all, training of lawyers was once the exclusive domain of the practicing bar through apprenticeships, and lawyers, individually and collectively, have never totally renounced their training role. Continuing legal education takes place in many forms — through law firms, bar associations, and continuing legal education institutions, public and private. None has been immune from criticism; all are seen as part of the solution.

One of the central questions which has to be addressed before the contours of reform can be sketched is the future role of law schools vis-a-vis other training institutions. Law schools have important strengths, but perhaps equally significant limitations, as providers of a broader array of legal training.

In theory, law schools have three full-time years of their students' time.⁶⁷ They have achieved the status of primary training institutions, the exclusive route to certification for the practice of law in virtually every state.⁶⁸ Law schools are staffed, in the main, by full-time law faculties.⁶⁹ During the past 15 years, there has been impressive growth in clinical programs. More recently, attention has begun to be directed to the less adversarial lawyering skills, often by means of simulations, and to alternate means of resolving disputes.

These actual and potential strengths of law schools as leaders in the reform of legal training cannot blind us to some harsh realities of the law school landscape. Overall, law schools have been remarkably resistant to fundamental change. As the 60 years of studies and reports demonstrate, peripheral accommodation rather than basic reform has been the typical law school response. This may be explained by several phenomena characterizing legal education. First, law faculties, especially of the major "national" law schools, are extremely inbred.⁷⁰ They consist disproportionately of people who have gradu-

supra note 6, at 158-62. For a more detailed description of several programmatic approaches, see Gullickson, *Mandatory Bar Admission Courses*, REPORT OF HOUSTON CONFERENCE, *supra* note 47, at 173; Kelley, *Transition Education*, REPORT OF HOUSTON CONFERENCE, *supra* note 47, at 198.

67. The three-year full-time program has held firm against challenges over the years from proponents of two-year and four-year alternatives. See R. STEVENS, *supra* note 37, at 211, 242-43. But many have argued that there is a de facto two, or even one and one-half, year program already in place. *Id.* at 243.

68. *Id.* at 219-20 n.24. The apprenticeship route to certification, once the customary route, now largely has gone the way of the Dodo.

69. The first substantial efforts to regulate legal education occurred in the 1920's. Through close cooperation between the ABA and the AALS, a variety of requirements were imposed, including one full-time teacher for each 100 students. *Id.* at 173.

70. FOULIS REPORT, *supra* note 16, at 82 (quoting Fossum, *Law Professors: A*

ated from one of a relatively small number of similar law schools, whose limited exposure to the world of law practice typically consists of a judicial clerkship or a short stay with a major corporate law firm. Beyond these pedigrees, the primary qualifications for appointment to a law faculty tend to be exemplary performance as a law student under a case-method regime, and professional experience likely to have honed intellectual legal skills and capacity for doctrinal analysis. It is hardly surprising that the case-method continues to hold sway in the classroom, and that publishing doctrinal analyses is the surest route to faculty success and recognition. Unless the demography of law schools and their faculties change, or change is mandated, it is hard to imagine the core of the educational program changing in fundamental ways.⁷¹

Even if that can be accomplished, there is a second major problem. The economics of legal education work strongly against the kind of change necessary to elevate a broader array of dispute avoidance and settlement skills to the center of the curriculum. The student-faculty ratio is between 20 and 25 to 1 at most law schools. The ratio in most other graduate programs is 10 to 1 or less. It is well-documented that clinical education, and to a lesser degree education by simulations, are substantially more labor- and cost-intensive than the case-method approach.⁷² The fiscal problem is compounded by the fact that we are in a period of diminished educational resources.

If universities or other regular funding sources are unlikely, at least in the short run, to be able to generate increased resources for legal education, three options exist: (i) law schools will not be able to undertake an expanded educational program; (ii) other sources of funds will have to be tapped; or (iii) expanded education will have to be provided by law schools without appreciably greater resources.

All three alternatives focus attention on the organized bar. In the first event, if training in practice skills and in the theory of dispute resolution is not systematically undertaken by the law schools, it may continue to be done in a quite erratic fashion by the bar. Large private firms and other large legal employers will provide formal or informal training; bar associations and continuing legal education institutes will offer programs for the bar; and individual lawyers will learn as they can. Alternatively, the bar may provide more formal, systematized training, voluntarily or by mandate. This is the practice in

Profile of the Teaching Branch of the Legal Profession, 1980 ABF RESEARCH J. 501).

71. Frank anticipated the faculty inbreeding problem by his recommendation that many more law professors should have substantial private practice experience. See text accompanying notes 27-28, *supra*.

72. See, e.g., ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, CLE AND THE LAW SCHOOLS (1975); ALI-ABA JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, GOALS FOR CLE AND MEANS FOR ATTAINING THEM (1969); ALI-ABA JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE & RESPONSIBILITY (1959). For a more recent overview, see F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 158-62.

many other countries, often as a pre-admission requirement.⁷³ Funding typically comes from the government, from the organized bar, or from tuition paid by enrollees.⁷⁴

Instead of establishing separate educational enterprises to provide this training,⁷⁵ additional funding could be provided to law schools to do it. In light of the historic tensions between law schools and the organized bar over lawyer training responsibilities,⁷⁶ the likelihood that the bar would "tax" itself to provide law schools with substantial resources may not be great. The much ballyhoed oversupply of lawyers may further diminish prospects for organized bar support, as well as make it politically difficult for government to provide significant support for legal education, even if the support is earmarked for improving the preparation of the same number of law school graduates rather than for increasing their numbers.

The third alternative is that law schools could attempt to do some or all of these things without appreciably greater resources. In the short-term at least, this is the most likely alternative. Pressures for reform have grown to the point where law schools must respond and they have already begun to do so to some degree.⁷⁷ As more faculty members become involved in enterprises which respond to criticism about the law school's overly narrow focus, a critical mass may develop. This is more likely to be the case with the recent theoretical and practical courses involving lawyering skills and dispute resolution than was true of the clinics. By their nature, most clinics require that there be faculty (or staff attorneys) assigned to them full-time; it is far more likely that faculty members teaching lawyering skills or dispute resolution will do so on a part-time basis. If clinical faculty tend to be assigned those responsibilities as well,

73. See Gullickson, *supra* note 66.

74. *Id.* at 181-82.

75. There may be some advantages to having separate enterprises provide pre-admission skills training, especially as a means to surmount law school faculty inbreeding problems. But there are risks as well. The program may turn out to be relatively perfunctory. The New Jersey Skills and Methods Course, one of four mandatory pre-admission programs in the United States, is considered to represent a relatively serious effort, with substantial manuals distributed to participants and a set of written exercises required to be satisfactorily completed, but attendance at the course's sessions has been made optional. F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 158.

76. See, e.g., R. STEVENS, *supra* note 37, at 175. In the 1920's and 1930's there were serious disagreements among proprietary law schools, accredited national law schools and the organized bar. The AALS and ABA joined ranks to raise law school standards, a move which threatened the proprietary law schools. See *id.* at 172-90. It also had the effect of increasing the schism between theoretical and practical training. This may have contributed to a latter-day disaffection of lawyers toward the law schools, as many practitioners came to realize and express their lack of preparation in important lawyering skills.

77. See, e.g., Gorman, *supra* note 23, at 317-18; Cramton, *supra* note 61, at 326.

the distinction is insignificant. If "mainstream" faculty expand their teaching interests in these new directions and continue to teach some traditional enterprises, the distinction is real and important. General faculty acceptance of the new enterprises is much more likely to follow.

Under this third alternative, both faculty capability and institutional resource capacity are very much at issue. To some extent, both may be eased by expanded interaction between the law schools and the private bar. Experienced members of the private bar and the judiciary can play a larger role, as adjunct faculty, guest lecturers, and role-players and evaluators in simulations, in augmenting the law school curriculum. This can be accomplished at a relatively low cost through the impetus of a few full-time members of a law faculty.

Even if these positive developments were to occur, there would be other problems to deal with. One may involve a replay of the controversy over incorporating professional responsibility and ethics into the law school curriculum: the "pervasive" approach versus separate courses.⁷⁸ Just as the separate professional responsibility course approach has emerged as the dominant mode, so it is likely that the controversy over teaching lawyering skills and dispute resolution theory will be resolved. Indeed, it may be the only feasible solution in many law schools where few current faculty members have the capacity or inclination to integrate these approaches into mainstream courses. Creating a separate corner of the curriculum for dispute-avoidance and settlement oriented courses creates another problem, much debated already, regarding clinical professors:⁷⁹ the status to be accorded teachers of those new enterprises. The bifurcation of faculty caused in many law schools by the introduction of clinical programs could well escalate if there were a substantial increase in "non-traditional" curriculum offerings. Perhaps it might even lead to a bifurcation of the total law school experience into two years spent with the "traditional" faculty and "traditional" curriculum, and a final bridge year more avowedly consisting of professional preparation.⁸⁰ In some respects, this would make the final year of legal preparation sufficiently separable to loosen the law schools' monopoly on it and create the potential for other competitors to enter the picture. In other respects, this approach might lead toward law schools diversifying in ways that Bok has urged.⁸¹

78. See, e.g., FOULIS REPORT, *supra* note 16, at 55-62; Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 ABF RESEARCH 247, 274-75.

79. See generally GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 16, at 33-37, 113-24.

80. For one elaboration of this model, see CARRINGTON REPORT, *supra* note 46.

81. Among other suggestions, Bok urged that law schools take the lead in helping to devise training for new categories of people:

Law schools will need to take the initiative in educating for a broader range of legal needs in our society. An efficient system of extending access to legal services throughout the society will demand the imaginative use of paralegal personnel. An effective system for extending legal protection to the poor must

For the remainder of this article, I assume the feasibility of this third alternative and the unlikelihood of the first two alternatives. In the next part, I will explore briefly how the law school curriculum could be modified to respond to well-taken criticisms. Then, I will describe some first steps in these directions which I am taking.

IV. MODIFYING THE LAW SCHOOL CURRICULUM⁸³

Proposing modifications in the law school curriculum involves answering at least the following threshold questions:

1. What skills are necessary for competency in most forms of law practice?
2. Which of these skills are already being taught in law schools?
3. How successfully are they being taught?
4. Which of the essential skills not being taught are "teachable" in law schools?
5. What curricular and related changes can permit law schools to improve the teaching of necessary skills already taught and to incorporate the teaching of other necessary skills?

This last question raises many, more specific questions about timing, sequence and pedagogy.

A. *Skills and Knowledge for Lawyer Competency.*

The small but growing literature about lawyer skills and knowledge is surprisingly consistent.⁸³ The skills and knowledge identified by lawyers as im-

involve greater efforts to educate the disadvantaged about their rights, so that they can defend their interests without being exploited or having to go to court. A serious attempt to provide cheaper methods of resolving disputes will require skilled mediators and judges, who are trained to play a much more active part in guiding proceedings toward a fair solution. In short, a just and effective legal system will not merely call for a revised curriculum; it will entail the education of new categories of people.

Bok, *supra* note 2, at 583.

82. Curricular changes obviously represent only one effort, and possibly not the most important, to enhance the competency of lawyers, especially in dispute avoidance. Bok has suggested educating new categories of people and creating new institutions to deliver legal services to the poor and middle class. *Id.* Others have proposed modifying law school admissions criteria to give more weight to applicants' personal characteristics and life experience, which would indicate their potential to be effective dispute avoiders and dispute settlers. CRAMTON REPORT, *supra* note 44 at 18-22; Vernon, *supra* note 47 at 567.

83. See, e.g., CRAMTON REPORT, *supra* note 44, at 8-10; L. BAIRD, *supra* note 48, at 8; F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 123-38; Vernon, *supra* note 47, at 560; Burris, *Testing in Practice Skills*, REPORT OF HOUSTON CONFERENCE, *supra* note 47, at 136.

portant fall into several clusters:

1. Those that are fact-related (*e.g.*, fact gathering; fact marshaling and use);
2. Those that relate to interpersonal aspects (*e.g.*, instilling others' confidence in you; interviewing; negotiating; and getting along with clients and with other lawyers);
3. Those that are law-related (*e.g.*, legal research skills; ability to understand and interpret opinions, statutes and regulations; knowledge of substantive and procedural law; and ability to synthesize law); and
4. Those that involve transmittal of information or implementation of legal strategies (*e.g.*, effective oral expression; writing briefs, opinions and letters; and drafting legal documents).

Of course, there are interrelationships among these clusters.⁸⁴ For example, client interviewing is an important means of fact gathering; legal research is closely related to both fact gathering and brief writing.

The array of skills identified is hardly surprising; what is surprising though is the relative importance attached to them by diverse samples of practicing attorneys.⁸⁵ Fact related skills are at the top of most lists. Some of the interpersonal and communications skills are also highly-rated. The more traditionally conceived "thinking like a lawyer" skills, substantive legal knowledge and adversarial skills, tend to be ranked lower—in some cases much lower. For example, in the most recent substantial study,⁸⁶ the four highest rated skills were: (i) fact gathering; (ii) capacity to marshal facts and order them so that concepts can be applied; (iii) instilling others' confidence in you; and (iv) effective oral expression.⁸⁷

B. *Core Skills and Knowledge Taught in Law Schools.*

Strikingly, none of the four highest rated skills is broadly emphasized throughout most law school curriculums. Clinical programs are the likeliest sources of training in fact-gathering and fact-marshaling. Effective oral expression may be the most direct focus of moot court and appellate advocacy programs, but the orientation is likely to be a relatively specialized, adversarial one. Moreover, in most law schools participation in clinics and moot court is voluntary, and a relatively small percentage of students take part in them.

84. F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 126-28.

85. *Id.* at 124-32; FOULIS REPORT, *supra* note 16, at 44-55; Baird, *supra* note 48, at 280-83. The survey approach of these studies may raise some methodological concerns, including the possibility that analytical skills emphasized by law schools may come to be considered so fundamental by practicing lawyers that they take these skills for granted and understate their importance. See FOULIS REPORT, *supra* note 16, at 49-50.

86. F. ZEMANS & V. ROSENBLUM, *supra* note 6.

87. *Id.* at 125.

Although courses and seminars in client interviewing, which deal with fact-related skills, have become more popular in recent years, they reach an even smaller percentage of students. Attention to interpersonal skills, through client interviewing, negotiations and other enterprises, is still more limited.

What are emphasized in law schools are the doctrinal analysis skills and substantive legal knowledge. These dominate the core curriculum of most law schools to only a slightly lower degree today than they did 50 or 100 years ago.

C. *Success in Teaching "Traditional" Law School Skills and Knowledge.*

A major argument in support of the case-method emphasis of legal education has been that law schools are uniquely suited to teach the constituent skills and knowledge embodied in this method, and that, properly used, the method provides law students with a theoretical grounding in the law which will enrich their professional outlooks and careers. That argument has been sharply criticized over the years. Often the criticism has been dismissed by mainstream legal educators because it has come from people who advanced a fundamentally different view of legal education, but that is increasingly less accurate. During the 1970's and early 1980's, many traditionalists have allied themselves with criticism of legal education; not only that it is too narrow in scope, but that even within its intended ambit it is not adequate.

One element of the more current criticism is that the way law schools utilize the case-method is neither sufficiently theoretical nor sufficiently practical. According to Professor Cramton, most law school courses function at an intermediate level of abstraction, which distorts or ignores the reality of how law functions in the society, and which stops short of the fundamental questions of policy and theory.⁸⁸

Another focus of criticism is that law schools have failed to reevaluate and update the whole concept of teaching students to "think like lawyers." This criticism involves several notions. First, that the lawyer whose thinking is said to be the focus of law school training should be a "real" lawyer, not an artifact of the professor's idealized concept of a lawyer.

Perhaps law professors are teaching their students to think as the professors would have lawyers think in what the professors see as an ideal world. This would be one in which there were no transaction costs in bringing rules into play, all clients could afford first-class legal craft, and all who played legal roles would be autonomous from any influence other than correct legal analysis. Clean reason rather than dirty deals would typify the system. Judges would respond to correct analytical technique and write opinions which would serve as models for both beginning and experienced lawyers. Trial judges, police, and officials of administrative agencies would carry out the law as properly explained. The public would respond with confidence to a legal system where reason rules, and the pronouncements of the courts would affect behav-

88. Cramton, *supra* note 61, at 331.

ior of all concerned so that there never would be a gap between the law on the books and the law in action.

Into this lovely utopian project came agitators urging attention to what lawyers actually do in the real legal system. They are met with concern about becoming a mere trade school. In the real world, however, there would be serious problems if university-based law schools refused completely to perform as trade schools, preferring instead only to develop "critical analytical faculties."⁸⁹

A second element of this criticism is that the thinking skills required of lawyers are not so distinctive as to force us to persuade our first year students that "their heads are full of mush."⁹⁰ Instead, law schools should be emphasizing the continuity between clear thinking generally and desirable legal thinking skills.⁹¹ This recognition would make it easier for law schools to be humane and supportive environments, rather than hostile and alienating ones. Refining the analytical skills of law students need not displace attention to other important lawyering attributes.⁹²

Finally, law schools have been criticized with increasing vigor for their failure to equip students, even their best students, with adequate legal writing skills. The problem is complex because, as with analytical skills, legal writing skills are predicated on general writing skills. The broader educational system properly bears a large part of the responsibility for its failures in that area. Nonetheless, law schools can certainly do more with their students. In far too many law schools students can graduate without significant exposure to legal writing, especially beyond the first year. Again, the problem is partly one of resources since serious legal writing programs require intensive small group or one-to-one contacts.

Some of the recent lawyer surveys provide a basis for beginning to evaluate these criticisms of the law schools' success in teaching the skills and knowledge they clearly attempt to teach. One study⁹³ indicates that more than 60% of the practicing attorney-respondents noted the following skills or areas of knowledge as the only ones they learned essentially in law school: knowledge of theory underlying law (84%); knowledge of substantive law (79%); ability to understand and interpret opinions, statutes and regulations (77%); legal research (75%); and ability to synthesize law (62%).⁹⁴

The law schools fared less well on some other skills and knowledge areas presumably falling within the traditional scope of legal education. Knowledge of procedural law, capacity to marshal facts and order them so that concepts can be applied, brief writing, and effective oral expression were not considered

89. Macaulay, *supra* note 58, at 514-15.

90. J. OSBORN, *THE PAPER CHASE* (1979).

91. *See, e.g.*, Mudd, *supra* note 47, at 706.

92. *See* Berger, *supra* note 8.

93. F. ZEMANS & V. ROSENBLUM, *supra* note 6.

94. *Id.* at 136.

to have been essentially learned in law school by a majority of the respondents.⁹⁵

Finally, a considerable number of activities, which constitute a major part of many lawyers' practices, were not considered to have been essentially learned in law school by the great bulk of respondents. Only 2% to 16% gave the law schools primary credit for fact-gathering, drafting legal documents, letter writing, negotiating and interviewing skills.⁹⁶ Comparably low ratings were given to key interpersonal skills, such as instilling others' confidence in you, getting along with other lawyers, and understanding the viewpoint of others to deal more effectively with them.⁹⁷

D. *Teachability of Other Essential Skills.*

A quarter century ago, it might have been plausibly asserted that the state of the law teaching art did not extend much beyond legal analysis and substantive law. Since then the National Institute of Trial Advocacy and others have demonstrated that litigation skills can be effectively taught in law schools.⁹⁸ Curriculum material and courses in negotiating, and in interviewing and counseling have multiplied. Clinical programs have treated fact-related skills more systematically and have succeeded in bringing some students into much closer touch with a part of the real world of law.⁹⁹ There is a strong likelihood that in the near future many of the important lawyering skills or knowledge areas not traditionally taught in law schools will be deemed teachable.¹⁰⁰ Beyond that, the law schools can at least provide students with a more

95. *Id.* The percentage of respondents who indicated they learned these skills principally in law school ranges from a high of 50% for knowledge of procedural law to a low of 15% for effective oral expression.

96. *Id.*

97. *Id.*

98. See Cramton, *Lawyer Competence and the Law Schools*, REPORT OF HOUSTON CONFERENCE, *supra* note 47, at 100.

99. *Id.*

100. See generally F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 139-41. Among the skills or areas of knowledge which a high percentage of respondents indicated had received insufficient attention in law school, a substantial number were considered teachable by at least two-thirds of the respondents. These included: fact gathering (66%); effective oral expression (74%); drafting legal documents (84%); opinion writing (84%); and accounting skills (71%). Several other important skills were considered teachable by a smaller but still substantial percentage. These included: negotiating (35%); letter writing (50%); and interviewing (48%). Only two skills, the most interpersonally-oriented, were considered teachable by a small percentage of respondents: instilling others' confidence in you (17%); and getting along with other lawyers (16%). *Id.* at 140. Were this study replicated now (data were collected between August 1, 1975 and February 1, 1976), a higher percentage of practicing lawyers might consider various interpersonal skills, including negotiating and interviewing, teachable since both law school offerings and public discussion have expanded in recent years.

realistic idea of the demands and potentials of law practice as it exists, let alone as it should be reconstituted.¹⁰¹

E. *Necessary Curricular and Related Changes*

Significant changes will have to be made in law school programs and attitudes if students are to be better-equipped to discharge the adversarial and nonadversarial functions practicing attorneys have traditionally carried out. Even more basic changes will be necessary if law schools are to play a major role in helping the profession to reorient itself so that more disputes are avoided, and more unavoidable disputes are resolved in a constructive, effective and less costly manner.

Some models for change exist; others will have to be devised. Among existing models, some represent radical departures from mainstream American legal education; others are more compatible with it. Some constitute a total institutional approach; others an alternative track to an otherwise traditional curriculum. Some focus on the first year, others primarily on the second and especially the third year.

A detailed description and analysis of those programs is beyond the scope of this article, but a brief overview is appropriate.

Antioch School of Law was created with a clinical and public interest law perspective.¹⁰² Throughout the educational program, students are exposed to a synthesis of theory and substantive law with practice. More than any other law school, Antioch is a clinical experience.

The new CUNY Law School also was established to train students for the "public profession of the law."¹⁰³ Its approach emphasizes a reconceptualization and reorganization of all substantive law course containers and substantial attention to the role of law and lawyers in society. For example, CUNY's first year program consists of: The Work of a Lawyer; Adjudication and Alternatives to Adjudication; Liberty, Equality, Due Process in Historical and Philo-

101. Law schools have been substantially criticized for their "failure even to make their students *aware* of the importance of some of these competencies to the actual practice of law." *Id.* at 141.

102. For a discussion of the impetus toward such a legal education program, see Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 *YALE L.J.* 1005 (1970).

103. In 1921, Alfred Reed emphasized the public nature of the law profession: This is a public function, in a sense that the practice of other professions, such as medicine, is not. Practicing lawyers do not merely render to the community a social service. . . . They are part of the governing mechanism of the state.

A. REED, *supra* note 18, at 3. The new CUNY Law School is focusing on Reed's notion in a more specialized sense; it is avowedly training lawyers for public service and public interest legal positions. See generally Catalogue of CUNY Law School at Queens College (1982).

sophical Context; Law and a Market Economy; Responsibility for Injurious Conduct; and Law and Family Relations.¹⁰⁴

Several other law schools have developed more limited innovations. Stanford had its Curriculum B, an experimental first-year track.¹⁰⁵ Northeastern has long had a cooperative work program under which law students spend alternate semesters during their second and third years in a legal job, but this work experience is not integrated into the educational program or supervised to any significant degree by law faculty.¹⁰⁶ Arizona State University of Law¹⁰⁷ and Notre Dame Law School¹⁰⁸ both have had intensive, small-group, skills-oriented courses for third-year students.

None of these models is likely to be both fully adequate to the demands and acceptable to a significant number of mainstream law schools. They either do too much or too little in modifying the traditional law school program.

A fundamentally altered third year program, as in the Arizona State and Notre Dame approaches, has real instant appeal. In most law schools, by the third year serious *ennui* has taken hold of many students. They are likely to be more involved with outside employers than with the life of the law school. Rejuvenating the third year with a substantial dose of real world lawyering skills has considerable appeal, but it is unlikely to work the fundamental changes in legal education that most critics have called for if the first two years of law school remain basically the same. The first year has such a powerful impact on the way law students think about law and the role of lawyers that leaving to the third year an attempt to broaden the focus would create a program working at cross-purposes with itself. Significant modifications in the first year program will be strongly resisted. The success of the first year program in engaging student interest and in teaching students the "thinking like lawyer" skills has been the jewel in legal education's otherwise somewhat tarnished crown. According to one view:

The intrusion of other approaches into the first year may dilute its intensity. The advantage afforded by a relatively narrow framework of analysis in the first year is that it cures habits of loose thought; permits rigorous exploration of detail; and accustoms students to limiting the scope of argument, paying close attention to language and making nice distinctions.¹⁰⁹

104. A. REED, *supra* note 18, at 13-15.

105. Brest, *A First-Year Course in the "Lawyering Process,"* 32 J. LEGAL EDUC. 344 (1982).

106. Telephone interview with Professor Daniel Schaffer, Northeastern University School of Law (Mar. 12, 1984).

107. For a description, see Remarks by Willard H. Pedrick, *printed in* LEGAL EDUCATION & LAWYER COMPETENCY, *supra* note 60, at 95.

108. For a description, *see* Remarks by Thomas L. Shaffer, *printed in* LEGAL EDUCATION & LAWYER COMPETENCY, *supra* note 60, at 109.

109. Boyer & Gordon, *Shaping New Worlds in Legal Education*, 2 LEARNING & THE LAW 4, 56 (1976).

Given the strongly held competing views, several possibilities exist. First, a compromise proposal, making relatively modest changes in the first year and more substantial changes in the second and third years, may command enough support to be widely adopted.¹¹⁰ Second, the organized bar or the AALS may effectively mandate general changes in the law school curriculum.¹¹¹ Third, individual state or law school dynamics may lead to a variety of differing responses.

In fact, the strong likelihood is that there will be no uniform solution to the conundrum, certainly not in the short-run. Law schools, prompted by a variety of different pressures, will continue to move along the path of diversification which they have been following these last 15 or 20 years.

If that prediction proves accurate, if change is incremental and diversified rather than cataclysmic and uniform, then it will be especially important for those devising and implementing curricular changes to describe them and to compare their efforts with others being attempted, and to open them to careful evaluation.

In that spirit, the final section of this article consists of a description of my efforts to respond to the need for broadened legal education, in my own teaching efforts and through attempts at curricular reform.

V. A PERSONAL FIRST STEP TOWARD CURRICULUM REFORM

In some ways, my background is much like that of the prototypical law professor—a strong academic record at a high status law school, a law review editorship, and then two years at a prestigious Wall Street corporate law firm. Had I begun my law teaching career at that point, I would have perfectly fit the prototype. Instead, I went on to several years each at the Peace Corps' General Counsel's Office, and at another major New York City law firm, but doing mainly public law work. My law faculty affiliation began after seven years of quite varied legal experience; in both obvious and more subtle ways that has influenced my approach to teaching.

From the start, in 1970, I tried to incorporate some reality into the classroom. Those early efforts unfortunately met with mixed results. I sought to use some simulated negotiations in a Business Associations course with almost 150 students. Although the students appreciated the opportunity to experiment with applying principles of substantive law in a practice setting, the size of the class and my own inexperience with the approach led to less than satisfactory results and a decision on my part to abandon the effort in favor of more traditional pedagogy. Meanwhile, I was more successful in developing a quasi-clinical component in a Public Education Law Seminar. Students were re-

110. For one such approach, see GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 16, at 63.

111. For some recommended changes, see CRAMTON REPORT, *supra* note 44 at 3-7; FOULIS REPORT, *supra* note 16, at 103-6.

quired to undertake projects referred by a range of "live" clients, some identified by me and others by the students themselves. The nature of the projects varied,¹¹² as did the extent of ongoing interaction with clients. The Seminar was successful in engaging students in legal work that responded to real problems of real clients, but in retrospect I have recognized that my efforts to assist the students were oriented more to substantive legal matters than to the fact-related and interpersonal skills that bulk so large in the lawyer's work and that law schools have left largely unaddressed.

Much more recently, I have begun to deal directly with some of those skills. For the past three years I have been teaching a Negotiations Seminar. This year, for the first time, I added a Client Interviewing and Counseling Seminar to the law school curriculum. It was an outgrowth of my work as faculty advisor to the school's National Client Counseling Competition team.¹¹³ I have also been conducting training programs for a number of area law firms, which focus on developing interviewing, counseling and negotiating skills in young associates.¹¹⁴

I have come to these teaching enterprises intuitively and serendipitously, rather than as a result of an empirically or theoretically-based decision. Indeed, the bulk of my serious reading in the field was catalyzed by my preparation of this article. Interestingly, that research has led me to realize that my efforts fit within a surprisingly old and widely-discussed body of curricular and pedagogical innovations. It has also led me to conclude that there are many important issues awaiting serious inquiry.¹¹⁵ I expect to be tackling several of

112. Students have participated in major constitutional cases, including *Robinson v. Cahill*, 62 N.J. 473, 306 A.2d 65 (1973), and in administrative proceedings before the New Jersey Commissioner of Education; they have drafted bills and memoranda for legislative committees; they have prepared legal memoranda and drafted regulations for the Commissioner of Education; they have assisted local school boards in various legal matters; and they have worked with parent, student, teacher and civil rights organizations in a variety of ways.

113. The program is organized and operated under the aegis of the Client Counseling Committee of the ABA's Law Student Division. It evolved from Professor Louis M. Brown's initiatives. See *supra* note 9.

114. There are interesting pedagogical advantages to working both with law students and with young lawyers. Thus far, I have conducted individual training programs for relatively large law firms, adapting the programs to their particular needs and interests. I expect to extend these activities to a broader cross-section of the practicing bar through CLE programs. I am especially anxious to provide such training to young lawyers in sole practice since they have the least opportunity for substantial feedback about their interactions with clients and other lawyers.

115. See, e.g., F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 162; FOULIS REPORT, *supra* note 16, at 83; Bok, *supra* note 2, at 581; Burris, *Testing in Practice Skills*, REPORT OF HOUSTON CONFERENCE, *supra* note 47, at 170-72; Benagh, *Developments in Peer Review*, REPORT OF HOUSTON CONFERENCE, *supra* note 47, at 290-97. Dorothy Linder Maddi is currently studying several important questions: (i) the role of law firm mentors in assisting young lawyers to acquire practical lawyering skills; and

those, especially the question of how young lawyers actually acquire important lawyering skills which the law schools have not traditionally dealt with.

My seminars in Negotiations and in Client Interviewing and Counseling, as well as my work with the Client Counseling team and with associates in local law firms, have important common elements. They are organized around a series of videotaped simulations.¹¹⁶ The simulations are preceded by readings and discussions of the theory underlying the particular lawyering activities involved, and often by exercises which highlight some of the constituent sub-skills, such as various listening techniques and question formulation. Each of the simulations is followed by feedback sessions and a group discussion, using the videotaped materials.

In developing these enterprises, I have been pursuing a variety of goals and objectives, and adopting what I believe are effective techniques for reaching them. As I have discovered, most of these are part of a developing tradition, which others have already begun to describe, and are consistent with some longstanding recommendations for the reform of legal education.

Following are the major elements of my teaching efforts and some of their historical antecedents and current parallels:

1. *Learning by doing.* A basic notion of simulations is that students can learn many types of material and many skills best by applying them in situations which approximate reality.¹¹⁷ Despite predictable initial skepticism, most students quickly find that simulations can be sufficiently realistic to engage their interest and even emotion. One of the strengths of this approach is that the flagging motivation of second and even third year students for their studies can be dramatically increased.¹¹⁸ Beyond that, repeated practice of the skills can reduce student anxiety,¹¹⁹ and permit them to begin focusing on the "af-

(ii) several aspects of lawyers' participation in post-law school education, including the effect of a mandatory continuing legal education requirement. AMERICAN BAR FOUNDATION, ANNUAL REPORT—1983, at 14-15.

116. For a good discussion of the use of simulations in legal education, see Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education*, GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 16, at 191-222. See also M. MELTSNER & P. SCHRAG, TOWARD SIMULATION IN LEGAL EDUCATION: AN EXPERIMENTAL COURSE IN PRETRIAL LITIGATION (1975).

117. It has often been said that learning can occur in a variety of ways: by the students listening to others describe the area of knowledge or skill; by the students reading about them; by the students observing others apply the knowledge or use the skill; or by the students themselves doing so. A substantial body of learning research supports the view that the last of these techniques has many advantages. For references to that literature, see Harbaugh *supra* note 116 at 198-210. In my teaching efforts, the other techniques have a place, but learning by doing (and through individualized feedback) plays the central role.

118. *Id.* at 198-205.

119. *Id.* at 206.

fective," as well as "cognitive," dimensions of the learning process.¹²⁰

2. *Use of videotaping.* Videotape technology is an important element of these enterprises.¹²¹ Learning by doing works best when students can observe how they have done, and when they have the opportunity for specific, documented feedback from faculty members and fellow students. Because students know that they all will be videotaped during the semester and exposed to group feedback, camaraderie rather than sniping tends to develop.

3. *Introducing students to the lawyering process in its more complete, accurate and realistic dimensions.* Criticisms of mainstream legal education go beyond its failure to develop important lawyering skills and extend to its failure even to depict the reality of law practice. Simulated legal transactions can redress both imbalances. The best simulations are based on a theory of the lawyering process,¹²² which is then translated into the execution of important skills. Inevitably, "human" skills, as well as intellectual and analytical skills, loom large in the give-and-take of the interview or negotiating session.¹²³ Students learn that careful preparation of facts and law is important, but so is the ability to persuade by developing trust (or perhaps, in some cases, by intimidating). The interpersonal skills so essential to successful performance are often skills which are clearly rooted in life before law school. Once students perceive this, another strength of the simulation approach becomes evident: to some extent it builds on past experience and existing skills, especially interpersonal skills.¹²⁴ Students are acknowledged by their peers and themselves as people with ideas and talents worth recognition—the learning phenomenon of positive reinforcement. At the same time, they are learning to cope with uncertainty and to understand that the good lawyer spends a substantial part of his or her time scanning available information, generating tentative hypotheses, and rejecting some until a final hypothesis is selected.¹²⁵ Tactical thinking, not just analytical thinking, is a large part of this process.¹²⁶

4. *Incorporating the Ethical/Moral Dimension.* Still another aspect of the simulation approach is the capacity for incorporating an ethical/moral dimension in a controlled "real life" situation. The way I chose to do that was, I believe, modelled after Professor James White's approach. At the start of each semester in the Negotiations Seminar, I provide the students with guidelines

120. *Id.* at 198.

121. See GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 16, at 75.

122. See Harbaugh, *supra* note 116, at 197.

123. See, e.g., Goodpaster, *supra* note 60, at 11.

124. See, e.g., F. ZEMANS & V. ROSENBLUM, *supra* note 6, at 128; L. BAIRD, *supra* note 48, at 54; Mudd, *supra* note 47, at 704. Interestingly, one of the main reasons people attend law school and prepare to become lawyers is a desire to work with people and to help others. FOULIS REPORT, *supra* note 16, at 30 (quoting from S. WARKOV & J. ZELAN, *LAWYERS IN THE MAKING* (1965)).

125. See Harbaugh, *supra* note 116, at 216.

126. See Macaulay, *supra* note 58, at 514.

for the simulations. One of those is that if, in connection with a negotiating session, any student believes that another has acted unethically, he or she may submit an ethics charge to me and I will convene a disciplinary committee to adjudicate the matter. This past semester, for the first time, a charge was filed, based on a videotaped negotiation session in which the charging student claimed he had been lied to. The student charged denied the allegation and in turn charged the other student with conduct unbecoming an attorney.¹²⁷ I constituted the rest of the class as the disciplinary committee, they reviewed the papers filed, took testimony from the other two students involved in the negotiating session, viewed the videotape, heard oral argument, and rendered a decision. By all accounts, it was an extraordinary learning experience for the class. The relatively dry and obscure rules of professional conduct were brought vividly and somewhat painfully to life.

5. *Developing lawyer-to-lawyer cooperative skills.* Most lawyering is not a solitary activity. Lawyers interact with clients, witnesses, court clerks, judges, and other lawyers, among others. Lawyer-to-lawyer contacts obviously will tend to be adversarial in litigation; there will also be an adversarial cast in negotiations designed to resolve disputes,¹²⁸ at least in the backdrop; but when lawyers representing the same client or client interest are involved, lawyer-to-lawyer cooperation should be the dominant theme.¹²⁹ In all my lawyer training enterprises, I use primarily two-"lawyer" teams to represent each client. This involves students in another level and kind of negotiation. They must develop a common position and strategy for conducting a client interview or counseling session, or for representing their client in a negotiation. Students expect confrontation and interpersonal difficulties when they are dealing with those representing an actually or potentially adverse interest. They are not prepared for such difficulties when they are dealing with an associate. Often the greatest difficulty occurs in the latter situation. Learning to overcome it and achieve cooperation is an important, often unanticipated benefit.

6. *Perceiving various ways to avoid or resolve disputes and their differing consequences.* Depending upon the mechanism by which a dispute is avoided or resolved, there may be striking differences in the context and tone of discussions, in the post-resolution climate, and perhaps in the result, viewed

127. The counter-charge was based on an inadvertently videotaped caucus between the two "lawyers" representing the other client in the negotiation. One of those "lawyers," the charging party, made a derogatory comment about the charged party. When his partner realized that the caucus was being videotaped, he attempted to quiet the other; instead, the "lawyer" pointed at the camera and referred to his opponent by another derogatory term.

128. For a distinction between dispute-settlement and rulemaking negotiations, see Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). One of the themes of my Negotiations Seminar is the variety of negotiating contexts, and the resultant differences in goals and dynamics.

129. See L. BAIRD, *supra* note 48, at 7; Himmelstein, *supra* note 8, at 15-16.

quantitatively as well as qualitatively. That reality may be self-evident as an intellectual matter, but observing it in action has a far greater impact. Consequently, I build into my Negotiations Seminar at least one demonstration. The students negotiate a matrimonial problem. Typically, it generates considerable emotion and sometimes even real ugliness. For those students who fail to settle within the allotted time, and there are usually some, the result is determined by a judicial opinion prepared by a family court judge who has had access to the same facts as the student-negotiators.¹³⁰ As a proxy for litigation costs, the results for all students who fail to settle are reduced by 10 percent. A third approach to the same problem situation is then provided by having a lawyer experienced in divorce mediation conduct a simulation for the class.

7. *Demonstrating the interrelationship among various lawyering skills.* To eliminate the possibility that students might compartmentalize various lawyering skills in the simulations, I have structured the situations to highlight rather than obscure the interrelationships. For example, in the Negotiations Seminar I have built into several of the simulations a client interviewing and counseling component. Although primary attention is focused on lawyer-to-lawyer interactions in the negotiations, interviews with "live" clients¹³¹ provide the student-lawyers with their factual information and those clients continue to be available for consultation throughout preparation for and conduct of the negotiation. Similarly, in the Client Interviewing and Counseling Seminar, I have structured the mirror-image, with the interviews and counseling sessions forming the core of the Seminar but lawyer-to-lawyer interactions constituting a continuing backdrop. Using live clients in both seminars also captures some of the unpredictability of the actual case without the risks inherent in students learning on the job.¹³²

8. *Exposing students to diverse lawyering styles and formats.* Teaching

130. In general, about one-third of the students' grade is based on the negotiation results. (The balance is based on written pre- and post-negotiation memoranda.) For the first several simulations, the results are defined in quantitative terms; for the last several, a qualitative/creativity factor is incorporated. For each simulation, a different impasse procedure is provided. In addition to the judicial opinion for the matrimonial problem, I use scoring based on pure chance (coin flips), or some approximation of the probabilities of a litigated decision.

131. Clients are portrayed by teaching assistants, alumni of one of my seminars, trained actors or actresses, or, occasionally, by me. I prefer to use people not already known to the student-lawyers, but that is not always practicable. For law firm training programs, I have been able to use only trained actors and actresses. In the law school context, there are some countervailing benefits to using other students who have experienced one of the seminars. Among other things, it contributes to the sense of a coordinated, substantial curricular effort. For an interesting use of client-raters, see Stillman, Silverman, Burpeau & Sabers, *Use of Client Instructors to Teach Interviewing Skills to the Law Students*, 32 J. LEGAL EDUC. 395 (1982).

132. See, e.g., GUIDELINES FOR CLINICAL LEGAL EDUCATION, *supra* note 16, at 89, 90-92; Harbaugh, *supra* note 116, at 191.

students to be more effective interviewers, counselors and negotiators hardly follows a unitary model. Existing research suggests that effectiveness can take a variety of forms.¹³³ It is important for students to be made aware of that. It is also important that they recognize that different formats for interacting with clients and with other lawyers impose different demands and bring different benefits.

To illustrate these points, I vary the approaches and formats of the simulations in both seminars. In the Negotiations Seminar students are free to use whatever negotiating style they prefer for the first two simulations. As part of their preparation for the third negotiation, they are required to read *Getting to Yes*¹³⁴ and to negotiate in a principled manner.¹³⁵ For the fourth, and last, negotiation they are free again to choose any style they wish.¹³⁶

The formats are varied as well. At least one of the negotiations is conducted one-on-one instead of two-on-two; at least one of the simulations is without time limit and another with the possibility of multiple negotiating sessions; several of the negotiations are based on fact sheets instead of client interviews; and the subject matter of the simulations covers a considerable range.¹³⁷

133. See G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 15-46 (1983).

134. R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981). Although this work has stimulated a great deal of long-overdue debate about negotiating tactics and styles, it has also provoked some strong criticism and some ambivalent reactions. See, e.g., White, *Essay Review: The Pros and Cons of "Getting to Yes,"* 34 J. LEGAL EDUC. 115 (1984). In *A Comment by Professor Fisher*, following Professor White's *Essay Review*, 34 J. LEGAL EDUC. at 120, Professor Fisher acknowledged that his book has inadequacies. "On the first day of my most recent negotiation course I tore a paperback copy in half to convince students how much work we had yet to do." *Id.*

135. The grading for this negotiation is modified to further encourage students to use a principled approach. Instead of arraying grades based on quantitative results, the students are evaluated based on the creativity of their result, with all participating in a particular negotiation receiving the same grade for their result. Despite these inducements and the students' honest efforts to adopt a principled approach, the range of styles which surface is fascinating: one person's "principled" approach is another person's adversarial, aggressive approach.

136. I continue to provide some inducement for principled negotiation. Half of the grade for result is based on a qualitative creativity measure. Nonetheless, a significant number of students adopt a decidedly aggressive, competitive style.

137. Typically, the simulated negotiations include a collective-bargaining situation, a matrimonial problem, a public policy conflict (e.g., a prison hostage case), and a commercial/corporate matter (e.g., negotiation about the breach of a restrictive covenant). Some of the negotiations are in the shadow of a looming litigation; others are not. Some involve dispute-settlement; others transaction-building. For some sample negotiation problems, see G. WILLIAMS, *TEACHER'S MANUAL WITH COURSE MATERIALS AND PROBLEMS FOR NEGOTIATION TO ACCOMPANY LEGAL NEGOTIATION AND SETTLEMENT* 77-174 (1983); H. EDWARDS & J. WHITE, *TEACHERS MANUAL FOR THE LAW-*

9. *Introducing the theoretical and empirical aspects.* If mainstream legal education can properly be criticized for being neither theoretical nor practical enough, teaching lawyering skills through simulations can certainly help to fill out the practical end of the spectrum, but its utility can also reach the other end of the spectrum. As Jerome Frank stresses, training law students by having them apply their knowledge to practical tasks can be done in a way which deepens and enriches that knowledge.¹³⁸ I have attempted to do that in several ways. First, I assign readings in, and we discuss, some aspects of game-theory, social and interaction psychology, and sociology (especially as it relates to the cross-cultural and gender aspects of interactions with clients and with other lawyers).¹³⁹ Second, we draw upon some of the literature regarding effective interviewing and negotiating.¹⁴⁰ Third, we consider the relationship between effective lawyering skills and dispute avoidance and alternative dispute resolution developments.

From this litany, it is clear that I have ambitious goals for my ventures into helping students to develop insights into, and some familiarity with, a range of lawyering skills not traditionally taught in law schools, but there are serious limitations on what I have been able to accomplish thus far. The nature of these enterprises requires that I teach a limited number of students each semester.¹⁴¹ The lawyering skills I deal with leave largely untouched a number of extremely important skills.¹⁴² A two credit seminar bulges at the seams when theory as well as practice is included. So long as the prevailing law school attitude toward "skills training" enterprises is that they are peripheral to the core curriculum, many students, especially in a buyer's job market, will avoid them.¹⁴³ Finally, in common with most law schools, we have not yet fashioned a coherent, curricular package to which students interested in this

YER AS A NEGOTIATOR (1977).

138. Frank, *supra* note 13, at 913, 923.

139. For some illustrative citations, see H. EDWARDS & J. WHITE, PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR (1977). See also A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS (1976).

140. E.g., G. WILLIAMS, *supra* note 133; H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

141. Thus far, I have limited enrollment in my seminars to 20 students. The use of client-raters, see *supra* note 131, or of fewer simulations, see G. WILLIAMS, *supra* note 137, at 1, may make larger enrollments feasible, but reducing the "learning by doing" and individualized feedback aspects represent a substantial tradeoff. Absent increased faculty resources for simulations, hard choices will have to be made.

142. These include drafting of legal documents, opinions and letters, and systematic fact gathering and fact marshaling techniques ancillary to client interviewing.

143. Although my seminars have generally been over-subscribed, even if I were able to accommodate all students who seek to register I would still be reaching only about 20% of the student body. Some other students may be exposed to similar skill training in other law school enterprises, especially clinical programs, but it is highly unlikely that a majority of the students currently participate in any such training.

approach to legal education can be directed.

Some of these limitations are rooted in the resource problem discussed earlier. Others can be dealt with by changes in institutional attitudes and by related curricular decisions. The two go hand in hand, but in no necessary sequence. If law faculties come to recognize the importance of educating their students to become more effective dispute avoiders and dispute settlers, and begin to welcome the requisite teaching methodology and courses into the mainstream curriculum, this will encourage those with special interests in the area to *organize and extend their efforts*. But the alternative sequence is possible, and perhaps more likely. Law professors already persuaded of the importance of this broadened conception of legal education must organize their efforts,¹⁴⁴ experiment with and improve upon available teaching techniques and materials, and conduct serious scholarly inquiries into the many fertile areas being identified. In this manner, discreet but effective proselytization can occur. Although undoubtedly there will be frustrations along the way, there is an appropriateness to using persuasion and conciliation to advance the goal of broadening legal education. Law professors can be role models for their students in this style of decisionmaking, as they have been role models for the more adversarial, analytical style in vogue for more than a century.

144. Some efforts have begun at Rutgers. As a first step, faculty members who are involved in, or interested in, teaching simulation enterprises, or using simulation or problem techniques in traditional courses, are meeting to explore their shared interests. Out of that may grow the impetus for curricular reform. At the least, students should be informed far more effectively about the range of existing possibilities to develop practical lawyering skills. Beyond that, students should be advised about coherent sequences of courses, seminars and clinics in which they might enroll. A byproduct of this faculty exercise will be identification of gaps in the current curricular offerings. For example, Rutgers, in common with most law schools, has not devoted significant faculty teaching or research energies to the theoretical or empirical aspects of practical lawyering skills. Finally, more far-reaching curricular reforms may be pursued. See *supra* text accompanying notes 102-111.