

The Future of Legal Education for Practical Skills: Can the Innovations Survive?

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Donald W. Jackson and E. Gordon Gee have distinguished themselves with yet another empirically oriented study of legal education.¹ This time, however, Gee and Jackson eschew mere description. To improve the quality of debate on the future of American legal education, they invite us to consider several intriguing hypotheses. Their review of the history of legal education in both America and England, their firsthand observation of present English legal education methods, and their evaluation of current data generated by interviews and questionnaires at ten American law schools lead them to suggest the following hypotheses:

(1) Large scale change in legal education is unlikely in the short run and exceedingly difficult to implement, maintain, and disseminate in the long run.

(2) Factors associated with the persistence of an innovation are (a) ability to convey essential ideas and skills in "at least a *minimally* acceptable" manner, (b) lower cost than alternatives, (c) ease of administration and application, and (d) consistency with the overall structure and system of the institution, including the faculty reward and incentive structure.

(3) Factors associated with the decline of an innovation are (a) great cost (especially if the cost is visible), (b) need for high levels of time and energy commitment, (c) need for substantial institutional adaptation for both implementation and integration with the totality of the law school curriculum, and (d) inconsistency with the extant system of rewards and incentives.

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1. Gee and Jackson's first study provided details on the formally and informally required curricula in American law schools. E. GEE & D. JACKSON, *FOLLOWING THE LEADER?: THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA* (1975). Their second study analyzed the number of course registrations in elective courses and related those courses to bar examination subjects. D. JACKSON & E. GEE, *BREAD AND BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION* (1975). See Kelso, Book Review, 1976 B.Y.U.L. REV. 597.

Illustrating how these hypotheses apply, Gee and Jackson point to the tension between the theoretical orientation usually found implicit in the case method (legal education's most successful innovation) and recurrent calls for a more practical orientation. Examples of such calls include the Chief Justice's Sonnett lecture,² the Clare proposals,³ formation of the Devitt Committee,⁴ and Arch Cantrall's articles of some years ago.⁵ Of course, the most highly visible point of tension is the continuing debate on clinical legal education.

An application of the Gee and Jackson hypotheses suggests that the future of clinical legal education is in doubt because all of the factors associated with the decline of an innovation are present. Although substantial financial assistance from the Council on Legal Education for Professional Responsibility (CLEPR) has allowed most law schools to now offer some form of clinical education, CLEPR's millions are coming to an end at a time when the costs of clinical education are thought to be relatively great and highly visible. Effective clinical education not only requires an enormous expenditure of teacher time and energy, but also calls for teacher-student relationships quite foreign to the usual classroom pattern. Clinical legal education is a recent innovation and represents a large scale change from traditional legal education models. In addition, conventional tenure and promotion tracks are not well adapted to the career patterns of clinical teachers.

Gee and Jackson suggest that clinical legal education would more likely continue its growth if efforts were made to alter the balance of factors that lead to decline or persistence. Thus, they advise tapping alternative sources of funding, reducing the load

2. Adapted in Burger, *Advocacy on Trial*, LEARNING AND THE LAW, Spring 1974, at 26.

3. Discussion pro and con may be found in Pedrick & Frank, *We Are Faced with a Clare and Present Danger*, LEARNING AND THE LAW, Winter 1976, at 46; The Special Committee on Admission to the Bar of the Association of American Law Schools, *Confusing Incompetency with Inadequacy is a Big Mistake*, LEARNING AND THE LAW, Summer 1976, at 41; Silverman, *Ending the Myths that Plague the Clare Proposals*, LEARNING AND THE LAW, Summer 1976, at 22; *The Open Door Policy on Trial: A Symposium*, LEARNING AND THE LAW, Winter 1975, at 46.

4. The Committee to Consider Standards for Admission to Practice in Federal Courts, appointed by Chief Justice Burger, and under the chairmanship of Judge Edward J. Devitt, is considering how the quality of advocacy in the federal courts can best be improved. Devitt, *Improving Federal Trial Advocacy*, THE JUDGES' JOURNAL, Spring 1977, at 40.

5. Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952); Cantrall, *Practical Skills Can and Must Be Taught in Law School*, 6 J. LEGAL EDUC. 316 (1954).

of clinical teachers, and inventing teaching materials and techniques that would do for clinical teachers what the casebook did for classroom teachers. Finally, Gee and Jackson suggest that incentives for clinical teachers could be improved, perhaps by providing alternative tracks toward promotion and tenure.

We find nothing here with which to disagree. We applaud Gee and Jackson's careful assemblage of factual data and their effort to mine it for evidence of trends, causal conditions, and projections. We believe that the context of legal education should be as broad as life itself and should include concern for the goals and consequences contingent on the exercise of our professional knowledge and skill. When the data is viewed from this perspective, additional trend and causation hypotheses emerge that not only indicate who has been responsible for what, but also suggest several projections and alternative futures that Gee and Jackson have not discussed. Details follow as we pursue Gee and Jackson's goal of contributing to the debate on the future of American legal education.

I. TRENDS AND CAUSAL CONDITIONS RELATED TO THE DEVELOPMENT OF PRACTICAL SKILLS EDUCATION

Gee and Jackson's review of historical and other data leads us to suggest four additional hypotheses:

(1) *The bar increasingly has become content not to have major responsibility for the initial education of future lawyers.* During the past 100 years, legal education in university-related law schools has been substituted for education in proprietary or independent schools and for the apprenticeship of students to individual practicing lawyers. Retreating from direct responsibility for legal education, the practicing bar appears content to rely on bar examinations to test the quality of an applicant's legal education. There is little indication that the practicing bar is currently prepared to assume the massive educational responsibility of training, for a substantial period of time, each year's wave of over 30,000 graduating law students. To the extent that practicing lawyers or judges wish to participate in law school education, they normally have ample opportunities to teach on a part-time basis or in other ways to assist in law school programs of education and research.

(2) *Substantial innovation does not frequently originate within law schools and usually occurs only if it is supported by (or at least is not opposed by) external forces.* Invention of the casebook method occurred when law schools were under no pres-

sure from bar admission authorities or accrediting agencies to use any other method. The anti-elitist philosophy of the Jacksonian era, beginning in the 1820's, had resulted in the destruction of almost all educational requirements for admission to the bar. By the 1870's, state laws no longer supported apprenticeship. Consequently, university-related schools could reasonably seek to attract good students by offering something different from either apprenticeships with practicing attorneys or lectures given in proprietary schools. Having succeeded in that endeavor, law school educators successfully locked Dean Langdell's vision into place through actions of the American Bar Association (ABA), the Association of American Law Schools (AALS), and, later on, the admission authorities. Today, however, further innovation is not prompted by the bar examinations, the ABA's standards for approval of law schools, or the AALS articles of membership. The climate for innovation is further tempered by the felt need to distribute research and development funds equally among all faculty members or ranks, except to the extent that a faculty member by individual initiative is successful in attracting a grant.

(3) *Law schools have been quite malleable when external pressures, including grants, have impacted upon the length of law school programs, the curriculum, the composition of the faculty, admission requirements, and the size of a library.* Gee and Jackson's historical review shows the rapid movement of law schools to comply when external standards have been changed. For example, they note that when the ABA issued its first list of approved schools in 1923, twenty-seven of the thirty-nine schools on the list had not been in compliance with the standards when they had been adopted only two years before.

We suspect that law school pliability has increased in recent years as the governance of law schools has increasingly shifted from decanal authority to faculty meetings. Whereas deans once served in office under governance conditions and for a long enough period of time to build up expertise in relating to outside forces, today they typically serve for less than six years. Functionally, today's deans closely resemble chairpersons of a faculty committee of the whole. Coming from the faculty and planning to return to careers in teaching and research, they will likely mirror whatever is the common denominator of the faculty. A desire for innovation is not likely to be that common denominator, since faculty members usually accommodate their individual interests in teaching and research to whatever is necessary to maintain the school's accreditation and prestige. Because law

faculties normally lack collective expertise in dealing with outside forces, and because it is now more difficult for deans to develop such leadership expertise, most law schools hesitate to take risks with innovations that are not encouraged by or compatible with external standards.

(4) *Law schools have affected the forces impinging on them from outside organizations only when at least a substantial number of schools, including prestigious leaders, have been united behind a concept and have worked largely from inside the impinging organizations—as by having professors and current or exdeans in positions of influence in the ABA Section of Legal Education or the National Conference of Bar Examiners.*

The ABA Standards of 1921 are described by Gee and Jackson as victories for schoolmen. It is not clear what developments since 1921 should be so regarded, other than perhaps the successful implementation of the 1921 policy decisions. With reference to practice skills education, Gee and Jackson have not presented any evidence indicating that clinical teachers are yet sufficiently organized, motivated, or well-placed to exert a substantial influence on external sources. Nor are clinical teachers typically in a good position to be influential within their respective schools, since most are recent appointees to the faculty.

There is, of course, a Section of Clinical Legal Education within the AALS. It has presented programs for annual meetings and has initiated a newsletter. Its most ambitious undertaking has been a national conference of clinical law teachers held at Cleveland State University School of Law on October 20-22, 1977. Supported by a grant from CLEPR, the conference focused on the theory and practice of clinical legal education as a means for teaching professional responsibility as well as practice skills. Nevertheless, whether clinical education is defined narrowly as programs in which students work directly with actual clients, or is considered more broadly to include problem and simulation approaches to the teaching of practice skills, it is not clear at this writing whether a foundation has been laid for bringing clinical teachers together in a coordinated program designed to work out a comprehensive theory for clinical legal education.

II. PROJECTIONS OF ALTERNATIVE FUTURES

When the above four hypotheses on trends and causal factors are added to those articulated by Gee and Jackson, what projections can be made for practice skills education? It seems clear that the causal factor which today has the most potential for

insuring the future of practice skills education in the United States is the Joint ABA-AALS Committee for the Project on Guidelines for Clinical Programs in Law Schools. Chaired by Dean Robert B. McKay and supported by a grant from CLEPR, the committee is undertaking, under the direction of Professor Steven H. Leleiko, a two-year study of clinical legal education. Its charge includes the responsibility to develop guidelines for assessing the quality of clinical legal education programs. Such guidelines, particularly if found useful and workable by the ABA's Accreditation Committee in the context of actual accreditation visits, might well become part of the ABA standards for the Approval of Law Schools either through interpretation or amendment. Indeed, as a result of its study and/or subsequent experience with guidelines, the Council might well recommend to the ABA House of Delegates that the ABA Standards be amended to require at least some practice skills education for every law student. If this were to happen, there can be little doubt that the clinical field would be invigorated by a spate of scholarship similar to that which followed the ABA Amendment of Standard 402(a) mandating that some instruction in professional responsibility be required of every law student. At or about the time of that decision, and continuing today, scholarship has proliferated (as evidenced by the number of new coursebooks in the area), problem-method innovations have begun to appear, and a fine set of television tapes on ethical dilemmas has been made available by the ABA Consortium on Professional Education.

Practice skills education could be locked into place—just as torts, contracts, and professional responsibility have been locked in—by a few words of text calling for law schools to require training in such skills of all student candidates for a professional degree. A wide variety of educational experiences could provide this training, including, but not limited to, supervised work with actual clients.

We predict that such a requirement is not likely to be imposed unless a coordinating arrangement is made with bar examining authorities. The data Gee and Jackson collected in their earlier studies show that about 85% of all course registrations (required and elective) may be affected by impending bar examinations.⁶ Adding a practice skills requirement would further limit

6. See Kelso & Kelso, *Must Bar Exams Distort Legal Education?*, THE JUDGES' JOURNAL, Spring 1977, at 17; see also Kelso, *supra* note 1; Kelso, *In the Shadow of the Bar Examiner, Can True Lawyering Be Taught?*, LEARNING AND THE LAW, Winter 1976, at 38.

student electives and discourage curriculum diversity. However, if the bar examination authorities permitted candidates to take the bar exam sometime after the first year in law school, the situation would be different. The third year of law school, freed from the shadow of the bar examination, could sensibly include a practice skills requirement, and the ABA Committee might so recommend. We understand that the ABA, AALS, National Conference of Bar Examiners, Law School Admissions Council, and other organizations whose functions relate to legal education are planning a series of coordinating conferences. An action plan designed to coordinate practice skills education and the bar exam could well work its way onto the agenda.

A coordinated move might bring into legal education new resources not otherwise available. For example, it might help induce the Ford Foundation to make an additional grant to CLEPR, justify additional appropriations by Congress to the National Legal Services Corporation, and persuade the ABA to strengthen its Consortium for Professional Education so that its efforts focused on pre-admission-to-practice as well as on post-admission education. It would also give the law schools an additional reason to call upon local practitioners and judges to contribute their services (or to work for a small honorarium) in the pursuit of clinical education, thus reestablishing the best part of the apprenticeship system. Further, it would give the law schools an additional budget justification in their dealings with parent universities. Finally, it might make the schools more responsive to opportunities for undertaking programs of education and service to state agencies willing to enter into contracts with law schools for such services.

Another external development that could impact favorably on clinical and other forms of practice skills education would be the successful development and implementation of a national boards examination on practice skills. Dean Fred Hart of New Mexico, working within the framework of a law school consortium, is directing a project designed to create such tests. More than 100 law schools have given preliminary indications of interest in cooperating. The enterprise has been funded by a grant to CLEPR from the Fund for the Improvement of Post-secondary Education. Taking such a test (or test battery) may ultimately

It is true, of course, that ABA Standard 306 permits 300 of the required 1200 residence and class hours to be satisfied by substituting something other than regularly scheduled class sections. However, law school decisionmaking is in the hands of classroom teachers rather than clinical teachers.

lead to a prestigious certificate or somehow become linked to the bar admission process. If so, it would have the kind of catalytic effect on practice skills education that national moot court and client counseling competitions have on the courses that develop those skills.

Predicting the future is more complex with respect to an innovation from within the law schools that would do for clinical teachers what the casebook did for classroom teachers. Gee and Jackson point out that nothing in the history of legal education has had the impact of the casebook method. It was inexpensive to create and use; it combined theoretical and practical education (at least for roles involved in appeals); and, perhaps most importantly, it involved teachers and students in an educationally rewarding interactive dialogue that could proceed either deductively or inductively. It is not easy, however, to see how a closely comparable result can be achieved in teaching students how to deal with clients and function in nonadjudicative lawyer roles in office practice.

Nevertheless, the future in this regard is less opaque if we make a sincere effort to free our imagination from the casebook analogy. First, let us not assume that all innovation must be the product of a lone scholar (or even coauthors working at several schools). In recent times, great innovations in technology have resulted from team efforts. If teams at or from several law schools tackled various jobs and competencies, as identified by a functional analysis, the necessary critical mass of energy and ideas might be developed to give birth to a powerful innovation. At the very least, the task of developing workable clinical education innovations might be divided into an agreed set of fields or areas for individual work.

In looking ahead to the possible parameters of practice skills innovation, we should not allow ourselves to think only in terms of printed material put between hard covers. Instead, we should think in terms of a total teaching environment and associated programs. Optimum development of practice skills may require an environment even more complex and interactive than a classroom, a teacher, and students who have read cases assembled in a coursebook. The teaching environment may have to resemble the real world of practice in many important respects.⁷

7. Thus, there may be a need for one or more schools to maintain a television staff and, perhaps, a staff associated with a national or regional network of computer-based instruction. Perhaps there will be an interface between this technology and others, such

Ideally, a facility specially designed for practice skills education should serve as the laboratory for clinical learning and experimentation, the library of current events, and the nerve center of teacher-student-client interaction. Separate housing, specialized equipment, and a trained staff would greatly facilitate the precise observing and recording of lawyering activity in all of its manifestations, as well as provide effective and efficient educational feedback to students from such observations. The building should also have the facilities and staff for obtaining up-to-date information on the developing factual context in which cases arise and are handled in the courts or otherwise. There should be systematic followup on cases to evaluate the lawyering, the legal processes, and the development of the law. Further, the staff should be collecting and processing political and socioeconomic information about the larger context of local, state, national, and international communities in which law is but one of many forces. Most importantly, the building should house personnel who would subject that information to the full range of "policy science" processes explicated by Harold Lasswell and Myres McDougal. This policy science is a professional decisionmaking process characterized by clarifying goals, discovering trends and causal conditions, making projections, and choosing and pursuing alternatives in light of what is most likely to produce preferred outcomes with an optimum expenditure of time and other resources.⁸

Cooperative innovation of this magnitude will more likely come into being if the accrediting authorities reconsider certain standards or criteria for membership. If innovation in clinical education requires teamwork by different kinds of specialists, working perhaps at different schools, or calls for a substantial amount of instrumentation or facility redesign, resources will have to be withheld or shifted away from conventional areas such as enlarging the library and increasing the number of full-time

as LEXIS, WESTLAW, and automatic typing machines, so that up-to-date teaching materials could be distributed instantly and duplicated at each law school (rather than printed at a central location and mailed to bookstores).

8. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

If the facility's programs encompassed a constituency more inclusive than the school's students, new resources might be brought into the school. For example, the school might educate the public on how law helps preserve individual liberty and increase the civil domain in which people reasonably are free from all forms of coercion. The public may learn that the law also seeks to ensure equality of opportunity, encourage the maximum production and sharing of all values, and preserve at least a minimal level of subsistence for all persons.

faculty. Given the limitations on current budgets and the trend of faculty input on law school decisions, present accrediting standards exert a powerful restraining influence on any such reallocation of resources. Thus, the following amendments to ABA Standards might improve the climate for innovation in the law schools.

First, under the heading "Faculty" the ABA might consider creating a new Standard 402(c) which would provide:

Law schools may substitute in place of a reasonable number of additional full-time faculty members specialists in educational technology, clinicians, staff members, or technology where the effect of such substitution on the school's educational program is the equivalent of adding an additional faculty member.

Again, ABA Standards with respect to the law library are, quite arguably, forcing each law school to collect a great deal of material that is or could be readily available through other means and to develop a staff of professionals whose expertise is solely in the handling of a conventional library. LEXIS, WESTLAW, and other systems of electronic storage and retrieval of legal text will surely substitute for a great many bound volumes in years not too far ahead. To pave the way for this change, ABA Standard 603(h) might well be amended to provide:

To the extent that a law library can make the text of legal material readily available by computerized research or otherwise, such technology may be used in substitution for publications in conventional bound form.

III. CLARIFYING, CHOOSING, AND PURSUING AN ALTERNATIVE FOR THE FUTURE

The development of innovations in clinical legal education necessarily involves an evaluation of the competing values that form the underpinnings of the debate between theoretical and practical orientations toward learning. For guidance on values to use in assessing legal education and charting its future, we should heed some wise people. We turn first to Dean Robert B. McKay, who recently wrote:

Without question legal education in the United States has met the test of technical proficiency. The law faculties are superb; the law students are at least as good; the libraries are generally excellent and the structures that house the law schools are often magnificent. In all these respects the law schools are stronger

than ever before and better than their counterparts in any other part of the world.⁹

Despite this favorable overall judgment on technical proficiency, Dean McKay also expressed disappointment that certain opportunities have been missed. He said that the law schools have remained almost exclusively professional in tone, rejecting repeated attempts for infusion of other social sciences and the humanities (even as background for understanding the context of legal issues). He admitted that almost all law schools now offer clinical courses in which law students represent actual clients under faculty supervision. However, he also said:

The proud claim to professionalism has been more facade than solid structure. If the interest in professional training had been the sole motivating force, we should long ago have required clinical training of all law students or at least have continued the apprentice programs that were long ago abandoned in nearly all jurisdictions.¹⁰

In this and other ways, according to Dean McKay, the law schools have not done as much as they should have done in leading the profession toward higher levels of professional ethics and responsibility. In his opinion

[l]aw schools should be justice schools in which law students are taught not only the need for faithful advocacy of their clients' causes, but also their professional obligation to improve the system for the delivery of justice; where law students are taught the obligation (and the excitement) of representing the poor and middle-income groups as well as the rich; and where professional responsibility is the most, not the least important matter to be taught.¹¹

Assuming Dean McKay's goals are generally accepted, how can they best be accomplished? A classic debate on the subject by two law school greats occurred in 1949. Professor Lon Fuller argued that law school education should immerse students in the processes of adjudication and legislation.¹² These processes should include what Professor Louis M. Brown would call

9. McKay, *Legal Education*, in *AMERICAN LAW: THE THIRD CENTURY* 261-62 (1976) (a collection of lectures delivered at the Bicentennial celebration of the New York University School of Law).

10. *Id.* at 263-64.

11. McKay, *A Plague of Simplistic Assumptions*, *LEARNING AND THE LAW*, Summer 1977, at 11, 15.

12. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 *J. LEGAL EDUC.* 189 (1948).

"preventive law" for clients, and focus particular attention on issues of professional responsibility as they arise.¹³ Necessary lawyer skills would emerge as a welcome byproduct of this concentration of attention. Professor Karl Llewellyn, disagreeing, urged instead that law schools focus on training students for "the law jobs" by emphasizing instruction in the various functional tasks of lawyers, particularly spokesmanship.¹⁴ This exchange of views mirrors the tension between practical and theoretical emphasis that Gee and Jackson found pervasive in the history and current debate of American legal education. If the decline or persistence of innovation is fully and accurately described by Gee and Jackson's hypotheses and the four hypotheses we have drawn from their data, then Fuller seems destined to win. His view is more compatible with the casebook method, while some, but not all, of Llewellyn's goals can be accomplished with cases and problems.

It seems that the best way to pursue the McKay goals and to escape from the horns of the Fuller-Llewellyn dilemma is to view desired consequences in terms of a sufficiently high level of process and values. This will lead to concentration on developing sufficiently comprehensive models of processes for the making, implementing, and reviewing of decisions. Therefore, our preceding four hypotheses, when combined with the Gee and Jackson principles on the decline and persistence of innovation, suggest a fifth factual hypothesis that might resolve the apparently hopeless dilemma posed for practice skills education, particularly clinical education:

When able people in legal education visualize a desirable goal with sufficient clarity, they find the way to combine and focus their energies to bring about innovation and to effect the institutional changes, internal and external, necessary to insure its survival.

According to the above hypothesis, the major prerequisite to innovation is visualizing with sufficient clarity a desirable goal, such as providing the optimum education for future lawyers. Writing in 1943, Professor McDougal identified one area of training indispensable to the optimum legal education when he as-

13. See L. BROWN & E. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (1978); *New Ways to Teach Lawyering: A Symposium*, LEARNING AND THE LAW, Summer 1974, at 8, 69-71; Brown & Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventative Law Analysis*, 10 VAL. L. REV. 453 (1976).

14. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948).

serted that “[n]one who deal with the law, however defined, can escape policy when policy is defined as the making of important decisions which affect the distribution of values.”¹⁵ In a recent address to the Law School Admission Council, he further explained why policymaking is the fundamental role of attorneys in today’s society and invited legal educators to identify the more specific lawyering roles and skills required for their performance:

The position that Professor Lasswell and I took many years ago was that while all law is policy, not all policy is law. All law, in the sense that it affects a distribution of values among people in a community, is policy; some policy is, however, naked power. Whether we like it or not, law schools, lawyers, government officials, all of us, are working with values all the time. The only question is how consciously, how deliberately, and how systematically we formulate and clarify these values.

President Levi [later Attorney General Levi] indicated very aptly when he remarked that the legal profession has always had a high concern for our great inheritance of the Western European values of human dignity. . . .

In your more detailed clarification of the basic community policies you serve, you need to become more precise about the goals for which you choose and train lawyers. One common conception of a profession is that it is a group that has not only a special skill but also a responsible concern for the goals and aggregate consequences of the exercise of this skill.

From this perspective, the social role of the lawyer is that of the specialist on authority and control who has a responsible concern for the common interests of all the communities of which he is a member. The function of the lawyer is to assist in the establishment and maintenance of the totality of a community’s public order—to reduce the number of decisions taken by mere naked power, to manage authority and control in a way that will maximize the production and sharing of all values, and to increase the civic domain in which people are free from all forms of coercion.

In the performance of this general role, the lawyer must obviously engage in many more specific roles or tasks. Your first task is to identify these more specific roles and tasks and the capabilities and skills required for their performance. It should scarcely require saying that your every effort should be to encourage pluralism and experimentation.¹⁶

15. Lasswell & McDougal, *supra* note 8, at 207 (emphasis in original).

16. McDougal, *Beware the Squid Function*, *LEARNING AND THE LAW*, Spring 1974, at 16, 17-18.

It seems to us that the faculty members in the best position to observe lawyers' roles and tasks, and the capabilities and skills required for their performance, are those associated with clinical programs or with other programs or courses in which practical skills are directly taught. The challenge for developing the future of legal education has clearly been cast by Professor McDougal in a way that puts it squarely into the "ball park" of practical skills teachers. Having been trained by the case method, and usually having further developed their skills through actual practice experience, practice skills teachers are cast in the role of professional observers and teachers in situations calling for practical wisdom. These faculty members should therefore be the front line of research on what constitutes a legal professional, how well the profession is fulfilling its responsibilities, and what kind of future professionals can help the profession as a whole competently provide a broad range of lawyering services.

We cannot suppose that the necessary concepts of effective clinical training will emerge if lawyering or social processes are viewed from a low level of abstraction. Little is likely to develop if practical skills education is viewed solely as the processing of cases, *e.g.*, interviewing poverty clients and serving their needs through the use of law students and law school resources. Nor is it useful to think only in terms of combining specific skills such as direct and cross-examination. Rather, the faculty and students must view the process as a unique window on the world that allows them to observe, record, process, critique, reassemble, and present back to students, the profession, and the world an accurate picture of what goes on when lawyers effectively reach decisions in support of responsible value choices. The goal is to build ever better models of the processes involved in making, implementing, and reviewing responsible policy, strategy, and tactical choices on behalf of clients or broader constituencies.

A review of the clinical decisionmaking process utilized by doctors provides some useful clues as to how one might start at a sufficiently general level. When effective medical clinicians are faced with a case, they generate alternative hypotheses in light of the facts initially presented and, using their knowledge of basic science, gather additional facts to subject those hypotheses to confirming and disconfirming tests. The most effective clinicians structure their diagnostic problems and their search for facts so that proof of one hypothesis tends to disprove another.¹⁷ We law-

17. Kelso, *In Quest of a Theory for Lawyering: Some Hypotheses and a Tribute to Dean Soia Mentschikoff*, 29 U. MIAMI L. REV. 159, 168-76 (1975).

yers also do that at each stage of our decisionmaking cycles. With respect to arriving at a basic choice of alternatives to implement a policy, strategy, or tactical decision, our decisionmaking cycles in each of our roles seem to involve the following tasks that have been isolated by McDougal and Lasswell:¹⁸

(1) Clarify goals: What is it that we (and/or our clients or other constituencies or communities) seek to accomplish?

(2) Determine trends: What is the degree to which these preferred events have been realized to date?

(3) Determine causal conditions: What factors account for the direction and intensity of change; does the explanation consist of a single factor or of multiple or (typically) interacting factors?

(4) Make projections: What is likely to happen regardless of my preferences?

(5) Consider alternatives: What alternatives will increase the probability that preferred events will most economically occur?

To classify problem types and goal implementation in light of these decisionmaking tasks, we would suggest a slightly more elaborate scheme than did Professor Fuller. One can begin, as he did, with adjudication, defining the task more broadly than litigation to include any processes in which decisions are based upon proof of facts and upon arguments as to the interpretation and application of rules. We can then add legislation, as he did, again defining it very broadly to include the creation of rules to express an accommodation of interests for governing situations or situation types (whether the creation be done by a legislature or by a client via a will or some collective manifestation of intention such as a contract). We would elaborate on this analysis by breaking negotiation out of legislation. Negotiation may lead to the creation of rules, as in a settlement agreement or a forward-looking contract; it may, however, also lead to agreements that merely set up processes.¹⁹ The focus of attention in negotiating is on creating a shared reality, *i.e.*, future behavior. Developing rules to govern

18. See Laswell & McDougal, *supra* note 8.

19. Professor Fuller asks:

What is a contract? For the lawyer concerned with the adjudicative process a contract is a legally enforceable agreement, and its meaning is that which a court will give to it in the event of litigation. For the lawyer bringing a contract into existence it may be primarily a framework for cooperative effort, which performs its function without regard to its enforceability or the interpretations a judge would give to it.

Fuller, *supra* note 12, at 195.

future behavior is merely one means for creating contingencies that help increase the probability of certain future behavior.

We would double back to argue that clarifying goals and evaluating alternatives as part of advising or counseling persons is as much a lawyer task as are litigation, legislation, and negotiation. It may also be useful to isolate and focus upon two other areas: spokespersonship other than advocacy, and the recruitment, selection, and training of personnel. Gathering facts, including information on what a client or a constituency really wants or needs, and predicting or evaluating the decisions of others are probably competencies involved in tasks rather than tasks which themselves directly serve to implement goals.²⁰

In traditional law classes, and even in practice skills courses, law teachers tend to concentrate so much on the making and the implementing of decisions that we usually do not consider the evaluation or assessment of our own decisions as one of our basic professional tasks. We evaluate judicial decisions, to be sure, but typically as a means to better understand how or why the court reached its decision or to argue that the court should have reached a different decision or relied on different reasons. It is not yet a standard part of our self-image as professionals to conduct our practice in a relatively self-conscious way, subjecting our own work and that of fellow lawyers to evaluative scrutiny in order to improve its quality. In fact, when we are dealing with people we typically begin to implement decisions in a tentative way, observing the reaction of persons we are seeking to persuade or from whom we are seeking to learn. If our first tactic doesn't appear to be working, we alter our initial approach. If that doesn't work, or the results appear entirely discouraging, we may review our entire strategy. We may even cycle back to review our basic goal preferences (our policy decisions) and talk them over with ourselves, our colleagues, or our clients. It is to be expected that practice skills teachers will perfect ways for giving feedback to students from their clinical performances that will enhance sensitivity to the evaluative aspect of professional problem solving. Hopefully, positive reverberations will appear at some future time in the way law is practiced and the way the profession is organized to sustain the quality of that practice.

The list of lawyer tasks might be elaborated further, though we have no concrete proposals. Enough has been said to indicate

20. One useful analysis of lawyer competencies has been prepared by the Competency-Based Task Force of Antioch School of Law.

the kind of framework we would suggest to clinical and other practice skills teachers around which they might usefully organize cooperative work to bring a sense of order to a field of instruction whose future is primarily their responsibility.

In sum, the means we recommend to achieve the goals expressed generally by Dean McKay and more specifically by Professor McDougal is to devise an approach to legal education that more accurately reflects the realities of today's law practice and society than does a system which includes only the casebook method (or that method as supplemented by some problems and materials). Of course, the knowledge and skills acquired in case or problem method courses form an important part of the foundation for a professional education. It is for the clinician, however, to integrate this kind of knowledge and skill into a fully contextual approach to professional problem solving.

To educate for this contextual approach to problem solving, we should clearly reject Dean Langdell's concept that three years of law study is best approached as a science leading to theoretical knowledge, a science whose materials are appellate cases and whose method is inducing principles from those cases. Instead, we should assert that three years of education for a professional career in law is best approached as an attempt to develop professional skill in making, implementing, and evaluating decisions in light of their full context. If this calls for science, it is "policy science."

In summary, the basic problem is to discover how values and other kinds of reality intertwine in wise decisions made by lawyers in the various contexts that make up the set of roles and tasks comprising their professional lives. The problem is not easy. However, with the path blessed by Dean McKay, the trail marked by Fuller and Llewellyn, the nature of the walk spelled out by McDougal and Lasswell, and strikingly good innovations appearing here and there, surely our clinical and practical skills teachers can do a better job of getting together in this generation of enhanced communication and travel than did the realists of a generation ago. The only troubling uncertainty in this part of legal education's future is the subjective-objective question of whether today's practice skill teachers think well enough of themselves and their goals and tasks to make the necessary investment of time and to take the risks inherent in any innovation.