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## Article

# Skills Is Not A Dirty Word

*Leonard D. Pertnoy\**

Today, legal education continues to resist the practical and is becoming increasingly more academic,<sup>1</sup> focusing more on theoretical analysis than on the process by which a legal result is actually accomplished. By way of illustration, when confronted with a problem of learning how to ride a bicycle, academics start by studying the principles necessary to master bicycling. They visit the library and check out numerous books about bicycles, wind velocity, balancing, and equipment, in an effort to learn how to ride a bike. Conversely, many excellent bicyclists simply climbed aboard a bicycle, and with their fathers running and pushing the bicycle eventually, without any understanding of the principles involved, mastered the ability to ride a bike. Complex thinking and analysis can get in the way of performance. Life rewards action; understanding is the "booby prize." The process of doing is a valuable learning experience. When that process is combined with theoretical understanding, the learning experience is enhanced.

The aim of this Article is to examine the place of skills in the law school curriculum and to urge that "skills" need not be considered a "dirty word." Rather, "skills" should be integrated with the currently used socratic methodology and analytical doctrine for the betterment of legal education as a whole.

### I. DEFINITIONS AND SCOPE

"Skills" is subject to many different interpretations. Skills courses are not courses that are designed to teach students how to act or where to find the courthouse. The law is predominately a literate, scholarly enterprise. Words, grammar, meaning, construction, analysis, synthesis, and, above all, creativity; are the stock in trade of a lawyer. A skilled secretary with a form book can

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1. See Harry H. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon* 37 J. LEGAL EDUC. 327, 327 (1987). Mr. Wellington posits that "[t]oo many very able academic lawyers who, for whatever reasons, do not venture outside the ivy-covered walls, scorn the practicing lawyer and his work (deprecate it) and look for rewards only from within the universities." *Id.* at 329.

draft pleadings; an investigator can interview witnesses; an office clerk can file papers in the courthouse; and a paralegal can check real estate titles. Of course lawyers need to do all these things at one time or another. But the common fodder of lawyers suggest how they view themselves and their role in society. If the lawyer looks on himself as a "handyman," he forfeits his ability to shape the law to respond to new needs of his client and society. Further, the handyman approach, because of its limited vision, may be a principle obstacle to making the law responsive to society's requirements for change and growth.<sup>2</sup>

Another obstacle in making the law responsive to changing needs involves the "anti-intellectual" tone of the law student body, reflecting the idea that books are a necessary evil.<sup>3</sup> Books are used to "look up the law," under the assumption that some black letter statement will determine whether the lawyer can serve his potential client. Perhaps worse, some students seem to think books are not always necessary. Rather, they feel that the lawyer's job is to indiscriminately use words as sorties against the opponent—the more the better, whatever their meaning.

Skills courses must be designed with the main purpose of demonstrating, and hopefully teaching, the importance of legal research,<sup>4</sup> analysis of facts within the framework of the law, general facility with words, and the molding or even creation of a solution to meet the needs of the client. Explorations of techniques of persuasion, written and oral, and the practical aspects of lawyering are the welcome by-products, but they remain of secondary importance. If they do not, then we are emphasizing the wrong skills.

Skills courses seek the same result sought in traditional law school courses, *i.e.*, teaching the student "how to think like a lawyer," or, perhaps more accurately, "how to think like a lawyer should think."<sup>5</sup> The beauty and

2. See John Nivala, *From Bauhaus to Courthouse: An Essay on Educating for Practice of the Craft*, 19 N.M. L. REV. 237 (1987) for the view that lawyers should instead equate themselves as "craftsmen," thus requiring more than a mechanical or rote performance of the law. *Id.* at 237.

3. A common "saw" among law students relates that the "A" average students become law professors, the "B" average students become judges, and the "C" average students become rich and successful attorneys.

4. See Elliot M. Burg, *Clinic In The Classroom: A Step Toward Cooperation*, 37 J. LEGAL EDUC. 232, 251 (1987). Burg contends "that students who are engaged in this way learn better and more easily; theoretical material placed in a real-life context becomes clearer and more understandable; the interconnection between theory and practice becomes more widely recognized and more deeply appreciated." *Id.* at 251.

5. Paul T. Wangerin, *Skills training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1986); see also Douglas D. McFarland, *Self Images of Law Professors: Rethinking the Schism in Legal Education*, 35 J. LEGAL EDUC. 232 (1985). McFarland does not quite agree with the above statement, but rather cites a <https://scholarship.law.missouri.edu/mlr/vol59/iss1/12>

appeal of a skills or clinical course is that the low student-faculty ratio (often one-on-one instruction) and the methodology (representation of a client, real or simulated) make the lesson easier to teach. The students work harder and the guidance is more intense and more enjoyable.

If structured and taught properly, skills courses are more demanding and scholarly than large traditional classes allow. None of us has any interest in a course that teaches how to be a "handyman."

There are two general types of skills courses—those that use real clients (clinical), and those that rely on simulation.<sup>6</sup> In simulation courses students are required to perform various skills by use of role play before an audience, which generally consists of other students, law professors, or outside attorneys, that then critiques and comments on the performance of the students. Trial skills programs and moot court programs and competitions are typical examples of the use of simulation. Simulation courses may often be used as training and preparation for clinical courses. Obviously, what is lacking from simulation courses is the excitement, motivation, and unpredictability of representing real, live clients.<sup>7</sup> There is room for both approaches, especially considering the cost of clinical legal education. Not only is there room for both within the curriculum, but both are essential in meeting the needs of students, many of whom require a course that utilizes simulation before they work in a clinic. Clinical courses refer to those elements of the law school curriculum that focus on skills training, rather than on the familiar substantive areas of law taught in the traditional curriculum. Clinical courses can be divided into the following categories:

1. *Live-Client Representation.* Clinical programs provide a controlled and supervised format for law students to practice law on behalf of actual clients. Most states have enacted legislation that allows eligible law students who have completed a sufficient number of semester hours toward their juris doctorate degree to perform legal services on behalf of indigent clients under the supervision of members of the Bar. These

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"schism" between "[t]raditional legal scholars" who want to teach students how to think like lawyers versus the "activist practitioners" who believe that students should be taught how to effectively practice law. *Id.* at 238-42.

6. See generally Joseph P. Tomain & Michael E. Solomine, *Skills Skepticism in the Postclinic World*, 40 J. LEGAL EDUC. 307 (1990), wherein the writers outline various other models for clinical courses.

7. One way to overcome this lack of enthusiasm is to employ factual scenarios based on the student's own lives. See, e.g., Samuel R. Gross, *Clinical Realism: Simulated Hearings Based on Actual Events in Students' Lives*, 40 J. LEGAL EDUC. 321 (1990).

clinical programs place students in public agencies and law offices outside the law school under the supervision of practicing members of the Bar. Typically, such programs provide students to the state attorney's office, the public defender's office, and the legal aid offices. Direct supervision of the students and office overhead expenses are provided by the external office where the student is placed and not by the law school. Supervision is provided by both the professor at the law school and a practicing attorney at the field placement office.

2. *In House Clinics.* In house clinics operate as law firms entirely within the law school. The supervising attorneys are law professors who are members of the Bar and who act as senior partners to student associates. All staff, equipment, and overhead costs are provided exclusively from within the law school.

This Article will focus mainly on the quality and quantity of skills and clinical offerings, rather than on their relative costs. If the quality isn't there, then it doesn't matter how economical the course may be. Yet, law schools cannot afford to hold out for the perfect clinical experience. Admittedly, it is difficult to reach a valid assessment of the cost of clinical education. However, when viewed in terms of value to the students, costs, although higher than traditional programs because of labor intensity, are nevertheless worthwhile.<sup>8</sup>

The value of skills courses is apparent to both students and practitioners. Students are almost universally enthusiastic about their clinical experience both during and after training. The clinical experience is normally one of the most memorable and valuable experiences at law school. Lawyers, judges, and bar associations across the country, who are increasingly critical concerning the lack of capable young lawyers, praise the clinically trained law graduates as being more confident and better qualified than non-clinically trained lawyers.<sup>9</sup> Presently, many bar associations are urging the passage of minimal level of skill requirements for continuing legal education for young

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8. See Stephen F. Befort, *Musings On a Clinical Report: A Selective Agenda For Clinical Legal Education in the 1990's*, 75 MINN. L. REV. 619, 625 (1991).

9. See John J. Costonis, *The MaCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 174 (1993).  
<https://scholarship.law.missouri.edu/mlr/vol59/iss1/12>

lawyers.<sup>10</sup> Judges are frequently heard to complain that the quality and capability of lawyers who try cases is unsatisfactory.

The importance of skills may be emphasized in substantive courses by considering that the theory and analysis gleaned from the Socratic study of cases is the direct result of the competence of the skills of the trial attorney in reaching the result. The appellate attorney often is only as good as the record created by the trial lawyer. Even if appropriate new legal arguments can be developed at the appellate level, appropriate objections preserving the record may not have been made at trial.

One proponent of clinical legal education, Stephen T. Maher, contends that a curriculum consisting of both traditional legal study intertwined with ample opportunity for clinical course work is necessary because the system of educating lawyers has changed over the years.<sup>11</sup> In the not too distant past, the bridge from law graduate to practicing lawyer was provided by the large firms.<sup>12</sup> These firms would hire the law graduates and train them to be practicing lawyers.<sup>13</sup> This system was flawed in the past<sup>14</sup> and it has become virtually outdated.<sup>15</sup>

10. Telephone interview with Ross Goodman, Chair of the Student Education Committee of the Florida Bar.

11. Stephen T. Maher, *Clinical Legal Education in the Age of Unreason*, 40 BUFF. L. REV. 809, 809 (1992).

12. *Id.* at 826.

13. *Id.*

14. "The flaws in the system were always clear. It never worked well for students who were not near the top of the class" and consequently were not hired by the big firms who had the time and money to invest in the training of a lawyer. "Unless [those students] could find a job in which they would receive training, students who were not near the top of their class were left to their own devices to secure the training they would need to become competent lawyers" *Id.* at 827. Maher also noted that:

It often appears that the real purpose of traditional legal education is to determine which students are the brightest of the bright so that these top firms, the intended beneficiaries of this system, can be reasonably assured that the top students they hire are worth the training investment they are about to make.

*Id.* at 827.

15. Maher points out in his article that "while it made sense for [the top] firms in the 1980's [to train and retrain law school graduates], when their demand for law students was at its peak, the system is less defensible today because the big firms have changed their requirements. First, they need fewer graduates. Second, as a result of the high salaries that even beginning associates earn today in top firms, firms are increasingly unwilling to invest resources in training new lawyers and want their lawyers to produce almost from the start. In short, top firms want the law schools to bear more of the training burden. *Id.* at 828, (citing Joel F. Henning, *Socrates, Isaac Stern, and Nadia Boulanger: Legal Education Beyond the J.D.*, 35 PERS. FIN. L. Q.

Mr. Maher concludes that the law schools are not prepared to supply adequate training to all of their students, nor are they capable of doing so.<sup>16</sup> Therefore, he proposes a radical overhaul of the law school system.<sup>17</sup> Briefly he espouses the use of Centers for Alternative Training (CATs).<sup>18</sup> The clinical legal education would be removed from the traditional law school.<sup>19</sup> Students would attend a traditional law school for two years and then go for a year to a CAT that would provide all the necessary training for a new graduate to enter the profession prepared to work as a lawyer from day one.<sup>20</sup>

Nevertheless, it should be abundantly clear that these law school disciplines, namely traditional analysis and skills education, are totally interdependent, intertwined, and integrated with one another. Neither component can be avoided. Therefore, it is time for traditional legal educators to acknowledge that there is a growing need for skills courses within the curriculum and that acquiring the skills necessary to practice quality law is difficult, demanding, and scholarly.<sup>21</sup>

## II. HISTORICAL OVERVIEW OF SKILL ACQUISITION IN PREPARATION FOR THE PRACTICE OF LAW

A proper chronicle concerning skills in the law school curriculum must include an understanding of the historical aspects of skill acquisition in preparation for the practice of law. Traditionally, entry into the legal profession had apprenticeship training and affiliation with practitioners.<sup>22</sup>

In England, Edward I recognized a need for apprenticeship training of the law. He directed the judges of the day to establish a procedure for such training, and in the years that followed, the Inns of Court were created.<sup>23</sup>

REP. 215 (1981)).

16. Maher, *supra* note 11 at 828.

17. *Id.* at 816.

18. *Id.* at 818.

19. *Id.* at 817.

20. *Id.* at 816. This is essentially the throw-in-the-towel approach. Mr. Maher seems to have lost faith in the law schools' and the ABA's ability to provide an adequate clinical education to a greater proportion of the law students. He therefore proposes his CATs as an alternative. It seems unlikely that the law schools or the ABA will embrace this concept as a viable alternative, however.

21. See also Frank W. Munger, *Clinical Legal Education, The Case Against Separatism*, 29 CLEV. ST. L. REV. 715 (1980), for the view that clinicians can augment nonclinical teaching.

22. ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 4 (1953).

23. *Id.* at 6.

For more than 300 years hence, the Inns of Court were the primary vehicle for a young man's entrance into the legal profession.<sup>24</sup>

Inns of Court training centered on the acquisition of methodology and practical skills by exposing the aspiring practitioner to moot arguments and mimic lawsuits.<sup>25</sup> It was a pragmatic system designed to produce able practitioners of the English legal system.<sup>26</sup>

By the 17th Century, Inns of Court were no longer the centerpiece of legal education in England.<sup>27</sup> Rather, apprentices served as clerks in the practitioners' offices. It was this system of legal apprenticeship training that came to the American shores with the Colonists.<sup>28</sup> The emphasis on skills acquisition, which is evident in any apprenticeship scheme, was followed in America for more than 100 years.<sup>29</sup> The prevalence of the early apprenticeship scheme continued for nearly another 100 years until about 1950, when the number of practicing attorneys in the United States who had been to college exceeded the number of those who had not.<sup>30</sup>

The first law school established in the United States was the Litchfield School, founded in 1784.<sup>31</sup> The Litchfield School, independent of any university, was started by Tapping Reeve, a practicing attorney, and stressed skill development.<sup>32</sup> Through a series of lectures, the fourteen month program concentrated on the practical considerations of the profession.<sup>33</sup>

The change in emphasis from skills acquisition to a scientific study of the law through the case method is widely attributed to Christopher Columbus Langdell.<sup>34</sup> Although the case method did not immediately take hold of the legal education process in America,<sup>35</sup> it is firmly entrenched as the primary method of legal training today and has undergone little change since its inception.<sup>36</sup> Nonetheless, since the initiation of the case method in the early

24. *Id.* at 6-8.

25. *Id.* at 7.

26. *Id.* at 8.

27. *Id.*

28. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* at 3 (1983).

29. HARNO, *supra* note 22, at 16.

30. STEVENS, *supra* note 28, at 209.

31. HARNO, *supra* note 22, at 29.

32. *Id.* at 29-30.

33. *Id.* at 28-32.

34. Langdell was dean of Harvard Law School from 1870 to 1885. *Id.* at 53-55.

35. Anthony Chase, *American Legal Education Since 1885: The Case of the Missing Modern*, 30 N.Y.L. SCH. L. REV. 519, 519 (1985).

36. Robert S. Redmount, *The Future of Legal Education: Perspective and Prescription*, 30 N.Y.L. SCH. L. REV. 562, 562 (1985).



1870s, there have been numerous cries for and attempts at injecting a skill-acquiring component to the legal education process.

In 1933, Jerome Frank propounded the idea of a clinical-lawyer school.<sup>37</sup> Frank believed that under the Langdellian case method, law schools had become too academic and too unrelated to practice. According to Frank, legal education was not complete without the acquisition of practical skills. He argued that law schools must include learning the law by work in the lawyer's office and by exposure to the proceedings of court.<sup>38</sup> Although Frank's viewpoint gained little momentum in the 1930s, it became the foundation of the push for increased clinical experiences in the law school curriculum that occurred in the 1960s.<sup>39</sup>

In June 1968, the Ford Foundation established the Independent Council on Legal Education for Professional Responsibility (CLEPR).<sup>40</sup> During its first five years of existence, CLEPR earmarked 6,000,000 dollars for the development of clinical and field work in ABA approved law schools. The goal of CLEPR was to make clinical coursework a regular part of the law school curriculum.<sup>41</sup> The CLEPR grants had an immediate effect of nearly half the law schools in America developing clinical programs within a few years after the first disbursement of the grants.<sup>42</sup>

Although the CLEPR grants gave rise to an explosion of clinical programs in the law school curriculum during the 1970s, these programs were kept on the periphery of the curriculum agenda.<sup>43</sup> Reluctance on the part of the traditional faculty members to accept clinical programs,<sup>44</sup> costs of the programs,<sup>45</sup> and the end of the CLEPR grants<sup>46</sup> have all contributed to perpetuate the marginal nature of clinical and skills oriented programs in the law school curriculum.

37. Jerome Frank, *Why Not a Clinical-Lawyer School*, 81 U. PA. L. REV. 907 (1933).

38. Frank complained about Langdell's obsession with the library and noted that "students trained by the Langdell method are like . . . dog breeders who only see stuffed dogs." *Id.* at 912.

39. STEVENS, *supra* note 28, at 157.

40. *Id.* at 230 n.95.

41. *Id.*

42. *Id.* at 216.

43. Eleanor M. Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473, 478 (1989).

44. FRANCES A. ALLEN, *LAW, INTELLECT, AND EDUCATION*, 69 (1979).

45. John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317, 328.

46. Arthur B. La France, *Clinical Education and the Year 2010*, 37 J. LEGAL EDUC. 352, 355 (1987).

Notwithstanding their marginal status, however, clinical programs and skills courses do survive. This phenomenon is due in no small part to the criticisms lodged against law schools regarding their failure to teach the skills necessary for the successful practice of law. Such criticisms can be found emanating from the bar,<sup>47</sup> the bench,<sup>48</sup> and even law students themselves.<sup>49</sup> As a result, skills courses continue to be taught today in most law school curriculums and generally include some mix of the following.

1. *Interviewing, Counselling, and Negotiation.* A study of the basic theories and techniques needed to develop competent lawyering skills for interviewing clients and witnesses, counseling clients, and negotiating with opposing parties. Skills are developed through simulated exercises, discussions, use of video tapes, and live demonstrations. Emphasis is on student performance.
2. *Civil Trial Advocacy.* A systematic development of active student participation in the techniques involved in the trial of cases, including jury selection, opening statements, direct and cross-examination of witness, introduction of exhibits, and closing arguments. Students conduct simulated jury trials.
3. *Criminal Trial Advocacy Practice.* Trial problems and strategies involved in criminal proceedings, emphasizing problems frequently encountered in the criminal proceedings in the state and the federal court system, including analysis of criminal investigative problems as well as actual trial segments in criminal trials.
4. *Clinic.* This course acts as a bridge between on-going legal studies and the practice of law. Students, working with a supervising attorney, are exposed to actual legal problems in the community in both civil and criminal matters. The classroom portion of the course gives students the opportunity to learn both substantive and procedural law that relates to their practical work. Through this personal experience, supervision, and classroom work, students are introduced to the legal profession and their future role as lawyers in society.

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47. ALLEN, *supra* note 44, at 66.

48. Marvin E. Frankel, *Curing Lawyers Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613, 613 (1977).

49. Fox, *supra* note 43, at 478.

In addition, most curriculums offer skills in student activities consisting of the following:

1. *Advanced Moot Court.* Advanced Moot Court is designed to promote excellence in legal research and written and oral advocacy. Participants prepare a brief and present oral arguments based upon a simulated appellate record containing issues that require in-depth research and analysis. At the end of the semester, students compete in an intramural moot court tournament judged by faculty and members of the local bench and bar. The final round, attended by the student body, is traditionally judged by a distinguished panel of judges.
2. *International Moot Court.* Students engage in an intramural moot court competition on a problem in international law. Students form teams and conduct international legal research, write an appellate brief called a memorial, and present oral arguments concerning a hypothetical problem of international law.
3. *Mock Trial Court.* The purpose of a mock trial program is to promote excellence in litigation and trial advocacy skills through participation in mock trials. The program typically consists of a series of intramural competitions in which student teams, working with a hypothetical case, act as both witnesses and attorneys trying the case, from opening statements to closing arguments.

### III. MORE AGGRESSIVE REFORM

While clinical and skill oriented programs continued to exist on the periphery of most law school curriculums, some legal educational institutions made attempts at more aggressive reforms. The City University of New York School of Law at Queens College, The New York University School of Law, and The Montana School of Law are examples of those institutions.

#### *A. City University of New York School of Law at Queens College*

In the fall of 1983 the City University of New York School of Law at Queens College first opened its doors to students. Beginning with the hiring of founding Dean Charles Halpern in 1981, the University's purpose was to

establish a law school that would integrate clinical methods with traditional areas of legal study.<sup>50</sup> Howard Lesnick,<sup>51</sup> who worked very closely with Dean Halpern, said that it was imperative for CUNY law students to understand that the law only has significance in relation to the underlying human problems that it addresses.<sup>52</sup>

The CUNY program assigns every student to a member of a "house." The house takes on the atmosphere of a law office. Each day, students divide their time between classroom instruction and work in the house. Through the house concept, CUNY attempts to integrate the traditional areas of study with the practical skills gained in the clinic setting.<sup>53</sup>

In the house, students apply the substantive law revealed to them in the classroom to hypothetical problems akin to those likely to be encountered in actual practice. Role playing and simulation are integral parts of the process. Integration was furthered by coordination among the faculty of teaching activities. Almost all courses are taught by teams of professors rather than individuals.<sup>54</sup>

The difficulties in creating and bringing form to a program as unconventional as CUNY were many. Criteria different from the norm had to be considered in faculty hiring. Established members of the legal educational community were hesitant to become involved with such an experimental program. Prospective faculty were measured not by their participation on reputable law reviews. Rather, CUNY faculty had to be committed to innovation with some prior experience in a clinical environment.<sup>55</sup>

A whole range of new teaching materials had to be developed, often by the faculty themselves. The experimental nature of the program demanded annual evaluations to revise the program. This was true not only of teaching materials, but of the pedagogical approaches that necessarily had to be developed as well.<sup>56</sup>

Ten years later, these difficulties, as well as others, continue. The road remains a bumpy one for CUNY. It has been difficult to place a faculty that

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50. Charles R. Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L.J. 549, 549 (1986).

51. Howard Lesnick was appointed a Distinguished Professor at CUNY Law School by Charles Halpern in the spring of 1982 and he was instrumental in the initial groundwork that ultimately gave birth to the CUNY Law School at Queens College.

52. Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1184 (1990).

53. Halpern, *supra* note 50, at 562-63.

54. *Id.*

55. *Id.* at 551.

56. *Id.* at 552.

would accept the overlap of labor and responsibility that the integrated program entails.<sup>57</sup> Many of CUNY's courses are taught by two or more professors. Also, the administrative bureaucracy of New York's university system has questioned the capabilities of the nontraditional skills oriented professors that are essential to the success of such a program.<sup>58</sup>

CUNY's biggest problem, however, was best stated by Eleanor Fox. "It is one of the predictable ironies of life that tradition ousts inspiration. The bar examiners demand that law graduates know that which they have always required law graduates to know. The CUNY curriculum did not mesh with the bar examiners' demands."<sup>59</sup>

### B. *The University of Montana School of Law*

In 1979, the University of Montana School of Law undertook the task of evaluating and revising its curriculum.<sup>60</sup> An extensive study of the Montana Bar showed that significant emphasis was being placed on the practical skills required to handle routine legal transactions.<sup>61</sup> This identified concern in the field prompted the school to address the issue by revamping its entire first year curriculum.<sup>62</sup> The stated purpose was an "integration of elementary practice considerations with the basic substantive law in the first year."<sup>63</sup>

Initially, all first year students participate in a month long introductory program designed to give the students a fundamental understanding of the legal system. Included is a segment on the litigation process in which students learn the difference between fact and rules, pre-trial litigation, and the trial process. Faculty members then stage a short trial to give substance to the theory.<sup>64</sup>

All first year students are members of a "law firm." In groups of six or seven, first year student "associates" are coupled with specially trained upperclass "junior partners" and supervised by faculty "senior partners." Through simulation and role playing, students make decisions that the

57. Lesnick, *supra* note 52, at 1192-93.

58. See *CUNY Trustees Seek Dismissal of Two Teachers; Law School Troubled by Competency Issues*, N.Y. TIMES, Sept. 30, 1988, at B6, col. 6.

59. Fox, *supra* note 43, at 481.

60. Jane Easter Bahls, *Teaching Students How to Practice Law: The University of Montana's Radical Goal for Its Professors*, STUDENT LAWYER, February 1989, at 26.

61. *Id.* at 27.

62. UNIVERSITY OF MONTANA SCHOOL OF LAW, ACADEMIC PLANNING PROJECT: INTERIM REPORT 5 (1983).

63. *Id.* at 6.

64. *Id.* at 9.

traditional curriculum does not allow and develop interpersonal communication skills.

During their first year, students are required to assemble a trial notebook. The notebook is supplemented during the second and third years, and it is intended to serve as an aid for graduates during their first few years of practice. This exercise is only one component of a three year trial practice sequence designed to "provide students with an ordered and connected series of academic and practical experiences to develop litigation skills."<sup>65</sup>

### C. *New York University School of Law*

Recognizing a need to provide students with the basic skills necessary for the successful practice of law, New York University School of Law has instituted a progressive three year clinical program within its curriculum. The program is progressive in that clinical courses are offered at three levels of advancement, which generally coincide with each grade of a traditional three year curriculum. Most innovative, however, is that the introductory level clinical course is required of all first year students.<sup>66</sup>

The mandatory first year clinical program at NYU is a two semester course for six credits and is simply titled "Lawyering." It consists of a series of role playing exercises involving interviewing, counseling, negotiation, case analysis, informal advocacy, and trial advocacy. Additionally, a moot court experience and a legal writing component are included.

The second and third level of advancement in the NYU clinical program are optional. Those students who desire to continue are given that opportunity, but participation beyond the first level is not mandatory.

## IV. REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP

The skills course offerings found in today's law school curriculum evidence a sophistication in content that seems to address the issue of necessary skills acquisition during law school. While the NYU program is unique in that it is mandatory for all first year students, a serious problem appears to be the unavailability of skill offerings to the great majority of the law school student body. Such unavailability is shown in data compiled by an American Bar Association task force study released in 1992.<sup>67</sup>

65. *Id.* at 14.

66. Don J. DeBenedictis, *Learning by Doing: The Clinical Skills Movement Comes of Age*, A.B.A. J. 54, Sept. 1990, at 57.

67. AMERICAN BAR ASSOCIATION TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, A.B.A. SEC. LEGAL EDUC. AND ADMISSION TO THE BAR, LEGAL Published by University of Missouri School of Law Scholarship Repository, 1994

Recently the American Bar Association, aware of the perception put forward by many writers that the law schools are not doing an adequate job of training law students to be fully functional lawyers,<sup>68</sup> issued its *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*.<sup>69</sup> In fact, this perceived gap between the law schools and the profession was the reason for the formation of the Task Force. In its introductory remarks, the Task Force asserted that the so-called "gap" was really a misnomer.<sup>70</sup> But the Task Force did recognize that the profession needed clinical programs designed to help the student along the continuum to the ultimate end of being a fully functional practicing attorney.

The Task Force compared the approaches of various law schools to their clinical programs and compiled a great amount of data. That data generally reflects that more schools are starting clinical programs, and those that already have them are expanding them. It is worth mentioning that the cost of clinical programs has not risen at the rate that other functions of the law school have risen. For example while the cost of instruction has risen 155.08% in the period between 1977 through 1988, the cost of clinical programs has risen 92.54%.<sup>71</sup> Of course, these figures may also represent the lack of investment by law schools in their clinical programs.

The Task Force "found that the majority of graduating law students had four or fewer skills experiences (clinics, simulated skills, externships and others) while in law school."<sup>72</sup> The category referred to as "others" included the taking of instructional skills courses such as Introduction to Lawyering, Interviewing, Counseling and Negotiation, Pre-trial and Trial Practice, Appellate Advocacy, Alternative Dispute Resolution, and Legal Writing and Research. Additionally when Introduction to Lawyering, Legal Writing and Research, Trial Advocacy, and Moot Court were removed from the category

EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 240 (1990).

68. See Alex M. Johnson Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991); see also Frankel, *supra* note 48.

69. AMERICAN BAR ASSOC. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, A.B.A. SEC. LEGAL. EDUC. AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 3 (1992).

70. *Id.* The Task Force concluded that the term "gap" was really a distortion since the law schools and the legal profession have two different missions to perform. It is their view that rather than looking at the transition from law student to practicing lawyer as a "gap," that transitional period should be looked at as a continuum. *Id.*

71. *Id.* at 249.

72. *Id.*

of skills courses, the majority of graduating law students had one or no exposures to professional skills instruction.<sup>73</sup>

Thus, while the Task Force report recognized the growth in professional skills curriculum, it quickly pointed out the lack of student exposure to these offerings. Some of the factors that contribute to this lack of exposure are "the labor intensive nature of such instruction with its resultant costs, lack of interest on the part of some faculty . . . and [the recent development of] sophistication in the handling of these materials."<sup>74</sup>

## V. SKILLS ARE AN ESSENTIAL PART OF THE CURRICULUM

Much propaganda has been ground from the mills of legal educators extolling the virtues of learning by doing. It is all true. Analyzing your own experience is psychologically more stimulating than analysis in the abstract.<sup>75</sup> Reading bits and pieces of Supreme Court cases about stop and frisk law and then trying to put the mosaic together in response to Socratic questioning cannot compare to the experience of putting the relevant distinctions on paper in a motion to suppress that may mean freedom for your client. The learning experience is enhanced if a professor reviews that motion to tighten it, and the student learns how to argue it by criticizing a simulated, videotaped motion hearing presented in a seminar setting. This is not simply training for the practice of law, because most practitioners do not have the time to take this much pain with their product. This is practice-plus.<sup>76</sup> Never again will the student be able to repent his mistakes at such intellectual leisure. Hopefully, an introduction of skills early in the student's law school career would serve to acquaint the student with the concept that skills and theory should be integrated and are both necessary in producing qualified lawyers.

Clinical courses in particular must be held accountable for performance in accordance with their bright promise. And that promise includes more than merely structured experience critically examined. It encompasses a greater sensitivity to the human values of law flowing from dealing with the stresses and strains of people. Moreover, clinical education inevitably delivers close, individual contact between student and teacher.

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73. *Id.*

74. *Id.* at 241.

75. See Panel Discussion, *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337 (1986).

76. *Id.* at 356. See Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982) for the theory that adult learners need to have some experience that motivates them to know that something is important to them.



Law schools should, at a minimum, offer a skills or clinical course to every student who wants such an experience.<sup>77</sup> Although most law schools have a structured first year curriculum, some form of skills introduction should be considered in the first year curriculum.

Ideally, the second-year student who wants to take a clinic in his third year should first have the opportunity to enroll in a skills course using simulation as the teaching device. Some students may prefer to forgo the clinical experience and learn from simulation only, perhaps by taking the simulated course in the third year. For most students, reality will force a choice between a course using simulation and a clinic.

## VI. GRADING SKILLS COURSES

A faculty member working closely with a student in a skills course is in a better position to accurately award a grade than would be the case in a large, examination course. Unfortunately, this puts the faculty member in an awkward position. The instructor carefully examines, in a one-on-one relationship, the ability of the student to analyze facts and laws, shape a remedy for his client, and convincingly present the solution to the decisionmaker. The problem is that the student's ability invariably merits a lower grade than the effort expended and the progress made by the student.

The resounding complaint of students regarding skills courses is that they have worked harder and learned more than in other courses for which they received better grades. Professors in skills courses are tempted to avoid the Rhadamanthine mark by grading on a Pass/Fail basis. But, with the possible exception of an extern clinic in which the judgment of supervising lawyers often conflicts with the professor, skills courses should be graded as any other course. First, skill courses are conducted in relatively small groups allowing the professor greater exposure to student performance and a better position to evaluate that performance than a professor of a larger traditional course. Second, by grading skill courses the same as traditional courses, any notion of second class status that skill courses may be burdened with would be dispelled.

## VII. CREDIT LIMITS IN THE SKILLS CURRICULUM

Many institutions limit by faculty vote the number of credits students may receive for "skills" courses. Under a basic skills curriculum, for example, the maximum is quickly reached if a student takes Interviewing, Counseling

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77. See LaFrance, *supra* note 46, at 359. LaFrance makes the case that in order to develop a well rounded lawyer, some clinical training is needed and will be particularly valuable to graduating students.

and Negotiation for two credits, Civil Trial Advocacy for three credits, and a two semester course of clinic for 4 credits each semester.

The trend appears to be that many law schools have set limits (although many have been discarded as unnecessary) on clinical credits and not skills credits.<sup>78</sup> Simulated courses are generally excluded from the calculation. The most generous limit set has been, from a limited survey, 18 hours.<sup>79</sup> The limits are practically unattainable in view of the skills offerings compared with the growing size of the student body at most law schools.

Limits should be questioned, not because there is any chance that many, or even any, students are likely to exceed the limit if we try to give all a chance to take a skills course. Rather, the wisdom of the policy should be questioned.<sup>80</sup> Should the limit encompass all skills courses, clinical and simulated? Should a student have to choose between Interviewing, Counseling and Negotiation and a skills course in Business Transactions?

These are the easy questions. The harder one is philosophical: if skills courses are designed to teach legal analysis, and are successful at doing so, do we want to restrict the student's opportunity to participate in such courses, in which coverage of a substantive subject area is somewhat secondary, in order to force them to sit through traditional classes that emphasize breadth of coverage? And if the answer is yes, where do we want to draw the line?

### VIII. CONCLUSION

No man can be a complete lawyer by universality of knowledge without experience in particular cases, nor by bare experience without universality of knowledge; he must be both speculative and active, for the science of the laws, I assure you, must join hands with experience.<sup>81</sup>

The time has come to make the jump from debate to action. The teaching of skills in conjunction with substantive law is necessary if law schools are going to produce functionally able practitioners.

Historically, the acquisition of skills was always considered an integral and necessary part of the preparation for successful practice of the law. Although the advent of the Langdellian case method caused many in the legal

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78. See Robert J. Condlin, "Taste Great, Less Filling:" *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 34, 45 (1986).

79. E.g., Nova University School of Law—limit of 14 hours; Florida State University School of Law—limit of 18 hours; St. Thomas University School of Law—15 hours.

80. Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. REV. 287 (1989).

81. SIR EDWARD COKE, PREFACE TO A BOOK OF ENTRIES (1614).

educational community to lose sight of this fact, the obvious inability of law school graduates to transition from the study of law to the practice of law has caused the need for teaching skills to again be recognized.

However, the current attempts at injecting a skills component into the law school curriculum fall far short of what is really needed. It is time to revise the conventional teaching methods and courses to more systematically integrate the study of skills with the study of substantive law and theory.

The marginal accommodation afforded skill courses in the law school curriculum does not suffice. Law schools have the tendency to add courses incrementally without much regard to the overall product. The peripheral status that skills courses hold in the vast majority of law schools negatively impacts on the coherency of the overall curriculum. Law schools need to develop a thoughtful consensus on the mix of perspectives and methodologies that will be taught with the objective of mainstreaming skill programs into the curriculum.

The task of integration need not be overwhelming at first. For example, a contracts course with emphasis on the Uniform Commercial Code can teach interpretative skills not present in a more traditionally styled contracts course; the theory of *res ipsa loquitur* can easily be explained and applied in an exercise of drafting a proper opening statement.

Full time faculty must have the primary responsibility for instruction of professional skills. Only then will the time necessary for proper design, organization, and management of the skills program be available. Skills professors possess qualifications unique and different from those required of a traditional substantive law professor. Law schools need to develop tenure tracks for skills professors, encouraging scholarship and knowledge of the literature in skills areas.

The task is clear and the challenge is at hand. Law schools are not graduating functionally able practitioners. This will continue so long as skills courses are maintained on the periphery of the curriculum, unavailable to much of the student body. The legal system, law students and society are being shortchanged. Recognition has occurred. It is time to return skills acquisition to the mainstream of the law school curriculum where it should have been all along. History tells us no less and practical reality dictates that "skills is not a dirty word."