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Bringing the Educational Reforms of the Cramton Report into the Case Method Classroom -- Two Models

Gene R. Shreve
Indiana University Maurer School of Law, shreve@indiana.edu

BRINGING THE EDUCATIONAL REFORMS OF THE *CRAMTON REPORT* INTO THE CASE METHOD CLASSROOM— TWO MODELS

GENE R. SHREVE*

The *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools* appeared on August 10, 1979. The report was released under the auspices of the Section of Legal Education and Admissions to the Bar of the American Bar Association. The title was quickly shortened to the *Cramton Report*, after Dean Roger Cramton, Chairman of the Task Force.

The *Cramton Report* advocates reform in law school coursework that would permit students simultaneously to explore and develop a greater number of skills relevant to practicing law. This Article advocates that these reforms[1] not be confined to the so-called "skills" courses but be considered with reference to all law school courses, including those employing the traditional case method approach. Rewards and frustrations that might result from implementation of the *Cramton Report* are related in the discussion of my experiences in modifying two courses traditionally taught by case method: Legal Methods and Conflict of Laws.

I. THE ESSENTIAL GOAL OF THE *CRAMTON REPORT*

The *Cramton Report* advocates changes in American legal education in a loosely textured and pluralistic manner. This manner may be attributable in part to the plenary character of the process of committee

* Visiting Associate Professor of Law, The National Law Center, George Washington University. A.B., University of Oklahoma, 1965; LL.B., Harvard Law School, 1968; LL.M., Harvard Law School, 1975. I with to thank Professor Stephen Dycus of Vermont Law School for his thoughtful comments on the original manuscript of this article.

1. Recommendations of primary importance to this discussion appear in Section IB of the Report entitled *Educational Program*. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 3-4 (1979) [hereinafter cited as CRAMTON REPORT]. *Cramton Report* recommendations on law school admissions and recommendations addressed to the American Bar Association and to bar admission authorities, although of considerable interest, are beyond the focus of this article.

creation of the report, and in part to an advertent attempt to create a foundation for a rich variety of responses.[2] Yet, despite the report's open-endedness, danger exists that it will be read too narrowly.

The feared interpretation might be as follows: Public concern exists regarding lawyer competence in the performance of a variety of professional tasks.[3] Students are dissatisfied with the small number of "how-to" courses in the curriculum.[4] Therefore the answer is to provide more "skills" courses, for example, trial and appellate advocacy, drafting, negotiation, and client interviewing and counseling.

My purpose is not to suggest that thoughtfully designed and taught skills courses are not as desirable as other law school courses, or that their numbers should not be increased. Rather, I suggest that skills courses provide only one means toward realization of the *Cramton Report's* essential goal. The goal is stated in the Report's opening statement: Law schools should "address the durable and fundamental aspects of lawyer competence since legal education must be viewed as preparation for a lifetime career involving continuous growth and self-development."[5]

The competent lawyer demonstrates three component abilities: analysis, planning, and communication. According to the Report, the function of law schools is to create an awareness in students of the integrated character of these component abilities, to develop in students three-dimensional standards for judging their own abilities and the abilities of others, and to develop in graduates a commensurately broad

2. "Individual schools have quite different student bodies headed for very different types of professional practice. Diversity and experimentation rather than mandated uniformity offer the most likely path to more effective law school education." *Id.* at 3.

3. *Id.* at 1, 14. *See* 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).

4. The *Cramton Report* suggests that case method, or socratic teaching, is quite effective for first-year students, CRAMTON REPORT, *supra* note 1, at 13, but "[d]uring the second and third years of law study, student effort declines and disbelief in value of the standard techniques and expectations of legal education increases." *Id.* at 17. *See also* F. ALLEN, LAW, INTELLECT AND EDUCATION 71-75 (1979); Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 652-59 (1973).

One recent study suggests that decline of student interest is perceptible during the first year. Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes and Personality Traits Among First-Year Students*, 1979 AM. B. FOUNDATION RESEARCH J. 791, 838-39. *But see* Schwartz, *Law, Lawyers, and Law School: Perspectives from the First-Year Class*, 30 J. LEG. ED. 437, 467-68 (1980).

5. CRAMTON REPORT, *supra* note 1, at 1.

and incurable itch to improve—the incentive for lifelong professional growth.

A thoughtfully designed and taught skills course[6] provides the kind of three-dimensional learning experience that the *Cramton Report* advocates. The Report would be artificially limited, however, if reforms were confined to courses that teach a given practicing function, for example, drafting or negotiating. Instead, the idea of enriching student learning situations by simultaneously engaging more component practicing abilities in the learner should be explored with reference to the entire law school curriculum.

A. *Constraints of the Traditional Case Method Classroom and Avenues of Reform Suggested by the* Cramton Report

In the ideal case method classroom, the student has read the assigned material and has come to certain tentative critical judgments about it when class starts. He or she listens carefully to the critical judgments of classmates and the professor; speaks out to probe, criticize, or defend issues that emerge; and, by the end of class, revises or expands his or her judgment if necessary. The process of testing and revising critical commitments continues beyond the end of the course.[7] The *Cramton Report* avoids outright criticism of conventional case method teaching. Most case method courses fail, however, to provide the kind of learning experience contemplated in the Report's goal.[8]

The Report stresses the need for competent lawyers to develop effective written and oral communication skills.[9] The traditional classroom

6. Such a skills course proceeds from an investigation of a given practicing function to an integration of humanistic and intellectual resources necessary to satisfy problem solving needs in that context. An exploration of possibilities for this kind of teaching can be found in Shaffer, Book Review, 51 So. CAL. L. REV. 761 (1978) (L. BROWN & E. DAVER, PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS).

7. Shreve, Book Review, 33 VAND. L. REV. 822, 829-30 (1980) (F. ALLEN, LAW, INTELLECT AND EDUCATION). For other descriptions of the nature and purposes of case method teaching, see Fuller, *On Teaching Law*, 3 STAN. L. REV. 35 (1950); Morgan, *The Case Method*, 4 J. LEGAL ED. 379, 391 (1952); Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL ED. 1 (1951).

8. The *Cramton Report* describes circumstances of case method teaching in which "the instruction consists primarily of assigned coursebook material (with little or no student use of the library), classes that consist of discussion of lecture, and a final examination graded but not commented on in detail by the faculty member." CRAMTON REPORT, *supra* note 1, at 23. The report observes that under such circumstances "opportunities for more fundamental skills instruction are severely limited." *Id.*

9. *Id.* at 3-4, 15.

dialectic may aid in the development of extemporaneous verbal acuity in students, but generally fails to provide a sustained, thoughtful, and systematic framework for considering the needs of oral communication in practice. Final examinations similarly fail to provide students occasion to anticipate and consider demands of written communication in practice. The *Cramton Report* recommends that law schools provide opportunities for oral and written communication with realistic exposure to the integrated demands of practicing law. Functions of the lawyer include litigating, interviewing, counseling, and negotiating.[10]

Factual investigation is a central function in applied legal analysis necessary for the practice of law.[11] The conventional case method course limits student experiences in fact gathering to the narrow confines of the casebook. Most casebook "cases" are appellate opinions that only partially reflect case records. Frequently editors either extrapolate important facts for students and present them in an introductory note to the case or omit them altogether.[12] In either event, the student is deprived of the valuable experience of winnowing out the legally significant facts from the immaterial. The *Cramton Report* recommends broader fact-gathering opportunities.[13]

In classroom discussion students often play the roles of judge and advocate. The *Cramton Report* suggests that opportunities be created to study other transactional roles and relationships encountered regularly in practice.[14] The Report makes the following additional recommendations relevant to professional preparation and growth that cannot be readily achieved in the traditional case method classroom. Students should be required to examine and develop transactional

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10. *Id.* at 3.

11. *See* H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 22 (1972). In a recent study by Leonard L. Baird for the Law School Admissions Council, law graduates surveyed rated the "[a]bility to analyze and synthesize law/facts" above all other abilities (including research and writing) in importance to their work. They rated the importance of law school training in this skill as second only to training in legal research. The results were reported in Cramton & Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEG. ED. 253, 265 (1979).

12. Thirty-five years ago, Karl Llewellyn decried the tendency of casebook editors to "shorten the facts, omit counsel's argument, and chop out of the opinion all those 'extraneous' points which were busy and continue to be busy flavoring the case for actual parties, actual counsel and any actual tribunal." Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 354 (1945). The trend has undoubtedly continued.

13. CRAMTON REPORT, *supra* note 1, at 3, 15.

14. *Id.*

skills of collaboration through team projects.[15] They should receive classroom exposure to professional models other than law teachers.[16] The Report also recommends means of measuring student growth in course work that are more frequent and informative than the course-ending blue-book examination.[17] Additionally, the Report suggests smaller class enrollments.[18] The balance of this Article is devoted to two law school teaching models intended to implement the objectives just surveyed. Both models involve courses frequently taught by the case method. In each case the proposed modifications involve simulation—the problem method in which the problem is solved by students play-acting lawyer roles. The approaches differ in that the first, more extended model, represents an entire course departure from case method teaching while the second model serves as a brief structural interlude in a traditional case method course. The models exemplify some of the satisfactions and frustrations to be found in adopting the *Cramton Report* approaches.

B. *Litigation Workshop*

I developed a legal method course called Litigation Workshop at Harvard Law School, taught it there for two years, then continued to refine and teach the course for five years at Vermont Law School. The course, like most legal method courses, is offered to first-year students. The course attempts to improve skills of legal analysis, to introduce students to the formal adjudicative process, and to serve as a supplemental laboratory for Civil Procedure.[19] Litigation Workshop produces a series of simulated events requiring that first-year students prepare and file a federal lawsuit, conduct discovery, brief and argue several pretrial motions, and try the case before a jury.

The case is set in the federal district of Massachusetts and is based in

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15. *Id.* at 4, 17.

16. *Id.* at 4. The local practicing bar is an obvious and frequently neglected resource. "It is a commentary on the lack of continuity between law school and law office that the schools have been able to make so little use of practitioners—in sharp contrast to the schools of medicine." Cavers, *"Skills" and Understanding*, 1 J. LEG. ED. 395, 396 (1949).

17. CRAMTON REPORT, *supra* note 1, at 4, 17.

18. *Id.*

19. Goals for the course are described more fully in Shreve, *Classroom Litigation in the First Semester of Law School—An Approach to Teaching Legal Method at Harvard*, 29 J. LEG. ED. 95 (1977). For other conceptions of the nature and purpose of a course in Legal Method, see H. PACKER & T. EHRLICH, *supra* note 11, at 28-29; Marple, *The Basic Legal Techniques Course at Catholic University School of Law: First-Year Lawyering Skills*, 26 J. LEG. ED. 556 (1974).

part on a case actually litigated there.[20] It involves a threatened eviction, alleged to be in retaliation for the attempts of a residential tenant to organize the landlord's tenants into a tenants' union. Suit is brought under 42 U.S.C. § 1983 to enjoin the landlord from commencing state eviction proceedings. The case contains three central issues: First, whether the first and fourteenth amendments are enforceable against the defendant, a private party; second, if so, whether the defendant intended the eviction of the tenant plaintiff in violation of plaintiff's tenant-organizing activities; third, if so, whether plaintiff's tenant-organizing activities were within the protection of the first amendment.

Events develop in the case through a series of assigned student exercises. An actor playing the tenant plaintiff is interviewed; a complaint is drafted and filed. The workshop class is split between students serving as counsel for plaintiff and defendant. Students soon engage in client counseling and negotiating, represent their clients in a temporary restraining order hearing, draft discovery documents, represent their clients in a hearing on motions to compel discovery and a hearing on defendant's motion to dismiss, and finally handle a jury trial.

The workshop is conducted during two-hour meetings held once a week. Each student is required to complete two written argument assignments (briefs on motions for a temporary restraining order and on motions to dismiss) and two drafting assignments (complaint and discovery). Additionally, each student has one pretrial and one trial oral assignment. Pretrial assignments vary according to the event necessary to expedite the case. Students A and B may engage in a mock hearing argument on the issuance of a temporary restraining order and students D and E may contest the motion of V and W to compel discovery in a subsequent week's hearing. Trial assignments also vary as workshop members assume different roles on the opposing trial teams. Teammate A presents the opening statement for the team, B handles direct examination of a witness, C and D divide the closing argument. Pretrial oral assignments are observed and subsequently commented on by the whole class. Every member of the workshop has a role at trial. The instructor comments on each written and oral exercise. The course contains no final examination, but the jury trial lasts an average of six hours.

20. McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd,* 438 F.2d 781 (1st Cir. 1971).

The Litigation Workshop follows the *Cramton Report* approaches identified earlier. It requires students to pass through stages of analysis and planning to acts of written and oral communication in various adversarial and nonadversarial roles that reflect the demands of practice.[21]

The manner in which facts are introduced in the course creates the opportunities for fact gathering and evaluation. Documents surface through client interview, discovery, and subpoena at trial. Facts are also disclosed when actors play principals in the case during interviews, counseling sessions, trial preparation, and testimony at trial.

Students participate in an evolving process of determining legally significant[22] facts within the framework of the case. As they move toward trial, they travel from the realm of legal analysis to the realm of fact investigation and appraisal. Students narrow the possible, useful facts and applicable legal rules until they create and argue from a record for decision in the case. Students experience the interplay of law and fact in applied legal analysis.

The transactional demands of collaboration in the practice of law are brought into the course by requiring that all oral assignments be performed by teams of two or more. Students are introduced to new professional models and interpreters through classroom visits by two attorneys who generally represent clients similar to the workshop plaintiff and defendant. The visitors are provided with course materials beforehand. In class, they address questions raised in the case and in analogous situations from their practice.

Students are provided with frequent and informative feedback on their progress in the course. Written assignments are returned with written comments by the instructor. When the complaint and discovery drafting assignments are returned, they are accompanied by models that serve as a basis for student comparison and become part of the

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21. Because students were required to act upon decisions they made, they were forced to the degree of activity and commitment in their problem solving that is characteristic of legal practice.

> For law is applied social science. It needs to draw on all the learning and wisdom it can get. But in the end it must make do with what it has, and work out the least objectionable solution. The professional lawyer is essentially a problem-solver, dealing with concrete and immediate problems which somehow or other must be solved.

H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 202-03 (tent. ed. 1958). *See also* Cavers, *supra* note 16, at 396.

22. Students based their legal analysis on a cumulative series of cases distributed as part of weekly readings. *See* note 20 *supra*. *See also* Shreve, *supra* note 19, at 98 n.10.

official case file. Oral assignments are preceded by the filing of a form in which each participating student explains his or her plan of action. Following the oral exercise, the forms are commented on and returned in the manner of a written assignment.

Small classes, recommended in the *Cramton Report*, are necessary to make the structured, closely supervised approach of Litigation Workshop succeed. Enrollment is limited to eighteen.

My experiences in teaching the workshop suggest that the approaches of the *Cramton Report* are worth undertaking in a legal methods course. Most workshop students enjoy the course and put a great deal of work into it. Their learning experiences seem personal and stimulating. My experiences, however, also shed light on some of the frailties of the Report's approaches.

Initially, the development and teaching of a course of this type is quite labor intensive. Outside the advocacy field,[23] published materials[24] are scarce. Law teachers who offer this sort of course usually spend a great deal of time developing their own materials.[25] The result is an expenditure of time greater than that necessary to prepare a case method course.[26] Litigation Workshop is also labor intensive when one adds to the amount of class time, the time spent in evaluating and commenting on student exercises, in student-teacher conferences, and in the innumerable and unstimulating tasks of administering the course. Course administration includes room scheduling, recruiting and coaching actors, recruiting guest attorneys and jurors, and supervising the

23. Excellent student law materials in trial advocacy have been developed under the auspices of The National Institute for Trial Advocacy. J. SECKINGER & K. BROUN, PROBLEMS AND CASES IN TRIAL ADVOCACY (2d ed. 1979). Other problem approaches can be found in R. KEETON, TRIAL TACTICS AND METHODS (2d ed. 1973); J. MCELHANEY, EFFECTIVE LITIGATION: TRIALS, PROBLEMS AND MATERIALS (1974); A. MORRILL, TRIAL DIPLOMACY (1972).

24. *E.g.*, H. EDWARDS & J. WHITE, PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR (1977); M. MELTSNER & P. SCHRAG, TOWARD SIMULATION IN LEGAL EDUCATION: AN EXPERIMENTAL COURSE IN PRETRIAL LITIGATION (1979).

25. Examples in addition to Litigation Workshop include Botein, *Simultation and Roleplaying in Administrative Law*, 26 J. LEG. ED. 234 (1974); Coleman, *Teaching the Theory and Practice of Bargaining to Students*, 30 J. LEG. ED. 470 (1980); Hollander, *The Simulated Law Firm and Other Contemporary Law Simulations*, 29 J. LEG. ED. 311 (1978); Marple, *supra* note 19; Ordover, *An Experiment in Classroom Litigation*, 26 J. LEG. ED. 98 (1973).

26. The *Cramton Report* recognizes the need to standardize teaching materials in this area. CRAMTON REPORT, *supra* note 1, at 29. The *Report* urges that funds for the development of materials be made available, *id.* at 28, and that "creation of new teaching methods and materials that focus on the improvement of fundamental lawyer skills should be valued no less than research on legal doctrine" in matters of faculty appointment, retention, and tenure. *Id.* at 4.

gradual release of factual data into the course. Law schools may have trouble interesting their faculty members in this type of an expenditure of personal resources.

Law schools may experience difficulty in freeing interested faculty members from other assignments. The faculty-student ratio is smaller and the course is therefore far more expensive than typical case method courses. In a time of relative financial austerity for law schools, a course like Litigation Workshop must compete for adoption with other labor intensive, low-enrollment alternatives like seminars and clinical fieldwork and supervision.

Costs for a course like Litigation Workshop can be reduced through repetition of the course in succeeding years. Time spent creating the course materials is not repeated, and the creators may become sufficiently familiar with the twists and turns in the course so that he or she can teach a greater number of sections at one time or involve and guide their colleagues in teaching sections of the course. This was my experience at Vermont Law School.

The problem with successive year repetition of Litigation Workshop was that materials from preceding years—for example, model pleadings, discovery, and successful briefs—were made available by upper-year students to first-year students and were subsequently referred to in preparing their assignments. Only a few cases of this sort of academic dishonesty probably existed, but they were difficult to detect and quite upsetting to the Litigation Workshop teachers and to the vast majority of workshop students who did their work honestly.

Our response thereafter was to offer the course on a pass/fail basis, hoping to reduce the incentive for "cribbing" from materials distributed in earlier years. Numerous arguments can be advanced for pass/fail grading of this kind of course. The emphasis should be on individuality of student approaches and growth rather than evaluation with reference to a common norm. Unfortunately, because Litigation Workshop was the students' only pass/fail course of the semester, students tended to slight Litigation Workshop in allocation of time among their courses. The best solution to the problem caused by repeated use of the same materials is to replace or substantially alter the materials every year, but that would make the course even more expensive and labor intensive.

Most, if not all, of the costs or frustrations associated with Litigation Workshop discussed thus far could be resolved in the unlikely event

that law schools had unlimited financial resources. A further limitation exists as to the feasibility of courses like Litigation Workshop, which probably counsels against their implementation on a broad scale, even if they were affordable. They simply fail to cover the breadth of substantive ideas that can be covered in a case method survey course. No teacher of Property, Constitutional Law, or Poverty Law could sacrifice consideration of a broad succession of ideas to dwell for an entire term on the few issues presented in the workshop case.[27] The aspects of Litigation Workshop that make it valuable also make it an incomplete and inefficient substitute for the basic survey courses.

It would be a mistake, however, to associate innovations suggested by the *Cramton Report* exclusively with efforts of pedagogical engineering like Litigation Workshop that offer total structural alternatives to case method teaching. One can also structure exercises that pursue avenues of reform suggested by the *Cramton Report* within an otherwise traditional case method survey course. The approach may produce more modest returns, but it can produce returns in curriculum areas that might otherwise remain unresponsive to the challenge posed by the Report. My second model applies the approach in one of the most traditional survey courses, Conflict of Laws.

C. *The Choice of Law Trial*

I taught Vermont Law School's basic course in Conflict of Laws. Central to the course are questions of choice of law: Which state's governing law should be applied when the occurrences or transactions underlying the case appear to implicate the laws of more than one state? Students in the course are introduced through cases and text to a series of contemporary approaches, or methodologies, which purport to direct and explain the choice of law process. Students are invited to examine the extent to which these methodologies are complementary and tend to illuminate the choice of law process and the extent to which they are antagonistic—representing competing approaches about the nature and

27. McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971), the case on which Litigation Workshop is based, is not even cited in several property casebooks. In two others, discussion of the case is limited to brief reference in the notes. C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 946, 964 (1974); C. HAAR & L. LIEBMAN, PROPERTY AND LAW 340 (1977). The case also appears in edited form in another casebook, but less than three of the one thousand twenty-five pages of that casebook are devoted to presentation of the opinion. C. BERGER, LAND OWNERSHIP AND USE (2d ed. 1975).

relative importance of judicial method, statutory interpretation, comity, and the primacy of local law.

A customary means of probing these matters is to ask students whether the result in an assigned case can be explained by reference to a given methodology and whether use of another methodology could have been expected to change the result. The case method is admirably suited to this task because choice of law rules are largely judge made.[28] Nonetheless, the pedagogic constraints of the traditional case method classroom can be felt. Student analysis, planning, and communication are largely limited to reading and reflection on the day's assignment, followed by extemporaneous classroom responses to questions about the assigned material[29] or hypotheticals. A great deal of the factual and other material important to a real-life judicial inquiry about choice of law is lost in the process of casebook editing. Students often perceive Conflicts as merely a form of mental gymnastics and have difficulty relating their classroom experiences to their sense of professional preparation and growth. My response has been also to adopt approaches advocated in the *Cramton Report* in this context.

After we spend several classes considering choice of law in the conventional case method fashion, I conduct what might be called a choice of law trial. The trial is conducted before the court of the mythical State of New Homestead. Defendant is a citizen of New Homestead and plaintiff is a citizen of the neighboring State of Verdemont. The facts are stipulated.[30] The question to be answered in the classroom trial is whether our New Homestead court should decide plaintiff's argument for application of strict liability with reference to Verdemont

28. This is particularly true in the torts field, to which the "choice of law trial" is directed. *See* Weintraub, *The Future of Choice of Law for Torts: What Principles Should Be Preferred?*, 41 LAW AND CONTEMP. PROB., Spring 1977, at 146.

29. Assigned material consists primarily of abridged appellate opinions. Casebooks include R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS (2d ed. 1975); J. MARTIN, CONFLICT OF LAWS: CASES AND MATERIALS (1978); W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS (7th ed. 1978); E. SCOLES & R. WEINTRAUB, CASES AND MATERIALS ON CONFLICT OF LAWS (2d ed. 1972); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS (1965).

None of these books is devoted entirely to printing appellate decisions. Each also contains editor's notes, book and article excerpts, and statutory material. Yet very little of these materials are conducive to teaching in the broadened professional context recommended by the *Cramton Report*.

30. Plaintiff, purchased from the Defendant, a New Homestead manufacturer, a solar heating unit that, through malfunction, ignited and destroyed plaintiff's Verdemont home.

law, which recognizes it, or New Homestead law, which does not acknowledge strict liability.[31] A five-student team is appointed from the class to represent plaintiff in advocating the choice of Verdemont law. Another team is appointed to represent defendant and urge the application of New Homestead law.

Four more students are appointed to serve as expert witnesses at trial. Each of the four is asked to become the living embodiment of one of the four principal choice of law methodologies we have examined in the case method before this exercise.[32] Each expert witness is to prepare for trial with reference to two questions: (1) What will the choice of law result be if my methodology is used to decide this case? (2) What is the strongest case for the adoption of my methodology? Each expert witness declares the choice indicated by his or her methodology at the beginning of the exercise. Those experts choosing Verdemont law are examined by plaintiff's counsel and cross-examined by defend-

31. Both states are common-law negligence jurisdictions. Defendant gave plaintiff sufficient warnings about installation to bar recovery on a theory of negligence through creation of the defense of assumption of risk. The laws of the states do differ, however, with reference to the availability of a cause of action for strict liability.

Through a series of opinions, the Verdemont Supreme Court has elaborated a theory of strict liability for consequences of malfunction of any item offered for household use. In its most recent case, the Verdemont Supreme Court extended the doctrine to create liability for a home fire caused by a defective air conditioner. The court stressed the importance of protecting the home, perceived strict liability as a possible deterrent in defective product design, and concluded that it was more desirable for the cost of the disaster to be borne by the manufacturer than by the consumer or, ultimately, the State of Verdemont.

On the other hand, the New Homestead Supreme Court has repeatedly refused to adopt the standard of strict liability. Its last refusal came in a recent case where a house in New Homestead was destroyed by fire through malfunction of another of the defendant's solar heating units. The opinion of the New Homestead Supreme Court stressed in that case the economic importance to the state of active growth of New Homestead industries and the particular importance of encouraging the development of energy alternatives in northern New England. The court also noted that all bills introduced by the New Homestead legislature intending to create strict liability were overwhelmingly defeated.

Fictional judicial opinions from the Verdemont and New Homestead Supreme Courts were included in the assignment.

32. The four methodologies are: (1) The approach of the original RESTATEMENT OF CONFLICT OF LAWS (1934). *Cf.* 3 J. BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS 501 (1902) ("Conflict of Laws deals with the recognition and enforcement of foreign created rights."); (2) The approach of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). *See* Reese, *Conflict of Law and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963); (3) The "government interest" approach. *See* Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and Reformulation*, 25 U.C.L.A. L. REV. 181 (1977); and (4) Professor Robert Leflar's "choice influencing considerations." Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

ant's counsel. Those experts choosing New Homestead law are then examined by defendant and cross-examined by plaintiff. In this adversary context, questions concerning the results suggested by the methodologies and the desirability of their adoption[33] are considered.

At the conclusion of witness examinations, one student from each team argues in summation to the court. In addition to myself, the court consists of eight students whom I appoint immediately before argument. Members of the court are free to interrupt and question counsel during closing argument. After the argument, each student judge is asked to give a bench opinion concerning the law to be applied and the methodology to be adopted. I extrapolate a decision from the students' opinions and my own, announce it, and conclude the exercise.

It would be impossible to teach a basic survey course in Conflict of Laws through the approach of course-long simulated development of a single case taken in Litigation Workshop. Yet, the same kind of pedagogical engineering found in Litigation Workshop serves to create the choice of law trial, and a similar structural interlude could possibly be designed in any other basic survey course. Costs of the choice of law trial are not prohibitive. Creation of the exercise consumed considerably less time than creation of an entire simulation course. Because the exercise is entirely oral, its reuse in later years is probably not compromised even if the work is graded. It is desirable to conduct the entire exercise at one time, and that requires a block of at least two hours. Administrative problems are minor, however, in comparison to Litigation Workshop.

The choice of law trial, however, creates problems that differ from those encountered in Litigation Workshop. The exercise creates only

33. Each methodology has its detractors. For criticisms of the original RESTATEMENT, see W. COOK, THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS (1942); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933). For criticism of the RESTATEMENT (SECOND), see Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965); Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Tort Cases*, 44 TENN. L. REV. 975 (1977). For criticism of "government interest," see Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Rosenberg, *Comments on* Reich v. Purcell, 15 U.C.L.A. L. REV. 551, 641 (1968). For criticism of Leflar's "choice influencing considerations," see W. REESE & M. ROSENBERG, *supra* note 29, at 473-74; Trautman, *Rule or Reason in Choice of Law: A Comment on* Neumeier, 1 VT. L. REV. 1, 14-15 (1976).

Expert witnesses and attorney team members assigned to examine them specialized in a given methodology, engaged in extensive background reading of sources exemplified in this note and note 32 *supra*, and brought considerable depth to the mock proceedings.

twenty-two student roles. Because Conflicts enrollments may be quite large, many class members will be mere spectators. If students know they will have no part to play, their motivation to read and consider the problem materials may be reduced. I try to offset this by informing students that the appointment of students to the court will be delayed until immediately before argument. Students who prepare, however, may feel foreclosed if they are not assigned a role. If possible, it is desirable to schedule enough exercises so that every student has a role in at least one. This should not be a prerequisite, however, for adoption of this kind of supplementary teaching exercise. Most students, whether participating or not, understand that this kind of teaching is both experimental and student-centered. Students are supportive because they enjoy it and because they are grateful for the interest in teaching that experimentation suggests.

The choice of law trial has greatly enriched the Conflicts course. Students have found it both entertaining and helpful in clarifying difficult course material. Subsequent case method work was enhanced because students returned rested and refreshed. From a purely intellectual standpoint, the exercise aided students' critical understanding of the choice of law process. The student court's search for "justice" in its decision led it and the rest of the class to a better understanding of the decisional tensions that produce varied and frequently perplexing conflicts case law. The functions of collaborative analysis—planning and oral communication of the counsel teams—also permitted them to integrate their analytic understanding of course material with growth in other component abilities of applied legal analysis.[34] The participation by the expert witnesses, with allegiance only to their respective methodologies, gave depth and added dimension to the proceedings.

II. CONCLUSION

It may be tempting to think of the curricular goals of the *Cramton Report* with reference to practicing skills courses like the traditional trial advocacy course or more recently developed courses in interviewing, counselling, negotiating, and preventive planning. Neither of the models I have described is skills-directed in that sense. This does not,

34. Two of those areas are planning and communication. *See* notes 5, 21 *supra* and accompanying text.

however, lessen the desirability of innovation in pursuit of the *Cramton Report* goals in these and other nonskills settings. Curriculum offerings other than basic survey courses might be better taught in ways that, like those in Litigation Workshop, depart entirely from case method teaching. Even basic survey courses like Conflict of Laws can be enriched by structural interludes that require students to direct analytic learning to the performance of practicing tasks.