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Marjorie Murphy

Glen Weissenberger

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A PRACTICAL MODEL OF JURISPRUDENCE: EXTENDING REALIST THEORY

*Marjorie Murphy**
*Glen Weissenberger***

I. INTRODUCTION

Karl Llewellyn observed that the "skills" lawyers use in their work do not differ from the ordinary skills of all human interaction.[1] The truth of this observation may be obscured by the labels imposed on various lawyering activities. For example, lawyers asking questions are "interviewing," "cross-examining," or "taking a deposition," depending on the context; lawyers' speeches are called "oral argument" or "opening statement"; and lawyers discussing the resolution of a

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*Associate Professor of Law, University of Cincinnati; LL.M. 1985, Georgetown; J.D. 1982, University of Virginia; B.A. 1978, Rutgers College.

**Professor of Law, University of Cincinnati; J.D. 1972, Harvard; B.A. 1969, University of Cincinnati.

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1. Llewellyn believed that lawyers maintain the cohesiveness of society, and that every group has someone within it — usually not a lawyer — who performs the task of holding the group together by overcoming conflicts among its members. *See* Llewellyn, *Law and the Social Sciences — Especially Sociology*, 62 HARV. L. REV. 1286, 1291-92 (1949) [hereinafter Llewellyn, *Law and the Social Sciences*]; Llewellyn, *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1374, 1398 (1940) [hereinafter Llewellyn, *Law-Jobs*]. He viewed "laymen" as performing essentially the same function as lawyers with the same skills:

> [I]t is fascinating, as one watches a new family struggle with children who are just coming to talking age, to watch legally untrained parents — *and* two- or three-year-olds — revert to or reinvent such lawyer's techniques as the distinction, the extension of a rule by analogy, literalistic construction of an announced rule, or construction according to the spirit which giveth life; or to see them redevelop

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dispute are "negotiating." Universal communication and thinking skills underlie these lawyer behaviors.[2]

While this labeling may make lawyering more salable to the public, it undoubtedly has an unfortunate effect upon the thinking of legal educators. In the belief that these labels mirror unitary, discrete, lawyering activities, each reflective of a cultivated or specialized behavior unknown to the common person, lies a conclusion that the activities themselves must be taught to law students. This manner of thinking bifurcates the work of lawyers into behavioral and cognitive units with discernible limits[3] and suggests to law students that lawyers'

> almost *ab initio* the theory of notice and a hearing, or the theory against ex post facto law.

Llewellyn, *Law and the Social Sciences*, *supra*, at 1304; *cf.* W. TWINING & D. MIERS, HOW TO DO THINGS WITH RULES xiii (1976) (asserting that basic skill of rule-handling is not particularly legal).

2. The AALS Committee on Curriculum headed by Llewellyn called attention to the skills lawyers share with other liberally educated professionals, and urged law schools to develop "that use of art in language which is a major phase of the humanities . . . ." Bunn, Cavers, Falknor, Feezer, Moreau & Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 391 (1945). The committee further noted that "[s]o far as concerns the 'human-nature' phases of counseling advocacy or other skills of practice, they rest either in that wisdom which is the goal of all university work or else in a field called psychology . . . ." *Id.*

3. A dichotomization of lawyering pervades the literature on legal education. The activity portion of a professional task — "how to do legal research, to collect and sort facts, to interview, counsel, and negotiate, and to organize and manage legal work" — is described as "practical" skills, Wangerin, *Skills Training in "Legal Analysis:" A Systematic Approach*, 40 U. MIAMI L. REV. 409, 412 (1986), and as "technical" skills, Strong, *A New Curriculum for the College of Law of the Ohio State University*, 11 OHIO ST. L.J. 44, 47 (1950). The AALS-ABA Committee on Guidelines for Clinical Legal Education indicated that clinical legal studies may include activities such as interviewing, fact gathering and file investigating, diagnosing a client's problem, developing case strategy, counseling, drafting legal instruments and writing legal briefs, negotiating and settling, preparing for and conducting trials, and preparing appellate briefs and arguing appeals. AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, CLINICAL LEGAL EDUCATION 14-15 (1980).

Juxtaposed to the activity portion of a professional task are those analytical skills thought to compose the single umbrella skill of "legal analysis." Professor Wangerin summarizes the content and allocation of the dichotomy: "Skills can be divided into two categories. 'Dialectical' skills . . . include learning how to read and analyze cases, statutes and regulations, and how to construct legal arguments. The other skills are 'Practical.' . . . As a general rule, clinical or simulation courses teach practical skills." Wangerin, *supra*, at 411-12. The bifurcation is unsound for reasons developed in this article and introduced by T. Amsterdam:

> By no means all of us so-called clinical teachers . . . [of] counseling and negotiation and trial advocacy thought of ourselves as doing something properly described as skills training. We thought that what we were doing was no more or less skills training than what traditional classroom teachers or contracts and torts and crim-

"skills" are largely behavioral. Curricular offerings to teach these specialized skills focus upon the execution of discrete, divisible operations.[4]

Two course genres have evolved. In the first, the student performs a series of fact-specific, technical behaviors. In the second, the course design seeks to strengthen a student's interpersonal skills as a foundation to the successful performance of lawyer behaviors. The tendency to define professional legal skills coterminous with the multitudinous technical behaviors or with the interpersonal skills integral to these behaviors flows from the untested premise that the activity dimension of a professional task defines the contours of professional legal skills. This article challenges this premise.

Neither the discrete activities of lawyers nor interpersonal communication satisfactorily identifies the distinction between "asking questions" and "cross-examining" or "legal interviewing." This article contends that the professional roles of the lawyer in society distinguish a lawyer's activities from those of other professionals, and a lawyer's professional skills from ordinary human skills. Educators strive to teach students to "think like a lawyer." Educators should also strive to teach students to ask questions "like a lawyer," settle disputes "like a lawyer," and interview clients "like a lawyer." To define the phrase "like a lawyer" exposes essential lawyering characteristics and illuminates the distinctiveness of legal skills.

Twenty-five years ago Irvin Rutter rejected the identification of lawyering skills with lawyers' behaviors, asserting that a limited number of skills underlie the myriad activities of lawyers. These skills, according to Professor Rutter, are not severable from the context in

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> inal law had done when they taught students to read and interpret cases and to analyze legal doctrines . . . . In exactly the same sense we were doing skills training when we taught ends-means thinking, information-acquisition analyses, contingency planning, comparative risk evaluation in decisionmaking, and the like. These subjects seemed to us no less conceptual or academically rigorous than case reading and doctrinal analysis.

Amsterdam, *Clinical Legal Education — A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 615 (1984).

4. C. Menkel-Meadow has described two categories of modern skills education, "traditional process or skills courses, such as interviewing, negotiation, counseling and trial advocacy," and "substantive courses with clinical or fieldwork components, where the primary purpose is the study of the law and its doctrine in the context of the relevant legal institutions." Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 572 (1980). This article focuses on the more prevalent former category of courses and its theoretical base.

which lawyers operate.[5] The practical model of jurisprudence[6] offered here proceeds from Professor Rutter's conclusions by positing the primacy of lawyering to derive a taxonomy of legal skills. In section II, the Langdellian educational framework is rejected and its effect on modern skills education exposed. In section III, the four professional roles of a lawyer and the four units of information upon which the lawyer draws to execute those roles are described. In section IV, drawing upon the model developed in section III, "like a lawyer" is defined, and legal skills are distinguished from "precedent skills" such as interpersonal communication. Section V concludes the article by arguing that legal skills education must intellectually equip students to perform lawyers' roles and must provide opportunities for students to practice lawyers' roles so that students can acquire replicable legal skills.

II. REJECTING ELEMENTALISM

Modern professional skills curricula rest on two dominant theoretical models, both traceable to a legal pedagogy rooted in the Langdellian conception of legal education.[7] That pedagogy has compelled a

5. Rutter perceived a fundamental distinction between lawyers' "operations" and skills. Rutter, *A Jurisprudence of Lawyers' Operations*, 13 J. LEGAL EDUC. 301, 312 (1961). Professor Rutter called for his colleagues to identify legal skills. *Id.* Rutter illustrated his analysis in his discussion of doctrine: "[It] constitutes an intensely practical skill, perhaps the most important single skill of the practicing lawyer . . . . [D]octrine is only one part of 'the law,' often a comparatively small part." *Id.* at 307. Rutter went on to assert, "Even more importantly, the part that it does play cannot be adequately perceived when it is learned outside the context of lawyers' operations . . . ." *Id.* He then gave this example: "Only one who has suffered through the preparation of an estate tax return can adequately realize the contribution of this process to a grasp of the total fabric and interrelationships of the estate tax law." *Id.* at 326.

Llewellyn sounded thematically similar notes, stressing that one must study and understand the institution. Llewellyn, *Law and the Social Sciences*, *supra* note 1, at 1289-90. He, like Rutter, regarded the rule part of the "law-institution" as only one "*tool*-part" of the institution and viewed rules not as the substance of the discipline of law, "but instead as being *some* of the measures by which the men of the discipline go about the jobs of the institution." *Id.* at 1291.

6. The model presented here is designed to give discussants a common language and a common set of concepts on which to build analyses. This model hopefully will provide an effective medium for describing and discussing lawyers' skills. As Dean Mudd has noted, "[A] formula or heuristic device is useful precisely because it offers a conceptual framework within which complex ideas can be considered conveniently." Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189, 203 (1986). While the model of jurisprudence differs significantly from Dean Mudd's model, both models strive to focus educational questions in the context of lawyering. *Id.*

7. Langdell enunciated the function and method of legal education in the preface to his first casebook:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and

disfiguring fragmentation of lawyering in the law curriculum, with skills curricula having developed as an appendage to the traditional, doctrinal curriculum. As skills curricula and skills faculty emerged within and adapted to the Langdellian environment, both acquired three deleterious characteristics that impede the development and legitimization of professional skills within the legal academy. These developmental impediments suggest the need for a re-evaluation of what constitutes a legal skill.

Legal education generally divides into three discrete concentrations: substantive law, professional ethics,[8] and professional skills.[9]

> certainty to the ever-tangled skein of human affairs is what constitutes a true lawyer; and hence to achieve that mastery should be the business of every earnest student of law . . . . [A]nd much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.

C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871). Langdell considered his approach to legal education to be the only alternative to the "trade school" mentality: "If it [law] be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices." R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 52 (1983) (quoting Langdell).

Although Langdell's name is that most closely associated with the case method, it was one of his colleagues — himself a former student of Langdell — James Barr Ames,

> who really fixed the type of case book in American law schools. His decisions were chosen, not with a purpose of tracing by slow steps the historical development of legal ideas, but with the design, through the selection of striking facts and vivid opinions, of stimulating the thought of the student, and leading his mind on by one step after another until he had become familiar with the fundamental principles of the subject and the reasons for them . . . . His method became, at least for his pupils, the typical method of teaching by cases: Keener followed it, and later Wambaugh, Williston, Beale, and their younger colleagues[.] It may well be said that it was the very wide use of Ames' nine case books that established the case system in other law schools.

HARVARD LAW SCHOOL ASS'N, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917, at 81-82 (1918).

8. Professional ethics does not occupy a quantitatively large portion of a law school curriculum. In most schools, the professional responsibility or ethics course is a two or three credit, one-time course offering. It is elevated here to the level of a "concentration" in light of three factors: the independent emphasis placed on professional ethics by the profession itself (embodied in the Code of Professional Responsibility); the increasingly frequent requirement that applicants to the bar successfully take a Multistate Professional Responsibility Exam; and the internal urging that professional responsibility receive more pervasive and serious treatment within the law curriculum. *See, e.g.*, McKay, *What Law Schools Can and Should Do (And Sometimes Do)*, 30 N.Y.L. SCH. L. REV. 491, 514 (1985).

9. A fourth area of concentration, jurisprudence, has emerged over the last fifty years, according to one observer of legal education. Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1068-69 (1986). From the mid-sixties until the early eighties, first-year law students at the University of Cincinnati studied jurisprudence as part of the required Legal

Course titles quickly signal the concentration of the course; through the first year curriculum[10] and subsequent accumulation of courses, students are thought to acquire the fundamentals to enter the legal profession. Both the overall curriculum design and the typical course design reflect the "elementalism" of legal education.[11] The elemental

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Method course. UNIVERSITY OF CINCINNATI BULLETIN: COLLEGE OF LAW, 1966-1967, at 19; UNIVERSITY OF CINCINNATI BULLETIN: COLLEGE OF LAW, 1981-82, at 33. Jurisprudence is currently an element of a required first-year course at the University of San Diego School of Law. UNIVERSITY OF SAN DIEGO SCHOOL OF LAW BULLETIN, 1985-87, at 26.

10. First year course load is rarely negotiable. It presents a mix of "essentials" — generally, substantive law presented through the case method, and legal research and writing. Gee and Jackson's analysis of 1974-75 catalogs of ABA-approved schools revealed "the almost consensual first-year curriculum": Contracts, Torts, Property, Civil Procedure, Criminal Law, Constitutional Law, and Legal Research and Writing. E. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA 15 (1975). Their research confirmed Professor Rutter's contention, made seven years earlier, that "almost uniformly the backbone of the first year required curriculum is built upon some version of Beale's 1902 package which includes Contracts, Torts, Property and Procedure." Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 CIN. L. REV. 9, 49 (1968) (footnote omitted).

Innovations at a number of schools are making inroads into this curricular sanctuary. New York University School of Law, beginning in the fall of 1986, includes a six-credit lawyering program in its first-year curriculum. The focus of study is the students' own planning and performance of a number of activities basic to legal practice: interviewing, counseling, case analysis and problem handling, negotiation, informal advocacy, and trial advocacy. The program emphasizes "interpersonal dynamics and communication. The integration of legal and factual analysis, lawyers' roles and the impact of role on lawyers' thinking, methodologies for lawyers' planning and decision-making, and techniques for learning how to learn from experience." THE FIRST YEAR LAWYERING PROGRAM 3 (n.d.). The University of New Mexico School of Law requires first-year students to take a three-hour Introduction to Law course, which focuses on justifications for our legal system, and a course in Legislative and Administrative Processes, which analyzes processes by which policy is translated into law and then applied, and teaches principles and techniques of statutory construction and interpretation. THE UNIVERSITY OF NEW MEXICO BULLETIN: SCHOOL OF LAW 26-27 (n.d.). The University of San Diego School of Law requires first-year students to take a three-hour Law and Lawyering course involving "jurisprudence, the history and nature of the legal profession, the roles of attorneys in society and the legal system, and the nature of the attorney-client relationship." UNIVERSITY OF SAN DIEGO SCHOOL OF LAW BULLETIN 1985-87, at 26. Beginning in the fall of 1987 Vermont Law School will inaugurate a three-year mandatory general practice course. Nat'l L.J., Aug. 25, 1986, at 4, col. 3.

11. A more historical and jurisprudential analysis of legal education might account for the elemental nature of modern legal education in the tension between Langdellian legal philosophy and that of the Realists. The former postulates and emphasizes the primary nature of doctrinal law and the latter at least sensitizes some educators to the more practical dimensions of lawyering. As Twining has recently described the arguable points of tension:

> First, insofar as members of the movement [realism] perceived a shared enemy or set of targets in a newly dominant orthodoxy [Langdellism], there were several different kinds of reasons for their dissatisfaction: the illusion of the logical form

educator divides the material to be taught into individual units that are taught sequentially. This sequential approach assumes that the student who understands the individual units will be able to identify and integrate those units necessary to the performance of a lawyering activity. Elementalism presumes that a lawyer's activity, such as drafting a contract, is a sum of generalizable, severable parts, such as the writing form, the responsibilities of the lawyer, and the controlling law of the jurisdiction.[12]

To illustrate, fourth amendment search and seizure law is taught through analysis of leading Supreme Court cases. Neither the materials nor faculty routinely address the drafting, argumentation, or role of a Motion to Suppress, except insofar as the motion provides a vehicle for appellate review. Allocated to the skills faculty would be, perhaps, a lesson in interviewing the defendant to obtain facts giving rise to the fourth amendment issue or an exercise in cross-examining the police officer on his compliance with the fourth amendment. Under the tutelage of the Professional Responsibility professor, the student may consider the ethical dilemma raised when he doubts his client's account of the arrest and the police officer's conduct.

Legal educators' reliance on elementalism[13] extends beyond the

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> or of so-called mechanical jurisprudence; the divorce between legal education and private legal practice; the rather different divorce between law in books and law in action; the intellectual — and, separably, the political — conservatism of Langdellism; the nonempirical nature of Langdell's "science"; and the unresponsiveness of this kind of legal discourse to the needs of the American legal system.

Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 354-55 (1985). Such jurisprudential tensions have surfaced in clinical education and skills training. *See* Wizner & Curtis, *"Here's What We Do": Some Notes About Clinical Legal Eduation*, 29 CLEV. ST. L. REV. 673 (1980). But as Professor Stevens has observed, educational theory may be no more than "mere historical survivals." Stevens, *Legal Education: The Challenge of the Past*, 30 N.Y.L. SCH. L. REV. 475, 483 (1985). To the extent that any coherent theory of legal education exists, educators endorse the dichotomy of the academic and practical sides of legal curriculum. *See* sources cited *supra* note 3.

12. Even using an elemental analysis, this brief list of the "parts" of drafting a contract is inaccurate. The beginning lawyer should also incorporate the "custom" governing the particular type of contract. Soia Mentschikoff illustrates: "Even today, all contracts have some kind of status left over. Look at the typical lease. It has boiler plate provisions recognizing the landlord's higher status, and very few tenants are able to change the lease provisions. Lawyers must understand this or clients will be harmed." Mentschikoff & Stotzky, *Law — The Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 724 n.56 (1986). Additionally, the young lawyer must determine the controlling facts detailing the intent and goals of the parties to the contract. "Fact" education has appeared more recently through discrete course offerings. *See* D. BINDER & P. BERGMAN, FACT INVESTIGATION FROM HYPOTHESIS TO PROOF (1984).

13. Notable exceptions to and criticism of the elementalism of legal education exist. Chief

academic. One argument proffered repeatedly in opposition to skills education urges deferring skills training to the students' first employers, since skills are a more easily learned component of lawyering.[14] Thus, the educational burden of the law school is eased in a benign manner, while faculty time is freed for scholarly research and writing and management of the law school.[15]

While an elemental orientation so pervades legal education that alternatives seem impractical and unfeasible,[16] reconsideration of the

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among them has been the work of Irvin Rutter who recognized the integrated nature of lawyers' work. *See supra* note 5 and accompanying text.

In addition to literature deviating from the elemental approach notable exceptions exist in courses. *See infra* note 16.

14. In a plenary session of the 1984 annual meeting of the Association of American Law Schools, Dean Sandalow asserted,

> The more difficult question is whether . . . law schools are obligated to foster development of purely professional skills and knowledge . . . .
>
> The time, energy, and attention of students and the financial resources of law schools are limited. A decision is required about the purposes to which they can most profitably be devoted. [In my view,] [n]one is sufficient to justify allocating it to purely professional training. Doing so unduly sacrifices the ability of the schools to cultivate the more general intellectual qualities that students require . . . .
>
> Moreover, purely professional training can as readily be offered outside law schools, but many of the intellectual qualities discussed earlier are likely to take root and be cultivated only within a university. The nourishment of these qualities is the special mission of the university and, therefore, of law schools within the university.

Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 174-75 (1984).

15. Shaffer and Redmount proffer a psychological explanation: law faculty oppose emphasis on personal or interpersonal awareness or on human relations skills because of its irrelevance to their own success. Faculty have been rewarded for their intellectual skills, and their professional lives transpire "in chambers that are insular, and even remote from daily life." T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 135 (1977). Along similar lines, Zemans and Rosenblum suggest that emphasizing "analytical" skills at the expense of "interpersonal" skills serves to focus attention on "the ideal-type tasks of the profession which set it apart from and contribute to its prestige in the larger society." F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 123-32 (1981).

16. The enormity of the task of reorganizing a faculty curriculum and teaching materials to comport with a different education theory is reflected in the experience at City University of New York. *See* Kaplan, *Pioneering Spirit Thrives at a Unique Law School*, Nat'l L.J., Oct. 1, 1984, at 1, col. 1; Linn, *This Is a Law School?*, STUDENT LAW., Sept. 1984, at 37. Dean Charles Halpern noted,

> A sense of dissatisfaction with current legal education and with the performance of the legal profession is widespread among practitioners and teachers and in the larger society . . . . Most law schools are not in a position to respond to the

elementalism of legal education is warranted. The assumption that any single lawyering activity is the conjoining of severable, generalizable parts suffers notable flaws.[17] The conjoining process requires feats of identification and recall beyond the abilities of even exceptionally capable beginning lawyers. Consider, for example, a beginning lawyer's first attempt to draft a contract. The lawyer must elicit facts and goals from the client, identify controlling doctrine, and then draft. Perhaps, if recall is sufficient, the lawyer can draw upon Interviewing and Counseling, Contract, and Legal Drafting courses, respectively. But in which course did the lawyer learn how to identify each "element" of the task? Additionally, where has the lawyer learned how to integrate these elements, such as the client's desire to restrict competition, a doctrinal disapproval of anticompetition clauses, and a personal distaste for broad anticompetition clauses? And perhaps most importantly, how will the beginning lawyer evaluate the final product and identify areas for improvement?[18]

> criticism even when they share many of its judgments; their curricula were established years ago, and change comes slowly.

Halpern, *From the Dean*, CUNY Law School at Queens College, 1985-1986, at 3, 5.

On a smaller scale, individual professors integrate traditional substantive material, skills literature and simulation to produce another alternative to the Langdellian fragmentation of lawyering. *See, e.g.*, L. LoPUCKI, PLAYER'S MANUAL FOR THE DEBTOR CREDITOR GAME (1984).

17. Additionally, legal education as currently structured fails to stimulate adult students. *See, e.g.*, Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 584 (1983). In reviewing "the larger defects" of the legal system and the role of law schools in addressing them, President Bok pointed out that

> [l]aw students have also complained for years about the sameness of instruction with its constant discussion of borderline cases and problems. In contrast to medical school, where the experience becomes more absorbing as students leave the lecture hall and enter the ward and clinic, legal education often seems tedious after the first year.

Id.

Educational theory suggests that adults learn in a manner quite distinct from that of children. A linear approach, like the elemental approach, does not correspond to the problem-solving focus and experiential orientation of the adult learner. *See* Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 328-30 (1982); *cf.* Clark, *The Rationale for Computer-Aided Instruction*, 33 J. LEGAL EDUC. 459, 463 (1983) (branching allows instructional feedback to vary with students' responses); Hazen & Hazen, *Simulation of Legal Analysis and Instruction on the Computer*, 59 IND. L.J. 195, 198 (1984) (computerized instruction eliminates need for students to progress linearly: branching forward or backward within materials permits learning from errors at more individual pace and format).

18. These are not the only questions that might occur to the beginning lawyer first confronted with lawyering tasks. The beginning lawyer may also be concerned at an emotional reaction toward the client, or the family's reaction to the hours devoted to work. The law

Practicing lawyers challenge the soundness of elementalism in their report that legal education failed to prepare them for lawyering.[19] This complaint belies the assumption that the law school graduate will intuitively employ, from legal education, the elements of knowledge necessary to perform competently. The complaint suggests that a lawyering activity is a process that, in its execution, is greater than the sum of learnable, discrete parts.[20]

The inadequacies of legal education in preparing students for lawyering activity are not ameliorated by current skills courses that focus primarily on technical lawyering behaviors,[21] or on the interpersonal skills relevant to those behaviors.[22] Both schools of skills education advance theories of legal skills elemental in nature. The theoretical constriction is not surprising given the rigidly elemental curricular environment in which skills courses evolved. Whatever may be the

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curriculum neglects questions addressing the relationship between a lawyer's personal self and professional self, much to the detriment, perhaps, of the profession. *See* Meltsner, *Whither Legal Education*, 30 N.Y.L. SCH. L. REV. 579, 583 (1985).

19. F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 137. Zemans and Rosenblum note that

> [t]he skills rated [by surveyed attorneys] as the *most* important to the practice of law were apparently learned *outside* law school. Only for the capacity to marshal and order facts to apply concepts do the law schools receive substantial credit (44%). The other three skills most important to the practice of law — fact gathering, instilling confidence, and effective oral expression — were learned in law school by only very small proportions of the bar.

Id. The surveyed lawyers did not attribute this failure to the limits inherent in formal education. As Zemans and Rosenblum report: "Fact-gathering, effective oral expression, drafting legal documents, opinion writing, and accounting skills are all generally considered to be within the capacity of law schools to teach, but they are viewed by only very small proportions of the respondents as having actually been learned there." *Id.* at 139.

20. The failure of legal education to educate students for lawyering competence received extended description and prescription in *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR [hereinafter Cramton Report]. In identifying the skills fundamental to lawyering, the report noted seven areas, each one described by a verb, suggesting that competence in process, not just information, underlies effective lawyering. *Id.* at 9-10.

21. *See supra* note 3.

22. *See* Aiken, Koplow, Lerman, Ogilvy, & Schrag, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985) (describes the purest form of the interpersonal skills approach) [hereinafter Schrag]. Most materials are hybrids, in the sense that attention to interpersonal skills appears within the context of specific fact situations.

A putative third theory of professional skills training identifies and teaches skills within the roles that lawyers perform, the roles defined as fact-finder, interviewer, and counselor. Menkel-Meadow, *supra* note 4, at 559. The materials Professor Menkel-Meadow identifies with this school of thought uniformly emphasize interpersonal skills, marking this theory as a variant of the interpersonal school of professional skills.

wisdom of the Langdellian fragmentation of lawyering, the patterning influence on skills education has been powerful: skills educators have fallen into lock-step with traditional faculty, creating courses that teach but another set of elements.

In behavior-oriented skills courses, such as Interviewing and Counseling or Civil Clinic, the student practices a fact specific task, confining the learning experience to the particular facts of the exercise or clinic. Typically, this experience offers the student little upon which to extrapolate in the future.[23] Behavior-oriented professional skills courses manifest the theory that legal skills coincide with and are defined by the physical activities engaged in by lawyers. In live client clinic, for example, students take an assigned case from initial interview through resolution.[24] The "skill" portion of that exercise is coextensive with the physical activity of the lawyer. Examples of this are interviewing the client for the facts, drafting and filing the papers, and conducting the discovery. The student serves as the lawyer with, perhaps, adjunctive simulation training to prepare for anticipated interviews or court appearances.

Although case handling exposes students to broad lawyering processes and the demands of performance, practical constraints have prevented such courses from becoming a vehicle for broad skills education. In addition to the pressures from funding sources,[25] caseload and client responsibility have contributed to the inability of willing clinicians[26] to expand the breadth of skills education within the clinical

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23. Certain commercially available materials attempt to offer students structural and generalized information that both informs the immediate performance of a professional task and offers guidance to future performances of the task. *See, e.g.*, R. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY (1985). Such materials alone do not, however, offer the student the role experience that is basic to any skill. *See infra* § V.

24. Case-oriented courses are usually taught as live-client clinics, with students acting as counsel on actual legal problems. The students ordinarily work under the supervision of an attorney, either the clinical instructor or an adjunct lawyer, as ordinarily required by state student practice rules. *See, e.g.*, Ohio Governing R. II 1-2, OHIO REV. CODE ANN. tit. 19 (Anderson 1873 & Supp. 1986) (limited practice of law by legal interns). Innovations on this type of clinic include a fully simulated clinic at William Mitchell School of Law and case responsibilities assumed in conjunction with a substantive seminar. Even in its variations, however, the skills focus is upon the activities necessary to manage a particular type of case.

25. *See infra* note 44.

26. Some clinicians, focusing on the particular substantive specialty of the clinic, in fact reject any attempt to teach skills broadly. A review of the history of clinical legal education suggests that at its incipience, the format was a politically influenced attempt to heighten student awareness within the context of professional responsibility. *See* Stevens, *supra* note 11, at 483. The transformation into a major educational basis for professional skills education has

course.[27] Activity-focused courses immerse the student in narrowly circumscribed behaviors — perhaps those with which the skills faculty are most familiar — representing a small and potentially deceptive fragment of the broad world of lawyering.

A second type of skills course focuses less upon the physical activity to stress the underlying interpersonal skills[28] used in those activities. Such courses indoctrinate students in those social skills that affect the quality of their lawyering. As aptly described by Professor Bergman, "Many of the social skills involved in legal work, such as showing empathy during interviewing and counseling, or questioning in trial representation, are skills which non-lawyers and lawyers alike use in everyday life."[29] The emphasis on interpersonal skills presumes that such skills are an "element" of every lawyering behavior, and that, by improving such skills, the student will better perform every future lawyering task.[30]

For the student, neither prevailing legal skills theory educationally identifies rudimentary and unique skills necessary for the myriad tasks that lawyers regularly perform.[31] Both theories delimit a concept of legal skills that exist independently of other elements of the legal

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occurred gradually and subtlely. *See infra* note 34. The willingness of clinical faculty to assume at least titular responsibility for broad professional skills education may have accompanied a general desire for professional recognition and security within the law school academy. *Cf. infra* note 43 (the professional status of clinicians remains in flux).

Some clinics retain as a primary objective the exposure of students to an indigent, deprived, or culturally distinct clientele, both to nourish students' political awareness and provide much needed pro bono services.

27. *See, e.g.*, Stuckey, *The Vocational Model in Practice: The Domestic Practice Clinic*, in AALS NATIONAL CLINICAL TEACHERS CONFERENCE MATERIALS 66, 70 (1986). Stuckey's objective was to "design a clinic in which the students would perform a broad range of lawyering tasks, primarily to help them acquire a better understanding of law practice. Acquisition or improvement of particular skills was to be a secondary objective." *Id.*

28. Professional skills education takes the form of live-client clinic and simulation courses. For purposes of describing the theoretical bases for legal skills a methodological demarcation is not helpful. Courses emphasizing interpersonal skills, for example, include live-client clinic, *see* Schrag, *supra* note 22, at 1054-55, and simulation courses in discrete, lawyer activities such as interviewing. *See, e.g.*, UNIVERSITY OF SAN DIEGO SCHOOL OF LAW 1985-87 BULLETIN 25-26.

29. Bergman, Sherr & Burridge, *Games Law Teachers Play*, in AALS CLINICAL LAW TEACHERS CONFERENCE MATERIALS 163, 171 (1986).

30. Schrag, *supra* note 22, at 1054-56.

31. In this regard professional legal skills education contrasts dramatically with the repetitive traditional education in case analysis or "thinking like a lawyer." Most commentators agree that law schools succeed in schooling lawyers in this particular legal skill, however subject to definitional debate that skill might be. *See* F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 137.

curriculum. Rarely does the skills course material, for example, explore the relationship between the "skill" and case law or the statutory background of the case.[32] Although behavior-oriented education exposes a student to the professional roles of a lawyer, it does not systematically identify, for example, how variations in professional roles affect skill performance. To the extent that a student "learns" a "skill," the experience is fact-bound. As Professor Rutter has argued, no law school could hope to offer such task-specific preparation for the manifold activities of lawyers.[33]

The theoretical narrowness of professional skills education, at best, aggravates the political and practical realities of skills educators.[34] First, whether primarily through behavior-oriented simulation courses, such as interviewing and counseling, through live-client clinic, or through interpersonal skills training, professional skills education occurs in isolation from the law school curriculum. Specialized courses, materials, and faculty have increasingly appeared in the last decade, solidifying skills training as an independent and frequently autonomous component of the curriculum.[35] Second, skills education is pervasively perceived as marginal, that is, of dubious acceptability within the legal academy, particularly in comparison to traditional core course offerings.[36] Third, student perception of skills education focuses on the

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32. *See infra* note 40.

33. Rutter, *supra* note 5, at 312. According to Rutter, offering task-specific courses such as drafting, counseling, examination, and cross-examination "involves a choice between selection of an insignificant number in the endless variety and multiplicity of professional operations and the impossible job of covering a large enough number to make even a dent in the vast area of practice." *Id.*

34. The extent to which "skills" faculty and "clinical" faculty overlap is undocumented. Recent trends, however, warrant the assumption that clinical educators and skill educators are not professionally distinct. *See, e.g.* Stuckey, *ABA Skills Training Committee,* AALS — Clinical Legal Educ. Newsletter (n.d.) (describing substitution of "professional skills instruction" for "clinical legal education" in proposed ABA-AALS survey by Skills Training Committee of the ABA, Legal Education and Admissions to the Bar Section).

35. Notable exceptions exist. The University of Denver College of Law conducts an integrated Advocacy Skills Program consisting of traditional law courses, a practicum program, an internship/externship program, and a student law office. UNIVERSITY OF DENVER BULLETIN: COLLEGE OF LAW, August 15, 1985, at 24. The University of San Francisco School of Law requires first-year students to complete a two-semester Lawyering Process course aimed at integrating skills and substance by focusing on the legal process in the context of substantive first-year classes. University of San Francisco School of Law: Lawyering Process 1984-85, at 1 (unpublished manuscript); *see also supra* notes 10 & 16 (discussion of various law school curricula).

36. One commentator has described this marginality using terms such as "soft" and "feminine" in locating the clinic offerings in relation to the "hard" and "masculine" traditional offerings. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the*

"reality" of skills courses, as opposed to the "irrelevancy" of traditional courses.[37] Although such practical and political troubles are not of themselves sufficient grounds for rejecting the elemental foundation of skills education, they do reflect a need to identify and define the relationship, if any, between legal skills theory and the traditional curriculum.

Each of these three characteristics imposes restrictions and burdens upon the development of professional skills education and educators. Curricular isolation, and the development of skills specialization, have led to doctrinal and professional isolation. The results are anomalous: skills faculty cluster together and skills materials largely omit discussion of substantive issues. The doctrinal confluence between the criminal clinical supervisor and the criminal procedure professor is frequently unexplored in favor of the perceived similarity between clinical methodology and, for example, the teaching methodology of the interviewing and counseling professor. Additionally, skills instructional materials fail to address the effect of underlying substantive doctrine on the execution of a particular skill,[38] assuming, for

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Status of Clinical Education, 52 GEO. WASH. L. REV. 272, 274-75 (1984). "Clinical education concerns people, unstructured situations, and feelings, all of which in our culture are generally associated with being female." *Id.* at 274.

37. *See* J. Boland, Ethnographic Study of Guardian Ad Litem Clinic 4-6, 16-18 (Nov. 12, 1985) (unpublished manuscript and data files).

38. The doctrinal narrowness of materials has been costly for skills faculty who must too frequently create their own materials or tailor commercially available materials to their own needs. Soia Mentschikoff and Irwin Stotzky have noted the toll this myopia takes on students:

> Clinical exercises are often performed by students who do not possess the necessary substantive knowledge about the area in which the problem arises. For example, certain trial skills, such as cross-examination, are often taught in the context of a problem with which a student is entirely unfamiliar. This leads to a false assumption by students that knowledge of "how to do it" — how to perform a cross-examination of a witness, for example, — is sufficient *without* knowledge of the field of law at issue.

Mentschikoff & Stotzky, *supra* note 12, at 698-99 n.6.

Binder and Price note the lawyer's knowledge of the substantive law as an element in legal interviewing. D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING 54, 86-87 (1979). Redmount and Shaffer identify "decid[ing] when and how to utilize law in client affairs" as part of legal counseling. R. REDMOUNT & T. SHAFFER, TEACHER'S GUIDE: LEGAL INTERVIEWING AND COUNSELING 3, 19 (1980) [hereinafter TEACHER'S GUIDE]. The student materials call attention to the importance of substantive law only twice. R. REDMOUNT & T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING 2-30, 7-5 (1980) [hereinafter LEGAL INTERVIEWING AND COUNSELING]. That these course materials give only passing notice to the role of underlying substantive doctrine implies that counseling and interviewing skills can be effectively taught and learned without attention to the role of substantive law in the process. G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983) does not expressly examine the effect of sub-

example, that the skills instructor and the skills course will have a general litigation orientation.[39]

Current characterization of skills education has resulted in marginality both for the skills faculty and for the skills curriculum.[40] In a world of limited resources, skills faculty, courses, and budgets are frequently the first objects of consideration, and the last objects for implementation, when a school faces economic limitations.[41] Indeed, the very existence of skills faculty and programs is largely attributable to the availability of grant money and other soft funding.[42] As that

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stantive law on the negotiation and settlement process.

39. Redmount and Shaffer's materials include exercises that require the skills instructor (and the students) to apply criminal law, family law, and the law pertaining to wills and estates, landlord-tenant relations, and corporations. LEGAL INTERVIEWING AND COUNSELING, *supra* note 38. The Binder and Price instructor's manual contains exercises that require application of the law to a wide variety of factual situations, including petty theft, failure to pay child support, repossession of a chattel, influence of alcohol and possession of marijuana, personal injury, and discriminatory enforcement of a municipal ordinance. D. BINDER & S. PRICE, INSTRUCTOR'S MANUAL FOR LEGAL INTERVIEWING AND COUNSELING 33-36, 38-39, 50-52, 63-70, 83-86, 92-93 (1979).

40. In several places skills education has moved into the center of the curriculum. The most notable example is CUNY Law School at Queens College. *See* CUNY LAW SCHOOL AT QUEENS COLLEGE 1985-1986 (1985); *see also supra* notes 10, 16 & 35 (discussion of various law school curricula).

41. *See* Kelso & Kelso, *Legal Education's Future: A Broader Horizon or a Narrowing Window?*, 59 WASH. U.L.Q. 661, 666 (1981). After noting the diminishing flow of federal funds to the states, the Kelsos suggest that

> [i]t thus seems likely for the decade of the '80s that at least some of the law schools and their universities will face the question of whether the existing number of instructors can be maintained . . . . Expensive clinical programs and seminars on newly developed fields will be tempting places to begin. They probably will have less powerful support in faculty councils than will the more traditionally established courses that relate to the bar examination and that draw heavy student enrollment.

Id.

42. From a historic point of view, the extensive number of clinical programs which exist today found their origin through the $10,000,000 allocated to the support of clinical legal education by the Council on Legal Education for Professional Responsibility (CLEPR). These funds were largely used to make grants to law schools throughout the country to initiate and expand clinical programs.

Swords & Walwer, *Cost Aspects of Clinical Education*, CLINICAL LEGAL EDUCATION 133, 189-90 (1980). CLEPR funds were awarded on a declining basis, with the understanding that the school would find the means to finance the program in succeeding years. Some schools secured add-on funding from other foundations and government agencies. *Id.* at 190.

Beginning in 1978, law schools received monies for clinical education under Title IX of the Higher Education Act. In 1979-80, 56 institutions received Title IX funding. *Id.*

money has become increasingly scarce, skills faculty have turned to their law schools and alternative funding sources to secure their place in the law school curriculum. These financial maneuvers have resulted in separate professional tracks for many clinical educators,[43] and restrictions in clinical design,[44] both reinforcing the isolation of the skills curriculum and faculty, and simultaneously inhibiting assimilation of skills educators by law schools.

Finally, and particularly as a result of student perspective, current skills education distorts the actual role of "skills" in the practice of law. Students in skill classes tend to minimize the importance and reality of the substantive law, emphasizing their human relational skills to the displacement of their substantive training.[45] As discussed in the following section, lawyers' professional skills are no more nor less "real" or essential than the doctrinal component of lawyers' work. However, the perpetuation of this myth, that skills education has a greater claim to reality, disserves students seeking education to perform as lawyers.

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43. The professional status of "skills" faculty is unclear. To the undetermined extent that "skills" and "clinical" faculty overlap, *see supra* note 34, their professional status remains an issue within many law schools and within the academy itself. *See* Yarborough, *Report from Skills Training Committee*, Syllabus, Sept. 1985, at 1, col. 4. The Skills Training Committee of the American Bar Association Section of Legal Education and Admissions to the Bar began in late 1985 to evaluate the effectiveness of clinical legal education programs with the aim of establishing benchmarks from which progress can be made in accomplishing the goals of Accreditation Standard 405(e). Standard 405(e) encourages law schools to accord clinical law teachers status substantially equivalent to that enjoyed by other law faculty. *Id.*

Joel Seligman, in his study of what he calls the "Harvard method" of legal education, observes that

> [a]s late as 1975-1976, clinical supervisors remained second-class citizens on most law school faculties, with such denigrating titles as 'instructor,' 'lecturer,' 'adjunct professor,' or 'staff attorney.' Only 15% were hired under contracts that could lead to tenured positions. Although clinical supervisors often worked longer hours, they were typically paid less than academic professors.

J. SELIGMAN, THE HIGH CITADEL 163-64 (1978).

44. Law School clinics that depend on funding by Legal Services Corporation must limit their services to the poor as do other Legal Services Corporation grantees. *See* Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, 99 Stat. 293, 305 (1985); 51 Fed. Reg. 28,641 (1986); *cf.* Legal Services Corporation Regulations, 45 C.F.R. 1611.3 (1985) (eligibility requirements for clients of Legal Services Corporation grantees). Some grants further restrict use of the funds to certain poor people, for example, the elderly. *See* Legal Services Corporation Announcement of Adjustments in the Intended Awards Under the Law School Civil Clinical Program, 50 Fed. Reg. 25,800 (1985). Interest on Lawyers' Trust Account (IOLTA) grants similarly require that they be expended for delivery of civil legal services to poor individuals. *See* Request for Comments, 50 Fed. Reg. 14,778 (1985).

45. *See* J. BOLAND, *supra* note 37, at 4-6.

The consequences of the current methods of skills training are not unnoticed by legal academicians:

> One of the things that terrifies us as we look at the law school world and see that skills are often taught without substance or that information is stressed to the exclusion of an understanding of the process, is that those who are being trained in that limited way are simply never going to know what they do not know. They will simply be unable to judge adequately the necessary ingredients of a competent lawyer.[46]

Calls for greater understanding of what skills actually are, and how best to teach them to law students, pervade the literature on skills teaching and jurisprudence.[47]

A complete re-evaluation of legal skills theory and education must follow the recognition that the present state of skills education is a product of the artificial, elemental character of the pre-existing curriculum. Moreover, it is arguable that current skills programs are suspect to the extent that they assume a theoretical and political posture of accommodation. This argument is buttressed by the undeniably unfortunate consequences of isolation, marginality, and distor-

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46. Mentschikoff & Stotzky, *supra* note 12, at 743 n.78; *see also* Committee on Appellate Skills Training, *Appellate Litigation Skills Training: The Role of the Law Schools*, A.B.A. APPELLATE JUDGES CONF. 13-15, 18-19, 28 (1985) (typical appellate advocacy and moot court programs provide law students almost none of the knowledge or skills necessary to be competent in handling appellate litigation).

47. *See, e.g.*, F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 123-64; Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 231, 270-75 (1974); Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945); Rutter, *supra* note 5; Strong, *The Pedagogic Training of a Law Faculty*, 25 J. LEGAL EDUC. 226 (1973); Strong, *Pedagogical Implications of Inventorying Legal Capacities*, 3 J. LEGAL EDUC. 555 (1951); *cf.* Cramton Report, *supra* note 20 (supporting stronger emphasis on skills development within law schools); Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978) (identifying skills lawyers find important and role of law school in developing them); Gee & Jackson, *Current Studies of Legal Education: Findings and Recommendations*, 32 J. LEGAL EDUC. 471, 480-88, 504 (1982) (concluding that legal education needs to prepare students more effectively for practical tasks of law practice); Mentschikoff & Stotzky, *supra* note 12, at 701 n.9 (identifying skills as component of liberal legal education).

Rutter succinctly stated the task thus:

> If we can isolate, extract, and crystallize a limited number of skills underlying legal operations generally, we may then be in a position to organize some broad fields of operations into a systematic structure, subject to guiding operational principles and techniques, using relatively few concrete operations as a vehicle for training in such underlying skills.

Rutter, *supra* note 5, at 312.

tion. The assimilation problems experienced by modern professional skills courses and faculty suggest that, despite a general endorsement of the desirability of teaching lawyering skills,[48] broad agreement on what constitutes a legal professional skill is still lacking.[49] The practical model of jurisprudence offered in section III as a basis for legal skills education proceeds not from hole filling in the existing curricular topography but from an analysis of what lawyers actually do in their work.

III. A PRACTICAL MODEL OF JURISPRUDENCE

The practical model of jurisprudence comprises two primary operative levels: the four roles of a lawyer and the four units of information that a lawyer creates and consults in the execution of the lawyer's roles. In every task a lawyer performs, the roles that guide, shape, and restrict the gathering and use of information are relation-coordinator, interpreter, representative, and resolver.[50] These roles can easily be observed through a closer look at what is known about the nature of lawyering.

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48. Commentators have not always agreed that professional skills should be taught. Professor Stevens chronicles the hostility toward skills education generally — and clinical approaches particularly — in his history of American legal education. R. STEVENS, *supra* note 7, at 216, 238-41. The traditional view of legal education "stresses the role of experience and training after law school (a period of informal apprenticeship or professional development) in the development of a full-fledged, competent lawyer." Cramton Report, *supra* note 20, at 11. While the Cramton Committee Report found that "[f]ew elements of competence have been totally ignored by law school instruction," it nonetheless concluded that law schools can do a better job than they presently do in developing some of the fundamental skills underemphasized by traditional legal education. *Id.* at 11, 14; *cf.* ASSOCIATION OF AM. LAW SCHOOLS, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971, at 7, 8, 36 (P. Carrington ed. 1971) (proposing place for skills education in standard law school curriculum) [hereinafter Carrington]; D. Bok, *supra* note 17, at 584 (recommending "classes to study the methods of mediation and negotiation, supervised work in new institutions for delivering legal services . . . seminars on new ways of resolving disputes and avoiding litigation").

49. Problems of isolation, marginality, and student misperception might well persist even in the face of a theoretically sound definition of professional skills. Nevertheless, defining legal professional skills in a manner coordinated with the traditional curriculum and rooted in lawyering maximizes the possibility of cooperative rather than polarized educational efforts.

50. The roles of a lawyer are both externally imposed through societal-client need and expectation and internally imposed through the lawyer's desires for social reform, prestige, and wealth. The primacy of roles derives from the confluence of societal expectation and individual response, each of which exerts pressure upon the manner in which the role is performed. Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 93 (1986). As Dean Mudd has recently noted in his article arguing for performance-related education, "The world of the performer and the audience are inseparably intertwined. A proper frame of

The second level of the model identifies four informational resources that inform a lawyer in performance of the professional roles and that are created, examined, consulted, and used through the legal skills discussed in section IV. In discharging a role, a lawyer negotiates doctrine, facts, societal values, and personal self. In performance of a role, the lawyer transforms these informational resources into volitional action or inaction. For example, the operational result may be as dramatic as initiating a law suit, or as instantaneous as a choice of words in posing a question during a deposition. The common denominator to all legal activity is the process of performing within a professional role in a manner informed by societal values, personal self, doctrine, and situation-specific facts: legal skills provide the mechanisms by which the process is consciously controlled.

Empirical studies of lawyering[51] provide a reference for identifying and culling the significant characteristics of what lawyers do. As used here, the term "lawyer" includes those who have been admitted to the bar[52] and are engaged in legal work. The term "legal work" includes, but is not limited to, work performed on behalf of a traditional client base.[53] For reasons that will become evident, "legal work" is used broadly to reach the "lawyer as decision maker, and . . . as counselor."[54] The first tier of the lawyering model, therefore, includes

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reference for lawyer performance must account for the internal point of view — that of the professional, and the external point of view — that of the client." Mudd, *supra* note 6, at 202-03.

51. J. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962); B. CURRAN, THE LAWYER STATISTICAL REPORT (1985); W. WEYRAUCH, THE PERSONALITY OF LAWYERS (1964); F. ZEMANS & V. ROSENBLUM, *supra* note 15; Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUND. RESEARCH J. 155; Lortie, *Laymen to Lawmen: Law School, Careers, and Professional Socialization*, 29 HARV. EDUC. REV. 352 (1959). Additionally, the authors draw upon their own personal experiences in skills education and the practice of law.

52. This bottom-line criterion is admittedly arbitrary. The exclusion of certain people who, based on the discussion that follows, would otherwise be included, is difficult to justify based on the absence of bar admission alone. However, the exclusion affects only those tasks that are performed both by lawyers and non-lawyers, the latter being accounted for in the theory espoused here, but not in the numbers cited.

53. Zemans and Rosenblum limited their study to the practicing bar, including government attorneys who actually represent the government and attorneys who work for corporations in the capacity of house counsel or as part of the legal staff. They excluded legal academicians, judges, government attorneys whose primary job was administrative or legislative, and corporate managers and officers who happened to be licensed attorneys. F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 18. *But see* W. WEYRAUCH, *supra* note 51, at 26-27 (1964) (study of German "lawyers" that included legal scholars, judges, prosecutors, attorneys and notaries, administrative officials, and business advisors).

54. Brown & Shaffer, *Toward a Jurisprudence for the Law Office*, 17 AM. J. JURIS. 125,

lawyers as judges, mediators, legislators, and guardians.[55] The number of lawyers currently engaged in legal work exceeds 500,000.[56]

Functionally, the work of lawyers involves the terms, including rules and agreements, by which individuals, government, and organizations[57] — hereinafter referred to as "units of interest" — coexist in a world of limited space, knowledge, and resources.[58] Lawyers work among these units of interest, creating bridges of cooperation and agreement, formulating and pursuing demands, and representing and resolving issues in conflict. Some observers describe lawyering, on a macro level, as a major legitimating force that facilitates the imposition and maintenance of power balances.[59] Others have asserted that lawyers function in a self-serving positioning for employment and status.[60] A third view argues that only by the civilized hand of the lawyers will the units of interest function in a progressive direction.[61]

125-26 (1972). The prior exclusion of lawyers' counseling and decisionmaking function has distorted the image of client-based lawyers. As Mentschikoff & Stotzky observed, "Lawyers generally spend more time as counselors than as advocates." Mentschikoff & Stotzky, *supra* note 12, at 716. Mentschikoff based this observation on a series of research studies conducted under her supervision between 1955 and 1960. *Id.* at 714 n.35. Indeed, a study completed in 1983 revealed that attorneys in a typical case "spend almost half of this time in conferences with clients, factual investigation other than discovery, and settlement negotiation." Trubek, Sarat, Felstiner, Kritzer, Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 90 (1983) [hereinafter Trubek]; *cf.* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (challenging notion of "litigation explosion").

55. The model of jurisprudence does not include, for example, law professors who have, for academic purposes, removed themselves from "legal work" as defined below. *See infra* text accompanying notes 64-130.

56. *See* B. CURRAN, *supra* note 51, at 12 (excluding retired or inactive lawyers and lawyers in education).

57. "Organizations" refers to formal and informal groupings of individuals, some of which may seek status as legally recognized entities. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

58. This truncated description of societal organization is intended not to evoke philosophical normative debate, but to posit the presence and pressure of competition and cooperation between individuals as topographical locators for the work of lawyers. Although the nature and modes of the competition and cooperation can significantly affect, for example, the concentration of lawyers affiliated with a particular unit of interest, discussion of the relationship between the model and various interpretations of the societal dynamic lies outside the scope of this article.

59. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 *passim* (1977) (early nineteenth century adoption of instrumental conception of law transformed law into means of social control and change). Horwitz explains that American law moved to formalism after 1850 as "the powerful groups in that society [came] to have a great interest in disguising and suppressing the inevitable political and redistributive functions of law." *Id.* at 266.

60. *See, e.g.*, F. RODELL, WOE UNTO YOU, LAWYERS! (2d ed. 1957).

61. *See* Carrington, *supra* note 48, at 7.

Yet, each observation uses motivational and hierarchical terms to describe the role and effect of the lawyer amid the interactions of individuals, governments, and organizations. The professional roles of the model offer descriptive, not prescriptive,[62] guidance by clarifying lawyers' roles and providing an organization by which educational decisions might be discussed.[63]

Lawyers, as they move among individuals, government, and organizations, consistently assume four distinct roles: relation-coordinator, interpreter, representative, and resolver.[64] In the first role, the lawyer coordinates and influences relations among society's units of interest. "Relations" refers to the interconnections between individuals and governments and organizations through which each unit of interest makes demands for limited space, knowledge, and resources.[65] Lawyers, for example, design and operate the systematizing machinery of the Uniform Commercial Code, the Administrative Procedure Act, and the Bankruptcy Code. The relational dimension of lawyers'

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62. The descriptive generality of the roles discussed hereafter is an intentional attempt to purge the normative tone of much legal skills discourse. Discussion of what lawyers should or should not do inherently assumes that society needs lawyers and uses lawyers. How to define society's "use," independent of lawyers' prescriptions, raises methodological problems answered in this article by reference to lawyers' evaluation of the demands of their work, "demands" made in some measure by the consumers of legal services. The extent to which the professional roles should be doctrinally circumscribed to curb, for example, lawyers' self-interested drift from serving societal needs, *see, e.g.*, H. Kritzer, W. Felsteiner, A. Sarat, D. Trubek, The Impact of Fee Arrangements on Lawyer Effort, Working Paper 1984-3, Disputes Processing Research Program, University of Wisconsin Law School; or to regulate the execution of a role, *see infra* note 112, though not within the scope of this article, would certainly be within the scope of a legal skills education derived from the model of jurisprudence. *See infra* § V.

63. On the importance of models, *see supra* note 6. Dean Mudd also noted the inadequacy of the Langdellian model, "Because thinking-like-a-lawyer is an inadequate frame of reference to accommodate the complexity of lawyering, a new conceptual model is needed." Mudd, *supra* note 6, at 203.

64. Soia Mentschikoff and Irwin Stotzky have described "three major functions of law: dispute settlement, channeling and rechanneling behavior, and allocating the final say." Mentschikoff & Stotzky, *supra* note 12, at 705. The focus here differs because the initial question differs. This article inquires not as to the functions of "law" vis-à-vis society but as to the functions of any individual lawyer vis-à-vis society. The difference reflects a judgment that the former inquiry will never be satisfactorily answered since "laws" cannot be observed. One can only "see" what lawyers themselves are doing and study how "law" figures in their work.

65. Standing doctrine requires that status and treatment of natural objects be litigated through humans who represent or share the interests of the natural objections. Christopher Stone advances the creative and provocative argument that natural objects, long the object of human demands and struggle, should have representation against humans. C. STONE, SHOULD TREES HAVE STANDING: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS 11-26 (1974).

work manifests an immediate, noteworthy consequence: the work of lawyers is a human-based activity. As a painter renders a model, and a musician arranges notes, so the lawyer is intimately concerned with human beings. The lawyer assumes some quantum of responsibility for the environmental demands and needs of people. "[T]he responsibility," according the Professor Noonan, "comes in the response to other persons; it is the greater the more one is conscious . . . that the action affects not a hypothetical '*A*' but a real Helen Palsgraf."[66]

In 1980, approximately 68 percent of the 542,205 licensed lawyers in the United States were working in the private practice of law;[67] 179,923 of these lawyers (33.2 percent of all lawyers) were in solo practices.[68] How do these people describe what they do? In the 1980 seminal study of the Chicago Bar more than two-thirds of the respondent lawyers described their law work as falling into one or more of these seven areas: corporate, real estate, personal injury, trusts and estates, tax, criminal, or family.[69] Summarizing the responsibilities associated with one of these "areas" embodies the relational concept with the daily concerns of a practicing lawyer.

"Corporate" law, as practiced, is something broader than the law governing "the relationship of a corporation to its officers and upper management and its shareholders . . . ."[70] It includes all aspects of the life of a corporation: contracts, labor relations, competitors, the market place, taxes, and the regulations that govern its operations.[71] Conceptually fundamental to the practice and teaching of corporate law is the fiction that the corporation is an entity, like an individual, with its own rights[72] and obligations. The lawyer representing a corporation represents that entity, not the individuals employed by the entity.[73] Similar descriptions of each field by which private practicing lawyers

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66. R. NOONAN, PERSONS AND MASKS OF THE LAW xi (1976).

67. B. CURRAN, *supra* note 51, at 12.

68. *Id.* at 13.

69. F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 72-73. "While only 15.5% (N = 542) indicate that they devote their time exclusively to a single area of the law, most of the sample limit their practices to a few substantive legal areas. Most do not cite more than three fields . . . ." *Id.* at 71-72 (footnote omitted).

All 542 lawyers responding to the study "practice law" as defined by the authors: "[I]t seemed conceptually most sound to consider as practitioners those attorneys whose *primary* role was the representation of the legal status of others." *Id.* at 18 (footnote omitted).

70. D. VAGTS, BASIC CORPORATION LAW 11 (2d ed. 1979).

71. *Id.* at 11-12.

72. *See, e.g.*, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-09 (1946) (corporation enjoys right of "people" to be secure against unreasonable searches and seizures).

73. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

classify themselves demonstrates that lawyers work amid holders of interest, structuring the lives of people and not things. This fact is too frequently overlooked by educators and practitioners alike.[74]

In addition to the 370,111 lawyers in private practice[75] in 1980, there were 19,160 lawyers in the judiciary[76] (27 percent of whom were court officials or support personnel rather than judges[77]), 53,763 lawyers working in the government,[78] and 54,626 lawyers working for private industry.[79] Another three and one-half percent of the 542,205 licensed lawyers worked for special interest groups, such as "unions, professional associations, trade associations, fraternal societies, political action groups and religious organizations"; legal aid and public defenders' offices; and in educational institutions.[80] These lawyers also function as relation-coordinators. As judges, lawyers set and adjust the balances between units of interest on a case-by-case basis.[81] Government lawyers coordinate relations through direct and incidental policy-making: "[P]olicy . . . is made through the drafting of legislation, regulations, and executive orders; through interpretation of statutory and administrative law; through reviewing of work done by bureaus and divisions; and through the litigatory and administrative process."[82] Llewellyn has summarized the work menu of "interested groups" with a description equally applicable to their lawyers: "They 'see' bosses; they persuade administrators; they lobby bills . . . they discover barriers in the language of the Venerable Document, or in the cases 'under' it, and press those barriers upon the courts."[83]

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74. *See* T. SHAFFER & R. REDMOUNT, *supra* note 15, at 1-13; Zemans & Rosenblum, *supra* note 15, at 137 (interpersonal skills essential to law practice not developed in law school); *cf.* R. NOONAN, *supra* note 66, 19-20 (masking people through depersonification of law-rules).

75. B. CURRAN, *supra* note 51, at 13.

76. *Id.* at 16.

77. *See id.*

78. Government lawyers include those working in United States Attorneys' offices, state and local prosecutors' offices, and public defenders. *Id.* at 17; *cf. id.* at 593-94 (public defenders included within government classification only for purposes of comparison with earlier censuses).

79. *Id.* at 19.

80. *Id.* at 21. On the inclusion of public defenders in two categories, *see supra* note 78.

81. Whether an analytic positivist or realist or other, the observer of the judiciary must note the profound effect that a single judicial decision can have upon disputants. *See, e.g.*, S. MILLER, THE GOOD MOTHER (1986) (fictional account of custody of only child awarded to father based on judge's disapproval of mother's sexual permissiveness).

The inclusion of judges in the formulation of the model may be overly ambitious. Nevertheless, because of conceptual similarity of their work, judges are included.

82. V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, THE LAWYER IN MODERN SOCIETY 49 (2d ed. 1976) (quoting BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE (1948)).

83. K. LLEWELLYN, JURISPRUDENCE 242 (1962). The essentiality of the relation-coordi-

Florida Law Review, Vol. 39, Iss. 1 [1987], Art. 3

As relation-coordinators, lawyers not only work with human material, they must possess what Professors Mentschikoff and Stotzky have called a "situational sense": "A lawyer in a shipping case, for example, is less than helpful if he does not understand the industry, its practices, and the various resolutions of disputes made in the past. . . . Further, a lawyer must understand the makeup of the group with which he deals, its goals, operations, and beliefs."[84] A notable aspect of this "situational sense" is time sensitivity. "Relations" are constantly changing and changeable. The lawyer must simultaneously consider arrangements between units of interest in the past, their current status, and the potentialities.[85]

In their second role, lawyers serve as interpreters; they "explain or tell the meaning of: present in understandable terms."[86] As interpreter the lawyer performs two primary functions on behalf of a unit of interest:[87] the lawyer assigns meaning and priority to information for the purpose of locating a situation on the legal landscape, and translates both the information and meanings into a comprehensible and usable form. Jurists generally recognize the importance of performing this role in their work. Of the 542 respondents in Professors Zemans' and Rosenblum's study of the Chicago bar, 86.6 percent rated as "important" the "ability to understand and interpret opinions, regulations, and statutes."[88] Clinical law students participating in a recent study of professional skills noted the importance of explaining the legal proceedings in nonlegal language.[89]

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nation role to lawyering is seen, too, in the work of lawyer legislators. The legislator formally orders to the relationship between society's units of interest, requiring that he possess an informed sensitivity to the units of interest and the limits of compromise and cooperation.

84. "A competent lawyer must, therefore, be a universalist." Mentschikoff & Stotzky, *supra* note 12, at 716 (footnote omitted).

85. For evidence of lawyers engaged in time-dependent work, see generally Brown v. Board of Educ., 349 U.S. 294 (1955) (separate but equal doctrine for public schooling rejected against history of failure); Gideon v. Wainwright, 373 U.S. 335 (1963) (right to counsel for indigent criminal defendant imposed against demonstrated inadequacies of pro se representation); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) (implied warranty of habitability judicially approved in light of history of landlord-tenant relations), *cert. denied*, 400 U.S. 925 (1970).

86. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 632-33 (1985).

87. A unit of interest may or may not be a "client" in the traditional manner. As discussed in the context of the third role, the jurisprudence model expands the representative role of lawyers beyond a fee-paying or client-designated base. Therefore, the entity for whom a jurist will interpret varies. *See infra* text accompanying note 100.

88. F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 125.

89. J. BOLAND, *supra* note 37.

As interpreters, lawyers rely heavily upon their own ability to distill the ambiguity and uncertainty from foundational information such as facts and law. Judges, who perhaps most apparently and consciously serve in the interpreter role, experience the tension between the role pressure for explanation and the natural uncertainty of facts. Consider, for example, Judge Angela Bartel's description of what makes a case "hard" from her perspective as a Wisconsin trial judge:

> The greater the number of acceptable outcomes, the greater the potential for uncertainty; the greater the number of potential outcomes, the more complex the process of alternate hypothesis evaluation becomes — when the mind aches to resolution and harmony. External factors make cases "harder" such as overzealous or uncontrolled advocacy, extraordinary high [sic] public interest or visibility, extraordinarily impact [sic] (social, monetary, freedom, or statutory or constitutional validity), conflicts with co-ordinate branches of government.[90]

The difficulties experienced by trial judges in their evaluation of information are inescapably intertwined with lawyering generally. The "capacity to marshal facts and order them so that concepts can be applied," for example, has been rated "important" to the practice of the law by 91.6 percent of the respondents in Professors Zemans' and Rosenblum's study.[91] And "understanding the viewpoint of others to deal more effectively with them," alternatively described as "effectively translating information and meanings to others," was thought to be "important" by 76.4 percent of the respondents.[92] Professors Austin Sarat and William Felstiner have chronicled both aspects of the interpreter role in the work of a divorce attorney. The divorce attorney "locates" his client's legal problem within a range of legally available outcomes for domestic disputes and responds to the client's need for explanation of procedures, rules, and court decisions.[93]

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90. A. Bartell, Judicial Decision Making in the Trial Court 16 (Sept. 20, 1985) (unpublished manuscript).

91. The importance of this aspect of practice cuts across areas of speciality and size of law firm in which respondent was practicing. *See* F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 9-13.

92. *Id.* at 125.

93. Sarat & Felstiner, *supra* note 50, at 99, 126. Sarat and Felstiner's prototypical lawyer performs all four jurisprudential roles with a divorce client; the role of interpreter stands out,

Florida Law Review, Vol. 39, Iss. 1 [1987], Art. 3

The third role assumed by lawyers, the representational role, is the most familiar and widely acknowledged role.[94] As representative, the lawyer is restrained from pursuing personal ends in the lawyer's own name. "Representative" is defined broadly to include standing or acting for any of the units of interest previously discussed. A "representative" may be acting on behalf of the profession itself — an officer of the court[95] — or on behalf of societal order as manifested in statements of law — a defender of justice.[96] Judges, legislators, and client-based lawyers alike are expected to perform within the structure of the representative roles. For example, in the case of *Aetna Life Insurance Co. v. Lavoie*,[97] the United States Supreme Court found that Justice Embry of the Alabama Supreme Court had violated the due process clause of the fourteenth amendment by participating in the decision of a case that "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own [separate but similar] case."[98] The judge's failure to recuse himself abrogated his role as representative of the judiciary[99] in favor of self-promotion.

Dissension to the assertion that all lawyer's work is representative can be anticipated. The skeptic's response is that lawyers merely assume the role as a safe shelter from which they effectively promote their own interests. In this regard the practical model of jurisprudence caps an important, political Pandora's box, the opening of which is

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due in part to the singular focus upon the lawyer-client interaction and each participant's role in the interaction. *See id.*

94. Indeed, Zemans & Rosenblum saw this role as that which most clearly differentiates practitioners from other persons qualified to practice law (e.g., successful bar examinees, including judges, legal academicians, legislators, title examiners, corporate officers, and other administrative officers and managers): "Ultimately it seemed conceptually most sound to consider as practitioners those attorneys whose *primary* role was the representation of the legal status of others." F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 18. This role was the sine qua non of those lawyers included in the Zemans and Rosenblum study. *Id.*

95. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19, 7-39 (1976) (duty of lawyer to the adversary system of justice); CODE OF JUDICIAL CONDUCT Canon 1 (1976) ("judge should uphold the integrity and independence of the judiciary"); Nix v. Whiteside, 106 S. Ct. 988 (1986) (attorney's duty of loyalty to client is tempered by attorney's duty to search for truth).

96. *See, e.g.*, OHIO REV. CODE ANN. § 2151.281 (Page Supp. 1986) (lawyer appointed to represent best interest of child).

97. 106 S. Ct. 1580 (1986).

98. *Id.* at 1586.

99. Judge Embry probably also breached governmental regulations of employee conflicts of interest that apply widely throughout government. Such breaches are of a different nature, however, subjecting the violator to disciplinary actions without necessarily vitiating the action taken by the employee.

outside the scope of this article. Preliminarily, the model frames actual lawyering. Lawyers describe, perceive, and govern themselves as representatives of interests other than their own. If this description arises from a self-interested artifice to safeguard the financial and social security frequently found in lawyering, then discussion should consider the utility and appropriate dimensions of the role, not its existence.[100] If, on the other hand, lawyers broadly fail to perform effectively and competently in this role, grounds for improved education and regulation emerge. In the meantime, one can observe that the lawyer as representative is ubiquitous.

Eighty-two percent of all lawyers engage in a client-based practice.[101] Another nine percent of all lawyers work for the federal, state, or municipal government.[102] Each of these attorneys takes an oath of office, pledging to represent the interests of the governmental entity. "On behalf of," "in the name of," and "for the good of" become part of every lawyer's vocabulary before being licensed to practice. The Code of Professional Responsibility, for example, warns the lawyer to maintain a representative posture before a tribunal and not to "assert his personal opinion as to the justness of a cause, as to credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused."[103] Disciplinary action against lawyers failing to pursue or harming the interests of their clients abounds.[104] The Judicial Code of Ethics[105] and, in extreme cases, the United States Constitution,[106] require judges to recuse themselves from cases in which personal interest will determine the outcome.

Lawyers themselves express concern about functioning effectively,

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100. *See supra* note 62. *But see, e.g.*, F. RODELL, *supra* note 60 (discussing lawyers' self-serving positioning for employment and status).

101. B. CURRAN, *supra* note 51, at 12 (counting all practitioners except judiciary and government as client-based).

102. *Id.*

103. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR-7 106(C)(4) (1976).

104. *See, e.g.*, Smiley v. Board of Comm'rs of Ala. State Bar, 286 Ala. 216, 238 So. 2d 716 (1970); Paradisio v. Board of Comm'rs of Ala. State Bar, 284 Ala. 450, 225 So. 2d 855 (1969); *In re* Couser, 122 Ariz. 500, 596 P.2d 26 (1979); McMorris v. State Bar of Cal., 35 Cal. 3d 77, 672 P.2d 431, 196 Cal. Rptr. 841 (1983); Oliver v. State Bar of Cal., 12 Cal. 3d 318, 525 P.2d 79, 115 Cal. Rptr. 639 (1974); Colorado v. Forsyth, 187 Colo. 438, 534 P.2d 1210 (1975); Florida Bar v. Dancu, 490 So. 2d 40 (Fla. 1986); Florida Bar v. Mackenzie, 485 So. 2d 424 (Fla. 1986); *In re* Schuyler, 91 Ill. 2d 6, 434 N.E.2d 1137 (1982); Louisiana State Bar Ass'n v. Williams, 479 So. 2d 329 (La. 1985); Attorney Grievance Comm'n v. Pollack, 279 Md. 225, 369 A.2d 61 (1977); *In re* Greer, 61 Wash. 2d 741, 380 P.2d 1330 (1983).

105. CODE OF JUDICIAL CONDUCT Canon 3 (1972).

106. *See supra* note 98 and accompanying text.

sensitively, and professionally in their representative capacity.[107] And in a study of law students enrolled in a clinical course, the researcher concluded that a primary attraction to clinical education was the student's interest in actual representation of clients.[108] Another study concluded that the interest to represent a client, along with a desire to influence society, may very well accompany the first-year law student to law school.[109]

In the fourth and final role, all lawyers serve as resolvers, making and facilitating decisions of resolution. "Resolution" is not merely a decision of closure in a disputed matter. Lawyers play a significant role in avoiding and defusing disputes through alternative dispute resolution,[110] counseling, and other actions designed to forestall the eruption of a dispute.[111]

Lawyering anticipates a conclusion, whether by way of judicial decision, legislative enactment, or simply a signed, effective legal instrument.[112] It is not enough for the lawyer to list ten options for the

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107. T. SHAFFER & R. REDMOUNT, *supra* note 15, at 129.

108. J. BOLAND, *supra* note 37, at 7.

109. T. SHAFFER & R. REDMOUNT, *supra* note 15, at 102. The test group was very small, only twelve freshmen and eight seniors from Valparaiso. *Id.*

110. The importance of the resolutional dimension of lawyering is reflected in the increased use of alternative dispute resolution mechanisms, which arose from frustration with time delays and the demands on resources of full adversarial proceedings. That the profession should be actively increasing opportunities to resolve conflicts expeditiously demonstrates the profession's recognition of and commitment to this role. *See, e.g.*, Riskin, *Mediation in the Law Schools*, 34 J. LEGAL EDUC. 259 (1984).

111. Trubek, *supra* note 54, at 86. "Overall, we found that 71.8% of individuals with grievances complained to the offending party, and that a dispute arose in 63% of these situations. Of these disputes, 11.2% resulted in a court filing." *Id.* Some educators have urged law students and lawyers to prepare for and to assume a broader counseling function with clients. *See, e.g.*, A. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING (1972). Lawyer as counselor could warrant a fifth role in the model of jurisprudence if, for example, lawyers were both hired and educated for counseling in its psychological and legal dimensions. *See id.* at 57-85 (chapter entitled *Psychology for Counselors*). Currently, legal counseling consists primarily of the lawyer as resolver conveying informational options available to a client within a demarcated doctrinal framework.

112. Appropriate means and limits for "leading" a client to a resolution have been the subject of scholarly debate. The lawyering model frames that debate as an issue of role rather than as an issue of professional skill to be debated and decided by both the individual lawyer and by the broader community. Restrictions on the role — such as requiring signed understanding and consent by a client to an important legal decision — could be doctrinally imposed, shaping the contours of the role through behavioral limitations on individual lawyers. As S. Macaulay has observed, "Lawyers are selling services and they must try to persuade, trick or coerce clients into accepting any service the lawyer is willing or able to provide." S. Macaulay, Lawyer-Client Interaction: Who Cares and How Do We Find Out What We Want to Know? Working

resolution of a problem in the relations between an individual and organization, or between an organization and the government. It is not enough for the lawyer to assure the client that the list exhausts all possibilities available to that client. A decision must be reached. The lawyer must say, "I recommend option three to you with the understanding that it is the most expensive." Or the lawyer must say, "I cannot choose for you from this list. You must make the choice and I will answer the questions that arise as you decide."

Lawyers recognize this role in the reliance of individuals, organizations, and government. More than eighty-eight percent of the respondents to Zemans' and Rosenblum's questionnaire designated "instilling others confidence in you" as "important."[113] In a recent study conducted by Professors Sarat and Felstiner one lawyer[114] summarized his discomfort in the role:

> [Y]ou can become a hypothetical maniac . . . [in] the practice of law . . . for two reasons . . . . [Y]ou are kind of guarding yourself from malpractice and you are also thinking, my God, the one time I don't alert somebody she's going to walk out the door and it's going to happen. And it happens just enough to make you real sensitive.[115]

Similarly, a participant in a student study summarized the resolutional aspect of lawyering in this way:

> [I learned] just how important it is that this is a person's life that you are dealing with. To go into a person's home and talk to them about what happened and you or someone else is going to make those decisions about what is going to happen to them that they have no control over is kind of mindblowing. I think that will be a good thing to always remember when you do things.[116]

These four roles performed by and expected of lawyers comprise the professional self that a lawyer cultivates and manages, either consciously or unconsciously, throughout a legal career. In the execu-

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Paper 1984-4, Disputes Processing Research Program, University of Wisconsin Law School, 6-7; *see supra* note 62.

113. F. ZEMANS & V. ROSENBLUM, *supra* note 15, at 125.

114. For a judge's description of the resolver role, see A. BARTELL, *supra* note 90.

115. A. Sarat & W. Felstiner, Law Talk in the Divorce Lawyer's Office 23-24 (July 1985) (unpublished manuscript) (on file with Professor M. Murphy, University of Cincinnati College of Law, by permission).

116. J. BOLAND, *supra* note 37, at 9.

Florida Law Review, Vol. 39, Iss. 1 [1987], Art. 3

tion of roles, the lawyer draws upon an informational base of four topical categories: "doctrine," "fact," "societal values," and "personal self." Doctrine and facts represent generally understood concepts within lawyering. These four categories constitute the second tier of the model. Doctrine includes procedural, statutory, and common law. Fact includes both situation-descriptive evidence and other significant information. For example, fact includes peculiarities of a particular forum or opposing counsel, or financial limitations of a client or community. Although treated as discrete for purposes of discussion, the categories overlap at points. For instance, a judge's requirement that the principals be present at a pretrial conference may be classified both as "doctrine" and as "fact."

Societal values refer to those norms the lawyer perceives as the standards of the social environment by which the lawyer and the issue at hand will be judged, praised, or condemned. The lawyer need not subscribe to these values personally, but may even think them unfounded and absurd. Nevertheless, the informational worth of societal values is evidenced by the extent to which they presage the response of others affected by a particular issue and inform lawyer activity. In the latter manifestation, societal values color lawyers' evaluation of, for example, issues of free speech[117] and criminal penalization,[118] and serve as explicit legal referents, as in obscenity law[119] and child custody determinations.[120]

Though "personal self" is a less acknowledged information base, the private self of a lawyer interacts with the role demands of professional life.[121] "Personal self" includes both innate and learned mecha-

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117. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20, 31 (1971) (first amendment as protection for explicitly and predominantly political speech to promote discovery and spread of political truth).

118. *See, e.g.*, Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (description of optimal and minimal sanctions derived from economic analysis of crime prevention).

119. "[O]bscenity is to be determined by applying 'contemporary community standards' . . . ." Miller v. California, 413 U.S. 15, 37 (1973). *But see* Pope v. Illinois, 107 S. Ct. 1918 (1987) (holding that third prong of *Miller* test — serious literary, artistic, political, or scientific value — should be based on reasonable person standard, not contemporary community standards).

120. *See, e.g.*, OHIO REV. CODE ANN. § 2151.414 (Page Supp. 1985) (permanent termination of parental rights appropriate if child is without "adequate parental care" and termination is in child's "best interest").

121. R. Unger has articulated this duality as a primary characteristic of liberal psychology: "The discomfort of life is a consequence of the relentless battle these two aspects of life must wage against one another . . . . [T]he self flees constantly from the public to the private . . . ." R. UNGER, KNOWLEDGE AND POLITICS 59-60 (1975). M. Meltsner has noted the detrimental

nisms that a lawyer employs consciously and unconsciously in the professional roles.[122] In the model, the personal self is the jurist's internal informational source, which if consciously developed, is an ever increasing and maturing resource in effective lawyering performance. It reflects a personal value system, experience, and innate qualities like judgment, intuition, and character. It informs the lawyer of the potential response to role behavior. For example, a lawyer might consider whether societal condemnation or praise is important, whether performance will be diminished because of antipathy to a client, whether the tedium of a particular matter is tolerable, and whether a yearning to be a poet should impel abandonment of the legal profession.

The personal self wields significant influence upon the execution of the four professional roles and the development of work patterns responsive to client and professional expectations. Control of the "personal self" inheres in the development of a "professional self." The ability, for example, to repress a private repulsion in the face of client conduct or to refrain from crying or raging when rebuked by an ill-tempered judge requires separation and suppression of the personal self in deference to professional roles.[123]

Lawyers function in a professional role as relation-coordinator, interpreter, represenative, and resolver. Their tools, items of doctrinal, factual, societal, and personal information, inform their behavior in role. It is against this two-tiered practical model of jurisprudence that the "skills" of lawyers, by which information is transformed into role activity, are discussed.

IV. A Theory of Legal Skills

Lawyering has been analogized to audience performance in its demands upon the lawyer-performer.[124] Adopting the metaphor, the

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consequences of the private-professional schism for some lawyers, particularly the "suppression of feeling" to facilitate identifying "with our client's point of view . . . ." Meltsner, *Whither Legal Education*, 30 N.Y.L. Sch. L. Rev. 579, 585-86 (1985).

122. The authors prefer to think of the process as conscious with unconscious factors, but it is probably analytically identical to say that the process is part conscious and part unconscious. Our statement simply provides for an analysis that assumes that lawyers in their professional role are conscious of the effects of the psychological forces comprising their "own interest" — such as fees, effort allocation among clients and on-going relationships with adversaries. *See* S. Macaulay, *supra* note 112, at 7-9.

123. Education in separating the professional and personal selves occurs subtly from the first day of law school when the student learns to favor the broadly applicable statement over the anecdotal, the reasoned over the emotional, and the third person over the first.

124. Mudd, *supra* note 6, at 201. "The word 'performance' implies three elements: an actor,

model of jurisprudence described in section III accounts for the actor, the knowledge, and the audience expectation in the "performance" of lawyering. But without skills to transform roles and information into action, the lawyer's performance remains fragmented and seemingly undecipherable. Current pedagogies of legal skills have done little to cohere curricular elements into performance-oriented education, opting instead to characterize skills as "activity" severable from the lawyer's full information base. Responding to the theoretical flaws and consequences discussed in section II and drawing upon the practical model of jurisprudence developed in section III, the alternative theory of legal skills presented in this section depicts the formative interaction of professional roles and information in the production of unique legal skills.

Llewellyn suggested that essential "lawyering skills" are reinvented daily as situations pressure people to perform "law jobs."[125] Rutter argued that common legal skills underlying lawyers' activities could and should be identified and taught.[126] The practical model of jurisprudence spans these two fundamental observations to identify both the universality and uniqueness of lawyers' professional skills. As generalists, lawyers employ "precedent skills," ubiquitously used skills such as extension of a rule by analogy,[127] ends-means thinking,[128] and interpersonal skills.[129] Contrasting precedent skills, the shibboleth "like a lawyer" is borrowed from the pervasively acknowledged skill "thinking like a lawyer" to reference those attributes that distinguish legal skills.[130]

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an action, and a resulting product, which sometimes, for instance as in the case of a dance, is the action itself." *Id.*

125. *See supra* note 1.

126. *See supra* note 5.

127. *See supra* note 1.

128. Amsterdam, *supra* note 3, at 614-15.

129. *See supra* text accompanying notes 28-29 & 34-37.

130. In "thinking like a lawyer," educators have searched for the intellectual identifiers that would facilitate the teaching of this universally approved "legal skill."

> [C]onsider a description of the cognitive elements of "thinking like a lawyer." Specifying that "thinking like a lawyer" is no more nor less than vocabulary, case analysis, manipulation of rule systems, and argumentation helps the teacher in designing a course or curriculum and the student in learning within the course of curriculum. At the general level this provides a guide to the teaching of skills considerably more explicit and helpful than the traditional approach of repetitive, nonexplicit experience with Socratic dialogue.

Legal education consciously presupposes the presence of certain precedent skills — skills thought foundational to undertaking lawyering. The Law School Admissions Test (LSAT), for example, attempts to identify and measure some of these precedent skills, such as use of precedent and reconciliation of results. It has long been recognized that to "think like a lawyer" a student must not only assimilate a significant amount of raw information, but also be able to apply syllogistic reasoning. While a lawyer must know or learn how to use law digests, computerized research systems, and case reporters in order to identify "doctrine," neither syllogistic thinking nor library research are skills peculiar to lawyers. Political scientists and economists, for example, may both rely upon the same research and analytic skills.

Lawyers' work draws upon other precedent skills obviously not evaluated by the LSAT, such as interpersonal skills. Throughout a legal career, the lawyer will be in contact with human beings. Thus, interpersonal skills will affect the lawyer's ability to perform, for example, as interpreter for the client whom the lawyer will have to question and counsel. Likewise, a lawyer will implement precedent skills to speak in public, negotiate a disputed point to a conclusion, elicit information through direct questioning, and identify information needed to proceed effectively in the lawyer's work. The practical model of jurisprudence suggests that this incomplete list of human skills, as essential as they may be to the effectiveness of lawyers, are but preliminaries in the acquisition of professional lawyering skills.

Performing "like a lawyer" requires lawyers to adapt precedent skills to role-complying behavior. Legal skills are manifested most fundamentally in filling the units of information and in using the informational resources. These two dimensions of legal skills, "fill" and "use," represent a primary division in a taxonomy of legal skills. Whether the legal skill is a "fill" or "use" skill, both the other units of information and the professional roles exert operative effect on skill performance.

To illustrate, consider "fact-gathering like a lawyer," filling the fact unit of information in preparation for any lawyering activity.[131]

Feinman & Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528, 532 n.11 (1986).

The activity flurry associated with other "legal skills" has, perhaps, distracted legal educators from similar discussions of the intellectual components of all legal skills. Based on the discussion of legal skills herein, to the above description of "thinking like a lawyer" must be added "professional roles."

131. This illustration is not intended to identify "fact-gathering" as a discrete subject area. Just as instruction in "thinking like a lawyer" suffuses the curriculum, so too instruction in

As the model suggests, the legal skill is not a raw accumulation of every possible fact logically related to a particular interest, dispute, or decision. In a professional role, the lawyer will call upon the fact unit, simultaneously referring to the information contained in each of the other units. The decision, therefore, how to fill the fact unit will be guided by such doctrinal directions as the need to complete the financial statement required in a bankruptcy proceeding or to demonstrate changed circumstances in seeking the modification of a child custody decree. Information contained in each unit informs and checks the filling of other units.[132]

Lawyers' professional roles likewise transmute precedent skills to fit the unique demands of lawyering. Researching domestic and foreign law, identifying local court and business customs, and distilling a case holding from the written court opinion are precedent skills useful in filling the doctrine unit of information. Similarly, creation of facts, recreation of facts, and language characterization of information may be essential in filling the fact unit of information. Nevertheless, no jurist proceeds to research all of the law or to recreate all of the relevant facts. The lawyer circumscribes his inquiries by identifying and pursuing goals and strategies consonant with the lawyer's professional role.

To identify the independent influences of the professional role and the informational content of other units of information on the precedent skills of "filling the fact unit" is not to imply that the relationship between the activity and the role or between the units of information within the context of the activity constitute discrete legal skills. To the contrary, the legal skill of fact-gathering cannot be fragmented into precedent skills, roles, and other units of information; even the

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other legal skills may be introduced. Although pedagogical issues are clearly implicated by the model of jurisprudence, this article does not attempt to prescribe or recommend a prototypical legal skills curriculum. *See infra* § V.

132. An interactive relationship between the doctrinal unit and the societal value unit in composing an advocacy brief is apparent in Anthony Lewis' description of the work of Arnold Fortas and Porter in *Gideon v. Wainwright*:

> Bright young men break [the issue] down into tiny components . . . they probe, imagine, cover every exit. Then, from this jumble of material, a skilled lawyer creates a legal work of art, choosing a coherent form for his argument and ruthlessly eliminating all that is extraneous to that form . . . . A direct question — such as "Should Clarence Earl Gideon have had a lawyer at his trial?" — has become a much more sophisticated constitutional conception, not necessarily more remote from life but richer in its reflection of history and philosophy and judicial attitudes.

A. LEWIS, GIDEON'S TRUMPET 120-21 (1966).

roles and other units of information interact in the execution of legal fact-gathering. Consider the initial interview of a criminal defendant accused of murder. Based on the information known to the lawyer through the police report, the lawyer anticipates that the defendant might claim that the decedent held a weapon at the time the defendant was seen stabbing the decedent. Is there to be a self-defense claim?

How does the lawyer "fact-gatherer" answer the question? Based upon the legal standard, the lawyer appreciates that, for example, the self-defense claim might fail if the defendant could have safely retreated. The defendant may not know about the obligation to retreat; additionally, the defendant may be quite receptive to even subtle "coaching" from the lawyer on the point.[133] The lawyer proceeds to adapt the precedent skill — fact-gathering by interviewing — to meet the doctrinal dimension of the query and, similarly, to meet the contours of the role. How the lawyer phrases the question, whether the lawyer leads the defendant or uses a contemptuous tone, will depend, in part, on whether the lawyer is the defense attorney, the prosecutor or, even, an attorney for a codefendant.

Yet, even as the doctrine unit and professional role shape the interviewing skill, the doctrine and personal self units are shaping the professional role. The defense lawyer, for example, is familiar with the Code of Professional Responsibility, requiring lawyers to report perjury to the court, and the Supreme Court's endorsement of such reporting requirements.[134] Personally, the lawyer prefers representing "innocent" clients over "guilty" clients. The defense lawyer might ask, "You couldn't have run away from this guy safely, could you?" Alternatively, in deference to his legal and ethical constraints, the defense lawyer may ask, "Can you tell me what you were thinking about when you first saw the decedent?" The legal skill used by the lawyer in this interview combines knowledge, audience expectations, and personal pressures[135] in a moment of performance.

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133. The defendant may simply not remember clearly what options were available to him given the likely emotional intensity of the encounter. *See* E. LOFTUS, MEMORY, SURPRISING NEW INSIGHTS INTO HOW WE REMEMBER AND WHY WE FORGET 77-84 (1980).

134. Nix v. Whiteside, 106 S. Ct. 988 (1986).

135. Teaching a student to "fill" the personal self unit of information "like a lawyer" in any fact specific situation threatens the privacy of the student to the extent that the teaching methodology contemplates student revelation of personal information. Additionally, such instruction raises concerns regarding the qualifications of law faculty to teach a subject matter in which they have had little, if any, education. Direct "personal self" education may not, however, be necessary since professional role education requires students to segregate professional and personal issues.

"Use" legal skills, such as legal argument, negotiations, and counseling,[136] are similarly sculpted from precedent skills by the simultaneous pressures of the informational units and professional roles. And, like "fill" legal skills, the dominating influences on the execution of any particular lawyering activity can vary through the conscious, decisional selection of the lawyer or through inattention. Clearly, lawyers would not, for example, conduct the initial interview of the criminal defendant described above in any uniform manner.

Variations in the application of a legal skill may be traced to differences in roles, in reality and conceptually,[137] in doctrinal and factual knowledge, in abilities in interpersonal communication, and in values. But variations may also be attributable to ignorance or misunderstanding of the nature of legal skills. Through legal skills education that contextually places lawyering activity amid roles and information, lawyers can learn to identify and select consciously for themselves the informational base and purpose of their behavior. Current skills education too frequently fails to acknowledge the panoply of influences that produce lawyering performance, leaving the student unprepared to plan and control professional activity.[138]

The theory of lawyering skills derived from the practical model of jurisprudence militates in favor of redesigning professional skills education, however circumscribed, to stress not the activity of the lawyer but the effect of the lawyer's roles on the identification, accumulation, relation, and use of information and the adaptation of precedent skills to the professional role demands of lawyers. The pedagogical issues raised by adjusting the purpose and focus of professional skills education are the subject of section V.

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136. The practical overlap between "fill" skills and "use" skills is evident in, for example, the typical task of counseling a client where the lawyer both defines the factual perimeters of the issue and invokes their significance to direct the client. *See* Sarat & Felstiner, *supra* note 50, at 125.

137. The contours, for example, of the representative role of lawyers for criminally charged juveniles have undergone a doctrinal change as a result of *In Re* Gault, 387 U.S. 1 (1967). Whether lawyers practicing juvenile law prior to *Gault* have conceptually adjusted their role is a distinct question.

138. This failure occurs in skills courses that emphasize, for example, precedent skills without relation to doctrinal information or professional role, and in clinical courses that emphasize the lawyering activities of a substantive area without addressing use of legal skills in other substantive areas of practice. *See supra* text accompanying notes 23-37. The young lawyer, therefore, engaging in lawyering activity, unaware of the full informational base, is unable to manage the decisionmaking required by the professional roles. It can hardly be surprising if the "audience" finds the beginner's "performance" wanting.

V. PEDAGOGICAL ISSUES

From this alternative theory of legal skills flows a legal skills pedagogy designed to enable students and lawyers to control and synthesize information and their professional roles. Three immediate educational objectives follow: to identify and teach (1) how to define the contours of the professional roles; (2) how to assess the relative weight of information bearing upon any lawyer activity; and (3) how to transmute precedent skills into legal skills. Students who can conceptually appreciate, if not practice, these three tasks have the intellectual tools for performance. How and by whom such objectives can be met are questions fully answerable only with further study.[139]

Employing a legal skill requires, first, that the lawyer consciously, intellectually, and practically appreciate the professional roles of relation-coordinator, interpreter, representative, and resolver. These roles embody both the expectations of the audience and the thematic "meaning" of the lawyer's work. They are not, however, static or fixed. The lawyer must know how to define the professional roles. The contours of the role, both in reality and ideality, shift, like any subjective perception, with changes in doctrinal, factual, societal, and personal considerations. As Professor Shaffer has illustrated:

> The moral inheritance we have as American lawyers . . . includes dissenters . . . who . . . do not find, in American legal ethics a trustworthy commitment either to the rule of law or the principle that a responsible lawyer works within the system . . . . Some of these dissenters offer . . . that clients . . . are more important than institutions . . . [and] than abstract and official ideas and that friendship is more important than justice.[140]

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139. As C. Menkel-Meadow has observed,

> As an instructor and practitioner, the clinician has a unique opportunity to study the legal profession as an ethnomethodologist — that is, a participant observer . . . . [and] a rich opportunity for a systematic behavioral examination of the participants in and the structure of the legal system.

Menkel-Meadow, *supra* note 4, at 572. By tethering skills education to the practice of law, research on these educational objectives can be conducted through studies of practicing lawyers. Research on how skills are learned, however, can only be conducted through studies of students (or lawyers) who are, in fact, learning. For these reasons, the clinical educator is ideally situated to further an understanding of both how lawyers employ legal skills in performance and how students acquire them.

140. Shaffer, *The Ethics of Dissent and Friendship in the American Professions*, 88 W. VA. L. REV. 623, 638 (1986).

Second, all legal skills require the lawyer to assess and assign relative weight to the information upon which the lawyer's behavior is based.[141] Students of lawyering must become cognizant of the wealth and diversity of information and their control over its use. Finally, all lawyering activity incorporates and changes precedent skills through an expansion of information and assumption of professional roles.[142] The interactive dynamic of roles and information must be consciously appreciated if legal skills are to be learned rather than fortuitously acquired.

That law students can arrive at their final semester of law school without having "learned" these three dimensions of lawyering performance was suggested in a study of law students enrolled in a live-client clinical course at the University of Cincinnati.[143] The students were asked to comment on their experiences as guardians ad litem for children appearing in Juvenile Court. The students repeatedly reflected on their personal adjustments to the demands of the lawyer's professional roles, roles which they assumed with case responsibilities:

> [Y]ou can't reinforce [sic] your values on other people. You got to accept them [sic] they are. You really have to change yourself and try to understand them and know you can't change the world.[144]

> From dealing with the parents, I realize that people are different and that I am not going to be dealing with other lawyers and people will not understand the legalese that is used . . . it's important to learn how to portray your role to people in the best light that is truthful.[145]

> Probably, good lawyers don't always tell the whole truth. They don't lie but they don't tell everything. They don't help

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141. This assessment process is similar to but broader than the informational assessment performed by a lawyer as interpreter for a client. To locate a client's situation, for example, on a legal "map" requires a balancing of information for the purpose of, perhaps, advising the client. *See supra* text accompanying notes 86-89.

142. The interpersonal skills used in a friendship or on a sports team may not be fully appropriate for a judge or divorce lawyer in a professional role. Similarly, public speaking skills developed on a debate team or as a political candidate must be tailored, for example, to the constraints of the appellate courtroom.

143. J. BOLAND, *supra* note 37, at 7-11. The clinic was offered in the spring semester, 1985, to third-year law students. Of the ten students enrolled, nine were in their final semester of law school; one student was on "flex time" requiring completion of one additional semester.

144. *Id.* Data files/WT.

145. *Id.* Data files/KK.

> you out as much as you think they should if it is going to hurt their case, it doesn't mean they're not a good lawyer, it might mean that they're better.[146]
>
> I guess I never realized how much involvement we really had. We have pretty much responsibility. We don't have ultimate, but we talk to these people. I guess I didn't realize the amount of personal involvement.[147]

Implicit in these students' comments is a nascent understanding of the professional roles of relation-coordinator, interpreter, representative, and resolver, respectively. While the students do not characterize their experiences with the terminology of professional roles, they do recognize the influence of professional expectations in forming behaviors not previously apparent to them. As the researcher concluded, these clinical students "gained some insights into their role responsibilities as lawyers."[148]

The informational assessment and preparation required to perform their roles also impressed the study group in their evaluation of their clinical learning experiences:

> You go into the interview with the bright idea that you are going to find out everything that you need to know, which you think you do after you talk to the first person, but then you talk to the next person who saw the same thing and you get a different story. After you've done that four or five times, you realize that you are going to have to look at everything and make your own decisions . . . so you can't really go in with anything pre-conceived, you've just got to take each situation, each interview and weigh what you've got.[149]
>
> There are different ways to approach cases and maybe the whole process. You never really know what kind of atmosphere you are going to have to deal with, whether it is to be really adversarial or more conversational so you just have to prepare with what you have so that you can deal with any situation that comes up.[150]

Similarly, students acknowledged that the assessment process required a factual inquiry that cannot be entrusted to others.

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146. *Id.* at 13.
147. *Id.* at 9.
148. *Id.* at 11.
149. *Id.* at 10.
150. *Id.* Data files/WT.

> When I leave [an interview] I learn how I wish I had asked a question . . . . I think I'm learning what to say and what not to say and how to say it . . . . Another thing I think that I learned too — it was real hard — I trusted so much and I really didn't question what anybody told me. I think I learned maybe not a good thing but maybe I shouldn't trust so much. Of course people are telling me what they want me to hear . . . which kind of bothered me because I feel like I am a better judge of character than that but I guess that did teach me not to take things quite so literally.[151]

Their responsibilities in identifying, valuing, and using the informational resources in their professional capacities were a primary area of performance apparently unanticipated by these students.[152] "They moved away from interpreting information in a casual, everyday manner toward interpreting information through the many different perspectives uncovered during their investigations."[153]

Finally, a certain perplexity over the nature of "skills" used to develop cases is reflected in one student's struggle to explain the interviewing experience:

> I would say on interviewing that I couldn't point to a single skill that I picked up . . . in a sense this didn't seem like professional interviewing. We were more fact finding than anything. Maybe that is what interviewing is. We basically sat down and talked to these people. We saw how they felt. This was a delicate situation when we asked them what should be done. It wasn't adversarial interviewing. It certainly wasn't cross examination. That is a different sort of interviewing skill.[154]

The study findings suggest that these students' clinical experience may have been their first exposure to the three intellectual bases identified here as foundational to the development of legal skills.[155]

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151. *Id.* at 10-11.

152. Initially, the researcher had elicited from the students what they hoped to learn in the clinical course. "[T]hey were drawn to the course because it offered the chance for real work in a courtroom setting and to learn the skills related to being an effective lawyer." *Id.* at 6. They did not, however, offer any specifics. Based on his evaluation of the students' assessment of what they learned in the course, the researcher concluded that "important insights into their socialization as lawyers" dominated their experiences. *Id.* at 13.

153. *Id.* at 11.

154. *Id.* Data files/GJ.

155. The study was not designed to test either the validity or pedagogy of legal skills derived from the model of jurisprudence. In fact, the research results suggested the primacy

However, the legal curriculum and the professional skills curriculum, specifically, has not been designed to equip students with broadly applicable and replicative legal skills. Legal education does introduce the student to new precedent skills, such as legal research or syllogistic thinking, and it builds upon previously acquired precedent skills, such as public speaking or descriptive writing. However, legal education has not traditionally exposed students to, for example, the formative effect of roles and information on the use of precedent skill. Thus, while a course in interviewing directs the students' attention to the development and refinement of interpersonal skills, such courses rarely explore forming and altering interviewing approaches based upon doctrinal needs or concerns.[156] Such courses also rarely explore employing suggestive interviewing technique[157] both to fill the fact informational unit and in response to the professional roles as representative and resolver.

A legal skills curriculum based on the practical model of jurisprudence has three essential characteristics. First, students are taught the nature of legal skills, including the interaction of roles and information. Second, "skills" courses, however circumscribed, focus on the impact of lawyers' roles and information on the use of precedent skills, not on precedent skills acquisition or refinement. Legal skills courses neither distortingly de-emphasize the importance of one or more units of information[158] nor exaggerate the prominence of precedent skills such as interpersonal skills.[159] Third, legal skills instruction illuminates the interaction of roles, information, and precedent skills to facilitate student replication outside the course and law school. This characteristic requires that students perform as lawyers.

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of professional role in lawyering performance and the inadequacy of skills theories that fail to equip students for role performance generally. Additionally, the results, as suggested in the student comment regarding "interviewing," challenged the conceptualizing of skills as discrete, physical activities. The extent to which students may learn a legal skills foundation in a non-clinical methodology will be the subject of future study.

156. *See supra* note 138. Materials do explore altering styles in response to the type of client. This is primarily an interpersonal skills question, recognizing that efficacy of interviews varies with personality types.

157. *See* E. LOFTUS, *supra* note 133, at 149-69.

158. The de-emphasis on fact information in typical doctrinal courses with a concomitant reliance on appellate reasoning has been criticized as tending to warp the student's perspective of the relative relation between fact and law. Rutter, *supra* note 5, at 316-18.

159. Gross student deficiencies in precedent skills raise a separate issue. Remedial instruction in interpersonal relations, public speaking and goal-setting appear to be a logical corollary to the typical response for inadequacies in writing and reading.

Florida Law Review, Vol. 39, Iss. 1 [1987], Art. 3

Assume, for example, that the beginning lawyer in section II had never received instruction in law school on how to draft a contract. Assume also that the lawyer's first client has requested the lawyer to draft a contract. Educated now in legal skills, aware of the professional roles the lawyer serves with the client, and alert to the informational based upon which to draw, the lawyer can employ "fill" skills for doctrinal[160] and factual[161] informational gathering. The model provides a framework for the lawyer to recognize both areas of knowledge and, more importantly, areas of lack of knowledge. Whether the lawyer should draft this contract or whether the draft will be of any quality are questions left to the lawyer's control, but questions legal education has prepared the lawyer to answer.

While this article advocates a legal skills theory derived from the practical model of jurisprudence, it does not attempt a description or implementation of a plan for a legal skills curriculum. Too little is known to recommend any one method for teaching even the intellectual, much less practical, foundation of legal skills. Should legal skills, such as "thinking like a lawyer," "interviewing like a lawyer," or "fact-gathering like a lawyer," be the focus of a "skills" course? Should legal skills be integrated into the more traditional doctrinal concentrations? What type of educator is best equipped to teach the legal skills? What, for example, is the significance of the educator's own experience in functioning within professional roles? To what extent should precedent skills be part of the law school curriculum?

At a minimum, the curriculum should offer students considerable exposure to the professional roles, the creation and use of informational resources, and the adaptation of precedent skills and performance opportunities in which some number of legal skills are practiced. Students might learn legal skills in a variety of effective ways. To illustrate, consider how to teach "fact-gathering like a lawyer." Three possibilities are immediately obvious: a lecture describing the skill, including the significance of lawyers' roles, with problems asking the student to identify what facts the student would seek to put in the unit; a simulation exercise through which the student prepares an investigation plan and perhaps conducts a witness interview; or an actual clinic case for which a student must conduct a factual investigation.

Resources and other teaching objectives or interests may predis-

160. E.g., library research, conversations with experienced contract lawyers, and area form books.

161. E.g., client interview and telephone call to seller.

pose a faculty to one method over another. But there is very little empirical basis that clearly recommends one methodology. In this regard, the practical model of jurisprudence can only direct thinking about alternative methods of teaching legal skills, and moreover, suggest a structure for validating the efficacy of a teaching methodology.

Alternative designs for legal skills education must compete with the elemental nature of modern legal education and a current skills focus on lawyering activity. The model can help focus discussion of how to circumscribe and teach legal skills. Consider, for example, the feasibility of offering no traditional "skills" courses such as Interviewing, Counseling, and Negotiations. Alternatively, faculty could agree to add to their substantive courses simulations of a lawyering activity in which lawyers in their field frequently engage. Upper level courses in Lawyers' Professional Roles[162] and Lawyers' Informational Base would be prerequisite to a live or simulation "performance" clinic. Precedent skills could be supplemented by optional mini-courses. Such an array of courses and course experience promises students fuller exposure to all of the ingredients of lawyering without fragmenting the work beyond recognition and recall.

Student opportunity to perform is an essential component in a legal skills curriculum based on the practical model of jurisprudence. Performance, assuming professional roles and facing the audience, offers an essential educational culmination in which legal skills are activated to transform information in the service of professional roles. In addition, this environment is cushioned for initial performance anxiety and errors. For what purpose was the time of learning if not to perform? "Attention to the performer or even to the act of performing is incomplete unless attention is also given to the final product."[163]

VI. Conclusion

Either a reorganization of current professional skills courses or an overhaul in the medium by which legal skills are taught must follow a decision to abandon Langdellian elementalism in legal skills theory.

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162. Professor Murphy offered such a course during the Spring Semester, 1987. While the students simulated various lawyering activities (client and witness interviews, negotiations, etc.) class readings and discussions focused the students on why they made particular decisions regarding how to proceed (or not to proceed) in the simulation. This emphasis was furthered by the use of non-legal simulations, against which the students could contrast their professional role decisions. The course was highly successful.

163. Mudd, *supra* note 56, at 202.

Florida Law Review, Vol. 39, Iss. 1 [1987], Art. 3

Legal skills will be isolated in a curricular corner only so long as its theoretical base spreads no further. In answer to Professor Rutter's assertions that legal skills share intellectual rooting, the practical model of jurisprudence offers an alternative theory of legal skills that blends lawyers' professional roles, their precedent skills, and information into the controlled activity by which they serve society.