

Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections

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INTEGRATING ALTERNATIVE DISPUTE RESOLUTION (ADR)
INTO THE CURRICULUM AT THE UNIVERSITY
OF WASHINGTON SCHOOL OF LAW:
A REPORT AND REFLECTIONS

*Lea B. Vaughn**

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INTRODUCTION

As I began to write this essay, I realized that its conception overlapped with the twentieth anniversary of my own graduation from law school in 1978. Even a cursory review of the literature in the intervening twenty years demonstrates that both legal education and the legal profession have been assaulted by change, for good and ill. This essay attempts to capture the experience of one school as we began the integration of alternative dispute resolution (ADR) into our curriculum.

The essay is framed in two basic parts. In the first part, it describes the program of integration that was undertaken at the University of Washington during the 1995-1997 period of the Fund for the Improvement of Post-Secondary Education (FIPSE) grant. After describing the context in which these curricular changes were made, it describes the changes in years one and two of the grant program. Additional changes that have occurred subsequent to the final grant report in October 1997 also will be summarized. One of the lessons that emerges from our experience is that change will be an incremental, long term process. Although it was not possible to adopt a University of Missouri-Columbia program¹ within the two-year time frame of the grant, it is likely that the law school will have a program that resembles the Missouri Plan, albeit with a greater focus on the role of the legal writing program.² This section of the essay, then, serves more as a contextualized “how-to” manual for schools that wish to make these changes slowly, or that have less than optimal conditions for the adoption of the full Missouri Plan.

The second part of the essay focuses on the process of curriculum reform. Although the overt topic of this symposium issue is the integration of ADR into the law school curriculum, the entire project has consequences far beyond the obvious. Integrating ADR into any law school curriculum places two issues squarely on the agenda of any law school: (1) What should we teach? and (2) What methods, generally, should we use when teaching? As Professor Riskin notes in his report, one major purpose of this undertaking is to change the “lawyer’s standard philosophical map.”³ By this, he means that he wants the lawyers’ ordinarily adversarial,

1. See Leonard L. Riskin, *Final Report: Integrating Dispute Resolution Into First-Year and Other Law School Courses: Disseminating a Proven Reform*, 50 FLA. L. REV. 589, 591-97 (1998) (describing the University of Missouri-Columbia program). For the purposes of this essay, it will be called the “Missouri Plan” or the “FIPSE Project.” An earlier description of that project appears at Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution Into Standard First-Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509 (1989).

2. See Kate O’Neill, *Adding an “ADR” Perspective to a Traditional Legal Writing Course*, 50 FLA. L. REV. 709, 714-18 (1998) (describing the legal writing program more fully).

3. Riskin, *supra* note 1, at 607; see also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982) [hereinafter *Mediation and Lawyers*].

rules-based focus to be expanded so that lawyers engaged in dispute resolution would always consider interests beyond the solely legal ones as well as a broader framework of possible dispute resolution processes. Because creating a more global view of conflict and lawyering⁴—at least in my view—is one of the goals of this grant project, it means that one must squarely face what Professor Pipkin calls “taming the heresy.”⁵ As he explains this, many of the attributes of ADR contain elements that challenge, if not threaten, both traditional law school teaching and practice. The last part of this essay will reflect on the positive gains that can be assimilated into a particular law school’s culture and the effects that this project may have generally for curricular reform.

Finally, this essay is written with two audiences in mind. The first are those readers, both educators and practitioners, who are interested in adapting the Missouri Plan to their law school.⁶ I hope that the descriptions included here help you as you consider either adopting this plan⁷ or approaching curriculum reform more generally. My colleagues are the second audience for this essay. Again, I hope that those of you who read it will consider adopting this program or that, at least, it may influence you to approach your teaching differently.

I. THE UNIVERSITY OF WASHINGTON FIPSE PROGRAM

A. Context

1. General—The Law School

The University of Washington School of Law is located in Seattle, Washington and has a student body of approximately 500 J.D. students. Although it is a nationally-ranked law school, most of its students come

4. For example, one of Professor Riskin’s metaphors is the lawyer as “problem-solver.” He begins to make this point in the first chapter of his casebook in a section entitled “What Are the Roles of the Lawyer?”. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS*, 52-70 (1987).

5. Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609, 648 (1998).

6. One tends to assume that only law professors and administrators can have an influence on law school curriculum. Dedicated alumni and practitioners also form part of a law school’s constituency, and can, under the right circumstances, also be involved in the process of curricular reform. Indeed, one can make a compelling argument that they should be involved if for no other reason than to diminish the tension between academia and the profession. Students can also play a significant role.

7. The efforts to adopt the Missouri Plan at the University of Washington will be referred to as either “the plan” or “the program.”

from the state of Washington. As its mission, the law school sees itself preparing students to be lawyers engaged in public service and law practice. The law school has a full-time faculty of forty-three, and the student-faculty ratio is 11.5:1. The typical teaching load for a full-time faculty member is 14-16 quarter credit hours (about ten semester credit hours) per year, and the average class size is 30-35 students, although there are large section classes of approximately 75-100 students. In the first year, the school maintains a small section program in which each first year student has a small section of approximately 25-30 students for legal writing and another small section for one of their substantive courses. Over the last decade, faculty composition has changed so that although the absolute number of full time faculty has remained fairly constant, five positions are now dedicated to clinical teaching. This change, while deliberately welcomed and voted on by our faculty, has left some feeling that we are stretched in terms of our coverage of traditional, doctrinal subjects.

In September 1993, the law school began a process of in-depth curricular reform, forming a special committee to develop a plan. After an extensive series of meetings and colloquia, the reform committee presented its proposal to the faculty in March 1995; it described a law office model for the first year curriculum. Reaction to this proposal was mixed. Part of our faculty strives to identify and develop a core curriculum, while others are completely comfortable with a "Let 1,000 flowers blossom" approach to the curriculum. Because of this mixture of approaches, and our previous dean's inability to provide all of the resources for this comprehensive change, efforts at comprehensive curriculum reform collapsed. Many faculty were discouraged and leery of any hint of curriculum reform.

In the last three years, the law school has been engaged in a process of change. During the grant period, the law school embarked on two significant projects. First, the law school is engaged in a campaign to fund and build a new law school building on our main campus.⁸ At the same time, the entire law school community has been engaged in a process of strategic planning which began in 1996.⁹ In the long run these may well benefit initiatives in integrating ADR into the curriculum. During this grant, however, they often competed for faculty attention. These initiatives

8. This effort may not seem significant to those at private law schools. This effort, however, is the first attempt at the University of Washington to undertake a jointly funded private/public partnership. In addition to raising funds from private sources, the law school dean must also constantly lobby the state legislature and university officials regarding the capital budget. This process is, at best, time consuming for the dean and other involved administrative personnel.

9. The latest draft of the strategic report recommended the creation of a dispute resolution center. *See* University of Washington School of Law, Strategic Planning Report (Draft 1998) (on file with author).

were also complicated by the unexpected resignation of our dean and the appointment of his successor at the time the FIPSE Project grant was awarded.

During the same period, the law school moved, usually incrementally, to make a number of other curricular changes. For example, the faculty embraced a public service ideal and now requires students to engage in public service as a graduation requirement. Similarly, our clinical program is now a mature program hosting several clinics on a permanently funded basis. Our Basic Legal Skills (BLS) course is now anchored by a Director with a tenure-track appointment, who can focus on a long term program, and work with other faculty on the integration of various first year topics.

A number of new appointments have brought fresh perspectives and energy to the process of teaching. The curricular and faculty changes have often been salutary for the FIPSE Project, since it has been easier to convince new faculty to sign on as they design courses for the first time than to ask existing faculty to alter their coverage and teaching techniques.

Finally, it is important to note the less quantifiable, but often more important, quality of life among the faculty. One of my colleagues describes us as having a "culture of anomie." It is more fully described in our self-study report submitted to the AALS:

Yet there are areas in which we have great room for improvement. Although colloquial lunches have become a common occurrence, we are often too busy at lunch time to go for a casual lunch with a colleague. There is also a tendency at the Law School for faculty members to pursue their own individual teaching and scholarly missions without serious and sustained give and take among one another. While faculty members do read and discuss one another's work, there could be more of this. . . .

It is even more rare for faculty members to visit one another's classroom simply in order to learn about the teaching techniques used by one's colleague. Again, this seems to happen only when the faculty member whose classroom is visited is being considered for renewal or promotion. . . .

Finally, there is relatively little collaboration in teaching among faculty. Occasionally faculty members will co-teach a course. In the clinics, there seems to be some institutionalized collaboration. Recently a number of the first year teachers have begun to try to collaborate in the first year curriculum by trying to create legal writing exercises which draw on and reinforce first year doctrinal material. A two year grant project for integrating alternative dispute resolution into the first year also promises an opportunity for further collaboration. Nonetheless, collaboration is a relatively rare phenomenon.

The Special Committee on Curricular Reexamination has made a tentative proposal that would institutionalize collaboration in the first year. But that proposal has not yet received wide-spread faculty support.¹⁰

Readers may wonder at this candor, but I hope that an honest description is useful in assessing the validity of the approach that the Washington team used under this grant. Moreover, I suspect that this type of environment prevails at many law schools, both public and private. Law schools' openness on issues like collaborative vs. individualized teaching or curricular reform can probably be plotted on a continuum.

2. The Law School's Exposure to ADR Before the Grant

The Law School's introduction to ADR began during the 1986-1987 school year when Jay Folberg, now of the University of San Francisco, was a visiting professor. One of the courses he taught was entitled "Alternative Dispute Resolution." It is perhaps symptomatic of faculty skepticism about this area that while he was allowed to teach this course, it was to be graded on a credit/no credit basis. During Professor Folberg's visit, I was able to audit his ADR class so that I would be able to teach it in subsequent years. Most of the focus of law school teaching at that time, however, was classical litigation-oriented, doctrinal coverage of American law. A notable exception was that Cornelius Peck had started a negotiations course.¹¹

At the time of the grant application, many things had changed. Most significantly, the law school had a lively clinical program and had just hired Julia Gold¹² to be the director of the mediation clinic.¹³ Practice skills faculty had been meeting, and had decided to offer a specialized "track" in dispute resolution. Moreover, multiple sections of the ADR survey course

10. University of Washington School of Law, Self-Study Committee (1996) (prepared for the Ass'n of Am. Law Schools and the Am. Bar Ass'n for the joint AALS-ABA Septennial Site Evaluation) (on file with author). This, and other external and internal documents, form the source for this section of the essay.

11. Although Professor Peck is most widely known for his scholarship in labor relations, employment law and torts, he was a significant driving force in the early movement to establish negotiations courses in law schools. In this, he is a colleague to Professor J.J. White of the University of Michigan.

12. Julia Gold, Senior Lecturer, Director of the Mediation Clinic, is a member of the FIPSE Project grant team. The other member of the team is Kate O'Neill, Assistant Professor and Director of the Basic Legal Skills Program. Our team was unusual in that it was composed solely of women, and that with the exception of the Project Director, Lea Vaughn, the members of the team (at the time) were not tenure track faculty members. During the course of the grant, Kate O'Neill became a tenure track member of the faculty. I mention these facts because there may be gendered or status aspects to the success of our adaptation that cannot be explored within the confines of this essay.

13. The mediation clinic had been established in 1991.

were being offered on a regular basis. But none of these efforts were coordinated, and they very much depended on the initiative of interested faculty to get them and keep them going.

Similarly, at the time of the grant application, student exposure to ADR was very limited. I had integrated some ADR into my first year course in civil procedure, but I taught a small section of only thirty students. Up to sixteen students per year could enroll in the mediation clinic, and the law school would generally offer one or two small sections of ADR Survey, Negotiations, and Interviewing and Counseling. Because students were often repeat takers of these courses, I estimate that about one-fifth to one-quarter of any given class has had some exposure to ADR. Finally, shortly before the grant period, the law faculty established a Dispute Resolution Track which would provide participating students with a special certification on their transcripts and diplomas.¹⁴

3. The Washington Legal Community

The local legal community is a particularly fertile place for fostering and reinforcing the increasingly central role of alternative dispute resolution. In meetings with alumni and practicing attorneys during our recent strategic planning process, both groups have stressed the importance of both legal writing and ADR. Both the Washington State Bar Association (ADR Section) and the Federal Bar Association have been leaders in the local community in making ADR a mainstay of both state and federal practice. At the state level, the ADR section has been extremely active in presenting continuing education programs, making proposals and developing state-wide and local legislation. Most Washington counties have a mandatory court-ordered arbitration program¹⁵ and many counties have dispute resolution centers (DRCs) which are authorized by statute.¹⁶

Similarly, at the federal level, under Local Rules 16 and 39.1, the federal courts and bar make high use of ADR. Local Rule 16 (pretrial conferences) requires the parties to discuss the use of ADR.¹⁷ Local Rule 39.1 (Procedures for Alternative Dispute Resolution) has as its objective

14. The faculty who teach practice skills, civil procedure, and clinical law developed the Dispute Resolution Track several years ago. It is designated as a "concentration" and students who complete track requirements "will have a notation to that effect on their transcripts." University of Washington, 1996-97 SCHOOL OF LAW GENERAL BULLETIN 20-21. Currently, the track requires students to complete courses in interviewing and counseling, negotiation, a non-litigated approach to dispute resolution, trial advocacy, and a clinic. *See id.* Students must also prepare a substantial paper in an area of dispute resolution. *See id.*

15. *See* WASH. REV. CODE §§ 7.06.010-.910 (1989); WASH. R. SUPER CT. M.A.R. 1.2. Under these rules, most counties have developed their own mandatory civil arbitration rules.

16. *See* WASH. REV. CODE §§ 7.75.010-.100 (1989).

17. *See* LOCAL RULES W.D. WASH., CIV. R. 16(a).

“afford[ing] litigants the opportunity to resolve their disputes early and inexpensively through mediation, arbitration, or summary jury trial.”¹⁸ The court maintains a register of volunteer attorneys who can act as mediators and arbitrators in cases under the rules.¹⁹ Local Rule 39.1 also provides that the court may, with the consent of the parties, send cases to non-binding summary jury trials.²⁰

Thus, in addition to the use of ADR in transactions, any attorney practicing in this area of the country must know about ADR since it is now deeply integrated into local practice at both the state and federal levels.

B. *Year One*²¹

In the first year, we accomplished less than we had hoped. The reasons for this unmet goal have little to do with the worth of the project, and more to do with where we were as an institution and our institutional culture. During the first year, our school had a new dean, underwent the preparation and conduct of our seven year AALS-ABA site review, launched a building campaign, which consumed the dean and the Building Committee, and witnessed the demise of our curricular reform efforts. None of these obstacles, save the site review, were anticipated, but they all sapped valuable faculty time and attention from the grant. The moral here, I suppose, is that external events can swamp dedicated reform efforts, and that a faculty can handle only a limited number of major issues.

Nonetheless, there was some success and most of the year was spent laying the foundation for change. Team members spent most of the winter and spring building interest in the program on a one-to-one basis by talking to colleagues in their offices. This effort was facilitated by the fact that we made several major teaching assignment changes in the first year, largely because our former dean (who taught in the first year) left and we hired some new faculty. Most of the faculty we talked to were interested in using some of the materials in their classes next year, and because they are either teaching the course for the first or second time, they welcomed additional ideas. Thus, some members of the first year faculty began cautious experimentation with the materials.

At this time, there were other options for trying to adapt this program, but the grant team ruled them out. Given the recent failure of over-arching curriculum reform, and the exhaustion and alienation it left, any large scale

18. LOCAL RULES W.D. WASH., CIV. R. 39.1(a).

19. See LOCAL RULES W.D. WASH., CIV. R. 39.1(b)(1).

20. See LOCAL RULES W.D. WASH., CIV. R. 39.1(e)(1).

21. Discussion of the adoption of the ADR program into the legal writing program is discussed in O'Neill, *supra* note 2, at 709, and is therefore omitted from this discussion. The integration of this program into our legal writing program, which was not a part of the original Missouri Plan, may be one of the most significant accomplishments in our use of the grant.

systematic project seemed unwise. Obviously, if the curriculum reform effort had been more successful, the reform would have provided a natural platform for the adoption of this program. Another approach would have been to ask the Dean, a long-time faculty member, to launch this program. His attention, between building issues and adapting to a new position, was focused elsewhere. Thus, it seemed to team members that it was best to revise our original plan of a full-scale "sell" job, and to work individually with our colleagues. This plan was to prove more consistent with our culture and successful in the long run.

During the 1995-1996 school year, Professor Leonard Riskin visited our law school. This visit proved to be extremely valuable in moving people "off base." During the course of his visit, he ran a demonstration class in which he debriefed an ADR exercise for one of the basic legal skills classes. The ability to put a "face" on a program and an idea is very important. The feedback I got from my colleagues was overwhelmingly positive. After that class, people left with a sense of "I could do that too," or "Gee, it's not as hard as I thought it would be to do this." He also presented a colloquium on negotiation techniques. This presentation was also useful because it demonstrated the intellectual foundations and respectability of this endeavor.²²

On the basis of this experience, it would be useful for other schools considering the plan to ask an expert from another school to demonstrate how to teach one of these classes. I suggest a person from another school so that the demonstration does not become mired in personality or political issues at a particular law school. It would also be important for the dean to back this visit and to urge faculty attendance.²³ Faculty should be given advance copies of all of the teaching demonstration materials, and as much context for the teaching demonstration as possible. Again, the point is to make the material and the method as accessible as possible to faculty. Similarly, presentations or "mini-training" sessions on various ADR processes may be useful during the first year.²⁴

22. Again, this idea is a reference to Professor Pipkin's concept that it is necessary to "tame the heresy." See Pipkin, *supra* note 5, at 648. Faculty need to be disabused of the notion that this is just a practice skill, because all of the practice skills have theoretical foundations and present intriguing intellectual issues. Similarly, they could see that the faculty involved in this program thought carefully about its implementation; this was not a "feel good" or "touchy-feely" effort.

23. The success of this presentation will also turn on a school's willingness to talk about teaching. Many schools reserve their colloquia programs to presentations about topical or theoretical substantive legal topics, and disdain, or regard with suspicion, efforts to talk about teaching. Indeed, this result is probably part of the "heresy" that this program churns up: that law school faculty, like any other group responsible for teaching, need to talk about their craft as well as their subject.

24. See *Mediation and Lawyers*, *supra* note 3, at 41-43 (stating that one of the headwinds to the use of mediation in the legal profession, and by extension, other forms of ADR, is lack of

In the 1996 summer term, we surveyed every faculty member about what they were currently doing in this area, their interest in integrating ADR into their teaching, and what might inhibit them from doing so.²⁵ Again, we contacted each faculty member personally to follow-up on the survey, and the resulting information aided our efforts. It allowed team members to assess what approach would be most useful with each faculty member. In addition, I prepared a list of exercises specific to each first year subject that were available in the Riskin and Westbrook teachers' manual.²⁶ Prepared exercises proved to be a valuable incentive. For many people, the vector of resistance was not disapproval of ADR, but rather of the labor-intensive effort of developing exercises that would be good substantive and procedural vehicles for teaching ADR and the underlying course material. Several colleagues borrowed the exercises wholesale, and their satisfaction will make further integrative efforts easier. Additionally, as a result of a private gift, we were able to catalogue all of our ADR materials separately and to acquire more materials.²⁷

The moral here is that curriculum reform in this area may, for some faculty, be a matter of making it as easy as possible. In the last decade, a plethora of ADR teaching materials have emerged. It might be enough for a school that wants to try our incremental approach that one faculty member be given release time to help other faculty find and adapt materials for their classes. Also, most faculty were interested only in the negotiation exercises, remarking that they really did not know much about mediation or other emerging forms of ADR. As a result of these remarks, we began to think about what efforts we could make, in the long run, to educate faculty about ADR processes such as mediation, mini-trials, and summary jury trials.

At the very least, the efforts we were able to undertake in the winter and

knowledge about it). There are numerous ways that a law school can train its faculty in ADR techniques. For example, we used two techniques. First, we have several faculty who are qualified to make presentations to the faculty at colloquia or faculty retreats. Second, our law school runs a continuing legal education program that provides a mediation certification program as well as other ADR classes. These classes are available free to faculty. Another way that a law school could encourage learning about ADR is to consider it part of the teaching component for promotion and salary evaluation, i.e., faculty who gain these skills will see it in their paycheck.

25. This process does not have to be cumbersome. With the advent of e-mail, a fairly simple and short survey can be sent to all faculty members. Sending it out under a dean's signature may garner more responses, and there may be a need to "pester" non-respondents in order to gain a full picture of the status of ADR at your school.

26. See LEONARD L. RISKIN ET AL., *INSTRUCTOR'S MANUAL WITH SIMULATION AND PROBLEM MATERIALS TO ACCOMPANY RISKIN & WESTBROOK DISPUTE RESOLUTION AND LAWYERS* (2d ed. 1998).

27. Many of the best materials for teaching ADR have been expensive videotapes. Several alumni who wish to discourage litigation and encourage the use of ADR have given generously to our law school so that we can acquire ADR teaching and scholarly research materials.

spring (mostly educational) convinced many faculty of the necessity of some exposure to ADR for our students. Not all of our plans worked out the way we might have thought. At this point, one might say we are in the process of “creating value” and “enlarging the pie” on this campus.²⁸

C. Year Two

In year two, our efforts were more focused and we had greater success. Several faculty, beyond the grant team, agreed to “try” an exercise in their first year class as a result of discussions during year one of the grant process. Thus, students in some contracts, torts, criminal, and property classes were exposed to ADR, usually negotiation. These efforts, however, were not coordinated and the choice of coverage and method was left to the individual instructor.

The greatest success came in our basic legal writing course. As a result of her exposure to ADR in this grant process, Professor Kate O’Neill, Director of the Basic Legal Skills Program, became more keenly aware of the litigation bias of the first year writing program. She describes her efforts elsewhere in this symposium issue.²⁹ In brief she coordinated an exercise in which all seven sections of students³⁰ witnessed a mediation as the culmination of a memorandum writing exercise in the fall term. In subsequent quarters, each section had an additional ADR writing assignment or exercise, and we moved from an appellate-based moot court program to one based on motion practice. As a result of these changes, every first year student has systematic exposure to mediation and negotiation. Efforts in this area were also encouraged by using FIPSE Project grant money to provide mini-grants in the summer of 1997 to write

28. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986); David A. Lax & James K. Sebenius, *Interests: The Measure of Negotiation*, 2 *NEGOTIATION J.* 73 (1986). As opposed to a zero-sum view of negotiation, *i.e.* win/lose or one slice of “pie” for me means one less for you, this view suggests that by fully exploring party interests, one can expand the slices of “pie” as well as trade them in a way that does not necessarily mean a loss for one party while the other gains. This approach calls for a collaborative rather than competitive approach to negotiation. This is also mirrored in the win-win theory of ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981) which stresses the exploration of interests rather than positions, and generating a number of options as part of the negotiation process.

29. See O’Neill, *supra* note 2, at 709.

30. In addition to the Director of the Basic Legal Skills Program, there are three other lecturers in the program. During the course of the grant, one of the lecturers took the law school’s forty-hour training program in mediation which is offered through our continuing education program. She was able to use her recently gained expertise to work with Julia Gold, Director of the Mediation Clinic, in designing a realistic and educational mediation simulation for the students to watch. This underscores the need for adapting schools to secure mediation or other ADR training for key faculty members.

and design exercises.³¹

Another significant effort, which Professor O'Neill describes in her symposium article, was to re-think the way in which first year students are taught to write case briefs during orientation and the first several weeks of law schools. Under Professor O'Neill's approach, our students are encouraged to consider the interests of the parties in addition to the traditional "facts" of the case. This consideration of interests includes non-legal concerns and issues as well as legal ones. In this way, students develop a more complete appreciation of what may drive litigation and the development of legal rules. At the same time, this exposure prepares them to think about the full range of interests that are considered by various forms of ADR.

In the second year, the team approached the clinical law teachers.³² Like legal writing, clinical law programs, with their emphasis on live client representation before local courts, probably have one of the most firmly embedded litigation biases within the law school. Because two of the five clinical instructors are mediators, teaching both mediation and the ADR survey course, and the others are philosophically inclined towards ADR, it was easy to suggest that these instructors include some material on ADR in the classroom portion of their courses. All of them have done so.

During the second year of the grant we also attempted to persuade the instructors in the required professional responsibility course to cover ADR. Although this was not envisioned in the original grant, professional responsibility seems to be a natural area for the incorporation of ADR materials and ideas into the law school curriculum. For example, many states have established, by statute or decision, a mediation privilege in litigation. Coverage of this privilege could and should be a natural part of attorney-client privilege, especially in jurisdictions which make widespread use of mediation. Similarly, this material could also be inserted in

31. Provision of mini-grants can be a spur to developing exercises, as well as providing time to become familiar with simulation-based teaching. The grants in this case were for \$500 and they allowed the director of the program to require the other writing faculty to be present for a short part of the summer. But again, this may be confronting the heresy. In most law schools, summer stipends or grants are to be used solely for research. Law schools may want to reconsider this policy. In the current period of curricular upheaval, it may be well worth temporarily, if not permanently, diverting some research dollars to funding efforts that improve teaching and curriculum. A mini-grant was also given, after application and review, to one of our contracts teachers. She used it to incorporate and refine the teaching of transactional negotiations in her contracts class.

32. The University of Washington, like many law schools, now has a rich offering of clinical programs. We offer clinics in affordable housing development (transactional), appellate advocacy, child advocacy, criminal law, immigration, mediation, refugee and immigration advocacy, and unemployment. Total clinic enrollment is approximately 80 students. For our school, this represents about half of a law school class. Given this student exposure, it is important for faculty committed to ADR to work with the clinical faculty to develop a consistent message about the best uses of litigation and ADR.

an evidence class.³³ Again, this is an area in which having an expert in the area can lead to initial success. Because one of our faculty, Alan Kirtley, has written on the mediator privilege,³⁴ it is fairly easy to arrange a guest lecture in which both the class and the instructor can be exposed to this important ADR issue.

D. *Subsequent Results and Future Efforts*

During the 1997-1998 school year, although the grant had ended, I continued to lobby my colleagues, especially those in the first year, about incorporating ADR into their classes. This gentle persistence has paid off. As this table illustrates, our school now has the following ADR coverage:³⁵

<i>SUBJECT</i>	<i>SECTION A</i>	<i>SECTION B</i>	<i>SECTION C</i>
Civil Procedure	No Coverage	No Coverage	Full Integration
Torts	Negot. Exercise	ADR Discussed	No Coverage
Contracts	ADR Discussed	ADR Discussed	Full Integration
Property	Negot. Exercise/ADR Discussed	Negot. & Mediation Exercise/ADR Discussed	No Coverage
Criminal Law	Plea Bargain Exercise/ Mediation (VORP Progs.)	No Coverage	No Coverage
Constitution Law ³⁶	No Coverage	No Coverage	No Coverage
Basic Legal Skills	Full Integration	Full Integration	Full Integration

33. This goal will probably require another year because the faculty who teach this subject are taking sequential leaves of absence, one for the 1997-98 school year and the other for the 1998-99 school year.

34. See Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1 (1995).

35. Definitions of terms used in the chart:

1. Full Integration: The instructor has fully adopted the Missouri Plan in a way that is appropriate to the subject taught. Students perform exercises in negotiation, mediation, and possibly arbitration. The instructor also raises ADR issues in appropriate cases.
2. ADR Discussed: While the instructor does not perform any in-class exercises, ADR is discussed in appropriate cases.
3. No Coverage: The instructor neither discusses ADR nor performs any ADR exercises.

36. Our required Constitutional Law course covers the structures of government and the commerce clause. There are very few ADR instructional materials that have constitutional law as their substantive basis; therefore, lack of coverage here is not surprising.

This table represents a substantial change from two years ago when the only coverage of ADR was in the small section of civil procedure which I teach. Moreover, because of the arrangement of our small section classes, the civil procedure students in my small section and the contracts students in the small section do not overlap and there is no double coverage. The message here, I hope, is that persistence and patience will be rewarded. Although this was not the process envisioned when the grant was accepted, this incremental model can be successful. Moreover, it is complemented by our Dispute Resolution Track and our clinical offerings.

In the future, the most important goal will be to institutionalize this program. Up until this point, this program at our law school has depended upon the good will of the involved faculty members, although it is institutionalized as part of the legal writing program. The key to further institutionalization will be securing decanal commitment. While I believe that Professor Riskin overstates the need for the initial involvement of the dean in this program,³⁷ especially if a motivated faculty member decides to undertake this as an individual mission, in the long run these efforts can be fruitless if there is not an institutional commitment. Alternatively, one might be able to pursue this as part of a curriculum reform process or by a grass roots movement from involved faculty.

A second long term goal will be to establish a first-year faculty working group. Currently, I am in the process of securing the blessing (and help) of the Associate Dean for Academic Affairs for this project. I envision the creation of a program in which faculty who teach in the first-year curriculum will meet on a regular basis during the school year. At these meetings, involved faculty can share course coverage and other issues involved in teaching first year students. Although these meetings can and will address more than the integration of ADR into the curriculum, they will be useful for sharing information about the teaching of ADR and for the coordination of the program which up until this point has been lacking. Getting everyone in one room will be much easier than lobbying on an individual basis. I have been cautious about suggesting these meetings on the heels of our failed curriculum reform effort which had targeted the first year curriculum. Finally, I am hopeful that this effort will secure the foundation for a broad consensus on our faculty that such an effort is worthwhile. Because all of these faculty also teach upper division courses, it is a fair assumption that they will feel comfortable integrating ADR into those courses.

At the same time, between our strategic planning process, planning for our new building, and a grass roots, student-based curriculum reform

37. See Riskin, *supra* note 1, at 606.

effort, the coming school year may lead to a renewed curriculum reform effort. If this should take place, there is enough of a consensus in favor of ADR coverage that further development of this curriculum will be on the agenda.

E. *Lessons Learned*

The survey of the faculty revealed several reasons for reluctance—and rarely, outright refusal—to participate in the FIPSE Project grant program. Typically, the following reasons were offered:

- There is too much to cover in my class already.
- I don't want to change what I've been doing.
- I have a large section (75-100 students) and these projects won't work.
- I don't believe in ADR.
- I don't know enough about ADR.

Some of these reasons involve philosophical issues but others involve issues that are easier to address, especially if a school decides to approach this as a long-term, incremental change. In his article in this symposium, Professor Riskin suggests that there are four conditions for the successful adoption of this program: a “lead” faculty member, a core of at least three knowledgeable faculty, strong decanal support and a consensus about the worth of the program.³⁸ In our case, the first three conditions exist and strong decanal support is being sought. But this aside, there are other things that can lead to the success of this program.

Although the philosophical issues will be addressed below, there are some “quick and dirty” lessons that we all learned during the course of this grant cycle. First, we learned that in the face of growing faculty workloads, the most important thing one can do is to make it as easy as possible for a faculty member to participate in this program. For example, this means that the lead faculty member or core group of faculty must be willing to take the time to help interested faculty find appropriate and easy-to-use teaching materials.³⁹ Similarly, it can be helpful if the lead teachers are willing to

38. *See id.*

39. This is also, by the way, a plea to those who write these exercises. The teachers' materials that come with these exercises need to err on the side of over-inclusion. For example, it would help if the materials to be handed out to the class were available in an 8½ x 11 inch reproducible format. Primary and secondary school publishers learned this a long time ago; law school textbook publishers have yet to learn it. Alternatively, a disk of the materials should be made easily available. Second, there needs to be a complete set of “set up” and “debriefing” notes for the exercise. For example, on the “set up” end, it is helpful to know how it is keyed to the major casebooks or concepts in a course, and what materials the students will need to have covered before beginning

either teach a demonstration class or to be present when an instructor tries an exercise for the first time. Not all instructors will want or need this much help, but its availability is often key in persuading reluctant colleagues.

A second, yet obvious, lesson is that money is a great incentive. A faculty mini-grant program, which we learned about at one of the grant meetings in Missouri, was extremely successful in generating faculty interest in this program. We ran our program by advising faculty that small grants of \$250 and \$500 would be available for faculty who wished to design their own problems. This incentive was central to the success of integrating this program into our writing program, and was helpful in moving it into other first year classes. Similarly, funds also can be used to send faculty to local mediation or ADR training programs so that the faculty can build its base of expertise in this area. With strong decanal, or possibly alumni, support for this program, creative minds can develop other incentives to enable interested faculty members to commit to the program.⁴⁰

A third and final lesson is that outside visitors, both faculty and practitioners, can be catalysts for change. Most schools have on-going lecture or colloquia series, and it is fairly easy to arrange for a visit.⁴¹ Another approach along these lines is to encourage other faculty to seek out guest lecturers for their classes while they gain expertise in ADR. Many practitioners are delighted to guest lecture in a law school classroom. Again, the lead faculty can be helpful in locating qualified guests for classroom visitation.

Although there may well be other lessons we learned in the course of this grant, these three stand out. While they are suggested as part of an incremental approach, it is likely that they will be useful in any school considering wholesale curriculum reform in this area.

the exercise. On the “debriefing” end, complete notes describing the course of a typical classroom discussion need to be included. Although the experienced ADR teacher will not use these notes, they are extremely useful and comforting to instructors making their first foray into both ADR and simulation-based teaching.

40. To reiterate a point made earlier, the most effective incentive for undertaking curriculum or pedagogical reform may be to reward faculty who undertake these efforts with credit for teaching which shows up in salary increases. *See supra* note 24. Many faculty, here and elsewhere, feel that curricular and pedagogical innovation is like pouring water down a hole, and that law schools reward only scholarship and *traditional* teaching.

41. Using Professor Pipkin’s metaphor of “taming the heresy” again, this may be easier said than done. Many faculty reserve colloquia for theoretical or scholarly presentations. We realized during this grant process, however, that many faculty are interested in discussing curriculum and pedagogy.

F. *An Aside on Integrating ADR into Civil Procedure*

For the last five or six years, I have taught civil procedure at our law school, and have fully integrated ADR into my course. At the very least, our participation in this grant proved that civil procedure is an ideal vehicle for incorporating ADR into the curriculum. For schools that want to teach ADR but do not want to adopt the Missouri Plan, either incrementally or wholesale, civil procedure is an obvious course in which to insert this material.⁴² Judge Harry Edwards states that “it is inconceivable that ‘one could properly teach . . . a course [such as civil procedure] without, at a minimum, including a major introductory segment that seeks to put court adjudication into a broader dispute resolution framework.’”⁴³ Integrating ADR into a civil procedure course provides advantages beyond the coverage of ADR. Many students complain that civil procedure is an overly dry, abstract, and technical course. As they learn more about how the law works, many also complain about the litigation orientation of the course. They also grope for some handle by which to critique the civil litigation system. Inclusion of ADR addresses each of these issues.

First, using ADR simulations allows for some variety in the course. The students readily grasp the basics of most of the ADR techniques, and their feelings of mastery generate enthusiasm. I do not claim to turn them into expert negotiators or mediators; rather, I tell my students that their exposure to ADR is designed to make them informed practitioners who will be aware of all of their dispute resolution options. Even for students who plan never to enter a courtroom, I point out that many of the ADR techniques and theories are useful in transactions, especially those learned in interviewing, counseling, and negotiations. Because I use ADR exercises within the context of our on-going development of the Federal Rules of Civil Procedure, I find that the students learn more about the Rules themselves as they realize how many options a litigator has at any point in a case. As an added benefit, the use of ADR exercises (as well as other written assignments) allows me to address different learning styles in the classroom.

It is tautologous, perhaps, to say that ADR is not litigation.⁴⁴ By teaching the students about ADR, I address their very real concerns about

42. See generally Paul J. Spiegelman, *Civil Procedure and Alternative Dispute Resolution: The Lawyer's Role and Opportunity for Change*, 37 J. LEGAL EDUC. 26 (1987).

43. Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285, 292 (1988) (alteration in original) (quoting Frank E.A. Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL EDUC. 229, 233 (1984)).

44. Increasingly, as ADR enters the mainstream, many say that ADR stands for “appropriate” dispute resolution, rather than “alternative” dispute resolution. In this sense, litigation is a choice rather than an assumption.

the prevalence of litigation in this country. They learn that not every dispute has to end up in court, and that lawyers are the most important gatekeepers for access to the various forms of dispute resolution. But I also stress that some forms of ADR may not happen at the beginning of a case. For example, we discuss whether discovery should play a role in mediation or arbitration. Again, this integrated coverage results in a deeper knowledge of the rules as well as the real context of pre-trial litigation.

Finally, ADR provides an excellent critique of the civil justice system. The materials that are assigned to the students⁴⁵ provide many theoretical article excerpts that allow us to intelligently discuss our court system and possible alternatives. For example, towards the end of the course we discuss Federal Rule of Civil Procedure 16 (Pretrial Conferences). At the same time, students conduct a negotiation and observe a mediation in a case they have researched in their Basic Legal Studies class. I find that the discussion of Rule 16, the civil justice system and ADR are incredibly informed and lively. Rather than expressing vague sentiments or nascent ideas, the students can point to a variety of readings, their own experience, and those of their peers as they try to sort out what works best.

A brief description of my course may help put flesh on my claims. I begin the course by teaching about how disputes occur and reach lawyers, and then we move to the Federal Rules of Civil Procedure (pre-trial litigation).⁴⁶ We end the course with jurisdictional and *Erie* issues. In the syllabus, I frame the course as follows:

Disputes are a part of human existence. By what processes are they resolved? In what ways does the law shape disputes, and how does legal process affect disputants, lawyers, and decision makers? This course will cover the way in which the legal system processes disputes. The primary focus will be on the Federal Rules of Civil Procedure. . . . Not all disputes, however, should be resolved by litigation. What other alternatives are available? This course will also introduce you to some of the most prominent ideas and techniques of the alternative dispute resolution movement. Thus, this course is designed to prepare the modern lawyer to choose wisely among dispute resolution alternatives for your clients.⁴⁷

45. I use the abridged edition of the Riskin and Westbrook casebook. LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (abr. 2d ed. 1998).

46. I use a casebook which starts with the Federal Rules and ends with jurisdiction. *See* RICHARD L. MARCUS, ET. AL., *CIVIL PROCEDURE* (2d ed. 1995). Other books that are assigned include LAWRENCE R. DESSEM, *PRETRIAL LITIGATION* (2d ed. 1996), and GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976).

47. Lea B. Vaughn, *Civil Procedure Course Syllabus* (1998) (on file with author).

In the first week, we start with what the students know about disputes and conflict to lay the basis for an introduction to pretrial practice.

Most of the ADR portion of the course is taught through exercises. Below is a brief summary of each exercise:⁴⁸

1. Where Do Disputes Come From?: The Client Interview

In this part of the class, students interview each other in groups of two outside of class time about why they came to law school, or about some dispute they recently had. Each student writes a short memo describing the contents of the interview, and they give a copy to their interview partner. In class, I ask the students about how the interviewing process went, and I ask the interviewee about the accuracy of the memo as well as how they reacted to seeing their story re-presented by their “attorney.” This exercise allows me to lay the groundwork for the origin of facts and interests in a case, and is excellent background for teaching Federal Rule 11. Approximate time: 1-2 hours.

2. Debate: Should ADR Counseling Be Mandatory?

Four students, in teams of two, are given articles, pro and con, about this issue. The class is encouraged to ask questions. This allows an introduction to the idea of lawyers as gatekeepers, and how notions of professional responsibility overlap with both civil procedure and ADR. This exercise also takes place near the beginning of the course. Approximate time: ½ hour. °

3. Options for Pretrial Settlement: Negotiation, Mediation, and Rule 16

For the past several years, I have coordinated this part of the course with Professor Kate O’Neill.⁴⁹ In their Basic Legal Studies class, students

48. These exercises are not included in the Riskin and Westbrook instructor’s manual. *See* RISKIN ET AL., *supra* note 26. Additional information can be had by contacting the author. In addition to ADR exercises, my students draft a complaint, interrogatories, and give a short personal jurisdiction oral argument. A small section of 30 students makes this possible. Next year, for reasons unrelated to the grant, I will teach the large section of 116 students. When I surveyed my past two years of students about what I should keep and what should go as I convert to a large section, they were unanimous that I keep the ADR portions of the class. Subsequent work experience had demonstrated the usefulness of this material, they said, and it made the class more interesting, as well as providing a basis for comparison with the litigation model of the typical civil procedure class.

49. For a school that wishes to do more than cover ADR in their civil procedure course, we have found that coordinating coverage between the Basic Legal Skills Program and Civil Procedure has been beneficial to both courses. *See* O’Neill, *supra* note 2, at 713-14. For another view on coordinating legal writing and civil procedure, see generally Joseph W. Glannon et al.,

will have written their first case memo on a problem Professor O'Neill, or another Basic Legal Studies instructor, has prepared. In the weeks leading up to coverage of pretrial settlement, I ask them about what kind of discovery they would do in their case. Then, I prepare additional facts, and ask students, in teams of two, to negotiate a settlement. After the negotiations are completed, they view a mock mediation of the same problem in class performed either by Professor Julia Gold, Director of the Mediation Clinic, or by her students. The following day, I debrief the negotiation and the mediation against the backdrop of Rule 16. We focus on the procedure that Rule 16 may impose on settlement, and the differences they observed between the negotiation and the mediation. If there is time, we also talk about mandatory mediation, and the Washington requirement of mandatory arbitration of small civil claims. As noted above, these classes, which come towards the end of our fall quarter, are always lively. Approximate time: 3 hours.

In the second quarter, I cover jurisdictional issues. We have some discussion of drafting dispute resolution clauses while we also discuss forum selection clauses. But most of the ADR coverage occurs in the fall quarter. I estimate that I use between four to six class hours to cover this material, and that the students get the same exposure to traditional civil procedure as students in other sections. While I am concerned about coverage of basic civil procedure doctrine, I am not obsessed by it.⁵⁰

And in passing, my students remind me each year that because of my ADR coverage, they have been the consistent winners of the client counseling competition. They also tell me that their summer employers are glad that they have covered this material, and give them more varied assignments because of their familiarity with ADR. But most importantly, my students tell me that they appreciate ADR and the approach I use to

Coordinating Civil Procedure with Legal Research and Writing: A Field Experiment, 47 J. LEGAL EDUC. 246 (1997). Again, this coordination achieves the goals of the integrated or pervasive curriculum.

50. Consider these more sharply worded comments:

It may be that my suggestions will require that some part of the traditional course receive less attention in a civil procedure class. Those who are worried about that prospect should ask themselves why, for example, they are concerned with studying so many cases on personal jurisdiction and the *Erie* problem. One reason, I would guess, is that those areas are among the few in a traditional civil procedure course which provide a real line of cases and a certain intellectual stimulation. That is not reason enough. The course can be made both more interesting and more insightful by pushing beyond the development of legal doctrine to a frank questioning of the basics of civil procedure and ADR.

Spiegelman, *supra* note 42, at 36.

teach it because it puts back a human element in the first year.

II. CURRICULUM REFORM ISSUES RAISED BY THE FIPSE PROJECT GRANT

A. Context

At this point, the influence of Christopher Columbus Langdell on the shape of the modern American law school curriculum is well known.⁵¹ Basically, the Langdellian pedagogy shifted the focus of legal training to the university classroom rather than through hands-on apprenticeship. At the same time, Langdell's "scientific" method revolved around a Socratic dialogue about appellate cases. For many professors, this means teaching students to "think like a lawyer."⁵²

The consequences of this "reform" have been profound, particularly for first year students. Their immersion in this pedagogy shapes, arguably forever, their approach to the law. It teaches both by what it covers and by what it ignores. Thus, it should not surprise anyone that the typical first year student believes that the law focuses on the litigation-based resolution of cases rooted in a pigeon-holed notion of common law issues.⁵³ It also means that first year students often fail to grasp the political and sociological dimensions⁵⁴ of legal issues as well as lose sight of their very human face. In the process of learning to "think like a lawyer," they often lose the ability to feel like a caring and compassionate person.

In recent years, law school curricula have begun a largely unguided process of reform. The most noteworthy addition to the curricular mix has

51. Histories and commentaries on Christopher Columbus Langdell's (and by implication, Harvard's) influence on American legal education are legion. For one such in-depth treatment, albeit from a critical perspective, see JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* (1978).

52. See Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57 (1992). Professor Schultz argues that law schools need to end the skills versus substance dichotomy. She notes, "Although lawyers must perform a wide range of tasks in ever-changing contexts, law schools send the message that law is litigation." *Id.* at 59.

53. See E. Walter Van Valkenburg, *Law Teachers, Law Students, and Litigation*, 34 J. LEGAL EDUC. 584, 599 (1984). Part III of that article focuses on how the traditional first year curriculum influences students' ideas of what the law is. See *id.* at 597-99. Like Professor Pipkin, he observes that "[c]ourses dealing with matters other than the study of cases end up being viewed as 'soft' and as irrelevant to what lawyers 'really do.'" *Id.* (Stating that "[f]or most students, therefore, the law school experience focuses remarkably on litigation in court, not only as a means of resolving disputes but as the essence of what lawyers do"); see generally Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1 (1992).

54. Economics is deliberately left off of this list because it is my perception that many law schools now include some coverage of economics, particularly in first year subjects like contracts and torts.

been the addition of live client representation clinics. Another development has been the infusion of other disciplines such as economics or literature. But these developments have not fundamentally challenged the adversarial perspective implicit in American legal education.

At the same time, a number of tensions has emerged that make curriculum reform a battle ground for only the most hardy of souls. The first of these tensions exist between the academy and practice. Perhaps no one has captured these tensions better than Judge Harry Edwards. Responding to changes that he has identified in the profession,⁵⁵ Judge Edwards has lambasted law faculties because of what he views as a lack of care about practice and practitioners as they engage in scholarship increasingly removed from the daily concerns of most lawyers.⁵⁶

B. *The Challenges of the Missouri Plan*

Into this cauldron of activity ventures the Missouri Plan. Faculty that adopt this program need to understand both the context and stakes of this program, as well as the goals and challenges presented in adopting an integrated, ADR curriculum. Central to this understanding is grasping what Riskin is attempting to achieve,⁵⁷ and Pipkin's commentary that a

55. See Edwards, *supra* note 43. Judge Edwards identifies the following challenges to modern practice: the caseload crisis, the growth of law firms and their increasingly commercial aspects with a concomitant decline in legal services for the poor and middle class, the role of minorities, the declining respect for the offices of justice, and the rise of the unethical or sloppy/unprofessional practice of law. See *id.* at 286-89.

56. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). This article led to a symposium discussion in a subsequent volume of the *Michigan Law Review*. See Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993).

57. See *Mediation and Lawyers*, *supra* note 3. This article is probably the best philosophical explanation of what Riskin is attempting, and what role he believes that ADR may play within the law school and within the legal profession. He argues that mediation challenges the adversarial culture by posing a norm of harmony, while acknowledging that the alegal character of mediation may disadvantage participants who are not aware of their legal rights. See *id.* at 34-35. These benefits and dangers can be managed by the knowledgeable lawyer, *i.e.*, one who understands traditional rule-based litigation as well as the potentially alegal, party-controlled mediation process. He contends that the future of mediation in this country will rest upon lawyer's learning more about mediation and its uses as well as becoming mediators. See *id.* at 41. The contemporary norms of legal practice—*i.e.*, an atomistic or de-contextualized view of the client's situation, resort to an adversarial dispute resolution system, a heavy rule-based orientation, and zealous representation of clients tend to blind lawyers to the types of beliefs that underlie mediation practice. See *id.* at 43-45. For example, the generation of creative, party-based solutions to problems that may well not "be governed by any general principle except to the extent that the parties accept it." *Id.* at 44 (footnote omitted). He identifies legal education as a source of the inculcation of the dominant adversary culture. "[N]inety percent of what goes on in law school is based upon a model of a lawyer working in or against a background of litigation of disputes that can be resolved by the

condition for successfully adopting this program requires a willingness to “tame the heresy” implicit in ADR which makes it “unappealing to traditional law professors.”⁵⁸ The heresy implicit in this curriculum is two-fold. First, it challenges the traditional adversarial and litigation based legal culture.⁵⁹ It also challenges the traditional law school pedagogy in which students are inculcated in the adversarial culture through the use of Socratic⁶⁰ large classroom instruction, by suggesting that “problem solving” simulation-based learning may be as good, if not better, than the traditional method of instruction.⁶¹ The observations below are designed to comment and expand upon the insight of Pipkin’s thesis.⁶²

Any suggestion that a law school adopt an integrative⁶³ law school

application of a rule by a third party.” *Id.* at 48 (footnote omitted).

58. Pipkin, *supra* note 5, at 648. Briefly, Pipkin’s thesis, with which I largely agree, is that heresies are calls for change, not revolution, that challenge “prevailing orthodoxies and practices.” *Id.* Resistance is greatest at the outset of the introduction of a “heresy” (in this case, ADR’s challenge to traditional adversarial culture), although it can be overcome “through implementation of power or conversion of unbelievers.” *Id.* Or, the heresy can be “tamed,” i.e. expanded, compromised, in the process of adoption. *See id.*

59. *See id.* at 689.

60. Socratic instruction is the close study of appellate cases using a question and answer method. The use of appellate cases in instruction necessarily implies a litigation framework.

61. *See* Pipkin, *supra* note 5, at 621.

62. Another way of thinking about curricular issues is to argue that the inclusion of ADR attacks the “hidden” curriculum of law schools. Although the idea of “hidden” curriculum is not new, one of the best expositions of it in the law school setting appears in Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509 (1987). By foresight, he suggests why Professor Pipkin’s “taming the heresy” argument may seem novel:

My point is that the approach of implicitly answering fundamental questions by not asking them pervades legal education: it is in fact the not-so-hidden message of law school. Many teachers find it difficult or inappropriate to raise the fundamental questions in class or in their writing. It *is* difficult, because they are often hard and controversial questions. And many students find it difficult and inappropriate for precisely the same reasons: they are embarrassed and uneasy about considering issues as sensitive and as vital as who they are and what their future should be. The dilemma is that if teachers and students do *not* address these questions and struggle to articulate the best answers they can discover and defend, they answer the questions by ignoring them. There is (to borrow from Sartre), quite literally, “no exit.”

Id. at 512-13 (footnote omitted).

63. *See* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992). An integrative curriculum would be similar to the one Deborah Rhode describes when she uses the term “pervasive” as it pertains to her vision of teaching ethics. *See id.* at 36. An integrative curriculum would be something like a classroom without walls. The rigid pigeonholes of the Langdellian curriculum would give way for a curriculum in which faculty would acknowledge in their classes that any given legal problem involves numerous legal doctrines and processes as well

curriculum raises any number of issues, but they revolve around two central questions that vex the modern American law school: (1) What shall we teach? and (2) How shall we teach it? Up until now, the MacCrate Report's⁶⁴ suggestion of more skills training in law school,⁶⁵ and the rise of the law school clinic have been the biggest challenge to the traditional curriculum and pedagogy. Both of these developments seek to integrate skills training, formerly the task of law firms and government agencies in their work with new lawyers, into the law school. While this skills based/clinical model of education taxes the resources of increasingly cash-strapped law schools, it did not challenge the fundamental assumptions of curriculum or pedagogy: that the duty of law school was to teach the uninitiated to "think like a lawyer" so that they could function in an adversarial culture. The challenge of the integrative ADR curriculum, however, runs far deeper.

First, and foremost, this curriculum challenges the adversarial

as knowledge from other disciplines like economics, sociology, psychology, and politics. A discussion of ADR would be integrated into every class, like ethics, on the theory that to do otherwise would "marginalize" the subject. The observations she makes in that article are germane here, especially in the way in which her views dovetail with that of Professor Pipkin. Consider, for example:

Historical experience demonstrates that a laissez-faire approach is particularly inadequate when it comes to ethics. Many students will wish to avoid anything that appears "touchy feely." A well-constructed ethics curricula, however, addresses issues of far more personal relevance than much of what is now required in professional schools. Many practicing lawyers will never encounter a shifting (or springing) executory interest; virtually all will confront issues of honesty, confidentiality, and loyalty.

Id. at 43. She notes that "the primary rationale for addressing ethical issues throughout the curriculum is that they arise throughout the curriculum." *Id.* at 50. Most of these statements could be made about the centrality of dispute resolution and transaction processes. Like Professors Riskin and Westbrook, Professor Rhode has published a casebook which builds on the ideas she developed in her article. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998).

64. See ABA, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) [hereinafter MACCRATE REPORT].

65. See *id.* Technically, the *MacCrate Report* does not require or call for law schools to teach these skills, but rather suggests that these skills need to be learned and honed continuously throughout one's legal career. See *id.* The way in which many law school faculty, however, have read it is to place upon law schools the responsibility for developing these skills in their students. See *id.* Commentary and reaction to this report has been rich and varied. See, e.g., Symposium, *The 21st Century Lawyer: Is There a Gap to Be Narrowed?*, 69 WASH. L. REV. 505 (1994).

assumptions underlying legal culture and the law school's unspoken⁶⁶ inculcation of students into that culture. Alternative dispute resolution, especially certain forms of negotiation and mediation, challenge the tenets of the adversarial, rule-based culture of the first year. Thus it was not surprising to me that some of my colleagues refused to teach any ADR because they perceived it as "weak" or "touchy-feely." For them, the choice was a Kierkegaardian either/or. There could only be winners and losers in curriculum reform; their own immersion in adversarial culture blinded them to the possibility of compromise or of the mutually beneficial co-existence of two, or more, different approaches to lawyering.

This program also forces one to ask "What is the canon?" as one alters a course or a curriculum to "make room" for ADR. Although it is not always necessary to trim course content to include ADR exercises, since most of the Missouri Plan problems are based on first year substantive topics, a teacher who wishes to pursue this topic more deeply will have to make decisions about course coverage. A faculty member who delves deeper, and who honestly faces the challenge that ADR poses to the adversarial culture must ask what is of value in the adversarial culture? What is of value in ADR? How can these two be combined? How do these decisions affect substantive coverage?⁶⁷

Thus, many of my colleagues asked about course coverage, and whether the use of simulations or exercises will dilute substantive coverage. Much of this coverage argument I regard as illusory, and not always related to a willingness to discuss what can be or should be part of the canon. Sometimes, it is just a way of saying "I don't want to change," or "I don't want to do the extra work of changing my course." But for those who have valid and sincerely held concerns about diluting basic coverage, I hope that my examples in this essay allay some of those concerns. Many faculty who have used exercises or simulations suggest that the resulting doctrinal analyses are richer.⁶⁸

A second, major challenge posed by the Missouri Plan is that much of the instruction is based on simulations. This raises questions about pedagogy. While law school faculty will frequently consider and debate curriculum changes, they seldom discuss pedagogy: how we teach. Many

66. Few of my colleagues, and almost none of the available teaching materials, inform students about the assumptions underlying the law school curriculum and pedagogy. Given the lack of information, it is thus no wonder that the law student's resistance to or alienation from law school is often diffuse.

67. Of course, ADR is not the only challenge to the traditional law school curriculum. For example, the increasing specialization within the legal profession raises questions about the curriculum.

68. See Larry Grosberg, *Lawyering Skills*, Presented at the Institute for Law School Teaching Workshop (May 26, 1995).

of us teach as we were instructed: Socratically. Others, dissatisfied with our own experience of the Socratic method, or our own clumsy attempts to teach using it, stumble about, often arriving at the lecture.

The Missouri Plan suggests, by implication, that one way to transmit legal material is through the use of simulations. This approach challenges both the live client, small class environment of the clinic and the Socratic techniques of the traditional classroom. But despite this challenge, the simulation-based model of instruction presents several advantages. The well designed simulation allows prepared students to assimilate material experientially. To successfully perform a typical ADR simulation, they must have prepared material (substantive and procedural) in advance of the simulation, learning both the material and the advantages of planning. During the simulation, they engage in problem solving, much like we ask them to do during an examination. And, like the examination, there may be multiple issues for the students to “spot” and resolve.

A well-structured and thoughtful debriefing of a simulation can have other educational benefits. As the students share and discuss their experiences, it allows the students to reflect on the subject matter of the simulation. For example, an instructor might ask whether a rule that had been studied in the casebook functioned as one might expect “in practice,” or whether the rule served any particular function at all in the selected ADR process. There are a wealth of questions that an instructor can ask to stimulate reflection and curiosity about both the underlying substantive rules and the ADR process involved in a simulation.

Other benefits flow from the simulation method. Many of the simulations require students to work in groups and to collaborate.⁶⁹ As opposed to the adversarial, atomistic approach of the Socratic classroom, this collaboration seeks to dilute the competition that exists for many students in law schools. For critics who bemoan this, however, I only ask you to consider how most lawyers practice upon leaving law school—my recollection of practice within my firm was that we worked collaboratively in small groups to solve problems.⁷⁰ Thus, the simulation also copies a feature of practice and allows students to develop skills that will be useful in practice. For example, the five minutes spent discussing “the free-rider problem” in a particular exercise can help a student to develop a strategy for surmounting this problem in other work settings so that they

69. See Roark M. Reed, *Group Learning in Law School*, 34 J. LEGAL EDUC. 674 (1984). Although focusing on clinical education, Professor Reed develops a model that demonstrates the advantages of cooperative and experiential education. See *id.* at 678.

70. Professor Reed hypothesizes that some discomfort with “group work” may come from American individualism as well as immersion in the adversary system. See *id.* at 683. But he notes: “[i]n truth, we participate in groups all of our lives and while we often dislike it, lawyers must work in groups of people, and the best lawyers exhibit considerable skill at it.” *Id.* (footnote omitted).

collaborate more effectively. Cognitively, this collaborative group work exposes students to opinions differing from their own and enhances their ability to talk about and deal with difference.⁷¹ These types of dialogues rarely occur in the large Socratic classroom; that is, while the Socratic method may teach substantive law, it does not prepare students to discuss it in a respectful and meaningful manner. The ability to have civil discussions about the law, however, is integral to the role the law plays as a foundation of a democratic society.

A nontrivial consideration in moving to simulation-based education is that it can relieve boredom.⁷² While this is more of a problem in the second and third year, it can also occur in the first year. A well-timed series of simulations can relieve the tedium of constant class discussions or lectures. Moreover, the hands-on approach of this method is often good at fulfilling the needs of students with different learning styles.

A final advantage of simulations is that they are cheap. Unlike clinical education which requires a low and therefore costly student to faculty ratio, many simulations can be performed in large classes. Although it might be preferable to individually critique each group of students performing a negotiation or a mediation, there are still lessons to be learned in a large group debriefing. Some teachers may, on a rotating basis, videotape selected groups during a simulation and then play this back to the class for comments. But the bottom line here is that simulations can be cost effective as well as educationally useful.

A third issue that is raised by the Missouri Plan is what Deborah Rhode, in another context, calls "the pervasive curriculum."⁷³ When the Missouri Plan is fully adopted, it means that ADR appears pervasively throughout the first year curriculum and possibly beyond it. This plan is a direct challenge to a curriculum that pigeonholes the law into rigid categories called "torts," or "contracts." It suggests to the students that the boundaries implied by their class schedules may be more fluid than they had been led to believe. An instructor at a law school with a fully integrated or pervasive ADR curriculum must expect that students may raise questions about issues not strictly within the four corners of their subject area. For example, in one exercise that I use involving employment law in my civil procedure class, it is not unusual for my students to raise questions about the underlying contract and tort issues as well as the civil procedure issues. The virtue of this approach is that the students become

71. See *id.* at 681.

72. See Paul Barron, *Can Anything Be Done to Make the Upper-Level Law School Courses More Interesting?*, 70 TUL. L. REV. 1881 (1996). Disenchantment is also found among recent graduates because law schools do not give them a realistic sense of practice. See Schultz, *supra* note 51, at 62.

73. See Rhode, *supra* note 63, at 36.

comfortable in discussing law in a way that practitioners do: holistically. They learn to see the relationships between and within various doctrinal areas of the law. This approach can be challenging to many faculty, and some may be uncomfortable with the “I don’t know” that they may be forced to utter on some occasions.⁷⁴

A final, and possibly difficult, lesson for faculty will be that if this program is fully implemented, the faculty must collaborate. The Missouri Plan is broken down into modules such as negotiation, client interviewing, mediation, and arbitration. The faculty must discuss which modules their program will cover, and who will teach each module. This plan will call for a degree of coordination that, at my school at least, is unheard of. While many of my colleagues have been perfectly happy adapting parts of the Missouri Plan piecemeal, the next step calls for the faculty to employ and model the collaboration called for in many of the simulations. In a law school that has been as traditionally individualistic about teaching as ours has, this seems to be the most intractable barrier to the adoption of this program, even more daunting than the “heresy” problems raised by Pipkin. Nonetheless, my colleagues who have been willing in this last school year to engage in some collaboration have found it to be rewarding and stimulating. My hope is that in the long run the implementation of this program will enhance the development of a faculty community.⁷⁵

CONCLUSION

Our participation in the FIPSE Project has left lasting changes in our curriculum, changes that I believe are for the better. Students attending our law school now have a more complete vision of the legal system, and a stronger sense of the options they have for participating in dispute resolution as problem solvers, counselors, litigators and reformists. While

74. Of course, that “I don’t know” can be turned back on the student. When this happens in my class, I often suggest that we collaborate in finding an answer together. For example, I will ask the student who raised the issue to do a little research and drop by my office or send me an e-mail. We will discuss our findings together, and I will ask the student to make a brief presentation to the class.

75. Others have found the collaborative results of curriculum reform beneficial to the faculty community:

Teaching together is fun, teaching together is supportive, and doing something with a group of colleagues enriches one’s own work. The interest shown by many of the younger faculty members suggests that collaborative teaching also speaks to an often unmet desire to be integrated into a community.

Todd D. Rakoff, *The Harvard First-Year Experiment*, 39 J. LEGAL EDUC. 491, 498 (1989); see also Glannon et. al., *supra* note 49, at 259.

I can point to discrete changes in the classroom, I believe what will be more interesting and more rewarding in the long run is to document the changes that this curriculum will make in the law school culture, and the implications these changes will have for the American legal system writ large.

