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## Sim City: Teaching “Thinking Like a Lawyer” in Simulation-Based Clinical Courses

Kris Franklin  
*New York Law School*

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KRIS FRANKLIN

## Sim City: Teaching “Thinking Like a Lawyer” in Simulation-Based Clinical Courses

ABOUT THE AUTHOR: Kris Franklin is a professor of law at New York Law School and the director of New York Law School’s Academic Skills Program. The author wishes to express her appreciation to Elizabeth Cooper, whose thinking about teaching clinical simulations prompted this piece.

## I. INTRODUCTION

*To American legal education, the significance of being able to think like a lawyer lies not only in its potential to encompass significant educational imperatives but also in the powerful pedagogy with which the phrase is inextricably linked.*<sup>1</sup>

Referring to classic Socratic questioning, the authors of the widely-praised Carnegie Report thus sweepingly (and accurately) advance the invisible syllogism undergirding the design of legal education in the United States:

1. American law students must learn to “think like lawyers.”
2. Case-based Socratic dialogue is what teaches students to think like lawyers.
3. Therefore law schools base their primary teaching on Socratic discussion of assigned case law.<sup>2</sup>

The Report acknowledges the utility of the Socratic method, which provides a kind of “cognitive apprenticeship” in legal thinking,<sup>3</sup> but bemoans the fact that other approaches to and dimensions of legal education are too often thought of as add-ons.<sup>4</sup> As an alternative to the traditional model, the Report calls for a more effective integration of clinical education and doctrinal teaching.<sup>5</sup>

The authors of the Carnegie Report and most commentators on legal training in the United States take as a given the notion that courses in basic legal doctrine, taught through Socratic questioning about assigned series of cases, are fundamental not only, or even primarily, because they teach about basic topics of law, but because they hone students’ habits of mind.<sup>6</sup> In short, the Carnegie Report authors, like many observers of legal education, appear to take for granted the second proposition

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1. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 47 (2007) [hereinafter CARNEGIE REPORT].
  2. This construction deliberately echoes the traditional syllogism pattern: “All men are mortal. Socrates is a man. Therefore, Socrates is mortal.” RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE FOR CLEAR LEGAL THINKING 46 (3d ed. 1997). The pattern is frequently used to teach deductive reasoning, to the point that its inclusion in textbooks designed to introduce law students to legal reasoning is commonplace, perhaps even expected. *See, e.g., id.* at 46–47; CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 68 (5th ed. 2006); CATHY GLASER ET AL., THE LAWYER’S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY 64 (2002); NADIA E. NEDZEL, LEGAL REASONING, RESEARCH, AND WRITING FOR INTERNATIONAL GRADUATE STUDENTS 68–69 (2d ed. 2008).
  3. CARNEGIE REPORT, *supra* note 1, at 28.
  4. *See id.* at 191–92.
  5. *See id.* at 194–200. A main focus of the Carnegie Report is to advocate for what it calls an *integrative* approach to each aspect of the legal apprenticeship—the cognitive, the practical, and the ethical-social. *Id.*
  6. *See, e.g.,* MARTHA RICE MARTINI, MARX NOT MADISON: THE CRISIS OF AMERICAN LEGAL EDUCATION 58 (1997). *But see* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 130–61 (2007) (raising questions about the efficacy of using Socratic dialogue as the sole means of large-classroom teaching in law schools, and discussing ways in which the technique may best be employed); Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997) (providing support for the analysis of the use of Socratic teaching set forth in *Best Practices for Legal Education*).

in our invisible legal education conjecture:<sup>7</sup> that case reading and attendant interactive questioning constitute *the* way to teach law students the intricacies of legal reasoning.<sup>8</sup> Further, they seem to presume (wrongly in many cases)<sup>9</sup> that the goal of acculturating law students into the rigors of legal reasoning is substantially accomplished at the conclusion of the boot camp-style immersion students receive from the outset of their legal education.<sup>10</sup>

This explains why we often openly acknowledge that students may not necessarily retain the finer points of, say, vicarious liability doctrine in tort law—most important is that they learn how to approach and reason their way through the legal problems.<sup>11</sup> Once they have significantly mastered that skill, the thinking goes, law students are ready to begin to learn more precisely the subject matter that they may encounter after graduation, as well as to begin studying the less conceptual skills that they will need in their profession. Clinical education in all of its forms exists to serve this

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7. I use the term “conjecture” here as mathematicians and logicians do: to mean something generally presumed to be accurate, but not yet irrefutably proven. Merriam-Webster’s dictionary gives as its third definition of the term, specific to mathematics, “a proposition . . . before it has been proved or disproved.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 263 (11th ed. 2003). But the connotation of the term generally carries with it the presumption that the conclusion is probably true. *See, e.g.*, Wiktionary, <http://en.wiktionary.org/wiki/conjecture> (last visited Nov. 14, 2008) (indicating that, in mathematics, the term refers to a statement “likely to be true based on available evidence, but which has not been formally proven”).
  8. I am somewhat overgeneralizing here, of course. More importantly, in using the broadest and most base stereotypes about learning in law school, this discussion necessarily omits the now widespread acknowledgment of the central role that first-year training in legal writing has in acculturating students to legal thinking. But in seeking to describe the hallmark of contemporary indoctrination into legal modes of reasoning, the Carnegie Report reflexively, and almost exclusively, credits Socratic questioning in traditional doctrinal subjects. *See* CARNEGIE REPORT, *supra* note 1, at 47–87, 194.
  9. The rise in the importance of the field of academic support in law schools can be seen as an acknowledgment that many of the students who do not thrive or initially succeed in law school are nonetheless capable of doing so if taught more individually, or through different means. *See* Jean Boylan, *The Admission Numbers Are Up: Is Academic Support Really Necessary?*, 26 J. JUV. L. 1, 7–12 (2006) (assessing the value of academic support programs for ensuring the success of both traditional and non-traditional law students in the classic legal curriculum); Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839 (1997) (exploring the history of the academic support movement in legal education and describing how its teaching supplements traditional legal education).
  10. *See* CARNEGIE REPORT, *supra* note 1, at 185–86.
  11. *See, e.g.*, SARAH LAWRENCE-LIGHTFOOT, RESPECT 166–67 (1999) (providing a profile of law professor David Wilkins and observing that he is little concerned about teaching substance that “might be accomplished through directed reading” and he sees his primary goal as helping students “feel comfortable and to teach them a certain way of thinking . . . what we call thinking like a lawyer”).  
Most explorations into the purposes of legal education, particularly the most foundational training afforded in the first year of law school, attend far more heavily to the teaching of particular habits of mind than to the acquisition of specific knowledge. *See, e.g.*, Bethany Rubin Henderson, *Asking the Lost Question: What Is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 56–63 (2003) (defining the primary purpose of contemporary legal education as learning to think as lawyers do and exploring the functional and normative elements of such thinking).

latter profoundly *practical* function, in complement to the doctrinal instruction and rehearsal of legal reasoning skills offered in casebook courses.<sup>12</sup>

This conception of clinical teaching as an introduction to fundamental professional skills can undoubtedly be a good thing.<sup>13</sup> Clinical education has long been thought of as a way to bring more active learning, excitement, engagement, and even passion into the law school environment.<sup>14</sup> Clinical work allows, indeed encourages, students to connect their theoretical knowledge to the skills essential to lawyering work. But this attitude also reinforces the “additive” notion that the Carnegie Report ostensibly deplors: the idea that clinical experiences are something in addition to basic legal education, not that they are basic legal education in and of themselves.<sup>15</sup> Clinical education is not conceptualized as offering the *same* kind of “cognitive apprenticeship” as doctrinal classes; rather it is conceived as a complement to this education.<sup>16</sup> In other words, it does not teach students to *think* like lawyers, it trains them to *act* like lawyers once the cognitive training is fully in place.

Even clinicians sometimes make distinctions between the introduction to interactive lawyering skills thought to be taught in simulation-based classes, often open generally to second- and third-year law students, and the presumably more rigorous learning in the closely-supervised live-client clinics, usually offered only to small numbers of third-year students.<sup>17</sup> The idea seems to be that the simulation courses are somewhat akin to training wheels for lawyering skills—an arguably

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12. With its emphasis on clinical education as a professional apprenticeship, the Carnegie Report certainly adopts this view of clinical education as inherently focused on the practical aspects of legal training. See CARNEGIE REPORT, *supra* note 1, at 100, 195.

13. Indeed many have suggested, and several schools have adopted, the inclusion of training in clinical skills as a required part of beginning law students’ formative curriculum. See, e.g., Stefano Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, 13 J. LEGAL WRITING INST. 207 (2007).

14. See Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123, 126–28 (2000). This notion that clinical methodologies generate passion may account, at least in part, for the connection sometimes drawn between clinical education in law and the recent movement focused on “humanizing” legal education. The “humanizing legal education” scholarship is not necessarily drawn directly from the pedagogical thinking of clinicians, but seems to take for granted that hands-on teaching in law schools better serves law students, and does less damage to their emotional well-being and self-confidence than more traditional large-classroom modes of instruction. See Justine A. Dunlap, *‘I’d Just as Soon Flunk You as Look at You?’ The Evolution to Humanizing in a Large Classroom*, 47 WASHBURN L.J. 389, 391 (2008) (offering that “because of the nature of clinical legal education, most clinical law teachers do not need to do anything special to ‘humanize’ their teaching; it is an inherent part of the undertaking”).

15. See CARNEGIE REPORT, *supra* note 1, at 190–91.

16. See *id.* at 191.

17. Although, the distinctions among these traditional clinical offerings may be becoming blurred or perhaps obsolete. See David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191 (2003) (asking whether “case-centered,” live-client clinical teaching effectively covers the basic practical skills of interviewing, counseling, or negotiation); Maranville, *supra* note 14, at 130–36.

helpful tool in the learning progression, but only an early step toward more advanced course work covering the real thing.

In this essay I want to consider what happens if we think about clinical teaching of law in much the same way that we have come to think about the most formative stages of doctrinal teaching: that is, if we assume that the specific skills and information clinical teaching emphasizes are important, but ancillary, benefits to the ultimate project of “thinking like a lawyer.” This project is a thought experiment: I am not necessarily advocating for an entire reframing of the role of clinical teaching in legal education. In fact, I believe that clinical education, perhaps most especially the classic clinical experience of students being responsible for handling actual cases or parts of cases under the close supervision of an experienced teacher/lawyer, does a remarkably good job of simultaneously training students in all of the dimensions described in the Carnegie Report.<sup>18</sup> But by its very design this form of teaching is resource-intensive, hence usually available to only a small segment of the law school population. Moreover, it tends to be seen as a pinnacle educational experience in legal education, rather than a basic one that is and ought to be part of students’ *foundational* learning.

But I believe that imagining a different set of goals in clinical teaching, particularly in the most introductory simulation-based courses, leads to a conclusion that they are excellent places to learn and reinforce basic legal analysis.<sup>19</sup> Consequently, these courses can be thought of not simply as offering hands-on training in the sort of interactive skills not covered by large subject-driven lecture classes, nor only as an

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18. That is, by design, the interaction between senior-lawyer and junior-lawyer that constitutes the teacher/student relationship in a live-client clinical experience necessarily provides apprenticeship in the cognitive, professional, and ethical domains that the Carnegie Report embraces. See CARNEGIE REPORT, *supra* note 1, at 194–200.

19. I focus this essay primarily on simulation-based clinical teaching in part because the purposes of live-client clinics are somewhat different and have been amply articulated. The legion of articles describing the value of having supervised students represent clients as a learning experience could not usefully be tallied here. For one evocative rumination on the value of this form of clinical teaching, see Ian Weinstein, *Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to My Clinic*, 13 CLINICAL L. REV. 573 (2006). For a book-length exploration of two professors’ thinking about their clinical teaching, see PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION (1998). For a widely respected clinician’s thesis on state-of-the-art design in clinical legal education, see DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS (2002). There have been some explorations of the educative value of simulation teaching. See, e.g., Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 428–34 (2002), but fewer for supervised case-based teaching.

More consequentially with respect to cognitive instruction, live-client clinics are often limited to enrolling only third-year students by local practice order, whereas simulation courses can include second-year law students. Indeed, they often seem especially aimed at second-year law students, so rather than focusing intensively on one particular and usually narrow kind of practice experience, they can have a broader, more survey-like purview. This makes them especially well suited to teaching basic and advanced legal reasoning. Also, the design of simulation classes usually makes them better suited for enrolling a larger number of students than live-client clinics, thus offering a wider pool of students the benefit of this sort of training.

introduction into the “real” professional education offered in live-client clinics (although they certainly are both). Instead, we can conceive of simulation-based courses serving both of these functions and as ideal sites for teaching students both the most elemental as well as the most complex forms of legal thought. Together with the introductions offered in beginning doctrinal courses and legal research and writing courses, these sorts of classes can better prepare students to begin at a more advanced conceptual level, and consequently engage in more rapid and more sophisticated learning, both in subsequent live-client clinics and in actual practice settings.

## II. DEFINING THE SKILLS OF LEGAL THINKING

Of course, this raises a thorny question: exactly what *are* the basic skills of legal thinking? To consider seriously whether any particular type of law teaching emphasizes “thinking like a lawyer,” we should have some agreed-upon set of criteria for what that phrase signifies. Unfortunately, upon close examination, the meaning of the phrase turns out to be surprisingly opaque. “Thinking like a lawyer” is a phrase so routinely used and so often self-referential that its meaning is generally left unexplained, or at least ill-articulated.<sup>20</sup> Given the variability and subjectivity of potential meanings of the phrase, our use of it skates uncomfortably close to something that “we know when we see it.”

It is perhaps not surprising then, although possibly embarrassing to legal academia, that as recently as 2007, an article seeking solely to explore and define the meaning of the phrase “thinking like a lawyer” was still a valuable scholarly contribution.<sup>21</sup> Natt Gantt’s investigation of the phrase seeks to review existing theories about the constitutive skills required for legal reasoning and to break down “thinking like a lawyer” into its cognitive components.<sup>22</sup> To summarize (and risk oversimplifying)<sup>23</sup> his project, Gantt breaks down the aims of basic legal reasoning into seven overarching processes or intellectual skills:

1. problem solving;
2. identifying legal issues;
3. logical reasoning;

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20. As early as 1971, the Carrington Report on legal curriculum described the phrase as “so circular that it is essentially meaningless.” ASS’N OF AM. LAW SCHS., TRAINING FOR THE PUBLIC PROFESSION OF LAW: 1971 (Paul Carrington ed., 1971), *reprinted in* HERBERT L. PACKER & THOMAS ERLICH, NEW DIRECTIONS IN LEGAL EDUCATION 129 (1972).

21. See Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413 (2007).

22. See *id.* at 418, 421–36.

23. Gantt’s theories are far more sophisticated than this cursory summation allows. Moreover, he breaks many of the larger tasks (as listed *infra* text accompanying note 24) into far more detailed components. “Identifying legal issues,” for example, is subdivided into: assessing relevance, dissecting thought, and perceiving ambiguity. *Id.* at 445–57. Some components are further subdivided; for example, “assessing relevance” is subdivided into determining relevance before rules are known and determining relevance once rules are known. *Id.* at 445–53.

4. arguing from rules;
5. seeing all sides to a question;
6. attending to detail;
7. recognizing the “big” issues.<sup>24</sup>

With the existing lack of consensus regarding what the hallmark thinking of lawyers constitutes, it may be easy for any of those in the profession to quibble with Gantt’s list. Nonetheless, it provides as useful a summary as any of what we imagine to be the basic skills of legal thinking.

But such a tolling of proficiencies in legal thought raises the question of how beginning lawyers acquire and practice these reasoning skills. Paula Lustbader’s groundbreaking research on ways law students acquire mastery explicitly names a “Learning Progression” that takes place over five levels, encompassing twelve distinct stages.<sup>25</sup> For Lustbader, each learning stage, or “construction site” (she uses building metaphors throughout her article), is both additive and reflective. As students ascend to the next stage they “revisit previous ones and refine the skills they developed in the preceding stages. Each time they get a more complicated problem or begin mastering a new doctrinal area, they may have to start the whole process over again.”<sup>26</sup> Lustbader’s work helps to describe ways that law students learn, to diagnose student problems, and to explain how and why law students’ thinking can become stuck, and it prescribes stage-specific solutions for common problems that students encounter in their development as legal thinkers.

The model of the Learning Progression presupposes that there is a discernable hierarchy of beginning, intermediate, and more advanced means of legal reasoning—that is, it assumes that there are absolute distinctions between simpler and more complex forms of thought.<sup>27</sup> In this regard, Lustbader’s theory echoes the more general classification of orders of conceptual skills that general educational researchers have been developing for more than half a century.

One influential general educational theorist, Benjamin Bloom, proposed more than five decades ago in his seminal *Taxonomy of Educational Objectives* that cognitive operations could be organized into six levels, moving from the simplest through

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24. *Id.* at 436–78.

25. See Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315 (1997).

26. *Id.* at 323 (citation omitted).

27. Consequently, the model presumes that there exists a general consensus of what each form of thought consists of. In light of the multiplicity of meanings “thinking like a lawyer” might be given, this presumption is certainly challengeable. Nonetheless, it is one I agree with. Legal professionals can debate the details of what constitutes “smarter” or “more simplistic” thinking in law, but most would agree that such distinctions do, in fact, exist. I imagine, too, that *details* of what a hierarchy of legal reasoning skills should look like might warrant further theorizing. But like “thinking like a lawyer” itself, the very notion of a progression or ranking of thinking processes in law is a profitable one to consider even if we do not wholeheartedly ascribe to it or have not fully determined precisely what it entails.



increasingly complex operations to the highest orders of conceptual thinking.<sup>28</sup> Bloom's early work has been revised and re-examined over the years, but the essence of his categorizations of thinking, commonly known as Bloom's Taxonomy, remains well-respected and commonly used.

Contemporary education theorists, following Bloom's Taxonomy, have articulated six distinct levels in the cognitive domain (the "Taxonomy"):

- I. remembering;
- II. understanding;
- III. applying;
- IV. analyzing;
- V. evaluating;
- VI. creating.<sup>29</sup>

While more expansive and layered versions of the Taxonomy have sometimes been represented as a wheel, the cognitive levels listed above are most often organized within an upside-down pyramid or in other ways portrayed wholly hierarchically.<sup>30</sup> Thus, in concordance with Lustbader's theories, the Taxonomy presumes that there exist both lower and higher forms of thinking.

This notion makes intuitive sense to anyone who has ever graded a set of law school exams. Some modes of thinking about legal problems simply seem more sophisticated, more advanced, just plain *smarter* than others. Legal educators wish that we could somehow get all of our students to produce this higher-order analysis of legal problems. This suggests, then, that one important objective of education, perhaps the paramount one, is to move students along to the most advanced cognitive modes.

Certainly both Lustbader and Bloom, and his followers, do not believe that learning is *only* a progression from one stage/site/level of thinking to the next. Nor do they suggest that all students begin or end at the same place. Nonetheless, their schemata explicitly employ hierarchies from lower to higher modes of thought, from the basic to the complex, and take for granted that students must pass sequentially through each stage before moving onto the next.<sup>31</sup> Indeed, legal education often (perhaps even usually) does follow that trajectory. Many students, whatever their

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28. See A COMM. OF COLL. & UNIV. EXAM'RS, *TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS, HANDBOOK I: THE COGNITIVE DOMAIN* (Benjamin Bloom ed., 1956) (introducing the Taxonomy and explaining its functions and uses).

29. See *A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM'S TAXONOMY OF EDUCATIONAL OBJECTIVES 31* (Lorin W. Anderson et al. eds., abr. ed. 2001) [hereinafter *REVISED TAXONOMY*] (summarizing a cumulative investigation of Bloom's Taxonomy and proposing a contemporary consensus of its working parts).

30. Circular representations of the Taxonomy generally include all three of the educational objective "domains" that Bloom identified—cognitive, affective, and psychomotor. Of these, Bloom's cognitive domain usually garners the most attention and is the only one addressed in the common pyramidal representation of Bloom's orders. See *generally id.* at 258–59.

31. Lustbader, *supra* note 25, at 354 ("[R]emember that most students must progress through this series in sequence.").

prior academic achievements, enter law school with little to no real understanding of what will be expected of them, and spend much of the first year reshaping their intellectual landscape.

Yet learning is much messier, more recursive, more patchy than these models may seem to admit.<sup>32</sup> Students often move through the experience of law school not fully aware of what level they are on; occasionally they venture into new, more advanced levels without having “graduated” from the previous stage; equally as frequently, they dip back and forth between the basic and the complex.<sup>33</sup> It stands to reason, then, that even if primary doctrinal teaching in the first year of law school does a good job of inculcating legal reasoning skills (as the Carnegie Report posits they do),<sup>34</sup> the task is hardly completed after one year of legal study. Not all students will have mastered the nuances of interpreting law and applying rules to facts, but even those who have successfully done so should further aspire to advance their thinking.

Consequently I have found Bloom’s Taxonomy to be a useful tool in crystallizing my own understanding of the different levels on which my students may be operating. In fact, I have adopted a short summary of the Taxonomy in the form of a pamphlet-sized “flip chart” as a helpful teaching tool in some courses.<sup>35</sup> The flip chart, while not designed precisely to describe forms of legal reasoning, is easily adaptable to law. It makes explicit the various levels of thinking that lawyers may employ,<sup>36</sup> providing convenient examples of the forms of questions that each level of thinking addresses.<sup>37</sup>

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32. Moreover, Lustbader would likely agree with that assessment of law students’ progress. *Cf. id.* at 323.
33. This perhaps argues for teaching law students to adopt the kinds of engaged self-awareness of progress in learning advocated by Michael Hunter Schwartz. *See generally* MICHAEL HUNTER SCHWARTZ, *EXPERT LEARNING FOR LAW STUDENTS* (2005). Schwartz urges law students to become “self-regulated learners,” moving repeatedly and seamlessly between planning, performing, and reflecting on their learning. *Id.* at 3. Doing so, he suggests, has been shown to improve students’ performance in a variety of disciplines. *See id.* at 3–5. It stands to reason that if progression among levels of thinking is a complicated process, teaching students to be attentive to their own learning might help them be more attuned to their own cognitive processes.
34. *CARNEGIE REPORT*, *supra* note 1, at 51–54.
35. *See generally* EDUPRESS, *QUICK FLIP QUESTIONS FOR THE REVISED BLOOM’S TAXONOMY* (2001) [hereinafter *TAXONOMY FLIP-CHART*]. This flip-chart, which promotes itself as “an indispensable tool for . . . [t]eachers . . . [p]arents . . . [and] [s]tudents,” has stacked tabs arranging the various levels vertically. *Id.* The page for each level offers key words (generally verbs) that epitomize the work being done on that level and shows examples of the kinds of questions an inquiry at the level might generate. I have found this flip-chart to be a good resource because it is intuitively organized and inexpensive. My thanks to Colleen Grady, who introduced me and many others to this chart during a 2007 conference presentation.
36. Understanding the various levels of thinking is a worthwhile goal, at least according to those who advocate the value of metacognition for adult learners. *See* Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1 (2003); Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 MICH. ST. DCL L. REV. 447. There has been discussion of teaching metacognitive strategies to law students for at least two decades. *See* Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 478–79 (1988).
37. The chart helps students identify, understand, and assess the differences among intellectual tasks such as summarizing the material they study (Level II—understanding); making inferences or categorizations

The Taxonomy is a useful tool for identifying more basic and more advanced thinking in law. It can show precisely what we expect law students to master early on in their legal training: not simply remembering and understanding legal concepts, but also applying them in order to analyze new scenarios. But as much as we want these mid-level mental processes to become ever more intuitive, automatic, and expertly-executed, we also want to speed law students toward the most sophisticated forms of thinking in and about law.

### III. SITUATION-BASED PROBLEM-SOLVING TEACHES AND DEVELOPS THESE REASONING SKILLS

If we are willing to consider clinical teaching as training in legal thinking, it is not hard to conclude that simulation-based courses fulfill (and advance) the role of “cognitive apprenticeship” in complement to doctrinal teaching. After all, it is not inevitable or even guaranteed that students will pick up cognitive skills in doctrinal classes, to the extent that there is nothing about learning contract law that *necessarily* teaches students the habits of mind that define legal thinking. Rather, law school faculty deliberately organize the experience of introductory doctrinal classes to make that process an intrinsic part of the course, and stress legal analysis as one of the major components of it. There is no essential reason that clinical courses cannot be conceptualized the same way—as arenas that emphasize both content and a rigorous training in process.

As an example, let’s imagine a fairly typical scenario designed to teach client counseling and negotiation. The student possesses some basic information about the client’s factual scenario<sup>38</sup> and must work with the client to prepare for upcoming settlement talks. What kind of questions does the student need to ask, and how would she answer them in order to help the client work through the problem successfully?

Usually, the student’s best strategy would be to think through the problem by starting from the end point: that is, she would work in conjunction with the client to define the ultimate goals for settlement.<sup>39</sup> But to define realistic goals means that the student must have an extremely nuanced understanding of the client’s current situation. To get *there* she has to have discovered as much as she could from the client. Asking the client for information is not sufficient, however—for a lawyer doing her job well, gathering information from the client is not simply a process of serving as a waiting vessel for a client to fill with narrative.

Fact development is instead a dynamic, engaged kind of inquiry that includes prodding the client to think through things differently and more specifically by

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about it (Level IV—analyzing); or making informed judgments about it (Level V—evaluating). See generally TAXONOMY FLIP-CHART, *supra* note 35.

38. Facts are gathered either from interviewing the client or through a given narrative summary of the client’s circumstances.

39. See DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 3–6 (1989); G. NICHOLAS HERMAN ET AL., *LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH* 67–89 (2001).

asking the kinds of questions that will actually reveal more about the strengths and limitations of the client's position.<sup>40</sup> Moreover, as clinical courses teach students, and experienced practitioners know, fact development and goal setting are not static. What one knows about a given area of law guides the kinds of questions one asks, as well as the sorts of facts one develops. This, in turn, determines what parts of the law one will research. Consequently, wherever the law is ambiguous, the developed facts will shape the legal arguments the lawyers will make to best advantage their clients (or at the very least, guide clients about what to expect if the case were not settled but litigated or even dropped). The development of novel arguments or interpretations of law may similarly prompt further factual investigation so that the research cycle turns back on itself one or more times.

By engaging in these tasks the student is necessarily using all of the "thinking like a lawyer" skills proffered by Gantt: in order to work with the client to *solve the problem*, the student/lawyer has to *identify legal issues*, which requires *logically applying rules to facts* within the scenario, *from the perspective of both her client and all other parties involved*. To do this most effectively, she must both *attend to the details* of the facts and the applicable law, while still *seeing the big picture of her client's ultimate desired outcome*, as well as the larger body of law this case brings to bear.<sup>41</sup>

It cannot simply be the case that a typical second-year clinical law student is able to do all of this expertly because she has already fully internalized these habits of mind and is just plugging them into the situation at hand in order to practice advising clients. If that were genuinely true, there would quite literally be no need for legal education beyond the first year of introductory classes and the summary of advanced doctrine offered by a few agreed-upon upper-level survey courses. The experience new lawyers need in order to become experts in their fields could easily be gleaned in subsequent on-the-job training.<sup>42</sup>

I think, however, this is too limited an image of the typical law student's intellectual work in such a task. Depending upon your point of view, this is either an overly pessimistic perspective on the work the student-lawyer is engaged in while counseling her client, or an overly-optimistic perception of what the typical law student has fully mastered. I suspect, instead, that the process of thinking through

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40. For a brief but insightful discussion of the "interaction effects" in lawyer/client fact-gathering, see ANTHONY G. AMSTERDAM ET AL., *LAWYERING BY THE BOOK* 134–39 (N.Y.U. Lawyering Program 2008). For a far more extended disquisition on what clinical teachers have to say about how lawyers and clients develop facts and set goals, see Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161 (2002).

41. See Gantt, *supra* note 21, at 437–78 (describing the cognitive components of "thinking like a lawyer").

42. Indeed, such a view might look favorably upon a dramatic reduction in the time and energy currently devoted to law school education, and a return to the more apprentice-based model of previous centuries for new-lawyer training. But this is hardly the reform advocated by the Carnegie Report, and even the most pessimistic examinations into the future of legal educations do not suggest that this might be the direction we are heading. See, e.g., Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 498–500, 504 (2005) (exploring problems and criticisms of the current legal educational model, including arguments that it lasts too long, costs too much money, and teaches too little that is of practical use in the profession).

how best to solve the problems a client presents necessarily develops and expands the cognitive landscape for almost any law student assigned that task. Each question she asks forces the student to imagine where she might go next; each fact or law or client response creates new opportunities to deepen and broaden her analysis. Resolving the problem necessarily rehearses, and thus helps make automatic, the fundamental processes (lowest and earliest levels) of legal thinking.<sup>43</sup> Simultaneously, the act of working through the exercise inevitably *moves* the student toward the more advanced and conceptual forms of reasoning that lawyers use.

That is, it must be true that at least some of what the student was doing during the simulation does function on the most simplistic levels of the Taxonomy. At the very least, the competent student/lawyer must *remember* and *understand* the client's situation, the relevant area of law, and the client's goals. But to resolve the problem, she must also engage in the mid-level processes that we most commonly conceive of as "thinking like a lawyer": *applying* the law to the client's situation and *analyzing* facts and law in order to best advise the client about possible outcomes. Working through a simulated counseling session with a client can thus provide profoundly useful practice and reinforcement of those mental processes.

Yet, in order to construct a fully realized set of suggestions and possible solutions for her client, the student must also engage in the highest levels of cognition: those processes that the Taxonomy identifies as "evaluating" and "creating." Where analyzing a situation consists of determining its major issues and themes, classifying and categorizing it, distinguishing between its constitutive parts, working out causes and effects, identifying relevant evidence for the client's position, drawing inferences from the law, and drawing conclusions from all of these processes,<sup>44</sup> *evaluating* a situation asks a very different set of questions. Rather than just probing the material of the case (whether the client's story, the law, or the connections between them), evaluation requires the student to make substantive judgments about the material she is considering, and about how to approach the client's preferred outcome. The student is not only classifying and categorizing, but also judging and prioritizing. Having considered all sides of the legal problem and visualized the big picture, she can now compare the validity of the arguments that might be propounded, and support her client's case by both the facts and her own judgments.

Alongside evaluation, moreover, the student may find opportunities to *create*. Having judged the situation, she must predict the various outcomes of the factual and legal arguments she and the other parties might make. And having prioritized her points, she also has to be able to adapt, adjust, and modify them in response to

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43. Automating the fundamental processes is valuable; evidence suggests that one hallmark difference between the cognitive strategies of novices and experts is the speed in narrowing focus that comes with practice. See Stephen Ellmann, *Fast Talking* (New York Law Sch. Clinical Research Inst. Paper No. 05/06-10, 2005), available at <http://ssrn.com/abstract=871747>.

44. Some of the questions the Taxonomy suggests in order to achieve these processes are: What are the parts or features of . . . ? How is . . . related to . . . ? Why do you think . . . ? What is the theme of . . . ? What inference can you make about . . . ? How would you classify . . . ? What conclusions can you draw from . . . ? See generally REVISED TAXONOMY, *supra* note 29.

input from the other parties or (if it comes to that) the judge, so that in taking all of these factors into consideration she can best act to maximize her client's position or options. While analysis and evaluation are, to varying degrees, reactive, the realm of creation is generative and imaginative, interweaving possibility with probability and pragmatism.

When the required intellectual tasks are broken down in this manner, we can see the similarities between the cognitive work required in simulation courses and doctrinal classes. *Both* require students to internalize the basic processes of remembering and understanding, while they also demand more sophisticated thinking in applying and analyzing what they have learned. At their best, both push students further along the spectrum toward the most demanding kind of intellectual work: making judgments, offering opinions, and creating new ways of looking at the problem at hand.

Moreover, because we know that students learn material best when it is presented in context,<sup>45</sup> the holistic experience of simulations along with the exigencies of having to solve a particular problem for a particular client combine to construct an ideal environment for students to learn both the nuts and bolts and the finer points of legal analysis. Extended simulations, then, at the very least add practice-skills education to students' previously-honed reasoning skills; at their best, they cultivate, nurture, and encourage increasingly sophisticated and complex forms of "thinking like a lawyer."

#### IV. IMPLICATIONS FOR LEGAL PEDAGOGY

If we integrate these insights about teaching simulations into our concept of legal pedagogy, where might we end up? Perhaps, exactly where we are now. There may be no need to change anything in most law schools' current educational model. Noting that there is some overlap in the educational objectives of different law school classes may give us room to acknowledge some valuable repetition in the usual sequence of legal education, but this hardly *requires* a revision. But a move toward seeing simulations as an essential part of students' training in legal cognition might press us toward refocusing (or at least refining) some of their operation, and might call for a larger re-imagination of their role in the education of new lawyers.

It is axiomatic that most educators are likely to be most successful in teaching what we deliberately set out to cover, and what we lavish the most attention upon. If we imagine simulation courses *solely* as introducing some of the interpersonal skills that lawyers may need, we will accordingly construct simulations devoted primarily to teaching and honing those particular skills. For example, with the goal of practical rehearsal in mind, a clinical professor might reasonably decide that the more opportunities a student has to practice a particular task such as counseling a client

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45. See Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 943 (1997) (citing Stephen D. Brookfield, *Adult Learners: Motives for Learning and Implications for Practice*, in *TEACHING AND LEARNING IN THE COLLEGE CLASSROOM* 137, 144 (Kenneth A. Feldman & Michael B. Paulsen eds., 1994)).

and to get feedback on her performance, the better.<sup>46</sup> In light of the resource limitations faced by any class seeking to offer experiential learning and individualized critique, the faculty member might well decide that students would best benefit from repeated opportunities to engage in relatively short and straightforward exercises, each designed to introduce or rehearse specific techniques.

But a simulation intended explicitly to help students deepen their intellectual grasp of legal concepts and achieve higher orders of reasoning might engender a very different set of design considerations. The problems would likely be more complex. Problems demanding higher orders of thinking require students to puzzle through overlapping facts, and to make nuanced choices about how to interpret and frame arguably-applicable legal doctrine. Thus they are not likely to be scenarios that can be conveyed in a few short summary memos or a collection of canned cases. Rather, the facts are more likely to unfold through a series of live or transcribed interviews, depositions, and other (simulated) artifacts of legal or factual research. Understanding legal doctrine is more likely developed through individual student/lawyer's own definition of the legal question and subsequent topical research, and so on.

In addition to project design, a shift or expansion of the educational objective might have ramifications for the evaluation of student work. Since it takes time to articulate the sorts of reasoning steps that expert thinkers might take in order to work through these more multilayered problems, instructors would necessarily need more time to give different types of critical feedback to their students. Their feedback would necessarily have to include suggestions to improve students' practical performance, but should also try making visible to students the many layers of cognitive work that they may have been using implicitly, as well as providing students with assistance in moving toward higher orders of legal thought.<sup>47</sup> It is already true that much of the work of teaching simulations involves modeling analytical, evaluative, and creative ways of dealing with clients and the law. But an explicit legal reasoning-oriented clinical program might add to that by focusing more, or at least differently, on ways to guide students towards those more sophisticated ways of thinking about legal problem-solving.

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46. Support for that approach can be found in the notion that genuine expertise is usually achieved only after an unusually large amount of time devoted to practice. Researchers have formulated a magical number of 10,000 hours rehearsal time as foundational for success in almost any field. For a discussion and summary of the 10,000-hour rule, see generally MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 35–68 (2008). For more academic exploration of the 10,000-hour rule, see K. Anders Ericsson et al., *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 *PSYCHOL. REV.* 363 (1993) (arguing that expert performers develop their characteristics through a life-long period of deliberate effort, as opposed to being born with innate talent).

47. Obviously, trading off these varying goals, or better yet seeking to find ways to combine them such that they do not have to become zero-sum exchanges, may be the best choice of all. I mean in no way to suggest that clinicians replace one narrow set of objectives with another.

I should add, too, that I do not mean here to diminish the fact that this sort of intensive skills/theory teaching is what many teachers of simulations, both in clinical and doctrinal courses, already do. But I do mean to suggest that we can be clearer about the multiple objectives of such simulation teaching. If cognitive training is defined as at least one of several important goals in that pedagogy, we might make some different choices in exercise design.

More broadly stated, however they are designed, simulation-based courses imagined as part of law students' cognitive apprenticeship, in addition to the central locus of practical training, would have a very different role to play in our collective understanding of current practices in legal education. Perhaps without saying so, we are already exceeding the Carnegie Report's expectations of clinical pedagogy as providing practical training and preparation for the profession. Where the Carnegie Report sees practical training as "additive" to the central mission of law schools, re-framed basic clinical courses might be seen as a central locus for the "integrative" teaching that the Carnegie Report authors so fervently desire.<sup>48</sup>

There are multiple directions such an insight could lead us toward. Whether this stance argues for moving more of these kinds of courses into the first year, or expanding the offerings and requirements for simulation-based courses in the second and third years; whether it means rethinking who teaches these courses<sup>49</sup> and how they are integrated with other parts of the curriculum: these questions are beyond the scope of this brief essay. However, I would encourage us to embrace this opportunity to challenge our students and ourselves, and to take advantage of what is currently an underused, and under-theorized, resource.

Thus, I do not mean simply to suggest that all law schools ought to expand clinical offerings or that all students ought to take simulation clinics (although perhaps this would be a good idea). Instead I want the body of legal educators, both clinical and non-clinical, to remember that these classes serve not only to teach "practical skills," but serve also the crucial educational function of inculcating in students fundamentally *legal* ways of thinking. In fact, for anyone used to thinking of doctrinal course work as serving this function, it ought to seem unsurprising that simulations will do so as well—perhaps more thoroughly, with greater depth, and greater "sticking power." After all, what is the kind of hypothetical, fact-pattern-based essay examination typically given in such courses but a cursory (and somewhat uni-dimensional) simulation?

## V. CONCLUSION

Simulation courses are not just staging grounds for the "real" work of actual legal practice; they are a space in which legal theorizing is strengthened and deepened. If we frame simulation-based clinical teaching as part of an integrated web of legal education that can encourage and generate sophisticated understandings of lawyering work, we can use much of what most law schools are already doing to imagine a richer, more layered, more successful law school curriculum. One in which the Carnegie Report's authors could surely take pride.

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48. See CARNEGIE REPORT, *supra* note 1, at 191–92.

49. Which may, or may not, also include reconsidering status distinctions among different legal subjects or different law teachers. The Carnegie Report itself expresses concern over the devaluing of clinical subjects or faculty. See *id.* at 88, 91–94.