

The Integration of Theory, Doctrine, and Practice in Legal Education

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The separation of theory and practice in legal education may have originated in Thorstein Veblen's wisecrack in 1918 that "in point of substantial merit the law school belongs in the modern university no more than a school of fencing or dancing,"² or even in Christopher Columbus Langdell's claim that the content of legal education must be scientific to be worthy of study in a university.³ John Dewey traced the origins of the dualism of theory and practice to the distinction drawn in ancient Near Eastern cultures between higher and lower kinds of knowledge for purposes of social status. This distinction was unfortunately perpetuated by the Greeks, who confined experiential knowledge to the artisan and trader classes and hindered the development of scientific knowledge for more than one and a half millennia.⁴ Whether arising from a desire for social status or respectability within the university or from some other cause, the determined separation of theory from practice has severely limited the scope of modern legal education.

Although not sufficiently coherent to be called a movement, the effort to integrate theory and practice in American law schools has been gathering momentum. Discussions of the relative roles of theory and practice in legal education have, however, been characterized by inconsistent use of the terms "theory" and "practice."⁵ Definitions of these terms are therefore necessary at the

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2. Thorstein Veblen, *The Higher Learning in America* 211 (B.W. Huebsch 1918). Veblen had the same views about business schools and undergraduate programs. His ideal was something like the Institute for Advanced Study at Princeton, were it not for their occasional lapses into concerns about issues with some social relevance. The realist research program at Johns Hopkins would have been entirely too practical for Veblen. See John Henry Schlegel, *American Legal Realism and Empirical Social Science* 147-210 (U.N.C. Press 1995). But Veblen was on the wrong side of history. Today law professors, as university faculty, should be able to hold their heads just as high as the fencing masters and the dance instructors.

3. C.C. Langdell, *Harvard Celebration Speeches*, 3 L.Q. Rev. 123, 124 (1887).

4. That is, until the products of Greek thought were "reanimated by contact and interaction with just the things of ordinary experience and the instruments of use in practical arts which in classic Greek thought were supposed to contaminate the purity of science." John Dewey, *Logic: The Theory of Inquiry* 74 (Henry Holt 1938). Dewey believed that this distinction had shaped Greek attitudes toward "liberal" education: "Vocational and practical education was illiberal in Greece because it was the training of a servile class." John Dewey, *Challenge to Liberal Thought*, in *Problems of Men* 143, 145 (Phil. Lib. 1946).

5. For example, Dean Hoeflich has written that law school education at Transylvania

outset. Between theory and practice, a mediating term is needed to identify the relevance of theory to practice, and it is convenient to use the term *doctrine* for that purpose; that is, to reflect the past judgments of courts, legislatures, administrative agencies, and other sources of law about what theory is relevant to a specific problem. So the term *doctrine* is used here to refer to the concepts, rules, standards, principles, and institutions derived from primary and secondary sources of law. *Theory* is restricted to perspectives derived from outside the body of doctrine, from such disciplines as economics, history, psychology, literary criticism, philosophy, and political science.⁶ *Practice* consists of the skills required to apply theory and doctrine to real problems.

These concepts cannot be distinguished with bright lines. In fact, their interdependence may lead students to draw inferences when any one of them is neglected by a classroom instructor, either about its intrinsic importance or about the instructor's views of its importance. Integration is not only possible, but to some extent inevitable. With conscious, planned integration, each component is put into a transformative context that enriches both itself and the others.

Why Integration?

Concern for integrating theory and practice in legal education is by no means new. Karl Llewellyn was the first law teacher to address the need for such integration. As he wrote in an AALS curriculum report in 1944: "Technique without ideals may be a menace, but ideals without technique are a mess; and to turn ideals into effective vision, in matters of law, calls for passing those ideals through a hard-headed screen of effective legal technique."⁷

Llewellyn's vision found few adherents. In fact, the inclusion of theory or practice in the law school curriculum is still not universally accepted. Surely the

University in Kentucky in the 1830's had a theoretical component: "[T]he professor would tell the students of the relevant cases and statutes. This was the theoretical portion of the educational program" M. H. Hoeflich, *Plus Ça Change, Plus C'est La Même Chose: The Integration of Theory & Practice in Legal Education*, 66 Temple L. Rev. 123, 134 (1993). On the other hand, Judge Posner has recently written that "[t]he focus of a traditional legal education is practical Emphasis is placed on the parsing of statutes and, of particular importance in a case law system, of judicial opinions; on learning the contours of fundamental legal doctrines; on professional values; and, increasingly, on the acquisition of litigating and negotiation skills." Richard A. Posner, *Frontiers of Legal Theory* 1 (Harv. U. Press 2001) [hereinafter Posner, *Frontiers*]. Posner has also written that the Harvard Law School around 1960 was "heavily practical," as in considering the meaning of "adverseness" in the doctrine of adverse possession. Richard A. Posner, *The Problems of Jurisprudence* 2 (Harv. U. Press 1990) [hereinafter Posner, *Problems*]. Hoeflich uses "theory" and Posner, except for his reference to skills, uses "practice" to refer to what I am calling "doctrine."

6. The term *theory* so defined is similar to what Judge Posner calls "legal theory." Posner, *Frontiers*, *supra* n. 5, at 2-3.

7. *Committee on Curriculum*, 1944 Assn. Am. L. Schs. Handbook 159, 161 (reprinted in Comm. on Curriculum, Assn. Am. L. Schs., *The Place of Skills in Legal Education*, 45 Colum. L. Rev. 345, 346 (1945)). Not only is the style of the report unmistakably Llewellyn's, but he later described it as "written to the best of my ability" *Proceedings of the Annual Meeting 1947* Assn. Am. L. Schs. Handbook 68. This aphorism was Llewellyn's "favorite admonition." Mary Ann Glendon, *A Nation Under Lawyers* 197 (Farrar, Straus & Giroux 1994). But he sometimes reversed it for effect. See Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 Colum. L. Rev. 651, 662 (1935) [hereinafter Llewellyn, *On What is Wrong*].

time is past when a justification ought to be needed for inclusion of theory. The impact of interdisciplinary scholarship on law has been extraordinary.⁸ There is a difference between training lawyers and training paralegals beyond the length of the course of study. Law school graduates need a theoretical perspective for evaluating law and legal arguments; increasingly they will be required to handle theory in practice.

Many legal educators maintain that any deficiencies in legal education can be addressed during the mentoring new lawyers receive in their first jobs.⁹ But the questions that Llewellyn asked in 1935 about mentoring have never been answered: “[H]ow *many* get it? And with whom? And under what conditions favorable to learning? Do you *know*? Does anybody?”¹⁰ These questions have become increasingly moot as mentoring in firms is dying under the pressure of billable hours.¹¹ Reliance on mentoring to make up for deficiencies in coverage of doctrine and practice skills was probably always misplaced.¹² Such reliance certainly favored elite students, good students, and students with social and family connections; it did not favor average and below average students, students without connections, or traditional outsider students who may have been the victims of discrimination.¹³

Reliance on mentoring has virtually compelled many students into working in large law firms when their preferences lay elsewhere. Duncan Kennedy has described the “teaching of doctrine in isolation from practice skills” as an “incapacitating device” that makes it seem “hopelessly impractical to think about setting up your own law firm” He maintains that “[l]aw schools are wholly responsible for this situation. They could quite easily revamp their curricula so that any student who wanted it would have a meaningful choice between independence and servility.”¹⁴

Furthermore, if such craft skills as drafting, counseling, and fact-gathering are to be acquired by law school graduates only in practice, then, to borrow a phrase

8. For a succinct summary, see Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 Mich. L. Rev. 1921, 1925-26 (1993).

9. See e.g. Paul Brest, *The Responsibility of Law Schools*, 58 L. & Contemp. Probs. 5, 17 (Summer/Autumn 1995); George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 Mich. L. Rev. 1929, 1943 (1993).

10. Llewellyn, *On What is Wrong*, *supra* n. 7, at 668.

11. The bleakest account of the fate of mentoring is probably Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 Minn. L. Rev. 705, 739-46 (1998).

12. “In all likelihood, the majority of law graduates never received first-rate on the job training.” ABA Sec. Leg. Educ. & Admis. to the Bar, *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools* 15 (ABA 1979) (the Cramton Report).

13. The other crutch that legal educators often rely on to cover basic doctrinal gaps and introduce students to local law and procedure is the commercial bar review course. See e.g. James Boyd White, *From Expectation to Experience* 21 (U. Mich. Press 1999); Markus Dirk Dubber, *Reforming American Penal Law*, 90 J. Crim. L. & Criminology 49, 74 (1999); Priest, *supra* n. 9, at 1943; Michael E. Solimine, *Book Review*, 57 U. Cin. L. Rev. 987, 1004 n.2 (1989) (reviewing G. Alan Tarr and Mary Cornelia Aldis Porter, *Activism and Politics on State Supreme Courts*). Llewellyn’s questions about the adequacy of mentoring have likewise never been answered with regard to the adequacy of the commercial bar review courses.

14. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *The Politics of Law: A Progressive Critique* 54, 65 (David Kairys ed., 3d ed., Basic Books 1998).

from Blackstone, local practice “must be the whole [they] will ever know”¹⁵

Methods

Theory, doctrine, and practice can be fully integrated in the education of all students in only three ways: within a course, through coordinated courses, or across structured course sequencing. Coordination is the key. A rich array of electives in itself cannot accomplish integration. All three methods are being tried in various schools. Certainly the directors of writing programs have pioneered more experiments than any other segment of the law school community. Writing Across the Curriculum programs¹⁶ have constituted the single most coordinated effort at introducing practice into courses previously concerned only with theory or doctrine.

Efforts to coordinate the first-year writing program with other first-year courses have shown that coordinated courses can accomplish very effectively the benefits of integration.¹⁷

The approach that has received the least attention is the use of sequencing. One possible approach is to use capstone courses, cross-disciplinary courses with prerequisites that can build on what the students have already learned of the doctrine and theory and expand that knowledge in the process of applying it in actual practice. For example, a real estate capstone could be devoted to the construction of a planned unit development or condominium, with tax or environmental issues incorporated, all against the background of the social and political concerns expressed by such critics as Evan McKenzie in *Privatopia*.¹⁸ As students draft restrictive covenants or association bylaws, as they talk with practitioners or real estate developers or perhaps even residents of gated communities or condominium conversion projects, the theory provides a basis for evaluation and critique that cannot occur with purely doctrinal content.¹⁹

15. William Blackstone, *Commentaries* vol. 1, *32. This point is similar to an argument made in 1923 by Charles E. Clark, Dean at Yale, later judge, and now nearly forgotten as a proponent of legal realism. See Charles E. Clark, *Book Review*, 33 *Yale L.J.* 109, 109 (1923) (reviewing Edward W. Hinton, *Cases on Code Pleading*). Clark changed his mind later, though for a reason that in fact seems to support his original position. He was assigned to teach a skills course in legal drafting, but found that in the drafting course, he “could not approach the results obtainable in the courses in the substantive law of wills or future interests which I was giving at the same time.” The one idea that he tried most strenuously to get across was the idea that a will should be short and simple, which “would now be hopelessly at variance with the plan and practice of the modern law office. . . . [N]o first-class New York law office would think of drafting a will of less than twenty pages.” The students had “to forget everything I had told them and simply look up the office models” Charles E. Clark, “*Practical*” *Legal Training an Illusion*, 3 *J. Leg. Educ.* 423, 427 (1951).

16. See e.g. Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 *Neb. L. Rev.* 561 (1997).

17. See e.g. Pamela Lysaght et al., *Integrating Theory and Practice at University of Detroit Mercy*, 77 *Mich. B.J.* 684 (1998).

18. Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale U. Press 1994).

19. This is not, however, necessarily to recommend that law schools adopt a program of subject matter concentrations or specializations. When my school’s task force on the curriculum investigated the issue of specializations in 1997-1998, we found very little interest among the practicing bar in hiring law students with specializations. In fact, one hiring partner of a large law

In any consideration of curricular arrangements for integrating doctrine with theory and practice, an initial question concerns what methods of instruction are usable or necessary. We have superb methods for teaching doctrine, although not all of them are equally effective for an integrated approach.²⁰ Practical training is receiving much attention in law schools today.²¹ Methods for teaching theory, on the other hand, are seldom discussed.

The teaching of theory is a challenge, in part because theory itself usually entails significant practice components such as microeconomic analysis, social research methods, techniques of literary criticism, or historical method. Judge Posner has called it a “scandal” that law students are not instructed in the fundamentals of statistical inference.²² More than twenty-five years ago, the economist Paul Samuelson predicted that as law professors had ever more knowledge to impart to students, they would be compelled to abandon the time-consuming Socratic method in favor of lectures.²³ It seems likely that as faculty

firm in Detroit reported “near disasters” with associates who had specialized too much in law school. This is not to say that specializations are a bad idea, but only that the evidence for their increasing the marketability of a law school graduate is mixed. See Ann M. Griffin, *What’s Your Major?—A Question for Law Students in Michigan?*, 80 Mich. B.J. 72 (2001).

20. The Socratic method is not as effective for teaching statutes and regulations as for case law. Langdell opposed student study of statutes, even to the point of forbidding the Harvard Law Library from acquiring them. Eldon R. James, *The Harvard Law School Library*, 27 L. Lib. J. 157, 158 (1934). The use of the Socratic method for discussion of theory can easily become little more than a class recitation. Soia Mentschikoff developed a problem-method approach for teaching statutes at Harvard in the late 1940’s. See *Proceedings of the Annual Meeting*, *supra* n. 7, at 72. With her method, which works well with classes of any size, the students have in advance a problem that does not give them all the facts or tell them what sections of a statute are applicable. In class, the instructor plays the role of the client asking for advice from the students, acting as attorneys. Nearly all of the virtues of the Socratic method are duplicated in a setting that easily can accommodate theoretical issues or any number of practice skills. She demonstrated the method in *Great Law Teachers Series 1967*, “*The Problem Method in Commercial Law*” (Teaching Methods Comm. of the Assn. Am. L. Schs. 1967) (videotape).

A hybrid approach combining the case method with the problem method was suggested by Jerome Frank in 1933. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 Pa. L. Rev. 907, 916 (1933). He urged the intensive study of complete records of one or two cases for half a year, in order to give the students a real understanding of how cases are won, lost, and decided. He himself vacillated about the extent to which he wanted to incorporate history, ethics, economics, politics, psychology, and anthropology with such an approach; he feared that theory might hinder the development of the students’ fact-skepticism. Laura Kalman, *Legal Realism at Yale, 1927-1960* at 169-70 (U.N.C. Press 1986). But a much abbreviated version of Frank’s approach, treating cases as problems to be solved, can be accomplished by immersing students in the facts of cases, including information and documents not included in the opinion but easily available from court records and briefs; such additional material assists students not only in showing them the alternatives available to the lawyer, but also in making them comfortable working with documents.

21. The law reviews and the materials from the Institute for Law School Teaching at Gonzaga contain accounts of fascinating experiments in teaching practice skills in all kinds of course arrangements. See the superb bibliography in Arturo Lopez Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 Neb. L. Rev. 132 (1998).

22. Posner, *Problems*, *supra* n. 5, at 462.

23. Paul A. Samuelson, *The Convergence of the Law School and the University*, 43 Am. Scholar 256, 270 (1974) (“Just imagine teaching topological dynamics by the Socratic method: you would scarcely get past Newton’s second law before the Thanksgiving vacation intervened . . .”).

attempt to convey theory to students, they are relying more and more on lectures. Yet lectures are widely regarded among legal educators as the least effective teaching method because they involve passive rather than active learning.²⁴ That may not, however, be correct if the goal is merely to convey information. Few areas of academic instruction have been surveyed as thoroughly as economics education, yet nothing has so far really been proven to be superior to lecturing in economics courses.²⁵ But the outcome being tested is merely short-term knowledge. If the goal of the contracts course were only to convey rules, principles, and economic conclusions to be memorized, empirical testing at the conclusion of the course might well show that students learned more in a lecture course than with any other method. But that indicates nothing about the ability of the students to analyze cases and statutes or to apply them to new facts.²⁶ Furthermore, too much lecturing is likely to encourage in students the tendency to privilege the instructor's views; student curiosity will for the most part be limited to trying to identify what is most likely to turn up on examinations.

But while theory may be taught through lectures, it needs to be explored in practice settings. If, for example, after teaching a unit on nuisance law with immersion in the Coase Theorem, the teacher invites a practitioner who has litigated some nuisance cases to the class for a dialog with the students about problems and strategies, the probability is high that the practitioner will at some point reveal that he or she has never heard of the Coase Theorem and has never been involved in a case in which the parties showed the slightest inclination to negotiate after judgment.²⁷ After the students recover their composure, discussion can pursue issues such as transaction costs and strategies for negotiating with parties who are emotional or, in a sense, behaving "irrationally."

There are methods for exploring theory within classes using simulation and other techniques. One method for getting at foundational assumptions is a simulated legislative hearing, with students appointed to various panels of witnesses based on their academic backgrounds. Panels of Moral Philosophers, Economists, Law Professors, or Social Workers can testify for or against a real or fictitious bill.²⁸

24. See e.g. Gerald F. Hess, *Seven Principles of Good Practice in Legal Education: Principle 3: Good Practice Encourages Active Learning*, 49 J. Legal Educ. 401 (1999).

25. See William E. Becker, *Teaching Economics to Undergraduates*, 35 J. Econ. Literature 1347, 1363 (1997); John J. Siegfried & Rendigs Fels, *Research on Teaching College Economics: A Survey*, 17 J. Econ. Literature 923, 940-42 (1979).

26. As Edward H. ("Bull") Warren, on whom *The Paper Chase's* Professor Kingsfield was based at least in part, put it:

My experience leads me to believe that a large proportion of the students, on coming to a law school fresh from the *dolce far niente* college years, would rather walk two miles than think for three minutes. If the instructor will only give them something that they can write down and memorize, the students will rise up and call him blessed. But too much lecturing is bad for them,—very bad.

Edward H. Warren, *Spartan Education* 22-23 (Houghton Mifflin 1942).

27. Similar findings were reported in Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. Chi. L. Rev. 373 (1999).

28. I have, for example, used a bill periodically reintroduced in the Michigan legislature to abolish the doctrine of adverse possession.

Such exercises may in fact not reflect reality. When Judge Edwards suggested that "theory"

Students get experience in handling theoretical arguments in the context of doctrine and practice.

John Dewey maintained that “general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations”²⁹ This is true, *a fortiori*, of theoretical constructs as well.

How much theory is necessary? One of the virtues of Socratic method is that it is fundamentally subversive. It provides students with techniques for challenging not only judges, but ultimately even the teacher. At the minimum, students ought to be given enough theory to evaluate and challenge it. For example, an analysis of landlord-tenant law in terms of Hegel’s *Philosophy of Right*³⁰ ought to provide students with enough understanding of Hegel’s philosophy to be able to challenge his assumptions. Hegel deserves no more deference than Judge Cardozo.

Here lies a serious problem with implications for curriculum design. If the theory is too complex, it may be impossible to treat the theory intensively enough within an integrated course to make it truly useful to the students. It would, for example, be impossible to teach methods of statistical analysis within an evidence course. If a separate course is designed to teach the theory, it should be tied to substantive law or to a substantive course, where the relationship of the theory to doctrine and practice can be explored in sufficient depth to test the applicability of the theory to legal issues. Furthermore, students who have already studied the theory as undergraduates will be bored if the theory is not linked to something new to them, and those for whom the theory is new will be overwhelmed with something that seems to have limited value to them as future lawyers.³¹

However theory is handled, the integration of practice into the curriculum as a whole cannot be seen as marginalizing clinicians and other faculty with expertise in writing, trial practice, appellate advocacy, and other skills. On the contrary, an integrated approach demands a much greater reliance on such expertise than is now found in most law schools, as well as full integration of skills programs into the mainstream curriculum.

Benefits of Integration

Law students—like law faculty—are adult learners; students are learning to be lawyers just as faculty are learning to be educators and scholars. For adults, it is

may have greater utility to legislatures than to courts, a partner in a major law firm who has argued before the Supreme Court and lobbied in Congress wrote that Congress is even less interested in abstract legal theory than the courts. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 Mich. L. Rev. 2191, 2207 (1993).

29. John Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17, 26 (1924).

30. See Margaret Jane Radin, *Reinterpreting Property* 44-71 (U. Chi. Press 1993).

31. A sociologist on the law faculty at the University of Nebraska in the early 1950’s encountered substantial resistance in his attempts to introduce law students to social science methodology. But once the instructor provided precise examples of the methods by which social science research might be drawn upon by lawyers undertaking verifiable fact-finding, hostility declined considerably. “[T]he student accepts sociology for what use he can make of it—once he is convinced of the necessity of becoming versed in the rational approach to policy issues. Sociology is neither offered nor accepted for its own sake.” Robert C. Sorensen, *The Analytical Problem Technique for Teaching Sociology in a Law School*, 17 Am. Sociological Rev. 229, 232 (1952).

critically important to have an honorable occupation.³² From student perspectives, their new careers depend on a mastery of doctrine and practice; for faculty, theory.

Just as faculty can easily be bored by practice, students can easily be bored by theory.³³ Integration provides a possible method for reconciling these perspectives.

It often seems as though law students take large doses of Lethe water daily; they have a remarkable ability to forget most of what they have been taught. Samuel Williston and Karl Llewellyn, probably two of the twentieth century's greatest commercial law teachers, found that when they got their own contracts students in later courses in commercial law, the students had forgotten what Williston and Llewellyn themselves had taught them in contracts.³⁴ But Barbara Woodhouse has pointed out that despite students' memory lapses, they tend to remember with crystal clarity the doctrines they master for their first-year moot court arguments.³⁵ Not only do they remember what they learned for their moot court problems, but most of their knowledge of the law used for those problems was acquired with little expenditure of class time.

Modern conveyancing practice is plagued with errors made by lawyers in firms of all sizes. Consequently, in my property course, one of the drafting assignments I use requires the students to prepare a recordable deed. They may use any resources they wish, get help from anyone other than another member of the class,³⁶ and turn in whatever they think necessary. I give them a memo with the names of the grantors and grantees and the legal description, and then subsequently I act as the client or clients, and the students ask questions. If they ask the right questions, they get additional documents; they may also find out that there's much more to this than the memo indicated. They may learn, among other things, that the tragedy of the commons is about to be reenacted yet again; that the seller has promised the buyers items that may or may not be fixtures and were not mentioned in the purchase agreement executed by a real estate broker; that the grantees, on the mistaken advice of a lawyer acquaintance, want to hold the property in a form that is probably unwise, at least in Michigan; and that the seller has promised to give a special warranty deed, which is a criminal misdemeanor in Michigan, so they have to find an alternative method to accomplish the same end. After sorting out all the problems, the students must then draft a deed that meets the requirements of the recording acts.

Such an exercise makes rules and principles concrete. Dower is no longer merely a medieval abstraction for students worried that a seller whose wife has just

32. Lila A. Coleburn & Julia C. Spring, *Socrates Unbound: Developmental Perspectives on the Law School Experience*, 24 L. & Psychol. Rev. 5, 10 (2000).

33. See e.g. Richard A. Posner, *Problematics of Moral and Legal Theory* 288 (Harv. U. Press 1999); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 60 (1992) [hereinafter Edwards, *The Growing Disjunction*]; Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 Mich. L. Rev. 2075, 2108 n.8 (1993).

34. *Proceedings of the Annual Meeting*, supra n. 7, at 68.

35. Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 Mich. L. Rev. 1977, 1989 (1993).

36. Initially, I was somewhat concerned that this would give an unfair advantage to students who have lawyer relatives or have access to forms in law firm computer systems. This concern is unfounded. Conveyancing work is often so sloppy and lawyer ignorance is so prevalent that such access, far from being an advantage, can easily become a trap.

died may be romantically involved with another woman, whom he might marry before the closing. With understanding and application comes critique—of rules and standards, of form books and judicial opinions, and, above all, of the drafting skills of members of the legislature.

But what is astonishing is how well the students remember what they learned—even actually taught themselves—in this assignment. A little over two years later I see most of these students at events connected with graduation, and I often give them a little oral quiz to see how much they remember. I always find that they have forgotten much of what I taught them Socratically, but virtually all of them remember almost everything they used in the deed assignment: the test for fixtures, the difference between male and female grantors, the font size required for deeds, the required paper weight, the ink color, the margin at the top of the first page, the language most commonly used in Michigan to create a joint life estate with indestructible alternative contingent remainders. And these benefits accrue from an investment of no more than twenty or thirty minutes of class time two and a half years earlier.³⁷

In 1935, Karl Llewellyn summarized the purpose of such exercises:

The fact is that legal rules mean, of themselves, next to nothing. They are verbal formulae, partly conveying a wished-for direction and ideal. But they are, to law students, empty. A brilliant student told me recently of the pleasure of his course in Bills and Notes, in which he had been doing algebraic tricks. *This student had, however, never seen a bill. . . .*

This type of manipulation, for all its values esthetic and sometimes practical, is vicious when left to itself. . . . [Furthermore], it leads to the slower student's groping in a three years' daze, with hold for neither right hand nor for left. The slower student, the concrete-minded student, does not even get to taste the fun.

Whereas to set rules into their social context, into the context of how men do things, and of what difference the rule makes to those men—this is to give body to a rule for any student. It has graphic value, it has movement value, it has memory value. Rules thus seen are not only more meaningful. *They are also easier to learn.* You save time, when you teach them thus. You also make *critique* of the rule take on its human content. You make critique inevitable, because the human content, once introduced, will never be denied.³⁸

37. Short-term benefits of this modest deed assignment are also substantial. Students working as summer clerks in firms and courts after their first year of law school often call or visit me to tell about their successes and problems. While no one can expect that new law school graduates—let alone first-year students—have mastered all of any field, providing them with even a narrow field of expertise can give them a perspective from which to evaluate what they are learning on the job. Fairly regularly, students working for lawyers or judges are confronted with issues involving such matters as the language in purchase agreements or deeds, dower rights, trade fixtures, special warranty deeds, chain of title questions, reversionary interests, and other aspects of this deed assignment; not infrequently, they recognize problems and understand how to approach them better than the lawyers or judges for whom they are clerking.

38. Llewellyn, *On What is Wrong*, *supra* n. 7, at 669.

Problems of Integration

Integrating theory, doctrine, and practice, no matter how it is implemented, entails several common problems. The first is faculty incentive. As Barbara Woodhouse has pointed out, not only is there seldom any reward for good teaching, but undertaking an innovative program can in fact entail disincentives to the extent that it deprives faculty of time for research and writing.³⁹

A second problem is faculty expertise. Robert Hutchins maintained long ago that the reason law faculty cannot teach practice skills is that it is impossible for them to keep up with the “tricks of the trade.”⁴⁰ This problem is in fact exaggerated. Faculty have no need to keep up with *all* current practice, only those areas related to the courses they teach. Few faculty would want to do what Karl Llewellyn did shortly after beginning his teaching career—leave for two years’ experience in practice in areas he was teaching.⁴¹ But such extreme measures are unnecessary. Attendance at bar association and alumni/ae programs can yield much information about current practices. Lawyers and judges love to talk about their work. Any faculty member who speaks at a bar meeting or writes a bar journal article on some problem in the law will, within six months, have more than enough information about current practices to incorporate into a course.⁴²

Although guest lectures can easily be a waste of time for everyone, student dialogs with practitioners can be illuminating. For any areas that are extremely complex or undergoing rapid change, or for any course such as a capstone course that has a significant practice component, an arrangement often extremely beneficial to students is to have the course team-taught by a full-time faculty member and a practicing adjunct professor. The late Curtis J. Berger had an experience that was very rewarding both for him and for his students in team-

39. Woodhouse, *supra* n. 35, at 1993-94.

40. Robert Maynard Hutchins, *The Higher Learning in America* 47 (Yale U. Press 1962) (1st ed. 1936).

41. William Twining, *Karl Llewellyn and the Realist Movement* 100-02 (U. Okla. Press 1973). See also Edward D. Re, *Law Office Sabbaticals for Law Professors*, 45 J. Leg. Educ. 95 (1995).

42. Such contacts will often generate letters and calls from judges and attorneys seeking help, which can also be very useful class exercises. Recently, I got a wonderful letter from a firm asking for help with sorting out the title to a large tract of land with a hunting lodge. The lawyer writing the letter described the interested parties as “1,” “2,” “A,” “B,” “C,” “D,” and their children, and included three pages of questions and information about these people, as well as an attachment from some other lawyer with a note: “John, here’s your answer.” After blocking the letterhead and the signature, I distributed the letter to the class. We discussed the letter for about fifteen minutes, with students noting the complete irrelevance of the attachment; the legal issues were all in fact simple, the only difficulty—and it was serious—being to devise an incentive for each of the parties to join in a common solution. Volunteers drafted a response, and the class approved the response after some discussion about the unauthorized practice of law. The firm was extremely grateful, though somewhat embarrassed, and the students, while getting additional experience in drafting professional letters, learned that forms of ownership have dimensions that go beyond the legal rules.

An important element of such exercises, however, is that the instructor should not think out the best resolution in advance. Much of the benefit for the students derives from the joint effort of teacher and students to develop a workable approach, especially in such a case as this where in fact no approach was entirely satisfactory. See Donald A. Schön, *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* 296 (Jossey-Bass 1987).

teaching his course in non-corporate entities at Columbia with Lewis Kaster of Robinson Silverman in New York City. Both teachers attended each class, and both participated in the design of the course and the evaluation of the students.⁴³

A third problem is course time, although that too can be minimized with careful planning.⁴⁴ If practical assignments are used to teach the theory or the doctrine, what the students teach themselves does not need to be treated in class, although there needs to be some method of evaluation and correction.

Another major issue is jurisdiction. Students are not really learning to navigate the sea of legal sources, to devise alternative courses of action, to study interrelationships among apparently unrelated rules and principles, or to evaluate the reliability of secondary sources unless a real jurisdiction is used in practice components. Fictional jurisdictions can be used for assigning some tasks, but they fail to give students experience with navigating on their own. For efficiency, the jurisdiction used should probably be that in which the majority of students intend to practice, although if it differs from the jurisdiction where the school is located, there are other advantages to using the local jurisdiction: social and economic data is easier to obtain; social workers, law enforcement officials, title insurance executives, and others with practical expertise, as well as judges and practitioners, are more readily available; and the law library is more likely to have everything related to the law of the local jurisdiction. The drawback is that every law school class contains students who intend to practice in a variety of jurisdictions, and those who do not intend to remain in the jurisdiction used in class naturally have a morale problem. The course may also have an image problem if it is regarded as teaching too much local law. In fact, as long as the law of one jurisdiction is studied in depth, students will benefit even if they go to another jurisdiction. Much as with the study of comparative law, a student who knows well the law of Montana will find it easier to learn, understand, and critique the law of New Jersey.

Karl Llewellyn failed to persuade either the profession or even his colleagues in his own schools⁴⁵ to attempt the integration of theory and practice with doctrine. Is

43. Conversation with Curtis J. Berger (June 7, 1997); telephone conversation with Lewis Kaster (June 19, 2001).

44. The problem of class time haunted Karl Llewellyn throughout his career. See, e.g. Karl N. Llewellyn, *Case Method*, in *Encyclopaedia of the Social Sciences* vol. 3, at 251 (1930) (the use of lectures, supplementary material, and outside student reading is needed because “knowledge of the positive law is won under case discussion only at heavy cost in time”); Llewellyn, *On What is Wrong*, *supra*, n. 7, at 666-67 (in upper-level courses, we need to use texts and lectures to free time for actual use of the cases in drafting or counseling); Karl N. Llewellyn, *McDougal and Lasswell Plan for Legal Education*, 43 *Colum. L. Rev.* 476, 478 (1943) (discussing Llewellyn’s effort to “wrestle with the problems of time” in trying to reach the more ordinary student); *Committee on Curriculum*, *supra* n. 7, at 162 (a central problem is the limited class time and its most effective use, and so we need to be more efficient); *Proceedings of the Annual Meeting*, *supra* n. 6, at 68 (Llewellyn’s remarks: “I take as the fundamental problem, time”); Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 *J. Leg. Educ.* 211, 215 (1948) [hereinafter Llewellyn, *Current Crisis*] (to save time, we need to encourage students to turn to outside reading); Karl N. Llewellyn, *The Study of Law as a Liberal Art*, in *Jurisprudence: Realism in Theory and Practice* 375, 386-87 (1962) [hereinafter Llewellyn, *Study*] (1960 address in which Llewellyn advocated cutting doctrinal information to permit time for undertaking technical training; for the rest, rely on independent reading that is not discussed in class). He seems to have failed to convince his colleagues that this is a problem worth addressing.

45. Llewellyn, *Study*, *supra* n. 44, at 380.

success any more likely today? Much has changed in the forty years since Llewellyn died: the clinicians have made practice almost respectable;⁴⁶ there can be no doubt now that reliance on mentoring after graduation is inadequate; we now have two or three decades of innovative experiments introducing practical components in doctrinal courses; the acceptance of much theory by courts and legislatures has provided many more concrete examples for classroom study; the MacCrate Report and the simultaneous critique of legal education by Judge Harry Edwards⁴⁷ have been taken much more seriously than previous recommendations from the ABA and the legal profession; and perhaps even the rankings in *U.S. News & World Report* have spurred schools into efforts at product differentiation in order to attract students for whom the integration of practice and doctrine with theory is likely to have substantial appeal.

Implementation

What needs to be done? The first step is that law schools must accept responsibility for *every* graduate to whom they award degrees. Karl Llewellyn's assessment a half-century ago is generally still true:

What has not been done as yet on any important scale at any individual law school is to . . . seek to set up, within the available time, a reasonably rounded, reasonably *reliable* body of training for a *whole* student body. That is, as the question of social responsibility raises its head, a *sustained effort to make the law school's law degree become a reliable mint mark*.⁴⁸

Not long before his death, Llewellyn concluded that anyone "who proposes to practice a liberal art must be *technically competent*" and that "this minimum competence of *each* mint-marked law graduate does not appear, as yet, in these United States."⁴⁹

Within schools, a pervasive approach to integration across the curriculum is probably impossible. At least since Felix Frankfurter,⁵⁰ the tradition of absolute faculty discretion over course content is very strong, and for many faculty, such discretion is a matter of academic freedom. Nevertheless, determining what is actually being taught might be a first step toward serious consideration of curricular means for integration that will reach all students. The MacCrate Report recommended that every law school undertake a skills inventory.⁵¹ Such

46. But not quite. See generally Paul D. Reingold, *Harry Edwards' Nostalgia*, 91 Mich. L. Rev. 1998 (1993).

47. See Edwards, *The Growing Disjunction*, *supra* n. 33.

48. Llewellyn, *Current Crisis*, *supra* n. 44, at 218.

49. Llewellyn, *Study*, *supra* n. 44, at 380.

50. According to Senator Sam Ervin, who was a student at Harvard in the early 1920's, Frankfurter "taught everything but public utilities in his course on public utilities." Paul R. Clancy, *Just a Country Lawyer: A Biography of Senator Sam Ervin* 81 (Ind. U. Press 1974). This tradition may well have antedated Frankfurter. The *Lehrfreiheit* of German academic models may well have influenced American law teachers in the late nineteenth century. See Mathias Reimann, *A Career in Itself: The German Professoriate [sic] as a Model for American Legal Academia [sic]*, in *The Reception of Continental Ideas in the Common Law World 1820-1920*, at 165, 186 (Comparative Studies in Continental and Anglo-American Legal History Bd. 13, 1993).

51. ABA Sec. Leg. Educ. & Admis. to the Bar, *Legal Education and Professional Development*—

inventories can yield data that is very impressive as to the range and depth of the school's skills training, but usually reveal the haphazard nature of such training outside the clinical program. Perhaps we also need theory inventories to find out whether students are being introduced—and if so, to what extent—to the theory they will find most profitable in their careers and to themselves as citizens and lawyers.

Nationally, empirical research is needed on the effectiveness of various teaching methods. Anecdotes indicate possibilities, but not probabilities. Before such data can be generated there must be some agreement about desirable, measurable outcomes with greater specificity than can be derived from the MacCrate Report. As Professor Munro has pointed out, assessment programs in law schools have been woefully inadequate.⁵²

Craftsmanship

The goal, the unifying concept, with integrating theory, doctrine and practice ought to be to instill in every student what some legal realists, and Karl Llewellyn in particular, called “craftsmanship.”⁵³ Unfortunately, there is no synonym. *Skills* is too narrow; *competence* from its use in malpractice and disciplinary proceedings sets too low a standard; *professionalism* is close, but has become too much associated with behavior and ethics.⁵⁴ In fact, if *competence* in malpractice could be redefined as craftsmanship, the troubling distinction between ability and performance would largely evaporate.

To see the law as a craft to be mastered is to evoke some of the more positive characteristics of a guild: pride in work, recognition of the importance of the work to society, routine acceptance of obligations to meet the needs of society without profit as the overriding concern,⁵⁵ even an aesthetic appreciation for a well structured argument, an elegant strategy, or a well drafted document. Law schools have allegedly been very successful at taking even highly idealistic students and converting them into graduates who care only about making the most money at the

An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 259 (ABA 1992) (the MacCrate Report).

52. Gregory S. Munro, *Outcomes Assessment for Law Schools* 33 (Inst. L. Sch. Teaching 2000).

53. E.g. Llewellyn, *Current Crisis*, *supra* n. 44, at 219; Committee on Curriculum, *supra* n. 7, at 180; Twining, *supra* n. 41, at 199.

54. *Professionalism* in this sense is emphatically not, however, Judge Posner's new profit maximizing, rationalized professionalism. See Posner, *supra* n. 33, at 185-211.

55. The history of the pro bono obligation of lawyers is somewhat obscure. David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U.L. Rev. 735, 738 (1980). On the other hand, English serjeants at law were reminded at the time of their creation of their obligation to the poor, often in connection with the symbolism of their habit. For example, the Chief Justice of the Common Pleas, speaking to new serjeants during the reign of Henry VIII, explained the meaning of the tabard: “The tabard reacheth from the head to the feet and aideth the body, legs and arms, in token that you shall refuse to take no man under the protection of your good counsel: all partiality and hatred laid aside, be as glad to tell the poor man the truth of the law for God's sake as the rich man for his money.” *Speech of a Chief Justice of the Common Pleas*, in J. H. Baker, *The Order of Serjeants at Law* 288, 292 (Selden Socy. 1984) (spelling modernized). For additional examples, see *id.* at 354, 361, 379.

most prestigious law firm possible.⁵⁶ Perhaps, if theory, doctrine, and practice can be integrated and suffused with the values of craftsmanship from the very beginning of the law student's course through law school, the craft ideals can take

56. Robert Granfield, *Making Elite Lawyers* 47-49 (Routledge 1992); Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 L. & Socy. Rev. 851 (1996). Surely this transformation in respect to vocational preferences arises primarily from conditions created by the law schools themselves—by imposing heavy debt loads on many students and by telling all of them that to become good lawyers they need to get jobs in large firms that offer mentoring programs. Occasional decanal or professorial lectures on the importance of public service can hardly be expected to override these immediate concerns for law school graduates.

Apart from vocational goals, it does seem that students also lose or at least moderate their commitments to specific ideological goals. Students' "loss of idealism" is often attributed to the narrowing effects of legal education. See e.g. M.H. Hoeflich, *Law, Culture and the University: An Inaugural Discourse*, 40 Syracuse L. Rev. 789, 796 (1989); Gregory A. Kalscheur, S.J., *Law Schools as a Culture of Conversation: Re-Imagining Legal Education as a Process of Conversion to the Demands of Authentic Conversation*, 28 Loy. U. Chi. L.J. 333, 335-42 (1996). I have discussed this matter with many students who came to law school to save the world, or at least the environment, or to advocate Native American rights, or to overturn *Roe v. Wade* and restore the moral fabric of society, or to return America to its true libertarian roots, but who, after a year or two of law school, are much less "idealistic." For many of them, the effects of legal education are not narrowing, but broadening. Some have said that it's "a little like growing up." As one described the process, "if you learn nothing else in law school, you learn that there are two sides to every question, that what you thought was obviously the 'right' cure may have entirely unforeseen and undesirable consequences." For a similar analysis, see Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 115 (Harv. U. Press 1993).

Law students have sacrificed much to go to law school. Most of them want to proud of their profession, they want to contribute to the good of society, they want to be effective lawyers and good citizens. They *want* to be craftswomen and craftsmen of the law.

the place of students' lost idealism or, even better, show them how they can put their idealism into practice. Perhaps what the law schools teach and the values they inculcate can survive the first five years of practice. Perhaps law schools can then make a significant contribution to improving the quality and delivery of legal services.