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SYMPOSIUM

TEACHING AND TESTING FOR COMPETENCE IN LAW SCHOOLS

ROBERT KEETON*

I. COMBINING ACADEMIC AND PROFESSIONAL EDUCATION

A. *The Dual Role of Law Schools*

Law schools in the United States are typically both academic and professional. Most law schools are university-related, treasuring their ties to traditions of learning and inquiry. At the same time, they conceive it as one of their missions to contribute to the preparation of students who expect to be practising lawyers.

B. *Academic Education and Competence*

Centering pre-admission legal education in university-related law schools has detached it from its earlier mooring in law office reading and apprenticeship. Association with a university underscores the objective that the basic educational preparation for careers in the legal profession be, first, more systematic than the vagaries that any set of clients' interests and concerns are likely to present to an apprentice; second, more reflective than instruction is likely to be in competition with the demands of a busy law office; and, third, richer in variety of both content and perspective than a single mentor or law firm would be likely to offer. Detachment from the immediate contacts of law offices with the worlds of business and government provides some insulation for uninhibited, reflective inquiry out of which may emerge deeper understandings of law and all the institutions and relations it affects.

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These positive gains from treating the study of law as an academic discipline reinforce rather than conflict with a law school's professional mission. Educational experience in a protected academic setting — far from being tangential to or in conflict with preparation for a career in practice — is indeed the ideal basic educational preparation for a professional career in law. Stated another way, the point is that a sound basic education in law is essential to the competence of a lawyer. To the extent that we can define, teach, and test for the acquisition of that basic education, we can define, teach, and test for something that is essential to competence. On this much, consensus exists not only among academicians but surely more broadly in the legal profession as well.

Before we examine more closely the nature of a sound basic education in law and its relation to competence, consider first the nature of elements of competence.

II. ELEMENTS OF COMPETENCE

A. *Knowledge of Theory and Doctrine; Skills of Understanding and Application*

One way of thinking about elements of competence for the practice of law is to see them as falling generally into two broad categories — knowledge and skills. Each of these categories is subject to further division, and at least in some contexts it is useful to distinguish knowledge of doctrine from knowledge of theory and to distinguish skills of understanding (including the skills of legal analysis) from skills of application such as interviewing, counseling, negotiating, drafting, and persuading. These four categories — knowledge of theory, knowledge of doctrine, skills of understanding, and skills of application — may be viewed as a continuum moving from a strong orientation toward theory on the one hand to a strong orientation toward practical application on the other.

Even though the emphasis of legal education may be placed elsewhere, it is probably agreed that at least a basic minimum of knowledge of theoretical foundations of law is an important element of professional competence — of immensely practical use in many contexts of professional performance. Sharp differences emerge quickly when discussion turns to priorities of emphasis on the theoretical and practical, but rarely is it disputed that a good understanding of theoretical foundations of basic legal doctrine is an essential element of competence to represent clients effectively.

Knowledge of basic doctrine is also an agreed aim of education in law schools, and a recognized element of competence. Differences emerge, however, as inquiry extends to identifying and defining more

particularly the knowledge that is essential to competency. One kind of difference concerns the elusive meaning of "knowing." What do we mean when we speak of "knowing theory," or "knowing doctrine," or "knowing law"? Can one "know" a body of law without "understanding" why it came to be as it is, on the one hand, and how it applies in the solution of practical problems, on the other hand? For example, does one "know" the law of products liability when one is able to state a general rule of strict liability but unable to articulate supporting moral theories of accountability or supporting economic theories of resource allocation and risk management? Or, from a contrasting perspective, does one "know" the law of products liability when one is able to state both a general rule of strict liability and supporting moral and economic theories but unable to formulate instruction that will serve to guide judges and juries in deciding individual controversies so as to produce a total set of evenhanded dispositions? Or, from a similar perspective, does one "know" the basic law of contract and property when one is able to recite the central theories of enforceable promises and ownership of things and yet unable to determine whether an exculpatory clause in a residential lease, between identified persons in particularized circumstances, is legally enforceable or not? Or — in a comparison starting at a point already removed somewhat farther from theory toward application — does one "know" the law of self-defense in criminal cases when one is able to recite rules and standards as they have been stated by legislatures in statutes, by judges in appellate opinions, and by writers in articles or texts, but unable to formulate statements that might be included in a charge to the jury, or an argument of counsel, correctly applying those rules to disputed evidence in a particular case and explaining, so a jury can understand them, the different outcomes the jury might reach, depending upon their resolution of disputed facts?

It is an essential part of "knowing," in a profound sense, that one "understand" the "known" body of law well enough to be able to draw upon those parts of it that are relevant to a problem of practical affairs and to use them in addressing the problem. One comes to greater understanding of stated rules of self-defense, for example, by testing their application, observing the legal outcomes they command in varied fact situations, and reflecting on the consistency of those outcomes with moral values that might be asserted as part of the foundations of the law of self-defense. With that greater understanding, one becomes better prepared — more nearly competent — to distinguish a case argued as precedent, or to draft a proposed statutory reform. Thus the more profound knowledge is closely associated with skills such as persuading and drafting. Indeed, our drawing a line, for our own analytic purposes, between knowledge and the ability to use knowledge

is an artificial separation, even if nonetheless useful. The source of its usefulness is that human minds are incapable of grasping the whole truth at once and may be aided by provisional separations that allow us to apply our limited intellect to manageable bits of the whole. We are inevitably in peril of forgetting that the separation is not the reality but instead an abstraction invented by human minds, to be used as an aid to comprehension and not as an object of fealty. But if we can remember the nature of this separation and remain receptive to reexamining it from other perspectives, observing a two-fold distinction between knowledge and skills — or a four-fold distinction among knowledge of theory, knowledge of doctrine, skills of understanding (including legal analysis), and skills of application — may contribute to our inquiry into the requisites of competence.

Speaking of "observing" this distinction reflects another hypothesis that it may be useful to make explicit. Even though the formulation of distinctions such as these is the product of the mind, one's assertion of observing the distinctions is an appeal to others to accept the distinctions as consistent with their own observations. Even if we cannot entirely disentangle knowledge and skills at points where they intertwine, we can see the difference clearly at points farther outward. We understand in a general way, at least, what one means when saying that a student knows much of a given body of law — both theory and doctrine — and may even be good at legal analysis, but has not yet acquired the skills of application needed for a type of law practice that depends in part on that body of law.

Basic knowledge, then, is part of what is required for competence — but only part. One who has acquired all the knowledge and understanding that we commonly associate with a sound basic education in law may yet be unprepared to function as a lawyer, even in the least demanding of lawyer roles. Skills also are essential. On this, too, academicians and practising lawyers generally agree, even while differing sharply, both as groups and individually, about whether helping novices across the bridges between the academic discipline and practical applications should be primarily, if not exclusively, a responsibility of law schools or of the bar.

B. *Knowledge, General and Special*

A mark of professional performance is that it always occurs within the bounds of some professional role. Most professional roles leave ample room for distinctive individual performance, but bounds there are, and the competent professional must know them. To be competent for the legal profession, moreover, one must know the bounds of not a

single role but many. This knowledge and, indeed, understanding of the differing constraints and freedoms of different roles that the lawyer may occupy in different contexts is a part of the general knowledge that every lawyer must have to be competent. The lawyer who does not know the demands and constraints of undertaking to draft a contract between two persons, though with their consent, is likely to encounter unforeseen trouble in the minefields of conflicting interests. Such a lawyer is unprepared to perform professionally in the context. So too is the lawyer who undertakes the role of advocate in an adversary proceeding, or counselor, or negotiator, without understanding that always the lawyer is performing in a role that carries demands and constraints different from those one experiences when acting for oneself. Qualities such as integrity, industry, and reliability are necessary conditions for professionally responsible performance, but they are not sufficient. The lawyer must have basic knowledge of the legal system and of the differing constraints and freedoms associated with the varied roles the lawyer may undertake within that system. This is a part of the general knowledge that is essential to competence.

Other parts of the essential general knowledge extend to all the basic doctrines of the legal system within which the lawyer practices — in Anglo-American systems, the staples of contract, tort, property, criminal law, procedure, and constitutional law at least, and probably taxation, corporations, administrative law, commercial law, and evidence as well. No doubt many readers will have their own favorite candidates for addition to this core list of subject matter about which every lawyer should know the basics.

All this general knowledge, however, is only a part of the knowledge required for competence to undertake a particular professional assignment or to undertake assignments regularly in a defined area of practice. To be prepared for particular assignments one must have at the outset, or have the means of acquiring when needed, a great deal more knowledge specialized to the problem or the area within which it falls.

C. *General Skills of Understanding*

The skills needed for competence to undertake an identified professional assignment plainly will vary with the assignment. Can we, however, identify some skills that every member of the legal profession should have developed to at least a minimum degree of proficiency? The answer is surely yes.

At the least, every competent lawyer has developed what may be usefully classified as general skills of understanding — skills of analysis, learning, and communication.

Skills and Analysis. One type of analysis — commonly referred to as legal analysis — has been referred to already. Distinguishable, though closely related, is the skill of factual analysis. The relationship between the two is extraordinarily close because the distinguishing features of a good factual analysis serve as the distinguishable conditions to which a good legal analysis may attach different outcomes for good reasons.

Skills of Learning. Throughout their professional careers, competent lawyers must continue to learn in order to stand still rather than falling back professionally in the face of changing law and changing contexts, and the more so to advance professionally. Mastering ways of learning efficiently and effectively, and developing the capability and practice of using them, are essentials that every competent lawyer must have developed to at least a minimum degree.

Skills of Communicating. Lawyers' work is largely, though not exclusively, verbal. Skills of writing, speaking, listening, and reading are basic essentials of competency.

D. *Special Skills of Application*

Just as special knowledge beyond the core of basic knowledge of law and the legal system is essential to most professional assignments, so too individual professional assignments are likely to require one or more special skills, such as interviewing, counseling, drafting, negotiating, and persuading. Whether or not some minimal proficiency in these skills is regarded as a basic requirement for competency, substantial proficiency in one or more of these special skills will be essential to effective representation of clients in many particular contexts.

The ABA Code of Professional Responsibility and state codes fashioned after it all base some rules of conduct on the principle that a lawyer should not undertake an assignment unless the lawyer is competent to complete it or expects to have become competent or to engage a competent associate when the need arises.[1] Very little help is available in the literature, however, for one who wishes to understand what is required for competence. In no other context is this absence of effective guidance more noticeable than in relation to the need for skills beyond basic skills of analysis, learning, and communication.

The outline appearing immediately below is a suggested structure for identifying and describing the elements of competence for undertaking an assignment as a trial lawyer.[2]

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6–101 A(1) and EC 6–1 (1969).

2. *See generally* Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 79 F.R.D. 187 (1978).

Basic

Standards of Competence for Trial Counsel Generally

1. Knowledge of
   a. Rules of evidence
   b. ABA Code of Professional Responsibility
   c. Basic substantive law
   d. Specialized substantive law relevant to the case
   e. Local rules

2. Ability to
   a. Investigate and direct investigation of facts
   b. Analyze factual issues and proof
   c. Analyze legal issues
   d. Draft court papers
   e. Prepare written briefs
   f. Present oral arguments on motions
   g. Evaluate claims and advise clients regarding settlement
   h. Conduct negotiations for settlement
   i. Develop a comprehensive trial plan

3. Character
   a. Integrity
   b. Industry in preparing adequately for assignments undertaken
   c. Professional reliability (compliance with standards of professional conduct)

Additional

Standards in Competence for Trial Counsel in Testimonial Civil Proceedings

1. Knowledge of
   f. Rules of civil procedure
   g. Law of jurisdiction and venue in civil cases

2. Ability to
   j. Sense human relationships and reactions
   k. Examine witnesses
   l. Cross-examine witnesses
   m. Present arguments to the jury
   n. Prepare requests for instructions and objections to the charge

Additional

Standards of Competence for Trial Counsel in
Criminal Proceedings

1. Knowledge of
   f. Rules of criminal procedure
   g. Law of criminal jurisdiction
   h. Substantive and procedural criminal law generally

2. Ability to
   j. Sense human relationships and reactions
   k. Examine witnesses
   l. Cross-examine witnesses
   m. Present arguments to the jury
   n. Prepare requests for instructions and objections to the charge

Even if Part II of this summary is taken as a generally acceptable identification of the skills required for competency in trial advocacy, of course it will not serve for other roles in which skills of interviewing, counseling, negotiation, and drafting are more important and skills of persuasion somewhat less important than in trial advocacy. Also, a teacher who sets out to define these skills more precisely and to design ways of teaching and testing for their development is embarking on an undertaking the nature of which is barely suggested here. Even so, perhaps this outline will serve the purpose of suggesting the general nature and scope of the work to be done if one is to seriously address issues of teaching and testing for the full range of skills required for competency in practice.

III. ELEMENTS OF COMPETENCE IN TRADITIONAL LAW SCHOOL EDUCATION

A. *Emphasis on Doctrine and Analysis*

Education in law schools has tended to focus primarily on two central elements of competence among the four broad elements identified in Part II of this article; it has focused on knowledge of legal doctrine and skills of legal analysis, with less attention to underlying theory on the one hand and to skills of application on the other.

The emphasis on knowledge of legal doctrine is attested by the organization of the traditional curriculum of law schools and the names given to courses, most of which identify segments of legal doctrine. The emphasis on legal analysis is attested by the common assertion — somewhat at odds with the organization and nomenclature of the

curriculum — that law schools are more concerned with training students to think as lawyers and judges think, or as they should think, than with filling student minds with knowledge of the law. Probably it is some form of skill of legal analysis that is most often in the mind of the speaker who makes this common observation about emphasis on training students to think.

Perhaps some readers will object to classifying training in thinking as training in a skill. Certainly it is an element of competence easily distinguishable from skills such as interviewing, counseling, negotiating, drafting, and persuading, and one who so prefers may give it a name other than skill. But it is even more sharply distinguishable from knowledge, and in the present discussion, it is referred to as a general skill of understanding — one that it is essential to develop in some minimum degree before any bridges can be crossed between knowing law and using it in addressing a problem.

There are, of course, degrees and degrees of the depth of training in probing analysis. Methods of instruction centering almost exclusively on the study of appellate opinions tend strongly to emphasize a special kind of analysis — rigorously probing analysis of legal doctrine as developed in the common law case-by-case judicial elaboration of reasons for decision. As other methods of instruction are introduced, many other kinds of analysis, legal and factual, may become centers of attention.

Whether the subject of probing be judicial opinions or instead some other form of exposition, analysis that probes deeply enough exposes premises of reasoning and invites critique of those premises by whatever standards of evaluation the critic may advance. Premises of legal reasoning are inevitably to some extent value-laden, and so are the critic's standards of evaluation. One of the skills of a good teacher is the skill of leading students through probing that is deep enough for them to recognize not only the key values implicit in a body of law but also the key values implicit in their own standards of evaluation of that body of law.

Skills of analysis — legal and factual — lead to a skill of exposing the value implications of choice. Perhaps it overstates the point to call it a skill of moral analysis, but it is at least a skill of developing a better informed basis for choice that inevitably has value implications.

The common assertion that moral values cannot be taught in law schools — or elsewhere to persons as mature as law students — misses the point that moral dilemmas cannot be answered well, or even recognized for what they are, without the application of the knowledge and analysis that makes the difference between blind choice and informed choice.

Why has education in law schools tended to emphasize only the middle of the spectrum — legal doctrine and legal analysis? Why do law schools give less attention to theoretical foundations on the one hand and practical applications on the other? An easy answer is that this emphasis reflects the priorities of interest among law teachers. The unexpressed but rather apparent innuendo is that one having both the power and the will to change priorities in law schools need only change the criteria for selection, promotion, and tenure of law teachers. On closer examination, however, this answer seems unpersuasive.

Criticisms of the two-fold emphasis on legal doctrine and legal analysis come from diametrically opposed perspectives. One set of criticisms charges that law schools give inadequate attention to foundations of legal doctrine in moral, social, economic, political, and philosophic theory. Another set (voiced mostly by an entirely different group of critics) charges that law schools give inadequate attention to the practical applications of law to life problems. It is most unlikely that it would be possible to advance the objectives of both sets of critics by a single set of teacher qualifications applied uniformly to all teaching appointments. Few if any potential appointees have such broad and balanced qualifications and interests. A more promising avenue for achieving what one conceives to be a better balance among potential emphases is to aim for diversity among different members of the faculty. It is true that this point need not be seen as a challenge to the assertion that a change of emphasis in legal education could be achieved merely by a change in personnel policies. No doubt greater diversity of emphasis could be achieved by deliberately aiming in faculty appointments for greater diversity of qualifications and interests among different members of the faculty, without attempting to make such diverse interests a condition of each appointment. Achieving greater diversity in this way seems a worthy aim.

A second observation, however, seems inconsistent with the assertion that the priorities of emphasis in law school could be easily changed, over the long run, by merely changing appointments criteria. A more persuasive case can be made for the proposition that some basic characteristics of law and education have tended to produce emphasis on legal doctrine and legal analysis and over time would tend to do so again even in the face of a dramatic attempt to change appointments criteria.

In the first place, legal doctrine and legal analysis are more easily comprehended, defined, taught, learned, and tested than either the theoretical foundations or the practical applications. Indeed, the consensus that we can teach and test for mastery of legal doctrine and legal analysis is so powerful that demands for evaluation and proof of claims

of the effectiveness of an educational program — voiced with vigor in recent years in relation to proposals for new educational programs oriented toward practical application — are rarely directed toward those parts of law school curricula that focus primarily upon legal doctrine and legal analysis.

Even in the face of this strong consensus on the effectiveness of law schools in teaching and testing for competence in legal analysis, as well as knowledge of legal doctrine, one may feel uneasy about whether the competence in legal analysis that our tests disclose may not be a competence dependent more on inherent ability and earlier training than on what happens to students after they enter law school. Of course, *legal* analysis depends on knowledge of *legal* doctrine, mostly acquired by law students after they enter law school. For this reason, students are unable to show proficiency in legal analysis until they have acquired a certain body of legal knowledge. But to infer that law schools have also contributed to development of greater skills of analysis than those the students had upon entry is largely a leap of faith. Indeed, the strong correlations between Law School Admission Test scores and performance in law school examinations might be read as suggesting that the skill of analysis is not merely present in latent form but instead already developed when students take the LSAT.

We have more reason for confidence, then, that we know how to test for the skill of legal analysis than that we know how to teach it.

A second reason that current pre-bar-admission legal education tends to emphasize legal doctrine and legal analysis is that it is centered in university-related law schools. Inherently this relationship tends to produce less emphasis on practical application than occurred when pre-bar-admission legal education was located primarily in law offices. The gains of locating basic education in law in university-related schools plainly outweigh the risk of inadequate attention to practical application, but they do not justify inattention to avoiding that risk — a point to which Part VI of this article returns.

Locating legal education in university-related schools creates a climate favorable to appropriate emphasis on the theoretical foundations of law. Any inadequacy of emphasis on this element of competence must have its source elsewhere, and the most likely source is the inherent difficulty of the subject. Probably even those law teachers of core curriculum subjects who give more than average emphasis to basic theory in their course instruction tend to give tests that do not faithfully reflect that emphasis. Part of the explanation, surely, is that law teachers tend to have greater confidence in their evaluation of answers to doctrinal and analytic questions than in their evaluations of answers

to questions having a stronger theoretical orientation. Since students are acute observers of what to expect on examinations and tend to allocate their priorities of study consistently with their observations, the law teacher's theoretical emphasis tends not to be reflected in study when it is not reflected in examinations.

In summary, emphasis on legal doctrine and legal analysis comes naturally. If basic education in law, conducted in law schools, is to give substantial emphasis also either to theoretical foundations or to practical applications, this balance must be achieved by deliberate choice and by continued attention to maintaining the broader, more diverse curriculum.

B. General and Specialized Knowledge

What knowledge of law should law schools try to teach? The answers one hears both inside and outside law schools reflect some ambivalence on this subject. On the one hand, it is said that legal doctrine will change over the time period during which a lawyer practices, little of what one learns in law school will be remembered when needed, and it is easy and essential to go to the library and find the up-to-date doctrine when needed; for these reasons, it is said, the doctrine taught in law school is less important than the legal method. On the other hand, course titles in typical law school curricula convey a message of emphasis on doctrine rather than method. They suggest a progression from the most basic bodies of doctrine (such as contracts, property, torts, criminal law, and procedure) through a second level of doctrine still generally regarded as basic (such as constitutional law, corporations, taxation, commercial law, administrative law, and evidence) to more advanced and specialized subjects that are mostly elective and are treated, in law school and bar examination requirements and in faculty advice as beyond the core of basic education in law that every student should have acquired before entering practice. The general knowledge of the first and probably also the second of these levels of progression in law study seems essential to competence for practice in virtually any field of law.

The general knowledge acquired in a sound basic education in law is, however, only part of the knowledge required for competence to undertake a particular professional assignment or to undertake assignments regularly in a defined area of practice. Even though it is useful for a student to be exposed to some specialized bodies of doctrine ("to sink a few deep shafts" by way of example as well as for their intrinsic worth) still it would be unrealistic to aim for teaching each student in law school all the bodies of specialized knowledge the student might

later need for competence during years of practice, extending far into the future. The needs could not be accurately foreseen, and in any event their scope would be beyond reach. This point helps to account for the general view among law teachers that they are more concerned with teaching the basic principles of an area of law than with teaching details of current doctrine that may have been modified by the time the student confronts a problem of practice in that area.

Although some specialized knowledge might be taught and learned in law schools, in general, the specialized knowledge required for competence either in special assignments or in defined areas of practice must be acquired after the basic education has been completed. Indeed, continued competence will require continued acquisition of specialized knowledge throughout one's years of professional performance. If law schools continue to make a significant contribution to teaching specialized knowledge, they must do so by offerings beyond the J.D. curriculum.

C. *Teaching and Testing for Skills*

Three basic general skills of understanding are identified in Part II of this article — skills of analysis, skills of learning, and skills of communicating.

Traditional law school education, as already noted, emphasizes skills of legal analysis both in classrooms and in examinations. Skills of factual analysis receive some, though plainly less, attention in instruction, and less still in testing.

Leading students through a process of legal analysis and evaluation of the legal analyses of others is a first step toward another goal of a sound basic education in law — to develop in students the skill and the inclination to engage in such probing analysis when the teacher is no longer around to guide it. The hope is that by observing a model of probing analysis presented by the teacher and by participating directly or vicariously in the application of that model not only to the writings of others but also to their own or other students' standards of evaluation, the students are learning to learn.

Skills of learning have received less explicit attention in law schools than skills of analysis. Increased interest in clinical education has tended, however, to focus increased attention on the importance of learning how to learn and the importance of developing and nurturing good habits of learning. This emphasis arises naturally from recognition that the scope of the experience any particular student may have while in law school, and more especially while in a single course in law school, is so limited that the lessons to be derived from that experience will be

of relatively little value unless the student is learning something about experience more generally. Perhaps the most valuable thing to be learned is learning how to learn from the experience of the future.

A good experience-based course will help students learn, first, how to evaluate performances of others, second, how to evaluate their own performances and, third, how to improve their own performances. It is useful to make these goals explicit and to communicate them to students. A good critique of a student performance serves not only its intrinsic purpose of telling that student what in the performance was good and why, and what could be improved and how, but also a second purpose — as a model for other students in the class of elements of evaluating a performance they have just observed.

The most compelling testimony of the value of law school courses that focus on skills training is the student evaluation that describes such a course as a transforming experience. The student emerges from the course with a sense of being a different person, performing in some typical role in a distinctively different way at the beginning and end of the course. When that sense has been developed in the student, very likely it will carry with it both an improved capacity to learn from the experience of the future and a strong inclination to use that capacity rather than allowing it to lie fallow.

The third set of general skills of understanding — skills of communicating effectively — come into operation only upon a foundation of at least a basic level of understanding acquired through use of the skills of analysis and learning. From another perspective, however, skills of communicating are essential to effective analysis and learning and are thus as basic as these latter two skills.

A recurring problem for law teachers (though certainly not unique to teachers of law) is the difficulty, both in the teacher's own work and in the guidance of student learning, of cutting through barriers of communication and the misunderstandings that flow from them. First year instruction in law is sometimes described as remedial reading. The point extends as well to writing, even if taught only indirectly and incidentally, and the more clearly when writing exercises are assigned and criticisms and evaluations are returned to the student. And the point extends to spoken as well as written communications.

The kind of instruction that is referred to as remedial in character is aimed at clarity and precision. Though essentials, these are only two among a larger number of characteristics of the skillful communications of a competent lawyer, who must also master, among others, techniques of persuasion and accommodation (including, on appropriate occasions, deliberate and perhaps even creative ambiguity).

Although law schools have traditionally done much to help students improve the clarity and precision of their written and spoken communications, their record is less impressive with respect to other aspects of communication skills. One reason, no doubt, is the higher unit cost of instruction aimed, for example, at improving writing style. A second, and perhaps even more basic reason, is the greater difficulty of defining the elements of competence in writing style — or in other aspects of communication skills apart from clarity and precision. Moreover, even if definition can be agreed upon, there are greater difficulties in teaching and testing for elements of competence such as writing style.

The problems of defining elements of competence and of developing effective techniques and methods of teaching and testing are probably even greater as we move from the general skills of analyzing, learning, and communicating to special lawyer skills such as interviewing, counseling, drafting, negotiating, and persuading.

Only the last of these — and only in the contexts of litigation, primarily in trial and appellate courts — has received moderately large-scale attention in law schools. Probably this development, too, reflects not simply what happened to be the priorities of interest among law faculties but instead reflects in part the greater ease of defining the skills essential to competence and of designing programs to teach and test for those skills in the highly structured context of trial and appellate advocacy than in the more amorphous contexts of less rule-bound settings.

IV. METHODS OF TEACHING

The main core of law school instruction may still be appropriately described as one or another among many varieties of case-method instruction. The main focus is on rigorous analysis of cases or problems.

In several ways, however, law school instructional techniques have been changing substantially. In the 1970's in comparison with the 1920's, for example, or even the 1950's, the focus of rigorous analysis has been more heavily on policy implications and less heavily on applying or distinguishing doctrinal precedents. Also, fewer teachers are using Socratic techniques, in less demanding forms, and for lower percentages of their total instructional time. Two independent pressures probably account for much of this change in technique. One is doctrinal. The enormous growth in the total body of judicial opinions, statutes, and other relevant materials creates a pressure toward lecturing because of the inherently slower pace of subject matter coverage in class discussions. The second pressure is sociological; students have been more resistant and less responsive to traditional discussion techniques than

were the classes of earlier student generations. One may agree that both these causes of change should be taken into account in a rational evaluation of teaching methods and yet be skeptical that the law faculty response has been ideal. The wiser response to a massive increase in materials may be greater selectivity rather than more coverage, and student resistance to discussion techniques may be grounded more in reaction to particular techniques than to all techniques involving a class in active discussion rather than making them passive listeners. Also, students are less likely to resist involvement when they understand a teacher's motivation for involving them — the belief that they will learn more in this way — and find the teacher openly willing to discuss with them this teaching-learning hypothesis and the techniques the teacher uses in trying to teach consistently with it.

In pursuit of a more thoughtful evaluation of methods and techniques of instruction, it may be useful to step back and observe the whole range of ways of teaching and their relation to ways of learning. One way of classifying teaching-learning techniques for law study identifies five main categories: (1) exposition, (2) demonstration, (3) discussion, (4) supervised simulation, and (5) supervised practice.[3]

The learning outcome of a teaching-learning exercise depends heavily on the intensity of the students' concentration of interest and energy throughout the period of the exercise. Levels of intensity of interest and energy tend to be lowest in the passive roles of listening to or reading expositions, somewhat higher in the passive roles of hearing or seeing demonstrations, and increasingly higher when students are involved in discussion, supervised simulation, or supervised representation of clients in dealing with live problems.

This observation alone raises the red flag of warning that a trend toward more lecturing in law school classes may be ill-advised.

A second reason for concern about a trend toward more lecturing is that narrowing the range of techniques of teaching may reinforce the inherent tendency to emphasize only those things the teacher is more likely to engage in with confidence in lectures — exposition of legal doctrine and exposition or demonstration of legal analysis.

Skills training — even for the general skills of analyzing, learning, and communicating, and more so for skills of application such as interviewing, counseling, drafting, negotiating, and persuading — is likely to fail if the teaching is almost entirely in the form of exposition

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3. *See* Keeton, *A Framework for Thinking About Law-Related Learning* in QUALITY LEGAL SERVICES AND CONTINUING LEGAL EDUCATION, 27–39 (1975).

and never proceeds beyond demonstration into techniques that involve students in active rather than passive participation in class sessions.

Objections are raised to techniques of supervised simulation and supervised practice on grounds of unit cost. Team teaching in which law schools draw heavily upon volunteers from the bench and the bar, participating in a team organized and directed by a full-time or part-time member of the law school faculty, can bring costs into a range comparable to that for small classes and seminars, as well as enriching the teaching capabilities by reason of the greater diversity of experience and talent represented in a good teaching team. The potentialities of such team teaching methods have been illustrated both in the sessions of the National Institute for Trial Advocacy, which depends almost exclusively on supervised simulation, and in law school clinical courses that use team teaching in courses integrating both supervised simulation and supervised practice. They have been illustrated, as well, through less extensively, in clinical components of law school courses in contexts other than trial and appellate advocacy — contexts of interviewing, counseling, negotiating, and drafting.

Computer-aided exercises, though not as promising as team teaching in providing effective supervised simulation at reasonable cost, may also make a contribution in this way. A well-designed computer-aided exercise may place the student in a lawyer's role, receive student responses, evaluate them within constraints concerned with the computer capability of reading responses, and collect for the instructor's evaluation responses that the computer cannot evaluate. The branching capabilities of computer programs offer opportunities for tailoring the progression of the exercise to the student's responses. The timing capabilities — the fact that the computer can be otherwise usefully occupied while the student at a given terminal takes as long as needed to think through a problem before responding — offer opportunities for pacing exercises in accordance with the student's state of progression in knowledge and skill.[4]

V. METHODS OF TESTING

Mastery of doctrinal knowledge and of the skill of legal analysis are most commonly tested in law schools by problem questions, stating key assumptions of fact and calling for essay answers that in most schools are evaluated by the faculty member teaching the course. The concern of law faculties about the difficulty of fairly evaluating student answers

4. *See generally* R. BURRIS, R. KEETON, C. LANDIS & R. PARK, TEACHING LAW WITH COMPUTERS: A COLLECTION OF ESSAYS (1979).

is underscored by persistence in performing the onerous task of grading rather than assigning it to assistants.

Large classes produce a pressure toward use of "objective" questions the answers to which can be mechanically graded. Even these "objective" examinations tend to be problem oriented and aimed at testing the skill of legal analysis as well as knowledge of a body of doctrine. Because of the extraordinary difficulty of avoiding unintended ambiguities as well as excluding the influence of subjective factors on both the student responses and the evaluation standards on which the grading guide is based, "objective" examinations tend to be less flexible and, in the view of most law teachers, generally less satisfactory instruments of examination than problem questions calling for essay answers that are graded by the teacher of the course.

The teacher's evaluation of essay answers necessarily involves judgments that cannot be entirely objective, even though the aim and determination are to make them evenhanded. Law teachers believe, in general, in their capability of making these judgments fairly on questions testing doctrinal knowledge and legal analysis. Their confidence probably diminishes substantially as the subject of examination moves toward a stronger theoretical orientation. Plainly, confidence diminishes rapidly as the subject moves in the opposite direction, from a central focus on doctrinal knowledge and legal analysis toward examining other skills — even skills of writing, and more so as to skills of application.

Lack of confidence in standards of evaluating skills, in either oral or written performances, surely does not go as deep, however, as concern about recognizing the different elements and qualities that account for quite different levels of performance. The greater concerns go to using in this context as many levels of refinement of evaluation as one may confidently use in evaluating legal analysis, and in identifying and describing the elements of the performance that account for the evaluation.

Even though evaluation of skills exercises (apart from legal analysis) probably cannot be as nearly objective and as finely calibrated, with confidence, as evaluation of essay answers to questions calling for a display of doctrinal knowledge and legal analysis, it seems reasonably clear that useful evaluations can be made. Indeed, effective skills training in simulated exercises in trial advocacy has depended heavily on diagnosis by members of the teaching team, explanation to the student of that diagnosis, explanation and demonstration of better ways of performing, and new efforts by the student to perform in one of the better ways in a second effort, either on the same exercise or some new exercise requiring the same skill.

When called upon to do so, members of such a trial advocacy teaching team are able also, with considerable confidence, to add to these discursive and explanatory evaluations an overall comparative evaluation — a numeral or letter grade, or a categorization such as excellent, good, satisfactory, or unsatisfactory. It is plainly more difficult, however, to devise "objective" tests for skills of application than for demonstrations of knowledge and legal analysis. In the present state of the art, we must expect both higher cost in human resources and lower confidence in results when testing skills than when testing knowledge and legal analysis.

VI. AIMS FOR THE FUTURE

Should law schools aim for a balance of emphasis different from the traditional heavy focus on knowledge of legal doctrine and skill of legal analysis? Can law schools expect to succeed, and will the effort be worth the cost, if they try to offer more skills training in the relatively neglected skills of learning from experience and communicating, and also in special skills of application such as persuading, interviewing, counseling, drafting, and negotiating?

The potential gains are substantial.

The most obvious and direct gain is the benefit to students in helping them bridge the gap between traditional basic legal education and practice. Developments in the legal profession, including the pressures toward higher entering compensation and quicker absorption into active client representation offer less rather than more promise that effective bridging will occur in the future in that kind of law office supervision that is aimed substantially at instruction as well as getting on with the work at hand. Moreover, helping neophytes bridge this gap is essentially an instructional problem. Law offices are even less likely than law schools to practice effective skills instruction without consciously setting out to do so and commiting substantial energies and resources to the task.

The bridging need not be attempted by practising lawyers alone nor by law teachers alone. The most promising possibilities are those involving all branches of the legal profession in the effort. It seems more likely that such a joint effort can be successfully mounted in law schools than anywhere else among our legal institutions. Moreover, to return to a theme asserted at the outset of this article, instruction in skills, along with legal education more generally, should be more systematic than the vagaries of any set of clients' interests and concerns are likely to present to an apprentice, more reflective than instruction is likely to be in competition with the demands of a busy law office, and richer in

variety of both content and perspective than a single mentor or law firm would be likely to offer.

It is tempting, always, to conclude that the things we are most confident we can do are the things it is most important that we do. If law schools yield to this temptation, they will continue to emphasize teaching and testing for knowledge of legal doctrine and skills of legal analysis. That emphasis will be changed — corrected, if one agrees that it is too narrow — only by conscious choice and continued vigilance against falling back to what we can do most easily and most confidently.