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Nancy Schultz

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General Article

*57 HOW DO LAWYERS REALLY THINK?

Nancy L. Schultz [FNa]

WESTLAW LAWPRAC INDEX

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An unfortunate debate repeats itself at law faculty gatherings nationwide: Should law schools be teaching future lawyers the full range of skills they will need in practice? Or should we focus on teaching doctrine and analytical skills? In the midst of this debate, nearly everyone agrees-in an “indefinable chant whose repetition suggests sacred meaning” [FN1]-that the purpose of law school is to teach every student to “think like a lawyer.” Few seem to recognize that we cannot really teach students how lawyers think without teaching them at the same time what lawyers do. Thinking like a lawyer is a much richer and more intricate process than collecting and manipulating doctrine.

This article attempts to present a case for offering in legal education a complexity that matches the complexity of the legal world in which our students will function after they graduate. We need to expand our view of the process of educating future lawyers and judges [FN2] and ask: What do our students need and how can we fill those needs? This article does not attempt to address every aspect of the question, but it does argue that at least one dichotomy still prevalent in legal academic circles-“skills” versus “substance”-ought to be banished from our thinking.

I. The Contours of the Debate

A. A Brief Historical Perspective

The battle between practitioners and academicians has been going on for at least a century. [FN3] In the early days of our country's existence, lawyers ***58** entered the profession through the apprenticeship method. [FN4] New lawyers “learned by doing” at the side of experienced practitioners. The modern age of legal education began in the 1870s, when Christopher Langdell announced to the world that law should be studied as a science and that we could ascertain its universal principles by looking at the raw data (cases). Langdell's premises have been described as follows:

1. Law involves a scientific analysis able to reveal the life-giving principles of the common law.
2. This science of law could be advanced only by specially trained researchers-not practitioners-who were committed to disciplined analysis.
3. The subject most appropriate for such scientific analysis is the body of written appellate opinions.
4. Legal education means instilling techniques for scientific probing into these opinions.
5. Like other sciences law should be pursued under circumstances most conducive to scientific thought, viz., in a university rather than in the hurly-burly world of law offices and courts where law is learned, at best, unscientifically. [FN5]

By the 1950s, the case method dominated legal education in the United States. [FN6]

The appeal of the case method as a means of teaching legal principles is not particularly difficult to understand. The method can accommodate a large group of students in a single classroom. It lends itself easily to a certain intellectual rigor, and the necessary materials can be compiled and used repeatedly, with some updating as the law changes. What does seem odd, however, is how this single approach came so completely to represent what American law schools were all about, at least until recently. [FN7] Why did law faculties decide that their sole purpose was to develop students' analytical skills through the manipulation of doctrine, and that more ***59** practical training should be reserved for after graduation? [FN8] It almost seems as though the current model of legal education did not replace the apprenticeship approach but rather became a three-year academic precursor to apprenticeship.

B. What Are the Relevant Lawyering Skills?

Although lawyers must perform a wide range of tasks in everchanging contexts, law schools send the message that law is litigation. We may never agree on a definitive statement of what skills are necessary for good lawyering, but we nevertheless need to acknowledge the importance of a much broader range of skills than has traditionally been the focus of the law school curriculum. We must teach our students that many lawyers never even contemplate the courtroom as a part of their practice. [FN9] They spend their time putting deals together, trying to build things and make them work. We should acknowledge that different kinds of legal specialization require different skills, and encourage our students to practice and develop skills that will be needed in nonlitigation settings.

Let us consider in broad terms the lawyer's role in society: (1) lawyers are public servants, who assist private individuals in their attempts to secure justice under the law; [FN10] (2) lawyers must simultaneously represent individuals and the legal system; [FN11] and (3) lawyers must deal with uncertainty in a wide variety of situations on behalf of a wide variety of individuals and institutions. [FN12] What do we need to teach our students so that they will be able to perform these complex and crucial functions competently? Without attempting to provide an exhaustive list of each “skill” [FN13] that a lawyer might need at some point in his or her career, we can categorize skills in a useful fashion. A former student of mine observed that law students, like the Scarecrow, the Tin Man, and the Cowardly Lion, ought to come away from their experience in law school with “brains, heart, and courage.” [FN14] Although these are not necessarily either completely distinct or completely comprehensive categories, the image offers a useful paradigm.

***60** Brains. The cognitive skills that lawyers need are many and complex. For example, depending on the type of practice, lawyers must be able to (1) analyze and synthesize legal principles; organize and present a coherent and persuasive line of reasoning in speech and writing; interview prospective clients, examine witnesses,

and draft pleadings or interrogatories; listen, exercise judgment, and engage in moral reasoning; and develop knowledge of self and of the premises of the legal and the social order, [FN15] (2) think independently, master complex bodies of data, organize the data into legal categories, and present the resulting intellectual product in a persuasive manner that is designed to achieve a particular goal; [FN16] (3) critically analyze the utility, effectiveness, and social implications of legal doctrine and procedure; integrate nonlegal approaches into the legal problem-solving process; and synthesize and build original legal theories, frameworks, and systems; [FN17] (4) figure out the different goals that a particular client might choose to pursue, sort out the relationships among different possible goals, devise possible strategies for realizing a particular goal, try to separate compatible from incompatible goals, and prioritize among different possible goals. [FN18]

Perhaps the single most useful cognitive skill for a good lawyer is the ability to learn from experience-from self and from others. [FN19] This, theoretically, is what we try to teach in law school. We acknowledge that we cannot teach "The Law," so we try to teach an analytical process that will allow our students to teach themselves in the particular contexts they are likely to face in practice. [FN20] The analytical process is much more complex, however, and encompasses many more components than law schools have traditionally recognized. In both litigation and nonlitigation contexts, we must reinforce problem solving and creativity as relevant legal skills. We should teach our students that a good lawyer must, at some level, be an artist. [FN21]

***61** Heart. An additional aspect of lawyering that is very real but often forgotten is the human aspect. Lawyers must deal with people every day-other lawyers, clients, judges, witnesses, experts. Good lawyers should have good interactive skills-communicating, listening, sensitivity, empathy. Some writers suggest that we should remind our students that they function as part of a larger social fabric, that the practice of law is inherently human, and that normal human behaviors and reactions must be taken into account on a daily basis. [FN22] For example, when addressing legal issues in a family context, can we legitimately suggest that our students focus exclusively on what their clients are "entitled" to under the law? If a divorce is contemplated and children are involved, the children's needs and the importance of at least some long-term civil contact between the parents must be taken into account. An understanding of psychology and sociology can only improve the effectiveness of the lawyer in this setting.

Similarly, a lawyer who is a good judge of character and a thoughtful and insightful listener can often ascertain the client's true motivations and goals and thereby provide more appropriate service. The lawyer who can sense when opposing counsel is being forthright and when to probe for additional information or concessions can also be a more effective negotiator. These are skills that should be discussed and enhanced in the academic setting.

Courage. Lawyers also have a unique responsibility to be ethical and to exercise judgment in a way that considers the effect of the lawyer's actions on disparate groups of people who may have conflicting interests. The amount of thought and effort that goes into the development and revision of the rules governing professional responsibility is indicative of the importance of ethical considerations to the practicing bar. The professional responsibility courses that are required in most, if not all, law schools, sometimes even in the first year, indicate that law schools also recognize the crucial nature of these considerations. [FN23] We cannot, however, assume that such courses sufficiently sensitize our students to ethical issues. We should ***62** raise ethical concerns and dilemmas constantly, regardless of the subject matter that is the primary focus of the course. Ethical responses to particular situations should become instinctive responses, not afterthoughts that are grafted onto the problem.

Lawyers need ethical reflexes as part of their day-to-day functioning. For example, when conducting negoti-

ations, lawyers must not only grapple with the issues on the table but must constantly bear in mind their ethical obligations in relation to client confidences, keeping the client informed, and representations (or misrepresentations) to other parties involved.

Individuals may disagree on whether specific components of the "brains, heart, and courage" categories are appropriate for inclusion in the law school curriculum or on how they should be taught, but it should be apparent that a good lawyer must juggle many and sometimes competing kinds of information in performing needed services for clients and the community. A multifaceted approach to teaching that acknowledges this complexity and attempts to provide tools for dealing with it effectively will prepare lawyers better for entering the practice of law.

II. Ending the Debate

A. The Argument for Integration

Why is it so important that we find the right balance in our curriculum? Law schools, we have often been told, are gatekeepers of the profession: "they ultimately shape the character of those passing through." [FN24] Students come to law school, for the most part, expecting to learn what it means to be a lawyer, a practicing member of the bar who represents clients in a variety of situations. We hear about increasing levels of lawyer dissatisfaction, manifested in part by lawyers leaving the profession in droves and also by growing problems with substance abuse. Is it possible that at least some of this dissatisfaction arises because we send fledgling lawyers out into the world with no idea of what to expect? I do not mean to suggest that educational reform will solve all of these problems, but only that if it would help to offer a more realistic view of practice in law school, we ought to give serious consideration to the possibility that we could do some long-term good in this area. We charge tuition, we certify some degree of proficiency at the time of graduation, and we have therefore accepted the obligation to prepare our students for their postgraduation lives in a meaningful way. [FN25] Law school offers a unique opportunity to use three years of concentrated study in an institutional setting to provide future lawyers with both the skills and values they will need to provide crucial services to the community.

Because meaningful preparation is apt to take on different dimensions as we move into the twenty-first century, [FN26] we must constantly educate ***63** ourselves in the range of skills that will be required of the students we are responsible for educating. We have the resources to do so. Judges and practicing lawyers, who are aware of what is needed, can educate us. If we understand the expectations placed on our graduates, we can make more informed decisions about how to educate them.

Law schools currently do not prepare students to meet the high expectations they are likely to encounter in practice. This is true regardless of the kind of practice the student ultimately chooses-large or small firm, solo practice, or public service. We should not assume that most of our students are going to find employment with large law firms [FN27] that will be happy to train them in basic skills during their first few years of practice. [FN28] Current economic realities make it very difficult for a firm to subsidize new lawyers while they learn their trade. To attract the "best and brightest," large law firms are paying ever-higher starting salaries, which in turn are supported by increasingly high billing rates, even for the most junior associates. [FN29] At the same time, clients are asking more questions about their bills [FN30] and are wondering why it takes two attorneys to take a deposition. If one of those attorneys is attending the deposition as a learning experience, should the client foot the bill? In this highly competitive marketplace, is it any wonder that law students are constantly clamoring

for more skills courses?

Law schools are in fact in a better position than law firms to offer skills training. We have more time to teach skills in context, to discuss the ***64** application of theory in particular situations, to reflect on which approaches work and why, and to offer opportunities for experimentation where failure does not result in dire consequences for the client or for the young attorney's reputation or livelihood. Once we recognize the wide variety of talents needed by competent lawyers and stop separating the learning of theory from its application, it becomes painfully obvious that "skills" training is more than just an appropriate part of a legal education-it is essential if we are to do the job we claim to be doing.

Allowing students to integrate skills and doctrine while still in school, with time to think about the whys and wherefores, should make them better, more responsive and responsible lawyers. Trial by fire in the hustle and bustle of practice is not the way to acquire a fundamental understanding of why and how some approaches, tactics, and methods work better than others. Maybe two or three years of contemplation can prevent at least that many years of pure trial and error. Learning from one's mistakes is useful, but when those mistakes occur at the expense of others, or perhaps of one's professional reputation (or even one's job), it is worth some effort to minimize the likelihood of error.

It is often argued that we cannot teach competence. This is true, but we can teach students how to analyze their own performance and thus continue their education throughout their careers. We can teach them how to gather, process, and then communicate information in the most effective and efficient manner. As Richard Posner suggests, we can, but we do not: "The academy does not generate the knowledge that judges, lawyers, and legislators need in order to operate a modern legal system, yet there is no other institution capable of generating it." [FN31] The limited focus of most law school classes on derivation of rules and policy considerations from appellate decisions cannot begin to approximate the thinking process of the competent attorney. Teaching students to think like lawyers loses much of its meaning if that thinking is not placed in the context of what lawyers actually do. [FN32]

If we are attempting to teach judgment as part of a good legal education, we must recognize that students cannot develop that skill if we teach content without placing an equal emphasis on context. Lawyers must be able to understand and evaluate the array of options available to them in any given situation. [FN33] We must therefore help our students to become aware of the full range of complexity they will encounter in attempting to use the analytical skills we teach them. We must do more than read and extract rules from the published opinions of appellate courts. Appellate ***65** opinions do not reflect the multidimensionality of the world into which our students will graduate; rather, they suggest that most law is a product of combat in the guise of litigation. [FN34]

Excessive reliance on the Socratic method compounds the message of combativeness that we send to our students. Teaching students to be tough, analytical, and quick on their feet gives them useful skills for the "real world," but the perception that these are the only useful skills for a lawyer and that they are appropriate or necessary in every context in which our graduates will find themselves is erroneous. Do we really want to turn out legions of competitive warriors? Or do we want to give future lawyers a more well-rounded perspective on what life in the law is and ought to be like? If law school represents our best chance to shape the future of law practice, why do we not want to have a hand in guiding how our students will conduct themselves, not just through analytical skills but through communications and interpersonal skills as well? We should present our lessons with a variety of approaches that more closely approximates the variety of tasks that our students will be expec-

ted to perform.

We must also offer a broader perspective on the world in which lawyers function. Legal principles did not develop and do not exist in a vacuum-they are meaningless unless viewed and applied in context. For example, the ongoing battle over privacy rights cannot be understood without reference to historical, social, and medical concepts. We should discuss theoretical underpinnings [FN35] and broad ethical issues. [FN36] The need for an understanding of other disciplines-history, psychology, sociology, and economics [FN37]-becomes plain after even the most cursory examination of the range of problems lawyers and judges face. [FN38]

Pure legal theory and doctrine obviously belong in legal education, but we must not exalt them over all the other information a lawyer needs. Legal ***66** philosophy is likely to be of greater benefit to all-practitioners, clients, and judges alike-if it can be incorporated into and expressed as part of everyday practice. For example, an understanding of social contract theory and philosophies of individual autonomy can guide our arguments and decisions on such issues as the right to die or on the treatment of victimless crimes such as prostitution.

A more well-rounded education will fuse thoughtful, creative ideas with the ability to implement those ideas in ways that are beneficial to individual clients and to society in general. We do not want to produce good technicians with nothing to say any more than we want great thinkers who are unable to translate their thoughts into any kind of usable, concrete form. What is known and understood is useless if it cannot be communicated effectively. Conversely, the communication process cannot be taught and refined without understanding what is to be communicated.

Above all, we must stop viewing legal education as an either/or proposition. [FN39] If we agree that a legitimate definition of necessary lawyering skills must reflect the complexity of what a lawyer actually does, and if we agree that a good legal education ought to train students to achieve some basic level of competence in the practice of law along with an ability to continue to learn in a meaningful way from experience, then we have identified our educational objectives in a way that we can use to guide our curricular choices. [FN40] While practitioners and academics argue about whose responsibility it is to teach practice skills, young lawyers are floundering and wishing somebody would give them some assistance before they damage a client's interests or lose a job. The law schools should adjust their curricula to acknowledge the increasing complexity of the world of legal practice and to focus on what students must know to function in that world, rather than on what we were taught in law school or on what we think is “good for them” in a purely paternalistic way.

B. Some Practical Suggestions

Law can be exciting. It offers an opportunity to promote justice and to use the mind and heart in innovative and powerful ways [FN41]-and yet our students are not getting this message from their studies. The ennui that often afflicts upperclass law students is mainly the product of the repetitious approach to law teaching currently employed in most law schools. ***67** Although the traditional analytical, Socratic approach can be useful, there is little justification for preferring it above all other teaching methods. It would be impossible to catalog all the possible approaches to teaching legal material; rather, my goal is to offer a sampling of options that emphasizes creativity, communication, and application.

1. Experiential Learning

Experiential learning has been defined as “a method of teaching in which students' performance of a task or role is the first step and the primary data in a process of discussion and analysis.” [FN42] I use the term broadly to refer to any exercise or approach to teaching material that requires the student's active involvement and immersion in a concrete aspect of the problem under discussion. The goal of getting students actively involved in their education can be met in many ways. One of the simplest is by asking them to write regularly. Such writing does not have to take the form of graded research papers requiring written critique from the professor but can be as simple as an in-class writing or drafting exercise from which the professor may select samples for analysis and discussion. Students can draft parts of a contract or a pleading or a piece of legislation. Through such exercises, students are apt to discover the reciprocal relation of writing and thinking. [FN43]

There are many other ways of encouraging students to participate actively in the classroom. For instance, a greater emphasis on legal problem solving in realistic contexts can be an important teaching tool. [FN44] Students can be asked to assume the roles of counsel, clients, judges, and jurors in classroom discussion. Some professors find the use of extended simulations a rewarding and effective way of teaching the most basic concepts. A Brooklyn Law School professor created and implemented a large-scale simulation based on a highly publicized murder case. The exercise required students to develop facts, make the charging decision, attempt to negotiate a guilty plea, and finally to prepare and conduct the trial. [FN45] In addition, using litigation documents can enhance the teaching of procedure ***68** courses. [FN46] For example, students can be asked to draft complaints and answers, or at least to critique poorly drafted pleadings in the light of the requirements of applicable rules. In criminal procedure courses, the opportunity to see an indictment or an information would enhance the students' understanding of how the real-world process works.

Some instructors fear that comprehensive coverage will be sacrificed if too much time is spent on supplementary exercises and materials. One wonders, however, why coverage is so crucial if the goal is to teach an analytical process rather than the everchanging details of the law. Other professors feel doing such exercises “right” requires an understanding of too many diverse disciplines. It is sometimes argued, for instance, that first-year students cannot be exposed to simulated discovery exercises because they have no understanding of evidence.

Such concerns can be dealt with effectively by careful design of classroom (and out-of-class) exercises. The instructor needs to think through the purpose of the assignment, set realistic goals, and present just enough material to accomplish the desired purpose. For example, an in-class discussion of what kind of discovery to conduct (what kind of questions to ask and of whom) can teach students to think about the facts of a case in very precise terms. I have used this approach in legal writing classes. At the beginning of class I briefly outline available discovery tools and then ask what kind of discovery the students would pursue in the case on which they are currently writing their memos. The early responses tend to be very unfocused, showing no sense of the target audience or of strategic phrasing. The students get the idea very quickly, though, and by the end of the class are asking precise, useful questions. Similarly, a negotiation exercise can teach fact gathering, analysis, and manipulation, or beginning oral advocacy, without becoming a full-fledged course in negotiating techniques and strategies. Such an exercise can teach the importance of obtaining all available information before deciding how to approach a case. It can also demonstrate some of the ways in which doctrine will be used in practice.

Once the instructor identifies the goals of a course, he or she can choose instructional methods and design exercises that are carefully tailored to develop specific skills. Particular courses will lend themselves to different goals. For example, a focus on using doctrine for planning purposes might be appropriate in property, tax, or trusts and estates courses. Drafting might be an appropriate focus in contracts courses, and the development of

proof could be the focus of exercises in evidence.

Law schools should encourage and support the development of innovative, nontraditional courses. For example, several law schools now offer courses in sports law that incorporate contract, arbitration, labor, and ***69** antitrust principles and include drafting and negotiation exercises. A course in negotiations can offer an opportunity to practice preparation, strategy, and technique in several doctrinal contexts. A course in interviewing and counseling can likewise give students a chance to practice fact gathering, synthesis, and communication in multiple legal settings. Traditional courses can also be combined in unique ways, as the "Contorts" experiment at Rutgers University School of Law demonstrates. [FN47]

We also need to offer some very practical guidance about the daily life of the practicing lawyer. Many of our students will go into general practice, and a few schools, such as University of Vermont and University of Wisconsin, have created programs that specifically target such students. [FN48] Students in these programs are given the opportunity to plan and work through transactions in both litigation and nonlitigation contexts.

Some writers advocate more substantial restructuring of the curriculum. [FN49] Several law schools, including University of Montana, University of Denver, and William and Mary, have completely restructured their first-year programs, putting their first-year students into "law firms" that deal with the cases and issues as they might actually arise in practice. The students not only research and write relevant documents but interview and counsel clients, conduct negotiations, and work on pretrial documents as well as appellate briefs. [FN50] Other schools, such as New York Law School, have redesigned their training programs for all three years. [FN51] Certainly one of the most dramatic new looks at legal education comes from the CUNY Law School. [FN52]

When law schools consider curricular change, two practical concerns are likely to arise. The first is financial: How much innovation can the school afford? The second touches on sacred notions of academic freedom [FN53]: Can we insist that individual professors teach their courses in a particular way?

For law schools with tight budgets, there are many innovations that can be introduced in individual courses at minimal cost. In fact, most of the ***70** suggestions I have offered are not expensive. Introducing a simulation exercise or adding supplementary materials on legal documents should not increase the cost of teaching a course. Many changes can be implemented without requiring smaller class sizes or hiring additional faculty, although such improvements should make a difference in schools that can afford them. In some cases, of course, money will be an object. Summer grants for course development, individualized instruction, and use of audiovisual or computer teaching aids will affect law school budgets. Individual schools will simply have to make decisions about priorities and desirable allocation of resources. With careful planning, however, most schools should be able to incorporate new approaches and methods, with benefits to students that may not be measurable in dollars and cents alone.

As for academic freedom, we might discover that there is more agreement than we think about the desirability of a more integrated approach to law teaching. If every faculty held a meeting designed to encourage a free and frank exchange of views on ways to incorporate new ideas and teaching methods into traditional courses, and if the message was clear that such innovation would be supported by colleagues and the administration, who knows what might happen? Is it possible that many of us continue to teach in the traditional manner because we perceive no real incentive to change? A consensus that innovation is desirable and a reward system for attempting it might alter that perception. [FN54]

It is helpful to frame the discussion of how to broaden our conception of teaching students to think like law-

yers not as a criticism of past efforts but rather as an accommodation of a changing world. We all know that the practice of law is changing, and we are increasingly sensitive to the need to incorporate other disciplines into a well-rounded legal education. Can we not begin with such recognitions and look forward, rather than looking back to justify our past?

It is also important to recognize that, if a faculty agrees that teaching thinking in context is a useful paradigm, the burden on individual professors need not be great. Even if there is no consensus favoring a comprehensive redesign of the entire curriculum, those who wish to try major innovations in the form of new courses or course-long simulations should be encouraged to do so. Those who are satisfied that their traditional approach works well to teach necessary analytical skills might be encouraged to try just one additional writing or role-playing exercise in conjunction with their usual materials. It seems likely that if every member of a faculty agreed to add one contextual exercise in each course, the learning experience of our students would be enhanced immeasurably.

***71** 2. Broader Perspectives

Although the primary emphasis of this article has been on incorporating into the curriculum more aspects of what has traditionally been referred to as “skills” training, there are other aspects of necessary legal “skills” that have generally been given short shrift under the existing system. As I have already noted, we need to remind our students that they function as lawyers in a world that includes history, philosophy, psychology, economics, and other perspectives as part of the legal context. Experts in these areas have substantial contributions to make to the completion of our students' training to become fully functioning legal counsel in an increasingly complex society.

We need to inject into legal education a sense of the reality of the larger world in which lawyers will practice. Law schools, according to one writer, should offer courses in judicial administration to create “more sensitivity about the gap between justice and its institutions and how to narrow it.” [FN55] Another writer proposes a required first-year course in “Society and Conflict,” which would explore alternative means of thinking about and resolving disputes, to counter the existing and almost exclusive emphasis on litigation. [FN56] Others have similarly suggested a need to focus throughout the law school curriculum on history, institutional context, and the appropriate responses of individual lawyers to specific situations. [FN57] At such schools as University of Pennsylvania and George Mason University, law and economics has become part of the first-year curriculum. Offering a multidimensional approach to legal education can seem intimidating unless we look at legal education as a three-year process that offers an opportunity to try many different approaches in different contexts.

Some think that emphasizing skills training or alternative approaches will detract from the appeal of legal theory, doctrine, and perspective. Such arguments suggest a lack of faith that those sources of ideas are inherently interesting and a failure to recognize that all these approaches are part of the unified whole that is “thinking like a lawyer.” Might not student enthusiasm for theoretical and policy discussion be enhanced if students knew they would learn how to fit such ideas into practice? To the extent that disinterest stems from the perception that theoretical concepts have no practical use, an integrated approach that puts theory into context will enhance the academic experience for student and teacher alike.

3. Evaluating Student Performance

Studies that attempt to measure the effectiveness of such teaching approaches as the case method, problem method, lecture, programmed instruction, and audiovisual methods do not disclose significant differences ***72** in student performance when learning is measured by examination. [FN58] Rather than concluding that it therefore makes no difference how we teach, I would suggest that perhaps the fault lies in our measures of student performance. If we do devise methods of instruction that better prepare our students to function in the "real world" of law practice, how would traditional law school exams be able to detect such improvement? The exams cannot approximate conditions under which our students will be asked to perform once they leave our halls. [FN59]

Lawyers have access to libraries, files, clients, and colleagues. They can consult any and all of these sources in a time frame over which they have much more control than that presented in the exam setting. [FN60] If we teach our students to make the most effective use of all available resources and to exercise appropriate judgment in doing so, then we have accomplished a large part of our objective. If the result of such teaching is not reflected in the examination process, maybe we ought to find alternative means of evaluation. This is not necessarily as radical as it sounds. Along with direct performance evaluation, [FN61] we can use take-home exams, research papers, and written analyses of lessons gained from role playing and simulation to gain detailed information about what our students are taking away from their classroom experience.

III. Conclusion

This discussion has been presented in the hope that it will stimulate new dialogue and reflection about what it means to "think like a lawyer." Perhaps it will prod law schools to think about their goals and to ask what steps, major or minor, they can take to improve the education of the next generation of lawyers. There is no answer that will work for all institutions or all faculty members. Schools must make individualized decisions based on financial resources, physical facilities, faculty size and expertise, student body size and needs, and location. Nevertheless, if they look at the problem more flexibly and less contentiously, many schools and faculties may find ***73** that they can introduce a greater variety of approaches, often with minimal additional cost or resource reallocations.

Whether the result is a restructuring of the entire curriculum or something much more modest, the important task is to begin the process of reassessment and to seek a coherent, comprehensive view of the education available to the average student at each school. Ultimately, the more variations students are exposed to-in teaching methodology, [FN62] personal visions, [FN63] interdisciplinary concepts, and the like-the more likely they are to emerge as well-rounded, thoughtful, mature professionals, capable of making their own decisions about how to conduct themselves effectively in the world of law practice and human interaction into which we send them.

[FNa]. Nancy L. Schultz is Director of Legal Research and Writing, George Washington University National Law Center. The author wishes to thank Pam Chamberlain for her patience through many drafts, Charlie Craver for his constant support, Jason Palmer for his willingness to help with the boring details, and Andy Taslitz for knowing what she was trying to say and helping her figure out how to say it better.

[FN1]. Rudolph J. Gerber, Legal Education and Combat Preparedness, 34 Am.J.Juris. 61, 67 (1989).

[FN2]. Some of our students, of course, will become legal scholars at some point in their careers, but even schol-

arship can be improved by a deeper understanding and appreciation of the work of a lawyer.

[FN3]. Herma Hill Kay, former president of the AALS, recently observed that this dispute was already well-established in postrevolutionary America. Herma Hill Kay, Lawyers and Law Teachers: Are We in the Same Profession? AALS Newsl., Dec. 1989, at 3 (citing Robert Stevens, Law School: Legal Education in America From the 1850s to the 1980s 5 (Chapel Hill, 1983)). See also John Nivala, From Bauhaus to Courthouse: An Essay on Educating for Practice of the Craft, 19 N.M.L.Rev. 237, 259 (1989) ("for over 100 years, voices have been raised about the dangers of either practice or theory dominating the other").

[FN4]. The American Bar Association's National Conference on Professional Skills and Legal Education, 19 N.M.L.Rev. 1, 87 (1989) [hereinafter Conference]; Edward J. Devitt & Helen Pougiales Roland, Why Don't Law Schools Teach Law Students How to Try Lawsuits? 13 Wm. Mitchell L.Rev. 445, 447 (1987); Steven I. Friedland, The Use of Appellate Case Report Analysis in Modern Legal Education: How Much Is Too Much? 10 Nova L.J. 495, 499 (1986).

[FN5]. Gerber, supra note 1, at 62.

[FN6]. Id. at 65.

[FN7]. As clinical programs and other alternative approaches develop, former critics have begun to express greater satisfaction with the job law schools are doing in skills training. Ronald L. Carlson, Competency and Professionalism in Modern Litigation: The Role of the Law Schools, 23 Ga.L.Rev. 689, 696-97 (1989). In the 1986-87 academic year, 171 ABA-approved law schools offered some form of professional skills training. Conference, supra note 4, at 8. In addition to trial advocacy, such skills as interviewing, counseling, negotiation, cost-benefit analysis, and case planning are now taught. New teaching approaches have proliferated, including the problem method, the adversary method, the lecture-textbook method, the discussion-textbook method, audiovisual instruction, programmed learning, computer-aided instruction, role playing, simulation exercises, and the use of students as teachers. Paul F. Teich, Research on American Law Teaching: Is There a Case Against the Case System? 36 J.Legal Educ. 167, 171 (1986). In spite of these advances, however, there remains substantial dissatisfaction with the current state of legal education. One federal appellate judge recently observed that in his view today's graduates are less well prepared for practice than those of his generation. Harry T. Edwards, The Role of Legal Education in Shaping the Profession, 38 J.Legal Educ. 285, 288 (1988). See also Howard Lesnick, The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law, 10 Nova L.J. 633, 637 (1986) (arguing that changes such as the humanistic and clinical movements have not truly been integrated into the mainstream).

[FN8]. Robert J. Martineau, Appellate Litigation: Its Place in the Law School Curriculum, 39 J.Legal Educ. 71, 73 (1989).

[FN9]. The focus on litigation in law school may influence the choices novice lawyers make about what roles to play in the dispute resolution process and may determine how well they perform those roles. E. Walter Van Valkenburg, Law Teachers, Law Students, and Litigation, 34 J.Legal Educ. 584, 599 (1984).

[FN10]. Gerber, supra note 1, at 85.

[FN11]. Frederick C. Tausend, Robert Hutchins' Question Defining the Purpose of Legal Education-Then Doing Something About It, 10 Nova L.J. 851, 854 (1986).

[FN12]. See Jay Feinman & Marc Feldman, Pedagogy and Politics, 73 Geo.L.J. 875, 890 (1985) ("The lawyer must function unilaterally as well as in collaborative, competitive, and hierarchical environments").

[FN13]. The use of the word "skills" itself may be problematic because for many people it conjures images of teaching plumbers or auto mechanics. Conference, supra note 4, at 29. Although I suspect this is often true, I will continue to use the word because I think it is the most efficient word to convey the idea to the greatest number of people. It is unfortunate and almost incomprehensible that legal skills have become equated with purely mechanical skills, for legal skills cannot be learned or practiced effectively except as part of the intellectual context in which they are needed.

[FN14]. Kevin T. Mulhearn, in his graduation address, Villanova University Law School, May 18, 1990.

[FN15]. Lesnick, supra note 7, at 633-34.

[FN16]. Kay, supra note 3, at 2.

[FN17]. Teich, supra note 7, at 167 (quoting Michael Josephson, 1 Learning and Evaluation in Law School 50-98, submitted to the Teaching Methods Section, AALS Annual Meeting, January 1984).

[FN18]. Eugene Cerruti, Michael Perlin, Richard Sherwin, Nadine Strossen & Donald Rothschild, Report of the Professional Skills Training Committee to the Faculty and Administration of the New York Law School 8 (Dec. 1989) (unpublished document) [hereinafter Report].

[FN19]. Karl E. Klare, The Law-School Curriculum in the 1980s: What's Left? 32 J.Legal Educ. 336, 341 (1982).

[FN20]. The importance of teaching our students how to learn cannot be overemphasized. A lawyer's years in practice "can be a purblind, blundering, inefficient, hit-or-miss learning experience in the school of hard knocks. Or they can be a reflective, organized, systematic learning experience-if the law schools undertake as a part of their curricula to teach students effective techniques of learning from experience." Anthony G. Amsterdam, Clinical Legal Education-A 21st Century Perspective, 34 J.Legal Educ. 612, 616 (1984).

[FN21]. One writer offers an intriguing analogy to the theater, suggesting that lawyers must be critics, actors, and playwrights, and arguing that law schools need to teach more of the creative playwright function. Jonathan Chase, The Play's the Thing ..., 10 Nova L.J. 425, 425-26 (1986). For a thoughtful analysis of the creative artistry involved in the expressive and rhetorical process in which lawyers constantly engage, see James Boyd White, Doctrine in a Vacuum: Reflection on What a Law School Ought (and Ought Not) To Be, 36 J.Legal Educ. 155, 162-63 (1986).

Linguistic artistry is a process that can be developed in the academic environment, and given the importance of communication to being a lawyer, it is a process that should be practiced and emphasized throughout law school. Indeed, legal writing itself can offer a microcosm of what lawyers do intellectually. It includes research, analysis, decision making, strategizing, application of general principles to particular contexts, integration of law and facts, organization, logic, persuasion, storytelling, and attention to details such as grammar and citation form. The elements of skill and judgment required to perform these tasks well must become almost second nature to the good lawyer.

[FN22]. See, e.g., Paul Bergman, Avrom Sherr & Roger Burridge, Learning From Experience: Nonlegally-Specif-

ic Role Plays, 37 J.Legal Educ. 535, 540 (1987) (arguing that we need to teach students how to incorporate appropriate everyday social behavior into legal settings); Joan Heifetz Hollinger, Baby M, Lawyers, and Legal Education, 37 Buff.L.Rev. 675, 679-80 (1988/89) (arguing that we must constantly reinforce in our students the need for compassion for clients and the ability to help clients pursue their goals without disregarding the interests of others).

[FN23]. I recognize the lack of enthusiasm for many professional responsibility offerings and do not intend to suggest that such courses are sufficient in their present form. Nevertheless, their mere existence is an acknowledgement of the integral role of ethical considerations in the practice of law.

[FN24]. Gerber, supra note 1, at 61 (citing Harlan F. Stone, Public Influence of the Bar, 48 Harv.L.Rev. 1, 14 (1934)).

[FN25]. Clark Byse, Legal Scholarship, Legal Realism and the Law Teacher's Intellectual Schizophrenia, 13 Nova L.J. 9, 19 (1988).

[FN26]. As Richard D. Lee, director of training programs for Morrison & Foerster in San Francisco, observes, there are several fairly recent but escalating types of pressure on the practice of law that make even large law firms less tolerant of anything other than stellar performances by newly hired attorneys: (1) increasing firm size-there are 35 firms of more than 400 lawyers, and over 300 firms of more than 100 lawyers; (2) increasing specialization, even for young attorneys; (3) increasing transaction speed; (4) increasing salaries and billing rates; and (5) decreasing loyalty of clients coupled with increasing attention to details of bills-firms now provide computer printouts of time records and specific expenditures. Richard D. Lee, A View From the Bench and the Bar, presentation at Mini-Workshop on Legal Writing Throughout the Curriculum, AALS Annual Meeting, January 3, 1991. See also Michael Meltsner, Healing the Breach: Harmonizing Legal Practice and Education, 11 Vt.L.Rev. 377, 379 (1986); Tausend, supra note 11, at 855-56.

[FN27]. The assumption is not born out by the facts. Two thirds of all lawyers in private practice are in firms with two or fewer lawyers. Only about fifteen percent of new lawyers begin their careers with firms of one hundred or more lawyers. Almost thirty percent of new graduates become associated with firms of thirty or fewer lawyers. Furthermore, those who start out with large law firms and later wish to find other employment find that after five to ten years of practice they are unemployed and virtually unemployable-the skills they have learned are suited only to that setting and are not wanted elsewhere. Conference, supra note 4, at 20.

[FN28]. Even the larger law firms do not, and perhaps never did, provide the kind of training many people seem to assume that they do. Those of us who went to large law firms after graduation were often asked, as our earliest assignments, to draft complaints or interrogatories, although we had never before seen such documents, nor had we given any sustained thought to the process of gathering and presenting facts. This is a fairly common experience among my colleagues and is reported by Peter T. Hoffman (University of Nebraska College of Law), who notes that “associates, more often than not, were tossed into legal situations with a sink or swim attitude” and that “[a]s a result, we made mistakes, and we learned from our mistakes, but we did so at our client's expense.” Conference, supra note 4, at 24.

[FN29]. Report, supra note 18, at 8. See also supra note 26.

[FN30]. See supra note 26.

[FN31]. Richard A. Posner, The Problems of Jurisprudence, 468-69 (Cambridge, Mass., 1990).

[FN32]. "In any professional field, theory and practice are necessarily interdependent. Sound theory is challenged and informed by the issues that arise in practice, while successful practice is guided and sustained by tested theory." Kay, supra note 3, at 3. See also Frank Maher, Ivory Towers and Concrete Castles: A Hundred Years War, 15 Melb.U.L.Rev. 637, 644 (1986) ("Acting and thinking must go together-or both are futile").

[FN33]. If students do not learn in law school that when they make decisions they must consider their obligations to both their clients and the legal system, the pressure to generate billable hours may determine the decisions they actually make in practice. Edwards, supra note 7, at 291.

[FN34]. Even the litigation process is considerably more multifaceted than a published appellate decision can begin to suggest. If litigation is the battle zone, "appellate judges are generals remote from the line of battle who after the fight count the wounded and lecture the survivors on what should have been done." Gerber, supra note 1, at 64. Gerber goes on to note that "what is emphasized, sometimes subtly, in today's realist-shaped law school is mercenary combat as a private means for using legal rules to address social change." Id. at 67.

[FN35]. See Don LLewellyn & Richard Turkington, Ruminations on Legal Education in the Next Decade, 10 Nova L.J. 647, 665 (1986).

[FN36]. See Robert Stevens, The Nature of a Learned Profession, 34 J.Legal Educ. 577, 581 (1984) ("[A] broadly educated lawyer is likely to be a more ethical lawyer. One who has questioned assumptions and honed values is more able to accept the ethical responsibilities that go with membership in a learned profession").

[FN37]. Much of the debate over appropriate constitutional interpretation turns almost exclusively on historical analysis. Brown v. Board of Education turned heavily on expert testimony regarding the psychological and sociological harm caused by racial segregation. And without some understanding of basic economics, the lawyer who attempts to weigh the benefits of a structured settlement as compared to a lump-sum payment will be at a serious disadvantage.

[FN38]. In this vein, Richard Posner argues for a more comprehensive approach to legal education, noting that "[s]kills of mathematical modeling, statistical analysis, survey research, and experimentation; knowledge of legal institutions here and abroad and of the pertinent parts of the disciplines (economics, political science, statistics, philosophy, psychology) that bear on law; the scientific ethic-all these are for the most part ignored." Posner, supra note 31, at 468. See also Michael Burns, The Law School as a Model for Community, 10 Nova L.J. 329, 380 (1986).

[FN39]. Nivala, supra note 3, at 239 ("Legal education cannot afford to be balkanized into antagonistic competing camps. It is a whole, an interweaving of the doctrinal and the doing, a concrete, specific, personal, real life application of the abstracted and theoretical. Legal education must be pluralistic, not monolithic").

[FN40]. Although the movement for curricular reform of the past two decades has recognized that we need to do more, we have not always created a comprehensive plan that considers educational objectives and attempts to implement them in a coherent fashion. The result is that "[a]t best, legal travellers will never know whether they have arrived. At worst, they never will arrive." Andrew J. Pirie, Objectives in Legal Education: The Case for Systematic Instructional Design, 37 J.Legal Educ. 576, 589 (1987).

[FN41]. “The study of law becomes the stories of human nature. And many of the most compelling stories are those that have shaped the freedoms we Americans so take for granted that we cannot even name them.” Ellen Alderman & Caroline Kennedy, In Our Defense: The Bill of Rights in Action 13 (New York, 1991).

[FN42]. Paul J. Spiegelman, Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web, 38 J.Legal Educ. 243, 257 (1988). Spiegelman offers an extended discussion of the benefits of experiential learning and its possible uses in a variety of law school contexts.

[FN43]. “Students need to learn that writing, like classroom recitation, is not merely a way of setting out the final product of one's thoughts but, rather, is a part of the process of thinking.... The lawyer who understands that writing itself is thinking knows that, in the process of writing, thoughts will come.” Kathleen S. Bean, Writing Assignments in Law School Classes, 37 J.Legal Educ. 276, 281 (1987).

[FN44]. For an extended discussion of applying systematic techniques of problem solving in the law school context, see Stephen Nathanson, The Role of Problem Solving in Legal Education, 39 J.Legal Educ. 167 (1989).

[FN45]. Stacy Caplow, Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law, 19 N.M.L.Rev. 137 (1989). Caplow describes some student complaints and some reservations about the design and implementation of the exercise but feels that, overall, the experiment was a success. The educational benefits could presumably be reaped as well through smaller-scale simulations requiring less time and effort but designed to accomplish precise educational goals.

[FN46]. Instructors can use supplementary materials such as David Crump & Jeffrey B. Berman, The Story of a Civil Suit: Dominguez v. Scott's Food Stores, 2d ed. (Chicago, 1985), which includes presuit documents such as a claims adjuster's file, pleadings, discovery, pretrial proceedings, trial, posttrial proceedings, and appeal papers. The teacher's manual makes it possible for instructors without a background in law practice to use the materials.

[FN47]. For a lengthy description of the genesis of this experiment and its outcome, see Feinman & Feldman, supra note 12. The authors designed the course to emphasize competency in research, writing, and analytical skills; mastery of doctrine; and consideration of historical and philosophical underpinnings. Id. at 875.

[FN48]. For a discussion of what law schools do-and do not do-to help students enter general practice, see Edward J. Littlejohn & William I. Weston, Booking on a Career as a GP, 5 Compleat Lawyer, Summer 1988, at 38. It has even been suggested that we need to offer instruction in law practice management. R. Lisle Baker, Enhancing Professional Competence and Legal Excellence Through Teaching Law Practice Management, 40 J.Legal Educ. 375 (1990).

[FN49]. See, e.g., Marjorie Holmes, A Semi-Modest Proposal: Is a Little Business Sense Too Much To Ask? 10 Nova L.J. 599, 601-62 (1986) (arguing for extensive changes in the law school curriculum because the vast majority of lawyers do primarily transactional as opposed to litigation work).

[FN50]. For a discussion of the program at University of Montana, see Jane Easter Bahls, Teach Students How to Practice Law, 17 Student Law. Feb. 1989, at 25.

[FN51]. See supra note 18.

[FN52]. For a description of the CUNY philosophy, see Charles R. Halpern, A New Direction in Legal Educa-

tion: The CUNY Law School at Queens College, 10 Nova L.J. 549 (1986). Such an approach might not seem appropriate for everyone, but we ought to respect the thought and effort that goes into such an experiment.

[FN53]. An anonymous reviewer for the Journal offered the phrase “curricular anarchy” in this context to describe the current state of academic programs at many law schools.

[FN54]. It is, of course, also possible that the reasons for sticking with traditional approaches have been more deeply internalized than I have understood, or that inertia is too great a force to be countered by mere discussion, but it seems that there is nothing to lose and potentially much to be gained by at least exploring alternatives. For a thoughtful and unique discussion of what is wrong with legal education and some practical suggestions for improvement, see Friedland, supra note 4.

[FN55]. Gerber, supra note 1, at 84.

[FN56]. Van Valkenburg, supra note 9, at 609.

[FN57]. Bayless Manning, From Learned Profession to Learned Business, 37 Buff.L.Rev. 658 (1988/89).

[FN58]. Teich, supra note 7, at 178. Teich notes that computer-aided instruction “appears unique in its capacity to boost group performance levels.” Id. He suggests that greater use of individualized instruction techniques may be called for. Although a nice idea in theory, it is doubtful that many law school budgets allow for serious consideration of such options on a large scale.

[FN59]. The exam formats most often used may have some relationship to state bar examinations and may be justified to some extent on that basis. But when the subject matter is not likely to appear on any bar exam, the argument makes little sense. Additionally, once the students have taken a half dozen or so “bar exam type” tests, mere repetition of format seems unlikely to enhance bar preparation in any meaningful way, especially given the proliferation of bar review courses that most students enroll in after graduation.

[FN60]. One of my students, Robert J. Rhee, argued in a speech presented in my Advanced Oral Advocacy class that the time pressure of law school exams and the emphasis on “issue spotting” (as opposed to analysis) might contribute significantly to the poor writing and “shotgun” approach to analysis that many lawyers offer in advocacy documents filed in court. He suggested that law school exams train embryonic lawyers to become “cheap street hustlers playing a numbers racket with the courts.”

[FN61]. E.g., in Advanced Oral Advocacy, I grade the oral presentations based on my observation and then grade the written products separately.

[FN62].

> Although no one can be all things to all people, we can each try to emphasize our strengths and be open to approaches that come less naturally. What we ultimately must hope is that within each of our law faculties there will be sufficient diversity for any given student to encounter excellent examples of each of these approaches to law and teaching. Our students need to know that what they are seeing is a variety of approaches to what is a never entirely knowable reality.

Thomas D. Morgan, Teaching Students for the 21st Century, 36 J.Legal Educ. 285, 291 (1986).

[FN63].

> Each teacher has a uniquely different way in which he naturally relates to the law. Some relate to it as

> craftsmen, working with the points of authority provided by the cases and the inferences allowed by the canons of legal reasoning to reach the legally correct result. Some like to cut below the legal forms and lay bare the bones of the basic conceptual relations running through many cases but fully articulated in none. Some like to study the law as a social phenomenon. Some study law as a potential instrument of justice to remedy social wrongs and realize moral ideals. A teacher's relation to law is often much deeper than simply a style of analysis of the sorts listed above. Teachers also exemplify what the law can be to someone: the chance for personal redemption through skill and hard work, or intellectual play for its own sake, or simply one fascinating set of facts after another. The point is that each teacher relates naturally to the law in his [or her] own way and it is that relation and the skills necessary to it which is what he [or she] has to teach.

Richard B. Parker, A Review of Zen and the Art of Motorcycle Maintenance With Some Remarks on the Teaching of Law, 29 Rutgers L.Rev. 318, 329 (1976).
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