justice a luxury the poor cannot afford, happen and subsist largely because we dare not whimper if our individual safety and integrity are neither threatened nor violated. We must begin imbibing the irrevocable truth that we belong to one nation; that we are one people sharing a common will, a common spirit and a common destiny -- and that any misfortune or suffering descending upon each diminishes us all.

With that consciousness, we can work together to make justice an abiding sustenance of our democratic society and a refuge of our claims to equality, freedom and human dignity.

A statesman[33] once said, "If the record of man's progress is the chronicle of everlasting struggle between right and wrong, it follows that the solutions of our problems lie largely within ourselves, for only with self-mastery can we hope to master history."

I urge you, therefore, to bring the powers of self-mastery into the task of helping us put our judicial house and the whole democratic social landscape in order -- a self-mastery that is emboldened by the will to see right, justice and human dignity prevail in our troubled land.

33 Adlai Stevenson.

IMPROVING LEGAL EDUCATION: THE APPLICATION OF MODELS OF LAWYERING AND TEACHING TO LAW SCHOOL PEDAGOGY

PETER L. DELACY*

Professor Karl Llewellyn explained the primary job of legal education to new students at Columbia Law School in these terms: "[the job is] to discover what you need in order to practice your profession, to pick out such parts of that equipment as are either most fundamental or best teachable in school, and to devise means of getting these things across to you."[1] This article addresses Llewellyn's first and third directives. In the language of this article they become a "model of lawyering" and a "model of teaching." The challenge of legal education is to assimilate the attributes of these models.

Almost six decades after Llewllyn's remarks, doubt continues whether legal education does its job most effectively. Reform in law school programs is debated at the behest of student and faculty striving to create better education. The organized bar calls on law schools to improve the quality of bar candidates. The public, perennial critics of the legal *profession*, are now turning their attention to the "source" of the "plague of lawyers" -- law schools.

The current dialogue regarding legal education is carved out of the tension between the academic education of lawyers and their practical training. It has been characterized as "[s]chool v. reality"[2] or Langdell's "science of law" v. Jerome Frank's "lawyer school."[3] The debate is not new. Summarizing the historical trend, Gordon Gee and Donald Jackson conclude,, "[a]s we considered the experience of English legal education, the educational programs of other professions, and the history of and recent

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1 K. Llewellyn, **Bramble Bush** 19 (1930).

2 Turrow, *School v. Reality*, New York Times, Sunday Magazine; November 8, 1988.

3 Frank, *A Plea for Lawyer-Schools*, 56 Yale L.J. 1303 (1949).

trends in American legal education, we were struck by the repeated emergence of one issue: the tension between 'practical' and 'theoretical' orientations in professional training."[4]

The practical/theoretical tension is manifested in two problem areas in legal education: *What to teach and how to teach it*. The first area "what to teach" or curriculum reform is not the concern here.[5] Decisions on curriculum are difficult to discuss in a generic sense; such decisions are often defined by the setting of a specific law school. Instead, this article examines the more universal and often overlooked subject of teaching methodology.

One objective of this work, is to summarize and update recent discourse regarding law school pedagogy. The source material for this discourse is primarily articles published in the *Journal of Legal Education*. That Journal remains the most prominent and readily available academic publication on legal education. Whenever possible, reference to this source material directly (or closely) related to text is provided for the reader. In that way, hopefully this article can serve as a guide to others who wish to pursue their own inquiry.

This article is written from the perspective of an American lawyer and educator. Examples involving substantive legal content are, naturally, taken from the American legal system. However, the message of the article

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[4] Gee and Jackson, *Current Studies of Legal Education: Findings Recommendations*, 32 J. Legal Educ. 471, 504 (1982).

[5] Madeline Hunter, a renowned educator, offers the following distinction between teaching and curriculum:

> Teaching... is defined as the constant stream of professional decisions that affects the probability of learning: decisions that are made and implemented before, during, and after interaction with the student. While highly related, teaching is distinct from determining curriculum. Curriculum building involves factor-analyzing the goals that are based on beliefs and values. Teaching involves factor-analyzing the goals into dependent and independent sequences of learning, diagnosing students to determine what each has achieved in that sequence, and employing psychological principles that contribute to the speed and effectiveness with which each student acquires new learnings in those sequences.

Hunter, *Knowing, Teaching and Supervising*, in Using What We Know About Teaching 1169-70 (P. Hosford ed., Association for Supervision and Curriculum Development, 1984).

is germane to Philippine legal education. In many ways, this article is an elaboration and defense of the section on New Teaching Methods contained in Atty. Ricardo J. Romulo's "The Lawyer and Legal Education: Nemo Dare Potest Quod Non Habet."[6] The development of excellence in law school teaching should not be the exclusive domain of any one legal system.

A central theme of this article is that the Socratic method has an important role to play in the education of future lawyers. Over-reliance on the method however, is inconsistent with current models of lawyering and learning. Recent empirical studies of the practice of law and research by cognitive psychologists into the way people learn, suggest that the tension between the practical and theoretical approaches should form a creative and effective pedagogy in teaching law students. The models indicate that the traditional method -- Socratic dialogue -- be neither replaced nor blindly relied upon. Rather, students should be consciously resources to fully develop their lawyering competencies.

THE SOCRATIC METHOD

An appropriate beginning to a discussion of law school teaching is the Socratic method. Alternatively termed "a talismanic statement"[7] or "the best known system for teaching doctrinal law,"[8] the Socratic method is certainly the most striking element of legal education. Christopher Columbus Langdell, Dean of Harvard Law School, introduced his case method of legal education and its accompanying Socratic dialogue in 1877.[9] Its reception

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[6] Romulo, *The Lawyer and Legal Education: Nemo Dare Potest Quod Non Habet*, Vol. I, No. 3, Journal of the Integrated Bar of the Philippines (1973) in **Reading Material in Introduction to Law.** *See also*, **Principles and Methods of Law Teaching** (Philippine association of Law Professors, Philippine Association of Law Schools, 1988) and *The Philippine Yearbook on Legal Education 1978.*

[7] Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. Legal Educ. 189, 194 (1986).

[8] Teich, *Research On American Law Teaching: Is There A Case Against System?* 35 J. Legal Educ. 167, 170 (1986).

[9] Langdell has become known as the "father" of the case method. A more accurate characterization is "midwife" for the case method was used prior to Langdell. See Robert Stevens, Law School: Legal Education in America from the 1850s To The 1980s (Chapel Hill, 1983).

Allan Stone describes the motivation and the method as follows:

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was less than enthusiastic; "[t]o most of the students, as well as to Langdell's colleagues, it was an abomination."[10] In spite of its early critics, the Langdell case study (implemented through the Socratic method) has become the hallmark of legal education. The Socratic method is embodied in Philippine legal education in the form of "recitation." Designed to improve students' analytical abilities the Socratic method in various forms remains today the primary teaching style of virtually all first year courses and most upper level courses in law school.

The Socratic method of teaching is aptly described as teaching through questions and answers.[11] It is more than this because it involves the artful development of questions designed to direct and instruct -- something quite different than asking questions for the sake of asking questions.[12] When done correctly, the Socratic method teaches analysis; "the

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[9](...continued)

For Langdell, the Socratic dialogue was a necessary adjunct to the case method of study. Believing that the law was a "science" consisting of a cohesive body of clearly discernable "principles or doctrines, "he felt that the dialogue was the best way to help the student elicit these principles. But Langdell refused to have these principles laid out before the student: rather, it was necessary that "the student judge all material for himself, scrutinize instances closely, accept no other man's judgment until he had judged its logic for himself.

Stone, *Legal Education on the Couch*, 85 Harvard L. Rev. 392, 406 (1971).

[10] Centennial History of the Harvard Law School, at 35 quoted in L. Freedman, **A History of American Law** 615 (1985).

[11] L. Freedman, **A History of American Law** 243 (1985).

[12] It is difficult to define the Socratic Method as one technique; in practice it appears as several "variations on a theme." The following summary highlights the major "variations" including some suggestions as to their respective utility and difficulty:

> 1. Doctor [teacher] may simply ask leading questions and receive the indicated answers, proceeding smoothly and orderly through the material along a predetermined set course. This differs from lecture only in that it takes longer, and offers the listener the variety of two voices for the monotony of monologue; but it must be a poor lecturer who cannot devise at least equivalent leaven, and all in all, this procedure does not have much to recommend

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it as a substitute for lecture.

2. Doctor may ask elucidative questions until student takes an erroneous or indefensible position, and then attack that position with argumentative questions, or, with the student's position as a starting point, ask questions leading from it to a point where the error becomes palpable. This *reductio ad absurdum* process is useful in inducing caution in expressing opinions; but when that elementary thought training has been accomplished, this procedure may prove oppressive rather than catalytic, as students may become wary of approaching the open areas of the law, or undocumented policy questions, through reluctance to advance their own ideas without authority, or even to think for themselves.

3. In variation of the second process, doctor induces student to state, or agree with, different rules or judicial statements of wide acceptance, and then leads him in the same fashion from that starting point until he meets himself in the road, coming in the other direction. This process is very useful in teaching the analytical and critical process,, and in demonstrating that independent though may often be better than acceptance of prior dictum, as well as in restoring mortality to some of youth's false legal hierarchy; but is seldom adequate to cover all points which must be treated in a course and is most effective when loose ends are tied up in a summary lecture at the end of each chapter or topic covered.

4. A fourth method - let Socrates' shade not be too distressed at its inclusion - I shall call the pure case method, in which doctor (a) calls for statement of assigned case - of course, pinning down analysis of facts, issue reasoning, and dictum by cross-questioning as usual; (b) puts hypothetical cases; and (c) asks for opinions, criticisms, and disagreements, without leading at all as to the answers expected, but only as to the areas and aspects for the problem to be considered. Here the teacher approaches most closely the function of the medium and lecture is, so to speak, in aphelion. The difficulties in this method are: first, in resisting the temptation to lead by putting obvious cases in juncture with the tough ones, and mixing deceptive leading toward wrong positions with a sequence of cases which approach the obvious, to baffle attempts to determine the doctor's own opinion by analysis of his method; and second, in resisting student attempts to break the

(continued...)

point is not to instill in the student a new bit of substantive memory but rather to force the student.... to learn how to arrive at a better solution....[it] actually leads to mental growth."[13]

The Socratic method also has come to embody the persona of the law school professor. The "Socratic Trainer" typified in the character of Professor Kingsfield in *The Paper Chase* is brought to life in the memory of every law graduate. Who can forget Professor X, the dispassionate, intimidating and unending questioner? The persona is part of the process because, "[a]n intense and sustained dialogue is essential to home thinking skills. The students must learn to stand up to this sort of combat, and must come to realize that slovenly efforts at analysis are simply not acceptable from lawyers."[14] The aggressive use of the Socratic method provides the battleground for students to test their development of legal analysis.

The method is inexorably linked to developing in law students an ability to think in a new way - "like a lawyer." In attempting to define pornography, U.S. Supreme Court Justice Potter Stewart wrote, "I shall not today attempt further to define [it]... [b]ut I know it when I see it."[15] The same principle often seems to control an elusive concept. The result is often fuzzy generalizations about "analytical thinking" or "critical thinking." These approaches are problematic because it is difficult to evaluate such a broad skill. A definition such as "knowledge of and ability to use the law" is more useful educationally because it attempts at identifying specific "learner outcomes" - observable and measurable student cognitive development.[16] Better yet, is a definition of "thinking like a lawyer" that includes the following "learner outcomes": (1) acquisition of a legal vocabulary - the "tools" of the trade, (2) an ability to identify legal issues and apply "rules" to

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[12](...continued)
process by direct classroom-question or by desperate corridor campaigns to obtain under-the-classroom trots and hints, as the refuge from the library itself.

C. A. Peairs, Jr., *Essays on the Teaching of Law*, 12 J. Leg. Ed. 323, 337 (1960) quoted in Looking at Law School (Taplinger Pub. Co., N.Y., 1977).

[13] D'Amato, *The Decline and Fall of Law Teaching in an Age of Student Consumerism*, J. Legal Educ., 466.

[14] MacFarland, *The Ideal Law Professor*; 35 J. Legal Educ. 93,97 (1986).

[15] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

[16] See infra note 35 and accompanying text (discussing instructional objectives).

"facts", (3) an ability to read, analyze and utilize judicial opinions - separating reasoning from dictum, distinguishing similar cases and synthesizing precedents into a coherent doctrine; and (4) understanding the nature of legal argumentation -- both procedural and substantive.[17]

With this definition, the Socratic method can more accurately be said to develop specific and identifiable cognitive (thinking) skills. When done correctly, the Socratic method effectively develops these skills.[18] The overwhelming reliance of law schools (producing competent lawyers) on the method, is indicative of this success. The American Bar Association's Legal Education and Admissions to the Bar Section in examining the Socratic method concluded, "[t]he traditional 'Socratic method' of legal instruction continues to be used in first year law classes as an extremely effective technique for developing analytical skills."[19] Students learn to discern and to apply the law, to view the law as a growing doctrinal body, and to be stimulated [20]in the process - "that is no mean achievement".[21]

A MODEL OF LAWYERING

Having outlined what the Socratic method can accomplish it is time

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[17] Feinman & Feldman, *Pedagogy and Politics*, 73 Geo, L.J. 875, 882-4 (1985).

[18] David Bryden after comparing the similarity of first and third year law students' performance on the same exam (designed to evaluate analysis skills) expresses reservation as to whether the Socratic method demonstrably increases student's analytical abilities after first year, "[i]t would not be surprising, given the results of this study, to discover that most students have nearly as much analytical, even in construing statutes, at the end or even in the middle of the first year as they do after three years. If so, we need to reconsider the purposes of upperclass pedagogy, D. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. Legal Educ. 479, 501 (1984).

[19] ABA Legal Education and Admissions to the Bar Section Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 13 (1979) (commonly known as the "Crampton report") quoted in David P. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. Legal Educ. 479, 479 (1984).

[20] Some contend that fear is not an appropriate stimulant, "misplaced fear impedes learning and shapes attitudes in a negative way. Students become less concerned with knowledge in depth than with the answers that give them higher grades." Address by Prof. Howard Fink, Section on Teaching Methods, Association of American Law Schools, Houston, Texas (December 29, 1976).

[21] Gee and Jackson, *Supra* note 4 at 504.

to examine whether this learning outcome - thinking like a lawyer - coincides with a model of lawyering. This is nothing more than following Llewellyn's first directive that the job of a law school is to determine what is needed to practice law (i.e., model of lawyering). From this perspective, the learning outcomes of the Socratic method are limited. Asked to defend the method, a law professor might accurately (and instinctively) explain that it is designed to teach students to "think like a lawyer." That statement also reveals the method's constraint. The limitation lies in the fact that our model of legal education and the practice of law includes considerably more than "thinking like a lawyer."

There is general agreement with the proposition that the primary purpose of law school is to produce graduates who have the range of skills needed to practice law competently. Exploring the range of skills, Jay Feinman and Marc Feldman suggest:

> Every legal problem requires that the lawyer deal with three elements: The law, the facts, and the people. The lawyer must combine the three and produce the results through the forms and procedures of the legal system. In so doing, the lawyer must be capable of acquiring new knowledge and skills, must be self-consciously critical, and must exercise judgment in choosing among alternatives. Thus, our catalogue of the qualities of the capable lawyer includes knowledge of and ability to use the law, fact-consciousness, interpersonal skills,, operational skills, autonomous learning, critical self-reflectiveness, and judgment. Each of these qualities is composed of various elements and requires different abilities.[22]

Implicit in this listing is the realization that "thinking like a lawyer" - knowledge of and ability to use the law - comprises only part of our model of lawyering and, in theory, the type of graduates that legal education should produce.

This criticism relates not to what the method does, but rather to what it fails to do.[23] By far the most prevalent criticism of the Socratic

[22] Feinman & Feldman, *Supra* note 17 at 891.

[23] This is not to ignore the fact that numerous commentators criticize the Socratic method for *what it does*. They point to the inordinate level of anxiety and stress created by the method and its damaging effect on students' mental well-being. See S. Shanfield & G. Benjamin, *Psychiatric Distress in Law Students*, 35 J. Legal Educ. 65 (1985). The reaction of law students to the method is to develop a certain level (continued...)

method is in its failure to teach students important lawyering skill; "[t]o put it plainly, law school is not lawyer school. With the exception of clinical programs that teach practice skills, and which generally stand as isolated segments of law-school curriculum, there is still little effort to teach students, while they are in law school, what it means to practice law."[24] These lawyering skills can be grouped into three categories: (a) process skills

[23](...continued)
of insensitivity. Looking at this phenomena, a psychiatrist concludes:

> It is my contention that law school education explicitly shapes the character development of law students in certain ways which are detrimental to efficient professional performance. The character adaptation is necessary in order to resolve and escape the tensions of the classroom. The principle characterological developmental change is to become "unemotional" ... This ... characterological defense...enables a person to avoid the necessity of caring about people with its intrinsic capacity to stir up anxiety.

A. Watson, *On Teaching Lawyer's Professionalism: A Continuing Psychiatric Analysis,* in Clinical Education for the Law Student 131 (1973)

More recently, the Socratic method has come under attack by proponents of the Critical Legal Studies (CLS) movement. CLS criticizes the method as being educationally unsound and for perpetuating an artificial and arbitrary hierarchy in the legal system. Duncan Kennedy describes student's reaction to the method:

> In the classroom and out of it, students learn a particular style of deference. They learn to suffer with positive cheerfulness interruption in mid-sentence, mockery, *ad hominem* assault, inconsequential asides, questions that are so vague as to be unanswerable but can somehow be answered wrong all the same, abrupt dismissal, and stinginess of praise. They learn, if they have talent, that submission is most effective, flavored with a pinch of rebellion, to bridle a little before they bend. They learn to savor crumbs, while picking from the air the indications of the master's mood that can mean the difference between a good day and misery. They learn to take it all in good sort, that there is often shyness, good intentions, some real commitment to your learning something behind the authoritarian facade. So it will be with many a something behind the authoritarian facade. So it will be with many a robed curmudgeon in years to come.

Kennedy, *Legal Education as Training for Hierarchy*, in The Politics of Law 55 (1982).

[24] Turrow, *Supra* note 2 at 53.

- fact investigation, planning, drafting, trial strategy and tactics, oral advocacy; (b) human relation skills - interviewing, counseling, negotiating, communication and emotional understanding in general; and (c) skills related to the ethical and social responsibilities of the profession. They are skills which rarely enter the domain of the Socratic dialogue.[25]

The dissonance between the learner outcomes of the Socratic method and our model of lawyering is reinforced by empirical studies of the practice of law. The most recent study, conducted by the American Bar Foundation[26] echo previous surveys in recommending that law schools need to do a better job in providing a wider variety of training in lawyering skills. When asked what skills and areas of knowledge they considered important (ranked from most important): 1. fact gathering 2. capacity to marshall facts and order them so that concepts can be applied 3. instilling others' confidence in you 4. effective oral expression 5. ability to understand and interpret opinions, regulations and statutes 6. knowledge of the substantive law 7. legal research 8. negotiating 9. drafting legal documents 10. understanding the viewpoints of others. These skills can be grouped into two broad categories: interpersonal skills and analytical skills. Again there is a divergence between the learner outcomes of the Socratic method - analytical skills - and the practice of law.

This divergence is further reinforced by lawyers' view of where they learned these skills. The respondents in the above study were asked the extent to which they learned each skill or knowledge in law school. Not surprisingly, law schools scored highly in teaching analytical skills. On the other hand, "the skills rated as the most important to the practice of law were apparently learned outside law school."[27] In reviewing this study Gee and Thompson concluded:

> We are persuaded that students and practitioners are right in insisting that legal education do a more effective job of preparing students for the practical tasks entailed in the practice of law. These include, for example, legal writing, effective oral expression, interviewing, counselling, negotiating, and trial practice. Law schools apparently do their best work in developing the analytical abilities of their students. While that is no mean achievement, their present and former students expect more of legal education. This has been a consistent finding in the empirical research that has been undertaken over the years, and it is now a commonplace recommendation of the various committees that have been charged with studying and making recommendations about legal education.[28]

[25] In addition, critics point to the method's exclusive preoccupation (when using cases) with appellate decisions. This preoccupation results in a skewed, narrow view of what the law and the practice of law entails. Moreover, the Socratic methods is criticized for generally not allowing students to consider other factors which make up or influence the law; including trial level proceedings, social, political and economic forces.

[26] F. Zemans & V. Rosenblum, **The Making of a Public Profession** (1981)

[27] *Id.* at 137.

These finding are not unexpected. The Socratic method attempts to develop analytical skills. It is the predominant method of law school teaching. It does not attempt to develop these other skills and not surprisingly, these other skills are generally not developed in law school.

This general criticism of the Socratic method indicates not an inherent deficiency in the method, but rather that our model of lawyering includes additional learner outcomes. The Socratic method remains a viable method, in this context, provided additional opportunities are available for students to develop the other skills contained in our model of lawyering. [29]

A MODEL OF TEACHING

The idea that the Socratic method be supplemented with additional educational opportunities is supported by current educational theories. Llewellyn's third charge to law schools is to devise a model of teaching -- an effective means at training law students. A model of teaching should maximize the opportunity of all students to develop the range of knowledge and skills contained in our model of lawyering.[30] Such a model encourages

[28] Gee and Jackson, *Supra* note 4 at 504.

[29] Curricular reform is not the objective of this article; however some response to Llewellyn's second directive seems warranted. That directive instructs law schools to, "pick out such parts of that equipment as are either most fundamental or best teachable in school." Skeptical readers at this point may suggest that these other lawyering skills -- primarily interpersonal skills -- are best teachable outside of law school. The overwhelming success of clinical legal education as well as so -- called 'skills' courses reveal that law school can be a highly effective place to learn and teach these skills. Moreover, as indicated, these are certainly "most fundamental" equipment to the practice of law.

[30] Faced with the limitations of the Socratic method, the usual response of law schools has been to adapt the school curriculum to include clinical programs as

(continued...)

a more deliberate teaching process and the introduction of additional teaching methods into the standard class.[31]

[30](...continued)
well as skills courses. While an important addition to the curriculum, these courses cannot fully respond to a need for a model of learning. From a practical perspective, most schools can only offer a limited number of clinical or skilled courses. To operate effectively, class size in such courses is much smaller and therefore more expensive than the traditional courses. The result is a limited opportunity for students to actually participate in such courses. Moreover, undo emphasis on skills courses in the curriculum threatens to narrow the focus of legal education. Learning outcomes in skills courses generally do not include "bar topics" and the practical skills focus of the courses usually comes at the expense of legal doctrine. From this perspective, legal education becomes "anti-intellectual." Finally the adoption of skills courses often comes at the expense of any real reflective inquiry into improving instructional methods.

[31] Instructive at this point in the discussion is the following introduction to materials prepared for a first year course in Contract Law:

> "...you should bear in mind that it is not the aim of any law school course to teach the black letter (or, if you prefer, the brass tack) law of contracts or some other subject. Entering students not uncommonly have a view of such a monumental absorption of knowledge as the be-all and end-all of law school. More experienced heads have rejected this end. This is, in the main, because
> * teaching is a poor way (as contrasted with the efficiency of reading or the vividness of practicing) of conveying substantive information
> * information will normally be forgotten before it can be useful
> * when it is needed, information is easily obtained, while skill in the utilization of information needs to be taught at length and in advance
> * it is impossible to predict who will need what information
> * the precise detail of the law of most subjects will vary from time to time...
> For these and other reasons with which you may come to feel in sympathy, you ought, as this course unfolds, always to attend to your skill development fully as much as to your knowledge of contract law."

R. Dazig, *Material on Contract Law* (1978) (unpublished manuscript prepared for use in first year Contracts course at Georgetown University Law Center)

(continued...)

This model of teaching incorporates findings from research into the process of human learning. These findings support the characterization of teaching as both a science and an art. The science of teaching is the cause-effect relationship that exists between teaching and learning. This relationships exists regardless of content and translates into recognizable principles which can be learned by most teachers. This science of teaching recognizes and allows for the artistic element of teaching. The art of teaching is that aesthetic quality in teaching which transcends proficiency in these "scientific" principles. While this art form can be observed and identified, it cannot be predictably "taught."

Central to this model of teaching is the proposition that "[s]tudent learning is a product of the extent to which the student possesses the prerequisites to the learning to be accomplished, the extent to which the student is or can be motivated to learn, and the extent to which the student is given appropriate instruction."[32] At the law school level, it is appropriate to assume that the law school admission process will screen out students who do not or will not possess the requisites skills to complete a course of study in law. Moreover, it is appropriate to assume (particularly in first year) that students are highly motivated to learn. Therefore, law schools have the luxury of focusing considerable attention to instruction.

Research into effective teaching suggests that teachers "need to be more explicit and systematic about what is to be learned and assert more control over how it is to be learned."[33] Apart from knowledge of the subject matter, any systematic approach to teaching involves three considerations: instructional objectives, methods and evaluation. This triad -- *what students are to learn, how they will learn it, and how the teacher will know whether students have learned it* -- forms the basis of effective teaching.

Instructional Objectives

The first consideration, instructional objectives, involves clearly articulating what student learning outcomes a teacher wants accomplished.

[31](...continued)
This orientation attempts to develop in students the conceptual insight ("thinking like a lawyer") of an area of the law as an aid to perform different kinds of lawyer's tasks. It attempts to accomplish this through a variety of teaching methods.

[32] Feinman and Feldman, *Supra* note 17 at 897.

[33] *Id.* at 897-898.

An instructional objective is a description of student learning expressed in terms of specific, measurable, and observable behavior. "At the level of the individual course, we must be more specific about the particular doctrines, principles, and skills to be taught and about the level of learning... we seek to achieve for each of the elements."[34] The objectives should be defined by our model of lawyering. As such, they should include the substantive content, cognitive development and other appropriate lawyering skills (e.g., drafting, negotiating).

The drafting of instructional objectives requires the law professor to make explicit decisions about what he or she expects students to learn. For example, a law professor's goal may be for the students to learn the law regarding Police Interrogations and Confessions, and specifically the rules related to the *Miranda* case. This may involve students simply being able to recite the holding in the case and list the *Miranda* warnings. Alternatively, the professor may be concerned with also developing in students an ability to "argue like a lawyer." The instructional objective may then be to have students use the facts of a *Miranda*-like problem to make an argument for both sides (the defendant and the prosecution) and explain why each argument would be more or less persuasive to a court which has exhibited an inclination to viewing not as prophylactic rules. The cognitive skills involved are certainly different and the teacher to be effective must articulate these differing skills prior to instructions.[35]

The development of specific instructional objectives, while tedious is critical to successful teaching. The identification and clarification of the objectives increases the likelihood of the development of coherent and

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[34] *Id.* at 898.

[35] A common approach to designing cognitive instructional objectives is the use of a hierarchical taxonomy of cognitive objectives developed by Benjamin Bloom. According to Bloom, cognitive development can be viewed at certain levels. His taxonomy proceeds on a spectrum from the lowest to the highest type of cognitive learning:

Level of Thinking	Definition
Knowledge	Recall of information
Comprehension	Understanding of material or information
Application	Use of rules, concepts, principles in new situations
Analysis	Breaking down information into its constituent parts
Synthesis	Putting together information into a new or unique plan
Evaluation	Judging the value of ideas using the set criteria

purposeful lessons. Second, the objectives help in the selection of appropriate methods, materials and resources. For example, having drafted the second objective above, the teacher naturally is focused on creating or finding an appropriate case to utilize. Finally, instructional objectives allow for accurate evaluation of students' performance and an assessment of the effectiveness of the law professor's teaching.

Methods

Having drafted instructional objectives, the second consideration in effective teaching is methods. There are several methods which can be successfully utilized in a law school course. These methods include: problem solving,[36] role playing or simulations,[37] and collaborative or group learning.[38] The motivation for using new teaching methods includes adding new life to courses after the excitement of first year begins to fade. Additionally, these methods can be used to increase students' prior thinking and preparation, thereby improving the quality of classroom instruction by "freeing time so that more and deeper issues can be discussed."[39] Further, the introduction of new methods is recommended as a means to merge the content of law with the lawyering process; to allow students the opportunity to approach the learning of law in a manner normally associated with the practice of

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[36] See G. Ogden, *The Problem Method in Legal Education*, 34. J. Legal Educ. 654 (1984); R. Davidow, *Teaching Constitutional Law and Related Courses Through Problem Solving and Role Playing*, 34 J. Legal educ. 527 (1984); C. Anderson & C. Kirkwood, *Teaching Civil Procedure With the Aid of Local Tort Litigation*, 37 J. Legal Educ. 215 (1987).

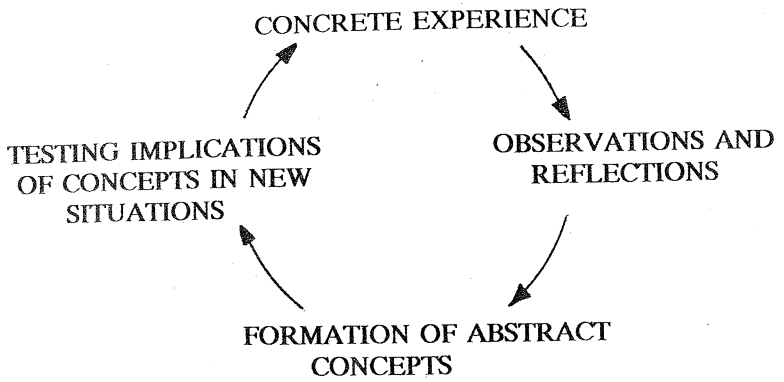
[37] 37. See J. Brown, *Simulation Teaching: A Twenty-Second Semester Report*, 34 J. Legal educ. 638 (1984); R. Davidow, *Teaching Constitutional law and related Courses Through Problem Solving and Role Playing*, 34 J. Legal educ. 527 (1984); B. Stern, *Teaching Legislative Drafting: A Simulation Approach*, J. Legal Educ. 391 (1984); P. Wald, *Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 35 J. Legal Educ. 35 (1986); P. Bergman, A. Sherr & R. Burridge, *Learning From Experience: Nonlegally Specific Role Plays*, J. Legal educ.(citation omitted); D. Day, *Teaching Constitutional Law: Role-Playing the Supreme Court*, 35 J. Legal Educ. 268 (1986); D. Herwitz, *Teaching Skills in a Business Law Setting: A Course in business Lawyering*, 37 J. Legal Educ. 261 (1987); P. Fry, *Simulating Dynamics: Using Role Playing to Teach The Process of Bankruptcy Reorganization*, 37 J. Legal Educ. 253 (1987).

[38] See E. Burg, *Clinic In The Classroom: A Step Towards Cooperation*, 37 J. Legal Educ. 232 (1987).

[39] Danzig, *Supra* note 31 at vii.

law.[40]

From an educational perspective, there is another compelling reason to introduce a variety of teaching approaches into a course. Research by cognitive psychologists indicated that students are more likely to learn concepts when they are given the opportunity to explore and experience those concepts in a variety of ways. This experiential learning theory describes learning in terms of the following four-stage cycle:



During this cycle learning occurs as experiences are translated into concepts which in turn are used as guides in the framing of new experiences.[41]

The result of this cycle is that students develop a learning preference or learning style. For example, some people feel most comfortable working with abstract concepts. Others, in order to learn most effectively, need

[40] Romulo, *Supra* note 6 at 7.

[41] A closer examination of the four-stage learning model would suggest that learning requires abilities that are polar opposites and that the learner, as a result, must continually choose which set of learning abilities he will bring to bear in any specific learning situation. More specifically, there are two primary dimensions to the learning process. The first dimension represents the concrete experiencing of events at one end and active experimentation at the other. The other dimension has active experimentation at one extreme and reflective observation at the other. Thus, in the process of learning, one moves in varying degrees from actor to observer, from specific involvement to general analytic detachment. D. Kolb, **Learning Styles Inventory: Technical Manual** 3 (1976).

"hands on experience." These differing learning styles are present because students most effectively *perceive* information in different ways - some prefer to take in information through concrete experiences while other prefer to take in information through abstract concepts. At the same time, students also most effectively *process* information differently - some process that information through reflection while others process the information by actively experimenting with it.

These differences in the way students process and perceive information result in four distinctive learning styles. These learning styles have important implications for effective teaching. Certain teaching methods are more compatible with certain learning styles. The following chart summarizes each learning style and links it with corresponding teaching methods.[42]

Learning Style	Favorite Question	Learning process	Teaching Method
Type I Innovative Learners	Why or why not?	Learns through listening and sharing ideas; needs to be personally involved	Discussion Methods Discussion, small groups, simulation, brainstorming
Type II Analytic Learner	What?	need to have the facts want to know what the experts think; create concepts & models	Informational Methods, lecture readings, Socratic
Type III Common Sense, Learner	How does this work?	need hands on experience, enjoys problem solving practical application	Coaching Method Socratic, work books, problems, simulation, small groups
Type IV Dynamic Learner	What can this become?	Learn through self-discovery, work through trial and error	Self-Discovery Methods simulation, small groups, discussion

[42] This chart summarizes a practical application of learning styles theory described by Bernice McCarthy. See B. McCarthy, **The 4Mat System: A Cycle of Learning** (1980).

Studies of traditional school settings (including law schools) demonstrate that Type II and Type III learners tend to excel in these settings. This is in part due to the fact that traditional schools "teach" in ways with which these learners are most comfortable.

The following lesson, developed by Prof. Cynthia Kelly, demonstrates how learning styles theory might be applied in teaching the concept of prosecutorial discretion:[43]

> **Type I:** Students are presented with a concrete situation and asked to assume the role of prosecutor. Student should consider why prosecutorial discretion exists, the costs and benefits involved.
>
> **Type II:** Students examine the common and statutory law which defines the scope of prosecutorial discretion by reading cases statutes and other materials. Additional information/analysis could be brought out through lecture, discussion or Socratic method. Student focus on understanding of basic substantive law.
>
> **Type III:** Students become actively involved in applying concepts. Students examine practical problems which face real prosecutors. Students role-play situations in which a prosecutor must apply statutes to a specific fact situation and make a decision about what to charge. Students may then be asked to draft a memorandum identifying reasons for the decision.
>
> **Type IV:** Students actively examine the concrete problems in this area. Students now focus on administrative and interpersonal issues/skills. Students act as prosecutor and explain to a rape victim the decision not to charge or to reduce the charge. Focus is on the interpersonal as well as ethical and policy considerations.

Part of the difficulty in discussing teaching methods in legal education has been the inevitable transformation of these discussions into a quest for a "best" method of teaching. What learning styles theory indicates

[43] C. Kelly, *Education for Lawyer Competency: A Proposal for Curricular Reform*, 18 New Eng. L. Rev. 607, 622 (1983).

is that there is no single "best" method, but rather that a variety of approaches need to be utilized. Paul Teich in reviewing studies into graduate teaching methods concludes, "empirical evidence is accumulating that suggests that none among the most widely debated law-teaching systems is uniquely effective. Evidence of parity in the overall teaching effectiveness of traditional instructional methods is emerging from experimentally generated data...students...appear to respond best...to "individualized teaching systems."[44] Such empirical findings are consistent with learning styles theory.

While not an exhaustive treatment of learning styles, this overview suggests that to give all students an opportunity to learn in their "style," teachers to the extent possible should be striving to employ a variety of teaching methods. Following the learning cycle helps ensure that students will have a more thorough understanding and use of concepts. Admittedly, some courses lend themselves more readily to certain learning styles and methods. Certain courses are simply more abstract (e.g., tax). Perhaps these courses will not utilize the wide variety of methods available. The implication, if not the dictate, of learning styles theory is that even in these courses, teachers should not rely merely on one instructional method.

Evaluation

The final element of our model of teaching is evaluation. The purposes of evaluation include grading students' performance (formal evaluation) and providing feedback to the teacher regarding students' progress (formative evaluation). Characteristics of good evaluation are simple: the evaluations are based on the instructional objectives (i.e., testing what you teach); the evaluation process is on-going and utilizes a variety of evaluative opportunities (recitation, exams, writing exercises, specific classroom performance such as playing the role of a defense lawyer in courtroom simulation); and the evaluation devices seek fair and reliable results (in other words, if the evaluation was administered several times, the results would be consistent).

Having developed specific instructional objectives, the creation of the formal evaluation device - traditional law school exam - is simply a matter of identifying which objectives will be evaluated (given the constraints of time) and developing corresponding questions. If a primary objective of a course relates to arguing like a lawyer (as outlined above) then the exam should attempt to specifically evaluate that competency. It should not attempt to evaluate a competency which the teacher did not consciously

[44] Teich, *Supra* note 8 at 168.

teach, regardless of its importance.[45]

The challenge in utilizing new teaching methods is to incorporate an evaluative component during implementation. In this way, students' performance and outcome in a negotiation simulation becomes part of the evaluation process. The task of the teacher is to continually explore additional ways of measuring students' performance. This on-going evaluative effort is, in part, designed to guarantee integrity in grading -- that a student receiving a grade of 87 deserves an 87. Having several evaluative devices, each with consistent results, decreases the likelihood of a fluke student grade (good or bad). In addition, providing differing evaluative opportunities, allows the teacher to "test" skills which may be measurable on a traditional instrument (such as the ability to negotiate on behalf of a client) and provides students an opportunity to "perform" in a variety of settings.

As noted above, a second purpose of evaluation is formative or diagnostic. On-going evaluation provides the teacher with specific information on the effectiveness of instruction. This feedback may often indicate that additional learning is necessary and allow the teacher to provide those learning opportunities, either inside or outside the classroom, prior to the completion of a course. Again, the intent is to diagnose and remedy the problems. The role of the teacher is to increase the likelihood that as many students as possible will complete the course with the intended abilities, rather than to guarantee that a certain portion of the class will fail.

CONCLUSION

The pedagogical approach to legal education outlined in this article

[45] This point is described more fully by Fink, *Supra* note 20,

> Sometimes the content of the examination tracks the subject of the course, sometimes it does not. If it repeatedly does not, the students will soon learn to prepare for the examination and not the course. The fact is that some material, sometimes the most important philosophical or conceptual material, is simply not testable, if testing means ranking on the basis of right and wrong answers. It is not unknown for a professor in class to emphasize, say, the philosophy of crime and punishment, and then on the examination ask questions dealing with the elements for burglary, robbery, and embezzlement, together with the statutes of limitations for each. What will future students, conditioned to examinations, consider important in that course the next time around?

attempts to meet the goal of producing competent candidates for the practice of law. To attain this goal requires a model of lawyering consistent with the practice of law. Such model involves more than the ability to "think like a lawyer." Equally important, the success of legal education is contingent upon the application of principles of effective instruction in the classroom. At the heart of these principles, is a call for introducing law students to a variety of teaching approaches and resources to fully develop their lawyering competencies. This is consistent both with an expanded model of lawyering and with research into the process of human learning. These new teaching methods should be systematically introduced in the classroom through the articulation of specific instructional objectives and a varied evaluative - formal and diagnostic - approach to assess students' performance.

While not a radical departure from traditional legal education, this approach comes laden with certain "baggage." First, the approach is more difficult than it looks. The process of early defining specific learning outcomes in legal education is challenging. Equally demanding is the development and implementation of new teaching methods. Implicit in these tasks is the recognition that the teacher is the most important person in the classroom.

Without diminishing the importance of the teacher, this approach requires an attitudinal shift in our view of legal education. The model of lawyering utilized in this article can be viewed as a shift from lawyer-centered ("thinking like a lawyer") to client-centered (incorporating interpersonal or client skills). In a similar manner, the model of teaching can be seen as a shift from a teacher-centered (lecture, Socratic method) to a learner-centered classroom. The teacher does not continually dominate the classroom. At certain times the teacher leads, at other times he or she relinquishes control and facilitates, coaches or merely observes. Likewise, the teacher's agenda is designed to integrate students' developmental progress.

The agenda of the classroom is propelled by the idea that capable students and capable professors can produce capable lawyers; that each student is capable of excellence. Understood in this agenda is that the primary goal of law school is teaching and that ranking students is often a separate process.

What does this approach offer in return for these efforts? First, a movement towards the reconciliation of the tension between the theoretical and practical paradigms of legal education. Success in the movement will mean training lawyers not in the narrow constraint of either paradigm, but in an integrated view of learning the law. Beyond this, the approach offers a design and the development of teaching skills to accelerate learning while

respecting the artistic element of the profession. Ultimately, it offers success in what Karl Llewellyn might term "the job of law school."

JUDICIAL INTERVENTION IN WITNESS EXAMINATION

JESUS M. ELBINIAS*

Chief Justice Marcelo B. Fernan, in the opening article published in the manual of "Reading Materials" used during the First Judicial Career Development Program held recently[1] at Puerto Azul, Cavite, wrote thus:

> The goal of an efficient court system is, indeed, half-won by having morally upright and competent judges and court personnel. The other half, however, is equally important and it includes the streamlining of procedural rules together with the provision of improved facilities and adequate resources for our courts.

It is streamlining one aspect of the procedural rules that this short work will focus on, because a reform in this area, unlike in the other areas, will not require improved facilities nor financial resources to attain. Thus, whatever savings that may be realized by deferring reforms in the other areas may be expanded for other projects of the judiciary.

The procedural aspect to be treated in this piece, which is proposed to be reformed, pertains to judge's intervention in the examination of witnesses during trial.

The present Clerk of Court of the Supreme Court, Atty. Daniel T. Martinez -- a fellow of the Institute for Court Management at Denver, Colorado -- in defining delay, has identified inexperience and inefficiency of the lawyer in procedural matters as among the major causes of a lawyer-caused delay. One instance of incompetence on the part of a lawyer, Atty. Martinez wrote, refers to the failure to allege the essential elements of the cause of action in his pleading, which, in effect, means incompetence in proving his case; for a party cannot prove what he has not asserted.

Now, if the lawyer is incompetent or ill-prepared to prove his case during trial, should the judge simply watch the proceeding as a passive and impartial umpire; or should he intervene at the trial to bring out from the

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[1] Held September 10-16, 1989.