

Akron Law Review
1999

***107 LAW & LAWYERING IN THE WORK PLACE: BUILDING BETTER LAWYERS BY TEACHING
STUDENTS TO EXERCISE CRITICAL JUDGMENT AS CREATIVE PROBLEM SOLVER**

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I. INTRODUCTION

In the Fall of 1995, a problem arose in an elementary school in a nearby district which had enormous potential to degenerate into litigation that might have destroyed the community. The semester opened with a flood of complaints from parents that all of the African-American first grade students in a particular school were assigned to the only African-American first grade teacher. That teacher was thought by many parents to be the least qualified of the four first grade teachers. While the administration and the district's solicitors caucused, fearing that parents of the African-American children, or the teacher, or both, might file discrimination complaints, the leadership of the teachers' association caucused to discuss whether, under either the law or the collective bargaining agreement, the teacher's rights had been violated. At the same time, the African American parents caucused to decide what to do about this anomalous result and its implications, and Caucasian parents caucused to decide what action to take to avoid the reassignment of their children into the class of a teacher thought to be weak professionally. Was there a basis for a complaint of discrimination? If so, who had a claim? How could the district avert the filing of a claim? How did this happen? What was the wise and best *108 educational result? Letters from parents, several of whom were lawyers, or who had consulted lawyers, started to fly. Everyone was demanding that the school district honor his or her asserted "rights." More than one of the lawyers at least hinted at the possibility of litigation.

While temperatures and pressures mounted, an African-American school board member proposed a solution: No students or teachers be reassigned; the schedules for the four classes would be realigned so that they would have a number of joint activities, both academic and other; and in-service support and training would be provided to all of the first grade teachers engaged in this experiment in collaborative teaching. This elegant resolution produced more integrated classes of students, provided all students with both African- American and Caucasian teachers, encouraged collaboration between and among teachers, which the district and the teachers union wished to support, and provided additional support and training in collaborative teaching for the teachers involved. Happily, the result also enhanced the community's belief in the district's good faith commitment to quality education for all students, equal opportunity for all teachers, and creative innovation in the service of its educational goals. No complaints were filed by anyone.

As a lawyer as well as a member of the school board, I was disappointed that none of the lawyers for any of the interested parties had proposed a solution other than to which their clients were entitled. None of them even suggested a process by which the interested parties could try to work out a solution that might satisfy the needs of all. Unfortunately, their approach was consistent with recent literature about lawyers and the legal profession which has reported negatively on the apparent increasing reliance on litigation to resolve disputes, incivility of litigation, disaffection of the public with the profession and disaffection of lawyers with the practice of law. [\[FN1\]](#) On the other hand, my experience as a lawyer and clinical law *109 teacher has taught me that the most effective lawyers are those that are able to deploy a broad array of skills in order to prevent and solve their clients' problems.

In discussing the school problem and its eventual resolution with my colleague, Professor Susan Sturm, we wondered whether the focus in law school on teaching students "to think like lawyers," almost exclusively through

the analysis of appellate court opinions, while effectively developing students' analytical skills, toughness, quickness, and the like, interfered with the students learning many other qualities that we have observed in good lawyers, in particular, critical judgment and problem solving.

We decided to develop a course whose goals and methodology would support students learning to think of their role as lawyers in terms broad enough to encompass not only the vigorous, tough-minded, persistent litigator/negotiator, but also the creative solver of complex problems. We asked ourselves several questions. What would it take to create such a learning environment? What might we do to equip our graduates with the tools lawyers need to maximize their potential as problem solvers for their clients and their communities? How would it feel for the lawyers who viewed themselves as creative problem solvers at least as much as "gladiators" or "hired guns?" [\[FN2\]](#)

This article is about the evolution of that course from the earliest planning through its presentation. [\[FN3\]](#) Hopefully, having the two of us involved in the day-to-day teaching of the course would send the message to our students that collaboration was a positive aspect of the learning and lawyering processes. Additionally, we hoped that the students would see that "academic" and "clinical" faculty are partners in their legal education. [\[FN4\]](#)

II. WHAT LAW STUDENTS NEED TO KNOW ABOUT BEING A LAWYER

Each year, American law schools release thousands of graduates into the world of legal practice. [\[FN5\]](#) The vast majority either obtain employment as entry level lawyers for law firms, corporations or governmental entities, or "hang out their shingle" as sole practitioners. [\[FN6\]](#) Practicing law is a very difficult job. [\[FN7\]](#) To perform at a reasonable level of competence and professionalism, a lawyer needs integrity, judgment, creativity, and a broad array of skills and abilities, as well as a sensitivity to issues of ethics and professional responsibility. [\[FN8\]](#) Law schools also educate all of our judges, many elected and appointed public officials, and many leaders of the business world.

As our students move from law school to law practice, they begin to have some degree of responsibility for the important personal and legal matters of their clients. At that time their knowledge of the law and of what it means to be a lawyer is essentially what they learned in law school. Therefore, it seems appropriate to expect that a law school education will provide the knowledge and skill necessary to represent clients and the preparation to learn what an attorney needs to know to become the kind of lawyer and citizen that society needs. Hopefully, they will achieve personal satisfaction from their work as lawyers, judges, public officials and public citizens.

In our view, the heart of what lawyers do is the exercise of critical judgement. In order to accomplish this, lawyers need to analyze the law critically, question the theory on which it rests, and challenge the appropriateness of its application. They need to gather, analyze, and synthesize information from a variety of sources and disciplines, while understanding that each source has its own perspective. They need to recognize and deal with ambiguity. They need to communicate effectively, orally and in writing with people as different from each other and themselves as clients, government officials, judges, jurors, and experts in various fields. In today's multi-cultural "global village," lawyers will need to engage in difficult discussions about complex and contentious issues such as the law's relationship to matters of race, culture and gender. Further, because so much of being an effective lawyer is learned through experience and reflection, they need to apply the same critical skills that they apply to a problem brought to them by a client in order to examine their work as lawyers.

III. BUILDING BETTER LAWYERS; TEACHING LAW STUDENTS TO THINK CRITICALLY, ACT CREATIVELY, AND EXERCISE CRITICAL JUDGMENT

A. Our "Mission" Statement

Our mission was to teach students to exercise critical judgment in addressing problems framed or constrained by the law, and to act creatively as transformative problem solvers, rather than solely as "gladiators." [\[FN9\]](#) In order to accomplish this, we set out to offer students, in a first year elective which was not identified as a "clinical" course, an opportunity to (a) critically examine and apply certain principles of employment discrimination law; (b) appreciate the importance of context and actively engage in defining and learning the context as a necessary

predicate to addressing legal problems; (c) experience the role of lawyer as "problem solver" in the challenging area of employment law; and (d) obtain feedback about the role of the lawyer as problem solver from experienced lawyers and other professionals. These experiences would encourage the students to begin to think critically about the lawyering roles that they want to create for themselves.

B. Teaching The Problem Solving Paradigm

At least since Lord Brougham's defense of Queen Caroline, [\[FN10\]](#) the model of the lawyer willing not only to risk his own wealth and reputation, but to disregard the consequences to others even "if his fate it should unhappily be to involve his country in confusion for his client's protection" [\[FN11\]](#) has been highly respected, both in fiction [\[FN12\]](#) and in life. [\[FN13\]](#) In a society such as ours which is marked by vast *113 differences in the opportunities afforded to individuals by reason of wealth, race, gender, class, and many other classifications, and where wealth and political power frequently have as much to do with the outcome of individual cases as do the merits, the need for lawyers as "gladiators" willing to "go the last mile," will always be with us. In such cases, the lawyers may be required to engage in the legal equivalent of hand-to-hand combat in pursuit of their client's expressed goals. However, even in private, purely financial litigation, such practices still go on, at the expense of the administration of justice, identifiable third parties, and the public. [\[FN14\]](#)

Yet, for most lawyers, "mano a mano" is not the only alternative to failing to represent their client zealously. [\[FN15\]](#) If we as teachers see only those polar extremes, we will identify no others in our teaching. Having chosen to be lawyers and teachers, we will necessarily teach to the professionally acceptable pole of the gladiator. Thus, we will, at least implicitly, encourage our students to see only those opposing choices and to "learn" that the gladiator model is the only professionally responsible model. [\[FN16\]](#) It was our goal to offer to the students a model of lawyering that was entirely professional, yet not solely that of the gladiator.

Clients come to lawyers because they perceive a problem that they believe they cannot solve in a manner consistent with their goals without the lawyer's assistance. Clients frequently have a perception of what their goal is and how it can and should *114 be reached. Often perception is limited to the "winning" or "losing" of a dispute. And frequently the lawyer merely accepts the client's perception, without question or reflection, and goes about the business of "winning." But lawyers can and frequently do make a significant impact on the contours of their client's goals as ultimately pursued. [\[FN17\]](#)

When the dispute involves parties that have an ongoing relationship, and where the interests of discreet third parties or the public are involved, the law offers little guidance about how to consider those interests insofar as they differ from those articulated by the client. In such cases the safe road is often that of the "gladiator's" unrelenting, instrumentalist focus. Unfortunately, the lawyer's unreflective, gladiatorial pursuit of the client's stated goals may lead to unnecessary cost to the client and injury to third parties or the public. [\[FN18\]](#) Clients are entitled to smart, aggressive, tough-minded and persistent lawyers. Indeed, I like to think that I was such a lawyer. I work hard to instill those qualities in my students. Yet, I also think that it is the unreflective, narrow, instrumentalist approach to lawyering that leads to what others have referred to as "uncivil practice" by lawyers overstepping the bounds of the procedural and ethical rules leading to frustration on the part of lawyers and to much of the public opprobrium with the profession. [\[FN19\]](#) For example, a law suit or even a complaint to the Human Relations Commission (in the case of the problem in the first grade class with which this paper begins) could have caused irreparable damage to the community and to its children, including the children of whomever ultimately "won" the case. This article contends that the exercise of critical judgment in the problem solving role is a highly professional goal and the antithesis of the unreflective, purely instrumentalist, "gladiatorial" approach to lawyering.

Employers such as those we created for our simulations are constantly faced with numerous constituencies, each of whom has a different view of the policy, practice or decision that will best serve their interests. Resolving one problem on a given day does not mean that any of the stakeholders will disappear or that their relationships, interests, and desires will change. Resort to litigation is frequently *115 not a viable option, as it solidifies and extends the adversarial relationship. Litigation is costly, provides no answer in the short run, and removes the ultimate solution from the parties most familiar with the problem and affected by the outcome.

The evidence made public in even a successful defense of a discrimination claim may lead some employees or

members of the public to believe that the employer acted improperly. Prospective clients, particularly those most concerned with their public image, might hesitate to be identified with the firm. Promotion disputes inevitably leave some employees unsatisfied. In the case of police, antagonism or distrust among officers can lead not only to reduced "productivity" or effectiveness of performance, but might also endanger the officers and the members of the public they serve.

The employment relationship offers rich opportunities for examining and experiencing the need for problem solving in this context. In our simulations, the facts were uncertain or ambiguous, the prospect of extended litigation not desirable for any of the interested parties, and the need for a resolution upon which each stakeholder could rely was great. Thus, our students had to recognize that assuming the "gladiator" role might not be in their clients' best interest. Instead, operation in the problem solving role and consideration of the interests of all stakeholders, as well as the state of legal doctrine and the direction in which it seemed to be evolving, would facilitate crafting a satisfactory non-litigation resolution to the existing problems while avoiding the creation of new ones.

C. The Relationship of Educational Theory To Our Mission and Methods

Since the early 1900s, psychologists and educators have recognized that different students learn differently. [FN20] That is, the manner in which people process information and communicate what they have processed differs. Thus, students with varying measures of aptitude or intelligence have been found to be able to master the same material when the teaching methods, method of assessing mastery, and time invested in teaching and assessment were made consistent with their *116 particular learning style. [FN21] Studies have also shown that learning style preferences vary along gender lines. [FN22] Not surprisingly, the learning styles of teachers affect the ways in which they process information and present it to their students. [FN23] Consequently, we, as teachers, need to be conscious of offering not only a mode of learning that suits our styles (and thus the learning styles of some-but not all-of our students), but a variety of teaching/learning styles in order to be offering the same "real" opportunity to learn to all of our students. [FN24]

Most students learn better when they are engaged in "active learning." Through "active learning" students are not merely "passive receptacles" of information, but actively participate in the process of identifying, absorbing and understanding the material. [FN25] "Learning is not a spectator sport [Students] must talk about what they are learning, write about it, relate it to past experiences, apply it to their daily lives. They must make what they learn part of themselves." [FN26] "Students learn what they care about and remember what they understand." [FN27] "Students learn by becoming involved Student involvement refers to the amount of physical and psychological energy that the student devotes to the academic experience." [FN28]

*117 The substantive law which we intended to use was complex, charged with political and emotional content, and constantly evolving. At the same time, we intended to teach material concerning "lawyering," [FN29] a concept to which the first year students would have had virtually no prior exposure. Our teaching experience confirmed that "active learning" generates high levels of motivation and enthusiasm, encourages collaboration, and helps to clarify doctrinal material. [FN30] Application of active learning techniques to the teaching of the theory and doctrine of employment discrimination law would give the students an opportunity to become physically and emotionally, and analytically engaged with the material. It would also give them opportunities to talk and write about what they were learning, relate it to past experience, and incorporate it in their daily lives. Because both the goals and the structure of the course would be different from those of the law school courses that the students have taken so far, we recognized that we needed to be proactive and creative to avoid confusion and make both the doctrinal and the "lawyering" material accessible to every student. [FN31]

D. Teaching Law & Lawyering In The Workplace By Engaging The Students In Solving Simulated Workplace Problems.

Because we believe that how we teach and how we expect students to learn *118 affects both the energy they invest in learning [FN32] as well as what they learn, [FN33] we were committed to using teaching methods which comported with what we wanted the students to learn. Because we wanted them to begin to learn to be lawyers, we needed to develop a model for teaching that placed the students in the role of the lawyer, and in that role, engaged

their active participation in learning the factual context from a variety of diverse sources, learning and applying the appropriate legal doctrine, dealing with their clients, and creating a proposed solution to the client's problem.

Our solution was to create simulated workplace problems involving the application of the legal doctrine and lawyering skills that we wanted the students to learn. Students were assigned the roles of one of the interested parties, or counsel, in each problem. The problems were constructed so that seeking a resolution through litigation was not likely to produce a satisfactory solution. Factual context was provided through non-legal readings and by having as "guests" in class lawyers and other professionals, whose professional experiences encompassed that of the "client," "expert," or other "role" they were assigned in the problem. [\[FN34\]](#) In order to perform their roles, the students would have to learn and synthesize the legal and non-legal material assigned for each problem including information they would have to obtain from their "client" or other professional source we brought to class. In their role, they would work with their client to develop a non-litigation solution to the problem. Wherever practicable, we would have the students work collaboratively in small groups. Each simulation would include a writing assignment.

Requiring the students to develop their understanding of the context both from readings and from interviewing "experts" would actively engage them in the course and demonstrate how their own work helped them to understand the problem. *119 Discovering the facts themselves would likely have a greater impact on their willingness to re-examine their factual assumptions than would hearing it from the professor. Having students work collaboratively and learn cooperatively would give them the experience of collaboration that is so important in lawyers' work. Using simulations and role plays would require the students to consider the perspective of the person in their "role" as well as those of others, rather than considering only their own perspective. Role plays would also help to reveal the impact of legal doctrine on the people affected by its application. Using simulations and role plays would require them to think independently and encourage initiative. It would also provide an opportunity for the students, working together in small groups, to know each other better and form relationships that might not otherwise have arisen. And it would help the students to reconsider the attitudes and beliefs with which they began the course in the light of their experiences during the simulations. [\[FN35\]](#) The feedback from outsiders would reinforce the value of their effort, analysis, and creativity. Further, we believed it would validate our notion that real lawyers, clients, and expert witnesses place a high value on the role of lawyer as creative problem solver.

In the course description and in our introductory remarks during the first class, we emphasized that this was to be a different experience with different work and different expectations from what they had learned in their other courses. [\[FN36\]](#) For example, in the first class, during which we sought to develop the "job description" of the new general counsel for the police department, we assigned no cases at all, concentrating on the relevant portions of Title VII and [42 U.S.C. § 1983](#), and an array of materials about policing and the history of our simulated police department in the city of "Urbana." [\[FN37\]](#) In class our discussion centered on what qualifications the students in role were looking for in the police department's lawyer, and why those qualifications were important. Before the second class which included interviews of the two "finalists" for the job, we asked the students to meet together briefly in cohort groups to share their goals and methods for the upcoming interviews. The writing assignment for that problem was to have each student reflect on what issues they were concerned about in the particular role assigned, *120 how they sought to deal with those issues or get those questions answered during the interview, what were the results of the interviews, and how they felt about the approach taken by students in roles other than theirs.

This use of a variety of active learning techniques (e.g., reading, questioning, discussing, role playing, and writing) offered an opportunity to connect with the different learning styles of our students and to connect the substance of the course (learning legal theory and doctrine and the lawyering skills needed to apply that law in a creative manner to solve problems) to our teaching methodology such that the implied messages were congruent with the express messages. [\[FN38\]](#)

We divided the course into segments, each representing a common workplace problem (e.g., employee selection, testing and promotion, harassment, etc.) and requiring examination of a different area of employment discrimination law doctrine (e.g., disparate treatment and the McDonnell Douglas [\[FN39\]](#) analysis, disparate impact, affirmative action, etc.). At least one simulation was created for each segment.

To expose the students to different issues posed by different employment contexts and permit them to build on the knowledge they gained over the course of the semester, yet minimize the burden of constantly changing fact patterns, we *121 situated all of our simulations in two factual contexts. We highlighted the need to consider the

perspectives of a variety of "stakeholders," as well as to see the opportunities for creative problem solving and teamwork by situating all of the simulations in an organizational context rather than in the context of ongoing litigation between two individual parties. To accomplish these goals, we created the "Urbana Police Department," and the law firm of "Bloom & Morgan." We thought that both contexts would be interesting and engaging to the students. They offered very different employment structures, one very formal and hierarchical, even paramilitaristic, blue collar, and public; the other more informal, private, and professional white collar. As with lawyers who develop company and industry expertise over the course of representation, the students would be able to build on their experience to deepen and broaden their understanding of the employer and the industry in which it operated in the context of the simulations we planned for them over the course of the semester. To this end, we assigned readings about policing, the structure and operation of police departments and law firms, and also created descriptions of the "Urbana Police Department" and "Bloom & Morgan."

For each segment we assigned a selection of readings from non-legal sources about the particular work environment and the specific workplace problem at issue. For example, concerning the segment on promotion, we assigned readings on the applicability of different types of testing and use of test results in employee selection. For the segment on sexual harassment, we assigned readings about the pervasiveness of sexual harassment in the workplace and its impact on its victims. Thus, the students' application of the legal doctrine to the specific problems we posed would be in context and built on the work they had previously accomplished. To generate an appreciation of the varied interests and perspectives that might be present in a given problem, each of the simulations had several clearly identified interested individuals or groups.

The use of invited guest professionals brought to the class a depth and breadth of experience, knowledge and personal perspectives, that could not have been easily duplicated if those roles had been filled only by faculty or other students. It also added a sense of reality and a level of performance anxiety for the students that heightened the seriousness with which they engaged in the role plays. Many positions clashed with the assumptions that the students brought to class. Indeed, in several cases, we were as surprised as the students at some of the positions taken by our guests. For example, a partner in a large and prestigious law firm who participated in the hiring discrimination simulation observed in an out-of-role discussion after the simulation that the hiring process is quite subjective because the resumes of students from well-regarded law schools (the only ones they consider) cannot give enough information to distinguish the potential successes from those who will not meet their standards. Consequently, personal "chemistry" between the *122 interviewer and the interviewee, including connections, such as whether the applicant went to the same school as the interviewer or their child, often plays an important part in the selection process.

In order to maximize each student's opportunity to participate in the role plays, we used two devices. In some of the role plays, a small group of law students were assigned the role of counsel for each of the interested parties. If the students all had the same role (e.g., counsel for the Police Commissioner), we divided the students into small groups of not more than four or five. Professor Sturm, our teaching assistants, and I played the parts of the other interested stakeholders (e.g., police officers' union, Minority Officers Association, community groups, etc.) whose various positions and perspectives the commissioner might want to consider in making his decision. Each small group of students then met separately with each of the role players to question them about their interests before meeting with the commissioner and developing a proposed solution to the problem. Wherever possible, we divided the class in half for the role plays and used two class rooms so that the students would be in smaller groups allowing each a greater opportunity to participate. But if there were two guests/experts with different experience or expertise, each was assigned to a class room with half of the class. We switched guest and student assignments in the middle of the class so that each group of students were able to interact with each guest.

E. Building the Course Around Employment Discrimination Law

Most adults spend a major portion of their waking hours at an occupation from which they derive both their livelihood and important aspects of their identity. Thus, the relationships that exist in the workplace and the law which affects those relationships have a very large impact on society. Employment disputes implicate deeply held beliefs on the parts of the stakeholders as well as critical matters of organizational and public policy. Problems which implicate employment discrimination law frequently involve more than merely two parties. When someone complains that she did not get a job or a promotion because of her gender, race, or age, others besides the employee

and employer might become involved. Such controversies have implications for the person who secured the job and perhaps for other employees concerned about whether the process and the outcome were fair, or whether the incident might have implications for similar treatment by their employer in the future.

With respect to such issues as employee selection, testing, sexual harassment, and affirmative action, many students come to class with pre-existing beliefs as to what the law is or should be. Offering first year students a safe, contextualized opportunity and challenge to re-examine their previously held beliefs fits very well *123 with our view that lawyers need to be able to examine critically legal theory and doctrine, and factual assumptions-theirs as well as others'. Moreover, employment problems frequently involve persons who will be in a working relationship with each other after the "presenting problem" is resolved. Consequently, while the legal doctrine applicable to the dispute may be relevant to its resolution, considerations of the ongoing working relationships among the parties and others with an interest in the conduct of the work place must be considered by anyone seeking a satisfactory resolution. Our experience suggests that employment cases are very fact-driven such that learning the context in which problems arise is essential to creating a workable solution. The factual ambiguities make prediction of the outcome of litigation particularly difficult even for experienced lawyers.

In the classes in which we analyzed court decisions directly, we also tried to uncover and examine critically the theoretical underpinnings and contextual assumptions of the decision. We asked the students to compare their own experiences with those assumptions as part of the process of testing the appropriateness of the legal rules. In order to add to the reality of the role plays, we sought to relate class discussion of the legal theory and doctrine reflected in the assigned case readings to the context of the simulations in which the students would be engaged. For example, in the class discussion concerning the simulation based on a law firm's allegedly discriminatory failure to hire, the analysis of intent to discriminate, stereotypical thinking, and other assumptions and subjective factors clarify the issues. The students understood more fully the potential for discriminatory treatment, the different perspectives of the actor and the victim concerning whether the facts implicate discriminatory intent, the difficulty of proving intentional discrimination, and why the problem is consequently so resistant to remediation.

IV. "GLADIATORS!" AFTER ONLY ONE SEMESTER

In the third week of the course during "The Unsuccessful Applicant" problem, [\[FN40\]](#) the students were assigned the role of counsel for the complainant, the firm, the accused partner, or the university (advising the Career Planning and Placement Office of the Law School concerning its role in the dispute and the application of its anti-discrimination policy). Each student was asked to write a memo to his or her "client" outlining the law and, importantly, recommending a course of conduct for the client. As we saw the problem, it was in the best interest of every party to resolve the dispute without the filing of any litigation, whether at the administrative level or in court. [\[FN41\]](#)

*124 Nevertheless, every one of the students assumed for purposes of writing a memo to the client that litigation was either underway or would be underway shortly. Not surprisingly, each student then proceeded to describe the client's legal position based on the limited information provided, how the McDonnell Douglas burden shifting process would work in the litigation, and what each saw as the likely outcome. Not one student considered a non-litigation resolution.

After the papers were turned in, several of the students explained their litigation assumption by saying that they "didn't know" what we wanted, and therefore assumed that we wanted them to analyze the statute and cases they had read and describe the best arguments for their client, much as they had been expected to do in their other first year courses. Even when we discussed the mediation of the dispute scheduled for the next class, they asked what we wanted them to do in their role as lawyers for their assigned clients and whether, as in their other courses they were to make the best arguments for their clients.

What made these responses to the problem even more striking was the fact that in our introductory remarks at the start of the first class, and during the subsequent discussion, we asked the students to think about the lawyer's role as not limited to that of litigator. In the first week's simulation, recommending a person to be hired as the General Counsel to a local police department, the students had discussed the variety of qualities and qualifications they would look for in the lawyer to be hired and in the next class they interviewed the two "finalists" for the position.

Among the materials we asked them to read for the first class was Rule 2.1 of the Model Rules of Professional Conduct and its comments which specifically authorizes lawyers to consider such things as "moral, economic, social and political factors" in counseling a client. [FN42] In responding to this problem, students identified several types of non-litigation problem solving that are crucial to effective lawyering. As a result, we expected that some of the students would at least raise the possibility of a settlement of the law student hiring dispute. We concluded that after only one *125 semester in law school our students had been conditioned to view "legal" problems solely as cases to be "won" in courts. When confronted with a problem in law school, the students were inclined to ask what hoops the professor wanted them to jump through rather than to examine the problem from the client's perspective and consider how best to solve it using their considerable analytical and creative powers. Further, although the students were told that they would be engaging in the mediation with groups of three or four representing each party and were not told not to discuss their mediation strategy among their co-counsel for the assigned client, none of them met to collaborate on the development of a strategy. If they considered the possibility, they must have assumed that collaboration was not permitted.

This experience reinforced our concerns that our students needed something more than what they were getting in law school if they were to become the quality lawyers that their clients and their communities need. It also pointed out how quickly the students had absorbed several implicit messages from their first semester: (1) legal disputes are resolved in litigation; (2) their role is to figure out, working alone, how to "win" disputes in litigation; and (3) when faced with a question from a person in a position of power to figure out what the questioner wants to hear and answer accordingly. The experience provided us tangible evidence of the need to engage the students in learning to exercise critical judgment and to operate in the problem solving paradigm in the first year of law school.

V. TEACHING STUDENTS TO USE LAW AND JUDGMENT AS TOOLS FOR PROBLEM SOLVING

A. Defining the Context

Context is critical to solving legal problems. Context involves both choosing how broadly or narrowly the lawyer sees her role in addressing the problem presented, and in choosing the factual variables that may contribute to the problem or be implicated by a solution. When the legal problem is expressed in an appellate opinion, the factual variables are the given "facts," i.e., those found by the fact finder and deemed relevant to the deciding court. The role of the lawyer is to identify and apply the legal rule, given those facts, which will vindicate the client's position. However, when a legal problem is presented to a lawyer by a client, the "facts" are not known. Moreover, the client's definition of the problem may be the actual problem, part of the problem, or not the problem at all. The lawyer's role is to help the client clarify and define the problem the lawyer will address. Thus, while the lawyer will probably consider which legal rules might be applied if the problem eventuates in litigation, the solution frequently does not involve the formal application of any legal rule.

*126 Consider the messy legal problems and resulting litigation that might have arisen as a result of all of the African-American first graders being assigned to the one African-American first grade teacher. [FN43] The lawyers, whether as parents, representatives of parents or the teachers' association, viewed their roles very narrowly in asserting their version of the facts and the legal rules that most likely would vindicate their clients' expressed position. In fact, the key to solving the problem was neither the factual determination of how the assignment of students had come about, nor the application of a legal rule. Rather, the impetus to a solution of the problem occurred when the school board member chose to "frame" the context broadly enough to encompass the long term relationships among all of the stakeholders, and then to ascertain each party's perspective about what the facts were and what their short and long term interests were. Having done that, the board member was able to creatively craft a solution designed to maximize achievement of those interests without unnecessarily embarrassing the parties' public positions.

What facts we see as relevant depend upon how we define the problem and our role in addressing it. For example, we created a simulation involving a complaint of sexual harassment by an associate against a partner in her law firm. The firm's counsel might readily have adopted the traditional "risk management" or "damage control" role. In that role, the lawyer would need to know whether the accused partner denied the accusation. If so, had there been any previous complaints about him and what was done in response. If there had been no prior complaints, counsel might set up the line of defense by denying the allegations. After all, the complainant and the alleged perpetrator were the

only persons present during the key events. If something did happen, the firm should not be liable because it had no prior notice or warning and it took prompt and appropriate action after receiving the complaint. [FN44] The "facts" to be investigated in this scenario are relatively limited.

Alternatively, counsel could choose to view the "problem" as involving the workplace environment more generally. Consistent with this definition of the problem, counsel's role may not be merely loss prevention, but rather encompass consideration of what might be done to provide a more respectful, supportive, and productive workplace. In such a case, the "facts" to be explored, (e.g., interviewing a cross section of all employees to ascertain specifically whether they believe that discrimination or harassment are problems at the firm, as well as their perceptions *127 about the environment and how it could be improved) would be much more extensive. The legal doctrine that the lawyer employs would be the same in either case. But the lawyer's role in responding to the situation would be vastly different depending on the client's business, workplace, and the potential impact (both in the short and long term) on the client and fellow employees of the performance of legal services.

By creating simulations in which resort to litigation was either not available or not desirable, we presented the students with a context in which there was no apparent premium in assuming an outcome decided by litigation to final judgment. We attempted to expose the students to this broader role and to have them experience it's possibilities. By providing sources of factual data that included both a wide range of readings, and individuals with relevant experience, we attempted to give the students the necessary tools to exercise that choice, and feedback from lawyers and other professionals concerning the relevant issues in order to decide how broad or narrow the lawyer's role should be.

B. Understanding the Context: Immersing the Students in Fact Gathering and Context on Behalf of "The Urbana Police Department" and the Law Firm of "Bloom & Morgan"

In a 1978 study of the extent to which lawyers perceived their legal education to have been relevant to the work they perform, 46.9% of lawyers surveyed considered investigating facts to be of "great" importance to their work, and 44.6% of lawyers considered interviewing clients to be of "great" importance. [FN45] The MacCrate Report considers fact gathering to be one of the ten essential skills of lawyering. [FN46] A good lawyer must be keenly aware of the surrounding facts of a case and their potential ramifications. [FN47] Except in clinics, law schools generally do not expose their students to the ambiguity in which legal problems appear. Nor do traditional classes expose students to their role in fact gathering. Most classes in law school present students with given (predetermined) facts which have been filtered through the adjudicatory process to the level of an appellate opinion. Correspondingly, students are presented with a set of facts on the final exam at the end of the semester. While this process is valuable for teaching the legal analytical process, it does not teach them the entire process. Moreover, it may leave students with the impression that lawyers deal with a tidy set of objective facts that all *128 parties agree on. Reality is otherwise.

Problems are most often presented to lawyers with critical facts unknown or in dispute. Rarely will two parties agree on one set of facts. Lawyers must be able to gather the necessary data from their clients, from other involved parties, and frequently from uninvolved sources in order to fully understand the problem and identify options which might lead to a viable solution. Lawyers must decide what information they need, collect the data, arrange it in the form of admissible evidence, choose the relevant evidence they will seek to introduce, and present it at trial. One or more opposing lawyers are doing the same with their version of the facts while working to exclude or minimize the impact of their adversary's evidence. Factual uncertainty makes litigation expensive, time consuming, and frequently embarrassing. Moreover, there is no assurance of the outcome. Even if litigation is to be avoided, lawyers still need to gather some of the relevant data and understand the facts as each party sees if they are to devise a solution that satisfies enough of each party's needs. Students need to understand this key role that fact gathering plays in lawyering. [FN48]

Lawyers learn the factual context from numerous sources. These sources include: (1) non-legal materials; (2) interviews of individuals with knowledge of relevant facts; (3) experts; (4) legal materials; (5) a combination of all of the data they accumulate, and; (6) their own accumulated knowledge. We knew that we could not replicate this process, but we could create simulations in which students experience important aspects of the process, albeit in refined doses. This experience would not only teach the students about the importance of context, but it would also

demonstrate that they did have the ability to learn the context without merely responding to what the professor wants.

During the first week of class in connection with the selection of the person to fill the newly created position of General Counsel to the Urbana Police Department, each student was assigned one of five roles (Police Commissioner of Urbana, Director of Personnel for the City of Urbana, representative of the Urbana chapter of the Fraternal Order of Police, representative of the Black Police Officers Associations of Urbana, or community representative). For the first class the students were assigned readings in urban policing, including portions of the Christopher Commission Report on the Los Angeles Police Department, readings about the Urbana Police Department's recent history and organization, and readings *129 concerning employee selection law and procedures. From these readings the students were expected to identify important duties and responsibilities of the general counsel, and to infer from them what qualities and qualifications a successful candidate would need. Class discussion focused on this fact development process in the form of creating a job description. In so doing, the students got their first exposure to the differences in perspective among the stakeholder groups, including what they wanted the new general counsel to be and do. They also began the process of understanding how qualifications for a particular job derive from how the job is defined.

During the second class the students in their respective roles (for which they were given separate background readings specific to their particular role) interviewed the two "finalists" for the general counsel's position. Using the information they developed concerning the general counsel position, the students sought to learn which candidate was best suited for the job. We reserved the last twenty minutes for discussion with, and feedback from, our "guests" after each simulation.

By mid-semester, our students, now themselves assuming the role of general counsel assisted the commissioner in designing a process for selecting officers for promotion to sergeant because the previously used system was under attack in pending litigation. While the law of disparate impact, employee selection, and affirmative action was crucial to their consideration, non-legal information about what sergeants do, the science and art of testing, and other aspects of employee selection had to be learned in order to create a contextual foundation for the application of the legal doctrine.

The students were again assigned case decisions and other legal and non-legal readings concerning testing. The case materials were analyzed in class. [FN49] The fact *130 that the students had studied materials concerning the context in which the cases arose appeared to have a positive impact on the extent and quality of student participation in the class discussion. The simulation covered two classes. In the first, two career police officers came to class to provide their perspectives, experiences and opinions concerning the role of the sergeant and how to select candidates for promotion to that position. During the second class, a testing expert and the "client," the Urbana Police Commissioner, (in the person of a former State Police Superintendent) joined us. When the students met with the Commissioner in order to clarify his goals, objectives, and counsel him concerning the process to be used to select officers for promotion to sergeant, they received a surprise. When they tried to discuss various theories, alternatives, and aspects of the new promotion procedure they were recommending, he made it clear that he was not interested in how they came to their recommendations, nor in their opinions of the testing process. He simply wanted their legal expertise on whether or not the new system would withstand litigation. Not only did they have to deal with conflicting legal and technical views on the testing process they were researching, they found that they had to deal with conflicting views on their role as lawyers.

Lest the students accept that their role was limited to answering the Commissioner's sole question "Will this stand up in court?" We, as faculty "co- counsel," asked the Commissioner what he thought about using the proposed new sergeant's promotion process as a vehicle for renewed efforts to obtain a satisfactory settlement of the existing litigation as well as to avoid further litigation. Whether because the idea was appealing on its merits or because a faculty member had raised it, the Commissioner reacted positively to this suggestion, leading the conversation into a discussion of how we might pursue a settlement. Thus, the students saw one example of a lawyer initiating the move from gladiator to problem solver and thereby affecting the client's selection of goals and priorities.

*131 Before the students were assigned the problem concerning the claimed discriminatory failure to hire by the law firm, they were assigned readings concerning unconscious discrimination, [FN50] a reading about women in law firms, [FN51] and Bloom & Morgan's "Manual For Personnel." Among the cases assigned were *Ezold v. Wolf*,

Block, Schorr & Solis-Cohen [FN52] and Masterson v. LaBrum & Doak, [FN53] both cases involving challenges by women to their law firm's failure to promote them to partnership. Before recommending the non-monetary portion of the settlement of a sexual harassment claim against the law firm, the students were able to question two experts, the Director of the Penn Women's Center and also a practicing clinical psychologist. The students' goals in these interviews included learning about the personal and environmental circumstances that tend to permit or discourage sexual harassment, the significance of the complainant's delay in reporting the incidents, and the response of the partner to whom the complainant first disclosed the incident. They were also assigned a number of readings about sexual harassment in the workplace, including some material relating specifically to law firms as work sites.

The students were required to understand and synthesize the law, the legal and non-legal commentary, and the information obtained from the experts in order to devise a recommendation for their client. Then, they met with their client to discuss their proposals. Through this process, the students began to understand how they and other individuals could work together as a team in order to more fully understand the problem in context, generate a richer array of options, and finally produce a recommendation that addressed the important issues and permitted the parties to move forward both legally and institutionally. After both of the law firm based simulations ended the real lawyers were able to share with the students their views regarding how the legal rules and decisions impacted the options open to the various parties as well as the limits on the law's ability to produce a desirable result through litigation.

C. Encouraging Student Collaboration

Lawyers collaborate with colleagues, clients, [FN54] consultants, court personnel, and *132 even with adversaries. "Collaboration" is defined as "The act of working together in a joint project" [FN55] while "negotiate" is "To transact business; to bargain with another respecting a transaction; to conduct communications or conferences with a view to reaching a settlement or agreement" [FN56]. Clearly, negotiation and collaboration are closely related terms. The MacCrate Report identifies negotiation as one of the ten essential lawyering skills. [FN57] In a survey of lawyers, 51% said that the ability to negotiate is of great importance to them in their work as lawyers. [FN58] While collaboration may connote a more benign, less adversarial relationship motivating communications, both terms involve communication between two or more parties seeking to come to some mutually acceptable goal. [FN59]

Lawyers need to know that "collaboration" and "negotiation" are not only acceptable methods, but valuable regardless of whether they are trying to solve the problem of how to "defeat the enemy," solve the client's problem in a creative and efficient manner, or identify "those factors which may lead to a decision that is morally just as well as legally permissible." [FN60] Further, lawyers must be able to listen and communicate effectively with others in order to think and work creatively to devise satisfactory solutions as part of a team approach. [FN61] Indeed, in my experience, most of the lawyer's day is spent in collaboration with others. Yet, traditional non-clinical law school courses offer essentially no opportunity for collaborative problem solving.

All of the simulations included some collaborative work among smaller groups of students, each of whom was assigned a particular role. Before each simulation which involved questioning an expert or making a presentation, the five or six students assigned a particular role met within their cohort groups to discuss their goals and priorities and to develop a consensus concerning how to proceed based upon their individual preparation. They were required to share their work which *133 provided further benefits. While they knew that there was a grade to be given for class participation, we told them that there was no particularly right way to proceed. While the students were so engaged, we moved from group to group to observe the activity from the perspective of both substance (the interests identified by the "Director of Personnel for Urbana" as distinguished from the "Black Police Officers Association") and process (how fully and evenly the students participated).

The questioning of experts was also done collaboratively in that everyone had as a goal obtaining information for use in a subsequent round of the simulation and the students recognized that any understanding gleaned from the inquiry would be available and helpful to the entire group. Similarly, the discussions and presentations to "clients" were done in collaboration. All of these sessions were lively and informative. Several students who participated very little in the large group discussions were actively engaged in these smaller group sessions. Our observations, supported by the students' feedback, confirmed that the students quickly and easily got into the collaborative mode after having been told that they were all part of the same group. They enjoyed working together rather than being on the "hot seat" or sitting fretfully hoping that they would not be called on next.

I believe that the opportunities for collaboration built into the course were effective. However, on further reflection it may be that we could have made even more effective use of these opportunities. In the future, it would be useful to reinforce its importance by reviewing the nature and extent of collaboration during our regular class discussion. That discussion would also provide feedback from the students concerning particular classroom experience and increase their consciousness of collaboration as an available lawyering tool.

D. Learning to Use a Variety of Forms of Communication

Many law schools have as a mission to teach students to "think like lawyers." When we really think like lawyers, however, we recognize that thinking is only part of the job. Communicating is also essential to the effective lawyer. Effective communication for lawyers cannot be limited to persuasively written, footnoted and "blue booked" memoranda addressed to sophisticated business persons, lawyers, or judges. Traditional law school classes teach quick, focused responses to specific questions and written answers to questions with fixed fact patterns, usually under time pressure. [\[FN62\]](#) Yet, lawyers communicate in a variety of ways, both orally and in ***134** writing. Past educational experience has shown that some students are better at one kind of communication than another. For instance, some students excel at presentation as compared to analytical or narrative writing. Consistent with our desire to expose our students to a variety of communication opportunities that more closely track those of an effective lawyer and to give each student an opportunity to learn and demonstrate her mastery of the course material, we sought to provide opportunities, inter alia, for small and large group discussion, interviewing "witnesses/experts," persuasive oral presentation, and typical "legal" as well as non-legal writing.

"Legal writing" is a term of art. It is taught in most law schools as a distinct course. It is what is expected on final examinations and in courses for which "papers" are a part of the assessment process. Aside from the correct citation of authorities, it is a particular form of narrative and persuasive communication. Deviation from that norm will result in a lower grade on the student's test or paper. Reliance on "legal writing" alone as the basis for a grade thus narrows the band of acceptable methods of assessing the student's mastery of the material of the course, and by implication teaches the students that is the way lawyers write. Once again, reality is otherwise. Lawyers communicate in writing in a variety of ways. In our effort to offer a variety of forms and opportunities for demonstrating mastery of the material and to demonstrate that there are a variety of ways in which lawyers are called on to communicate, we included several different forms of written assignments which were individually graded to form the major portion of the student's grade. There was no final examination.

Each writing assignment was reviewed and given extensive written comments as well as a grade. Our goals were to assess the student's work and to help them improve their understanding of the material. The first writing assignment followed the simulated interview of the finalists for the position of General Counsel for the Urbana Police Department. We asked the students to reflect on their role, what they saw as their goals, and how effective they thought they had been in pursuing those goals. We also asked them to reflect on the strategy of one other cohort group, as revealed by their questioning. We wanted thereby, to reinforce the students' consideration of the role and perspective of someone other than themselves. The second writing assignment was a memorandum to their client with a recommended strategy. When despite there were no litigations pending, all of the students assumed we would treat it as a draft, not as a final memorandum. It received careful review and comment and was returned before their "final" draft was due.

Among the other writing assignments were a proposed sexual harassment policy for the firm of Bloom & Morgan, and an editorial opinion piece ghost-written for the police commissioner which supported the sergeants' selection process ***135** recommended by the students (assuming that the commissioner had accepted their recommendation). It required that the students be able to explain to the public the reasons, based in both law and public policy, that supported their decision. These papers would permit the students to demonstrate their mastery of the legal material in the factual context of policing and their ability to consider the various "audiences" they wanted to persuade. The papers also allowed the student to demonstrate their ability to make a case for the Commissioner's decision that would be effective in persuading the various constituencies to support it.

E. Critical Analysis of Employment Discrimination Law

Understanding and evaluating the law critically and creatively is essential to use the law effectively and to fashion a solution to the client's problem. Consequently, we knew that it was important that the students struggle with the theory and doctrine in order to realize that careful analysis of the law is expected of them as lawyers. [FN63] In most segments of the course we began by assigning the students non-case and (frequently) non-legal material to establish the context and its importance. Thereafter, we assigned a selection of cases that we thought would help us develop the applicable theory and doctrine (e.g., McDonnell Douglas Corporation v. Green [FN64] and St. Mary's Honor Center v. Hicks; [FN65] Price Waterhouse v. Hopkins; [FN66] Griggs v. Duke Power Company; [FN67] and Ward's Cove Packing v. Atonio [FN68]) as well as cases and commentary that would assist us in uncovering the attitudes and assumptions that underlay the development of the legal doctrine.

An example of disparate treatment cases is the Court of Appeals and the Supreme Court decisions in Phillips v. Martin Marietta Corporation. [FN69] We *136 identified the holding: "The existence of ... conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for testing men and women differently under section 703(e) of the Act," and thus a defense to a claim of sex discrimination based on the company's blanket policy of not considering applications for employment from women with young children. Then, we asked the students to consider (or even prove) what was implied by the willingness of the majority of both courts to accept as relevant to a Title VII challenge the assumption that having small children at home creates problems for women, though not for men, that might adversely impact their work.

When we studied Price Waterhouse v. Hopkins, [FN70] we asked the students to *137 consider what "intent to discriminate" means. Given Justice Brennan's assumption that, if one could really examine the motive of the decision-makers in a "mixed motive" case, whether one would find an "intent to discriminate" in every instance, would it be a sufficient defense if the decision-maker passed a "lie detector" test saying that he did not have a discriminatory intent? Further, should there be actionable discrimination where the decision maker was unconsciously applying beliefs or stereotypes comparable to those evidenced by the majority opinions of both the Court of Appeals and the Supreme Court in Phillips v. Martin Marietta Corporation? [FN71]

We attempted to focus discussion of the legal doctrine as it would appear in the factual contexts selected by us for the problems. Before immersing the students in a simulation, we wanted them to understand the law well enough to be able to use it to address the problem called for in their roles and to use the simulation as a platform from which to build further insight into the implications of the applicable legal rules. This was not always easy considering a body of law as complex as employment discrimination law and one which was likely to result in multiple opinions in cases decided by the Supreme Court. We attempted to show that there was no clear answer regarding what a court would do if presented with evidence such as that available in the simulation.

In St. Mary's Honor Center v. Hicks, [FN72] we focused in a more or less traditional way on the holding as well as Justice Souter's dissenting opinion. We also discussed how the premises of the Court's decision in the McDonnell Douglas Corporation v. Green and Texas Department of Community Affairs v. Burdine [FN73] line *138 of cases were undercut by the ruling in Hicks. [FN74] Then, we discussed the problems facing a real plaintiff in proving intentional discrimination before and after Hicks by attempting to cast light on what evidence would be required to satisfy a fact-finder that had rejected the employer's proffered non-discriminatory reasons as "not believable." Against this unanswerable conundrum we reexamined the reasons which earlier courts had expressed for creating the doctrine of disparate impact and the McDonnell Douglas burden shifting model. As the students still seemed somewhat confused, we extemporized an impromptu "dialogue" on the majority's reasoning in Hicks with Professor Sturm taking the part of Justice Scalia, while I took the part of Justice Souter. The feedback from the students suggested that they found the discussion helpful in understanding the decision, its relationship to the McDonnell Douglas/ Hicks line of cases, and its implications for litigants.

VI. USING A VARIETY OF TOOLS FOR ASSESSING STUDENT ACHIEVEMENT

Consistent with our belief that different students learn and demonstrate their learning in different ways, we sought to provide a variety of ways for assessing the students mastery of the material. The grade was comprised of 80% for the various writing assignments and 20% for class participation. Given the variety of the written assignments and the variety of the class performance opportunities, we felt that we had created a fair opportunity for each student to both learn the material and demonstrate their proficiency.

One of the surprising bonuses we received from having real experts participate was the recommendation made during the in-class debriefing by testing expert, Dr. James Outtz, that we expand the number and variety of assessment tools that we were using to grade the students in this course. Although we declined his invitation, the suggestion led to a lively discussion with the class of other assessment tools that might be available. [FN75] Thus, the students discussed a potential real life application *139 of the principles that they had learned and used in the simulation.

VII. ASSESSMENT OF THE COURSE

I have three vantage points from which to assess the course as given: (1) my impressions at the conclusion of the course; (2) reflections on the students' final papers and formal course evaluations and responses to the questionnaires that we asked the students to complete; and (3) reflections over the past year and a half as I considered possible changes to the course.

A. End-of-Semester Impressions

We did not spend the amount of time analyzing opinions, refining doctrine and exploring theory in each doctrinal area that would have been allocated in a course in employment discrimination law. Nor did we give any written tests designed to examine how much of the theory and doctrine the students had remembered and could apply to a predetermined fact pattern. Nevertheless, based upon the use of the legal material by the students during the role plays and their written work, it seemed to me that they substantially understood what we covered. For example, in the Bloom & Morgan sexual harassment problem, the students were required to draft a sexual harassment policy and then meet with members of the firm's management committee to explain the policy and defend their recommendation that it be implemented. It seemed clear that the students understood the principles of both "quid pro quo" and "hostile environment" sexual harassment. The students clearly understood that because the alleged perpetrator was a partner, it was likely that the firm would be liable for his conduct. They also understood that the firm had a duty to take prompt and appropriate action to see that there was no recurrence, and that the conduct of the partner to whom the victim first complained would probably not have satisfied that requirement. Similarly, their understanding of the case law relating to employee testing and promotion was patent from their discussions with the "Commissioner" about the new sergeants' selection procedures they recommended and their Editorial Opinion pieces.

Despite their narrow, short term, "gladiatorial" approach to their clients' problem at the beginning of the semester, by mid-semester most of the students had begun to consider long-run implications of their approach to problems presented by their clients and the perspectives of the other stakeholders as part of their problem solving strategies. In addition they were quite used to asking questions of both their *140 clients and other "experts" regarding the factual context of the problem and possible approaches to a solution. As problem solvers, they recognized readily the difficulty of their challenge. However, they were amiable to considering the rich factual context made available to them. The solutions that they proposed clearly tried to harmonize their client's goals and objectives with both the state of the law and the interests of others in order to be both effective and implementable.

Feedback from lawyers and others began at the second class after they had interviewed the two "finalists" for the position of General Counsel to the Urbana Police Department. It continued through the semester whenever we had a role play that involved outside guests. Throughout the semester, the students expressed their appreciation of this input from "real" lawyers. The lawyers told us that they were impressed with the sophistication of first year students' use of the law and the facts to propose workable solutions to problems. At the same time, the students made it clear to us that we had assigned much too much reading from week to week and that several writing assignments were more burdensome than they (or I) had expected at the outset.

Despite the differences between this course and their other first year courses, and the heavy burden of readings and written assignments, the students seemed to be very much engaged in the class. Attendance was close to 100%. [FN76] More importantly, class participation was active throughout the semester. In most of the small group sessions including those in which the students questioned a guest/expert or counseled their client, all of the students

participated. Even in several of the larger classes there were times that student participation in the discussion reached 100%. Further, discussion usually spilled out into the hallway after the class time expired. It was also not unusual for students to share personal experiences that related to one of the issues that we were discussing. Finally, during the role play in which students had to present their proposed non-monetary resolution of the sexual harassment complaint to their "Management Committee" at Bloom & Morgan, our guests/experts commented upon, and I observed the students' enhanced ability to integrate the law, the reported facts, and the firm's long term interests and risks in making their presentation and responding to questions from the committee.

*141 As the course progressed, I realized that we had not provided sufficient opportunity and encouragement for collaborative work among the students. We thought that assigning four or five students to a particular role in each simulation would lead them to work together. Although, each of them prepared for her/his role before coming to class, the time which we made available for discussion among those in the same role before the role play began was insufficient to permit them to share each others' ideas to come to a consensus on how to proceed. Nor did we provide reading material or other pedagogical support for their collaboration. After the classes, we failed to provide them time or pedagogical support for meaningful review and reflection concerning the collaboration itself. These deficiencies were particularly acute in the early part of the semester. However, as the semester progressed and the students became more comfortable with the format and with each other, they were better able to work together. Not surprisingly, in their responses to the course evaluation questionnaires, they did not identify much actual collaborative work. However, a number of them indicated that they would like the opportunity to work collaboratively in the future.

B. Impressions After Reviewing the Students' Final Papers, Course Evaluation and Responses to Questionnaires

I was surprised to see a number of student responses stating that they thought more time was needed for lectures or discussion of "black letter law" to help them feel more comfortable with the law. On reflection, I can appreciate that first year law students would feel insecure about their knowledge of the law and their own ability to learn it. Consequently, a course which spends considerably less time analyzing and extracting legal principles, yet asks them to apply the law they are supposed to have learned to a complex factual context, would be daunting. At the same time, review of the students' final papers (recommending to the Commissioner of the Urbana Police Department plans for dealing with the pending and threatened litigation in light of the Commissioner's goal of a highly competent, community focused, integrated, department), and my observations of their use of the law in the various role plays and written assignments during the course of the semester demonstrated to me a strong foundation and critical understanding of the applicable legal theory and doctrine. While I don't want to ignore the students feelings of insecurity, I have greater confidence in their having learned the applicable law. Balancing the time spent on studying law by traditional means with the time spent on the role playing and writing was difficult. Because there are other opportunities during law school to sharpen the students' skills at reading and analyzing appellate court opinions and to learn employment law in greater breadth and depth, I would be disinclined to convert a significant amount of course time from role plays or writing and their unique educational benefits to discussion of the case law. Even if we were to increase the course from three to four credits by adding an additional *142 hour per week, I am not certain that I would want to commit the additional hour to pure legal analysis.

Almost all of the students indicated that they enjoyed the role plays, including the opportunity to consider the lawyers role. They also appreciated the opportunity to read and reflect on material other than appellate decisions. In this regard, a number of the students indicated that they would have appreciated more class discussion of the non-legal material, as opposed to merely references to it in the context of our discussion.

In reflecting on the roles they chose for themselves as in house counsel in the final written assignment, almost all of the students said that they had come to appreciate how the lawyer's role could potentially be much broader than they had considered at the beginning of the semester. Sixteen of the twenty-one students who answered the question of whether their conception of the lawyer's role had changed because of this course said that it had, while two others said that it had "somewhat." They acknowledged the lawyer's role in defining the context and the importance of considering a wide variety of non-legal material. In particular, almost all of them identified the importance of considering the interests of those other than their own client if they hoped to solve problems constructively. While one or two of the students opted for a very narrow role, the great majority saw the opportunity for more effective problem solving by adopting a broader role definition for the lawyer. Most understood that they would need to

convince their client of the appropriateness of such an enhanced role.

Most of the students appreciated the potential they have as lawyers to contribute to both their client and community. Examples of how they characterized their experiences in the course included the following:

"Having examined the role of the lawyer this semester, I believe that the very notion of lawyering is recommending courses of action that will serve your client's long term objectives and strategic goals. Failure to think globally and strategically about your client's interests will only limit your effectiveness"

"I have been counsel for the Urbana Police Department for almost five months, and I must admit that I do care about what happens to the department"

"The introduction of other disciplines into the study of lawyering in the workplace, such as industrial psychology, helped me realize that there is help out there"

"Most of my classes focus on legal analysis, an obviously large and important *143 part of being a lawyer. Luckily, now I have a better idea of what other skills I must have to succeed in the real world [I]t gives me much needed hope to know that there are jobs out there for lawyers that entail more than just pushing papers around and pulling out black letter law. What a relief!"

"Psychological and sociological issues were of vital importance in the context of this assignment The law serves as the skeleton of the solution, but the non-legal issues are the flesh"

"I had limited exposure to attorneys before law school, so I was not entirely sure of what attorneys actually did. I did assume that their [role] was to settle legal issues. Now, I see that their role is to settle issues legally For instance, I made various recommendations about recruitment and department morale as a response to the discrimination claims. Before this class, I would never have imagined those issues should or could be addressed by an attorney in a discrimination suit about the hiring process I never expected ... that I would be able to use (my problem solving ability in law school) to the extent that I have in this assignment"

"Over the course of the semester I learned that the role of in-house counsel is hard to define During the first role play experience I knew precisely what qualities I wanted in-house counsel to possess, and assumed that if in-house counsel had those qualities she would be able to reform the department. However, when I actually played the role of in-house counsel ... I realized that what I expected from in-house counsel during the first role play was somewhat hopeful"

"[B]efore I formulated my recommendations, I consulted with interested stakeholders to get their opinions about the various problems facing the Department. Their advice was not only helpful, it was critical Affected persons advice and concerns provide in-house counsel with information to determine the best solution and is [sic] also likely to ease implementation (individuals are less likely to be resistant to change if they had some say in the change)"

"I've come to realize that a lawyer is a vital vehicle for change in society, and that [they] ... are remembered and commemorated for stepping outside the system to impact culture."

"I think there is great room for lawyers to do much more positive work. I just worry that [I] won't be able to shape my own role due to constraints by my firm."

"The uncertainty of the law left me with a feeling of hopelessness."

"Well, I still feel the same way, but I see the possibility/potential for a lawyer's *144 role opening up and expanding."

"I see the lawyer's role as more than an advisor on 'the law.' While that is still a top priority, a lawyer must be cognizant of extra-legal- sociological-psychological concerns that a 'legal' environment might create."

"I've realized that there are more steps to 'fixing the problem' than I thought. The answer isn't always to 'fix the problem'."

"I realize that it is not all that easy to just fix a problem. A lot of variables are involved-like what caused the problem and how to prevent future problems."

"Initially, my views of the role [of in-house counsel] were narrow. I labeled the role as 'insurer and protector' in our first assignment. Over time, however, I came to appreciate a much broader notion of the potential duties and responsibilities of the job Through this final assignment I have learned just how difficult it is to balance the multiple responsibilities that I envisioned In January, I probably would have thought that, as in-house counsel, my 'help' would have been limited to determining the department's legal position in defending its current affirmative action plan. In addressing the affirmative action problem now, I viewed my role as in-house counsel as encompassing not only the legal position of the current plan, but also bettering the Department's legal position while facilitating the goals expressed by the Commissioner"

"[T]he traditional 'gladiator' approach to lawyering ... [is] reactive rather than proactive [It] seek[s] to maintain the status quo, and ... fail[s] to emphasize the identification and remedy of potential problems before they arise"

"I came to recognize that defending the [affirmative action] litigation was not a viable solution, but not solely for

the reasons that those programs would not withstand judicial scrutiny. Instead, I viewed the affirmative action and testing programs in light of the things they were, in theory, designed to accomplish: producing the best possible candidates for the job, eliminating discrimination within the department, eradicating racial tension both internally and between the Urbana Police Department and the community at large, and fostering a supportive working environment in the ... department. I came to view the potential and pending litigation as a 'warning sign' that our goals were not being accomplished. But how to fix the problem?"

"[F]irst and foremost, my responsibility is to the client Finally, drawing on the role plays ... I tried to take into account the views and needs of all factions and interested groups within the department. I recognized that the solution that I *145 have proposed will not leave any one group wholly satisfied; however, I have attempted to balance the 'burdens' and 'benefits' each group perceives as growing out of the current system in such a way as to ensure that, for all groups the 'benefits' will outweigh the 'burdens' in the new system"

"Aside from the substantive law (which is very important, of course) the Law & Lawyering course challenged us to look beyond the strict legal issues. Behind the legalities were real problems involving unequal opportunity, social stereotyping, professionalism in the workplace, etc. We discovered that in order to best address present claims and prevent future legal claims, focusing on the underlying disease can more effectively relieve the recurring symptoms."

"[A]s a law student I knew that I would have to deal with my client's perspectives and goals, but I never thought that I would have to be aware of so many other people's concerns This new idea is daunting for several reasons. First, it is a lot harder to take into account so many more factors than the legality of an action. It makes the job of a lawyer much more difficult. Second, I am fearful that [it] will not be possible to achieve in practice I know it is my job to give my client what he wants, but will I be forced to do so at the expense of improving a bad situation? [What] if my client has [ideas] which I don't agree with ... as in the first Bloom & Morgan exercise? [I]f that were a real life situation for me, I think I would have difficulty deciding if I would defend Smith [the partner accused of discriminating against the female applicant]. This would be an even harder decision considering that I was in-house counsel for the firm and might lose my job if I refused."

"Having just written the above memo in my role as in-house counsel, I am particularly struck by the enthusiasm I have had for the job. I've noticed that I enjoy both looking forward and strategizing for the future, rather than just fire-fighting current legal dilemmas. I like to think that the above piece has heart, in a way that none of my legal writing exercises give me a chance to interject I know that I'll have to do plenty of litigating as a future lawyer and will never be able to avoid tackling the black letter law, but this class and various exercises we have had, give me hope that I can do more than that as a counselor."

"I thought that lawyers were supposed to listen to their clients, go to the library and research the legal issues concerned with their client's problems Before working for the Urbana Police department, I believed that a lawyer's product delivery occurred when she fashioned a solution that benefitted only the client. Working as counsel for the Urbana Police department, I realized that it was not enough just to look at the facts and the law. It was important to hear the stakeholders' stories. Although there were times that I felt that the stories were too *146 different to be reconciled, I found that the more that I listened, the better I would do my job. Admittedly, the idea of shutting the door to my office when the stakeholders came at me one after another was more than tempting. Lawyers, after all, are still human"

C. Looking Ahead

When we began, we made a number of choices about what the course would and would not include. Those choices need to be re-examined. In addition, other questions have arisen. I address some of those issues below.

Q. 1. Should the course continue as a first year elective, or become an upper level course? Presumably more experienced law students could handle more material, and handle the complex employment discrimination law more easily.

A. 1. Much has been written about how law school socializes students to view the role of the lawyer as purely adversarial. Law school tends to cause students to see everything as a question of how to get the result your client wants, regardless of what the law says or of the implications to others. The fact that 100% of the students in the "failure to hire" simulation assumed that the matter was either in litigation or that litigation was inevitable and none of them proposed any non-litigation solution, demonstrated that socialization is firmly in place after only one semester. Aside from a course or clinic in alternative dispute resolution there is essentially no opportunity in the

remaining two and one-half years of law school to learn an alternative. Consequently, the remainder of law school likely serves to reinforce the "gladiator" model. On the other hand, if the students see the paradigm of the lawyer as "problem solver" in their experience before they take other substantive courses, they have the opportunity to at least look at the problems addressed in those courses from this perspective. Therefore, it seems appropriate to offer the students an alternative vision as early as possible.

Lawyering is an integrative activity which synthesizes legal theory, doctrine and factual context (including uncertain non-legal, historical facts and technical knowledge from other disciplines), and the goals and needs of clients and others. It frequently involves multiple parties as well as the public interest. Unfortunately, this model of lawyering is not included in the first year curriculum. However, it is essential to the role of a lawyer. To the extent that we want students to have that role in mind and be able to draw on it whenever they study any aspect of law, we need to expose the students to the course early in their careers as law students.

After spending their first semester reading appellate opinions and commentary on the law and answering the professor's questions in class and on the final exam, *147 the Law & Lawyering students acquired a significant and varied amount of "active learning" experiences requiring them to synthesize a variety of information from a variety of sources and disciplines. While they can get some of that in the second year in clinical courses, there does not seem to be any good reason not to expose the students to such "active learning" opportunities in their first year. The second semester of the first year also seems an ideal time, to offer a course in which students are immersed not only in legal analysis, but also in questions about their own role, the context in which they operate, and the critical role that other disciplines play in addressing legal problems.

Our first year students did master the complex "legal" material concerning the law of employment discrimination, the contextual material in which the simulations were placed, and the material regarding the role of lawyers as creative problem solvers. They also improved their ability to use the skills necessary to fulfill that role. My conclusion is that Law & Lawyering or a course with similar goals and properties would be a valuable addition to first year curriculum.

Q. 2. We did not expressly address problems of ethics or professional responsibility in our problems? Should we? If so, how?

A. 2. Consciously or not, expressly or by implication, we teach lessons in ethics and professional responsibility in every class. [FN77] Particularly in the case of ethics and professionalism, purposeful, self conscious teaching is preferable to accidental or random teaching. I am among those that think that it is never too soon to begin creating opportunities for law students to begin to learn that issues of professional responsibility arise frequently in practice. Law students should be able to recognize those issues when they arise, if not anticipate them in order to raise and discuss them with peers and with teachers to get a "feel" for the process of making choices in ethical matters and living with the consequences of those decisions. [FN78] *148 Moreover, because ethical issues arise "in context," students must learn to recognize and be willing to engage with them in the course of trying to address their client's problem. Thus, there is some logic to embedding a number of ethical problems in the simulations for the Law & Lawyering course. A course that is structured around solving simulated problems supervised by "real" clients/experts, including practicing lawyers, offers a unique opportunity for realistic, yet safe experiences to more fully understand how ethical problems arise, are identified (or ignored), and handled, as well as the potential for adverse reactions from clients and superiors in the law firm.

All of the simulations that we used did raise the question of the lawyer's role as counselor, an issue addressed directly by Rule 2.1 of the Model Rules. In addition, the "work and family" problem addressed the issue of the relationship of professional life and responsibilities to non-work life. It also presented the opportunity to discuss whether those not directly impacted by a result would support the employee who needed more time-off than the employer wanted and was legally required to give. Engaging students in that process in their first year sends the important message that ethics and professional responsibility are always important.

Q. 3. Could the course be presented as effectively without as much involvement of outside expert/guests who may not be as readily available to others?

A. 3. While I am continually "impressed" with how engaging Professor Sturm and I are in class, there is, if nothing

more, some modern entertainment value of changing the faces of the non-students with whom the students engage during class-even if I give our students credit (which I do) for longer attention spans than the average TV viewer. But there is much more to be said for having "real" lawyers and other experts participate in class as information sources and as clients. Everything we know about the differences among our family, friends, colleagues, clients, etc., is raised to another power each time we increase the number of different stakeholders whose interests, needs, and perspectives we try to accommodate in solving a problem. Students need to learn that solving legal problems frequently means hearing and understanding the perspectives of parties with very different views of the historical facts as well as, the implications of those facts.

The job of a police sergeant and how to assess whether a particular person can do the job was explained by a white female former Philadelphia career police officer, now the head of police at the University of Pennsylvania, and by an African-American male, formerly a District of Columbia career police officer. But their views of what it takes to be a sergeant and how to decide who will best *149 perform that job differed significantly. In the mediation of the "law firm hiring dispute," the lawyers who played the clients, and the Director of Career Planning who played her counterpart, gave very different perspectives about whether the questions by the interviewer were evidence of intentional discrimination. At the same time, there was broad agreement among them that it was not in their interests to end up in litigation. They also discussed the different alliances that each of them might seek to form in order to bring pressure on the others to settle. The greater the number and variety of "guest/experts we had, the more potential we had to generate discussion producing different perspectives-a reminder to the students that, as lawyers, they had to keep in mind that others frequently have perspectives different from their own.

Similarly, sophisticated explanations of the variety of performance assessment and prediction strategies as well as the strengths and weaknesses of each requires experience and expertise not usually possessed by law teachers. The many years of experience that went into forming the views that our guests brought to class would be difficult, if not impossible, to replicate with surrogates, either teachers or actors. Moreover, it is impossible to predict what technical questions students will have about a given simulation. Thus, experts rather than well-read law teachers are in the best position to answer the students' questions and enrich the discussion.

Finally, we wanted our students to engage in the role plays as if they were lawyers. It helped to have them deal directly with lawyers, clients, and experts, instead of merely with other law professors.

None of that is to say that we couldn't have reduced the number of outside guests. For example, we might have had the management committee in the law firm sexual harassment problem played by one outsider, or by an outsider and another law professor. We could have written the simulations to have fewer stakeholder groups, thus allowing fewer parts to be played by experts/lawyers. Each of these strategies would have required fewer guests. At the same time, reducing the number of guests without reducing the number of students would increase the number of students involved in each interaction with each guest. However, this strategy runs counter to the goal of maintaining small student groups to encourage maximum student involvement. On balance, I think that the course worked well with the role plays and with the number and variety of outside guests that we used. Certainly, problems with cost or availability could lead me to reduce their use. [\[FN79\]](#)

*150 Q. 4. Could our methodology be used or adapted effectively with a much larger class? If so, how?

A. 4. Professor Sturm and I have discussed this question at length. We considered the cost of having two full-time, experienced teachers in one class. We think that in its present format we could handle up to 40 students without causing significant dilution to our goals, particularly that of providing frequent opportunities for students in small groups to work together and to engage with lawyers and other guests/experts. Managing four or five cohort groups of stakeholders was challenging. It required us to monitor the collaborative preparations of each cohort group and to have whole-class discussion regarding each of their perspectives, concerns, and objectives. These discussions, in turn, alerted each of the other "role" groups about considerations and perspectives that they might not have considered. Within the time available, each of the four or five interest groups were able to ask a number of questions relevant to their concerns. Increasing the number of stakeholders would have made both student participation and management more difficult.

Keeping the small groups to four or five students each provided an excellent opportunity for all students to collaborate and to participate actively in the interaction with the experts, while also generating a variety of student-

based perspectives. We found it manageable to use two classrooms and divide the class in half for each simulation with one guest in each room. With four or five students per cohort group and four or five groups per simulation, this would yield between 16 and 25 students per room for each simulation or a maximum of 50 students. However, since some of the simulations were written for four cohort groups which we found preferable to five, we concluded that about 40 students was best given the structure we used. Moreover, grading papers throughout the semester for even the 26 students we had and providing the level of individual feedback and discussion we maintained was an extraordinarily heavy load for one faculty member. We think that reducing the number of students to 20 per faculty member would make a significant difference. Finally since class discussion was so important, keeping the class smaller supported the opportunities for every student from the most shy to the most extroverted, to participate.

Q. 5. What are the implications of this type of class to the overall law school curriculum?

A. 5. The goals that we enunciated at the outset of the course went beyond teaching "legal reasoning" and the basic theory, doctrine and structure of a particular body of law-the traditional goals of most first year courses. We added to the critical analysis of statutes and judicial opinions concerning employment *151 discrimination law a study of (1) the role of the lawyer as problem solver rather than solely as winner of legal arguments in court; (2) the underlying workplace context in which problems arise and in which solutions must be applied; and (3) the qualities of judgment and problem solving skills that support the role of problem solver. In addition, we employed a variety of experiential (clinical) teaching techniques that engaged the students actively in their own learning and that called on them to apply the analytical and problem solving skills that we wanted them to learn.

Although we did have to limit the breadth of the course and exclude several important topics in employment discrimination law, we never envisioned being able to teach a "full blown" course in employment discrimination law. Both of us recognized that most lawyers learn most of the subject matter about which they practice after finishing law school. Thus, teaching all that we might have been able to squeeze into a regular course on employment discrimination law was not essential. We believe it was more important to have the students consider the role of lawyer as problem solver, through contextualization of problems and the development of critical judgment.

Our observations and review of the students' work, the feedback from our guests, and the students' reaction to the course, strongly indicates that the course was successful in accomplishing our "mission." The success of the course suggests that collaborations of clinical and "academic" faculty, including the use of various "active learning" techniques to engage the students experientially, can provide worthwhile variety in the learning experience. This course acknowledges the validity of different perspectives, the use of critical legal analysis, and supports the student s' learning qualities of judgment and creative problem solving. Further, feedback from the students also suggests that this can be accomplished in an atmosphere which makes class enjoyable. Experience demonstrates that such courses can be designed and taught using a variety of other subject matter areas. [\[FN80\]](#) Problem solving exercises can be designed for any subject. Problems can be grounded in context and students required to examine the context and extract relevant data, both factual and technical. Assessment of the students' understanding of the material can be varied to include oral and written presentations of various types.

Q. 6. What are the implications of this course for other teaching *152 collaborations?

A. 6. It would have been extremely difficult to develop or teach this course without the collaborative efforts of Professor Sturm and myself. For example, without her participation in the planning and teaching, it is doubtful that I would have devoted as much time and energy to the detailed examination of the theory and the implications of the various opinions we studied as indicators of the unstated assumptions of the judges. I wonder whether the class would have been exposed to the impact of those decisions on the workplace without my input. Our student evaluations frequently expressed appreciation for having access to our different backgrounds and perspectives in dealing with both the legal and non-legal material.

The experience was exciting, intellectually stimulating, educational, and fun for me. Planning each class involved both having the advantage of, and having to consider another perspective on how to best achieve our teaching goals. Our initial discussions about which cases to use and the topography of the individual problems always changed after further discussions. In class, we frequently "picked up" different messages from the students and thus increased our ability to respond. Some students were more comfortable talking with Professor Sturm and some with me. After

class, it was always helpful to have a colleague with whom to debrief. I work well collegially such that the process worked well for me.

I have no reason to doubt, and every reason to believe that, just as Professor Sturm and I had a successful collaboration other teachers and researchers will find that the process produces successful results. The collaboration of "academic" and "clinical" teachers can produce great rewards for their students and for themselves.

VIII. CONCLUSION

Our students entered their second semester of law school with a narrow view of the lawyer's role—one in which the lawyer responds with a purely legal answer to a legal problem, and more often than not views her/his role in a purely adversarial mode: "How can my client win, that is, achieve the stated goal?" We believe that there is, in addition to the traditional "gladiator" model of lawyering, an opportunity to approach "legal" problems presented by clients from a broader "problem solving" perspective, and thereby to produce a result that may be even better for the client than that which the "gladiator" model might produce. [\[FN81\]](#) It makes sense, therefore, to expose law students to this model so they may consider it in addressing their clients' problems.

*153 Understanding this model requires an appreciation of the importance of the context in which problems arise, including the long-term interests and concerns of the clients and of other persons and entities with whom the client will have ongoing relationships. It also requires an appreciation of the lawyer's ability to influence the definition of the context, even as seen by the client. Moreover, operating effectively in the problem solving mode regularly calls on a range of skills, including marshaling evidence from diverse sources, including other disciplines. It also necessitates appreciating perspectives other than one's own, working collaboratively, and communicating with persons of different levels of sophistication and informational needs. Our goal was to have our students learn this model.

We chose to teach through having our students solve problems in role and to employ a number of other "active learning" techniques in order to stimulate the students learning and increase their opportunities to demonstrate that learning. The feedback that we received from our students strongly points to their having gotten the message. Even those students who chose the narrower role expressed an understanding that there is a broader role possible and the implications inherent in choosing one rather than the other. Moreover, feedback from several of our expert/guests as well as my own observations confirms that our students have developed an appreciation of the problem solving role and of the various skills that they may employ to operate effectively in that mode.

We have learned a great deal, including the need to be more circumspect in our reading assignments, perhaps to be much more aggressive in editing material that we assign, and to be more explicit in our planning if we want the students to engage in more collaborative work. Having said that, I believe that we have demonstrated that while emphasizing critical analysis of the law, we were also able to teach first year students to apply the law in a creative problem solving manner. That the course was novel and experimental did not scare them away. Rather, they seemed to relish the opportunity and challenge to integrate law and context by exercising critical judgment to think and act like the kind of lawyers they would like to become.

[\[FNal\]](#). Alan M. Lerner, Practice Associate Professor of Law, University of Pennsylvania Law School. I am deeply indebted to Susan Sturm, without whom there would have been no "Law & Lawyering" course, for her endless support and encouragement in the creation and teaching of the course, and the writing of this article. Our teaching and research assistants, Lori L. Marcus, Esquire, Dionne Broadus and Marcellene Hearn provided incalculable help in selecting the reading materials, participating in the simulations, and reviewing the students' in-class performance at the end of the semester. I am also indebted to the courageous students for enrolling in our experimental and challenging course, and for their enthusiastic and thoughtful participation which made every class interesting and fun for me. I am particularly appreciative of the work of Robyn Gemeiner, one of the aforementioned "courageous" students who also provided invaluable assistance in the research and writing of this article; to my clinical colleagues who put up with my unavailability during the time we were preparing and teaching the course; and to Professors Anthony Amsterdam, Douglas Frenkel, Robert Gorman, Howard Lesnick, and Hon. Edmund B. Spaeth, and numerous other colleagues and friends who provided helpful comments and suggestions during the course or the

writing of this article.

[FN1]. See Edward D. Re, [The Causes of Popular Dissatisfaction with the Legal Profession](#), 68 ST. JOHN'S L. REV. 85 (1994) (finding the causes of public dissatisfaction with the legal profession to be rooted in the billable hours phenomenon, excessive litigation in society as a whole and the commercialization of the law); MARY ANN GLENDON, A NATION UNDER LAWYERS (1994) (exploring the role of lawyers in the United States); ANTHONY T. KRONMAN, THE LOST LAWYER (1993) (reflecting on the lost role of the lawyer as statesman, a person of character and honesty whom society turns to for leadership and proposing what the legal profession can do to revitalize this role); SOL M. LINOWITZ, THE BETRAYED PROFESSION (1994) (presenting the role of lawyer as confidant, partner, and general counsel instead of as simply a legal technician); Peter Gabel, The Moral Obligation of Defense Lawyers, TIKKUN, July/Aug. 1997, at 8 (arguing that the traditional adversarial system's exclusive commitment to partisanship of counsel without regard to the consequences to victims of wrongdoing or to the community at large is a significant cause of public dissatisfaction with lawyers and the legal system).

[FN2]. We also wondered what effect, if any, such an approach to legal education would have on the way that law is practiced throughout the profession? And what effect would that have on the society so thoroughly imbued with the presence and work of lawyers? We believed that educating lawyers to exercise critical judgment and creative problem solving would produce more effective lawyers. We also believed that lawyers who exercise critical judgment and function as thoughtful, reflective, creative problem solvers can contribute significantly to reducing the volume and intensity of litigation as a tool for resolving disputes, as well as reducing polarization in society. As described below, we had a number of lawyers participate in various roles in our classes. The feedback we received from them confirmed our view that lawyers who can exercise critical judgment and function as creative problem solvers are better lawyers than equally bright lawyers who do not. Likewise, informal feedback from our students suggests that they are enthusiastic about that role of problem solver. Nevertheless, in this course, and in this paper, we have not attempted to determine or predict the impact on the profession, or on the broader society, of consciously seeking to teach critical judgment and problem solving skills. For an examination of why that transformation makes sense to the profession and to society see, Susan P. Sturm, From Gladiators to Problem- Solvers: Connecting Conversations about Women, the Academy and the Legal Profession, 4 DUKE J. GENDER, L. & POL'Y 119 (1997).

[FN3]. The course was given as a first year elective. In the second semester of the first year, all students are permitted to select two electives, one from from each of two lists: a) Labor Law or Administrative Law; or b) various "perspectives" courses, including "Law & Lawyering." As a first year elective, our course had to fit in the standard form of a three credit course covered in two classes, each of 75 minutes. We had 26 students, though we think that we could effectively engage up to a maximum of 40 using the format that we developed.

[FN4]. We learned from each other and brought different perspectives to bear on the planning, as well as to the class room teaching. Professor Sturm brought her years of examining the most theoretical foundations of the law, and of the positions espoused by the various justices of the Supreme Court, conceptualizing policies that might support equality and democracy in the workplace and teaching courses in employment discrimination law and "Critical Issues in The Law: Race and Gender." I drew on more than 25 years of experience with clients - plaintiffs and defendants - and with fellow lawyers reflecting on how to advise their clients to operate "on the ground" where the implications of the legislature's and the court's pronouncements were felt. These experiences helped us to fashion simulations that gave the students a fairly representative picture of what good lawyers actually do. It also gave us a basis for a rich and critical discussion of the relationship between the theory of employment discrimination law, the evolving doctrine, and the relationship of both to the problems faced by clients.

When it came time to develop the simulations in which the students would be called on to apply the law, our personal experiences provided rich sources of material and experts to draw on.

[FN5]. Eg. Class of 1995 Employment Report and Salary Survey, 1996 (NAT'L ASS'N FOR LAW PLACEMENT) 7 [hereinafter Employment Report].

[FN6]. Fifty-six percent of the 1995 law school graduates in the United States entered private practice, 13.4% entered legal jobs in a business setting, 11.6% entered government positions, and 2% entered public interest positions. *Id.* at 15.

[FN7]. See generally OLIVER WENDELL HOLMES, *The Profession of the Law*, in COLLECTED LEGAL PAPERS (Harcourt, Brace and Co., 1920) (discussing the struggle, yet potential, in law to carve out a meaningful niche for oneself); K. N. LLEWELLYN, *THE BRAMBLE BUSH; ON OUR LAW AND ITS STUDY* (Oceana Publications, 1960);

[FN8]. Lawyering encompasses all these skills because it is a profession which combines the technical and the abstract. A great lawyer must develop excellent technical skills of legal analysis, legal writing, negotiation, and oral communication. At the same time, a great lawyer must be a creative problem-solver with the ability to see his or her client's problem from a broader perspective. See AMERICA BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP*, 141-221 (1992) (designating 10 skills and 4 values essential to lawyering in its Statement on Skills and Values) [[hereinafter *The MacCrate Report*]; Paul Brest & Linda Krieger, [On Teaching Professional Judgment](#), 69 *WASH. L. REV.* 527, 528-29 (1994) (proposing that law schools alter their current curricula in order to teach students how to be effective decision-makers and problem-solvers); KRONMAN *supra* note 1, at 11-14 (discussing the lawyer as statesman); LINOWITZ, *supra* note 1 (arguing that effective lawyers serve as more than mere legal technicians, for example as thoughtful counselors).

[FN9]. Sturm, *supra* note 2, at 2.

[FN10]. ROGER FULFORD, *THE TRIAL OF QUEEN CAROLINE* 8 (1967) (J. Nightingale ed., Jobins & Co. Albion Press 1820-1821); see also Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext and Context*, 41 *J. OF LEGAL EDUC.* 29, 29 (1991).

[FN11]. *Id.* (quoting Lord Brougham).

[FN12]. E.g., HARPER LEE, *TO KILL A MOCKINGBIRD* (1960); AARON SORKIN, *A FEW GOOD MEN* (1990).

[FN13]. See, e.g., *Norris v. Lee*, No. 93-0441, 1994 U.S. Dist. LEXIS 96 (E.D. Pa. Apr. 15, 1994), in which the District Court denied a motion by a lawyer for leave to withdraw from representing a client with whom he had a serious disagreement, because the lawyer's role was that merely of the "gladiator" for the client who pursued the client's expressed goals. *Id.* at *2. The court ordered the attorney to represent the client no matter what differences arose, because it is not the attorney's place to argue with the client, but instead to represent the client to the attorney's maximum capacity. *Id.* at *2-3.

[FN14]. See, e.g., [Lee v. Southeastern Pennsylvania Transp. Auth.](#), 704 A.2d 180 (Pa. Commw. Ct. 1997) (affirming the grant of a new trial to the plaintiff occasioned by the defense counsel's repeatedly asking questions concerning a matter that the trial judge had ruled inadmissible); *Langer v. Presbyterian Med. Ctr.*, 1993 U.S. Dist. LEXIS 16193, *1 (E.D. Pa. 1993) ("called upon the court to referee yet another rancorous discovery dispute arising out of the rather nasty, prolix, procedural foreplay which has become something of an exercise in litigious siege warfare."); [Hall v. Clifton Precision](#), 150 F.R.D.525 (E.D. Pa. 1993). The professional publications of the bar abound with articles

concerning abusive practices by attorneys in litigation, and what should be done about them. See, e.g., John D. Shugrue, Identifying and Combating Discovery Abuse, 23 LITIGATION, No. 2, 10 (ABA, 1997); Jill Schachner Chanin, Dirty Tactics, 14 THE COMPLETE LAWYER 30 (1997).

[FN15]. While, as Dean Cramton points out, the opportunities, and therefore probably the occasions, for such lawyering vary with the context. Roger C. Cramton, On Giving Meaning To "Professionalism", in TEACHING AND LEARNING PROFESSIONALISM-SYMPOSIUM PROCEEDINGS, Oct. 2-4, 1996, at 7-8 & n.2. I know of no area of practice where there are not reported cases of lawyers having overreached, misrepresented, improperly withheld information, etc., in the name of representing their client zealously.

[FN16]. Rhode, *supra* note 10.

[FN17]. See generally Warren Lehman, The Pursuit of a Client's Interest, 77 MICH. L. REV. 1078 (1979) (discussing the lawyer's duty to help the client truly decide his or her interests rather than assuming an instrumentalist approach and pursuing what the client initially desires).

[FN18]. See e.g., [Spaulding v. Zimmerman 263 Minn. 346, 350 \(1962\)](#). (finding that defense counsel's failure to disclose could have led to serious physical harm, even death, to innocent third parties, had it not been discovered); see also [Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wash.2d 299 \(1993\)](#).

[FN19]. See, KRONMAN, *supra*, note 1; LINOWITZ, *supra*, note 1; Rhode, *supra* note 10.

[FN20]. CHARLES S. CLAXTON & PATRICIA H. MURRELL, Learning Styles: Implications For Improving Educational Practices, 3, 7-55 (ASHE-ERIC Higher Education Report No. 4, 1987) (testing different models for evaluating learning styles).

One particularly popular model for evaluating learning styles is the Myers- Briggs Type Indicator. See e.g. ISABEL BRIGGS MYERS, INTRODUCTION TO TYPE (Center for the Application of Psychological Type 1976); JOSEPH KATZ AND MILDRED HENRY, TURNING PROFESSORS INTO TEACHERS A NEW APPROACH TO FACULTY DEVELOPMENT AND STUDENT LEARNING 27 (1988).

[FN21]. CLAXTON & MURRELL, *supra* note 20, at 4-5.

[FN22]. H.A. WITKIN ET AL., PERSONALITY THROUGH PERCEPTION: AN EXPERIMENTAL AND CLINICAL STUDY 153-171 (1954) (concluding that women's personalities tend to be more "field dependent," meaning that they are heavily influenced by their surrounding field, whereas men are more likely to be "field independent" and these differences affect the learning styles of both genders); see also CLAXTON & MURRELL, *supra* note 20, at 8-13; CAROL GILLIGAN, IN A DIFFERENT VOICE: (1982); The MacCrate Report, *supra* note 8, at 22.

[FN23]. See L. Brillhart and M.B. Debs, An Engineering-Rhetoric Course: Combining Learning-Teaching Styles, 30 Improving College and University Teaching 80, 85 (1982), discussed in CLAXTON & MURRELL, *supra* note 20, at 52.

[FN24]. See Lani Guinier et al., Becoming Gentlemen: Women's Experience at One Ivy League Law School, 143 U. PA. L. REV. 1 (1994) (finding a greater rate of academic success in men law students than in women law students, as well as the alienation of women law students by the use of the Socratic method). Women law students do not fare

as well as men in the hierarchy and social structure of law school. As a result, many women students find law school to be a demoralizing alienating, life-altering experience.

[FN25]. Clearly students learn better when they are actively engaged in the learning process. Charles C. Bonwell & James A. Eison, *Active Learning: Creating Excitement in the Classroom*, 1 (ASHE-ERIC Higher Education Report No. 1, 1991).

[FN26]. *Id.* at 3 (citing Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice*, AAHE BULLETIN, 3-7 (March 1987)).

[FN27]. *Id.* (citing STANFORD C. ERICKSEN, *THE ESSENCE OF GOOD TEACHING* 51 (1984)).

[FN28]. *Id.* (citing ALEXANDER W. ASTIN, *ACHIEVING EDUCATIONAL EXCELLENCE* 133-34 (1985)); see also, KATZ & HENRY, *supra* note 20.

[FN29]. See The MacCrate Report, *supra* note 8 (identifying ten lawyering skills and four "values" which it asserts are common to the profession and to all, or substantially all, practicing lawyers, regardless of the context in which they practice). While there have been scholarly and other professional responses to the Task Force's Report, there is broad support for its identification of those ten skills and four values as common to the profession.

Among those skills identified in the McCrate Report which we hoped to build in our course were: (1) problem solving; (2) legal analysis and reasoning; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; and (8) alternative dispute resolution. We also involved the students in, or draw their attention to, all four of the "fundamental values:" (1) provision of competent representation; (2) striving to promote justice, fairness and morality; (3) striving to improve the profession; and (4) professional self-development. *Id.* at 138-40.

[FN30]. In my four years as a Clinical Law Professor, I have witnessed the impact of active learning. Feedback from my clinical students, along with my own personal observations, have shown that students are clearly more motivated and engaged in learning both legal doctrine and legal skills when they are active participants in the process. Professor Sturm has experienced this phenomenon through her varied teaching experiences as an Academic Law Professor. More formal research on education has also shown that students not only learn collaborative skills but also learn the material more thoroughly when they engage in cooperative learning. See Bonwell & Eison, *supra* note 25, at 43-47.

[FN31]. CLAXTON & MURRELL, *supra* note 20, at 77.

[FN32]. KATZ & HENRY, *supra* note 20, at 4-6.

[FN33]. See Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 U.C.L.A. L. REV. 1157, 1158 (1990).

[FN34]. For example, for the simulation concerning the development of a process for selecting police officers to be promoted to sergeant, an official of the National Black Police Officers Association and the Chief of the University of Pennsylvania Police were questioned in class by the students about the work of a police sergeant and how one might assess a candidate's ability to perform that role. In the simulated mediation of a claim that a law firm had discriminatorily refused to offer a follow-up interview to a third year law student, practicing lawyers played the parts of the complainant, the managing partner of the firm, and the interviewing partner, our law school's Director of

Career Planning & Placement played "herself," while a faculty member who teaches mediation, and one of her "star" pupils were the mediators.

[FN35]. BONWELL & EISEN, *supra* note 25, at 47.

[FN36]. In the first class we also pointed out that the class was an experiment in collaboration between theoretical and clinical teachers, theories and methods, and that we appreciated their willingness to join the experiment.

[FN37]. The material about the "Urbana Police Department" was derived from the Report of The Independent Commission on The Los Angeles Police Department ("The Christopher Commission"), July 9, 1991, and from organizational charts and job descriptions from another urban police department, that Professor Sturm had gathered in connection with other research.

[FN38]. See Lesnick, *supra* note 33, at 1159. Professor Lesnick proposes that traditional law classes have a clinical element in the sense that students learn not only the material explicitly covered in class, but also the implicit messages about lawyering that are conveyed through the material, the professor, and the classroom experience. *Id.* For instance, traditional legal instruction sends an implicit message that law is divided into "fields," that the core of law is private law, that the core skill of lawyering is analytic reasoning, and that litigation is the predominant mode of lawyering. *Id.*

Professor Lesnick put the ideas promulgated in *Infinity in a Grain of Sand* to work in the revolutionary first year program he helped design for the CUNY Law School at Queens College, a major goal of which was to teach students implicitly through the structure and emphases of the program as well as through the substantive material. *Id.*

[FN39]. [McDonnell Douglas Corp. v. Green, 411 U.S. 792 \(1973\)](#). McDonnell- Douglas is a central case to employment discrimination law and a starting point for analysis in most employment discrimination cases. In its opinion, the Supreme Court provides a three-step framework for proving employment discrimination. [Id. at 802-04](#). The plaintiff must first establish a prima facie case of discrimination through four elements: he or she must show that he or she belongs to a protected group, that he or she applied and was qualified for a job the employer was trying to fill, that though qualified he or she was rejected, and thereafter the employer continued to seek applicants with the plaintiff's qualifications. [Id. at 802](#). The defendant must then proffer a legitimate, non-discriminatory reason for the adverse act. [Id. at 802-03](#). In the final step the plaintiff has the opportunity to show that the defendant's proffered reason is in fact pretextual. [Id. at 804](#).

[FN40]. *Supra* Part, IIIB.

[FN41]. All parties wanted to avoid the costs of litigation but each party had more to lose than just money if the case were to enter the litigation phase. Ms. Freed still had to find a job in the legal community as well as attend her law school, and therefore wanted to avoid the possibility of being stigmatized as "difficult" or "overly sensitive." Bloom and Morgan did not want the publicity which comes with litigation, and the lingering suggestion that their firm engages in discriminatory hiring practices. Clearly such publicity would be bad for both recruiting new lawyers and attaining clients. Nor did the law school want to stigmatize itself as prejudicial and unsupportive of its students, for such negative publicity would discourage the best and brightest students from attending the university in the future, as well as suggest to interviewing employers that the university is a hotbed for discrimination lawsuits.

[FN42]. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1992).

[FN43]. *Supra* Part I.

[FN44]. An employer may escape liability for its employee's sexual harassment of another one of the employer's employees if the employer takes prompt and appropriate remedial action upon attaining actual or constructive knowledge of the harassing behavior. [Burlington Industries, Inc. v. Ellerth](#), 118 S.Ct. 2257 (1998); [Faragher v. City of Boca Raton](#), 118 S.Ct. 2275 (1998); [29 C.F.R. § 1604.11\(d\)](#) (1998).

[FN45]. Leonard L. Baird, A Survey of the Relevance of Legal Training to Law School Graduates, 29 J. LEGAL EDUC. 264, 273 (1978).

[FN46]. Skill number 4 in the Statement of Skills and Values is "Factual Investigation." The MacCrate Report, *supra* note 8, at 163.

[FN47]. Walter Otto Weyrauch, [Fact Consciousness](#), 46 J. LEGAL EDUC. 263, 264 (1996).

[FN48]. See Peter A. Joy, [The MacCrate Report: Moving Toward Integrated Learning Experiences](#), 1 CLINICAL L. REV. 401, 406 (1994) (arguing that it is difficult for first year students to understand the cases if they do not have insight into how lawyers interview clients, begin to frame issues, gather facts, and learn clients' objectives).

[FN49]. The assigned cases regarded hiring and promotion procedures, in particular testing as a part of hiring and promotions. The assigned cases were [Griggs v. Duke Power Co.](#), 401 U.S. 424 (1971) (holding that Title VII prohibits the use of tests which have a disparate impact, even if the employer has no intent to discriminate unless the employer can demonstrate that the test is substantially related to the job); [Washington v. Davis](#), 426 U.S. 229 (1976) (holding that under the Constitution as opposed to Title VII, unlawful discrimination requires proof of intentional discrimination not merely disparate impact); [WardsCove Packing Co. v. Atonio](#), 490 U.S. 642 (1989) (holding that the Court must compare the racial composition of the employer's employees to the racial composition of the labor market at large, instead of comparing the proportion of white to nonwhite employees working for the employer, in determining whether or not the employer is discriminating); [Connecticut v. Teal](#), 457 U.S. 440 (1982) (holding that an employer cannot use a test which has disparate impact on hiring and promotion process, even if the employer attempts to make up for that disparate impact in its "bottom line" result by consciously hiring and promoting protected groups); [Dothard v. Rawlinson](#), 433 U.S. 321 (1977) (holding that the Alabama state prison system can bar women from working as prison guards as long as they present evidence that women lack a bona fide occupational qualification); [Bridgeport Guardians, Inc., v. City of Bridgeport](#), 933 F.2d 1140 (2d Cir. 1991) (holding that officers selected for promotion to sergeant should be selected based on bands of objective test scores [i.e. all test takers with scores of 90%-100% are considered to have achieved the same score] rather than to use a strict rank-order, in order to alleviate the disparate impact that objective tests can have); and [Middleton v. City of Flint](#), 92 F.3d 396 (6th Cir. 1996) (holding that quotas are not an acceptable mode of affirmative action). These cases form the foundation of hiring and promotion discrimination law, and served as the legal framework through which the students analyzed the presented problems.

[FN50]. Charles R. Lawrence, III, [THE ID THE EGO and EQUAL PROTECTION: Reckoning With Unconscious Racism](#), 39 STAN. L. REV. 317 (1987).

[FN51]. JENNIFER L. PIERCE, GENDER TRIALS (1995).

[FN52]. 983 F.2d 509 (3d Cir. 1992).

[\[FN53\]](#). [846 F. Supp. 1224 \(E.D. Pa. 1993\)](#).

[\[FN54\]](#). See LINOWITZ, *supra* note 1, at 47 (conveying the efficacy of a collaborative relationship between the executives of an organization and the organization's counsel). Linowitz himself had such a relationship with the CEO of Xerox, where he was general counsel for a number of years. *Id.* The experience of one of the professionals who participated in our simulations is "senior counsel" to a large public company, and my personal experience as a private practice attorney reflected similar experiences.

[\[FN55\]](#). BLACKS LAW DICTIONARY 178 (6th ed. 1990).

[\[FN56\]](#). *Id.* at 720.

[\[FN57\]](#). The MacCrate Report, *supra* note 8, at 185.

[\[FN58\]](#). Baird, *supra* note 45, at 273.

[\[FN59\]](#). ROGER FISHER ET AL. GETTING TO YES NEGOTIATING AGREEMENT WITHOUT GIVING IN 3-97 (1991) (identifying five principles of successful negotiation: (1) Don't bargain over positions; (2) Separate the people from the problem; (3) Focus on interests; (4) Invent options for mutual gain, and; (5) use objective criteria).

[\[FN60\]](#). MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8, (1991).

[\[FN61\]](#). See Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. REV. 754, 758 (1984).

[\[FN62\]](#). Susan L. Brody, Teaching Skills and Values During the Law School Years, in THE MACCRATE REPORT, BUILDING THE EDUCATIONAL CONTINUUM 22-24 (1994); see also Anthony G. Amsterdam, Clinical Legal Education - A 21st Century Perspective, 34 J. LEGAL EDUC. 612 (1984).

[\[FN63\]](#). We did not, for example, consider any problems under the Age Discrimination In Employment Act, or The Americans With Disabilities Act; nor did we consider problems arising out of such important areas as downsizing and layoff.

[\[FN64\]](#). [411 U.S. 792 \(1973\)](#) (establishing the three step framework for proving employment discrimination).

[\[FN65\]](#). [509 U.S. 502 \(1993\)](#) (holding that a trial court is allowed to find legitimate, non-discriminatory reasons for the defendant's adverse act other than the reason proffered by the defendant, even after rejecting employer's preferred reason as pretextual).

[\[FN66\]](#). [490 U.S. 228 \(1988\)](#).

[\[FN67\]. 401 U.S. 424 \(1971\).](#)

[\[FN68\]. 490 U.S. 642 \(1989\).](#)

[\[FN69\]. 400 U.S. 542 \(1971\)](#), vacating [411 F.2d 1 \(5th Cir. 1969\)](#). The plaintiff in Phillips was denied a job at Martin Marietta. [Id. at 543](#). She brought suit under Title VII of the Civil Rights Act of 1964, claiming that the employer's policy of not hiring women with pre-school age children, such as herself, while applying no such rule to men with pre-school age children violated the Act. *Id.* The District Court held that unlawful discrimination could not have occurred because there was no prohibition against discrimination based on having children, and there was no discrimination proven against women, because 75-80% of Martin Marietta's workforce was female, while only 70-75% of the applicants were female. *Id.* The Fifth Circuit affirmed the District Court decision, reasoning that the discrimination was between married and unmarried women, and was, therefore, not prohibited by Title VII. [Id. at 544-45](#). In rejecting the interpretation of the Act preferred by the Equal Employment Opportunity Commission, the Court of Appeals stated:

[The Commission suggests] a Congressional intent to exclude absolutely any consideration between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute.

[Phillips, 411 F.2d at 4.](#)

The Supreme Court, per curiam, (Mr. Justice Marshall concurred separately) vacated the Fifth Circuit's decision, stating that the Fifth Circuit erred in reading 703(a) as permitting different hiring policies for men and women. *Phillips*, 400 U.S. at 498. The Court's opinion, however, acknowledged the possibility that because women's family obligations do conflict with work, an employer might be able to prove that not being a woman with young children at home was a bona fide occupational qualification. *Id.* The Court did not vacate the Fifth Circuit's decision because it found that assumptions about mothering roles are not to be considered in hiring practices, but rather because not enough evidence was presented at the trial to establish that mothers of pre-school children have different obligations than fathers of such children. *Id.* The Fifth Circuit and the Supreme Court were in agreement that considering a woman's traditional obligations at home when making a hiring decision does not violate Title VII. *Id.*

[\[FN70\]. 490 U.S. 228 \(1988\).](#) Hopkins is a landmark case which addresses the murky nature of intent in discrimination cases, where both lawful and unlawful considerations influenced the employer's decision. [Id. at 241](#). The Court held that if the plaintiff in an employment discrimination case proves that her gender played a motivating part in an employment decision, an inference of intentional discrimination arises. [Id. at 258](#). The defendant, however, can rebut this inference by proving by a preponderance of evidence that it would have made the same decision even if gender had not been taken into account. *Id.* While the employer has the burden of proof to show they would have made the same decision, upon carrying that burden they will have successfully rebutted the presumption, even though they were, at least in part, motivated by discriminatory reasons. *Id.* In § 107 of the Civil Rights Act of 1991, Congress partially overruled Hopkins by amendment to § 706(g), to provide that a violation of the Act is established when "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice" and that proof that the employer "would have taken the same action in the absence of the impermissible motivating factor" will affect only the remedy imposed by the court. [42 U.S.C. § 706\(g\)](#), § e-2, § 5(g).

[\[FN71\]. Cf., Bennett v. Veterans Admin. Medical Ctr., 721 F. Supp. 723 \(E.D. Pa. 1988\).](#)

[\[FN72\]. 509 U.S. 502 \(1993\).](#)

[\[FN73\]. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254- 55 \(1981\)](#) (holding that the defendant need only articulate - not prove - a non-discriminatory reason for its action).

[FN74]. In *St. Mary's Honor Ctr. v. Hicks*, the Supreme Court held that "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." [509 U.S. 502, 515 \(1993\)](#) (emphasis added). The burden is on the plaintiff to prove affirmatively that the defendant intentionally discriminated against him. [Id. at 506](#). In class we discussed the difficulty of obtaining direct evidence of discriminatory intent and the fact that the employer will always be in a better position to provide an explanation of why it acted as it did. Due to these circumstances, the plaintiff's burden to disprove all of the possible non-discriminatory reasons for the employer's action is enormously difficult.

[FN75]. One suggestion was that in lieu of the editorial opinion piece, we offer the students an option of appearing on a simulated T.V. interview to explain the reasons for the commissioner's decision. We discarded the idea when we were unable to come up with a procedure that would make the "interviews" uniform as to the interviewer, so that each student would have the same opportunity to "perform," and one which would permit anonymous grading.

[FN76]. Although we did not formally take attendance, Professor Sturm and I shared our observations with each other and asked for the observations of our teaching assistants. All of us agreed that absences were rare. In fact, when students were anticipating missing a class, they usually approached us beforehand to tell us and explain why. Also, in response to the anonymous questionnaires which we distributed at the end of the course (23 of the 26 students responding), the students reported an estimated mean class attendance of 96.4% of classes, and a median of 98%.

[FN77]. Susan P. Koniak & Geoffrey C. Hazard, Jr., *Paying Attention To The Signs*, 58 *LAW AND CONTEMP. PROB.*, 117, 118-120 (1995); Deborah L. Rhode, [Into The Valley of Ethics: Professional Responsibility and Educational Reform](#), 58 *LAW & CONTEMP. PROBS.*, 139, 143 (1995); Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?* 41 *J. LEGAL EDUC.* 3 (1991); c.f., Lesnick, *supra* note 33.

[FN78]. In a survey conducted by the Professionalism Committee of the ABA Section of Legal Education and Admission to the Bar, 19 law schools (14% of those responding) reported that they had some ethics/professionalism component in the first year. See Report of The Professionalism Committee, *Teaching and Learning Professionalism*, 39, 40 (ABA 1996). For discussion of some such courses, see, e.g., Stephen McG. Bundy, *Ethics Education In The First Year: An Experiment*, 58 *LAW AND CONTEMP. PROBS.*, 17 (1995); Rhode, *supra*, note 77, at 143.

[FN79]. We were fortunate that none of our guests charged for their time. Also, given our location in Philadelphia, and the experience working with these individuals that Professor Sturm and I had, we never encountered a problem in finding appropriate people to come to work with us.

[FN80]. See, e.g., Eleanor W. Myers, *Teaching Good and Teaching Well: Integrating Values With Theory and Practice*, 47 *J. LEGAL EDUC.* 401 (1997); Barbara Bennett Woodhouse, [Mad Midwifery: Bringing Theory, Doctrine and Practice To Life](#), 91 *MICH. L. REV.* 1977 (1993).

[FN81]. See *supra* Part I, we believe that the "problem solver" model also has great value for the lawyer, for the profession and for the community at large.

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