THE LAWYERING REVOLUTION AND LEGAL EDUCATION

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I. Introduction

My subject is a relatively new kind of law school teaching method. Emulating Robert Benchley, who titled one of his better essays "The Great Alaskan Fishing Controversy from the Standpoint of the Fish," we call this method "teaching Lawyering."

Teaching Lawyering is an offshoot of the clinical method of legal instruction of the 1960's. It is just beginning to emerge from its experimental stages and to be established as a regular part of the curriculum of several law schools in the United States. Two months ago, the faculty of New York University adopted a proposal to institute a 6-credit Lawyering course as a part of the mandatory first-year curriculum. NYU thus became the first of the so-called "national" law schools to ensure that every one of its students is exposed to the Lawyering approach. When NYU and Stanford inaugurated the experimental protoype of this Lawyering course four years ago, they were breaking new ground by introducing the Lawyering method into the first-year program, where it could be expected to influence the formation of students' early conceptions of what law and the study of law are all about. Since that time, other schools have developed, or undertaken to develop, first-year courses along similar lines. And various sorts of upper-year electives which employ the Lawyering technique are spreading.

I shall detail the technique later. Summarily, it places students in attorneys' roles in either real or simulated settings. The student is responsible for doing commonplace attorney's tasks: counseling a client, negotiating with opposing counsel, preparing the testimony of a trial witness. The student must identify his or her objectives, investigate the facts and research the law, formulate a plan of action, and carry it out.

Then the student's conception, planning, preparation and conduct of the exercise are subjected to intensive critical review.

This sort of teaching has two essential goals. It aims to produce law school graduates who are better equipped for practice, and to promote a fuller appreciation of the lawyer's functions in society -- what a recent report to the Social Sciences and Humanities Research Council of Canada called "a humane perspective on law, and a deeper understanding of law as a social phenomenon and an intellectual discipline."[1] It is not, as it is often misunderstood to be, simply "skills training." Although it concerns itself in part with lawyers' skills and seeks in part to enhance them, it is more fundamentally directed to deepening and broadening one of the classical aims of law school education: teaching "thinking like a lawyer." Its devotees believe that traditional methods of law school instruction have been based upon an overly narrow conception of what "thinking like a lawyer" means -- that law schools have long ignored important aspects of the ways in which lawyers do and should think, as well as vital aspects of the ways in which lawyers learn to think.

I hope to persuade you of these views if you do not already hold them. But why, you rightly ask, should I impose upon your time with such a topic? Because the Cambridge Lectures uniquely draw together members of the practicing bar, the judiciary, and the academic legal community to consider directions in which the profession is moving and should move. Law school education in Canada, as in the United States, is currently searching for new directions.[2] That search will benefit from discussion within the profession of the objectives which the law schools should pursue, and of the available methods for pursuing them.

So let me begin with a criticism of the mainstream of law school education today, focused upon its principal deficien-

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[1] LAW AND LEARNING (Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law) 47 (1983).

[2] See Macdonald, Legal Education on the Threshold of the 1980's: Whatever Happened to the Great Ideas of the 60's, 44 SASKATCHEWAN L. REV. 39 (1979-1980).

cies in preparing law graduates to think like lawyers. Then I shall describe the Lawyering method of teaching, noting how it seeks to address those deficiencies. Finally, I will say a few words about the major obstacle to expansion of this method of teaching: its relative costliness.

II. The Mainstream of Law School Education

My description of the mainstream of law school education is, like all gall, divided into three parts. I shall talk about what we teach, how we teach it, and what we seek to achieve by teaching it.

A. What we teach

First, what is it that law schools teach? For the most part it is the content of legal rules -- "doctrine" in the common-law rather than the civilian sense -- together with a narrow range of modes of reasoning within and about those rules.

1. The content and structure of legal rules

A very large part of our time is spent teaching substantive rules of law and the principles that connect them into a formal logical structure. By "rules" I mean, for example, the precept that malice is an element of the crime of murder; by "principles" I mean, for example, the concepts that malice is a subspecies of mens rea; that the term "mens rea" is used to denote whatever mental state the law defines as a necessary element of any particular crime, but may also connote the traditional preference of the common law for insisting upon culpability of mind as a condition of criminal liability; that this preference has been eroded in certain areas of the criminal law but retains vitality in others; that the areas of erosion exhibit certain common characteristics (more or less); and so forth. The long-continuing battle regarding the desirability of teaching "black-letter law" in common-law law schools is largely concerned with the balance to be struck between attention to what I have called "rules" and what I have called "principles"; too often, that is all the battle is about. Thus, for my present purposes, it matters little that the battle has turned into a rout in recent years; that teaching black-letter law is today viewed by most law teachers as so abhorrent to the intellectual

aspirations of a university law school that it constitutes an actus reus which (pace Sayre and Packer) gives rise to the irrebutable presumption of mens rea in the etymological sense. Doctrine -- in which I include both black-letter rules and the principles by which they are classified, connected, and criticized -- continues to be a substantial bulk of what teachers transmit and students learn in law school.

Consider not what law teachers want to do, or even say they do, but what they actually do. Watch the law teacher who ostensibly disdains teaching "mere doctrine" grow increasingly fidgety as class hours fall behind the syllabus, and the end of the semester draws near with its anticipated doctrinal coverage still unachieved. See this teacher abandon even the pretense of Socratic dialogue and begin to chatter at machine-gun tempo, banging away at rules and exceptions to the rules like so many bears and wolves in a shooting gallery. Consider that the course and its syllabus, the coursebook and its Table of Contents, are titled and organized doctrinally; that required courses are required because their doctrinal subject matter is deemed indispensable to a legal education (either for its own sake or because it exposes students to principles of importance for the appreciation and criticism of doctrine); that a teacher may teach whatever and however s/he pleases within a course called "Criminal Law" but will be gang-pressed every year into teaching some course called "Criminal Law" because if s/he did not there would be an unseemly hole in the corpus juris; and the law school -- like nature -- abhors a vacuum. Indeed, the school's entire curriculum is organized doctrinally; faculty appointments are largely dictated by felt needs to staff certain courses defined doctrinally; no one asks "should we have more courses that teach information-acquisition techniques and analyses?" or "socio-political perspectives on the law?" or even "statutory interpretation?" but rather "are we covered in Torts and Corporations?" or "should we develop in Communications Law?"

The message that substantive subject-matter coverage is the One True Goal is not lost on students. A colleague of mine once offered an innovative section of civil procedure which dared to not cover the Federal Rules of Civil Procedure seriatim. Instead, it was concerned with the way in which selected procedural rules could be put to various tactical uses. The students assigned to the section nearly rose in revolt. All of the other

sections were covering the Federal Civil Rules seriatim, and these poor folks simply could not believe that they were getting what they were supposed to get for their educational dollar. Have we not all seen students flock to class, armed with notebook and pen, prepared to fill pages of the former with the latter, only to discover miserably that the subject of this particular class hour did not happen to provide a sequence of simple declarative propositions that they could write out in numbered order? As time passes and the blank page remains blank, discomfort increases to nearly panic proportions. "Surely," you can see the students thinking, "something must be wrong with this hour if I am acquiring nothing from it that I can summarize and squirrel away in nuggets of doctrinal revelation." The students' attitude, we say, is the students' fault, not the faculty's. But is this so? The examination in the course, which is surely part of what is on the students' minds as they panic over the unfilled page, will predictably be the common form of law school examination in which the students know from both experience and scuttlebutt that they will score by issue-spotting, hence in proportion to ability to recall squirreled-up nuggets of doctrine.

Law students' pervasive fixation on learning the contents of legal doctrine also responds in part to the messages that students receive from the practicing bar regarding what should be learned in law school that is useful in practice. Practitioners are aware, of course, that an inventory of legal rules and principles is only a small portion of the knowledge needed to practice effectively. They are aware that a large portion of this knowledge consists of matters that are never touched in law school: knowledge, for example, of alternative possible ways of conceptualizing the issues in a negotiation; of the elements that go into an accurate assessment of the worth of a case for settlement purposes; of techniques of risk assessment, for purposes of counseling clients on decisions whether to run certain risks rather than pay the costs of avoiding them or insuring against them. But practising lawyers do not seem generally to communicate to law students, or to think themselves, that these latter subjects should be studied in law school. Why? There is a circularity involved here, I believe.

Since nothing remotely like these subjects was taught in law school when most practising lawyers went to law school, they simply do not think of the subjects -- however important in

practice -- as within the realm of law school discourse. If they encounter an important body of substantive rules about which they learned nothing in law school, say the rules relating to insurance, it is natural enough for them to think "well, really, the law schools ought to teach some insurance law." They are accustomed to the notion that teaching rules of substantive law is what law schools do. But when they encounter other problems for which their law school education left them unprepared -- let us say the problem of integrating the analysis of an uncertain rule of substantive law with an analysis of the probabilities that one or another possible course of action by a client will give rise to events which expose the client to liability under that rule, and with an analysis of the client's willingness to run risks -- the lawyer who encounters this sort of problem either does not see it at all, or does not see it as the sort of problem which is susceptible to disciplined thinking, or does not see that the sort of disciplined thinking involved is anything a law school might teach.

Thus, the narrow view which the law schools have traditionally taken of the range of knowledge that they should impart to students is self-perpetuating. The perception of practising lawyers that law school failed to prepare them adequately for many of the kinds of thinking they must do does not suggest to them that law school should. Rather it ratifies the conception that there are two distinct kinds of knowledge needed for practice: the kind that law schools transmit, and the kind that can only be acquired from on-the-job experience. This dichotomy is all too congenial to North American law faculties. It seems consistent with today's most fashionable interpretation of the historical origins of the university law school -- as a realization of the idea that lawyers ought to have a theoretical grounding in the law, separate from the practical training they can get in a law office. As a matter of contemporary politics, the theoretical/practical dichotomy permits academic faculties to go on doing what they have always done and prefer to do -- studying, analyzing, criticizing and teaching the contents of legal rules and the reasoning that underlies them -- while justifying the shortcomings of this limited curriculum as a preparation for practice by saying that anything which they would rather not teach can be better learned by their students after graduation. With practitioners and law teachers both subscribing to the theory/practice dichotomy, and most of them viewing "theory" as

the explication and criticism of doctrine, it is no surprise that law students want little from law school beyond instruction about rules of law.

Take the subject of Evidence. Evidence is taught in all law schools. Sometimes it is taught as a bread-and-butter course, a survey of the black-letter rules. Sometimes it is taught as a highly theoretical course, raising profound epistemological issues. Sometimes it is taught as an interdisciplinary course, drawing on materials from the behavioral sciences. Sometimes it is taught as a happy marriage of more than one of these approaches. But almost everywhere it is taught as an academic course concerned exclusively with rules of admissibility, burdens of proof, presumptions, and such-like doctrinal topics. Abolish the academic course in Evidence and students and practitioners alike would rise up in arms, crying that the basic rules of Evidence are the indispensable working tools of the practising litigator -- an absolute "must" in any program of professional training.

And this is very odd (as Lewis Carroll would have said), not in what it affirms but in what it ignores. For nowhere in the ordinary Evidence course -- or in any other traditional law school course -- is any any attention paid to such subjects as the thinking process involved in formulating a theory of the case, or the elements of factual persuasiveness involved in convincing the trier of facts. And nowhere are students or practitioners crying out that such courses should be given. How, I wonder, have we led students to believe that a knowledge of the rules of admissibility of evidence is an indispensable practical tool of the litigator, while a knowledge of techniques for deciding what facts one wants to prove is not? Why does the practising bar so readily accept the notion that law school is a place where it is necessary and proper to analyze the factors that trigger application of the 23 or 24 exceptions to the hearsay rule, but where it is unnecessary and not quite proper to analyze the ingredients of judgment that enter into an advocate's decision whether to undertake to adduce a particular piece of evidence at all?

2. <u>Reasoning within and about legal rules</u>

Together with the contents and the formal structure of

legal rules, law schools teach primarily a few basic modes of analytic thinking within and about the rules. These are ordinarily restricted to case reading, statutory interpretation, doctrinal synthesis, and a modicum of logical, philosophical and economic conceptualization and criticism of the extant rules and possible alternatives to them.

Case reading involves the exegesis of judicial judgments. It includes the reasoning by which, within the syntactical framework of a stare decisis system, one can identify the ratio decidendi of a case, so as to argue or predict that the case will or will not control the outcome in other hypothesized factual situations. The logic by which precedents are "distinguished" or their principles extended analogically are explored.

Statutory interpretation involves the linguistic and logical analysis of texts with due concern for the purposes of legislation, and requires a consideration of the appropriate means for discerning those purposes. It aims at enabling lawyers to argue or predict that a statute does or does not dictate certain consequences in hypothesized factual situations.

Doctrinal synthesis is concerned with ordering bodies of decided cases, finding patterns in them, identifying and reconciling their potential contradictions, isolating and composing the strands of reasoning reflected in them. It involves techniques of abstraction, characterization, classification, and integration that enable lawyers to describe "rules" or "principles" of law and argue or predict their applications.

Conceptualization and criticism of rules of law involves the examination of legal authorities and principles as parts of some sort of logical system. The aims are to discover the symmetry or asymmetry of the parts, to discern their relationships, and to propose explanatory constructs that may account for the whole system, increase its harmony, perhaps increase its utility as this is measured in the light of relevant values. The insights of philosophy, history, economics, sociology and other disciplines may be brought to bear both in anatomizing the system and in identifying and refining the relevant values.

Now, these are all vital kinds of analytic thinking for the practising lawyer and the judge, the legislator and adminis-

trator, the legal scholar and the law reformer. I put down none of them. Indeed, I believe that law schools should pay a great deal more attention to some of them, such as the conceptualization and criticism of legal rules. And if I think -- as I do -- that the law schools should cut back sharply on others, such as case reading, this is not because I deem them unimportant but because I think that we pursue them far, far beyond the point of diminishing returns. My present contention is simply that the kinds of analytic thinking I have just described should not be the exclusive focus of a law school education, as they now are for almost all students in almost all law schools.

Consider, please, the various other kinds of analytic thinking which are nowhere touched in the traditional law school curriculum. I will mention just a few.

First, there is **problem-identification analysis.** This involves the process of beginning with an unstructured situation and structuring it so as to identify the problem or problems it presents. Almost all analysis conducted by students in law school begins with issues that are explicitly or implicitly predefined. The case method, for example, focuses upon a study of judicial judgments written after the questions for decision have been focused through the filing of a lawsuit, joining of issue, arguments of counsel and rulings of the trial court. Statutory analysis largely involves the interpretation of texts which become relevant only after the problem at hand has been identified as one with which a statute deals. Students enter "Contracts" classes expecting to discuss "contracts" issues; the issues for discussion at any moment are further specified by the doctrinal structure of the course materials. Legal research materials are accessed topically, presupposing that the researcher knows the question to which s/he seeks an answer. Clients, however, do not walk into lawyers' offices wearing signs labeled "contract problem", nor are most of the other situations with which lawyers have to deal so neatly labeled. In problem-solving, the first problem often is to understand the means and difficulties of figuring out what the problem is.

Second, there is **the integration of legal analysis with factual investigation.** This is a process of developing legal analyses in situations where the facts and the law are only partly known at the outset, and will or will not become increas-

ingly known depending upon your choice to investigate them or not. It requires an understanding and informed selection of information-acquisition techniques, and procedures for the tentative characterization of problems in ways that permit them to be refined through progressive investigation. It includes an appreciation of the methods and difficulties of dealing with an open universe of information and of information-gathering options -- that is, a universe in which the total of the information potentially bearing on a problem is not artificially limited (as it almost always is in law school, and almost never is in life), but must be determined by the exercise of judgment -- including judgments when and when not to seek additional factual and legal information in view of the cost of seeking it and the likelihood that it will or will not be found, or will turn out to be relevant if found. Legal analysis in this setting includes identifying options and progressively exploring or testing them on the basis of increasing feedback; making decisions (including the decision which decisions must be made immediately) in ways that keep alternative courses of action open for development in the light of subsequent information which your immediate decisions are designed in part to produce. (Just to mention one subspecies of open-universe issue: It amazes me that we spend so much time in law school training students to find and analyze the law, and never spend one minute training them to discern and cope with situations in which the research necessary to obtain solid answers about the applicable legal rules is likely to be more expensive than the value of the answers is worth. These situations are pandemic in legal practice and policy-making alike, and pose difficult ethical as well as practical problems.)

Third, there is the process of **ends-means thinking**: the identification of the full range of alternative possible goals in any situation, and of the full range of ways to get to each of them; an analysis of the compatibility or conflict of alternative goals, of one goal with one or more means to a different goal, or of one means with another means; and the design of strategies for maximizing the likelihood of ending up at the most desirable places to be, while minimizing the risks of ending up at the least desirable. This involves techniques such as brainstorming, designed to assure that one's initial canvass of options is systematic, thorough, and creative, so as to guard against tunnel vision. It involves the important ability to plan backward: to begin with an inventory of objectives, trace out

all of the routes to them, and determine the first steps to be taken only after considering where they may lead. For example, after analyzing the client's present situation and what troubles the client about it, one considers what alternative situations it might be possible to create for the client, through actions that the client or the lawyer might take. If litigation is one of the potential actions, one considers the relief that might be sought through litigation and the other ways in which the process and the outcome of litigation may effect changes in the client's situation, and one compares the effects that litigation might produce with the effects of non-litigative action. The effects to be sought through litigation -- or to be avoided in litigation -- then become the intermediate "end-points" of reference in considering alternative possible forms of action and theories of the case. Now let me skip several stages for the sake of dispatch. Suppose that one has decided to pursue litigation, and that it has progressed to the stage where one is preparing a witness for trial. How does one decide what testimony to elicit from the witness? One starts with the intermediate end-points of the various possible rulings that the judge may make at the conclusion of the trial. One considers which rulings one is seeking, or seeking to avoid, and one's priorities with regard to obtaining certain rulings or avoiding others. One then considers what specific views of the facts -- of the events and the parties -- will lead the judge, with what degrees of probability, to make the various rulings. One asks, "what will I want to argue to the judge in closing are the facts of the case? what nouns, what adjectives will I want to use to describe the facts that I want the judge to find?" One considers the various possible ways of supporting those nouns and adjectives on the record, and of making them persuasive: direct evidence, inference, etc. One inventories one's several possible sources of evidence and decides what one wants the judge to carry away from the testimony of this particular witness. That then becomes a new end-point, to which one refers in structuring the examination of the witness so as to bring out the desired facts and create the desired impressions in a credible, coherent, interesting fashion -- or in an incoherent fashion, if a part of the impression that one has decided to convey is that the witness is incoherent. This kind of ends-means thinking is equally indispensable to the practising lawyer in negotiation, in the drafting of documents, in the counseling of clients about the conduct of affairs, and in governmental or institutional policy-making.

Fourth, there is the process of **weighing opportunities and risks in order to decide upon a course of action.** This involves the assessment of probabilities and the evaluation of benefits, dangers and costs; it involves techniques -- such as best-case/worst-case analyses and contingency planning -- for choosing among possible courses of action in situations where options involve differing and often uncertain degrees of risks and promises of different sorts. Here again, there is a vast difference between the processes of thinking necessary to deal with open-universe situations and the kinds of thinking to which our students are limited in law school, where the universe of facts and law bearing on any issue is not merely closed but so thinly textured that most of the considerations identified by analysis as relevant are incapable of being weighed. How often, in the course of the analyses in which traditional academic teaching engages, are the students able to get beyond an enumeration of the factors pertinent to judgment, and actually weigh those factors one against another? To do that kind of weighing requires a concrete, detailed understanding of the facts of any situation; and almost never in law school are the situations which we pose for study by our students sufficiently fleshed out with facts so that all of the considerations can be weighted. The only proper answer to virtually all of the issues which we frame for discussion by the students is "it depends"; and, for this reason too, problem-solving and decisionmaking remain always one step beyond the furthest reaches of law school analysis.

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Am I overstating the case? There is little empirical evidence available concerning what really goes on in law school. Even law teachers ordinarily know nothing about what their colleagues do in the classroom, behind the labels "Contracts," "Torts," etc. But consider the results of an unusual study undertaken by a faculty committee at my university last year. I should preface them by saying that NYU is among the most progressive law schools in the United States, offering an unusually rich curriculum taught by an uncommonly innovative faculty.

In this study, a questionnaire was completed by more than 200 second- and third-year students. Another questionnaire was completed by more than 40 faculty members. Students were asked to indicate, on a scale of 1 to 5, how much of the time in

"standard" courses -- that is, courses other than our first-year Lawyering course and our upper-year clinical courses -- was devoted to teaching each of the following items:

i. case analysis and interpretation
ii. statutory analysis and interpretation
iii. substantive law
iv. transactional or socio-political context in which substantive law problems arise
v. economic analysis of legal issues or processes
vi. jurisprudence/legal institutions (including sociological and political analysis of legal systems)
vii. professional responsibility
viii. analysis of lawyers' decisionmaking processes and techniques
ix. methods for developing facts
x. legal planning theory and techniques
xi. negotiation theory and techniques
xii. client counseling theory and techniques
xiii. advocacy theory and techniques
xiv. theory and techniques of interpersonal dynamics and communication in legal settings
xv. specific skills (e.g., how to elicit facts in a witness interview or prepare for a negotiation)

A response of "1" was specified to mean that "none or virtually none of the course" was devoted to the item in question; a response of "5" was specified to mean that "a very large part of the course" was devoted to the item. The faculty questionnaire asked teachers to indicate, on the same 5-point scale, how much of their various courses was devoted to each of the same fifteen items.

The students' responses demonstrated the overwhelming concentration of the curriculum upon case analysis, statutory analysis, and substantive law. For standard first-year courses, case analysis scored a whopping 4.6 on a 5-point scale; substantive law scored 3.4; statutory analysis scored 2.5. These were the only items to score 2.5 or above. For standard second/third-year courses, case analysis continued to weigh in at a healthy 3.8; substantive law, at 3.7; statutory analysis, at 3.5; and transactional context scored 2.9. These were the only four items to score 2.5 or above in the second/third-year standard curricu-

lum. None of the following items scored 2.0 or above, where 1.0 -- the lowest numerical value attainable -- was defined as meaning that "none or virtually none" of our courses was devoted to the item: developing facts, legal planning, negotiation, client counseling, advocacy, interpersonal dynamics, or specific skills.[3]

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[3] The mean responses of the students are displayed in the following chart. Abbreviated descriptions of the 15 items are employed here; the full formulations of the items as they appeared on the questionnaires are those set out in text above. It should be noted that the questionnaires contained a sixteenth item -- "other" -- which I do not display because the student responses to it indicate that, essentially, they perceive it as non-existent.

		1-Y courses	2/3-Y courses	Law' ying	clinical courses
i.	case analysis	4.6	3.8	1.6	2.1
ii.	statutory analysis	2.5	3.5	1.8	2.5
iii.	substantive law	3.4	3.7	1.9	2.8
iv.	transactional context	2.4	2.9	2.4	2.7
v.	economic analysis	2.4	2.4	1.9	2.0
vi.	jurisprudence	2.0	2.4	2.1	2.3
vii.	professional responsibility	1.5	2.2	3.8	3.5
viii.	lawyers' decisionmaking	1.8	2.3	4.7	4.5
ix.	developing facts	1.5	1.8	4.1	4.1
x.	legal planning	1.5	1.8	4.6	4.2
xi.	negotiation	1.6	1.4	4.5	3.4
xii.	client counseling	1.2	1.6	4.7	3.7
xiii.	advocacy	1.6	1.7	4.2	4.2
xiv.	interpersonal dynamics	1.2	1.3	4.8	4.0
xv.	specific skills	1.1	1.3	4.7	4.3

The students do not see "standard" first-year courses as varying greatly, one from another, in the relative amounts of time devoted to the fifteen items listed. Asked to indicate the extent of this variation on a five-point scale where "1" was specified to mean that "all courses were generally the same," and "5" was specified to mean that "courses varied quite widely," the students returned the following responses:

The faculty apparently perceived "standard" courses as devoting somewhat more time to a broader array of items than the students did. Nevertheless, the general pattern of faculty responses strongly confirmed the student responses in identifying case reading, substantive law, statutory analysis, and transactional context as receiving the lion's share of attention -- with jurisprudence alone among the remaining items making a fairly strong showing, primarily in upper-year seminars.[4]

	1	**2**	**3**	**4**	**5**
number of student responses	14	75	62	43	10
percentage of student responses	6.8	36.4	30.1	20.9	4.9

"Standard" second/third-year courses were viewed as varying considerably more widely from one another; the corresponding figures here, employing the same scale, were:

number of student responses	6	26	60	65	40
percentage of student responses	2.9	12.6	29.1	31.6	19.4

[4] Here are the median faculty responses for the 15 items, on the usual five-point scale, separately displayed for "standard" first-year courses, "standard" second/third-year courses, second/third-year seminars, and second/third-year clinical courses:

		1-Y courses	2/3-Y courses	Sem' nars	clinical courses
i.	case analysis	4.1	3.9	2.6	2.5
ii.	statutory analysis	2.6	3.8	2.9	2.9
iii.	substantive law	3.5	4.2	3.1	3.0
iv.	transactional context	3.1	3.4	3.5	2.6
v.	economic analysis	2.1	2.4	2.4	1.6
vi.	jurisprudence	3.1	2.8	3.2	1.7
vii.	professional responsibility	2.0	2.4	2.3	3.7
viii.	lawyers' decisionmaking	3.0	2.4	2.6	4.4
ix.	developing facts	2.3	1.9	2.3	4.1
x.	legal planning	2.4	2.1	2.5	4.5
xi.	negotiation	1.8	1.6	1.8	3.8
xii.	client counseling	1.8	1.6	1.9	3.6

What message does this concentration convey to students? That legal rules and the kinds of reasoning by which they are found and made, categorized and criticized, are of transcendent importance to lawyers, certainly. And that if there are other kinds of reasoning involved in the law, they are either unimportant or unintellectual -- unfit for systematic study during the period of one's training that is devoted to theoretical and meditative thinking. I have several problems with this message.

First, it just ain't true. Other kinds of reasoning that lawyers do are crucially important to the proficient practice of the law and to the intellectual self-discipline and humane understanding of one's role that mark the true professional. These kinds of reasoning are no less rigorous, no less conceptually sophisticated, and no less susceptible to systematic study in an academic setting, than those which now monopolize the law school curriculum.

Second, the message becomes in part a self-fulfilling prophesy. A little experience in practice quickly dispels the notion that the many kinds of lawyers' thinking which are ignored in law school are unimportant. But because these kinds of thinking were ignored in law school and have to be picked up in practice, and because the settings in which they are picked up in practice allow neither the leisure nor the guidance nor the learning-oriented atmosphere necessary for their systematic and reflective study, the notion is not dispelled -- rather it is reinforced -- that mental operations such as problem-identification analysis and ends-means thinking are unintellectual. Thus are the myths compounded that these are matters of "feel," not "logic," of "art," not "science," that they are unteachable, unlearnable, unanalyzable, that one is either "born with the knack" for them or goes without it all one's life. Such myths condone slipshod lawyering and make even conscientious lawyering less deliberative and introspective than it should be. They also have the ironic effect of making practising lawyers undervalue

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xiii.	advocacy	2.0	1.8	2.0	4.2
xiv.	interpersonal dynamics	1.3	1.3	1.7	4.1
xv.	specific skills	1.6	1.5	1.9	4.3

the kinds of systematic thinking that are examined in law school. "Academic analysis" becomes the antonym of "practical thinking." And when these attitudes are transmitted from practising attorneys to law students, they impair law teachers' abilities to teach even "academic analysis," by making academic analysis appear inconsequential, and by making law teachers appear irrelevant as role models, to the would-be practitioner.

But this is not the culminating irony. My third problem with the law schools' traditional disregard of modes of thinking that are central to many lawyer's functions -- such as negotiation and counseling -- is that it impoverishes the very study of legal rules to which the law schools are so single-mindedly devoted. Take, for example, an appellate judgment which decides certain issues of product liability and explicitly reserves others. A traditional method of analyzing this judgment in the law school classroom is to pose a number of hypothetical cases and to ask how they would or should be decided by a court in the wake of the judgment, how they would have been decided if the judgment had announced a different rule or reached the questions it reserved; then perhaps to evaluate these results under some normative standard. But for every case in which the judgent will affect the decision of a court in a subsequent litigation, there will be a hundred cases in which it will affect the result of a negotiated settlement of a claim against a manufacturer, and another hundred in which it will affect the advice a lawyer gives a manufacturer. I suggest that the significance of the appellate court's judgment is inadequately analyzed unless the students who study the case consider the impact of the judgment upon negotiation and legal counseling; and I suggest also that the impact of the judgment upon negotiation and legal counseling cannot be meaningfully discussed by students who have no conception of the thinking processes involved in negotiation and counseling.

Fourth, it seems to me -- although I have no empirical evidence to back this intuition up -- that the law schools' fixation upon legal rules and upon reasoning concerned with the explication, direct application, and criticism of legal rules likely tends to increase the preoccupation of lawyers with the resolution of issues and the governance of affairs by reference to formal authority rather than by private choice and informal accommodation. This may make lawyers less resourceful than they

ought to be in seeking out informal modes of dispute resolution and problem-solving; it may make them more inclined to be litigious and authoritarian.

B. How we teach

I pass now from what we teach to how we teach. My submission here is that traditional law school teaching methods force students into inactive roles that discourage, rather than encourage, initiative and creativity in legal problem-solving.

Almost all mainstream law school teaching is done in one of three formats: lecture, Socratic dialogue, and seminar. Seminars are usually taken in a student's third year; few students take more than one of them. Seminar instruction therefore has little overall impact upon the formation of students' attitudes toward learning or working with the law.

Lecture-style instruction is a passive experience for students. To be sure, students are expected to read and think about materials before class. Thus, they can compare their own analysis of the materials with the professor's as the professor lectures. But they tend not to do this. The knowledge that the professor will "pull it all together in class" is a disincentive to pulling anything together themselves beforehand. Speaking of forehands, those of you who are tennis buffs will appreciate the limitations of the lecture as a method of instruction. Imagine learning to swing a racket by being told how to do so.

Variants of the so-called Socratic method -- class discussions in which students volunteer or are called upon to answer the professor's questions and to respond to one another -- are the most widely practiced forms of teaching. These are supposed to provide an active learning exercise. They are supposed to model for the students a process of thinking critically, and to inspire or compel the students to practice it. The students will apply this process, so the theory goes, as a tool of self-instruction when they prepare for each day's class by reading materials which, in the words of Professor Max Rheinstein,

"we hand to them and expect them to read critically."[5]

That is a laudable ideal. But is it a reality? I would rather describe the reality as follows:

Prior to each class the students are given a reading assignment consisting of 20 pages or so of judicial judgments, perhaps some statutory and editorial matter, and often, following each case, a series of questions. They read these 20 pages, digest the cases descriptively, and feel that they have "done" their assignment. They read the series of questions as though they were simple declaratory sentences, ignoring the question marks. The next day, they appear in class and the teacher asks them questions. The teacher does not ask them all of the questions in the book; the students do not know in advance which of the questions the teacher will ask; and only a fool would devote time to considering so many questions for the dubious privilege of being called upon to answer so few. Indeed, most of the questions which the teacher asks in class were not in the book at all, and the students could not have thought about them in advance if they chose. The emphasis is on snap answers to snap questions, not upon deliberated thinking.

Notice an interesting point. If asked why they are asking all of these questions, most teachers would say that they are asking them in order to sharpen the students' critical acuity -- in order to get the students to think like lawyers. In other words, the questions are tools of analysis. But it is the teacher who furnishes all of the tools, and the students are never asked to examine them, let alone master the art of selecting them, let alone invent such tools for themselves. Do we ever blow the whistle, stop the class, and ask the students: "Why did I ask that last question? What function did it perform in helping us to analyze what we are analyzing? How well did it perform that function? What alternative questions might have been asked? How do they compare as tools for analyzing what we are analyzing? What are we analyzing, anyway? Why are we analyzing that? Are there other things we might be analyzing?"

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[5] I owe this this reference to Professor John Willis, who quoted Professor Rheinstein in Willis, What Makes a Law School Great?, 6 DALHOUSIE L. J. 361, 364 - 365 (1980).

Law teachers apparently assume that, in asking the questions, they are modeling an analytic process. But even if this purpose is revealed to the students, as it seldom is, the process itself goes unexamined. The logic by which the teacher chooses what questions to ask remains a mystery to the students -- something only Teacher knows or needs to care about. Is it any wonder then that students do not ask themselves questions as they read the cases assigned for class? that they learn only to answer questions, not to ask them? that their learning process -- indeed, their thinking process -- remains entirely passive?

Let me take a slightly deeper cut at this. Is it not fair to say that, thoughout most of law school, students are asked solely to criticize other people's thinking, not to do their own? The very heart of the case method of studying law is that the students are cast in the role of book reviewers of judicial judgments. My present point is not the hackneyed one that this fits them to be judges rather than practitioners. It is the more basic point that this fits them only to be reviewers of thinking, not originators of thinking; to be Monday-morning quarterbacks, not quarterbacks; to be critics, not decisionmakers -- and critics only in the derogatory sense in which Samuel Beckett uses the word "critic" as the unsurpassable epithet in Waiting for Godot. Think of what this denies students intellectually and emotionally. The ultimate use of legal thinking -- and the most exciting part of being a lawyer -- is problem-solving. Yet we do not train students to be problem-solvers, only solution-critics.

But, you will object, the criticizing of solutions is a necessary part of training in problem-solving. I agree that criticizing other people's solutions -- as a means of developing a methodology for criticizing one's own potential solutions -- is one way to begin to learn one aspect of problem-solving. There are, however, other essential aspects of problem-solving which are almost wholly ignored in law school education. I have mentioned some of them already -- problem-identification analysis, ends-means thinking, and so forth. Without a systematic exposure to these, students can neither be expected to develop problem-solving methodologies nor be expected to appreciate the role that analytic criticism of potential solutions plays in problem-solving methodologies.

C. What we seek to achieve

A still deeper cut at mainline legal education must ask what we intend it to achieve. I think our goals in law school teaching are too narrow, in two fundamental regards.

1. Our disregard of working knowledge

First, the kind of understanding that we seek to have our students acquire is of a very limited sort. It is the kind of understanding that permits one to discern, explicate, classify, and criticize the materials of the law, but not to work with them. When our students have completed a course in procedure they can, at worst, describe the rules of procedure; at best, analyze them in the manner of a fine, traditional law review article. They can tell you where to find the rules, what the rules are, what principles connect them; they can reason from and about the rules in a logical fashion; and to a limited extent they can describe how the rules function in practice, and can criticize both the logic and the functioning of the rules from a teleological perspective. But they cannot start with a real-life situation in which somebody has a cause of action, and construct a law suit taking a proper account of the rules.

It is not merely that they lack indispensable tools for doing this -- such as the techniques I've mentioned, say, for integrating legal analysis with factual investigation. More fundamentally, they look at the rules of procedure from only one end of the stick, because mainline law school education does. But it is the other end of the stick which a user of the rules must grasp. Law school analysis of the rules starts with the rules and asks how they apply. Users of the rules start with a situation and have to ask how the rules bear upon the situation.

A couple of years ago, a group of Evidence teachers and clinical teachers at my law school got together to try to figure out why it was that students after even the very best of Evidence courses could not start to think about the law of evidence in any effective way when they were placed in a clinical setting that required them to plan, prepare, or conduct litigation. We concluded that a major reason was that Evidence courses focused upon Evidence questions instead of questions to which the law of Evidence (among other things) was pertinent. Even in problem-

based Evidence courses, the problems took the form of giving the student a description of a piece of evidence and asking whether it was admissible -- or, at best, of giving the student a piece of evidence, putting the student in the role of a trial attorney, and asking "how do you get it in?" or "how do you keep it out?" These are eighth-order questions.

As I have suggested earlier, the first-order question is "What are the client's goals?" The second question is "With reference to those goals, what are the attorney's objectives in this litigation?" The third question is: "Within the framework of those objectives, what results does the attorney seek to achieve through the trial of the case?" The fourth question is: "In order to achieve those results, what impressions of the case and of the people involved in it is the attorney seeking ultimately to create in the mind of the trier of fact (and perhaps of an appellate tribunal)?" The fifth question is: "What raw materials are available for the attorney to use in creating those impressions?" The sixth question is: "What are the various ways in which these raw materials can be put together, so as to do the best possible job of creating the desired impressions?" The seventh question is: "How does any particular piece of potential evidence fit into the whole picture?" ("What is the purpose, or what are the purposes, of presenting it?" "What other pieces of evidence, or other means, are available to serve the same purpose?" "What effect will the presentation of this piece of evidence, and the process of presenting it (including possible hassles over its admissibility) have upon the ultimate impressions that I am trying to create?") Then, assuming the decision is made to attempt to present the evidence, we come to the eighth-order questions: "Is it admissible?" or "How do I get it in?" Of course one cannot ask all of these questions about every piece of evidence discussed in an Evidence course. But for a student to graduate from law school after three years of courses including an Evidence course, and never anywhere to have thought about any of these questions save the last, makes a travesty of the notion that law schools endeavor to teach "thinking like a lawyer."

And that is only a part of the problem. Too often, we not do not merely fail to confront students with both ends of the stick; we fail to ask them to take hold of **either** end. We ask them only to **look** at the stick. One of the most remarkable

things about law school is that students constantly study decisionmaking and never have to make any decisions. The very heart of being a lawyer is making responsible decisions. Day after day, lawyers must choose a course of action, choose and choose again, witness the consequences of their choices, and pay the piper intellectually and emotionally, if not financially. Part of a lawyer's education should surely be to come to grips with oneself in the process of decisionmaking -- to face up to the way in which one's own mind works under the pressure and the responsibility of making decisions -- and to test out how one's intellectual tools bear up under the strain. Yet most law students go through three years of law school debating "issues" in the abstract, without having ever made a single legally-reasoned decision that matters.

I suggest that this is a very serious deficiency. The purpose of legal reasoning is not simply to find the law, predict the law, or even criticize the law. It is to impose upon the mind the one indispensable feature of the professional and the scholar: intellectual self-discipline. As scientific method is designed to rein the impulses of the researcher, so legal method is designed to rein the impulses of the lawyer -- not solely to keep the lawyer from mistaking what results the law ordains, but to keep the lawyer from mistaking the results the lawyer wants for the results the law ordains. This kind of discipline can be acquired only by applying the legal method in situations where one cares about the results. One can "think like a lawyer" only by confronting and coming to understand the forces within oneself that drive one to think otherwise. Am I talking about psychoanalysis? Of course not. I am talking only about providing some opportunity in law school for students to decide issues instead of debating them. I am talking about putting students in a setting where they must think through issues thoroughly and concretely for the purpose of choosing among alternative courses of action aimed at achieving a goal, where they can taste the satisfaction or dissatisfaction of their measure of achievement both in anticipation and in fruition, and where they are required to examine the effects of their desire to achieve upon their thinking process.

2. Our disregard of learning after law school

The second respect in which our educational aims are

too narrow is that they stop at graduation. Law schools do not undertake to prepare students to learn from the experience of practice after they graduate. The three years of law school are viewed as a closed exercise. Conventional wisdom concedes that lawyers may continue to learn thereafter in the school of hard knocks, but insists that the two schools are wholly unaffiliated.

This view is unrealistic and unwise. Students learn for 90 weeks in law school and for 30 or 50 years at the bar. These 30 or 50 years will constitute by far the largest part of their legal education, whether the law schools accept the fact or not. They can be an inefficient, fumbling, catch-as-catch-can learning experience in the school of hard knocks. Or they can be made an efficient, focused, systematic learning experience, to the extent that the law schools acknowledge a part of their educational job to be to teach students effective techniques of learning from experience.

III. Teaching Lawyering

You will note that I have spent considerable time criticizing mainline law school education, leaving little for my discussion of the Lawyering method of teaching. This is not inadvertent. The Lawyering method can be best understood and quickly described as an effort to rectify the shortcomings of traditional law school instruction which I have identified.

A. The basic method

The basic method of teaching Lawyering involves six key features:

One. **Students are confronted with problem situations of the sort that lawyers encounter in practice.** The situations may be simulated -- for example, by role-playing exercises in which some students play the role of legal counselors and others play the role of clients -- or they may be real -- for example, students may be assigned to represent actual clients and to counsel them under the supervision of faculty members. Our first-year Lawyering course at NYU involves simulation exclusively, but we have upper-level clinical courses in which the basic Lawyering technique is used in live-client settings. The range of lawyering problems with which students are

confronted can be as broad as the range of things lawyers do, from advising an individual client with a domestic problem to drafting proposed legislation as a staff attorney for a government agency.

Two. **The problem situations are concrete, complex, and unrefined.** They are textured by a wealth of specific factual detail. In role-plays, the clients or witnesses are given guidelines for the invention of as much information as a real client or witness would possess -- about events, personalities, and their own viewpoints and emotions. Dealing with these situations requires attention to the interaction of factors in several dimensions: legal rules and principles; the practical workings of institutions and their personnel; economic considerations; logistical and strategic considerations; and the personal values, beliefs and feelings of the people involved.

The facts are presented to the students in the raw, not predigested through case reports or other selective summaries. How much of "the facts" the student obtains depends on how s/he goes about obtaining them. What "the issues" are depends on how the student goes about developing them. In one of the role-plays in our first-year course, for example, a client walks into the student/lawyer's office and says: "I've come to you because my full-time babysitter is threatening to quit. A neighbor child had a minor accident on my children's trampoline, and the baby-sitter is worried that s/he will be responsible if a more serious accident should occur." The client expresses little or no initial concern about the client's own possible liability for accidents on the trampoline; whether the student/lawyer chooses to get into that depends upon the student/lawyer. The client says nothing about insurance, although s/he has a homeowner's policy which s/he will dig up if asked. It is also up to the student/lawyer whether s/he chooses and manages to probe the facts sufficiently to find out that the client is divorced; that the client purchased the trampoline for the children after the divorce, partly as a guilt gift and partly for the purpose of attracting other children to come and play with the client's children; that the perceived need for this come-on arose partly from the client's realistic perception of the children's difficulty in making friends in a new neighborhood and partly from the client's apprehension that the children are socially gauche -- an apprehension which is partly a projection

of the client's own failure to make a satisfactory adjustment at work and in the client's social life since the divorce; and that all of these facts significantly affect the client's thinking about the trampoline. If the student/lawyer does elicit some or all of these facts from the client, it is up to the student/lawyer to decide which, if any, of the facts should enter into the lawyer's analysis of the nature of the client's "problem," and how.

Three. The students deal with the problem **in role**. They do not examine it from the standpoint of uninvolved observers, but from the standpoint of lawyers with a responsibility to perform: to help this client solve the problem. They must identify the problem, analyze it, consider and evaluate possible responses to it, plan a course of action, and execute that course of action.

Four. In all of these activities, **the students are required to interact with people**. They must work out the relationships among legal analysis, communication, and interpersonal dynamics.

Five, -- and this is the heart of the method -- the students' performance of each activity is subjected to intensive, systematic critical review. This review includes every step of the students' analysis, planning, decisionmaking and implementation of decisions by action; every aspect of the student's in-role thinking, behavior, and interaction with people. Often we will videotape or audiotape the students' activities during the performance stage, and "critique" the tape during the critical-review stage. Sometimes the students' performance is reconstructed from file memos or notes, together with the recollection of the participants. The student performers, together with the other participants in the exercise and usually with faculty and additional students, sit down and systematically take apart what happened in the performance stage, and why.

Six. **This critical review focuses upon the development of models of analysis for understanding past experience and for predicting and planning future conduct.** It identifies and explores the questions to be asked following any experience -- a meeting with a client; a negotiation with another lawyer; a

conference with a government official; a trial; the closure of a case -- in order to draw from that experience as much learning as one can. The students learn to ask, for example, "What were my objectives in that performance? How did I define them? Might I have defined them differently? Why did I define them as I did? What were the means available to me to achieve my objectives? Did I consider the full range of them? If not, why not? What modes of thinking would have broadened my options? How did I expect other people to behave? How did they behave? Might I have anticipated their behavior -- their goals, their needs, their expectations, their reactions to me and to my proposed course of action -- more accurately than I did? What clues to these things did I have that I overlooked, and why did I overlook them? Through what kind of thinking, analysis, planning, perceptivity, might I see them better next time?" These questions are, of course, the points of entry to examination of the kinds of lawyer's reasoning processes I mentioned earlier -- problem-identification analysis, ends-means thinking, and so forth. They are also the starting points for the students' development of conscious, rigorous, self-evaluative methodologies for learning from experience in the practice of law -- the kind of learning that makes law school the beginning, not the end, of a lawyer's reflective legal education.

B. Some examples of details of the technique

A few examples of variations within the technique may give you a more concrete sense of it and of the perspectives that it opens to the students. I take these examples from our first-year Lawyering course at NYU, although that is only one of many varieties of teaching Lawyering. The course consists of a sequence of six simulation exercises in interviewing, counseling, negotiation, and advocacy.

In the exercise I've already mentioned, involving the trampoline problem, one-third of the students play the role of client and two-thirds play the role of attorney. Each client has two separate attorneys, to whom the client relates independently. After an initial interview with the client, each attorney, who is assumed to be a young lawyer just beginning practice, addresses a memorandum to his or her senior partner, describing the student/attorney's initial impressions of the client's problem and possible ways of approaching it. The senior partner, role-played by

a faculty member, responds with a memorandum of reactions and suggestions. Then the attorney is left to deal with the client as the attorney thinks appropriate, closing the case by a specified deadline. The student/attorneys are instructed to keep an in-role file on the case, including notes of all factual investigation and legal research, memorials of all meetings and phone conversations with the client, and copies of all correspondence and of any instruments they draft. On the specified deadline, the attorney is to transmit this file to the senior partner with a covering memo describing and explaining the final resolution of the case. Clients are instructed to make out-of-role notes of their impressions of all interactions with each of their attorneys.

After the case is closed, the attorneys are asked to complete an out-of-role questionnaire designed to ascertain what factual information the attorneys obtained from the client, how they view the client and the client's problems outside of the focus of their attorney's role, how they perceive that they and their clients interacted in the process of consultation and decisionmaking, and how they believe that their clients would describe this interaction.

The questionnaires are a very useful tool of critical review in several ways. By asking the attorneys both to describe their relations with their clients and to state how they believe the client would describe those relations, the questionnaires force the students to consider the client's viewpoint, and often bring home to them forcefully that they gave insufficient consideration to the client's viewpoint during the performance stage of the exercise. The questionnaires also enable us to determine whether, for example, if an attorney took no account of certain facts or problems of the client in resolving the case, it was because s/he never unearthed the facts or saw the problems, or because s/he thought the facts irrelevant to, and the problems beyond the scope of, those problems with which s/he chose to deal as an attorney.

The clients are asked to write an out-of-role memorandum describing and comparing the approaches taken to the case by their two attorneys, and the clients' reactions to the differing approaches. The memoranda are required to address certain questions, inter alia the respective parts played by the

attorneys and the clients in decisionmaking. These questions are parallel to those in the attorneys' questionnaires, and permit us to compare how the attorneys perceive themselves as dealing with the clients, how they think that the clients are perceiving them, and how the clients actually do perceive them. Other parallel questions are asked. For example, the attorneys are asked how satisfied they thought that their clients were with the ultimate disposition of the case, and why; the clients are asked how satisfied they were, and why.

The clients' memoranda and the attorneys' questionnaire responses, work files, and closing memos to their senior partners are exchanged among all three members of each attorney/client triad. Then the three students meet together, sometimes with a faculty member or a teaching assistant (an upper-year student who has taken the course in a prior year), to discuss the issues raised by these materials. Whether or not a faculty member participates in the critical review sessions, the agenda for the sessions is set by the students after reading suggestive guidelines prepared by the faculty. Later the class meets in sections of 24 students, with faculty and teaching assistants, for a concluding discussion of the exercise. Various triads of students are asked beforehand to open discussion of certain issues by presenting the analyses of those issues which they have made in their earlier, separate critical review sessions.

The issues discussed range widely. They include the attorneys' differing conceptualizations of the clients' problems and the reasons for the differences -- why, for example, some attorneys focus on the babysitter's potential liability for trampoline injuries, others focus on the client's potential liability, some focus on both, and some focus on additional or other matters, such as the client's moral responsibility for the safety of neighbor children, the danger of trampoline injury to the client's own children, the children's general social-adjustment difficulties, or the client's. We discuss which of these matters are within the province of the legal counselor, whether the lawyer should be concerned with them even if the client appears at the outset not to be, whether and why and how the lawyer should talk about them with the client even if the client is resistant.

We discuss the differing approaches taken by different

lawyers to the investigation of the case: why did some attorneys spend the bulk of their time in the law library researching landowner's liability or respondeat superior, while others looked for the word "trampoline" in the law digests, and still others phoned athletic associations, insurance companies, sporting goods shops, or local high schools for facts about the probability and severity of trampoline injuries, and about possible safety precautions to reduce them? We discuss the different lawyers' differing interpretations of the law and the facts: why did some students reach more pessimistic conclusions than others about the client's potential liability? Did the attorney's, or the client's, degree of risk-aversiveness affect the attorneys' case reading? Should it have? Or should it have entered into the attorney's analysis of the case at some other juncture? Did the attorneys and their clients talk explicitly about the extent to which the client was and ought to be willing to run certain risks, and should they have?

We discuss and compare the attorneys' preferred solutions to the client's problems: why did some attempt to persuade the client to get rid of the trampoline, while others advised increased insurance coverage, or additional safety precautions, or the obtaining of releases from the neighbor childrens' parents, or an indemnification agreement with the babysitter. (As the law lies, an indemnification contract can be written that appears to give the babysitter greater protection than it does. The babysitter is not represented by a lawyer and is unlikely to consult one. Is the client concerned with safegarding the babysitter, or only with pacifying the babysitter so that the babysitter will stay on? Does the client, or the attorney, have any obligation of fair dealing with the babysitter?)

We discuss how the decisions were made between attorneys and clients -- to what extent the client's wishes and values were and should have been permitted to guide the decisionmaking process; to what extent the attorneys' wishes and values affected the process, and how; what services the clients wanted from their attorneys, and what they got.

One more example. In another exercise, the students work in three-person teams of junior attorneys in a legal clinic. Each team collaborates in designing a strategy for a conference

with a lower-echelon official of a government agency, to persuade the official to take certain action in a situation where the law and the facts are unclear, and where the agency's discretion is broad. The law and the facts which the students must master and weave together into a strategy of persuasion are complex. The conference with the government official will be short, so effective organization and planning for it are crucial. The students do not themselves meet with the government official. Their task is to brief their supervising attorney -- role-played by a faculty member -- to conduct the meeting. So, although the students are left to discover this point for themselves in foresight or in hindsight, their job is not in fact to design a game plan for a single meeting but for several: the meeting of the supervising attorney with the government official, the meeting of the students with the supervising attorney, and the students' meetings among themselves preparatory to the meeting with the supervising attorney.

How do, and how should, the different purposes of these several meetings, and the differing relationships among the parties to the meetings, affect preparation and planning for each of them? Is persuasion of a sort, and strategy of a sort, involved in each? How do, and how should, the students' persuasive goals and strategies affect their analyses of the law and the facts? In a later exercise, the students are assigned to work in two-person teams to prepare a trial witness in a criminal case. One student is designated as the attorney who will conduct the examination in court; the other student is assigned to assist. The working relationship between the two is left up to them. Some students draw upon their experience in the earlier exercise to perceive that this relationship can take various forms; that, although the students are co-counsel, their goals may very well not be identical; and that the nature of the relationship they work out is quite important both for the achievement of their respective goals and for effective preparation of the witness' testimony. Other students overlook the point and blunder into frustrating and unproductive relationships. How and why this happens is one of the subjects discussed in the critical review phase of the trial-examination exercise -- along with such other diverse subjects as the relationship which the attorneys sought to, and did, establish with their witness; the integration of legal analysis and factual investigation in witness interviewing and trial planning; and the law of evidence, gripped from the

proper end of the stick.

Our results in these sorts of exercises have been very encouraging. The students take an active part in shaping the ways in which they learn, and thus learn better how to learn. They gain demonstrably in insight and reflectiveness about the functions and the roles of lawyers and about the uses and the methods of legal analysis, including both the kinds of legal analysis that law school has traditionally taught and the kinds that it has not. They come to understand more richly the varieties and difficulties of thinking like a lawyer, and to fit the intellectual tools of the profession to their own resources for the task.

IV. The cost of teaching Lawyering

Now is not all of this very expensive? Certainly it is more expensive than traditional classroom teaching. Professorial time is the largest cost item in the law school budget, and any mode of teaching that requires a faculty member to spend an hour with two or three students, instead of 35 or 75, is relatively costly.

I have two observations on the matter of costliness:

First, the costs of teaching Lawyering can be cut substantially in several ways. Practising attorneys who understand the goals of this method of teaching can teach in it very effectively. If a law school has a well-designed Lawyering course and can enlist the cooperation of the practising bar, volunteer lawyers with a little training in the methods of the course can play a significant part in teaching it alongside faculty members. I have mentioned teaching assistants. They too can supplement the faculty. At NYU, our teaching assistants are upper-year students who have had the course in their first year. They do an excellent job, and are given academic credit for it. This makes good sense educationally as well as economically. Because teaching in the Lawyering method involves bringing one's critical faculties and interpersonal skills to bear upon ever-new material, it is a valuable advanced educational experience. Also, we find that our first-year Lawyering students themselves can get along pretty well without faculty involvement in some of the later course exercises. Remember that the course is designed

in part to build up both their capacity and their will to be self-critical. Critique sessions toward the end of the course are left to the students alone, sometimes with written guidelines suggesting issues that they may wish to address. Another way to cut costs is to integrate Lawyering exercises into existing legal-writing courses. Legal-writing assignments designed to teach library research, case reading, and memorandum writing can be restructured to include, for example, a client counseling exercise based upon the students' research. Most legal-writing courses provide individualized criticism of the students' written work product; this can be expanded to deal with the students' planning and performance of their counseling role as well.

Even with these cost-cutting techniques, however, teaching Lawyering remains expensive as compared with traditional large-class teaching methods. And that brings me to my final observation about costs, and my final reason for devoting as much of today's talk as I have devoted to a criticism of the mainstream law-school curriculum. Is it not worth considering, I wonder, whether some of the traditional classroom courses which the law schools now offer should be cut out, or cut back substantially in the number of teaching hours they consume, in order to make resources available for a broader range of teaching methods, aimed at a broader range of educational goals? Might not students be taught to read cases, and to discern and analyze the contents of legal rules, in fewer subject-matter areas, leaving them then to use these skills to learn the law in other areas for themselves? Might not some of the teaching hours thus saved be better invested -- say, in teaching Lawyering?