THE RESPONSIBILITY OF LAW SCHOOLS: EDUCATING LAWYERS AS COUNSELORS AND PROBLEM SOLVERS

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I

INTRODUCTION

Although lawyers add great value to society, the esteem in which our profession is held—not only by the public, but by practitioners themselves—has declined greatly in recent years. There is a widespread sense that the practice of law is devolving from a profession with a public calling into a business—and a business with sharp practices at that.

Some lawyers, judges, and law professors have criticized law schools for failing to improve the situation or even for making it worse. These critics particularly deprecate the interdisciplinary turn in contemporary legal education, arguing that law schools should stick to time-honored methods of teaching doctrine and legal analysis through the case method.[1]

In my view, American legal education is as strong as ever in doctrine and legal analysis. But it is strikingly weak in teaching other foundational skills and knowledge that lawyers need as counselors, problem solvers, negotiators, and as architects of transactions and organizations—roles that will pervade their professional lives. The need for these skills can only grow as law school graduates encounter problems with increasingly complex technological, global, financial, institutional, and ethical dimensions. The problem is not that legal education has become too adventurous, but that it has changed so little to meet the needs of a changing society.

This essay proposes a series of advanced courses that integrate the fundamental lawyering skills of counseling, problem solving, and negotiation with insights from other disciplines, including economics, psychology, and business. I shall refer to these courses in the aggregate as the "complementary curriculum"—an indication that they are elements of a coherent program that complements the traditional, case-based law school curriculum.

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This article emerges from an ongoing collaboration with Linda Hamilton Krieger, Senior Research Fellow at the Stanford Center on Conflict and Negotiation, in designing a course entitled "Problem Solving, Decisionmaking, and Professional Judgment." Some of the text is borrowed from our co-authored article, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994).

1. MARY ANN GLENDON, A NATION UNDER LAWYERS (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

Although these lawyering skills are essential for the various careers law school graduates will pursue—whether in corporate transactions, family law, public interest litigation, government, or as civic leaders—the curriculum does not prescribe a unitary approach to acquiring them. While some skills may be taught in cross-cutting courses such as Negotiation, many may also be incorporated in substantive law courses such as Corporations or Environmental Law. Thus students can develop lawyering skills in the contexts of different areas of practice, emphasizing those that fit their particular interests and career plans.

Coincidentally, the complementary curriculum responds to a perennial problem that some readers will recall from their own days in law school: by the time students have completed their second year, if not before, they have mastered the essentials of case analysis and yearn for something more. Situated within an array of other advanced courses, the complementary curriculum offers students the challenge of applying their substantive legal knowledge to real-world problems.

Most law schools today offer some pieces of the complementary curriculum. This essay seeks to place those pieces in a broader, comprehensive context.

II

ESSENTIAL FOUNDATIONS: THE CASE METHOD

Because the complementary curriculum builds on the foundation of case analysis, it is worth pausing for a moment to focus on that pedagogic method, which has been largely responsible for the success of American legal education.

Like the fifteenth-century explorer for whom he was named, Christopher Columbus Langdell set out with one objective but achieved another. Langdell sought to reduce the common law to a set of core principles, from which he could then deduce particular legal rules and doctrines. The legal scholar's job was to derive these principles from the myriad appellate decisions in which they were immanent—much as a biologist studied plants and animals to derive phyla and species. "The library," Langdell wrote, "is to law professors and students what the museums of natural history are to the zoologists, the botanical gardens to the botanists."[2]

While Langdell's jurisprudential theory did not last long, his "case method" of instruction has endured for over a century. James Barr Ames, whom Dean Langdell appointed to the Harvard Law School faculty, suggested the reason when he said that the student "is given no map . . . but is left . . . to find his

2. *Quoted in* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 53 (1983).

way by himself. His scramble out of difficulties, if successful, leaves him feeling that he has built up a knowledge of the law for himself."[3] Coupled with the issue-spotting style of examination, this method of active learning turned out to be a superb way of inculcating the analytic skills and the skepticism about easy answers that are requisite to competence in any career in the law.

The case method teaches problem solving by asking, in one situation after another: Given this set of facts and these precedents, what are the rights and liabilities of the parties? This provides the essential foundation for the lawyer's core task of advising clients about the legal consequences of particular courses of action. Further, as Anthony Kronman suggests, the case method may contribute to the development of a lawyer's judgment or practical wisdom:

> The case method of law teaching presents students with a sense of concrete disputes and compels them to reenact these disputes by playing the roles of the original contestants or their lawyers. It thus forces them to see things from a range of different points of view and to entertain the claims associated with each, broadening their capacity for sympathy by taxing it in unexpected ways. But it also works in the opposite direction. For the student who has been assigned a partisan position and required to defend it is likely to be asked a moment later for his views regarding the wisdom of the judge's decision in the case. To answer, he must disengage himself from the sympathetic attachments he may have formed as a committed, if imaginary, participant and reexamine the case from a disinterested judicial point of view. . . . One aim of this complex exercise in advocacy and detachment is the cultivation of those perceptual habits that lawyers need in practice.[4]

Dean Kronman goes on to argue that the case method's emphasis on the disinterested judicial point of view cultivates a civic-minded, public-spirited perspective; it induces students to care about "the good of the legal system and the community it represents."[5]

For all of its virtues, however, the case method of instruction is limited by the inexorable fact that appellate cases embody static situations with determinate facts. By contrast, lawyers in everyday practice are called upon to help clients arrange their future affairs in dynamically changing situations where the facts, as well as the law, are anything but determinate. Appellate cases do not allow students to "reenact . . . disputes by playing the roles of the original contestants or their lawyers." Actually, if one looks back to the origin of many cases, the parties were not contestants at all. Rather, they were individuals or entities seeking counsel in arranging their personal or business affairs or resolving a nascent dispute. In some instances, the very fact that litigation ensued signals a failure of their lawyers' judgment or skill. The remainder of

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3. *Id.* at 54.
4. KRONMAN, *supra* note 1, at 113, 116.
5. *Id.* at 119.

this essay focuses on a curriculum designed, among other things, to guard against such failures.

III

THE LAWYER AS COUNSELOR

Counseling lies at the heart of the professional relationship between lawyer and client. A client comes to a lawyer—rather than, say, an accountant, an engineer, or a psychologist—because the client perceives his problem to have a legal component. But most real-world problems do not conform to the neat boundaries that define and divide different disciplines, and a good lawyer must be able to counsel clients and serve their interests beyond the confines of his technical expertise—to integrate legal considerations with the business, personal, political, and other nonlegal aspects of the matter.

In counseling a client about a strategic decision, negotiating or drafting an agreement, or dealing with an organizational problem, the lawyer's work may be constrained, facilitated, or even driven, by the law; but it often calls for judgment and even expertise not of a strictly legal nature. Thus, good lawyers bring more to bear on a problem than legal knowledge and lawyering skills. They bring creativity, common sense, practical wisdom, and that most precious of attributes, good judgment.

This description of the lawyer's role as counselor raises fundamental questions about the relationship between lawyer and client: When is the lawyer an independent actor or authority? When is he an agent, subservient to the client's wishes? Is the relationship usefully understood as a partnership subject to ongoing negotiation? What are the lawyer's obligations when a client requests him to engage in actions that are lawful but which he finds morally problematic because of their impact on others? What are his obligations when he believes that the client will use his analysis of the law to violate its spirit or even its letter? When he believes that the client is acting against her own long-run self interest?

A comparison of the broad American conception of the legal counselor with the more limited role played by lawyers in other parts of the world can illuminate these questions and provide insights into the different legal cultures that our students are likely to encounter in practice.

At the core of the lawyer's role as counselor are the skills of questioning and listening to a client with an attitude of sympathy and detachment, while attending to the client's emotional as well as intellectual needs—all with the aim of helping clarify the client's objectives and helping her choose the best means of achieving them. These skills are best learned through closely supervised clinical exercises, which also afford students the opportunity to make, defend,

and reflect upon the strategic and ethical decisions presented by particular situations.

Although I am skeptical whether law school is the best place to teach most practical lawyering skills—largely because, as in learning a language, the skills quickly vanish unless students regularly use them—the basic skills of counseling are eminently usable in the informal interactions with friends and colleagues that take place outside of any classroom setting.

IV

THE LAWYER AS PROBLEM SOLVER, DECISIONMAKER, AND PLANNER

Problem solving, decisionmaking, and planning will pervade our students' professional work in whatever careers they choose. A client often comes to a lawyer without a clear sense of his underlying objectives or interests, but with his mind fixed on a particular solution. The client may mistake symptoms for the problem itself, define the problem too narrowly, or define it in terms of the most obvious or traditional solution.

A good lawyer can assist clients in articulating their problems, defining their interests, ordering their objectives, and generating, assessing, and implementing alternative solutions. This demands multifaceted problem-solving and decision-making skills, which in turn require a multifaceted approach to teaching.

A. Transactional Case Studies

The transactional case study is a fundamental vehicle for teaching problem-solving skills. Adapted from a method long familiar in business schools, the transactional case study presents a problem as a client might present it to a lawyer, and requires the student to identify, analyze, and propose solutions to it.

For example, a student might be asked to assume the role of a lawyer who is consulted by the founder and sole owner of a business: the client wishes to give the business to her three children as equal partners, and asks the lawyer to create a partnership and transfer her interest to the children in a way that minimizes the gift tax consequences. However, the case study reveals information designed to alert students that the client faces problems greater than the legal issues: Two of the children hold very different positions of authority in the family enterprise, and the third has not been involved at all. Whatever stability in their relations may exist while the mother is actively running the business may well dissolve on her retirement or death.

The case study affords students the opportunity to comprehend the broader problem and consider alternative ways to achieve the client's underlying goals.

Students might first analyze the case study individually and then work in groups in ways that develop collaborative problem-solving skills.

Transactional case studies are by no means limited to business or estate planning problems, but can encompass any problem a lawyer might encounter. For example, a student may assess the options available to a community facing a toxic hazard, or plan a strategy for conducting or settling a lawsuit.

What appellate cases are to the basic law school curriculum, transactional case studies are to the complementary curriculum, teaching a variety of problem-solving and decisionmaking skills through repeated engagement with problems situated in simulated real-world contexts. They promote the same sort of active learning as the analysis of appellate cases, giving students the opportunity to fall into and extricate themselves from the traps that await the unwary decisionmaker and to cultivate their skills and creativity.

B. Interdisciplinary Insights

It is impossible to learn or retain much of value in the absence of conceptual structures. The students' engagement with transactional case studies must therefore be informed by theoretical models, and the multiple realms in which lawyers engage in problem solving call for a multiplicity of models. The analysis of transactional case studies is therefore informed by readings from disciplines including decision theory, statistics, risk analysis, economics, and psychology.

Uncertainty is a pervasive component of most decisionmaking problems: uncertainty in identifying the causes of events and in predicting the consequences of decisions. The basic techniques for dealing with uncertainty come from probability and statistics. While lawyers need not be accomplished statisticians, they should grasp at least enough of the concepts to avoid making silly inferential errors and to know when and how to consult an expert.

To this end, the complementary curriculum should include elementary probability and statistics. It should also introduce students to two subjects that draw on both statistics and economics: decision analysis, which introduces methods for structuring and making decisions under conditions of uncertainty, complexity, and ambiguous preferences, and risk analysis, which offers methods for evaluating tradeoffs between costs and the risk of harms to persons, property, the environment, and other interests.

Decision and risk analysis are quantitative methods for getting decisions right. Lawyers have an equally pressing need to know how they and their clients are prone to get them wrong. Here the curriculum turns to the psychology of judgment and behavioral economics.

As intuitive statisticians, humans tend to make systematic inferential errors that frustrate our efforts to understand the causes of events: For example, we gravitate toward explanations that conform to preconceived notions or

stereotypes and we tend to overvalue vivid or recent data. Thus, television coverage of a single airline crash affects to a greater extent our assessment of how safe it is to fly than do statistics about the number of passenger miles per death.

As intuitive economists, we are loss averse: We weight prospective losses more heavily than prospective gains of the same magnitude, and we also tend to risk large but uncertain losses rather than accept smaller but certain ones. Furthermore, we are overconfident that our business and personal plans will succeed. We set expectations based on vivid information or on numbers that others suggest to us. For example, a litigant—or an untrained lawyer—who uses a decision tree to estimate the likelihood of a large verdict tends to give far more weight to the predicted outcome than is justified by the speculative probabilities attached to each branch of the tree.

All practicing attorneys—from in-house counsel to community lawyers representing indigent clients—must make decisions under conditions of uncertainty. Indeed, the leadership roles that lawyers play in society tend to bring them into situations of greater, not less, uncertainty. They need to know how to make unbiased assessments of risky situations.

Transactional case studies allow students to bring both quantitative methods and the insights of cognitive psychology to bear on actual problems. Some cognitive biases may be inevitable. However, as Stanford psychologist Lee Ross puts it, "we may still see the mirage in the desert, but we don't have to slam on the brakes."[6]

V

THE LAWYER AS NEGOTIATOR

What counseling is to the lawyer-client relationship, negotiation is to the client's relationship with others, including potential partners in business transactions and parties with whom the client is involved in a dispute. In effect, negotiation is a form of collaborative problem solving among parties whose interests converge and diverge in various ways.

The dominant contemporary approach to negotiation seeks to identify and maximize the parties' interests—to expand the pie rather than just divide it up. It recognizes, as Ronald Gilson and Robert Mnookin observe, that the parties' "differences in preferences, relative valuations, predictions about the future, and risk preferences," as well as possible economies of scale and other shared goods,

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6. Lee Ross, Reactive Devaluation in Negotiation and Conflict Resolution, Conference on Theoretical Perspectives on Dispute Resolution, Stanford University (Feb. 19-21, 1993).

have the potential for creating joint value.[7] However, the tensions between the parties' dual objectives of creating value and taking away maximum value for themselves creates what has been called the "negotiator's dilemma": while the opportunities for mutual gain are increased by disclosing one's true interests, the chances of securing the most for oneself are often improved by concealing them.

The task for the curriculum in this area is to introduce students to the barriers to negotiated agreements and the means for overcoming them. Game theory provides a useful model of how rational, self-interested parties deal with each other. Cognitive and social psychology provide insights into how real people may depart from an abstract model of rational behavior.

For example, the tendency toward loss-aversion makes people overly reluctant to give up something they already possess in exchange for something else of value. (Hence, one psychological barrier to negotiating peace treaties that require giving up territory, no matter how, or how recently, acquired.) We tend to favor views expressed by people we like or who are on our side of a dispute and devalue the views of adverse parties. We are prone to accede to requests from people who do favors for us—even slight and uninvited favors—and, by the same token, we tend to reciprocate concessions in the course of negotiations. We tend to accede to the requests of people we perceive to be in authority, even when compliance contradicts our strongly held beliefs. Once we have made a decision, we tend to discount evidence calling it into question and escalate our commitment to it.

Some of these methods of influence are part of the industry knowledge of enterprises ranging from selling cars, to enlisting people to join religious and civic causes, to fundraising. Lawyers should be aware of these dynamics, which may affect their own behavior and that of their clients.

Knowledge of these phenomena can be used to defend against others' use of them or, conversely, to manipulate people to one's own advantage. Because the techniques of influence are readily subject to abuse, teaching about them carries the concomitant responsibility to examine the morality of influence. This area of ethics is significantly underdeveloped and in need of thoughtful scholarship.

As in the case of counseling and problem solving, negotiation is usefully taught through a combination of interdisciplinary readings, transactional case studies, and clinical exercises that offer opportunities for students to test their theoretical understanding through simulated negotiations.

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7. Ronald Gilson & Robert Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 8 (1995).

VI

THE LAWYER AS ARCHITECT OF TRANSACTIONS AND ORGANIZATIONS

Lawyers negotiate joint-custody agreements, create partnerships, and design executive compensation programs and procedures for dealing with sexual harassment. In these roles, they create or modify ongoing relationships between their clients and other parties; they design and restructure organizations and processes. Much of this work requires knowledge of specific substantive and procedural law, but the doctrinal curriculum alone does not prepare students for the lawyer's role as the architect or engineer of transactions and organizations. Here, again, the complementary curriculum must draw upon knowledge from other disciplines.

A. The Economics of Transactions and Organizations

Recent advances in economics focus on structural or organizational barriers to negotiating and implementing efficient long-term arrangements. This research addresses problems of coordinating actions and sharing information among the parties to a transaction, problems arising from the divergence of interests between principals and their agents, and problems arising from "adverse selection" (for example, an insurance plan that covers cosmetic surgery will disproportionately attract people contemplating such surgery) and "moral hazard" (for example, a regulatory regime that allows the owners of savings and loan associations to benefit from risky investments, while imposing the costs of failure on taxpayers).

The research also sheds light on mechanisms for minimizing these problems, such as screening, monitoring, the use of incentives, and considerations of reputation. For example, consider the strategies available to an institutional client seeking to maximize the efforts and minimize the fees of the lawyers it retains.

While detailed knowledge of these bodies of economics will be especially useful to students planning careers in policymaking or business law, an understanding of the basic concepts is valuable for almost any career in the law.

B. Organization Theory

The economic model of the self-interested, rational actor is an abstraction. Most of us have myriad opportunities to engage in opportunistic behavior, which we resist or ignore for reasons of personal morality, institutional loyalty, law-abidingness, altruism, or socialization.

Our behavior is affected by the contexts in which we act, and one context of particular interest to lawyers is the organization: As James March and

Herbert Simon observe, "[o]rganization members are social persons, whose knowledge, beliefs, preferences, and loyalties are all products of the social environments in which they grew up, and the environments in which they now live and work."[8] The field of organization theory views decisionmakers as actors in the context of the structures, rules, norms, cultures, and politics of organizations. Much of the work in this field considers how these organizational features evolve and how they affect and are affected by decisionmaking within an institution.

Having a good sense of the dynamics of organizations will serve a lawyer well in many areas of practice. However, there is relatively little scholarship bringing organization theory to bear on the practical problems that lawyers and their clients face in organizational settings. By contrast to economics, this part of the curriculum is in a nascent stage.

C. The Dual Role of Transactional Case Studies

Transactional case studies play a dual role in teaching law students about transactions and organizations. At a minimum, they provide students with opportunities to analyze and solve problems that underlie long-term business relationships, and to use their creativity in designing viable institutions and processes. For these purposes, one can craft entirely hypothetical case studies, such as the family-business problem described earlier.

However, case studies can also allow students to test the application of various economic, psychological, and sociological theories to real-world transactions. For example, in a course at Stanford Law School entitled "Deals: The Economic Structure of Transactions and Contracts," Professor Ronald Gilson and his colleagues examine an actual real estate syndication to inquire how economic theory explains, or could have improved, aspects of the deal. Such empirical studies require the detailed examination of actual transactions—a time-consuming and expensive endeavor, but one that can expand theoretical knowledge as well as provide an excellent teaching vehicle.

VII

OTHER CROSS-CUTTING SKILLS

In addition to teaching counseling, negotiation, and related skills, the complementary curriculum contributes to law students' education in three essential areas: collaboration, legal writing, and legal ethics.

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8. JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 13 (2d ed. 1993).

A. Collaboration

From the moment they enter practice, lawyers spend much of their time working collaboratively with others, including clients, other lawyers, legal assistants, and professionals in other fields. The forms of collaboration include brainstorming, group decisionmaking, engaging in complex multitask projects, and editing and being edited. At its best, collaboration is efficient, as well as professionally and personally rewarding. At its worst, it is wasteful and pathologically destructive.

Collaboration is a skill that can be learned. Yet law schools have not traditionally offered students many opportunities to work collaboratively, let alone to reflect systematically on their successes and failures in team efforts. Most class assignments, exams, and papers are individual endeavors.

While traditional doctrinal courses could easily require collaborative work, the complementary curriculum is especially conducive to helping students examine, critique, and improve their collaborative skills.

B. Legal Writing

The form of writing distinctive to counseling is the memorandum to a client analyzing his or her problem and setting out and evaluating alternative courses of action. By requiring students to analyze a set of facts (not already homogenized, as they typically are in appellate writing assignments) in terms of both legal and nonlegal considerations, and to present options and recommendations in nontechnical language, the memorandum teaches clarity of analysis and exposition.

Negotiations often culminate in a contract or other document designed to guide the parties' future relationships. Drafting such documents calls for imagination in predicting different ways in which the future may unfold and for creativity and strategic choices about the precision or open-endedness of language.

Most fundamentally, drafting provides students with a sense of the inherent ambiguity and vagueness of language and, indeed, of what the legal philosopher H.L.A. Hart called the "indeterminacy of aim" that characterizes our vision of the future.[9]

C. Legal Ethics

Finally, the complementary curriculum presents countless opportunities to examine challenging issues of professional ethics in real-world contexts.

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9. H.L.A. HART, THE CONCEPT OF LAW 125-26 (1961).

Transactional case studies can readily incorporate many of the ethical issues that lawyers face outside of the courtroom—issues ranging from conflicts of interest, to the use of devious tactics in negotiations, to counseling the client who wishes to engage in antisocial behavior.

In clinical exercises, rather than merely discussing what would be the right or wrong thing to do, students actually *make* decisions, which can then be examined critically. This process, initially done with the guidance of a professor, lays the essential groundwork for critical self-reflection during the lawyer's career in practice.

VIII

CONCLUSION

Like Langdell and Ames, today's law professors want to teach students how to teach themselves the most important components of a skilled and principled law practice. Building on foundations laid over a century ago, the complementary curriculum is designed to prepare students for practice in a world that their forebears could scarcely have imagined.

While Langdell thought that legal scholars should imitate the scholarly techniques of other disciplines, the complementary curriculum is truly interdisciplinary, drawing on knowledge from fields including mathematics, economics, psychology, sociology, engineering, and business. As Ronald Gilson and Robert Mnookin have observed:

> legal academics are particularly well suited to the interdisciplinary effort necessary to exploring how our legal system, and private parties transacting in its shadow, behave. To the extent that legal academics share a common disciplinary core beyond facility with the output of courts and legislatures, it is a commitment to the importance of a deep and sensitive institutional knowledge. However, as legal scholars we are reasonably free of disciplinary restrictions on the tools that can be deployed in aid of our task. Legal academics may take economic analysis as far as it goes, but then switch to cognitive psychology or sociology to fully close the jaws of our analytic vice. In this respect we have the opportunity to use borrowed concepts with a freedom that our sisters and brothers in particular social science disciplines probably cannot.[10]

The complementary curriculum is not a substitute for other parts of the advanced curriculum—for courses that broaden and deepen a student's knowledge of substantive law and policy, introduce global perspectives, and develop advocacy skills. It does not substitute for courses that examine the legal system from the viewpoints of jurisprudence, history, social science, and critical legal theories—perspectives that are as important to the development of a lawyer's judgment as any technical skills.

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10. Gilson & Mnookin, *supra* note 7, at 13-14.

Indeed, in the end, no law school curriculum can substitute for good mentoring in a lawyer's early years of practice and for the experience of grappling with actual problems day to day. But law schools can provide a strong foundation for the ongoing, reflective self-education that is integral to any successful professional career.

Ensuring that today's law students graduate with this foundation will not, by itself, turn the legal profession around. However, to the extent that we increase the number of lawyers who possess the skills described in this article and the judgment and character to exercise them wisely and ethically, we will improve the quality of the profession and serve as a model for others in the teaching and practice of law. That in itself would be a substantial achievement.