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## Discovery and Invention: The NITA Method in the Contracts Classroom

*Jonathan M. Hyman\**

This paper describes how I have infiltrated the NITA method into a standard, traditional first year Contracts course.<sup>1</sup> To some, this may seem like a foolhardy enterprise. Why should we try to mix something as intensely practical as lawyers' skills with something so intensely abstract as the fundamental doctrines of contract law? Contract doctrines play an invaluable role in the first year of law school. They help translate bright people into specialists who can read cases and discuss legal issues, in a way that resembles lawyers' work. A contracts course taught with intellectual rigor has many devices to shake students from their naive assumptions about what law is. It inflicts impenetrable legal precepts on them. (What better example than consideration?) It gives them now-you-see-it, now-you-don't rules. (Is this an offer that I see before me, or only an invitation to an offer?) It introduces students to a hard world where legalisms brook no sympathy or compassion. (Too bad the promise to pay was made after the help was given; without a bargain—or maybe reliance—the law will usually let the losses lie where they have fallen.) When successful,

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1 By "the NITA method" I mean simulation exercises in which law students take on the role of lawyers and perform lawyering tasks. I do not limit the method to the precise format or subject matters that have traditionally been used at the National Institute for Trial Advocacy's (NITA) trial practice training programs. As will be seen, I do not use the traditional NITA procedure of conducting numerous and repeated exercises within a period of days or weeks, with immediate and detailed individual critique, nor do I cover the traditional NITA topics of the events of the trial from jury selection to closing argument. The simulation method, more broadly conceived, is applicable to lawyering tasks well beyond those involved in presenting evidence at a trial. The important educational function of the NITA method is fully served when the method is applied beyond the traditional manner.

it also gives students a sense that they can master legal doctrines and think more rigorously than they had expected. This is all quite a lot. With three years of law school available for students' learning, it would seem that we can safely wait until the end before putting a practical polish on the students' skills.

I do not think we should wait. We should not hesitate to become "practical" in first year courses. Our reluctance may result from a strong tradition in law teaching. Law teachers are no different from anyone else in their tendency to frame their goals and model their actions on the methods of those who have trained them. Our own first year teachers by and large avoided the practical and only insisted on a rigorous analysis of the legal doctrines exemplified by the cases; it thus can seem natural and appropriate for us to do the same. Moreover, we are not gripped simply by the dead hand of the past. Our first year tradition is a living one, fed by our metaphorical understanding of the hierarchy of professional knowledge.<sup>2</sup> In this hierarchy, the substantive doctrines of the law form the foundational building blocks on which the rest of professional competence must be built. This metaphor suggests that we need to get the foundation right, at the beginning, if we want the superstructure to hold up later on. Trying to lay on practical learning too soon will cause the superstructure to crumble, even if it looks pretty at first.

The metaphor is partially right. Understanding legal doctrine, and developing a facility to articulate it in a coherent way, are necessary elements of good legal practice. But the metaphor is also misleading. Necessity does not imply hierarchy. Knowledge of doctrine is not the only foundational element of legal education.<sup>3</sup> We should not conclude that a body of knowledge or set of skills must be learned in any particular sequence simply because it is

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2 Donald Schön has noted that much professional education within universities assumes a hierarchy of knowledge. The hierarchy starts with basic science, on which applied science is built. The technical skills of everyday practice are in turn built on that. The basic science step, being the most foundational, has the highest prestige. D. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* 8-9 (1987).

3 Anthony Amsterdam has forcefully articulated important foundational skills that good law students and lawyers should learn, beyond those that fit comfortably into a traditional doctrinal course. To the commonly understood competencies of i) case reading and interpretation, ii) doctrinal analysis and application, and iii) logical conceptualization and criticism, he has added iv) ends-means thinking, v) hypothesis formation and testing in the acquisition of information, and vi) decisionmaking in situations where options involve differing and often uncertain degrees of risk and promises of different sorts. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 613-14 (1984).

important.<sup>4</sup> Knowledge and skills that are important can be confronted first, and/or in the middle of learning, and/or last, or even throughout an educational program in a cyclical fashion. Since I see my teaching task as enabling students to become effective—and reflective—actors in the law, the question of the order in which they should learn skills and knowledge is for me an open one. I was a devotee of the NITA method before I became a professor in the traditional classroom, posing my Socratic questions from the podium with my dog-eared casebook in hand. When I came to add classroom courses to my clinical teaching repertoire, it seemed natural to approach my teaching tasks in NITA terms.

I have not found it difficult to develop simulation exercises using the doctrinal material from the casebook. I use seven. Four are relatively brief. Each can be completed in less than an hour of class time, with only a moderate amount of prior preparation by the students. The other three are more substantial, requiring more class or preparation time.

The three major exercises require the students, in turn, to measure contract damages by choosing between a loss in market value and the cost of completion, to negotiate a restrictive covenant and a liquidated damages clause in an employment contract, and to write or edit a client advice letter regarding an alleged breach of contract where an "acceptance" did not precisely match an "offer." The four brief exercises require the students: 1) to act like jurors and decide on the amount of damages to be awarded to a modern day George Hawkins for his "hairly hand;"<sup>5</sup> 2) to sketch out their plans for investigating the facts of a case in which the buyer seeks restitution of a down payment even though he is the defaulting party;<sup>6</sup> 3) to plan their negotiation strategy for an effort to settle a dispute about a restrictive covenant; and

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4 Schön points out that the foundational metaphor does not satisfactorily describe what professional learning entails. Instead, professional education requires students to live through a kind of paradox while educating themselves with the help of a teacher. "The paradox of learning a really new competence is this: that a student cannot at first understand what he needs to learn, can learn it only by educating himself, and can educate himself only by beginning to do what he does not yet understand." D. SCHÖN, *supra* note 2, at 93.

When we understand professional learning in this way, it becomes apparent that the paradoxical difficulty of learning how to find and articulate the holding of a case—a typical first year task—is no more foundational than the paradox of learning how to plan and carry out a negotiation strategy for settling a case or making a deal.

5 Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929).

6 Vines v. Orchard Hills, Inc., 181 Conn. 501, 435 A.2d 1022 (1980).

4) to interview a homeowner who has complained that the storm windows he bought were shoddily installed and hideously expensive. The exercises thus span three major substantive themes in contract law: choosing and applying damage rules, steering through the practical problems of reaching clear and effective consent, and dealing in an efficient way with the ambiguity of promissory language and breakdowns in contractual expectations. The issues range from voluntary consent as the fundamental characteristic of contract law to the kind of court controlled contract rules, such as damages, that are largely independent of the explicit agreements of the parties.

While introducing these lawyering simulations into a first year doctrinal class has seemed natural, actually using them has created some unwelcome strains and tensions for me. The students seem to enjoy them until their lives become too pressured and tense late in the semester. Because I still intend to use the course to introduce the students to substantive contract doctrines and proper methods of legal reasoning, the time I need for the exercises conflicts with the time I need to read cases and cover doctrine. I will discuss these limitations in more detail later, after I have described the exercises and explained why I think the NITA method which they exemplify is of critical importance for traditional legal education.

In light of my claim that these simulations embody the NITA method, I should note before proceeding any further that none of the exercises simulate trial practice itself. The students do not examine or cross-examine witnesses, they do not make opening statements or closing arguments, and, with some minor exceptions I will describe, they do not marshal facts and evidence into a theory of the case.<sup>7</sup> While the exercises dance only around the periphery of the trial itself, I think they properly may be said to use the NITA method. In my view, it is not trial practice that lies

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<sup>7</sup> Based on my experience, I doubt that trial practice simulations can be effectively imported into first year, first semester doctrinal courses, such as contracts, torts, property, and criminal law. I discuss this point further, below. Procedure courses may provide a more favorable circumstance for trial practice simulations, but they often focus on doctrinal issues concerning jurisdiction and the rules that establish the procedural framework of trials, rather than the problems of adducing evidence and making arguments in an effective and persuasive way. To this extent, they would probably also make it difficult to use trial practice simulations. Trial practice and other aspects of lawyering work can be treated effectively in the first year in separate courses, such as those offered at New York University and UCLA, but such courses keep the work separate from the exploration of a body of doctrinal knowledge.

at the heart of the NITA method. Instead, the crucial teaching of the NITA method is a sensitivity to facts in all their glorious detail, an instrumental view of legal doctrine, and an abiding concern with the art of persuasion. Even within the demanding confines of a primarily doctrinal course, simulation can be used to serve these ends.

### I. THE EXERCISES

The exercises begin with issues of remedies, such as the measure of damages and the enforcement of restrictive covenants, and end with contract formation. This order may appear backwards to someone who thinks of contracts in chronological fashion; contracts must be created before they can be enforced. Beginning a contracts course with remedies now has an honorable tradition stemming from the Legal Realists. Thus, contracts teachers may not be surprised to learn that I currently use the Dawson, Harvey, and Henderson casebook,<sup>8</sup> which begins with an extensive coverage of remedies.<sup>9</sup> I would ask readers who have not had the opportunity—or obligation—to think about these topics since law school to bear with me as I discuss the issues that give rise to the simulations. One of the things I have learned from NITA is the importance of the specific details of the case. In the spirit of the exercises, I should describe some specifics of the simulation exercises I use.

The students' first case is *Hawkins v. McGee*,<sup>10</sup> which requires the court and the students to choose between reliance and expectancy as the measure of damages. As some readers may remember, Dr. McGee,<sup>11</sup> in a surfeit of confidence, had promised to repair a scar on George Hawkins' hand giving him a "perfect hand." The doctor did not operate negligently, but he failed to provide his patient with the hand that was promised, giving him instead a hand with an unsightly growth. The New Hampshire Supreme Court decided that the trial court erred when it instructed the jury to measure damages by the additional damage Dr. McGee had done to Mr. Hawkins' hand. Instead, the proper measure of damages was the expectancy: the value of a perfect hand as promised less the value of the actual hand as imperfectly deliv-

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8 J. DAWSON, W. HARVEY & S. HENDERSON, *CONTRACTS* (5th ed. 1987).

9 See *id.* ch. 1, at 1-184. I have used other casebooks during the time I developed the exercises, and there is no requirement that the exercises follow a particular order.

10 84 N.H. 114, 146 A. 641 (1929).

ered. According to the Court, it was just as if the doctor had promised to fix a machine, rather than a hand.

As soon as we have finished a review of the case, no later than the second or third class, I divide the students into groups of six or seven, to act as "juries." I distribute my modern version of the facts with updated dollar amounts and more detail about expert testimony regarding damages. I ask each group to spend part of a class session deliberating and to reach a verdict on damages. This is an icebreaker for the students; I use it to get as many of them talking to me and to each other as soon as I can. Of course, the groups produce a wide range of verdicts. Beyond having to articulate to their fellow group members the difference between reliance damages and expectancy damages, the students discover that the difference between reliance and expectancy damages is not as clear in operation as it may appear in logic. Consistency in legal rules does not necessarily mean identity of outcome.

The first substantial exercise is a version of moot court. We reach it after reading and discussing the next four cases in the Dawson casebook. The issue is how to select the proper measure of expectancy damages. Even when we agree that the victim of a breach of contract should receive his lost expectancy as damages, we must still face the question of whether the damages should be determined by the amount it would actually cost to complete the promised performance, or should be limited to the expected income (or market value) lost by reason of the breach. I modeled the problem after *Freund v. Washington Square Press*.<sup>11</sup> In my example, a would-be professor has written a book about popular attitudes towards comets and has secured a contract with a publisher. After it has been taken over by a conglomerate, however, the publisher declines to publish, admittedly in breach of the contract. The author has lost anticipated royalties, but, by the uncontradicted evidence given in the problem, the royalties would be less than the \$2,000 advance which the author has already received and which the publisher has allowed him to keep. Rather than relying on lost royalties, which would net him no additional payment, the author seeks the amount it would cost him to print and distribute the book, an amount exceeding \$15,000. The publisher resists paying that amount. The students' task is to argue and decide what the proper measure of expectancy damages

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11 34 N.Y.2d 379, 314 N.E.2d 419, 357 N.Y.S.2d 857 (1974).

should be.

The *Freund* case is not in the Dawson casebook. I specifically instruct the students not to conduct any research beyond the casebook.<sup>12</sup> To be on the safe side, and to throw off any eager-beaver students intent on finding the "true" answer, I have added a few facts that could arguably distinguish *Freund*. I have not found that building from a real case skews the result. Since the exercise comes so early in their careers, the students seem to have little understanding that they might be able to find a useful case in the library, or even in commercial course outlines.

The model I use for the proceeding is an arbitration based on a record of stipulated facts. To do the exercise, I divide the students into groups of seven or eight. I assign three or four of each group to sit as a panel of arbitrators, who will decide the dispute. I divide the remaining four students in the group into "law firms" of two each, representing either the publisher or the author. Their task is to use oral argument to persuade the arbitrators to award damages based on the approach—either lost royalties or cost of completion—that favors their client. By using only stipulated facts, I let the students concentrate on making an effective legal argument. Although I describe the proceeding as an arbitration based on stipulated facts, it has the structure of an appellate argument on a fixed record.

There are no written briefs. In return for their courage in standing up to argue, I excuse the advocates from submitting anything in writing. The arbitration panel, however, must render its decision in a written opinion.

I usually use two class periods for the preparation of the

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12 The Dawson casebook presents the issue nicely. It juxtaposes *Groves v. John Wunder Co.*, 205 Minn. 163, 286 N.W. 235 (1939), with *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963). In the former, the court chose cost of completion as the proper measure of expectancy damages: it held that when a defendant had mined commercial land for gravel and then failed to level the mined land as the contract had provided, the plaintiff could recover as damages the \$60,000 cost of leveling the land. The court decided that awarding the cost of completion was not a windfall to the plaintiff, even though full performance of the contract would have only increased its market value by about \$12,000. In *Peevyhouse*, in striking contrast, a different court held that awarding the cost of completion for the breach of another land restoration contract would be a windfall. The proper measure of expectancy damages from a strip mining company that failed to perform its contractual promise to restore the stripped land was the \$300 diminution in the value of the land, not the \$30,000 cost of restoring the land. The Dawson casebook presents no easy way to reconcile the cases, but provides a rich texture of various considerations and arguments.



arguments, and one class period for the arbitration groups to conduct their hearings. I need two separate rooms for preparation. On the first preparation day, I instruct all the publisher's attorneys to meet in one room to discuss the case, and all the author's attorneys to meet in another room. Next, I instruct each group of arbitrators to meet to discuss the case on their own. I spend half of the class period meeting with the publisher's advocates, and the other half meeting with the author's advocates. I listen to their discussion, answer questions they might have about the proceeding, and ask them suggestive questions, such as what passages from the cases in the casebook they will use to support their arguments, what analogies they think are good ones, or what they think the other side will say. While the discussions may seem practical and procedural, they quickly become an incisive way to deal with the substantive issues in the casebook, since it is easy for the students to see the importance of articulating their claims clearly and using the cases as persuasive authority.

On the second preparation day, I let each team of two advocates meet alone to put the final (or not so final) touches on their arguments, while I meet with all the arbitrators together, to answer their questions about the proceeding. (Can they ask questions? How much time should they allow? Should they let the parties argue out of order? What arguments do they think the advocates will make? What aspects of the case do they find most troubling?) I have always been able to find enough available rooms to conduct the arguments simultaneously, especially since the arbitration format allows the proceeding to take place around a table. Conducting simultaneous arguments makes it unnecessary to engage in a more complicated scheduling exercise, and also minimizes the time I must spend observing.

I do not grade the exercise. With a class of any size, it would be impossible to observe all the oral arguments. I think it could be unfair to judge students on the basis of something so complex as an oral argument when we have not spent much time studying the elements of good argument. While the written opinions would provide something more concrete and analytic to grade, they are a joint effort of the arbitrators, reflecting in part who was most interested in (or least able to resist) putting pen to paper, or key to cursor. Moreover, if I were to grade the results, I would be inclined to consider the doctrinal substance of the opinions. That would make me much more the "judge" of the matter, placing the students in the accustomed student position of "one who is to

be judged." If the students are to understand what persuasion is, I think it is important that they undergo the experience of "being persuaded" in an unsullied fashion, without the teacher's thumb on their balance.

Although I do not grade this or the subsequent exercises, I encourage the students to reflect on what they have done, and I provide them with a modest amount of critique. Once the arbitration panels have submitted their decisions I make copies of all the arbitration decisions available in the library, and reserve half of a class for discussion of the exercise. The discussions can include anything that the students find interesting, but I usually find an opportunity to ask them what were the most telling or persuasive parts of the argument. From that, I am usually able to draw the moral that persuasion often goes hand-in-hand with articulation of specific, concrete facts described in a way that makes quite clear their connection to a rule of law. If there were few examples, I can ask the students whether they would have found the argument more persuasive "if . . . [filling in the blanks]."

While this is not an exercise in questioning witnesses, or making closing arguments, or any other aspect of trial practice with the possible exception of legal argument, its similarity to NITA/methods teaching may already be apparent. It keeps the students firmly grounded in thinking about what it takes to elicit a decision in favor of their client. The doctrinal rules play a part, but not for the purpose of developing a common understanding of the single best rule for choosing between the cost of completion and the diminution of value. Different panels can fairly come to different decisions. The exercise highlights the instrumental role of doctrine, as part of the lawyer's rhetorical repertoire and as part of the thinking process of the persons to whom the arguments are addressed.

The next exercise, a short one, comes after we have traversed more case law and arrive at restitution. We study *Vines v. Orchard Hills, Inc.*<sup>13</sup> which holds that in certain circumstances a breaching party whose breach is not willful may, despite his breach, obtain restitution of the value he gave the non-breaching party. In addition, restitution is only available to the extent that the innocent party was not harmed by the breach. In the case itself, the plain-

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13 181 Conn. 501, 435 A.2d 1022 (1980).

tiff sought restitution of the down payment he made on the purchase of a condominium, after he breached the sales contract and refused to close because his employer transferred him to another state.

The case was remanded for further proceedings. I ask the students to pretend they are the new lawyers for buyer and seller on remand. Their simulation task is to list the facts they would like to collect and the witnesses they would like to hear from in preparing for the new trial. I do not divide the students into teams, but simply use part of a class period to discuss their lists *en masse*. The exercise gives me an opportunity to introduce the students to the distinction between the concept of the "legal elements" of a claim and the factual propositions that support or counter those elements. This leads us to the point that most "facts" of any consequence in litigated matters are largely matters of inference.<sup>14</sup> For instance, the students understand from the case that restitution will only be available to the buyer if his breach was not willful—lack of willfulness is one of the legal elements of the claim for restitution—but most do not initially see what the facts might say about the question of willfulness. The court indicates that a job transfer at the employer's behest would not be willful, but for all we know the employee himself may have requested it for his own reasons. Identifying the person who instigated the transfer might in turn be related to the reasons or motives that each had for the transfer. Each of these inquiries are thus based on inferences, and each inference leads to further factual propositions. This method of putting facts together in a coherent order is a critical part of preparing and presenting cases.<sup>15</sup> While we do not discuss the techniques of pretrial discovery in the class, by introducing students to this manner of thinking about cases I seek to provide the framework of facts and legal ideas that discovery methods are meant to serve.

From restitution, the casebook moves on to equitable remedies, liquidated damages, and arbitration. These simulations follow the same pattern. We begin by discussing in class how to plan to negotiate a dispute about the meaning and scope of a restrictive covenant in an employment situation. I use the problem present-

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14 See Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 UCLA L. REV. 611 (1987).

15 See D. BINDER, P. BERGMAN & S. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* ch. 9, at 145-64 (1991) ("Theory Development: Developing Potential Evidence").

ed by the Practising Law Institute instructional videotape on negotiation. After our discussion, I show the tape in which Joseph Harbaugh and James Freund demonstrate and discuss the negotiation of the issue.<sup>16</sup>

I quickly follow this with the second substantial exercise. I ask the students, as lawyers for contracting parties, to negotiate a restrictive covenant and a liquidated damages clause for an employment contract between a computer expert and a chain of retail stores. The chain wants to upgrade its computer system; the expert wants to enhance her career, even though it involves a move from Oregon to the East Coast. I also ask the students to negotiate an arbitration clause, if they think it would be useful.

As with the advocacy exercise, I assign the students to work in pairs, on the assumption that they should begin to feel comfortable with the idea that the practice of law is a collaborative enterprise. It has been my practice to assign roles so that each student negotiates across the table from the student who was his or her advocacy partner or fellow arbitrator in the arbitration exercise. I also try to match each student with someone, other than his or her former partner, who was in that student's working group in the arbitration exercise. Former adversaries might find themselves partners in representing the employee, while a former arbitrator might be teamed with a former advocate representing the employer. I engineer these arrangements to introduce the students to the discomfiting fact that, in the practice of law, adversaries one day can become collaborators the next. The switch also provides me with an opportunity to point out to the students the extent to which negotiation is an exercise in persuasion. Negotiating opposite someone who was formerly a partner makes it easier for the students to understand the subtleties of the other side's predilections and viewpoints, and to realize that such understanding is a crucial element of persuasion.

We do not use class time for the negotiations. The teams of students schedule and conduct their negotiations on their own. The negotiators must reduce to writing the contract provisions to which they have agreed. If they cannot agree, they must submit to me the last proposals made by each team.<sup>17</sup> I place copies of the

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16 *Basics of Negotiations* (Videotape, Practising Law Institute 1984). See also J. FREUND & J. HARBAUGH, *PRIMER ON NEGOTIATION* (1984) (handbook prepared in conjunction with the videotape).

17 I have had to mediate heated disagreements between the two sides as to what

agreements on reserve in the library, after adding some marginal comments to them. Sometimes I distribute examples of particularly noteworthy contracts, and discuss them during the class period we spend reviewing the results. Sometimes agreements are "noteworthy" because they contain dreadful ambiguities, or say just the opposite of what the drafters probably meant, or leave important provisions completely unstated. Thus, our critique of the exercise can include reflections about the difficulties of making words work, and the dramatic aspects of negotiation.<sup>18</sup>

Just as the arbitration/advocacy exercise presents the students with a wide spectrum of possible arguments from which to choose, the negotiation exercise permits them great flexibility and inventiveness in constructing contract terms. For me, showing the students the rich possibilities of detail and precision is an important point of the exercise. They may learn, for instance, that a liquidated damages clause that pays attention to the factual details of the situation and varies with the time remaining on the contract, or with the type of breach or opportunities for mitigation, may meet the parties' needs more effectively than a single, arbitrarily imposed dollar amount. It may be legally more secure as well. A restrictive covenant can similarly be crafted to track the specific interests of the parties.

The topics of misrepresentation, unconscionability, and the parole evidence rule become the occasion for an exercise in interviewing. Using an installment sales contract and facts from an actual New Jersey case, handled by one of Rutgers' legal clinics, I ask the students to interview, in class, a prospective client in a consumer fraud matter. (I usually play the role of the client.) After being contacted by telephone and visited in his four-apartment home by a salesman, the client had signed a contract for the installation of storm windows. Despite the language of the contract, the client thought he was buying replacement windows. The windows could be purchased and installed for less than \$50 each, which was in fact what the seller paid its own

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the last proposals of each side actually were.

18 I usually seek to make three points with the negotiation exercise: that negotiation has a strategic structure that affects how the positions move and where the parties end; that good negotiation requires close attention to, and clarity about, words; and that negotiation situations often contain hidden opportunities for agreements that create value for *both* parties and can better serve their interests than a simple barter or trade-off. I have no difficulty finding the opportunity to raise these issues when we discuss the students' reactions to the negotiations.

supplier to deliver and install them. The contract, however, calls for the installation of 108 of them at over \$250 apiece. With installment sale interest, the total contract amount exceeds \$80,000. The substantial difference between the contract price and reasonable retail cost, coupled with the in-home solicitation and the disagreement about what kind of windows were promised, gives the students the opportunity to consider the unconscionability doctrine from both its procedural and substantive dimensions: Did the door-to-door salesman mislead the homeowner? Is the price simply too high to be enforceable?

As with the pretrial preparation exercise, I intend to bring out the relationship between law and fact in developing a case. Unless the students can articulate the legal doctrines governing the case, they will not ask the client questions that will elicit the most pertinent facts. But if they jump to a conclusion about the legal nature of the case too soon, they will not find out as much as they should know about the facts. In some years, the lawyer who tried the actual case has come to class to describe the trial, including dramatic highlights such as the salesman who refused to remove his sunglasses during his testimony, the seller's lawyer who fell ill and caused a mistrial just when things began going badly for his client, and a jury that initially announced a verdict for the seller when it meant to find for the homeowner.

The final major exercise asks the students to draft an advice letter to a hypothetical client, based on a memo describing the facts as reported by the client. The principal issue is whether a series of meetings and letters between the client and a prospective employer created a contract, or whether the client's purported acceptance varied so much from the terms of the purported offer that it became a counteroffer, resulting in no contract at all. The problem also presents practical issues of how to estimate the damages the client might receive in light of his duty to mitigate, and how to anticipate and advise the client regarding the cost of litigation.

## II. THE ROLE OF THE SIMULATIONS IN THE COURSE

In conducting these exercises, I share two important goals of the NITA program: I want the students to enhance their ability to communicate persuasively, with legal concepts and relevant facts, and I want them to learn to act ethically while carrying out lawyers' tasks.

I believe the key to learning persuasion lies in developing the skill of making use of the specific and the general, the concrete and the abstract, at the same time. This is a well-understood and uncontroversial aspect of the law. We all know how vigorously the particularities of each case drive it forward, how small facts can derail the theory a lawyer would most like to use, or how quirks can make cases hard to decide within established categories and thus precipitate the fashioning of new legal rules. At the same time, we know that particularities are never enough. They need expression in terms of general doctrinal categories. I find that law students have little appreciation of the proper balance between the particularities of the case at hand and the generalities of doctrine. This does not surprise me. The task of deciphering cases—that formidable obstacle which engulfs the students' first year—points entirely in one direction: from the particular to the general. Again and again, their teachers and casebooks ask students to take the facts of some real world event and abstract from it a general rule. Not content with this demand, we then ask the students to graft the rule onto a system of higher order rules. Always struggling to expand the specific to the general,<sup>19</sup> students have no occasion to work on the most effective balance between the two.

I intend the simulation exercises to be an antidote to this one-way demand. Rather than asking the students to generalize from the particular, these exercises ask them to construct an approach to the discrete situation that is bounded by the specifics of the problem. Of course, they must invoke the general in doing so: they are asked to couch their arguments or proposals in terms that fit within applicable, general legal doctrines. But invoking the general is only effective to the extent it is useful in making persuasive sense of the particular issues and facts at hand. In effect, I ask the students to shift their attention from the general to the particular.

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19 I do not ignore the fact that good classroom teachers are properly quick to criticize students who invoke airy generalities. Time and again, the teachers insist that the students bring their general statements down to the specifics of the case. This is not what I mean by attention to specifics, however. The purpose of most "anti-airiness" dialogue in classroom discussion is to get the students to state legal doctrine with precision. Once that precision is achieved, the class can move to the next step of developing a more abstract understanding of the doctrines as an entire body of law. The attention to specifics that works best in the practice of law, however, requires a lawyer to stay with the specifics more intensely, finding ways to develop the rich potential of the details.

Making use of the particular, not only the general, is the key concept that runs throughout NITA's various techniques. The technique of cross-examination requires questions that each focus on one image or idea and require the witness to communicate only one bit of pertinent information. Direct examination asks the examiner to elicit concrete and specific images, because it is such images that will tell the story in the most persuasive way. Developing a theme for the case, to run from opening argument through summation, is a necessary component of good trial work because it provides the trier of fact with a framework that the trier needs in order to understand the meaning of the particular details of the case.

While my contracts exercises do not require the students to engage in trial advocacy tasks, they nevertheless require the students to make good use of the particular and the specific. The students' work becomes more effective and more accomplished to the extent it is entwined in the specifics of the matter at hand. To succeed, the students should give their arguments and reasoning the rich sense of context and detail that are equally the mark of a good trial theory of the case.

The issue goes deeper than this. The need to manage both the general and the particular in a professionally effective way is deeply intertwined with another fundamental aspect of good legal practice—managing the tension between discovery and invention. When an accomplished litigator articulates an effective theory of the case, conducts the direct examinations with telling detail, and maneuvers the opposing witnesses into providing discrete and helpful facts, has she invented the case by the artfulness of her work, or has she merely discovered what was present in the facts all along? Discovery is not a sufficient description. She made many important choices, avoiding facts and arguments which, while true, would have detracted from the persuasive effect of her presentation. She planned with too much care, rejected too many possible arguments and questions, and suffered too many low points when the case seemed bleak for her efforts to be fully described as merely discovering what already existed. Even the pretrial process that is formally called discovery only takes on life when the litigator maneuvers it into being something more than a rote recitation of "just the facts."

Is her work invention, then? That isn't a sufficient description either. As inventive as the litigator is, when the dispute revolves around events that occurred in the past she cannot create good



facts, ignore sticky ones, or put words in witnesses' mouths. The process is neither exclusively invention nor exclusively discovery. It is some other process that partakes of both.

This intriguing question gets to the heart of what occurs in law school classes and in NITA courses. It explains why the two can seem so different. It is brought to mind by Roger Penrose's recent discussion of a similar issue in the field of mathematics. The tension between invention and discovery is very much alive for Penrose as he tries to understand the nature and meaning of mathematical theory, just as I find it important in thinking about litigators' work. In his recent book about mathematics, physics, and artificial intelligence,<sup>20</sup> Penrose tells that some mathematical discoveries and formulae have for him the quality of invention, and some have the quality of discovery.

Is mathematics invention or discovery? . . .

These are the cases where much more comes out of the structure than is put into it in the first place . . . . However, there are other cases where the mathematical structure does not have such a compelling uniqueness, such as when, in the midst of a proof of some result, the mathematician finds the need to introduce some contrived and far from unique construction in order to achieve some very specific end. In such cases . . . the word "invention" seems more appropriate than "discovery."<sup>21</sup>

Penrose cannot resolve the question of whether mathematics is merely the artifact of human invention, or whether it has some transcendent existence that is discovered by the insightful mathematician. He does not suggest any criterion other than intuition to distinguish invented theorems from those that are discovered, and he does not reduce all mathematics either to invention or to discovery.<sup>22</sup> Rather, he seems satisfied to live with the idea that invention and discovery are some kind of odd couple residing together in the human mind.

Litigation has a similar inevitable duality. The lawyer's creative powers of invention are directed to producing statements, or theories of the case, that have the attribute of being discovered. The lawyer's assertions ring true when we understand that they

20 R. PENROSE, *THE EMPEROR'S NEW MIND: CONCERNING COMPUTERS, MINDS, AND THE LAWS OF PHYSICS* (1989).

21 *Id.* at 96-97.

22 He could do so, for instance, by arguing that "discovery" is no more than cleverly disguised human invention, or that "invention" is simply inelegant discovery.

refer to something that "really" exists outside the courtroom, even while we know that they could not exist or be discovered within the courtroom without the lawyer's inventive powers. The highest art taught by the NITA method is the skill of inventing discoveries.

By now you may have started wondering whether a lawbook makes a sound if it falls from the library shelf when no lawyer is around to hear it. Let me bring the issue back to the law school classroom. The issue is important because the same dynamic of discovery and invention that exists in the litigation of cases also exists in the classroom treatment of law. In the classroom, teachers and students face a choice between discovery and invention similar to a litigator's choice. How they deal with the choice has important consequences for the type of learning that occurs.

My argument is that traditional classroom teaching lands too heavily on the side of discovery. This is not what many teachers, myself included, intend from our analysis of cases and doctrine in the classroom. As teachers in the University tradition, we commonly strive to demonstrate how doing law is an inventive and creative process. We focus on the invention involved in the creation and change of legal doctrine and ignore the invention that lawyers devote to the marshalling and presentation of evidence. Nevertheless, we are concerned with invention. Much of the intellectual structure of the classroom, however, drives students away from invention and leads them instead to focus on discovery. Their situation seems inevitably to be at odds with the aims of classroom teachers.

Discovery is what students want, and what they need to survive in law school. First, they must discover the rule that the teacher believes is lurking beneath the wordy surface of casebook opinions. They can do this by reading the cases, by using fellow students' outlines, and/or by reading commercial course outlines. Once they have drawn the rough map and filled in the primary colors of what the cases mean, they have accomplished much of what they must do to survive.

Writing exams also calls for discovery, to the virtual exclusion of invention. The standard student approach is IRAC: *Identify* the issues, state the *Rule*, *Apply* the rule, and state a *Conclusion*. Mastering this, the student can do quite well. The fundamental key to the process—identification of the issues—is simply discovery of what is immanent in the examiner's question.

For students who wish to go further, the next step in master-

ing a course is to write an outline on their own. This is nothing more than an exercise to discover the underlying framework of topics and doctrines that gives the course coherence.

Even the Socratic method itself highlights discovery rather than invention. Putting aside the question of whether the classroom questions that most law professors ask should properly be called Socratic,<sup>23</sup> the Socratic method at its best aims to have the student discover what she did not previously understand. Often the thing to be discovered is no more (and no less) than the limits of the student's assumptions and beliefs. The method does not allow much room for choice, synthesis, or creativity by the students.

Discovery is thus necessary for survival and success in the law school classroom. More dangerously, however, it is also sufficient for those purposes. Through discovery students can handle quite well the system of casebooks, quasi-Socratic classroom questions, and exams which they must master in order to graduate. Why should we expect them to launch themselves into the uncharted waters of invention?

For me, bringing NITA into the traditional classroom provides students with an opportunity and incentive to move away from a single-minded concern with discovery. The exercises invite them to engage in invention.<sup>24</sup>

This need to replace discovery with invention explains why it is crucial that students act as arbitrators as well as advocates in the simulation problems. It is also an excuse for not spending the time to grade the exercises. If I were to sit on the arbitration panels and participate in the decisions, rather than relying exclusively on students to judge the case, I fear the students would shift their focus to trying to discover my views of the right answer and the right reasons. The students who constructed the advocacy arguments would pitch them to me, and the students who sat to decide the matter would be looking over their shoulders towards me to discover whether they had got it right. Similarly, if I were

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<sup>23</sup> See generally Neumann, *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725 (1989).

<sup>24</sup> I do not mean invention simply for the sake of inventiveness. I do not use "pure" invention exercises, such as brainstorming or creating topsy-turvy simulated worlds. Such exercises can be quite stimulating to get the students out of ruts, to start their creative juices flowing, or even to imagine how to reorganize society in a more just manner. Pure invention, abstracted from the context of legal questions, will not take students closer to the vibrant edge between discovery and invention in legal matters.

to judge the negotiations by the quality of the outcomes achieved, or the skill demonstrated in negotiating, the students would again be led to try to discover what I had in mind as a good job, and bend their efforts accordingly. Without this burden, the sole object of their efforts is to persuade a fellow student as inexperienced as themselves, and they are more free to try creating an argument that will work.

The other important goal of the NITA method is training in legal ethics. The exercises have less to offer here than they do for the powers of invention. I have not written ethical issues into the exercises, and I only assign one reading on an ethical point that the exercises raise. In the negotiation exercise we often discuss the problems of disclosure and concealment, but these are as much doctrinal contract issues of misrepresentation as they are issues of candor in legal ethics. The advice letter problem raises some issues of candor to the client and the meaning of zealous representation in the face of limited client resources, but these are not prominent. In this regard, the exercises are similar to traditional NITA exercises, which also do not treat ethical issues in a systematic, prominent way.

Although the exercises do not treat ethical issues explicitly, I think they can provide an important context for sound thinking about legal ethics. Thinking clearly about ethical issues requires two things of lawyers: they should be able to reason soundly about lawyering technique, and they should be aware of the extent to which they can make choices about the actions they take. When lawyers act from rote, merely repeating the methods they have observed or used in the past, their thinking about ethics can become little more than *post hoc* justifications for what they already do. When they can give names to the elements of the techniques that they use, however, and can reason about the purpose and effectiveness of various techniques, their power to make ethical judgments about their actions is increased. Ethically troublesome action becomes more justifiable if it is firmly linked to a sound and effective technique. Conversely, action may remain ethically suspect if a lawyer cannot justify it by reference to technique, or if she cannot understand through a reasoned analysis how the technique at issue makes sense in the overall context of all the effective techniques that are available.<sup>25</sup> Building a vocab-

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25 For an extended discussion of how lawyers can use moral reasoning to make

ulary about technique and a practical understanding of how to use it are thus necessary for effective moral reasoning about technique. While simulation exercises in the context of a doctrinal course do not enable students to master the vocabulary or develop full understanding, I view them as steps in the right direction.

The theme of choice also has ethical implications. Moral responsibility increases with greater choice. To the extent lawyers have a range of options available to them, all safely within the scope of professionally responsible choices, their need to understand that they are ethically responsible for their actions becomes more acute. The large simulations in legal argument and negotiation emphasize that it is important for students to exercise their own best judgment about the wide range of plausible arguments or potentially effective actions available to them. The students are so entranced with the threat and drama of the situation, however, that they often do not fully appreciate how much choice is in their hands. The third major simulation, the advice letter, provides them with an even greater range of possible action. As part of that exercise, I assign as the one explicitly ethical reading a brief excerpt from Robert Gordon's analysis of the extent to which lawyers are independent of the wishes and commands of their clients.<sup>26</sup> Gordon vividly describes the wide range of equally proper opinions a lawyer can write in an advice letter to a client about a business plan that somewhat concerns the lawyer. Gordon's point is that, whether or not he or she is consciously aware of the options, the lawyer inevitably makes choices, and thus bears some responsibility for what he or she does.<sup>27</sup> This seems to be a useful point to make to the students after I have given them an exercise that requires them to choose from a wide variety of equally plausible and defensible choices.

### III. LIMITS

As much as I enjoy creating and conducting these exercises, however, and as unsatisfying as I would find it to teach without

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ethical judgments, see D. LUBAN, *LAWYERS AND JUSTICES: AN ETHICAL STUDY* 104-74 (1988). While Luban neither discusses the details of lawyering technique nor shows how thinking about technique relates to moral reasoning, his approach is appropriate for thinking about the ethical propriety of particular techniques.

<sup>26</sup> Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 26-28 (1988).

<sup>27</sup> For the argument that lawyers inescapably have discretion when they make ethical decisions, and thus must take more active moral responsibility for what they do, see Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

them, I cannot say that they are an outstanding success. The exercises still rub roughly against the casebook. Sometimes this friction produces lively sparks; sometimes it only results in scrapes and bruises. By the end of the semester, I often feel that the exercises have been incomplete, that I have missed important opportunities, and that the students have not taken the exercises anywhere near as far as they could go.

Part of my dissatisfaction stems from the very limited amount of time available for this work. Even after I have mustered the courage to skip large sections of the casebook, I am still left with very little time for the exercises. Each year, a different issue arises that I want to develop with the students, but for which I have no time. Whenever the students doing the negotiation exercise have difficulty reaching an agreement, for instance, I wish I could spend the time reviewing their negotiation actions in detail to help them search for more effective ways to communicate and to act. When, as all too frequently occurs, the students' written agreements lack even basic precision and completeness, I regret not having the time to turn the class into a seminar in contract writing.

The time spent covering doctrinal matters often forces me to shorten the last major exercise. Rather than ask the students to meet in groups and draft their own letters, I will often draft a letter myself. I try to include injudicious language and inappropriate points as an overly aggressive and inexperienced lawyer might. We then spend a class session playing the game of "how many things can you find wrong with this document?" That might teach something, but it weakens the simulation method because it permits the students to shed the role of lawyer and return to the role of student.

For anyone who appreciates the rich complexity of legal skills, and the great amount of time that can and should be spent in teaching them, these stringent time limits will be frustrating. The students have only the briefest chance to glimpse and apply the elements of skillful lawyering. They have no opportunity to repeat their tasks, although repetition is essential to sound skills development in the NITA fashion. And a faculty-student ratio of one to thirty or less prevents me from giving them the detailed, individual critique that effective skills development courses must have.<sup>28</sup>

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28 Steven Lubet correctly notes that role assimilation and individual critique are the

These simulations are also hampered by the fact that I have not included the elements of trial practice itself. The simulations all depend on the students' assumptions about the existence and meaning of facts. Yet the trial process itself does strange things to facts. It prevents lawyers from making use of "facts" that cannot effectively be expressed in the format of a trial. At the same time, it keeps the existence and meaning of facts somewhat open ended. When an experienced lawyer makes judgments about the "facts" when drafting documents or giving advice prior to trial, he or she usually understands that the "facts" will probably undergo some subtle and not so subtle changes when they are cooked in the crucible of the trial process. Students with no experiential understanding of the trial process itself are poorly equipped to make such subtle but important judgments. When I discuss the simulations with students, I am often aware that my comments are grounded in my experience with trials. As a result, I must either start lecturing to students based on my experience, rather than drawing their learning from their own, or I must ignore issues that I find interesting or important.

Despite the importance of understanding trial practice, I think it is unrealistic to bring trial practice simulations into a first year doctrinal course in a systematic and effective way. Lack of time is, again, a major obstacle. If I had to pare away even more doctrine to accommodate trial practice skills, I would not think that I could honestly call what remained "Contracts." More importantly, however, trial practice lends itself even less well than other practice subjects to the bits and pieces approach. Learning trial practice requires students to develop a very rich and intense experiential base. Courses that include only trial practice for an entire semester can provide some of this. Courses that provide trial practice instruction in intensive periods over several weeks, while students are taking no other courses, may provide the experiential base more effectively.<sup>29</sup> Even then, in my experience, no matter how intensive a trial practice course may be, law students do not learn trial practice skills as quickly or as effectively as do practicing lawyers who attend NITA courses. I attribute this to the fact

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keys to the simulation method. Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 125 (1987). The exercises I use fully adopt role assimilation, but allow for virtually no individual critique.

<sup>29</sup> Choosing between a trial practice method extended across a semester and one intensively packed into a few weeks is a matter of some controversy among trial practice teachers. I do not take sides; neither is an option for me in the Contracts course.

that practicing lawyers have a much richer experiential base than law students, and the experiential base greatly facilitates learning about how to act. But I am teaching law students, not lawyers, and cannot rely on the experiential basis necessary to make trial practice come alive.

Beyond the issues of extent of experience and available time, the content of trial practice exercises makes them less suited for inclusion in a doctrinal course than are the exercises I use. Trial practice can draw students away from explicit attention to legal doctrine. Simulated trial practice exercises typically have a neutral, abstracted quality that flourishes quite independently of any substantive legal issues. The doctrinal issues that we are studying in the contracts course, however, play a lively and direct role in each of the simulations I use. The arbitration argument requires choosing a legal standard for a fixed set of facts. The negotiation problem demands careful thought about the legal and practical limitations on restrictive covenants and liquidated damages clauses, and also requires students to think about the mitigation of damages. The advice letter requires an assessment of offer and acceptance, the mirror-image rule, reliance, and mitigation in order to judge the chances of prevailing in litigation. I could fashion exercises that focus in much greater detail on the practice techniques at hand, with more reading, more discussion, and more critique of what the students do. I feel less concerned minimizing the explicit analysis of technique for these exercises than I would for trial practice simulations. Arguing, negotiating, letter writing, and asking questions are more frequently within the students' pre-law experiential background than trial practice is.<sup>30</sup>

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30 By using simulation exercises other than trial practice, I have muted some ethical issues that can arise when exercises are used to simulate trials and the search for truth. Both Kenney Hegland, in Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69 (1982), and Steven Lubet, in Lubet, *supra* note 28, have incisively noted the moral cost of teaching trial practice with simulations rather than with real cases. In real trials, technique is constrained to a degree because it is meant to elicit some "truth" that exists beyond the trial itself, and because real clients and real witnesses create an additional moral dimension. Truth and moral concerns for clients and witnesses understandably take a back seat when students are free in a simulation to apply any technique that "works." Factual or historical truth is not an issue in the simulations I use, however. The facts are given in the appellate argument/arbitration exercise. The point of the negotiation exercise is to construct an agreement which will be acceptable to the degree it satisfies the needs and expectations of the parties, not whether it comports with some claim of objective truth. The advice letter depends more on deciding how to act in the face of factual and legal uncertainty than it does on persuading someone of the truth of a particular claim.



I accept this frustration as a necessary part of putting the NITA method into a traditional, doctrinal course. Of course, each time I feel compelled to move on to the next pages of the casebook and ignore the myriad of fascinating skills issues that the students' performances raise, I wish the course had twice as many credits and met twice as often. Sometimes I have even wilder fantasies, wishing to eliminate the current course divisions and replace them with innovative approaches that would weave issues of skills, good lawyering, legal doctrine and social justice throughout the educational program. But such reforms are difficult to create, and difficult to sustain. They cannot happen without wide-ranging support from a faculty and administration committed to the difficult task of institutional change. In developing and using these exercises, I am trying to take the NITA method as far as possible within the confines of a traditional, easily administered system of law school courses.

Beyond my inability to help the students develop their lawyering skills in any systematic or rigorous way, I have found another frustration that troubles me more. The students' work in the exercises, including the arguments they make and the opinions they write in the arbitrations, the reasoning and proposals they advance as negotiators, and the agreements they draft as a result of negotiation, frequently lacks much of the contextual detail and the invention that skillful lawyers could develop from the problem.<sup>31</sup> To me, this means that the exercises are not doing the full job they should.

I drafted the arbitration problem with an eye on the rich variety of arguments and approaches that the casebook makes available. Similarly, I chose the subject matter for the negotiation exercise precisely because it can provide a good opportunity for the creative use of rich and varied detail. With so many different ways to structure a restrictive covenant and a liquidate damages clause to meet the particular expectations and needs of the parties, the students have a broad opportunity for invention. A different problem, such as a simple negotiation over the price of a commodity to be sold, would provide a much less fertile field to work in. The students would be more likely just to haggle over

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31 Not all practicing lawyers are skillful. For a discussion of the failure of both lawyers and law students to make use of effective detail and reasoning in the negotiation of simulated legal disputes, see Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65 (1985).

price, trying to drive each other to accept their preferred deal by committing themselves to a bargaining position and firmly refusing to budge (at least until the last minute). They would miss what is most rich and difficult about negotiation.<sup>32</sup> Consequently, I am disappointed when the students fail to do much more than scratch the surface of the possibilities when they argue the arbitration problem or negotiate the contract terms.

This superficiality may occur because students in their first semester of law school still have such difficulty identifying and expressing legal doctrine, or even knowing what it is. Consequently, they have no idea how to use it when they have to create something in the course of an exercise. I may aggravate this deficiency by allotting insufficient time for preparing and discussing the exercises. After all, crafting an argument, or a negotiation approach, or a decision that effectively draws on the specific details of a situation and makes effective use of telling facts requires even practicing lawyers to pay sustained attention over a fairly long period of time. The rhythm of the law school day, which uses the clock and the turning pages of the casebook to keep the students on the move, works against this kind of detailed attention.

If either of these diagnoses are correct, they could make us pessimistic about the long term prospects for using the NITA method in doctrinal classes. If student inability to read cases and use legal doctrine is the issue, the solution would be to retreat to the two-step foundational model of legal education, in which learning about doctrine precedes learning legal skills. If lack of time is the issue, the most obvious solution would be to abandon the current method of structuring and scheduling courses in favor of some major innovations. That possibility, however, faces the substantial institutional obstacles I mentioned before.

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<sup>32</sup> A teacher could construct a buy-sell negotiation that contains rich possibilities for inventive agreements, but this would require writing in substantial detail about the financial and business situations of each of the parties. The negotiators could then examine those situations in the search for an agreement that provided more value than simple dollars for each party. Such problems work best when students have some familiarity with business needs and business situations. In addition, such facts would draw student attention away from the doctrinal issues that are the prime subject of the Contracts course. When a restrictive covenant and a liquidated damages clause are at issue, however, sound analysis and negotiation require the students to pay close attention to the relevant legal doctrines if they are to craft an agreement that is workable, durable, and captures the maximum mutual gain, as well as individual gain, that the parties can extract from their agreement.

Nevertheless, I remain convinced that detail and invention are the themes we should stress. I may have too firmly fixed in my mind a vision of what fine legal work is, and as a result become too impatient when students fail to achieve it on their very first try. I suppose I could try to open myself more to listening to them, trying to meet them on their own ground while modifying the exercises to emphasize those aspects of the work they seem most ready to do. More importantly, each year the students do put a great deal of energy into the exercises. Each year, the exercises provide something new, as they should, because new students are using their own perceptions and resources to create arguments or make deals.

I have only discussed contracts and some contracts exercises in this paper. I think the issues I have raised are generally applicable to using the NITA method in traditional, doctrine-based classes. For most classes, we will lack the time and the supervisory resources to train students in exercising legal skills in the thorough NITA way. But in most classes, the need to balance discovery with invention, and the need to focus on the details of a situation in order to invent, are important issues. With those in mind, I think it should be possible to construct exercises for most classes that open the door for students to learn these critical aspects of what the NITA method has taught us.