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PROCESS REENGINEERING AND LEGAL EDUCATION: AN ESSAY ON DARING TO THINK DIFFERENTLY

KAREN GROSS*

I. INTRODUCTION

Thinking about the nature and quality of legal education is not new.¹ Since the MacCrate Report² and the stinging criticisms of Judge Harry Edwards,³ legal educators have been overtly wrestling with how effectively to train individuals to become lawyers. The

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1. See WILLIAM LAPIANA, *LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994) (discussing the history — and twists and turns — of legal education in America); Richard A. Matasar, *Legal Education: Skills and Values Education: Debate About the Continuum Continues*, 46 N.Y.L. SCH. L. REV. 395 (2002); Rita I. Steinzor & Alan D. Hornstein, *The Unplanned Obsolescence of American Legal Education*, 75 TEMP. L. REV. 447 (2002); Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 J. LEGAL EDUC. 367 (1999); Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941 (1997); Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996); Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 215 (1948).

2. ROBERT MACCRATE, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 234–35 (1992) [hereinafter the MacCrate Report] (The report suggests that integrating simulations and live client contacts in law school, “enables students to relate their later practice experience to concepts they have learned in school, just as students are able to place the substantive knowledge that they acquire after law school in the framework of the concepts they have learned in their substantive courses.”).

3. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (“The law schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use . . . but many law schools — especially the so-called “elite” ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.”).

MacCrate Report urged law schools to integrate theory and practice within the academy to insure that legal education provided something more than a vague correlation to legal practice.⁴ Seemingly in the wake of the MacCrate Report, law schools began to provide students with greater skill sets, even within the mainstream substantive courses.⁵ Simulations, drafting and research courses, and experiences with negotiating and counseling clients — all designed to both introduce skills and promote professional values — have gained in prominence.⁶

But — and here is that proverbial but — we have tended to think about legal education within the existing paradigm. Stated differently, we have been largely satisfied with tweaking at the mar-

4. See MacCrate Report, *supra* note 2, at 236 (“Too often, the Socratic method of teaching emphasizes qualities that have little to do with justice, fairness, and morality in daily practice.”); see also *id.* at 234 (“[L]aw schools should continue to emphasize the teaching of ‘legal analysis and reasoning,’ and ‘legal research’ These skills can no longer be viewed as teachable only in the traditional classroom setting [L]aw schools provide a unique opportunity for exposing students to the full range of these practice skills, an opportunity that might not be readily available in actual practice.”).

5. See, e.g., GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* 105 (1999) (“Experiential learning integrates theory and practice by combining academic inquiry with real-life experience.”); Barbara J. Busharis & Suzanne Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. MARSHALL L. REV. 303 (2000); Susan L. DeJarnatt, *In re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing*, 50 J. LEGAL EDUC. 50 (2000); Joseph W. Glannon et al., *Coordinating Civil Procedure with Legal Research and Writing: A Field Experiment*, 47 J. LEGAL EDUC. 246 (1997); Pamela Lysaght et al., *Legal Education: Integrating Theory with Practice at University of Detroit Mercy*, 77 MICH. BAR J. 684 (1998); Alice M. Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report Into a Doctrinal Course*, 3 NEV. L.J. 32 (2002).

6. See GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* 105 (1999) (“Experiential learning integrates theory and practice by combining academic inquiry with real-life experience.”); Noble-Allgire, *supra* note 5; Eleanor Myers, *Teaching Good and Teaching Well: Integrating Values with Theory and Practice*, 47 J. LEGAL EDUC. 401 (1997); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 105–06 (1996); John B. Mitchell et al., *And Then Suddenly Seattle University Was on Its Way to a Parallel, Integrative Curriculum*, 2 CLINICAL L. REV. 1 (1995); Michelle S. Simon, *Teaching Writing Through Substance: The Integration of Legal Writing with All Deliberate Speed*, 42 DEPAUL L. REV. 619 (1992); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 32 (1992); Gonzaga University School of Law, <http://www.law.gonzaga.edu/Academics/default.html> (last visited Jan. 21, 2005) (Gonzaga University School of Law indicates that it correlates legal doctrine and practical application, text and experience. Students learn the law and apply it to the real world.).

gins. To date, with very limited exceptions, we have been unwilling to break the mold, particularly with respect to the first year of legal education — the training of “One L’s.”⁷ It is not hard to appreciate the reticence.⁸ There are many concerns — cost, feasibility, admissions, job placement, and overall marketplace acceptance — together with the perfectly normal skepticism about doing things differently, particularly since those doing the teaching were, obviously, trained in the very methods that would be altered.⁹ And, as most people readily acknowledge, lawyers (and law professors) are risk averse — although they are far from alone in fearing change.¹⁰ In fact, fear of radical change is what curbs ongoing success within many institutions.¹¹ And make no mistake about it, change has an effect on faculty, students and the institution itself.

What I would like to do in this brief essay is employ a process that has been *au courant* in business circles, particularly since Professor Hammer published his piece entitled *Reengineering Work:*

7. See SCOTT TUROW, ONE L (1988).

8. For a thoughtful discussion of the difficulties of change, see PHILLIP C. SCHLECHTY, SHAKING UP THE SCHOOLHOUSE: HOW TO SUPPORT AND SUSTAIN EDUCATIONAL INNOVATION (2000); ROBERT EVANS, THE HUMAN SIDE OF SCHOOL CHANGE: REFORM, RESISTANCE, AND THE REAL LIFE PROBLEMS OF INNOVATION 25 (1996) (“In truth, beneath its public persona, change lives a very different private life. Though we exalt it in principle, we oppose it in practice.”).

9. I do not mean to suggest that all law professors and law school administrators are satisfied with the status quo. Indeed, I suspect that many people have thought about changes and pondered what would improve the educative process. However, these personal observations generally do not lead to systemic change. With change, however, it might be interesting to assess the relative levels of professorial job satisfaction.

10. In his book, *Mastering The Dynamics of Innovation*, James M. Utterback observed, in the context of corporate restructuring and change, “To understand why established firms find radical innovation so difficult, we need to look at the organizational behavior and at the priorities of their leaders. Established firms with massively profitable businesses are almost invariably more conservative and risk averse than are fledgling competitors with none [G]round breaking changes are viewed as difficult, disruptive, unpredictable and risky” JAMES M. UTTERBACK, *MASTERING THE DYNAMICS OF INNOVATION* 223–24 (1996).

11. In a wonderful essay on the culture of resistance to change within educational institutions, Robert Evans observes that “[W]hat is surprising is not that institutions resist innovation, but that anyone would expect them to welcome it. . . . For institutions of all kinds, just as for individuals, stability, far more than change, is the rule.” ROBERT EVANS, *The Culture of Resistance*, in THE JOSSEY-BASS READER ON SCHOOL REFORM 510, 515 (2001).

Don't Automate, Obliterate in the Harvard Business Review in 1990.¹² As he observes, “[u]nless we change these rules, we are merely rearranging the deck chairs on the Titanic. We cannot achieve breakthroughs in performance by cutting fat or automating existing processes. Rather, we must challenge old assumptions and shed the old rules that made the business underperform in the first place.”¹³ So, employing the reengineering approach, I would like to offer some initial thoughts¹⁴ on re-imagining the first year of legal education — without existing constraints.¹⁵ This means asking the blunt question: if we were to start from scratch (cognizant of, but unencumbered by, the past), what would legal education look like as we train lawyers for today and give them the skills to adapt for the future? Through this thought exercise, I want to ponder the possibilities, recognizing that the implementation and acceptance of some or all of the results may present considerable (but not insurmountable I hope) hurdles — the details of which will have to await another article. But, if we do not imagine, we will be forever making incremental changes. We will not dare to be different — dare I say better — at educating individuals to become lawyers.¹⁶

12. Michael Hammer, *Reengineering Work: Don't Automate, Obliterate*, 90 HARV. BUS. REV. 104 (1990). Some might even suggest that the approach has been overused in the business arena; at a minimum, it has been employed in a variety of business contexts. The goal here is to apply it in a completely different context — extracting and employing its best practices.

13. *Id.* at 107.

14. This essay is normative in its orientation. The suggested ideas clearly could not be implemented without a more rigorous proposal — which this paper does not profess to be.

15. One can rightly ask why this reengineering exercise is focused on first year law students; wouldn't we be better served (and more easily served) by changing the upper level curriculum? I concede that it might be easier to change upper level courses and approaches but it seems to me that we need to start at the foundation of legal education, the place where we give students the initial signals about what we want them to learn. By the time second year arrives, if we have not made changes, students will already have formed a vision — a sense — of the enterprise. Better to seek out a change in that initial vision — a change that sets that stage for that which we seek. Of course, if the first year is changed as envisioned in this paper, it will call for an almost immediate change in the upper level curriculum. Starting at the bottom first — instead of from the top down — is not easier but it is, to my mind, preferred.

16. Some might suggest that we should be educating people to “think like a lawyer” rather than become a lawyer. This may be right in that many people can benefit from legal education without ultimately practicing law. That said, at least one impor-

II. EMPLOYING A REENGINEERING METHODOLOGY

Although there is no single method for business reengineering, there are certain steps that are frequently employed in the process,¹⁷ and I will utilize at least some of them here in the context of legal education.¹⁸ First, one needs to conduct a “current state assessment,” which involves both determining where one currently is in terms of educational approach and why that approach is not where one wants to be prospectively.¹⁹ This step also entails insuring that there is a shared understanding of where one wants to be at the end of the reengineering process, a step I’ll term “shared strategic visioning.”²⁰ Second, one needs to identify and then consider the new technologies that will allow, indeed perhaps force, one to re-envision.²¹ One needs to consider how those technologies will be employed by the relevant constituencies, an approach termed “value-stream re-invention.”²² And, one needs to expand current notions of who participates in this thought exercise — who needs to be involved in the re-envisioning process. Third, one needs literally to re-envision, crafting concrete suggestions and solutions, and

tant aspect of legal education housed in a law school is to train individuals capable of practicing law — even if they ultimately choose not to do so.

17. ProSci, *Selecting a Business Process Reengineering Methodology*, at <http://www.prosci.com/project-planning.htm> (last visited Jan. 21, 2005) (a recommended approach for business reengineering outlines seven phases: (1) project planning and launch; (2) current state assessment and learning from others; (3) solution design; (4) business case development; (5) solution development; (6) implementation; (7) continuous improvement); Maureen Weicher et al., *Business Process Reengineering: Analysis and Recommendations*, at <http://www.netlib.com/files/bpr1.pdf> (Dec. 1995); DAVID K. CARR & HENRY J. JOHANSSON, *BEST PRACTICES IN REENGINEERING* (1995); MARK YOUNGBLOOD, *EATING THE CHOCOLATE ELEPHANT* (1994).

18. Business reengineering is by no means the only approach to innovation within education. Indeed, there is a rich literature on educational innovation and many approaches to systemic educational change, particularly in K–12 education. See, e.g., THE JOSSEY - BASS READER ON SCHOOL REFORM (2001).

19. See ProSci, *supra* note 17.

20. See Susan M. Grotevant, *Business Engineering and Process Redesign in Higher Education: Art or Science?*, CAUSE 98 (Dec. 8, 1998), available at <http://www.educause.edu/ir/library/html/cnc9857/cnc9857.html> (last visited Oct. 20, 2004).

21. Grotevant, *supra* note 20 (Re-envisioning may also be termed as “procedure redesign.” In procedure redesign, new ways of doing business are identified.). See also ProSci, *supra* note 17.

22. Grotevant, *supra* note 20 (“In this process the needs and desires of the customer drive the design of the process rather than customers being required to adjust to the needs of internal processes and procedures.”).

assessing the benefits and detriments of the new vision.²³ It is at this point that this paper ends — although, were we to proceed with this exercise, we would need to consider the fourth step: the costs of, approaches to, measures of the success of, and methods of ongoing improvement with respect to, implementation.²⁴

III. CURRENT STATE ASSESSMENT

Currently, in most (although not all) law schools,²⁵ we teach in compartments — both in terms of substance (including legal eth-

23. *Id.* (There are risks associated with reengineering. Depending on the project, a radical change may be unhealthy whereas a less invasive measure may be beneficial.).

24. ProSci, *supra* note 17.

25. Some schools have taken new approaches, at least according to institutional literature and academic writings. (Actual success in implementation is not so easy to assess.) Consider the following examples: Case Western Reserve University School of Law has adopted a program called *CaseArc*. As they describe their program, “*CaseArc* is a revolutionary program that integrates the teaching of lawyering skills with legal theory and doctrine over the entire three-year course of a student’s legal education. . . . [I]t is a true three-year program required to be taken by all students.” Michelle C. Frygier, ed., *Leading the Way in Innovation, The CaseArc Program*, CASE IN BRIEF: THE MAGAZINE OF CASE WESTERN RESERVE U. SCH. OF L. CLEVELAND, OHIO, Spring 2004, at 2. Vermont Law School has developed an upper level “General Practice Program” that integrates substance and practice over a four semester period, with students forming, in essence, a mini-law firm with faculty serving as “senior partners.” This program serves only a small segment of the overall student body, given the high level of faculty involvement. See Vermont Law School, *The General Practice Program*, at http://www.vermontlaw.edu/academic/index.cfm?doc_id=35 (last updated Mar. 3, 2004). Other schools have employed an “integrationist” approach in selected courses. Consider Temple University School of Law. As described by Professor Myers,

At Temple Law School we have developed a course — Integrated Transactional Practice — which merges the teaching of theory and practice, which keeps upper-level students engaged by providing a program of active learning, and which provides a concrete and realistic context for students to experience the moral dimension of practice. ITP combines trusts and estates, professional responsibility, and transactional skills — interviewing, negotiating, counseling, and drafting — in an integrated two-semester sequence.

Eleanor W. Myers, *Teaching Good and Teaching Well: Integrating Values With Theory and Practice*, 47 J. LEGAL EDUC. 401, 401-02 (1997). Consider the University of Iowa’s “small-section program” in its first year course. See The University of Iowa College of Law, *First Year Curriculum*, at <http://www.law.uiowa.edu/courses/firstyear.php> (last visited Oct. 20, 2004) (“one of the distinctive benefits . . . is the first-year ‘small-section’ program which integrates training in basic lawyering skills into substantive courses taught by regular, full-time faculty”). At the University of Detroit Mercy School of Law, Applied Legal Theory and Analysis has assignments designed to help students understand the practical applications of the theoretical foundations of their subject classes. See University of Detroit Mercy School of Law, Academics, at <http://lawschool.udmercy.edu/aca->

ics) and in terms of the legal research, writing and lawyering skills. All the substantive courses cover defined subject areas. Look at any law school catalogue — the compartments leap off the page. Take the usual first year curriculum, the focus of our reengineering exercise. Students learn Contracts, Torts, Civil Procedure, Criminal Law, Property and sometimes Constitutional Law. Then, students take one or more courses in Legal Writing and Legal Research.²⁶ Then, in part, because we recognize the difficulty of and potential limits of compartmentalization, we tweak at the margins. Some schools add substantive courses to the first year — Administrative Law, the Legal Process, Jurisprudence.²⁷ Some schools introduce the lawyering skills — interviewing, counseling and negotiating.²⁸ Some teach Legal Method.²⁹ Within a given course, professors may introduce drafting exercises or simulations or ethics components. A particular Legal Writing course may use examples from first year, but usually without detailed coordination with the professor teaching the related substantive course — sometimes resulting in different but unexamined approaches to the same materials. Stated

demics/index.html (last visited Oct. 20, 2004). At Yale Law School, first year students are placed in a small group within one of the required doctrinal courses (i.e., Constitutional Law, Contracts, Procedure, and Torts). The class is a seminar-style course with about seventeen students, which integrates elementary training in legal research and writing with the regular course work. See Yale Law School, *Academics*, at <http://www.law.yale.edu/outside/html/Academics/acad-jd.htm> (last visited Oct. 21, 2004). Willamette College of Law teaches first year research and writing in conjunction with one substantive course in small classes (approximately twenty-five students). “Students learn the skills needed for all of their course work by focusing on the subject of one.” See Willamette College of Law, *Academic Programs*, at http://www.willamette.edu/wucl/academic/first_year.html (last updated Apr. 28, 2004).

26. See, e.g., catalogues for the following ABA accredited law schools: (1) New York Law School; (2) Fordham University School of Law; (3) Columbia Law School; (4) Stanford Law School; (5) University of Chicago Law School; (6) Northwestern University School of Law; (7) UCLA School of Law; (8) Boston University School of Law; (9) New England School of Law; (10) Benjamin N. Cardozo School of Law.

27. See, e.g., catalogues for the following ABA accredited law schools: (1) The George Washington School of Law; (2) Syracuse University College of Law; (3) Temple University James E. Beasley School of Law; (4) Vermont Law School; (5) Georgetown University Law Center.

28. New York Law School, *Lawyering (2) (REQ600)*: The course provides first year students with the opportunity to participate in role-playing activities (e.g., initial client interviewing, witness interviewing, client counseling). Students must analyze facts and documents to reach an appropriate outcome for the client file. See <http://www.nyls.edu/pages/1261.asp> (last modified Dec. 6, 2004) (containing course description).

29. See, e.g., catalogues for the following ABA accredited law schools: (1) Arizona State University College of Law; (2) Temple University James E. Beasley School of Law.

more simply, with limited exception, we create quite distinct lines among the courses and skills taught.³⁰

What is problematic about this categorization approach in legal education? Many things — and thus, the push for reengineering. First, in the real world, legal problems do not fit within the prescribed course contours. In real life, legal problems cross over the lines and call for an integration of the skills now taught in separate courses. Consider, for example, the segregation of writing and research from substance, a false dichotomy as most lawyers in practice recognize. It is difficult enough to learn research and writing as a first year student, but most current law school curricula do not help that process by contextualizing the learning (by linking it to the substance being taught), an essential aspect of adult learning.³¹ So, while some of the assigned legal research and writing may be tied into the substantive courses in some schools,³² we generally do not systemically integrate writing, research and substance in the

30. The failure to recognize intersecting categories (and hence creating false or non-existent dichotomies) has been recognized in other legal arenas. In a piece that still haunts me when I consider these issues, Judy Scales Trent observed that as an African American woman (who appears white), she was in at least three intersecting categories in a world that only saw (at least when written and perhaps still today) three separate categories. See JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY 2 (1995) (“Because I am a black American who is often mistaken for white, my very existence demonstrates that there is a slippage between the seemingly discrete categories “black” and “white.” This slippage is important and can be helpful to us, for it makes the enterprise of categorizing by race a more visible — hence, a more conscious — task.”); Judy Scales-Trent, *Women in the Lawyering Process: The Complications of Categories*, 35 N.Y.L. SCH. L. REV. 337, 338 (1990) (“The result of this way of thinking, the creation and maintenance of these rigid categories, is that it leads to the invisibility of minority women and the invisibility of the issues which affect them. The rule appears to be that these two categories do not intersect. In my work, I have argued that this rule must be broken.”).

31. GERALD F. HESS & STEVEN FRIEDLAND, TECHNIQUES FOR TEACHING LAW 11–12 (1999) (“Adults learn new concepts, skills, and attitudes by assigning meaning to them in the context of their previous experience. The learning process is cyclical. The learner becomes acquainted with new ideas and skills, applies the ideas and skills in real-life settings or simulations, reflects on experience with these new skills and concepts, redefines how they might apply in other settings, and then reapplies them in new situations.”).

32. For an exception to this approach and one that has been successful in both first year and upper level courses that we have employed at New York Law School, see Camille Broussard & Karen Gross, *Integrating Legal Research Skills into Substantive Courses: Using Commercial Law as an Exemplar*, in TEACHING THE LAW SCHOOL CURRICULUM 362 (Gerald Hess et al. eds., 2004).

first year and, in many instances, thereafter. Perhaps equally important, even when there is overlapping substance, there usually is not overlapping teaching and coordination. One effect of this is that practitioners hiring new lawyers complain that it takes recent graduates more time than desired in getting “up to speed” in the world of law practice. So, at least from the perspective of employers, we need to ask whether we are actually teaching what the real world desires and demands. One can wonder whether gaps between what is taught and what is needed also present a problem for the ultimate consumer of legal education — the clients.

Clients do not come into a lawyer’s office saying, “I have a U.C.C. Section 2-313 problem, with particular emphasis on subsection two, a potential tort claim for personal injury, an insurance question related to injury to my neighbor’s person and property (and my person and property as well), a labor law question regarding sick-leave at my job, and a general concern as to whether the best approach would be federal as opposed to state litigation for the contract and tort claims . . .” Instead, clients come in with a story, and that story is without boundaries. It sounds something like this: “I cannot believe what happened to me but this new barbeque set I just bought just exploded, injuring me and my neighbors, burning their fence and my lawn and leaving me out of work for weeks. My employer is not paying me, my insurance is not reimbursing me, my neighbors are threatening me, and the bill for the barbeque just appeared on my credit card bill. I need help.” From an educative perspective, we do not teach students, at least not first year students, to crossover among the substantive topics they are learning. Nor do we, for the most part, enable them to crossover with the more practical skills they are learning. Each of the issues raised — Contracts, Torts, Civil Procedure, Labor Law, Insurance Law — is taught and tested separately; some issues are taught in the first year and some in the second and third (or fourth for evening students) years. The writing, research and other practice skills (if the latter are taught in depth) are taught and graded separately as well. What we assume and hope, then, is that students will, without the benefits of in-school education, apply the discrete areas of their learning in a more interdisciplinary fashion so they can respond to legal problems when they are out in the real world. At best, the result is

a legal education that is incomplete; at worst, the result is lawyers whom we have inadequately trained.

Second, by teaching in categories, we actually reify those categories for our students. Students come to see, learn and then practice law based on how it is taught to them. Law learning is not unique in this regard.³³ For example, if one teaches students in math that there is only one way to reach an answer, one denies students the opportunity to develop other approaches. Similarly, if one teaches art by only using examples from the classics, one underplays the role of abstract or modern art. Similarly, if we teach history using only the Western Canon, we deny the importance, indeed existence, of other non-Western cultures and approaches.³⁴

Third, categorization curtails our opportunity to co-teach. Presently, we teach that with which we are most familiar and leave other subjects to those who are clearly more competent. We also commonly leave the "skills" to others, even when those teaching substance have considerable experience as practicing lawyers. There are clearly many reasons for this. Staffing considerations are

33. David Carraher et al., *On Reification*, available at <http://www.earlyalgebra.terc.edu/reviews/sfardlinchevski.html> (2002) (last modified Aug. 13, 2002) (reviewing Anna Sfard, & Liora Linchevski, *The Gains and Pitfalls of Reification*, *Educational Studies in Mathematics*, 26, 191–228 (1994) ("Key to their analysis is reification, a process by which what is initially viewed as a process comes to be viewed as a structure or mathematical object. They note that "objects like $3/4$, -2 , or the square root of -1 were borne out of operations of division, subtraction and square-root extraction . . . Students who continue to look at these expressions only as processes will be puzzled by problem contexts where they would be more fruitfully thought of as objects (that can then be subjected to a higher order of operations."); Tracy Goodson-Espy, *The Roles of Reification and Reflective Abstraction in the Development of Abstract Thought: Transitions From Arithmetic to Algebra*, *EDUC. STUDIES IN MATHEMATICS*, Sept. 1998, at 219–45; Cindy L. Griffin, *Rhetoricizing Alienation: Mary Wollstonecraft and the Rhetorical Construction of Women's Oppression*, *Q. J. OF SPEECH*, Aug. 1994, at 293–312. See also Richard Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 734–49, 824–47 (1988); James V. Smith, *Reading, Writing and Reification*, *SCOTTISH EDUC. REV.*, May 1981, at 25–35.

34. See HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* (1994). See also WILLIAM CASEMENT, *THE GREAT CANON CONTROVERSY: THE BATTLE OF THE BOOKS IN HIGHER EDUCATION* (1996); Bill Cope & Mary Kalantzis, *White Noise: The Attack on Political Correctness and the Struggle for the Western Canon*, *INTERCHANGE: A Q. REV. OF EDUC.*, Oct. 1997, at 283–329; Alison Schneider, *Stanford Revisits the Course That Set Off the Culture Wars*, *CHRON. OF HIGHER EDUC.* May 9, 1997, at A10–A12; James A. Banks, *The Canon Debate, Knowledge, Construction, and Multicultural Education*, *EDUC. RESEARCHER*, June–July 1993, at 4–14.

certainly an issue as co-teaching limits the number of available professors. Also, by their nature, law professors enjoy their autonomy — both with respect to the content of their courses and the classroom experience itself. However, legal problems beg for cooperative efforts; law firms regularly develop teams from different disciplines to handle a particular client's matters — a litigator, a tax person, a corporate guru, perhaps even an insolvency lawyer.³⁵

The impact of the approach we currently adopt in legal education for first year students is best illustrated, actually, in a non-legal example. Suppose, drawing closely on similar example developed by Professor Randall, that a student is learning to play the bassoon.³⁶ Assume the teacher provides the student with the greatest bassoon solo music ever written. Each class, the student and teacher read and dissect the music and occasionally play a portion of it. Together they listen to recordings of the great musicians playing the assigned music. They analyze what they have heard — what makes it strong or weak, why it is being played well or poorly, what would improve the rendition. At the end of the course, the student has learned all about notes, timing, tempo, composition, style, key. Suppose that then the student is asked to play the piece from start to finish in the orchestra. How well prepared is that student? First, the student has never really played the bassoon, at least not in a fulsome manner. Second, the student has never played a single piece of music from start to finish. Third, the student has never played with others — either bassoonists or others in the orchestra. Finally, the bassoonist has never really listened to music apart from that composed for the bassoon. In short, the student is woefully unprepared for playing in the orchestra. Returning to legal education, I wonder if we are not doing somewhat of the same thing

35. Edward Poll, *Compensation: Partnering With Your Partners*, 136b LAWBIz (Jan. 2001), available at <http://www.lawbiz.com/january2001b.html> ("Teamwork in a law firm means partnering with other lawyers in the firm to reach common goals. With partnering, it's the law firm, not any single lawyer, that is marketed, and it's the firm that serves as the legal representative of the client. Each individual lawyer brings to the table a special skill or expertise that, when added to all the others, better serves the interests and needs of the client.").

36. Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63 (1995) (Professor Randall is addressing, with this example, the flaws in law school exams. I share this observation but am using the example, slightly altered, to address flaws in the underlying educative process.).

when we teach students as we do. Obviously, the results are not as dramatic as those depicted in the bassoon example. But, we teach students only a part of what they need to know, we emphasize how others have written about the task (judges) and we teach them different pieces in isolation. Phrased differently, we do not teach students to play in the legal orchestra. It is time we did.

IV. STRATEGIC VISIONING

Reengineering, as developed in the business context, presupposes that a business is at Point A and wants to get to Point B; in most instances, the institution believes in Point B.³⁷ The question for the business is changing how one gets to Point B, not whether to pursue Point B. For example, one may have a billing department within a company but that particular department is not working efficiently and appears to be underutilizing technology and overusing person-power. The task is to re-envision how to do that department's work.³⁸ Certainly, one cannot do away with corporate billing altogether; obviously, every company is paid for its services and pays others for theirs. But, the goal is to find new ways of satisfying the commonly recognized goal. Similarly, if a company is marketing a product that it knows is extremely good, but the product is not selling well, the company can completely revamp how it "thinks" about the product in question in the marketplace³⁹ — re-

37. Mike Donovan, *Business Process Reengineering*, 1 INTELLIGENT MFG. 4 (Apr. 1995), at <http://www.lionhrtpub.com/IM/IMsubs/IM-495/bpr.html> (last visited Nov. 1, 2004) ("With business process reengineering (BPR), you fundamentally rethink and redesign the business process necessary to maximize customer satisfaction and profits. BPR is concerned with 'what could be.' BPR is the only approach that can quickly achieve dramatic and permanent improvements."); Hammer, *supra* note 12, at 5 ("The team must analyze and scrutinize the existing process until it really understands what the process is trying to accomplish Rather than looking for opportunities to improve the current process, teams should determine which of its steps really add value and search for new ways to achieve the result.").

38. See Hammer, *supra* note 12, at 3–4.

39. There is rich literature on the role of signaling in economic markets because of informational asymmetries. In essence, because markets are imperfect, certain items in essence "stand-in" for unknown information. That would inform decisions about quality. In hiring, for example, when resumes are similar, where one went to school can provide a signal — whether or not it is an accurate signal is another issue. See, e.g., A. Michael Spence, *Signaling in Retrospect and the Informational Structures of Markets* (Dec. 8, 2001), available at <http://www.nobel.se/economics/laureates/2001/spence-lecture.html> (last visited Nov. 1, 2004) (paper based on the author's speech given when receiv-

thinking everything from audience to price to retail and wholesale outlets, to forms of media attention given to product promotion.⁴⁰

In legal education I am not sure that we have a shared understanding of what Point B is, namely what is in the toolbox of skills needed to become a quality lawyer in the twenty-first century.⁴¹ And, many of us might debate the deeper issue of whether Point B is, in and of itself worthy, considering for example whether we need more lawyers (and if so, how many will be needed in the coming decades) or why legal education is cabined within the legal academy.⁴² But, that is another topic for another day. The absence of consensus on Point B clearly presents something of a re-envisioning problem in that ambiguity as to ultimate goals makes determining the process for getting there vastly harder, if not impossible. Moreover, if it is law professors alone doing the re-imagining, I suspect, our focus is somewhat incomplete. Each of us, as educators, focus on what we want our students to get out of our particular classes; as such, we tend not to focus with regularity or in a systematic way on the overarching goals of legal education. And, if we do think about these issues (frequently in the context of an ABA reaccreditation

ing the Nobel Prize in Economics). For a vastly simpler analysis of his theory, see Karen Christensen, *Nobel Laureate Michael Spence on Signaling*, ROTMAN MANAGEMENT MAGAZINE, Winter 2003, at 36–37, available at <http://www.rotman.utoronto.ca/pdf/winter2003.pdf> (last visited Nov. 1, 2004).

40. An example is CIGNA Corporation (provider of insurance and related financial services worldwide): CIGNA implemented BPR in 1989 and in five years saved more than \$100 million. See J. Raymond Caron & Sirkka L. Jarvenpa & Donna B. Stoddard, *Business Reengineering at CIGNA Corporation: Experiences and Lessons Learned From the First Five Years*, 18 MGMT. INFO. SYS. Q. SIM PAPER 3 (1994), available at <http://www.misq.org/archivist/bestpaper/caron.pdf>.

41. Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57 (1992) (“Few [law professors] seem to recognize that we cannot teach students how lawyers think without teaching them at the same time what lawyers do.” Consider the introduction of a lawyering class at the University of Albany where students learn essential skills while working on one case throughout the course. “The goal was to combine Legal Research, Reasoning, and Writing with substantive law and clinical methodology during the first year of law school in order to help students understand the relationships between them.”); Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals*, 44 J. LEGAL EDUC. 96, 98–99 (1994).

42. Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421 (1995); George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437–41 (1983).

review,⁴³ curricula revisions, dean search or other similar events), it is usually not sustained thinking that leads to systemic change with institutional staying power. Stated another way, we presume that what we each do in our respective classrooms adds to the collective knowledge that students acquire and, in the end, we find vague comfort in a belief that the needed skill sets for “becoming a lawyer” are delivered.

Thus, to make the exercise in this article work, I am forced to articulate what I take to be at least a sizable number of the skill sets that most legal academics agree graduates should have acquired over the course of their law school experience, creating, in essence, a forced shared vision. While some of us may place different emphasis on various identified items, and no doubt I have omitted some skills or values which others would have included and vice-versa, this list creates our Point B, the place we want to go. Indeed, the MacCrate Report created such a list as well.⁴⁴ The risk here is that if there is neither a shared view, nor readers willing to buy into the proffered view at least for purposes of this paper, then the re-engineering exercise will fail. Ironically, I am asking readers not to fight the hypothetical, although as we teach our students that too can be a useful exercise.⁴⁵

At a minimum, we want students educated within the legal academy to: acquire sizable knowledge of substantive legal doctrine (although the particular doctrines needed is the subject of some debate); develop a set of analytic skills that enables students to read

43. Law school reaccreditation occurs every seven years and the American Bar Association is the recognized accrediting organization. Among many other things, the team of inspectors looks at the law school's curriculum in light of Standard 302, which provides the guidelines for law school curricula. Interpretation of 302-3 also provides that “each law school shall engage in periodic review of the curriculum to ensure that it prepares the school's graduates to participate effectively and responsibly in the legal profession.” This information is available at www.abanet.org/legaled/standards/2004-05masterstandardsbook.pdf.

44. See MacCrate Report, *supra* note 2, at 243 (“Effective teaching of skills and values analyzed in the Statement ordinarily involves these components: (1) Development of concepts and theories underlying the skills and values being taught; (2) Opportunity for students to perform lawyering tasks with appropriate feedback; (3) Reflective evaluation of the students' performance by a qualified assessor.”).

45. Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 330 (1997); Richard K. Neumann, *On Strategy*, 59 FORDHAM L. REV. 299, 315 (1990).

cases, statutes and regulations across a wide array of substantive law, cull out important facts from cases or fact patterns, and then develop rigorous legal arguments that grow out of the application of the law to new fact situations we present; perform certain practical “lawyering” skills, including oral advocacy, legal writing, client interviewing, counseling and negotiating; conduct legal research both on and offline, using existing technologies; appreciate the ethical dimensions of legal issues that confront lawyers; understand at least some of the theoretical underpinnings of our jurisprudence; recognize the global nature of our world; foster an ability to learn new information and employ new technologies over a lifetime as a professional; and finally, recognize the role law plays in creating, promoting and preserving justice and liberty.

V. NEW TECHNOLOGIES, NEW STUDENTS

Reengineering certainly needs to take into account new technological advances (computers, hand-held devices, the Internet) presently and prospectively available to students, a situation that has true business parallels. But, we also need to be mindful of the changing demographics of law students and how that will impact the learning and teaching experience. The data shows that in 2002–2003 minority enrollment in law schools was approximately 27,000 students, whereas two decades before the number was approximately 11,600.⁴⁶ Looking at this trend moving forward, the current data reflect that a growing number of today’s youth under the age of ten in the United States are non-white.⁴⁷ These new students come with important life experiences and cultural diversity — all of which can impact on both teaching and learning. We also need to take account of the new understandings about learning, brain hard wiring, and differing types of intelligence.⁴⁸ Educa-

46. See Minority Enrollment Statistics 1971–2002, *available at* <http://www.abanet.org/legaled/statistics/minstats.html> (last visited Oct. 18, 2004).

47. See *generally* American Legislative Exchange Council, Report Card on American Education: A State-by-State Analysis 1976–1999 (2000), *available at* <http://bill.snr.arizona.edu/ssaa/Rc99f.pdf> (last visited Dec. 21, 2004); National Center for Education Statistics, Digest of Education Statistics, at ch.2: Elementary and Secondary Education, Table 42 (2003), *available at* <http://nces.ed.gov/programs/digest/d03/tables/dt042.asp> (last visited Dec. 21, 2004).

48. The leading scholar on thinking about multiple intelligences is Howard Gardner. See HOWARD GARDNER, INTELLIGENCE REFRAMED (1999). In his original work, Gard-

tional theory is now clear: there is no single learning style among our students. As educators have long noted, different people learn differently and whatever we ultimately envisage, it needs to be sufficiently nuanced so that students with all types of learning styles can participate in and gain from the educative experience.⁴⁹ As Mel Levine has noted, our brain pathways enable each of us to learn in different ways, and what works for one person in terms of optimal learning may not work for another.⁵⁰ As educational experts have noted, for example, some people learn best by reading material. For others, auditory learning is key. And for some, in addition to intellectual skills, there are a set of social skills that need to be developed to succeed as a professional.⁵¹ We should not underestimate the value of emotional intelligence as we train lawyers.⁵²

Moreover, current law students, some of whom are clearly influenced by technological advances, are, in terms of their educative experiences, vastly different from many of the people teaching them. They have grown up with computers, are proficient with the

ner posited seven intelligences (linguistic, mathematical, musical, body-kinesthetic, special, interpersonal and intrapersonal). Individuals have, he observes, blended intelligences and we need to take advantage of each person's unique capabilities. In the above referenced work, he adds three new types of intelligences (and one can posit that his list may grow in the future): naturalist, spiritual and existential. *Id.* at 47. From the pedagogical perspective and in terms of assessing which of these intelligences lawyers use and need (and will need going into the future), we would be well served to spend additional time thinking through Gardner's framework.

49. As expressed in GERALD HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR LAW TEACHING* 11-12 (1999), there are four characteristics of adult learning: (1) voluntary; (2) respectful; (3) collaborative; (4) contextual. ("Adults learn new concepts, skills, and attitudes by assigning meaning to them in the context of their previous experience. The learning process is cyclical. The learner becomes acquainted with new ideas and skills, applies the ideas and skills in real-life settings or simulations, reflects on experience with these new skills and concepts, redefines how they might apply in other settings, and then reapplies them in new situations.")

50. MEL LEVINE, *A MIND AT A TIME* (2002) (Dr. Levine urges that we must begin to pay more attention to individual learning styles, to individual minds, so that we can maximize children's learning potential).

51. Spence, *supra* note 39; Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998); Lustbader, *supra* note 45, at 321; M.H. Sam Jacobson, *Using the Myers-Briggs Type Indicator Test To Assess Learning Style: Type or Stereotype*, 33 WILLAMETTE L. REV. 261 (1997).

52. The pioneer in this field is Daniel Goleman and rich literature has followed his pioneering book, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1995).

Internet, and are accustomed to hand-held devices of all sorts. They have experienced instant messaging and instant access to data and have commonly not spent hours in libraries pouring through printed texts.⁵³ They have taken a plethora of multiple-choice exams and they have likely learned in crowded classrooms. They have learned through short bursts of information à la Sesame Street, suggesting the increased role of visual learning. These issues will become more predominant over the coming decades. Thus, educational offerings have to be responsive to the students of today and tomorrow; we need, then, to envisage education for students vastly different from those of us doing the re-imagining.

VI. EXPANDING PARTICIPATION

In the context of business reengineering, it has been observed that the process requires what is termed as “cross-functional perspective.”⁵⁴ It is not enough if one is revamping the accounting

53. See, e.g., Richard A. Matasar, *Electronic Law Students: Repercussions on Legal Education*, 29 VAL. U. L. REV. 909, 910 (1995) (“Students no longer learn to write; they learn word processing. The transparency is a tool of the past; it is now replaced by an overhead projector attached to a computer. Books no longer are mere words with the occasional graphs; they are interactive with sound and links to other materials. Students brought up with this technology will need technology to learn. Thus, law schools not only will be pulled to change by the emerging technological changes within legal practice, they will be pushed to the same place by their students.”). See also Laura Justiss, *A Survey of Fee-Based Web Subscriptions in Academic Law Libraries*, 95 L. LIBR. J. 383, 383–84 (2003) (discussing the term “disintermediation.” “While originally applied to banking and financial institutions, [it] has been appropriated into the technology vernacular to describe the use of the Internet to sell products directly to customers, thereby eliminating the bricks and mortar retail intermediaries.” As she states, “Our concerns about disintermediation notwithstanding, it is apparent that Web-based subscriptions are, at the very least, here to stay and are likely to comprise an increasing portion of our collections as the technology continues to advance.”) *Id.* at 400.

54. See Hammer, *supra* note 12, at 5 (“One way to ensure that reengineering has a cross-functional perspective is to assemble a team that represents the functional units involved in the process being reengineered and all the units that depend on it. The team must analyze and scrutinize the existing process until it really understands what the process is trying to accomplish.”); Robert Kling & Tom Jewett, *The Social Design of Worklife With Computers and Networks: An Open Natural Systems Perspective*, 39 ADVANCES IN COMPUTERS 239–93 (Marshall Yovitz ed., 1994), available at <http://www.slis.indiana.edu/faculty/kling/pubs/worknt.html> (last visited Oct. 21, 2004) (“Since many work steps in business processes are executed by people in different departments, this view encourages a cross-functional perspective . . . the business process view of the Accounts Payable (A/P) process sheds new light on it as a complicated, slow, error-prone process

department, for example, to speak only to those in that department. To re-imagine, one needs to include within the team those who use and those who depend on the processes being revamped. So, in the context of the accounting department, the team should include customers (who receive or send invoices) and those within the company who generate the invoices, like members of the sales force.⁵⁵

Applying this approach to legal education, we would be well served to ask currently practicing lawyers what skills they want and need in new lawyers of the future; we would want to know the criteria they currently and prospectively might use to select new lawyers. It would be useful to include clients — the ultimate end users of legal education. We should probably know what encourages clients to select particular lawyers. We also need to add judges and governmental agencies as team members. Further, we should speak to current students — students who have partaken of the existing process recently. Stated differently, reengineering legal education cannot occur solely among the academics within the legal ivory tower; there are too many stakeholders for that. We must move beyond the tower so that choices and approaches are more richly informed by what is occurring in the trenches. This is all the more important since many law professors have not practiced law for years, and others may never have practiced at all. The role of lawyers in the coming decades may not resemble the world of lawyering in which current professors were educated. With these steps and caveats in place, we can proceed to the actual reengineering/re-imagining of first year legal education.

VII. THE REENGINEERING EXERCISE

So, here is the challenge. What would happen if we erased the lines and pondered an integrationist approach to legal education — a curriculum where skills and substance were combined and taught together? Start with the following: Suppose that over the first year, instead of the current curriculum just described, students took four courses, one at a time, each respectively titled: *Contracts in*

involving many different departments and personnel Seen from this perspective, the opportunities for improvement are greater.”).

55. See Kling & Jewett, *supra* note 54; Hammer, *supra* note 12, at 3–4.

*Action, Torts in Action, Criminal Law in Action and Property in Action.*⁵⁶ Each would run for seven weeks, five days a week yielding, at year's end, the same credit hours as is currently ascribed to (and required for, according to the ABA accreditation requirements) the first year of law school. (Civil Procedure would be integrated within each course as will be described.) In addition to these four courses, there would be an orientation-like introductory one-week course upon entry into law school — on the role and function of the lawyer in today's society — an overview of the kinds of tasks lawyers handle. There would also be a concluding week as part of the courses at the end of the first year — co-taught by members of the teams teaching the four courses — bringing all the substantive materials together in a series of hypotheticals and brainstorming sessions. This last week would, in essence, employ a legal think-tank, legal strategy-like approach — similar to that employed in law firms where partners and associates brainstorm about a particular legal problem. An exam (the content of which would need to be assessed) would be held at the end of each seven-week course, testing the materials covered,⁵⁷ and there would be ample opportunities within the courses for grading on smaller exercises. Class participation would be a serious component of the grading.

Now, to get the full sense of this change, we need to delve into what the four courses themselves would address, and here is the place we need to do the real re-imagining. For these purposes, I am going to describe the *Contracts in Action* course — not because it is essential to lead with, but rather because it is the subject with which I am most familiar and hence the reengineering is easier to imagine. Indeed, different students could start with different courses over the first year to balance scheduling.

In this seven-week period, students in *Contracts in Action* would do the following: (1) Learn substantive Contract law in class ses-

56. See Colorado College, *The Colorado College Block Plan* (2004), available at <http://www.coloradocollege.edu/welcome/blockplan> (last visited Oct. 19, 2004) (Colorado College has adopted something similar in its first year and upper level courses where students participate in the "Block Plan." The Block Plan enables students to take a single course rather than the usual three or four courses offered at most colleges. This one course is intense and creates a different in and out of class dynamic.)

57. It would probably be worth questioning whether an exam is even needed, but I leave that thorny issue for another day.

sions that would meet daily (this would mirror, more or less, the current amount of substance usually taught over one or two semesters); (2) Perform legal research and write research memos on the Contracts law issues in reasonably close proximity to when they are being taught; (3) Conduct simulated client interviews on issues related to substantive contract law, again, coordinated with the substantive issues taught; (4) Address ethical dilemmas raised in a contract's situation arising out of the substantive material taught; (5) Learn aspects of Civil Procedure (jurisdiction, venue, pleadings, rules) and then prepare a complaint, answer and draft interrogatories related to a dispute involving a contract; (6) Negotiate a settlement and then draft the settlement agreement of the contract dispute raised in Item Five; (7) Prepare documents seeking a preliminary injunction when the settlement is breached; (8) Observe an actual litigation in a courtroom; and (9) Identify the other substantive areas of law that may be implicated and learn about how they would affect all of the above, with particular emphasis on the substantive unit that would be taught next . . . say *Torts in Action*.

To make this even more concrete, let me outline one week of the course — with its various component parts. Suppose that the week in question was dedicated to the topic of offer and acceptance. The legal doctrines, including a detailed analysis of U.C.C. Section 2-207, would be addressed. Counter-offer, preliminary negotiations and the like would also be covered.⁵⁸ In terms of legal research, posit that students were asked to research how offer and acceptance occurs online and what counts as “acceptance.”⁵⁹ And, the students would look at existing legal debates about that issue.

58. These are materials traditionally covered in first year Contracts. See, e.g., E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES & MATERIALS* 186 (7th ed. 2003); EDWARD J. MURPHY ET AL., *STUDIES IN CONTRACT LAW* 245–391 (6th ed. 2003). Some of the types of cases addressed would include the proverbial “chestnuts” and then some recent cases (prospective chestnuts?): *Klocek v. Gateway*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (order vac. for lack of subject matter jurisdiction, 2001); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000); *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689 (Minn. 1957); *Carlill v. Carbolic Smoke Ball Co.*, 1 Q. B. 256 (C.A. 1892).

59. E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES & MATERIALS* 151 (6th ed. 2001); EDWARD J. MURPHY ET AL., *STUDIES IN CONTRACT LAW* 245–391 (6th ed. 2003); E. ALLEN FARNSWORTH, *CONTRACTS* 139, 143 (3d ed. 1999). See *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).

In terms of lawyering skills and writing, consider requiring students to negotiate with each other to reach an agreement (actually getting to the offer that is accepted if possible) and then to craft an acceptable term sheet. (Just thinking about what terms would need to be in a term sheet is an activity worth doing.)⁶⁰ The students would then discuss, with a lawyer present, how binding that term sheet is in the absence of a definitive agreement.⁶¹ The inevitable failure of some student groups to even reach an agreement would be discussed as well. The Civil Procedure professor could then address how, if the term sheet were not abided by, the lawsuit would proceed. Would a complaint or a preliminary injunction or some other approach be most appropriate?

Clearly, these new courses present an ambitious agenda, and the courses could not and would not be taught by one person. Indeed, I suspect there is no one person who could teach any one of these courses in terms of knowledge base and certainly no one person would survive that much in-class “face” time — even if it is only limited to seven weeks. Instead, the course would be taught in a manner very different from current law teaching — there would be co-teaching with multiple co-teachers. Each course would have a designated leader, probably (but not necessarily) the person with the expertise in the substantive area of the course. The leader would be present a good deal of the time, participating in class sessions that involved other aspects of the course where other professors would move in and out. Each course would also have a research professor, a writing professor, a Civil Procedure professor and a skills professor. These professors would be in charge of activities, exercises, and learning experiences, that were synergistic with the substance being taught.

Clearly, creating the course itself would require an enormous coordinated (and costly) effort — and so would the actual running

60. Examples of what may be found in a term sheet are: key substantive provisions (price; quantity); key defined terms, the effective date, termination date, essential events of default. See GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION* 59 (2003).

61. This topic is at once theoretical and practical. Consider cases like *Empro Mfg. Co., Inc. v. Ball-Co Mfg., Inc.*, 870 F.2d 423 (7th Cir. 1989); *Texaco Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988). Consider law review articles like E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

of the course. And, perhaps it goes without saying but the signal to students would be that everything taught is not only related but of co-equal importance. In other words, researching and writing about Contract law is as important as substantive Contract law.⁶² Indeed, that lesson is a central one for lawyers — a good lawyer knows the law, can process information, can draft, can research, can handle a client, can strategize, can anticipate litigation. Moreover, the people teaching are deserving of co-equal respect. Those teaching practice skills are no less valuable than those teaching the “substantive” skills.⁶³ I’d suggest adding two other members to the team — to appear on occasional bases: lawyers engaged in practice and judges. In a given class, the preliminary injunction motion could be argued before a real judge (assuming the underlying materials were taught and learned); a class involving drafting force majeure clauses and representations and warranties could involve a practicing lawyer who brings into class examples from the real world — after the students are taught and learn the underlying le-

62. James E. Moliterno & John B. Mitchell et al., *Seattle University Skills Development Series*, 47 J. LEGAL EDUC. 280, 281 (1997). (As a student of Professor Moliterno states, “I learned more about contracts by doing that simulated exercise [or “by working in the clinic,” or “by having a summer job,” or “by doing that writing assignment”] than I learned in an entire semester of the Contracts course.”); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It & How to Achieve It*, 76 NEB. L. REV. 561 (1997); Leigh Hunt Greenshaw, “To Say What the Law Is:” *Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861 (1995).

63. Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. MARSHALL L. REV. 303, 304 (2000) (“Treating legal skills as distinct from legal substances cedes to the bar a crucial part of the faculty’s role in preparing students for their professional lives, whether as practicing attorneys, judges, or scholars.”); Ilhyung Lee, *The Rookie Season*, 39 SANTA CLARA L. REV. 473 (1999) (“In reality, both the legal writing subject and its teacher have been much maligned by the legal academy.” *Id.* at 489. “Legal Research and writing should no longer be considered a minor activity on the fringes of the law academy For too long under-appreciated and under-valued, it is time to give the subject the recognition that it is due.” *Id.* at 501); Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 LEGAL WRITING 225 (1999) (“In most cases, the perception of legal research and writing teachers still is that they lie at the edge of the academic faculty at their institutions; this despite the widespread recognition among practitioners and judges that legal research and writing are among the most important skills for a young attorney to possess.”); Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 141 (1998) (“Writing is dangerous because it highlights what is not present in the traditional doctrinal course: an opportunity to experiment with the hypotheses of doctrinal legal science.”).

gal doctrines. While this course seems daunting in terms of workload, it is worth remembering that this is the only course the students would take — and hence the allocation of time in total would not be vastly different from that currently employed.⁶⁴

Drawing again on the business model, one could term this teaching approach to the concept of horizontal teaming that is common in businesses.⁶⁵ Instead of a division of labor among individuals in distinct departments, companies are recognizing the value of different individuals within a company working together on projects — where everyone has a stake in the outcome and where the collaborative effort yields better results than individuals proceeding in their own spheres. This concept is already in play in some aspects of education.⁶⁶ Consider, for example, the team teaching that is done in elementary education where students are taught by a team of teachers, with one “major” teacher coordinating the process.⁶⁷

Each week, the *Contracts in Action* class activities would be varied. Some would be done with the group as a whole. Other activities would call for the class to be broken into subgroups to develop greater intimacy and to encourage collaborative efforts. When small group work is called for, members of the faculty team could

64. The Colorado College experience, see *supra* note 56, does not give students less work overall. It reallocates work. Students remain prepared for graduate schools despite a vastly different approach to undergraduate education.

65. *Horizontal Integration* (2004), available at <http://www.quickmba.com/strategy/horizontal-integration> (last visited Nov. 1, 2004) (Horizontal integration is “the acquisition of additional business activities at the same level of the value chain.” An example of horizontal integration in the entertainment sector would be a company owning television, magazines, radio, etc.). See also MORRIS A. GRAHAM & MELVIN J. LeBARON, *THE HORIZONTAL REVOLUTION* (1994).

66. *Faculty Collaborative Efforts*, at http://vita.tamu.edu/faculty_collaborative.htm (The Texas A&M faculty met with community college professors “to give community college faculty an understanding of the new engineering curriculum at Texas A&M University and how the math/science/engineering courses are integrated” and “discussion on how similar subjects could be integrated at community colleges. The afternoon session of the workshop addressed various concepts of Active-Collaborative Learning (ACL) and how it can be used in the typical college classroom.”).

67. ANN E. AUSTIN & ROGER G. BALDWIN, ASHE_ERIC HIGHER EDUCATION REPORT No. 7 (1991); Betty Robinson & Robert M. Schaible, *Collaborative Teaching: Reaping the Benefits*, 43 *COLLEGE TEACHING* 57, 57–59 (1995), available at <http://www.questia.com/PM.qst?a=O&d=94296503> (last visited Nov. 1, 2004); Barbara Leigh Smith, *Team Teaching Methods*, in *THEORY AND APPLICATIONS* 127–37 (K. Prichard & M. Sawyer eds., 1994).

all handle a given group, even if it is not in one's particular area of expertise. Stated differently, the seven weeks would be composed of different tasks, different approaches, different configurations of people and space. Email listserves, classroom websites and other types of technological support would be created. And, as is perhaps too obvious to mention, there would need to be a set of course materials/problems/exercises. These could, in part, be culled from what exists but some would have to be crafted from scratch.

VIII. OPERATIONALIZING THE NEW COURSES

There are clearly a number of significant hurdles in implementing the described courses and while a full discussion of implementation is beyond the scope of this article, several preliminary observations are worth noting.⁶⁸ Start from this premise: institutionalizing these courses will not be easy. Both their design (materials, content choices, coordination of activities) and their effectuation are hard. And, they come at a cost in terms of faculty time. The proposed courses will likely require more faculty and greater time demands on a professor, particularly the leader — although one can imagine the appeal if, for example, the leader's teaching role in a semester was limited to seven weeks, leaving that professor free to write, research or speak during the remaining seven weeks and perhaps be light-loaded for the next semester. For those for whom the first year courses are currently year-long, the ability to garner non-teaching time after the intense course terminates would be even greater.

These new courses require considerable coordination at all levels — in terms of staffing, rooms, grading, student interaction. And, there would need to be considerable pre-course planning both initially and as an ongoing matter. That takes resources away from other activities — at least until the course is up and running. Perhaps the wisest next step, given these hurdles, would be the implementation and testing of the program on a pilot basis with a portion of the first year class. That testing could take several forms

68. One obvious and unanswered issue is how the ABA, as the law school accrediting body, would respond to this vastly different approach to first year legal education. Like other issues within this paper, I leave that issue for another day. It is important, however, that it not go unnoted.

— comparing knowledge, skills and other pre-determined gains in this pilot program as compared to the more traditional first year course. And, there could be continuous tracking through upper level courses and on the bar exam. Satisfaction surveys, already underway within legal education, could be utilized and compared to other groups of students. Perhaps a longitudinal study assessing professional satisfaction, professional success and career choices could be measured as well, although that is at once a costly and ambitious research agenda.

There are the overarching questions of whether students would both enjoy and learn well in this approach and whether that learning would translate into bar passage (a prerequisite to law practice, although some would say poor measure of lawyering skills and future success)⁶⁹ and excellence as a lawyer.⁷⁰ (We currently measure the former but we do not currently assess the latter.) There is the very legitimate debate over whether it is worth sacrificing content, which would undoubtedly occur, in exchange for added skills.⁷¹ There are also issues of testing — in terms of what gets assessed and how — and the proverbial issue of criteria for grading and appropriate grading norms. While the latter issue is not unim-

69. John Locke Organization, “Unauthorized” *Practice of Law* (2002), at http://www.johnlocke.org/agenda2002/legal_reform.html (last visited Oct. 19, 2004) (“The law school/bar exam gauntlet is neither necessary nor sufficient to ensure a high degree of competence in legal service, because people can learn what they need to about the law in order to render competent service without having graduated from a law school Nor is bar membership a sufficient condition for competence. Lawyers make many errors, as do practitioners in all fields of human endeavor. No course of training or set of licensure requirements can eliminate error.”); Karen W. Arenson, *At CUNY Law, a Bit More Gavel*, N.Y. TIMES, Dec. 11, 2000, at B1, available at <http://www.lawschool.com/cuny-nyt.htm> (“Many at the school said that the [bar] exam was not a good measure of anyone’s ability to be an effective lawyer . . .”).

70. Student satisfaction with the proposal and current dissatisfaction with current legal education is another issue worth exploring. There is no shortage of criticism of student perception of the current state of legal education, including studies demonstrating that the current system is particularly unsatisfactory for women and minorities, two groups whose attendance will continue to increase prospectively — giving us, then, every reason to address their concerns now. For a detailed overview, see James R.P. Ogloff et al., *More than Learning to Think Like a Lawyer: The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73 (2000).

71. Commonly, this debate is framed in terms of sacrificing coverage. But, that presumes that what is being offered in the stead of what is deleted is not substance. Skills are a piece of the “substantive” knowledge base of lawyers. What is sacrificed is coverage — something that regularly occurs in all academic settings.

portant, these are not new issues; they are present in the current system where we actually spend remarkably little time focusing on how to test and whether all students with competence are tested in optimal ways to reveal that competence.⁷² For example, if oral advocacy is a skill, why not grade a student based on a meeting with a professor to discuss a series of relevant legal questions/problems? If speed is not an ingredient in most legal work, why time limit exams? There is also the significant question of how the market (and we should not forget the response of alums) would react to this re-engineering of the first year (and perhaps beyond) and whether students would flee from (or perhaps be drawn to) the school adopting it.⁷³ Perhaps alums would curtail donations, given the perceived break from tradition, although one could posit the opposite result for alums whose legal training left them less than satisfied. In his recent book, *Shakespeare, Einstein and the Bottom Line*, David Kirp gives us some hope that changes will not necessarily lead to massive flight from established institutions; indeed, change may yield a stronger and more diverse student body.⁷⁴

Then, there is another and in some ways more profound hurdle that reengineering presents — a hurdle that goes beyond practical, institutional and market constraints. We would need to re-imagine legal doctrine itself. As soon as we move beyond a survey course and instead focus on core principles and problem-solving, something that seems like an inevitable piece of integrating legal education, we would have to identify the central assumptions of our discipline, the validity of those assumptions and what distinguishes (or makes compatible) our body of knowledge. Since, to use Contracts again as an example, the newly envisioned course could not delve into every legal doctrine that undergirds contract law and every provision of the U.C.C., professors would need to distill Contract law's central assumptions and to examine those assumptions

72. Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. LEGAL EDUC. 475, 485 (2003) ("Grades and test scores together predict only about a quarter of the variation in law school performance. And they are by no means adequate to predict performance in practice. The few attempts to follow students after graduation have not found significant correlations between law school grades and later achievements."); Philip Kissam, *Law School Examinations*, 42 VAND. L. REV. 433 (1989).

73. This is an aspect of the signaling discussion, see Spence, *supra* note 39.

74. DAVID L. KIRP, *SHAKESPEARE, EINSTEIN AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION* (2003).

critically. We do some of that now, but I suspect most of us opt for the survey course approach and hence, at least in first year, spend less time communicating the deep structure of our particular discipline. When other disciplines are then implicated and problems designed, we would need to focus on these critical assumptions — and that is a challenge far beyond, although perhaps more interesting than, hurdles that would be classified as pragmatic.

So, with all of these observations, the question is whether the effort is worth the candle. It is to that last question that we now turn.

IX. CONCLUSIONS — FROM THE INCREMENTALIST APPROACH AND BEYOND

There are many obvious advantages to the suggested approach. It is integrationist in orientation. It provides contextual learning. It exposes students to professionals working together. It is cooperative in orientation. It at once provides depth and breadth. It exposes students to professors and in-the-trenches professionals. It attempts overtly to teach the skills that lawyers use and need. It may increase student satisfaction with their education and may motivate learning, particularly in the context of difficult material.⁷⁵ The revised first year also strikes me as exciting and interesting and engaging and novel. It seems like it would be educationally innovative and productive and, dare I say it, fun. The revised approach clearly needs more thinking, more time to settle, more input from many people with lots to add to this process. But, at least thinking differently moves us even further outside the box in which we have been dwelling for decades. That box, with its walls firmly sealed at least in many institutions, may be shortchanging new generations of law students entering an evolving legal world.

That said, this thought exercise may scare some readers who are wary of reengineering. But, there are ways of thinking about this that do not radically change what we currently do and allow us to move more slowly in trying out the suggested ideas. For exam-

75. Phillip Schlechty points out the value of student perseverance if that stick-to-it-ness is the product of engagement rather than fear. In the law school setting, replete with difficult materials, coercion and fear are, unfortunately, quite common. *See* SCHLECHTY, *supra* note 8.

ple, perhaps this article will encourage professors to co-teach aspects of the first year — for a day or two. Maybe it will encourage a legal research and Contract law professor to design an exercise together. Maybe it will motivate a skills professor and a Contracts professor to add a negotiating session within a class period or to share class periods for a week. Implementing less than dramatic change is also productive. Each of these steps may, in the end and with the passage of time, lead to courses like *Contracts in Action*. But, even if they do not, they move us into thinking more broadly about the legal education we currently provide to first year students. And perhaps this exercise pushes us to rethink the other years of legal education — beyond the first year. Certainly changing the first year without many applicable changes in the upper years would leave an unnecessary and problematic schism. And, we could investigate such questions as to whether three years of full-time school is the optimal length for a J.D. degree.

Although I understand and appreciate the appeal of an incremental approach,⁷⁶ I remain convinced that we benefit from thinking like the business reengineering folks — even if at the end of the day, we do not do everything we re-envision. I was recently at a conference at William and Mary Law School on the impact of electronic filing of court records.⁷⁷ In that context, one of my colleagues here at New York Law School, Professor Beth Noveck, suggested that courts have tended to store documents in file cabinets, where everything is ordered and sequenced in a certain prescribed way.⁷⁸ Online filing of court records, she observed, offers the opportunity to take apart the cabinets, to rethink how the information should be stored and how it could be used.⁷⁹ Phrased differently, unconstrained by physical cabinets, we can think

76. Total quality management (TQM) is an incremental approach and less invasive than business process reengineering. The following article identifies libraries utilizing TQM to improve the services provided to customers. See Denise G. Masters, *Total Quality Management in Libraries*, ERIC DIGESTS (1996), at <http://www.michaellorenzen.com/eric/tqm.html> (last visited Oct. 20, 2004).

77. The Courtroom 21 Project, *Third Courtroom 21 Conference on Privacy and Public Access to Court Records* (Feb. 27–28, 2004), at <http://www.courtroom21.net/privacy/index.html> (last visited Oct. 20, 2004).

78. Beth S. Noveck, *Privacy, Access and the Visual Persuasion of Electronic Legal Information* (draft on file with author).

79. *Id.*

differently about information and its storage, its use, its import. We can literally (and figuratively) think outside the box.

Applied to the first year of legal education, we need to think about dismantling, at least mentally, the cabinets in which we have captured and then taught information. We need to think about what happens if we eradicate the cabinets and ponder what to do with the information we want to impart. And we do not need to limit our rethinking to legal education. The reengineering process tried here can be applied to other graduate programs, undergraduate education and even elementary and secondary education.⁸⁰ Like law, other fields suffer from operating as they have for decades.⁸¹ The aim of liberal arts education today, for example, may require skill sets not needed, let alone contemplated, in the nineteenth or twentieth centuries.⁸² Training doctors and business people may require different approaches. What business reengineering tells us at the end of the day is that we should let our minds imagine . . . even when it scares us. We might just like what we come up with when we free ourselves of existing constraints and dare to think more broadly.

80. Consider the new curriculum adopted by Wheaton College described at Wheaton College's On-Line Catalog, *available at* <http://www.wheatoncollege.edu/Catalog/CONX> (last visited Nov. 1, 2004) ("Wheaton's unique Connections program provides an exciting way to explore different areas of knowledge and different approaches to problems. All Wheaton students must take either two sets of two-course connections (a total of four courses), or one set of three connected courses. Courses are linked across any two of six academic areas: creative arts, humanities, history, math and computer science, natural sciences, and social sciences.").

81. Carol Christ, *Crossing Intellectual Boundaries: Human Imagination Fuels Both Science and Literature*, SMITH ALUMNAE Q. 15 (2004) (Smith College President Carol Christ recently co-taught a course combining literature (her specialty) and science. The course was organized around four scientific topics with an accompanying fiction and also non-fiction for each unit. With respect to same, President Christ remarked, "The most surprising thing I learned is the extent to which the worlds of science and fiction are intertwined. . . . Smith students graduating today enter a world profoundly dependent in science and technology. They must have the capacity to make meaningful connections across intellectual boundaries.").

82. See, e.g., Karen W. Arenson, *New Course for Liberal Arts: Intro to Job Market*, N.Y. TIMES, June 19, 2004, at B3, *available at* <http://www.nytimes.com/2004/06/19/education/19PROF.final.html> ("After years of sending students out for internships to give them a taste of a possible career, college officials are beginning to look for ways to turn their faculty and classes to bolstering the career prospects of their liberal arts students.").

