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The Trouble with Categories: What Theory Can Teach Us about the Doctrine-Skills Divide

Linda H. Edwards

A traveler walking in the forest came across an extraordinary sight. On every tree, there was a target with an arrow dead center. Marveling at the marksmanship, the traveler followed the trail of bull's-eyes in search of the archer. Eventually, he came across a small boy with a bow and arrow. The traveler asked the boy where he had learned such skillful archery. "Well," the boy explained, "first I shoot at the tree. Then I draw a target around the arrow."

-Attributed to the Magid of Dubnow, described in
*A Clearing in the Forest: Law, Life, and Mind*¹

We might not need another article decrying the supposed doctrine/skills dichotomy. That conversation has been going on for a long time, and exhortations about status, faculty politics, and the devaluation of skills teaching seem increasingly old and tired.² But like it or not, in conversations about the urgent need to reform legal education, the dichotomy's entailments confront us at every turn. Is there something more to be said? Perhaps surprisingly, yes. We teach our students to examine language carefully, to question received categories, and to understand legal questions in light of their history. Yet when we talk about the doctrine/skills divide, we seem to forget our own instruction.

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1. STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 104 (2001).
2. This observation does not describe all recent offerings on the topic, some of which have added important new strands to the conversation. *See, e.g.*, Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 *NORTHEASTERN U. L.J.* 87 (2014) (applying educational theory); Harold Anthony Lloyd, *Exercising Best Practices, Exorcising Langdell: The Inseparability of Legal Theory, Practice and the Humanities*, 49 *WAKE FOREST L. REV.* (forthcoming 2015) (applying theories of meaning).

What follows does not exactly take sides in the typical skills debate.³ In fact, neither side is likely to be entirely happy with the ideas presented here. But if we are to respond thoughtfully and effectively to calls for reform, everyone—both “doctrinal” and “skills” faculty—will need to venture outside comfortable territory and be willing to risk old positions. Both groups have important work to do, but to address today’s crisis in legal education we need partners, not winners and losers. This article calls on history and metaphor theory to explain why it is so hard to work together across the doctrine/skills divide and therefore why Carnegie’s⁴ promise has not been realized.⁵ Taking Carnegie’s diagnosis seriously, the article proposes a strategy for building new bridges instead of maintaining old walls.

Introduction to Law School X and Its Semantic Confusion

Imagine a curriculum committee meeting at Law School X.⁶ The committee has been asked to review the school’s current curriculum. Quite possibly, the committee will begin by creating two lists and assigning each current course to one of those lists. The first list probably includes such courses as contracts, torts, tax, civil procedure, wills, and evidence. It probably also includes courses such as law and economics, critical race theory, and employment law. The second list includes such courses as legal writing, clinics, externships, negotiation, client counseling, and trial practice.

Committee members might recognize some differences among the courses on each list. For instance, they might notice that first-year casebook courses are different in some ways from upper-level casebook electives and that both differ from seminars. They might notice that legal writing is different in some ways from clinics, which in turn differ from trial practice. But to the committee, the two lists still seem like a “natural” division. The similarities among the courses on each list seem to outnumber and outweigh their differences. Perhaps more important, the differences between the courses on the first list and those on the second list seem somehow more fundamental than any differences reflected within either list.

3. This article results, in part, from twenty-seven years of law teaching—most of which has been spent with a foot on each side of the divide. I teach or have taught Property; Wills, Trusts, and Estates; Elder Law; Professional Responsibility; a Law and Rhetoric seminar; Appellate Procedure; Introduction to Law; and Employment Discrimination. I have also taught Lawyering Skills; Legal Writing I and II; Interviewing and Counseling; and various advanced writing courses. I confess that I have not yet integrated skills components into my own doctrinal teaching, so when I describe the changes doctrinal teachers should make, I am talking as much to myself as to others.
4. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].
5. *Infra* text accompanying notes 140-196.
6. “Law School X” is entirely hypothetical. It most certainly is not a code name for any school with which I have been affiliated.

As its discussion continues, the committee will need to give each list a name, but this may not be as easy as it sounds. We are likely to hear committee members using a number of different labels. For the category that includes legal writing and trial practice, committee members might use names like “skills,” “experiential,” “lawyering,” or “practice” courses. For the torts-and-contracts list, we might hear an even greater variety. Some committee members might focus on the kinds of materials used in the course (“casebook courses”) or where the professor stands for the principal course activity (“podium courses”). We might hear historical terms (“traditional”); or terms assuming a particular normative view of legal education (“regular” or “normal”); or terms referring to the kind of pedagogy assumed to be used (“Socratic,” “case-dialogue,” or “lecture”). We might hear “theoretical,”⁷ in an attempt to name a characteristic perceived to be the opposite of “skills.” Perhaps the two most common terms would be “substantive” or “doctrinal.”

Why are committee members struggling to settle on labels for categories that seem so natural to them? The early sections of this paper will look for answers from the classical view of categories. Under the classical view, categories are metaphoric containers. Like containers, they operate according to a simple in/out structure. Each potential category member is evaluated according to at least one characteristic that defines category membership. If the potential category member possesses the necessary characteristic, category membership is granted. If not, the potential member is excluded. Classical category labels identify a characteristic shared by all category members. So, for example, one who teaches (the defining characteristic) is inside the category container labeled “teacher.”

Our curriculum committee, then, is looking for labels that identify a characteristic shared by all courses on each list but absent among the courses on the other list. As we shall shortly see, none of the labels for the curriculum committee’s two lists has yet identified such a membership-defining characteristic. Thus, according to the classical view, no matter what we call them and no matter how natural they seem, the committee’s categories are simply wrong.

But as later sections of this paper will show,⁸ our analysis cannot stop there because, as it turns out, most categories do not function according to the classical view. Rather than identifying a defining characteristic, most categories identify one or more prototypes. Categorizers examine potential category members, looking for “family resemblances” to the prototype. If the categorizer decides that the potential category member and the prototype are similar enough, category membership is granted. If not, the potential member is excluded. Thus, category membership is a human decision made by the

7. “By ‘theory’ we commonly mean a set of general propositions used as an explanation. Theory has to be sufficiently abstract to be relevant to more than just particularized situations.” Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 580 (1987).

8. See *infra* text accompanying notes 116-139.

group in control of the discourse. In a family-resemblance category, likeness is not a matter of objective observation of the natural world but rather a matter of a cultural gestalt, rarely subjected to objective analysis.

More important, as this article will show, family-resemblance categories are not created just for fun. They are created when those in control of the discourse perceive a need to establish groups that include some potential members and exclude others. In other words, categories are created instrumentally, when there is a job to do. Thus, for family-resemblance categories, the relevant question is not whether the categories are objectively right or wrong. Instead, the relevant questions are what work the category does, and whether, on balance, that work is desirable. This article analyzes the work of the standard curricular categories—the committee’s two lists—and finds that on balance, its work is far more harmful than helpful to modern legal education.⁹

Are there better options? Almost certainly, and since those who deconstruct problematic structures should have the responsibility to suggest a way forward, the final sections of this article will present a better option. The article suggests replacing the doctrine/skills dichotomy with categories focused not on inaccurate assumptions about our own and others’ courses, but rather on the desired pedagogical trajectory of the curriculum to which we all contribute. The categories describing that trajectory are *foundation* courses, *bridge* courses, and *capstone* courses. These new categories or others like them would invite us to notice commonalities instead of differences; to expand our teaching and writing rather than live within the old constraints; to work together to achieve a better education for our students instead of dividing up into armed camps and defending our turf.

Make no mistake: both “doctrinal” and “skills” faculty are invested in the status quo, and replacing the old dichotomy threatens each group. Some who identify most fully as “non-skills” teachers may find congenial hierarchies undermined. Quite understandably, they may also resist the work of supplementing traditional pedagogies, an effort that will take time away from other projects. “Skills” faculty may be less than thrilled with the idea of giving up the old categories as well. An understandable human response to exclusion by one group is to get busy creating a separate group of one’s own—a group with its own value structure and criteria for success. Stepping out of that comfortable territory is undeniably frightening. Will these very natural fears and human resistances within both groups prevent us from moving forward, or will we choose to give up old battles and fault lines in order to claim a better future? That is the crucial question with which this article ends.

9. To keep the discussion manageable while also accurate and grounded (analyzing actual courses rather than stereotypes), the article sometimes examines two roughly comparable first-year courses—property and legal writing—as examples of a “doctrinal/substantive” course and a “skills” course, respectively.

The Classical View of Categories

When the Law School X curriculum committee was asked to analyze the school's curriculum, it began its work by organizing the school's current courses into categories. We should not be surprised. Categorizing is essential to managing life and engaging in human thought. In fact, it has been said that "categorization is the very process of reasoning itself."¹⁰ As Amsterdam and Bruner have written, "Categories are ubiquitous and inescapable in the use of mind. Nobody can do without them—not lawyers or judges, Hottentot farmers or school children, not even iconoclasts. Categories are the badges of our sociopolitical allegiances, the tools of our mental life, the organizers of our perception."¹¹ So we can have no quarrel with the committee for beginning its analysis with categories. Indeed, there was no other option. And we should have no quarrel with the committee's use of commonly accepted categories as its starting point. The committee had to start somewhere, after all, and existing language structures provide the semantic point of entry.

As indispensable as they are, however, categories must be handled carefully, for they can—indeed they always do—create particular perceptions and obscure others. To turn again to Amsterdam and Bruner, "[W]e are always at risk that our categories may lead us astray. Indispensable instruments, they are also inevitable beguilers. To interrogate their uses and their dangers is a necessary part of legal studies, as it is of any preparation for considered thought and action."¹² To avoid being beguiled by its own categories, then, the committee should consider what metaphor theory teaches about how categories work. As it turns out, categories work quite differently from the way most of us think they do.

Whether they know it or not, most people subscribe to the classical, objectivist view of categories.¹³ Ask nearly anyone how to tell whether a particular animal is a bird; you will hear that the animal is a bird if it has certain characteristics, such as feathers and wings. If it does not have those characteristics, it is not a bird. In this classical, objectivist view, categories have clear boundaries. Membership in the category is determined by a checklist of necessary and sufficient conditions. Essentially, this view of categories has them functioning akin to a syllogism. The category (men) has a necessary condition for membership (mortality). Thus, if Socrates is within the category of men, he must be mortal.

10. WINTER, *supra* note 1, at 70. "In order to understand the world and function in it, we have to categorize . . . the things and experiences that we encounter." GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 162 (2003).

11. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 19 (2000).

12. *Id.*

13. "The classical theory of categories, which is the default view held by nearly everyone in our culture, is that categories have a fixed, stable, and objective structure." Mark Johnson, *Mind, Metaphor, Law*, 58 *MERCER L. REV.* 845, 848 (2007) (citing GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 6 (1987)); *see also* WINTER, *supra* note 1, at 69-70, 75.

Metaphor theory¹⁴ explains the reason for this classical view of categories: we think of categories as containers and of ideas as objects.¹⁵ The act of categorizing is an act of abstract thought, but abstract thought, as it turns out, is grounded.¹⁶ It is an embodied activity, conceived according to our experience of the tangible world.¹⁷ We use containers every day in our ordinary experience of the physical world, so when we think about categories, we imagine them as the containers of our natural world. Categories thus seem to have rigid boundaries, with some items inside and all others outside these boundaries.¹⁸ The dualism of “in” and “out” is one of the key entailments of the category-as-container metaphor and the classical view it supports.¹⁹

Another key characteristic of the classical view is its seeming objectivity. The necessary and sufficient criteria sound neutral. A robin either has feathers or it does not. There seems to be no partisanship, either about the selection of feathers as a criterion²⁰ or about the conclusion that the robin has them. Under the classical view, categories seem simply to observe and report on the natural state of things. They do not seem to take sides.

The classical view of categories is probably the default view of our hypothetical curriculum committee, for like the rest of us, the committee’s members first conceived of categories according to their grounded, embodied experience. If they have not given the matter considerable thought—and most of us do not—they will probably unconsciously adopt the assumptions of

14. “The essence of metaphor is understanding and experiencing one kind of thing in terms of another.” LAKOFF & JOHNSON, *supra* note 10, at 5. As cognitive theory shows, metaphors are not simply poetic devices to add flourish to language; they actually structure human thought. WINTER, *supra* note 1, at xii. “It is common ground among many students of the philosophy of language, including Rorty, that there is no objective description of reality separate from our conceptual schemes. This is so because, as Hilary Putnam explains, there cannot be ‘any inputs which are not in themselves to some extent shaped by our concepts, by the vocabulary we use to report and describe them, or any inputs which admit of only one description, independent of all conceptual choices.’” *Id.* (quoting HILLARY PUTNAM, REASON, TRUTH AND HISTORY 54 (1981) (emphasis deleted)).
15. WINTER, *supra* note 1, at 23-27 (basics of categorization).
16. LAKOFF & JOHNSON, *supra* note 10, at 56, 272; Johnson, *supra* note 13, at 846-47.
17. LAKOFF & JOHNSON, *supra* note 10; WINTER, *supra* note 1, at 22-23 (human thought as a fundamentally embodied activity); Johnson, *supra* note 13.
18. “A category . . . is characterized by a set of inherent properties of the entities in the category. Everything in the universe is either inside or outside the category.” LAKOFF & JOHNSON, *supra* note 10, at 122; WINTER, *supra* note 1, at 15 (container as image schema); *id.* at 18-19 (ideas as objects); *id.* at 63 (boundaries, objectivist view, and dichotomous, P or not-P structure; all category members share necessary and sufficient characteristics).
19. WINTER, *supra* note 1, at 64 (container schema’s entailments of rigidity and closure resulting in dualism).
20. In fact, even in the classical view, categories are man-made, reflecting the values and objectives of their creators. Someone (or more accurately, a group of someones) decided that feathers are a necessary condition for membership in the category of “birds” and that flight is not. Thus, penguins and ostriches are admitted to the category.

classical theory, so we first ask how the committee's various labels fare under the classical view.

Labels

Under the classical view, the committee's awkward search for a pair of labels signals a problem. Like all category labels, the committee's labels are reductive, describing only some parts of the courses to which they refer. More problematically, though, no term describes a characteristic common to all the members of that category and unrepresented in the other, as classical category theory demands. All possible labels identify characteristics found among the members of the opposite list. Courses on the first list (contracts, torts, evidence, wills and trusts) quickly demonstrate the point. They all teach crucially important cognitive "skills." These skills are "lawyering" skills. They are taught through an "experiential" pedagogy that simulates important roles of law "practice."²¹

Labels for the first list are even more problematic. Under a classical view of categories, "non-skills" courses cannot be described accurately as "casebook" courses. While some of those category members do use casebooks and the accompanying case method, others use "problem" materials, statutory compilations, and sets of readings instead of traditional casebooks. Seminars are often included in the first category, yet many, possibly most seminars do not use casebooks, especially those that teach legal theory or a particular perspective on law, such as law and economics, critical race theory, law and rhetoric, or law and psychology.

Nor is "podium" an accurate label. For instance, many legal writing courses qualify as "podium" courses to the same degree as non-writing courses. In class, the professor stands in the same spot as does the contracts professor, and despite the importance of individual conferences, the writing professor's student interaction is still primarily in the classroom setting.

The label "theoretical" is not accurate. While some seminars may be mostly theoretical, such as law and economics or critical race theory, most courses in the first category teach far more doctrine than theory. The predominance of doctrine over theory is especially true for such prototypical "non-skills" courses as contracts, torts, property, wills, tax, and family law. Even more problematic, "skills" courses are built upon and teach theories of their own. Clinics and client interviewing and counseling courses teach theories about persuasion; about how people interact; and about the roles of clients and lawyers. Legal writing teaches theories about legal method, cognitive theory, narrative theory, persuasion, metaphor theory, and the composition process.²²

21. "By 'practice' we commonly mean the doing of something. Practice is also associated with the idea of repetition; therefore, practice sometimes is associated with the gaining of skills, because one gains skills by repetition." Spiegel, *supra* note 7, at 580.

22. See *infra* text accompanying notes 60-69.

Historical or normative terms are problematic as well. Terms such as “traditional,” “regular,” or “normal” unconsciously privilege one view of legal education over another. They assume and propagate a particular curricular perspective without being required to justify that perspective with evidence or rational argument. In these days of *MacCrate*,²³ *Carnegie*,²⁴ and *Best Practices*,²⁵ older normative views of legal education should be required to justify themselves and certainly by more than their age.

Terms referring to presumed pedagogical distinctions may be among the most inaccurate. In many seminars, students take roles in teaching, presenting their own research to the class. Among a group of contracts or wills professors, we would find some who use primarily “Socratic” questions, others who use primarily “case-dialogues,” and others still who use primarily a “lecture” or “problem” format. The pedagogies represented among “non-skills” courses are many and varied. They represent differences more related to the individual professor’s proclivities and talents than to the course content. What’s more, these same varieties of pedagogies are used by most “skills” professors as well.²⁶

Are the most common terms—“skills” and “doctrinal” or “substantive,”—better options? To answer that question, we must do something we have rarely done. We must think intentionally about what those words mean.

Definitions: “Substantive,” “Doctrinal,” and “Skills”

When committee members say that contracts, civil procedure, and evidence are “substantive,” what do they mean by “substantive”? Since discussions of legal education use the term but do not define it, we might begin with a dictionary definition. The relevant definitions of “substance,” according to Merriam-Webster, are:

23. A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter *MACCRATE REPORT*].
24. *CARNEGIE REPORT*, *supra* note 4. Both the *MacCrate Report* and the *Carnegie Report*, for all their virtues, further solidify the skills/doctrinal dichotomy. As this article will discuss, the dichotomy brings with it significantly problematic entailments for legal education. See Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 *ARIZ. L. REV.* 105, 116-17 (1998).
25. ROY STUCKEY, ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007) [hereinafter *BEST PRACTICES*].
26. The 2007 *Carnegie Report* describes a skills pedagogy similar to Langdell-type questioning: “Represented in case narratives and in conceptual form as procedures, the informal understanding that experts rely on in practice can be publicly represented and criticized for the purpose of raising the level of competence in the practice of law. The various aspects of practitioners’ knowledge, like aspects of legal analysis, thus can be made visible and intelligible through the kind of theory that illuminates practice.” *CARNEGIE REPORT*, *supra* note 4, at 11. Over the span of twenty-seven years of law teaching, including nineteen years of directing and coordinating legal writing programs, every legal writing course I have ever taught or observed has relied on those same classroom techniques.

1. the essence; an essential nature; a fundamental or characteristic quality;
2. the ultimate reality that underlies all outward manifestations; the practical importance; the meaning or usefulness;
3. the physical material from which something is made or which has discrete existence.²⁷

As we have seen, the classical view of categories relies on necessary and sufficient conditions, so to label one category as “substantive” inherently proclaims that non-category members are without substance. To be said to be without “substance” is a severe criticism indeed. Merriam-Webster provides an example of the negative: a bill without *substance* authorizes nothing concrete.²⁸ In other words, the bill fails in the fundamental task of any bill: to authorize or constrain particular human actions. To be without substance might well mean that a subject cannot be taught. To be without “substance” is to be without an essential nature; without practical importance; without meaning or usefulness. Is this what the curriculum committee means to be saying about “skills” courses?

The term “doctrinal” raises similar difficulties. When committee members say that contracts, civil procedure, and evidence are “doctrinal” courses, what do they mean by “doctrinal”? Once again turning to a dictionary definition, the word “doctrine” refers to:

1. something that is taught;
2. a principle or position or the body of principles in a branch of knowledge or system of belief;
3. a principle of law established through past decisions.²⁹

The first two definitions are the oldest.³⁰ They are broad, clearly including any material taught in a university and especially including a body or system of teachings relating to a particular subject. Under these definitions, the term

27. *Substance - Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/substance> (last visited July 30, 2014).

28. *Id.* (“[T]he . . . bill . . . will be without *substance* in the sense that it will authorize nothing more than a set of ideas”).

29. *Doctrine - Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/doctrine> (last visited July 30, 2014).

30. *Order of Senses, Help - Definitions*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/help/dictnotes/def.htm> (last visited July 30, 2014). The word “doctrine” originated in the late 14th century from the Old French word “doctore” (12th century), meaning “teaching” and from the Latin word “doctrina,” meaning “teaching, body of teachings, learning.” *Doctrine Definition*, ONLINE ETYMOLOGY DICTIONARY, <http://etymonline.com/index.php?term=doctrine> (last visited July 30, 2014).

would apply to all courses taught in a law school, including legal writing, negotiation, and trial practice. The definition's age is not the only relevant consideration, however. The third definition applies specifically to law, thus providing a definition for the relevant discourse community. Definition three defines "doctrine" as referring to a legal principle established through past decisions, such as "the doctrine of equal protection." But even assuming (inaccurately³¹) that skills courses do not teach principles of law, a legal principle cannot be separated from its hermeneutic tradition.³² Thus, to teach *doctrine* (in the sense of teaching legal principles) it is necessary also to teach the *skills* of legal reading and interpretation without which there are no legal principles.

Once again, then, the term is problematic. To say that a course teaches "doctrine" rather than "skills" is to say either that a legal principle exists without interpretation by an interpreter or that legal reasoning is not a skill. To say that a "skills" course does not teach "doctrine" is to say either that skills have no body of principles rendering them an area of knowledge (the first two definitions) or that skills courses can ignore the governing legal principles that provide the legal context for their exercise. Does the curriculum committee agree with any of these assertions?

Finally, we turn to the definition of "skill." Merriam-Webster describes the relevant meanings of "skill" as:

1. the ability to use one's knowledge effectively and readily in execution or performance;
2. a learned power of doing something competently: a developed aptitude or ability.³³

Can contracts, torts, and property be said to teach no skills? Do these courses fail to teach the ability to use knowledge effectively or the ability to do *something* competently? Does the curriculum committee, most members of which probably teach "non-skills" courses, mean to be saying that their own courses fail to teach a developed aptitude or ability to do *something* lawyers do?

Surely, if the committee stops to think about the implications of the classical model of categories, its members would agree that they do not believe the implications their categories create. Using property as an example of a "substantive" or "doctrinal" course and legal writing as an example of a "skills" course, the next two sections will explain why the committee would be right.

31. See *infra* text accompanying notes 60-64.

32. See generally PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* 140-66 (1986).

33. *Skill - Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/skill> (last visited July 30, 2014).

A Property Course Teaches Crucial Lawyering Skills

As we have seen, a “skill” is a learned ability to do something competently, a developed aptitude or ability. A “doctrinal” or “substantive” course like property does teach skills—the ability to use knowledge effectively and to do something lawyers do—or at least law faculties have long thought so. Consider, for instance, this language from the 1914 Carnegie Report,³⁴ distinguishing the case method from the earlier lecture method, for which the teaching of doctrine was the primary goal:

The [case method], on the other hand, proceeds from a fundamentally different conception of the task both of the teacher and of the student in legal instruction To Langdell and his followers the most important means of instruction is the analysis of the separate cases by the student. The analytical decomposition of the separate cases, and the distillation of the legal principles contained in each such case; the construction, on the basis of the analysis of the separate cases given in the case-book, of a system, historically and logically accurate, of the entire legal institution or field of law,—all these are in the first instance tasks for the students, who must perform them, even though under the guidance and direction of the teacher, as independently as possible. It is easy to recognize wherein then the fundamental difference lies. Under the old method law is taught to the hearer dogmatically as a compendium of logically connected principles and norms, imparted ready-made as a unified body of established rules. Under Langdell’s method these rules are derived, step by step, by the students themselves by a purely analytical process out of the original material of the common law, out of the cases; a process which forbids the *a priori* acceptance of any doctrine or system either by the teacher or by the hearer.³⁵

Clearly, the teaching of doctrine was not the primary point of case book teaching.³⁶ Instead, “[m]ethodology rather than substance became the nub of the system.”³⁷ The 1914 Carnegie Report went on to point out the fundamentally different goal of legal education under the case method:

Brief reflection shows plainly that it is only a step from this to a completely changed conception of the purpose of legal education as a whole; to the conception, namely, that the real purpose of scientific instruction in law is *not to impart the content of the law, not to teach the law*, but rather to arouse, to strengthen, to carry to the highest possible pitch of perfection *a specifically legal manner of*

34. JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* (1914) [hereinafter 1914 CARNEGIE REPORT], reprinted in JAMES R. MAXEINER, *EDUCATING LAWYERS NOW AND THEN* 47 (2007).

35. 1914 CARNEGIE REPORT, *supra* note 34, at 13.

36. In fact, Roscoe Pound observed that Langdell “didn’t care particularly whether you knew a rule or could state the rule or not, but how did the court do this? And why did it do it? That was his approach all the time.” Arthur E. Sutherland, *One Man in His Time*, 78 HARV. L. REV. 7, 10 (1964).

37. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 56 (1983).

thinking. This step, after [the case method] had reached its full development, was unhesitatingly taken by the foremost American teachers of law. In discussing this matter I have again and again encountered the very emphatic opinion that the really great accomplishment of the case system consists in the “training in characteristically legal thinking”³⁸

James Barr Ames, Dean of the Harvard Law School and perhaps the foremost explicator of the case method, explained that the acquisition of knowledge (doctrine) is not the purpose of a law school education using the case method:

The writer of the paper and I seem to differ radically in regard to the object of the three years of law school. I should infer from the paper that to the author, the main object is knowledge. The object arrived at by us at Cambridge is the power of *legal reasoning*, and we think we can best get that by putting before the students the best models to be found in the history of English and American law, because we believe that men who are trained, by examining the opinions of the greatest judges the English Common Law System has produced, are in a better position to know what legal reasoning is and are more likely to possess the power of *solving legal problems* than they would be by taking up the study of the law of any particular state.³⁹

For the case method, the goal was to teach an “imaginative activity,” in which students learned skills such as identifying relevant facts, making persuasive arguments, and supporting or criticizing legal outcomes.⁴⁰ In short, the case method’s purpose is the “training” of the mind.⁴¹ For Langdell, Ames, Keener, and the other pioneers of the case method, the focus of the course was not doctrine⁴² but rather the crucial skill of legal reasoning.⁴³ In their view, the primary virtue of the case method—its instructional purpose in replacing the lecture method⁴⁴—was its facility at teaching key lawyering skills. Keener maintained that under the case method, “the student is practically doing,

38. 1914 CARNEGIE REPORT, *supra* note 34, at 24 (emphasis added).

39. JAMES BARR AMES, 31 REP. A.B.A. 1025 (1907) (discussing a paper by Albert Kales), *quoted in* 1914 CARNEGIE REPORT, *supra* note 34, at 25 (emphasis added).

40. STEVENS, *supra* note 37, at 52.

41. William A. Keener, *The Inductive Method in Legal Education*, 28 AM. L. REV. 709, 711 (1894) (presented to the Section on Legal Education of the American Bar Association, Aug. 24, 1894).

42. Not teaching doctrine was the primary argument against the case method. The 1891 report of the ABA Committee on Legal Education gave voice to that critique, calling the case method a “great evil” and arguing that, first and foremost, law students should be taught basic legal rules: “Is it not equally clear that the special applications to particular facts, and especially such parts of them as depend merely upon the decision of the courts, should be kept back until the principles of law are thoroughly fixed in the mind of the student?” *Report of the Committee on Legal Education*, 14 ANN. REP. A.B.A. 301, 340 (1891).

43. STEVENS, *supra* note 37, at 56.

44. The skill of legal reasoning was also the key tool for creating the new “science” of law. *Id.* at 52-55.

under the guidance of an instructor, what he will be required to do without guidance as a lawyer.”⁴⁵ That description of the case method sounds startlingly like a description of a clinical course today.⁴⁶

Modern studies of legal education, too, identify legal analysis as a key lawyering skill. The MacCrate Report places legal analysis and reasoning as the second item on its list of “fundamental lawyering skills,” behind only the closely related skill of problem-solving.⁴⁷ Its *Statement of Fundamental Lawyering Skills and Professional Values* further identifies subskills of legal analysis to include formulating applicable legal rules; breaking down legal rules into their constituent subparts; analyzing each separately; identifying the reasoning applicable to each subpart; using those rules to identify pertinent facts and possible resolutions; recognizing common themes and concepts; formulating alternative legal theories; identifying and evaluating legal arguments; recognizing applicable equitable considerations; critiquing applicable legal theories.⁴⁸

Not surprisingly, the MacCrate Report’s *Statement of Fundamental Lawyering Skills and Professional Values* recognizes that the lawyering skills of legal analysis are taught in traditional “doctrinal” courses.⁴⁹ The 2007 Carnegie Report even more fully places the teaching of legal analysis in “doctrinal” courses, reporting that “nearly all the law faculty with whom we spoke [were] proponents of the case-dialogue method as the best means for inducting novices into the craft of legal reasoning.”⁵⁰ The report calls the case-dialogue method the “signature pedagogy” of legal education.⁵¹ According to the report, the “deep structure”

45. Keener, *supra* note 41, at 717.

46. In defending the case method from the criticism that it was academic rather than practice-based, Keener wrote, “[w]e are told, for example, by the opponents of the system, that the teaching of law by cases may make men academically learned in the law as a science, but will not make lawyers. . . . The truth is that one of the great arguments in favor of the case system is that it deals with both the scientific and the practical side of law. . . . [T]he student in studying a principle is required to study it in its growth and development as found in its application to the actual affairs of life, furnishes a complete check upon any tendency to become speculative and visionary. . . . [T]he powers of analysis, discrimination and judgment which have been acquired by the study of cases by the student before graduation must be acquired by the student of the text-book system after he has ceased to be a student, and has become a practicing lawyer.” *Id.* at 717-22.

47. MACCRATE REPORT, *supra* note 23, at 138.

48. *Id.* at 151-55.

49. The MacCrate Report’s *Statement* “diverges from the traditional case-method approach” only in that it adds two components common in practice settings and less common in a traditional law school course: (1) recognition of the need to re-evaluate tentative legal theories in light of additional factual development; and (2) recognition of the possible need to undertake additional legal research of applicable law. *Id.* at 156-57.

50. CARNEGIE REPORT, *supra* note 4, at 66.

51. *See, e.g., id.* at 47-86.

of the case method is designed to teach the “processes of analytic reasoning,” not a “system of statutory or ‘black letter’ law.”⁵²

While the 2007 Carnegie Report carefully avoids the term “skill” to refer to legal analysis, the report does specifically identify the case method’s purpose as teaching case reading, fitting rules to facts, interpreting text, applying legal rules to new facts, recognizing differing points of view, and drawing analogies.⁵³ The case method is observed to be “a potent form of learning-by-doing,”⁵⁴ a description sounding strikingly like any (other) “skills” course.

Even Best Practices for Legal Education, the study initiated in 2001 by the Clinical Legal Education Association (CLEA), recognizes the case method as the principal method for teaching analytical legal skills.⁵⁵ The method is described as teaching students to read cases; engage in professional discourse about relevant legal issues; analyze rules of law at a deep level; identify and apply policy considerations; predict what courts will do; analyze facts; spot issues; create analogies; and engage in reasoned justification.⁵⁶ While Best Practices cautions teachers to be explicit about their reasons for using the case method⁵⁷ and to use other pedagogies in addition to the case method,⁵⁸ it never questions the premise that teaching legal reasoning is at the heart of “doctrinal” teaching and that the case method is a “superb” way to teach analytic skills.⁵⁹

In sum, there should be little debate about the idea that even those “doctrinal” courses that simply march through the casebook using nothing but the traditional case method, as I confess I have always done, are nonetheless teaching crucial lawyering skills. Both the early sources explaining the case method and modern studies of legal education agree that traditional “doctrinal” courses teach students to perform critically important lawyering activities. Thus, because the current categories portray such courses as property and contracts as teaching primarily doctrine rather than crucial lawyering skills, the categories are inaccurate and manifestly unfair to “doctrinal” courses.

A Legal Writing Course Teaches Doctrine and Substance

The commonly accepted categories and labels do not treat “skills” courses any better, falsely implying that they teach neither doctrine nor substance. Even assuming the narrowest definition, legal writing courses are “doctrinal” —that is, they teach principles of law. First, legal writing students learn the

52. *Id.* at 24.

53. *Id.* at 63-72.

54. *Id.* at 74.

55. BEST PRACTICES, *supra* note 25, at 207.

56. *Id.* at 211-12.

57. *Id.* at 218-20.

58. *Id.* at 211-13, 224-25.

59. *Id.* at 211.

kind of legal principles that are taught in courses on the committee's first list. In typical first-year legal writing courses, four to six major assignments will be given, each of which requires students to analyze one or several legal questions.⁶⁰ These legal questions often are chosen specifically to avoid duplicating issues covered in other first-year courses, partly in order to expose students to an area of law they might not have a chance to study before they graduate.

Further, the depth of doctrinal coverage of these subjects is significantly greater than the depth of coverage of a similar legal question in torts, contracts, or property. Using property as an example, a specific legal question is generally covered in the casebook with two to three heavily edited cases from different jurisdictions and a few note cases, which students rarely look up and read. Syllabus constraints prevent spending more than two class days on most subjects, and often only one. For instance, the iconic Dukeminier property text covers the entire concept of gifts—all three elements of it—using two edited cases, one of which dates from 1898.⁶¹

In a typical first-year legal writing course, however, each assignment requires students to read ten to fifteen cases on the same subject from the same jurisdiction. Not only must the cases be read, but they must be read far more carefully than my property students read their edited cases. Legal writing students are significantly more accountable for their case reading,⁶² for they must choose the most important cases, justify those choices, and write an analysis of those cases. They must find analogies and distinctions among the cases and explain those similarities and differences in writing. They must identify the relevant policy concerns that might inform the ways the cases apply to a particular fact scenario. In short, they must write what, in my property class, could be a final examination question,⁶³ but they must do it much better and at a much deeper level.

In addition to the doctrine applicable to the particular assignment, legal writing courses teach legal doctrines specific to the course. These include (1) the ethical requirements that apply to predictive and persuasive writing; (2) the standards of appellate review; (3) a wealth of legal methods topics, such

60. Describing the first-year legal writing courses at the Carnegie-reviewed schools, the Report explains that the “emphasis was on learning legal doctrine by putting it to use in drafting legal documents.” CARNEGIE REPORT, *supra* note 4, at 105.

61. JESSE DUKEMINIER ET AL., PROPERTY 164-84 (7th ed. 2010).

62. “Writing assignments seemed more effective than expectations of being called on in class for ‘forcing you to read the case more than once’ in order to be able to analyze it” CARNEGIE REPORT, *supra* note 4, at 104 (quoting a student interviewee).

63. “[S]tudents often write better exam answers on issues that have been reinforced through their writing assignments.” Susan J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 J. LEGAL WRITING INST. 325, 340 (2011); see also Joseph W. Glannon et al., *Coordinating Civil Procedure with Legal Research and Writing: A Field Experiment*, 47 J. LEGAL EDUC. 246, 255 (1997) (finding that collaboration with a writing course improves exam performance).

as holdings, dicta, *stare decisis*, the precedential weights of various kinds of authorities, the precedential effect of plurality opinions, or what kinds of extra-record facts an appellate court can consider; (4) complicated questions of civil and appellate procedure, such as the procedural implications of motions to dismiss, motions for summary judgment, and appeals from those rulings; and (5) principles of statutory construction. All of these doctrinal topics are taught in the typical first-year legal writing course, and for some of them, the legal writing course is the only place they typically appear in the curriculum.⁶⁴

The remainder of a first-year legal writing course clearly meets the broader, older, and first-listed definition of “doctrine”: a body or system of teachings relating to a particular subject. In addition to matters of citation and style, these courses teach a very specific body of information about such matters as (1) the core forms of legal reasoning and persuasion; (2) sources and methods of legal research; (3) particular organizational paradigms for analysis and argument; (4) particular formats for analogies and disanalogies; (5) the requirements and components of particular documents; (6) informal rules and principles of persuasion applicable to factual analysis and persuasion; and (7) principles of persuasion for engaging in counterargument. Upper-division legal writing courses are exploring legal analysis and persuasion at sophisticated levels, teaching concepts of metaphor and narrative theory, composition theory, and other rhetorical and cognitive theory.⁶⁵ Most of these academic subjects—all crucial to legal reasoning and the work of lawyers—appear nowhere else in the typical curriculum. Together, they certainly constitute a body of teachings relating to the subject of the typical legal writing course.⁶⁶

Turning to the term “substantive,” all of this “doctrine” certainly constitutes “substance.” As we have seen, “substance” is something with a discrete existence; an essential nature; a fundamental or characteristic quality; an ultimate reality; a useful set of ideas of practical importance.⁶⁷ Our exploration of the doctrine of legal writing shows that legal writing (or by extension, any other “skills” course)⁶⁸ teaches substance.⁶⁹

64. See Richard B. Cappalli, *The Disappearance of Legal Method*, 70 *TEMPLE L. REV.* 393, 398-405 (1997).

65. See, e.g., LINDA H. EDWARDS, *READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD* (2012); see also MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (3d ed. 2013).

66. This body of doctrine also “refutes the charge of anti-intellectualism” often leveled at “skills” courses. *CARNEGIE REPORT*, *supra* note 4, at 104.

67. See *supra* text accompanying notes 27-28.

68. Considerations of length prevent this article from analyzing of other “skills” courses like negotiation, client interviewing and counseling, trial practice, or clinic. It requires little imagination, however, to realize that those other “skills” courses include principles and ideas to teach and to explore in scholarship. In fact, the *Carnegie Report* has noted the development of such “skills” theory. See *CARNEGIE REPORT*, *supra* note 4, at 195.

69. The substance of “skills” courses has increasingly been recognized in the broader legal academy. For instance, the 1981 revision of Standard 302(a)(iii) “substituted the word

The typical first-year legal writing course, then, is both “doctrinal” and “substantive” in all senses of each word. Legal writing teaches the law governing particular legal issues, often providing the students’ only exposure to the law for those issues and in more depth than in other doctrinal courses. It teaches the body of law applicable to legal issues generally (the meta-principles of legal method). It teaches a particular body of law applicable to predictive and persuasive analysis, including topics from civil procedure—topics that certainly are considered “doctrinal” when taught in a civil procedure course. It teaches a well-recognized body of other concepts that govern the subject of the course (the content and communication of written and oral legal analysis). Thus, the traditional labels are just as inaccurate and unfair to “skills” courses as they are to “doctrinal” courses. They incorrectly imply that “skills” courses teach no doctrine or substance.

The Road that Brought Us Here

We have already seen that before clinics and legal writing courses arrived on the curricular scene, law faculties identified the distinguishing characteristic of their own case method courses as the fact that these courses were *not doctrinal*. Both the 1914 and the 2007 Carnegie Reports identify the teaching of legal reasoning as the primary purpose of a case method course, but the two reports reflect different understandings of that project. The 1914 Carnegie Report saw the teaching of legal reasoning as teaching lawyering skills—teaching what lawyers actually do.⁷⁰ The 2007 Carnegie Report sees the case method as “predominately an academic tool divorced from legal practice.”⁷¹ Something happened in the near-century between these two reports, something that caused a change in the accepted understanding of the case method and its relationship to the practice of law.⁷²

In 1914, most of today’s “skills” courses had not yet entered the law school curriculum,⁷³ so the doctrine/skills dichotomy as we know it today had not yet entered legal education’s lexicon. Instead, the relevant categories in legal education were case method courses and lecture courses. Unlike lecture courses, case method courses taught the quintessential lawyering skill. Responding to criticisms that the case method resulted in reduced doctrinal coverage, these

‘instruction’ for the rather craft-oriented word ‘training’ in the prior Standard. This change reflected the growing appreciation of the intellectual quality of effective skills education and was in keeping with the more recent scholarly appraisals of professional skills teaching and newly developed methods for its teaching.” MACCRATE REPORT, *supra* note 23, at 265.

70. MAXEINER, *supra* note 34, at 2.

71. *Id.*

72. The 2007 Carnegie Report describes the developments over the course of the century: “Law entered the American university at a time when attempts to blend academic and practitioner traditions of legal training resulted in what was, in some respects, less a reciprocal enrichment than a protracted hostile takeover.” CARNEGIE REPORT, *supra* note 4, at 5.

73. John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 330-31 (2007-2008).

case method teachers argued that doctrinal coverage was not very important. overarching goal of a case method course was teaching what lawyers *do* rather than what legal information lawyers *know*.

Long before the 2007 Carnegie Report, however, those debates had ended. Case method faculties were firmly in control of legal education and no longer needed to distinguish themselves and their courses from treatise lecturers.⁷⁴ In the second half of the century, however, clinics began to appear. While the prototype of a case method course was a large Socratic classroom far removed from live client representation, clinic courses were intimate teaching experiences calling for close supervision of just a few students.⁷⁵ Clinic courses required meeting and actually representing real clients, something case method faculty wanted to avoid.

Thus, lawyers with different credentials and broader professional experiences were hired to teach clinics,⁷⁶ and case method faculties again felt a need to distinguish themselves and their courses. Not surprisingly, new categories appeared in the discourse—“skills” versus “substance” or “doctrine.” Wishing to maintain their claim of teaching legal analysis, case method faculty had an incentive to think of legal reasoning as something other than a skill. Soon, the doctrine/skills dualism became the predominate language of curricular discussions, and case method courses were no longer considered “skills” courses. Viewed from the perspective of the felt need to find differences rather than similarities, traditional courses seemed to fit together naturally in one category, while these new clinic courses seemed outside that paradigm.

The 2007 Carnegie Report reflects this shift. The report announces three “apprenticeships” of legal education: to *think* (case method courses); to *perform* (skills courses); and to act in conformance with professional values.⁷⁷ The 1914 report considered legal reasoning to be the key lawyering skill,⁷⁸ while the 2007 report positions the teaching of legal reasoning as the curricular opposite of

74. By the 1930s, nearly all law schools had embraced the case method. Bruce A. Kimball, *The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic "Abomination," 1890-1915*, 46 HIST. EDUC. Q. 192, 197 (2006).

75. From a dean's perspective, the prototypical “skills” course was an expensive undertaking. Interestingly, while “skills” courses are viewed as expensive, small seminars demanding similar curricular resources are seldom questioned.

76. “Law professors were not successful former practitioners. Many, particularly at elite law schools, had not practiced at all; of those that had, most had dabbled only briefly as clerks for judges or as neophyte associates for large commercial law firms. Rarely had they experienced clients firsthand.” MAXEINER, *supra* note 34, at viii. See also the Carnegie Report's description of “doctrinal” hiring patterns that limit diversity of preteaching credentials and experience. CARNEGIE REPORT, *supra* note 4, at 89.

77. CARNEGIE REPORT, *supra* note 4, at 27. The creation of these three “apprenticeships” implies that one can think well without performing and that one can perform well without thinking. In fact, neither implication is true. See generally Jessica Erickson, *supra* note 2, at 89-97.

78. 1914 CARNEGIE REPORT, *supra* note 34, at 23 et seq.

teaching a lawyering skill.⁷⁹ In 1914, teaching a lawyering skill was what made the case method the most effective method in legal education.⁸⁰ In 2007, overreliance on the case method is said to have contributed to the devaluing of skills teaching.⁸¹ Thus originally, when teachers wanted to distinguish their courses from the lecture method, the message was “*we* teach skills.” Later, when the heirs of those same teachers wanted to distinguish their courses from new clinical or legal writing courses, the message became “*you* teach skills.”

This discussion may sound critical of the law faculties of the 1980s, but in fact, their felt need to distinguish themselves from clinics and legal writing courses was understandable, if unfortunate. First, Langdell’s heirs had inherited a complicated attitude toward law practice. On the one hand, Langdell and his supporters fought to establish the case method in part because they wanted to improve the practice of law. In his fifteen years of Wall Street practice, Langdell had encountered both inferior law practice and large-scale corruption. He had become convinced that the rule of law was endangered by this low level of law practice.⁸² One of his primary goals in creating the case method and its accompanying reforms of legal education was the elevation of the practice of law into a more respectable and worthy profession. Thus, Langdell’s whole movement was aimed at fundamentally changing and improving the practice of law.

But on the other hand, Langdell and the early case method proponents also aimed to create a professional professoriate. Prior to Langdell’s reforms, law teaching was viewed primarily as a part-time activity, something successful practitioners did on the side. Langdell believed that instruction by part-time teachers was inherently inferior, both for students and for institutional excellence. He believed also that the creation of a new science of law would require the full-time efforts of the best academic minds. In order to change the practice, those minds should be uncorrupted by the existing practice. Langdell himself had left Wall Street in disgust with what he saw there,⁸³ and he did not wish to hire professors who had succeeded in that inferior, often corrupt environment.⁸⁴ So Langdell and his followers had some understandable

79. CARNEGIE REPORT, *supra* note 4, at 14.

80. 1914 CARNEGIE REPORT, *supra* note 34, at 24-29.

81. CARNEGIE REPORT, *supra* note 4, at 90-91.

82. BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1896-1906, 69-83 (2009).

83. Langdell was disgusted with the role of private influence with judges and with the seeming irrelevance of ability, learning, and experience. KIMBALL, *supra* note 82, at 68-69. The 1860s corruption of Tammany Hall under Boss Tweed may have been the proverbial last straw, driving Langdell out of practice and back to the academy. *Id.* at 70-83.

84. Practical realities affected hiring as well. Law practice, then as now, was more lucrative than law teaching. Successful practitioners often were not willing to set aside their practices and commit to a lifetime of law teaching. *Id.* at 173-75.

reasons to want to distinguish themselves from the law practice of their day.⁸⁵ Not only had Langdell's heirs inherited his ambivalence toward practice and his commitment to a professional professoriate, but more fundamentally, the whole Langdellian system had been born out of Langdell's driving need to establish a particular set of standards—an academic meritocracy—and to exclude those who did not conform.⁸⁶ In fact, one could make a case that Langdell's overarching goal was to create a meritocracy in which he could be king. Coming from a shattered home in rural poverty, Langdell was excluded from the privileged social elite, to whom the worlds of education and professional practice catered.⁸⁷ As long as success, power, and influence were primarily attained by fortuitous birth, Langdell would be excluded, no matter how hard he worked or how much professional merit he demonstrated.

The system was indeed unfair to him and to others like him. From his return to Harvard as a professor in 1870 to the end of his long life, Langdell aimed to establish an educational meritocracy that awarded professional status to those who achieved a particular kind of academic success,⁸⁸ for which, conveniently, he appeared to be the model.⁸⁹ That effort would succeed only if he could exclude others who did not measure up to his standards and share his view of education. Thus, Langdellian education was born out of the need to tightly control admission to the professoriate. While Langdell's particular view of academic merit led ultimately to a far too limiting view of legal education, he and his early followers cannot be faulted for upending the hegemony of social influence and corruption and replacing it with an educational meritocracy they believed would be open to all.

Second, and, as always, financial factors combined with history to play a role. Legal education's prototype was a large Socratic classroom taught by a professor with little or no practice experience.⁹⁰ Clinics however, required far more resources. The rudiments of a law office had to be put in place, but even more troubling, classes were exceedingly small, requiring nearly individual

85. As it happened, the first "skills" courses to enter the academy were clinics, not legal writing courses. Clinics brought live-client representation into the building, and as the first "skills" courses, they became the prototype of "skills" education. Live-client representation, however, was the very activity the professional professoriate wanted to avoid, so the felt need to distinguish these courses surely was strong. One cannot help but wonder how history would have unfolded had legal writing courses entered the academy first. Legal writing courses met in larger classrooms, did not deal with actual clients, and could have been seen as an extension of the kind of cognitive learning students were undertaking in their more traditional courses. But clinics came first, and the distinctions between clinics and case method courses seemed stark. They also seemed to strike at the heart of the Langdellian project.

86. See generally KIMBALL, *supra* note 82.

87. See generally *id.* at 20-83.

88. See generally *id.* at 84-346.

89. *Id.* at 166.

90. CARNEGIE REPORT, *supra* note 4, at 89-90.

instruction and supervision. From a dean's perspective, the creation and maintenance of the divide allowed administrators to cabin and control the growth of this expensive instructional method.⁹¹ Newly hired clinicians were recruited from a different applicant pool, selected by different standards, paid significantly less, and, most important, not placed on the tenure track. Existing law faculties, who were born and bred in Langdell's competitive meritocracy, had no incentive to notice "family resemblances"⁹² with these new "second class" teachers. The academic air they breathed—the Langdellian system that had taught them as students, honored them as graduates, and selected them for the professoriate—taught them also to carefully guard admission to their inner circle.

Third, existing law faculties held an emaciated view of skills teaching and scholarship. Once again we will use legal writing as our example.⁹³ Most legal writing programs were first created in the 1980s and 1990s and, of course, were envisioned by the law faculties then in place. Very few of those faculty members had themselves taken a legal writing course. For most, their only writing instruction had predated their legal education, and most of that pre-legal writing instruction had been conducted within the "current-traditional" paradigm.⁹⁴ According to that paradigm, teachers simply gave a writing assignment, with little or no teaching about either the writing process itself or the kind of organization and analysis the assignment required. Students wrote entirely on their own, with no interim feedback or other intervention in the writing process. When students had done the best they could on their own, teachers marked and graded the final product⁹⁵ and then gave the next assignment, repeating the process throughout the semester.⁹⁶

This view of writing instruction emphasized the formal components of the students' products but did little to teach novice writers how to produce those components. In her landmark 1986 article, Professor Teresa Phelps pointed out that in the current-traditional paradigm, the writer's production of text "remains mysterious."⁹⁷ She wrote:

91. Ironically, the growth of specialized upper-level "doctrinal" courses and seminars has undermined this rationale. See Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 *CLINICAL L. REV.* 1, 25 (2000); Steven R. Smith, *Financing the Future of Legal Education: "Not What It Used To Be,"* 2012 *MICH. ST. L. REV.* 579, 582 (2012).

92. *Infra* note 127 and accompanying text.

93. See Eichhorn, *supra* note 24, at 112-16.

94. Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 *SW. L.J.* 1089, 1093-94 (1986).

95. The Carnegie Report describes a similar process used in the 1970s to teach case briefing, portraying it as "all trial and error, with little guidance provided by the teaching fellow and no feedback until a draft was returned—typically splattered with red ink." *CARNEGIE REPORT*, *supra* note 4, at 106-07.

96. Phelps, *supra* note 94, at 1093-94.

97. *Id.* at 1093.

[A] tacit assumption of the current-traditional paradigm is vitalism, which stresses the natural powers of the mind and “leads to a repudiation of the possibility of teaching the composing process.”⁹⁸ The composing process is a creative act not susceptible to conscious control by formal procedures. “[T]he writer is, in a sense, at the mercy of his thoughts. He does not direct them at this or that point; instead, he follows them with more thoughts, spontaneously, naturally. It is hard to say whether he has the thoughts or they have him.”⁹⁹ The composing process is thus not teachable . . . “[T]he teaching of composition proceeds for both students and teachers as a metaphysical or, at best, a wholly intuitive endeavor.”¹⁰⁰

It is no wonder that newly created legal writing courses were underresourced. They were created with the mistaken impression that writing could be separated from thinking. Like Rick Blaine, Humphrey Bogart’s character in *Casablanca*,¹⁰¹ existing law faculties promised new legal writing teachers that they (the “doctrinal” faculties) would “do the thinking for both of us.”¹⁰²

Nor did legal writing—conceived as little more than remedial composition and an introduction to the components of two practice documents—seem to need a presence in the upper-level curriculum. Almost all legal writing courses were taught only to first-year students and thus only at the most rudimentary level possible. A few upper-level writing courses were designed to teach the drafting of other kinds of legal documents (litigation or transactional drafting), but these courses did not offer a deeper level of engagement with subjects thought to have been adequately covered in the under-resourced first year course.

Finally, other curricular developments played a role as well. As far back as at least the 1950s and 1960s, many law schools required “legal method” courses that taught the principles and analytical processes of the American common law system and of statutory creation and interpretation.¹⁰³ These courses,

98. *Id.*, quoting Richard E. Young, *Paradigms and Problems: Needed Research in Rhetorical Invention*, in *RESEARCH IN COMPOSING* 29, 31 (Charles R. Cooper & Lee Odell eds., 1978).

99. *Id.*

100. *Id.*, quoting JANET EMIG, *THE COMPOSING PROCESS OF TWELFTH GRADERS I* (1971).

101. *CASABLANCA* (Warner Bros. 1942).

102. *Id.* Currently, 73 percent of legal writing faculty members are women. ASS’N OF LEGAL WRITING DIRS./LEGAL WRITING INST., *REPORT OF THE ANNUAL LEGAL WRITING SURVEY 68* (2013), <http://www.lwionline.org/uploads/FileUpload/2013SurveyReportfinal.pdf>. Given that in the 1980s and 1990s, most other law courses were taught by men, the gendered implications of the *CASABLANCA* promise are striking. Even in the modern era, only approximately 37 percent of tenured and tenure-track professors are women. Nancy Leong, *Discursive Disparities*, 8 *FIU L. REV.* 369, 373 (2013) (citing *2008-2009 AALS Statistical Report on Law Faculty*, ASS’N OF AM. L. SCHS, <http://www.aals.org/statistics/2009dlt/gender.html> (last visited July 31, 2014)).

103. Cappalli, *supra* note 64, at 396. Some legal writing courses carry the title “Legal Method,” but those courses are not the more abstract and theoretical versions of legal method that predated many legal writing courses. When the term “legal method” is used as a course title here, it refers to courses that used materials such as the famous “Hart and Sachs materials,”

appropriately, were considered both substantive and doctrinal. Today's curriculum committee at Law School X would place them among the courses in the first category.

Beginning in the 1970s, however, legal methods courses began to wane.¹⁰⁴ With the advent of increasing competition for precious credits in the first year, law faculty began to take the position that legal methods concepts were taught "pervasively," within torts, contracts, criminal law, and other required courses.¹⁰⁵ By the 1980s and 1990s, when many law schools added required first-year legal writing courses,¹⁰⁶ many free-standing legal method courses had been eliminated.¹⁰⁷ Thus, it did not seem intuitively obvious to law school faculties that legal writing courses were the heirs apparent of the substantive and doctrinal legal method coverage, material thought to be covered sufficiently in other courses.¹⁰⁸

Hiring decisions provide evidence of this perceived gap between legal methods courses and legal writing courses. Legal methods courses had been taught by tenured and tenure-track faculty. New legal writing courses, however, were staffed with third-year law students, practicing lawyers, or new law graduates in positions with a one- or two-year cap.¹⁰⁹ Clearly, law faculties in that era viewed legal writing courses as something other than "substantive" or "doctrinal."¹¹⁰ Tenured and tenure-track faculty members—who dominated discussions of legal education—envisioned writing courses as little more than remedial grammar and citation form.¹¹¹ In fact, many faculty members believed

subsequently published as HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

104. Cappalli, *supra* note 64, at 405-12.

105. *Id.*

106. Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 894-96 (2002).

107. Cappalli, *supra* note 64, at 396-98 & 405-11.

108. *Id.* at 415-43 (challenging the pervasive approach).

109. Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 543-44 (1972-1973).

110. Law faculties in those days sometimes objected to legal writing course descriptions that claimed to teach legal reasoning. In response, in 1980, Professors Marjorie Rombauer and Norman Brand successfully petitioned the American Association of Law Schools (AALS) to change the section name from "Legal Writing and Research" to "Legal Writing, Reasoning and Research." *AALS Newsletters*, LEGAL WRITING INST., http://wiki.lwionline.org/index.php/AALS_Newsletters (last visited July 31, 2014).

111. Early versions of the course may have been created to fit this limited vision. See Rombauer, *supra* note 109, at 539-43; see also Charles Bunn et al., *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945) (Report, AALS Committee on Curriculum, Karl Llewellyn, chair); at 539-43; see generally Patrick J. Rohan, *Some Basic Assumptions and Limitations of Current Curriculum Planning*, 16 J. LEGAL EDUC. 289, 290 (1964). This limited view may have been encouraged by the formalist or current traditional model of writing, which emphasized the formal features

that writing was “inherent and unteachable,”¹¹² a skill a student either possessed or did not. Naturally, if a subject is unteachable, it cannot be thought to be “substantive” or “doctrinal” in any sense of either word.

Soon it became apparent to those actually teaching the course that students could not learn to write a thorough legal analysis or make a persuasive legal argument without understanding more about legal methods and legal reasoning than they could learn from their other courses.¹¹³ They realized that the primary subject matter of the legal writing course was and had to be legal thinking,¹¹⁴ including the doctrines and legal requirements—the “meta-law”¹¹⁵—that apply to that thinking.

In those years, however, legal writing teachers were not included in mainstream conversations about legal education, so the initial impressions of legal writing courses were created and maintained by well-intentioned people who did not teach the course and who did not generally talk with those who did. Understandably, the prevailing “non-substantive” and “non-doctrinal” impressions became firmly entrenched in the language of legal education. Today many of the voices in conversations about legal education have a more accurate understanding, but the old categories and labels are still in place. The time has come to remember our past and realize that property and other courses on the committee’s first list do teach critical lawyering skills. Correspondingly, legal writing courses and other courses in the “skills” category are and should be considered both “substantive” and “doctrinal.”

of particular writing products, especially clarity and accuracy. The formalist model assumed that thinking preceded writing and that writing was simply the expression of preformed thoughts. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 49 (1994); Pollman, *supra* note 106, at 896-99. Credit-hour allocations reflected this limited view as well. While legal methods courses routinely carried three credits, most legal writing courses carried only one or two credits. Rombauer, *supra* note 109, at 550.

112. Pollman, *supra* note 106, at 894; *see also* Rideout & Ramsfield, *supra* note 111, at 43.
113. In a 1970 survey of those teaching legal writing courses, “a large percentage of the teachers (70%) no longer regarded improvement of basic writing—teaching grammar or basic composition—as a primary objective of their courses. . . . Only 11% of the respondents indicated that they conducted any class devoted substantially to instruction in basic writing. Only 14% required students to purchase or use materials devoted to instruction in grammar.” Rombauer, *supra* note 109, at 552; *see also, e.g.*, Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 98-99 (2005); Melissa H. Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE U.L. REV. 281, 286 (2007).
114. The writing model undergirding the integral relationship between thinking and writing is that of modern legal rhetoric, the view that language creates meaning rather than simply expressing it. *See* Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 J. LEGAL WRITING INST. 58 (2000); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of the Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 173-174 (1993); Phelps, *supra* note 94; Pollman, *supra* note 106, at 900-05 (tracing the model back to Jacques Derrida and Hans-Georg Gadamer).
115. Cappalli, *supra* note 64, at 398-99.

Prototypes, Family Resemblances, and “the Squirming World of Contingency and Flux”¹¹⁶

So far we have used the classical model to analyze the two commonly accepted curricular categories, and we have seen that according to that model, the “doctrinal/substantive” and “skills” categories are inaccurate. But our analysis cannot end there. While the classical model is the default understanding of categories, the model does not account for many of the functional categories human beings use every day. For some simple categories, the classical view may be sufficient, but the more complicated or abstract the category, the less it fits this simple view.

Consider, for instance, the category of “bachelors.”¹¹⁷ When asked, most people would say that a “bachelor” is an unmarried man,¹¹⁸ but that definition does not function as the necessary and sufficient criterion for category membership, as the classical view would assume. What about the pope? What about a gay man in a state not permitting gay marriage? Or a Muslim man who is permitted four wives and has only three? Or an eighteen-year-old high school student living at home with his parents? Or an unmarried man who lives with his longtime girlfriend and their two children?¹¹⁹

For “bachelors,” the classical view of a single necessary and sufficient condition does not work so well. Rather, the category “bachelor” seems to be constructed around a prototype—say, Rock Hudson’s character in the movie *Pillow Talk*.¹²⁰ The prototypical bachelor dates many women, avoiding commitment to any one of them. He carefully guards his freedom and expressly rejects “settling down” and having a family. He views his uncommitted status as essential to his happiness. He is carefree, casual, and sometimes mischievously deceitful in order to advance his amorous objectives. Implicit in this description is a particular cultural context: that he is free to marry one (and only one) of the targets of his affection, should he so choose.¹²¹

These characteristics do not operate as an articulated list of necessary and sufficient conditions for the category “bachelor,” however. Instead,

116. In *Connoisseur of Chaos*, Wallace Stevens rejects binary thinking, which he describes as characteristic of a “reptilian mind” unable to understand “a squirming world of contingency and flux.” WINTER, *supra* note 1, at 65.

117. LAKOFF, *supra* note 13, at 70-71.

118. *Bachelor - Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/bachelor?s=t> (last visited June 26, 2014).

119. LAKOFF, *supra* note 13, at 70-71.

120. *PILLOW TALK* is a 1959 romantic comedy produced and distributed by Universal Studios. *PILLOW TALK* (Universal Studios 1959). Brad Allen (played by Rock Hudson) is a New York City playboy, enjoying uncommitted relationships with many women and often using trickery to further those relationships. *Id.* Eventually and unwillingly, Allen falls in love with Jan Morrow (played by Doris Day). *Id.* He successfully woos and marries her, thus losing his bachelor status. *Id.*

121. See WINTER, *supra* note 1, at 86-87.

they constitute a mental picture functioning as a prototype of the category. Membership in the category is decided by the degree of similarity to this mental picture. Similarity is decided by a cultural “feel,” not a critical, objective, analytical application of a set of standards.

Also unlike the classical model where all members of the category are equal, some radial category members are a close match to the prototype, and therefore more clearly category members, while others are further from the category’s center. The category of “bachelors,” therefore, is a radial category. A radial category centers on a prototypical member with “various extensions that, though related to the central case in some fashion, nevertheless cannot be generated by rule.”¹²²

Another common example is the category of “mother.” As George Lakoff has demonstrated, the “mother” category has no set of necessary and sufficient conditions for defining its membership, certainly not the criterion of being a woman who has given birth to a child.¹²³ Rather, the category “mother” is a complex grouping of “cluster models,”¹²⁴ including women who give up their child for adoption; women who marry the child’s father; women who adopt or foster the child; women who serve as surrogates for fertility purposes; women who unofficially serve in a “mothering” role, such as an aunt, a grandmother, or a neighbor; or women who donate eggs for implantation in another woman.¹²⁵ Nor is status as a woman a necessary condition. Current cultural shifts have broadened the category to include gay men who assume a mothering role.

The categories of “mothers” and “bachelors” demonstrate that the classical view of categories is far from adequate. Rather than operating according to a necessary and sufficient criterion, with rigid boundaries and an “in/out” structure, culturally complex categories operate radially,¹²⁶ relying on prototypes and family resemblances.¹²⁷ This different view of categories is not just of theoretical interest. It comes with some important differences, some of which explain the seeming inaccuracy of legal education’s “doctrinal” and “skills” categories.

First, in the classical view, all category members are equal, but in radial categories, *some category members are further from the center than are others.*¹²⁸ Thus, in

122. *Id.* at 71.

123. LAKOFF, *supra* note 13, at 74-76.

124. *Id.*

125. Lakoff identifies these cluster models as the birth model; the genetic model; the nurturance model; the marital model; and the genealogical model. *Id.* at 74.

126. LAKOFF & JOHNSON, *supra* note 10, at 76, 122, 177; LAKOFF, *supra* note 13, at 91, 114.

127. Wittgenstein used the term “family resemblances” which demonstrate “a complicated network of similarities, overlapping and crisscrossing: sometimes overall similarities, sometimes similarities of detail.” LUDWIG WITTEGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, 31e-32e (1953). See also LAKOFF & JOHNSON, *supra* note 10, at 76 & 123 & 177; LAKOFF, *supra* note 13, at 12-15; WINTER, *supra* note 1, at 71, 76-85, 90-91.

128. There are “some category members that most fully embody all of the characteristic attributes

the list of “doctrinal courses,” property, torts and contracts may be among the category’s prototypes, occupying central positions. It is to be expected that other category members, such as a problem-based course in estate planning (heavy on skills) or a seminar in critical legal theory (almost all theory, almost no doctrine), may be more distant from the center but still within the category.

Second, in the classical view, all category members are similar in all relevant respects; that is, they all share the same set of necessary and sufficient conditions. In radial categories, however, members display a variety of similarities and dissimilarities with the prototype. *Therefore, these non-central members can be quite different from each other and still be considered category members (or not).*¹²⁹ This understanding of radial categories explains how the problem-based course in estate planning and the seminar in critical race theory can be within the same category and perhaps even roughly equidistance from the prototypes in the center (property, contracts, and torts) but still so widely different from each other.

Radial categories, especially cluster models, also may explain other seeming anomalies. For instance, the operation of radial categories might explain why a legal writing course (a “skills” course) might in some ways be more similar to an employment law seminar (a “doctrinal” course) than it is to another kind of “skills” course, such as a clinic. Both the seminar and the legal writing course are teaching writing, with teacher reviews and comments on drafts and with the primary or sole course grade composed of the grade on the student’s written product. Both ask a student to produce a written analysis of a legal principle or situation. Both require that the analysis be communicated according to the customary characteristics of a particular written genre. In each case, the stronger student performances demonstrate traditional analytical skill, creativity, logical organization, and compliance with grammar, style, and other technical requirements such as citation form. Typically, each course requires individual research as a major student activity. Typically, neither course uses a casebook or the case-dialogue model of pedagogy. In their traditional forms, both courses focus primarily on the same cognitive skills—those commonly taught by the case method—rather than on other lawyering skills such as negotiation, client interviewing, or trial practice.

The original subjective decision about how to categorize legal writing—whether to find it most like a seminar or most like a clinical course—thus was contingent and indeterminate. It probably was made culturally rather than by any analytical process listing relevant similarities and differences. If the original categorizers had assumed an attitude of inclusion and therefore looked

or features of the category and other category members that either lack some of those traits or exhibit them only to a lesser degree.” WINTER, *supra* note 1, at 92.

129. A beanbag chair and a barber chair each resemble a prototypical chair, but in different ways. There need be *no fixed core* of properties that are shared by the prototypical chair, the beanbag chair, and the barber chair. LAKOFF & JOHNSON, *supra* note 10, at 123. *See also*; WINTER, *supra* note 1, at 74-76 (describing chaining, where various extensions have little in common with each other or even with the prototype center-periphery schema).

for similarities, there were similarities aplenty to be found. If not, differences were handy too. Once categorical decisions were made, however, they became part of a structured world view, and seeing other categorical options became difficult.

These first two prototype effects together offer what might be a realistic explanation for part of the seeming inaccuracy of the “doctrinal” and “skills” categories under the classical view. First-year and upper-division courses; “Socratic” and lecture courses; casebook and problem-based courses; exam courses and seminar (paper) courses; courses teaching legal rules and courses teaching jurisprudential theories—all of these can be members of the same category if they share a “felt” sense of commonality with the prototypical category members. In a radial category, the fact that these courses are quite different from one another may not mean that the category is sufficiently inaccurate to be nonfunctional.

Third, in radial categories, there is no objective method for deciding how similar to the prototype a category member must be, so *category membership is a subjective decision*.¹³⁰ This subjectivity leads inexorably to a fourth significant implication: similarity (and therefore category membership) is *defined according to the cultural values and norms of the groups who get to decide*.¹³¹ Categories are based on the categorizer’s experience, and every experience occurs within a culturally defined world.¹³² When the Law School X curriculum committee selects its categories, therefore, it chooses according to what matters to the committee members and their reference groups—those with whom they identify. Quite innocently, they experience categorized items as falling into naturally occurring groups, not realizing that it is their own cultural view that has created those groups.¹³³

The seeming naturalness of the process is magnified when today’s committee is using long-accepted categories and inherited language. These inherited categories were created by the people in power when the occasion prompting categorization arose and inherently preserve and transmit the “various values and theoretical commitments held by the people who [got] to decide” the categories initially.¹³⁴ In the case of the doctrine/skills dichotomy, these values

130. Category membership under the classical model is subjective as well, but less obviously so. The selection of necessary and sufficient conditions for category membership is a matter of value. See, e.g., Johnson, *supra* note 13, at 849-50 (Pluto example).

131. See LAKOFF & JOHNSON, *supra* note 10, at 159-60.

132. *Id.* at 57. “Categories are neither fixed nor uniform. They are . . . adjustable in context, given various purposes.” *Id.* at 165-66.

133. Winter, *supra* note 1, at 76. Categories are “a social resource for preserving & transmitting important cultural knowledge.” *Id.* They “encode important—though, sometimes, highly controversial—normative values.” *Id.* Nothing is observable “in principle” outside our frames of reference. *Id.* at 133. Everything depends on pre-existing cultural Idealized Cognitive Models. *Id.*

134. Johnson, *supra* note 13, at 850.

and commitments are those held by the tenured law faculties of the 1960s and 1970s.¹³⁵

This fourth implication has led us to a fifth: *categories are created for particular purposes and will vary depending on those purposes.*¹³⁶ Since category selection is open-ended, an item may “be seen as in a particular category or not, depending on our purposes in classifying it.”¹³⁷ If someone is categorizing food to evaluate her nutritional needs, she may use categories like “fruits,” “vegetables,” “meat” and “dairy.” But if she is categorizing food to provide a host with information for meal planning, she might place chicken, asparagus, and ice cream in one category (the foods she particularly likes) and coconut, okra, and oysters in another (the foods she would like to avoid). Similarly, when new academic courses are created, a categorizer might select categories that draw boundaries between the existing courses and the new courses (and those who teach them). Or that same categorizer might select categories that integrate the new courses, noticing the ways in which those new courses are similar to some of the existing courses. These two categorization choices would accomplish very different purposes and would create very different academic worlds. Each choice would, in fact, create the world the categorizer envisions.

Thus, to understand a category, we must know why the category was created.¹³⁸ If the creation occurred too far in the past to find direct evidence of purpose, we can find strong circumstantial evidence by examining the effects the categorization has had. No doubt law faculties of the past had multiple purposes, many of which were commendable. But they were human beings seeing the world of legal education through the cultural lens of their day. It is not hard to imagine that they looked for categories and distinctions that seemed to explain the “family resemblances” they subjectively felt.

Purposes can be completely legitimate, such as the Law School X curriculum committee’s purpose of analyzing whether the school’s curriculum offers sufficient depth in the kinds of education experiences it values. But the sixth implication of prototype theory is also true: *reasons for categorizing can include both conscious and unconscious purposes.* Since categories are almost infinitely adjustable; since the labels “doctrinal” and “skills” do not seem objectively accurate; and since these categories were inherited from an earlier time, perhaps the committee should question them. The committee should ask what original purposes these categories served, what kind of legal education they have created, and what kind of legal reforms they encourage or impede.

The doctrinal/skills dichotomy became engrained in thinking about legal education at least by the 1960s and 1970s, when clinic courses arrived in the

135. Those tenured faculties, of course, were schooled in the values and commitments of their own teachers and mentors, reaching as far back as Langdell and his followers.

136. We choose a category “because we have some reason for focusing on certain properties and downplaying others.” LAKOFF & JOHNSON, *supra* note 10, at 163.

137. *Id.* at 124, 164.

138. WINTER, *supra* note 1, at 86.

typical law school curriculum. The dichotomy was ready for easy use when law schools added legal writing programs starting in the 1980s and 1990s. In those early years, the participants in curricular conversations were almost entirely limited to faculty members who taught the courses included in the “doctrinal” category. Those faculty members imagined the content of the newer courses and compared them with their own. They could not help but notice who was teaching those new courses. They thought they could see “family resemblances” among themselves and their own courses, but they concluded that legal writing, clinic, and other such courses were fundamentally different somehow—outside their own “family.”

Today’s curriculum committee need not condemn law faculties of the past for acting in such understandably human ways. We all see the world through the cultural lenses of our time. But today’s committee can notice the effects of past choices and avoid replicating them. Since a category’s members can be quite different from one another and since categories are subjectively selected based on particular purposes, the committee could choose categories intentionally, to achieve today’s goals and purposes.¹³⁹ The committee should begin by asking what effects the doctrine/skills dichotomy may have had on legal education.

The “Disturbing” Entailments of the Doctrine/Skills Dichotomy

In 1930, Karl Llewellyn warned us about categories. He wrote,

A realistic approach would, however . . . [recognize] that to classify is to disturb. It is to build emphases, to create stresses, which obscure some of the data under observation and give fictitious value to others—a process which can be excused only insofar as it is necessary to the accomplishing of a purpose. . . . For this reason a realistic approach to any new problem would begin by skepticism as to the adequacy of the *received* categories It is quite possible that the received categories as they already stand are perfect for the purpose. It is, however, altogether unlikely. . . .

[A] realistic approach rests on the observation that categories . . . tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience. More than this: although originally formulated

139. Interestingly, the CARNEGIE REPORT explicitly recognizes and accepts the validity of the “cognitive revolution” of which category theory is a part, saying that “[t]hese developments provide new insights on the potential, as well as the limitations, of that venerable learning institution—the school.” CARNEGIE REPORT, *supra* note 4, at 95-96. In fact, the report specifically points to the importance of conceptual models in human thinking (“One of the key findings of cognitive research is how important conceptual models, or schemas, are in human thinking. Establishing cause-and-effect, ranking and ordering, and finding logical relationships of inclusion and exclusion are all basic cognitive devices that receive much attention and development at all levels of schooling. . . . [P]rofessionals must be able to integrate this kind of knowledge within ongoing practical contexts”) *Id.* at 96-97. The thesis of this article is that the CARNEGIE REPORT and others interested in reform should apply this very theory to their own work of reforming legal education.

on the model of at least some observed data, they tend, once they have entered into the organization of thinking, both to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with the terms of the categories. . . . [The realistic approach would be to ask whether] the data are still present *in the form suggested by the category-name*. This slows up thinking. But it makes for results which mean[] something when one gets them.¹⁴⁰

Perhaps it is time for legal education to “slow” its thinking in the way Llewellyn proposed. Other category options are certainly possible. For law school courses, a variety of characteristics can establish similarities and differences. Courses are similar or different on such criteria as course goals; pedagogies; kinds of materials; kinds of formative activities; kinds of materials assigned; degree of emphasis on knowledge acquisition; kind of knowledge to be acquired; expected level of student knowledge and experience brought to the course; kinds of skills to be taught; size of enrollment; degree of instructor interaction; and kinds of assessment techniques. Law school courses could be categorized according to any of these criteria. All of these sets of categories would be coherent in the sense that category members would share some degree of similarity on at least one characteristic.

Since any of these category choices would be logically justifiable, what matters is how the radial categories function in the world—what human purposes they serve and what unintended consequences they cause. For radial categories, the question is not what the category means but rather what work it does,¹⁴¹ so we turn now to evaluating the work of the doctrine/skills dichotomy.

The dichotomy’s work has not been all bad. This simplistic curricular world view enables a quick though very rough estimate of how many skills courses (of a certain type) and how many doctrinal courses (of a certain type) a law school offers. Some might argue that the doctrinal/skills dichotomy has facilitated the development of discrete “skills” teaching materials, professional organizations, and scholarship pertaining to particular skills. Some also might argue that these categorical divisions have facilitated the creation of hiring, evaluation, and retention policies specific to certain kinds of teaching, though whether those different criteria have been a positive development is a contested question. So the doctrine/skills dichotomy has been helpful in some ways, but the categories also have brought significant problematic entailments.

The Dichotomy Creates Inaccurate Perceptions. As we have already seen, the categorical division of “doctrine” and “skills” affects perceptions of individual courses. Faculties and other interested parties tend to think unconsciously about categories, using the classical model as their metaphor. Thus, they tend to make the very same inaccurate assumptions that the classical model invites, adopting its clear boundaries and its in/out structure. Faculties, students, and administrators likely perceive the courses in each category either as not

140. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453-454 (1930).

141. WINTER, *supra* note 1, at 65-66.

including the criterion of the other category at all or as including that criterion to a lesser degree than the course actually does.¹⁴²

Even in the unlikely event that law faculties study category theory as part of their curricular process and consciously regard the “doctrine” and “skills” lists as radial categories rather than classical categories, the category labels still affect perception¹⁴³ because even radial categories highlight and hide particular characteristics of their category members.¹⁴⁴ Each category exaggerates the identified commonality among its category members and obscures differences, making category members seem more alike than they actually are. Each category label also obscures other similarities among some (but not all) category members, thus hiding other options for category selection. And existing categories obscure unlabeled and therefore unrecognized similarities between category members and non-category members, thus making them seem more different than they actually are.¹⁴⁵

The property and legal writing examples have already demonstrated how this highlighting and hiding process plays out. The doctrine/skills dichotomy creates the very misperceptions we have seen. Property seems more focused on doctrine than it actually is. Property’s other similarities to and its differences from other “doctrinal” courses are obscured. Property seems to teach fewer skills than it actually does. Property seems more different than it actually is from courses labeled “skills courses,” such as legal writing, but less different from other paper courses (like seminars) than it actually is. Similarly, legal writing seems to teach less doctrine or theory than it actually does. Legal writing’s other similarities to “doctrinal” or “substantive” courses are obscured. Legal writing’s differences from other “skills” courses go unnoticed. As Amsterdam & Bruner have written, “We . . . see distinctions where there may be no differences and ignore differences because we fail to see distinctions.”¹⁴⁶ We are beguiled by our own categories.¹⁴⁷

The Dichotomy Causes Inadvertent Substantive Drift. Not only does the doctrine/skills dichotomy affect *perceptions* of current courses (and the faculty who teach them), but it may cause the *reality* of those same courses to shift over time. In legal education, as in all aspects of life, we create categories and then proceed

142. *Id.* at 70 (P or not-P).

143. Categories are based, in large part, “on cross-domain correlations in our experience, which give rise to . . . perceived similarities For example, the persistent use of a metaphor [or category] may create perceived similarities” LAKOFF & JOHNSON, *supra* note 10, at 245.

144. *Id.* at 61, 163, 178-79. In fact, every categorization creates inaccurate perceptions. *Id.* at 163 (“Every true statement . . . necessarily leaves out what is downplayed or hidden by the categories used in it.”).

145. We see similarities in terms of the cultural categories we’ve inherited, so the similarities we see are those that the existing categories have primed us to see. *Id.* at 147.

146. AMSTERDAM & BRUNER, *supra* note 11, at 49.

147. *See generally, id. supra* note 11.

to act out the characteristics and entailments of the categories we created.¹⁴⁸ When we work with one of the category members (a property or legal writing course), we tend, over time, to make it more consistent with its assigned category. Like other metaphors, then, categories not only create initial realities, as we saw in the prior section, but they also invite some kinds of changes over time and discourage others. As Lakoff and Johnson have noted of all metaphors, including categories:

[Categories] create realities for us A [category] may thus be a guide for future action. Such actions will, of course, fit the [category]. This will, in turn, reinforce the power of the [category] to make experience coherent. In this sense [categories] can be self-fulfilling prophecies.¹⁴⁹

This tendency means that in legal education, faculty members likely will teach a course the way its category expects it to be taught. Over time, as inevitable syllabus crunches and faculty time pressures occur, a professor teaching a “doctrinal” course will tend to reduce skills work in favor of preserving doctrinal coverage. For a “doctrinal” course, skills experiences are expendable. But if the instructor thinks of the course as a “skills” course and herself as a “skills” teacher, a syllabus crunch will result in a reduction of doctrinal coverage. After all, the categories teach us that doctrine is not the primary focus of a “skills” course.¹⁵⁰

The history of both property and legal writing courses seems to reflect this tendency. If a legal writing teacher thinks that her course is *not* doctrinal, she will minimize coverage of legal method and generalized legal reasoning. For any doctrine she does cover, she probably will not hold students accountable for learning it, for instance with an examination.¹⁵¹ Doctrine, after all, is not the purpose of the course, or so the category says.¹⁵² Similarly, for “doctrinal” first-year courses such as property, the categories may have changed the way teachers view their course goals, resulting in significant changes in both individual teaching and schoolwide curricular decisions.¹⁵³ As we saw in prior

148. LAKOFF & JOHNSON, *supra* note 10, at 158.

149. *Id.* at 156.

150. While the topic is too big to be covered here, the same currents push scholarship in problematic directions.

151. GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* 36-37 (2000).

152. As earlier sections of this paper have shown, this tendency may have, in fact, resulted in reduced legal writing instruction in both of these important “doctrinal” areas. Cappalli, *supra* note 64, at 131-33; EDWARDS, *supra* note 65 and accompanying text.

153. The CARNEGIE REPORT notes the simultaneous occurrence of (1) the advent of clinics and (2) the “doctrinal” faculty’s move away from practice concerns: “It is not surprising that law schools, located at the junction between academic and practitioner interests, have tried at different moments to go in different directions. Thus during the 1960s and 1970s, when law schools were expanding, there was new concern for social purpose, manifested in developments such as clinical-legal education. Yet at the same time, internal academic norms emerged as more powerful than ever, so that faculty research became more intensive and

sections, after “skills” courses entered the legal academy, the academy began to see case method courses as primarily doctrinal and the teaching of legal reasoning both as something other than a skill and as something that happens with limited intentional syllabus time and effort.¹⁵⁴

Both categories establish a limiting normative view of what each kind of course should do. As Lakoff and Johnson remind us, “We draw inferences, set goals, make commitments, and execute plans, all on the basis of how we . . . structure our experience, consciously and unconsciously,” according to the categories we ourselves created.¹⁵⁵ Thus, our commonly accepted categories tend to create the very reality they purport to describe.

The Dichotomy Discourages Carnegie-Type Integration. The 2007 CARNEGIE REPORT minces no words about the importance of addressing the doctrine/skills debate,¹⁵⁶ calling the need “increasingly urgent.”¹⁵⁷ As part of its analysis of this urgent need, the report rightly questions “the long-assumed qualitative difference between the formal teaching of doctrine and the learning of the skills of practice,” finding it “therefore important to re-examine the way in which law schools . . . have segregated the apprenticeship of conceptual learning from the apprenticeship of practice.”¹⁵⁸ Among the reasons supporting integration is the well-documented learning theory showing that high-order understanding requires a healthy dose of active or experiential learning methods.¹⁵⁹

One of the impediments to meaningful change, according to the report, has been the predominance of “additive” proposals. Both proponents and opponents of strategies for increased attention to skills have talked primarily

more like scholarship in the arts-and-sciences disciplines.” CARNEGIE REPORT, *supra* note 4, at 7. Interestingly, the report does not wonder whether the two simultaneous developments were causally related.

154. For instance, in recent years law schools began to reduce the credit hours allotted to property and the other traditional first-year courses in favor of increasing upper-division electives and adding a first-year elective. In listserv discussions about the pedagogical cost of the credit-hour reduction, we property teachers tend to talk about which subject areas we have had to reduce or delete from our syllabi. See RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE 65 (1999). We have talked much less, if at all, about the time we have had to cut from classroom work on careful case reading, the making of analogies and distinctions, synthesis of legal principles, and discussions of policy reasoning. In labeling property, contracts, torts, and criminal law as “doctrinal” courses, those of us who teach those first-year courses may be forgetting our role in teaching cognitive lawyering skills. We may be de-emphasizing those activities in part because we do not see ourselves—and do not want to see ourselves—as “skills” teachers.

155. LAKOFF & JOHNSON, *supra* note 10, at 158.

156. CARNEGIE REPORT, *supra* note 4, at 97 (pointing out that blending “the analytical and practical habits of mind that professional practice demands is, we believe, the most complex and interesting pedagogical challenge in the preparation of legal practitioners”).

157. *Id.* at 12.

158. *Id.* at 99.

159. Erickson, *supra* note 2, at 89-97

of adding more skills instruction to existing curricula (or not).¹⁶⁰ But the additive model has at least two closely related problems: (1) It maintains existing boundaries between the two groups of courses, therefore perpetuating the boundaries between the two groups of faculty members whose teaching assignments establish their identity; and (2) it views law school curricular decisions as a zero-sum game, with two interest groups (that is, the “doctrinal” and “skills” faculty) fighting over the same curricular real estate.¹⁶¹

The first problem is fundamental to the current stalemate, almost inevitably setting the stage for the second. To address these two problems, the Carnegie Report proposes what it calls a “bolder, more integrated approach.”¹⁶² Instead of merely adding more skills faculty, who will teach more skills courses, the report advocates the integration of skills components into existing courses.¹⁶³ Because this integration will bring existing case-dialogue faculty into the teaching of skills, it can be expected to prompt “deep engagement with the knowledge, skills, and defining loyalties of the profession.”¹⁶⁴ The goal is to overrun traditional boundaries.¹⁶⁵ This integrative approach would help legal education “re-integrate the severed components of the educational experience.”¹⁶⁶

Realistically, the Carnegie Report realizes that integration in pedagogy cannot be achieved without faculty teamwork,¹⁶⁷ but that kind of communication and mutual respect is discouraged by the in/out structure the “doctrinal” and “skills” categories perpetuate. The categories create and maintain divisions among faculty, with the effect that substantive collaborations are less likely. Most faculty members begin their careers and form their professional relationships and allegiances as members of one group or the other. These categorical boundaries discourage border crossings.

160. CARNEGIE REPORT, *supra* note 4, at 191. As the Carnegie Report observes, even the MACCRATE REPORT—a major voice advocating for improved skills education—assumes this additive model. *Id.* at 190.

161. *See id.* at 191-92.

162. *Id.* at 185, 191-92.

163. *Id.* at 191-92.

164. *Id.* at 85. Another, more practical advantage is that integration of skills into doctrinal courses would increase the amount of skills teaching with little additional expenditure of scarce resources.

165. “The desired integration, like competent practice, requires constant mutual adjustment among the emphases of the three parts, so that conceptual analysis is not only taught in doctrinal classrooms, nor is practice only taught in lawyering courses, nor is professional purpose and identity taught only in courses identified as such.” *Id.* at 125.

166. *Id.* at 84.

167. “In order to produce integrative results in students’ learning, however, communication and mutual learning must first occur among the faculty who teach in the several areas of the legal curriculum. The faculty responsible for curriculum and pedagogy in these areas must communicate with, learn from, and contribute to each other’s purposes.” *Id.* at 13.

Exhortations for such border crossings have been heard for years¹⁶⁸ with little result.¹⁶⁹ Despite its inherent credibility and persuasive force, the Carnegie Report is yet another such call. In the face of the conscious and unconscious effects of our cognitive world view, periodic exhortations in articles and reports are not enough. Category theory teaches that the Carnegie Report's "bold" proposal will need to be bolder still. It will need to include the adoption of categories other than those representing the sides of this civil war. We will need categories that encourage inclusion rather than exclusion, mutuality rather than hierarchy. Otherwise, neither group will be inclined to work with the other, and integration will remain a pipe dream.

The Dichotomy Impedes Improvement in Assessments. In recent years, the assessment movement has been the dominant force in other areas of education, but most law schools have been able to look the other way. Those days are about to be over, however,¹⁷⁰ with regional accrediting agencies and institutional officers asking law schools to identify their missions, adopt a plan, and measure their outcomes. All recent reports on legal education urge major improvements in assessment.¹⁷¹ Law schools will be expected to match their curricular decisions to their mission statement. Individual professors will be asked to increase significantly both the number and the variety of their formative and summative assessment techniques and to provide meaningful feedback to students on many of those activities.

168. Calls for integrating doctrine and skills have been part of the discussion at least since the 1930s. See e.g., Bunn et al., *supra* note 111; Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); Jerome Frank, *Why Not a Clinical Lawyer-School*, 81 U. PENN. L. REV. 907 (1933); Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948). In the modern era, calls have intensified, with Tony Amsterdam's 1984 article perhaps marking the resurgence of the idea. See Anthony G. Amsterdam, *Clinical Legal Education-a 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); see also John O. Mudd, *Academic Change in Law Schools, Part I*, 29 GONZ. L. REV. 29, 31 (1993-94) ("One of the modifications currently urged most strongly, yet one that represents an enormous challenge, is integrating professional skills instruction into the regular academic program."); Elizabeth M. Schneider, *Integration of Professional Skills into the Law School Curriculum: Where We've Been and Where We're Going*, 19 N.M. L. REV. 111 (1989).
169. Reasons for law schools' notorious reluctance to change are many and varied, of course. John Mudd has identified at least these: inertia; conflicting educational philosophies; faculty (for instance, overcommitment to faculty autonomy, resistance to reorienting their time and effort away from their own projects in order to implement the proposed change; comfort with the status quo; financial disincentives stemming from authorship of books); student/faculty ratios; budget; research; academic calendar; administration. John O. Mudd, *supra* note 168, at 46-63. This list does not address other roadblocks applying to particular kinds of proposals for change, such as a proposal to integrate "skills" teaching into "doctrinal" classes. Reluctance to change one's professional identity, especially to an identity of lower status, is such a proposal-specific roadblock.
170. "[L]aw schools and their faculty members will face increasing demands to engage in serious assessment strategies as a means of assuring accountability." Judith Welch Wegner, *Cornerstones, Curb Cuts, and Legal Education Reform*, 2013 J. DISP. RESOL. 33, 59 (2013).
171. See, e.g., BEST PRACTICES, *supra* note 25, at 235-63; CARNEGIE REPORT, *supra* note 4, at 162-84; MACCRATE REPORT, *supra* note 23, at 236-60.

Needless to say, implementation of better assessment practices will require significant changes in “doctrinal” courses. Law schools have long used primarily the case method pedagogy; have employed almost no formative assessment; and have limited summative assessment to one final examination. What study there has been of the effectiveness of this set of instructional practices has found it ineffective,¹⁷² and in light of its near exclusivity, the degree of its effectiveness would have to be extraordinary to justify the degree of its current use.

Continuing this form of legal education will not be sufficient. Several key assumptions will guide the implementation of an assessment model for law schools, two of which are especially relevant to the future of the doctrine/skills dichotomy: (1) Knowledge is not enough; law students must “be able to *do* what they *know*,”¹⁷³ and (2) legal education must teach students to do what their professional roles will require them to do.¹⁷⁴ In other words, the assessment movement will expect that doctrine will be learned at least in part by “doing” the doctrine.¹⁷⁵ Property students should learn to negotiate and draft a lease; wills students should learn to counsel a client and prepare a will; torts students should learn to interview a client and draft a complaint; evidence students should learn to make and argue objections in a trial setting; civil procedure students should learn to evaluate a set of discovery responses for purposes of a summary judgment motion.

Not only does good assessment practice require these active learning experiences, but fairness to students requires them as well. Currently, most law school grades are based almost entirely on a particular kind of final essay examination. Some students will find that assessment device congenial and will be able to perform well, but the actual practice of law rarely requires a lawyer to employ that particular skill. Other students, some of whom do not perform as well on a traditional law school examination, perform at a superior level on other lawyering activities.¹⁷⁶ Yet, the law school’s traditional

172. “The irony in the fact that legal education has chosen the bluebook essay exam as its primary means of evaluation is that the instrument itself lacks a sound basis in educational or assessment principles. Legal educators who have subjected the essay or bluebook exam to critical analysis during the last seventy-five years have roundly criticized it.” MUNRO, *supra* note 151, at 36-37. See also David J. Herring & Collin Lynch, *Teaching Skills of Legal Analysis: Does the Emperor Have Any Clothes?* 18 J. LEG. WRITING INST. 85 (2012).

173. MUNRO, *supra* note 151, at 12 (emphasis added); ALVERNO COLLEGE FACULTY, STUDENT ASSESSMENT-AS-LEARNING AT ALVERNO COLLEGE 4 (1994) (“Education goes beyond knowing to being able to do what one knows”).

174. MUNRO, *supra* note 151, at 13; ALVERNO COLLEGE FACULTY, *supra* note 173 (“Students’ abilities must be carefully identified in relation to what contemporary life requires.”).

175. See, e.g., Deborah Jones Merritt, *Pedagogy, Progress, and Portfolios*, 25 OHIO ST. J. ON DISP. RESOL. 7 (2010).

176. In teaching torts and legal writing in an integrated format, Susan Hankin has observed surprises: Some students who perform well on a traditional final examination do not perform well on a legal writing assignment, while others whose writing is strong in the context of a legal writing assignment do not perform well in an examination context. Susan

grading system largely does not capture and measure those other critical skills. Rather, it provides employers with limited assessment information that favors a particular group of students (those with one particular set of skills) over others who possess other arguably more important skill sets.¹⁷⁷

Finally, law school's current grading model may not even accurately assess the limited skill set it is said to assess, that of "thinking like a lawyer." As Gregory Munro has written, "Teaching students to 'think like lawyers' is too vague to pass muster as an appropriate mission. Most law schools have not examined what lawyers do, much less what they think, how they think, and whether legal thinking is any different than critical thinking in any other discipline."¹⁷⁸ Assessment practice will require more than creation of several complicated fact patterns designed to raise as many issues as possible in each question. It will require identification of the specific skills that make up this "lawyerly" thinking, as well as creation of assessment devices that measure student learning of those specific skills. Effective assessment devices may not turn out to look much like traditional law school examinations.¹⁷⁹

The relationship between the assessment movement and the need to dissolve the doctrine/skills dichotomy is clear. An effective education should be "integrated and coherent, not simply a collection of discrete activities."¹⁸⁰ Faculty members must collaborate on mission and outcomes, and individual faculty members must broaden their own assessment devices to include some that other faculty members are accustomed to using.¹⁸¹ In other words, effective assessment will require precisely the kind of integration the Carnegie Report prescribes. Yet, as the prior section discussed, the maintenance of the

J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 J. LEGAL WRITING INST. 325, 340 (2011).

177. MUNRO, *supra* note 151, at 33-39; Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 330 (1982); Phillip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 436 (1989); Janet Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L. REV. 723, 724 (1985).

178. MUNRO, *supra* note 151, at 49 (citations omitted).

179. "There is, then, a serious dissonance between our higher aspirations as teachers and our examination and grading practices. We aspire to teach mental habits that transcend substantive law but we do not try very hard to find out how well we are succeeding." David P. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479, 480 (1984).

180. Jean Mather, *Accreditation and Assessment: A Staff Perspective*, 66 NAT'L C. ASS'N Q. 397, 400 (1991).

181. The MACCRATE REPORT lists a number of examples of tasks that are, in effect, formative assessment techniques, such as writing exercises; research problems; simulation and role play; oral presentations; instructor-posed problems; clinical practice; computer simulation; and performance examinations. MACCRATE REPORT, *supra* note 23, at 244. Other formative and summative assessment techniques include student portfolios; oral or written reports to a supervising attorney, creating a litigation plan, identification of possible transactional issues, journaling, weekly quizzes; student self-assessment; evaluation of group work; student presentations on a particular subject; peer-review activities; and computer-assisted exercises.

doctrinal/skills dichotomy discourages this very kind of boundary crossing, making effective assessment more difficult.

*The Dichotomy Devalues the Teaching of Skills.*¹⁸² Finally we turn to what may be the most obvious entailment of the doctrine/skills dichotomy—the devaluation of skills. A law school’s curriculum speaks powerfully about its hierarchy of values, a hierarchy that is then carefully taught to students and to new faculty and continuously reinforced in the minds of existing faculty. Since the advent of clinics and other “skills” courses, legal education has been divided along the doctrine/skills fault line.¹⁸³ As the Carnegie Report found, “it remains controversial within legal education to argue that law schools should undertake responsibility for initiating and fostering this phase of legal preparation.”¹⁸⁴ The report observed, “[O]ne of the less happy legacies of the inherited academic ideology has been a history of unfortunate misunderstandings and even conflict between defenders of theoretical legal learning and champions of a legal education that includes introduction to the practice of law.”¹⁸⁵

The Carnegie Report both recognizes the traditional orientation privileging “doctrinal” teaching¹⁸⁶ and also asserts that skills education should not be devalued.¹⁸⁷ But that message is spoken from within the hermeneutical loop created by the standard categories of “doctrine” and “skills.” Thus the report accepts the hierarchy the dichotomy creates and maintains, even while arguing against it. For instance, the report tabulates the three apprenticeships, presenting the first (the case method) as “cognitive” and the second (skills) as “practical.”¹⁸⁸ Throughout its text, the report describes the case method as law’s “signature pedagogy”¹⁸⁹ and labels skills and professional values as

182. Discussion of status inequities affecting skills faculty will be omitted here, but the relationship between devaluing a subject and devaluing its faculty should be obvious.

183. The CARNEGIE REPORT calls it “the traditional theory-versus-practice divide.” CARNEGIE REPORT, *supra* note 4, at 92 & 105.

184. CARNEGIE REPORT, *supra* note 4, at 87. The report quotes an interview with a faculty member at an elite school who baldly stated that “our clinical program is not a good use of resources.” *Id.* at 100-01.

185. *Id.* at 8.

186. The report describes legal education’s traditional orientation as one “that privileges the cognitive apprenticeship in its present, stand-alone configuration.” *Id.* at 192.

187. “[W]e also consider the question of what could be done to move education for practice into the more central position it deserves to hold within the legal academy.” *Id.* at 89.

188. *Id.*

189. *See id.* at 24 (“Law’s signature case-dialogue method”), 47 (“The Case Dialogue As Signature Pedagogy”), 50 (“Legal Education’s Signature Pedagogy”), 56 (“legal education’s signature pedagogy”), 60 (“legal education’s signature pedagogy”), 75 (“Using the Signature Pedagogy”), 81 (“The signature pedagogy of law school”), and 187 (“The Signature Pedagogy”).

“shadow” pedagogies.¹⁹⁰ The report describes skills education as “generally the secondary focus of legal education.”¹⁹¹

Perhaps most problematically, the report consistently assigns responsibility for teaching legal analysis to case method (“doctrinal”) courses, rarely recognizing that “skills” courses often teach legal analysis better and at a deeper level than a case-method course could achieve.¹⁹² Tellingly, the report does not identify the particular analytical skills a lawyer must possess, and therefore it does not recognize that, while many of these skills can be introduced and practiced in case-method classrooms, some cannot be taught in that setting.¹⁹³ The teaching of legal analysis in a large “doctrinal” classroom is often haphazard¹⁹⁴ and does not offer sustained, individual practice or individual accountability for mastery of the skill.¹⁹⁵

The report’s consistent adoption of the doctrinal/skills dichotomy thus unwittingly undermines its own stated goals of integrating the apprenticeships and counteracting the influences that devalue skills education. As we should know by now, separate but equal is not equal. Carnegie invites legal education’s excluded groups to the lunch counter. Good. But surely it would be better to stop making judgments based on the excluding characteristic—to choose instead more neutral categories that integrate the dominant group and the excluded group rather than keeping them segregated.¹⁹⁶

190. *Id.* at 56-59. “Shadow pedagogy” is, of course, a term of art, and the second two apprenticeships do fit the definition of the term. The problem is not that the label is inaccurate but that, without resistance from the report, the use of the label perpetuates the phenomenon it describes.

191. *Id.* at 87.

192. In places, the report seems to treat legal writing as an exception, however. *See e.g., id.* at 104-11.

193. “The Socratic dialogue and case method . . . emphasizes certain steps of the cognitive process while ignoring others, and it does not provide a feedback mechanism to address and correct skills deficiencies.” BEST PRACTICES, *supra* note 25, at 134-35.

194. Jon Elson, *The Regulation of Legal Education: The Potential for Implementing the MACCRATE REPORT’S Recommendation for Curricular Reform*, 1 CLINICAL L. REV. 363, 384-85 (1994).

195. “There are those who defend the Socratic dialogue by claiming that it teaches intellectual skills by example as well as by direct involvement of the student, but . . . [t]he responses of a classmate . . . cannot . . . show the listening student where his or her intellectual deficiencies lie nor can they give him or her the feedback required to correct those deficiencies.” Andrew Petter, *A Closet Within the House: Learning Objectives and the Law School Curriculum*, in *ESSAYS ON LEGAL EDUCATION* 76, 87 (Neil Gold ed., 1982). Michael Hunter Schwarz calls this the “vicarious learning/self-teaching” model. Michael Hunter Schwarz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 351-53 (2001). Even Judith Wegner, who was the sole law-faculty author of the Carnegie Report and who otherwise sees great value in the case-dialogue method, finds that in the case-dialogue method, “key intellectual tasks receive much less attention,” with “limited instruction in application of the law to complex fact patterns, synthesis of ideas, and evaluation against criteria relating to fairness or justice.” Judith Wegner, *Theory, Practice, and the Course of Study—The Problem of the Elephant* 51, (2003) (unpublished manuscript), *quoted in* BEST PRACTICES, *supra* note 25, at 138.

196. The CARNEGIE REPORT recognizes “the central role of [teaching students] to classify and

We have seen that the common curricular labels of “substantive,” “doctrinal,” and “skills” are problematic. Under the classical model, each label strongly but falsely implies that non-category members do not possess the characteristic that serves as the identifying label for the opposite category. But the biggest problem is the work these categories do. While they have facilitated some arguably good developments, they also have been a powerful force preventing change in legal education. Since categories of one kind or another are inevitable, however, we must ask whether there are better alternatives.

Imagining a Better Future: Back to the Curriculum Committee

Karl Llewellyn not only pointed out the dangers of received categories, but he also identified the course of action:

It is quite possible that the received categories as they already stand are perfect for the purpose. It is, however, altogether unlikely. The suggestion then comes to this: that with the new purpose in mind one approach the data afresh, taking them in as raw a condition as possible, and discovering how far and how well the available traditional categories really cover the most relevant of the raw data. And that before proceeding one undertake such modifications in the categories as may be necessary or look promising.¹⁹⁷

The curriculum committee of Law School X began its deliberations by using the language and categories created by existing faculty members over fifty years ago, when “skills” courses and “skills” faculty first entered legal education in significant numbers. As we have seen, the terms were created to show the differences between new courses and existing courses. But what if law faculties of long ago had been thinking inclusively rather than exclusively? What categories might they have used; what entailments might have resulted; and what might legal education look like today?

Let’s take a flight of fancy and imagine a different past for legal education. When clinical courses came along fifty years ago, faculties could have surveyed existing courses, looking for those most like clinics. They might have noticed that a clinical course was, in a sense, a kind of culmination—a “capstone” course. Some other courses had that quality as well. Seminars often were considered the culmination of a student’s analytical study. Prototypical seminar students had taken many traditional law school examinations by then, and had learned to spot a multitude of discrete legal issues and to articulate and apply legal rules to the hypothetical clients’ situations described in the examination question. After all that practice with applying rules to individual hypotheticals,

categorize” and to do so with the knowledge that “all categories are for some purpose and serve particular functions” enabling “students to [learn] to think in a specific way, to value and aim at both precision and generality in the application of categories to persons and situations.” CARNEGIE REPORT, *supra* note 4, at 54-55. It is ironic that the report recognizes the importance of teaching students to be skilled categorizers but does not apply category theory to its own categorizations.

197. Llewellyn, *supra* note 140, at 453.

these students were now ready to step away from application to a hypothetical client and instead to think more broadly, deeply, and abstractly about a legal question, much as their professors were doing in academic scholarship. Like seminars, clinics were a culmination of a multitude of earlier courses as well. That same experience in spotting a multitude of legal issues and applying legal rules to hypothetical clients had prepared those same student to try their hands at representing real clients. Compared with seminars, the variety of the capstone experience was different, but the nature of the experience was exactly the same: bringing together multiple semesters of legal preparation for a much more advanced educational experience.

Other courses might have been thought of as “capstone” courses as well. For instance, some courses explored particular perspectives on law, such as law and economics, critical theory, or jurisprudence. Some offered a comparative perspective (courses in legal history or international law). For students who had taken property, wills and trusts, estate tax, and community property, a course in estate planning would be a capstone course. For students who had taken federal tax, estate tax, and corporate tax, a course in tax planning would be a capstone course.

The advent of clinics and externships thus might have been an occasion for curriculum committees to begin to notice a curricular progression and to rethink curricular planning in the direction of maximizing such “capstone” experiences.¹⁹⁸ They might have wondered what other courses should be added in order to build out a particular educational path or specialty. Later, when more specialized litigation and transactional courses came along, curriculum committees might have noticed that they were designed for students who had already taken one or more basic courses in the particular subject matter. So the capstone category might have included courses such as trial practice, advanced evidence, discovery practice, litigation or transactional drafting, appellate practice, and advanced legal research.

A few years later, first-year legal writing programs arrived on the scene. These courses were the very opposite of capstone experiences like clinics. They were entry-level courses, so they belonged at the opposite end of the educational experience. Looking for similarities rather than differences, the curriculum committees of the past might have noticed that the most important characteristic of other first-year courses was their key function of teaching the foundations of legal analysis. If faculties had a modern understanding of a legal writing course, they might have noticed that this description is precisely the most important characteristic of a first-year legal writing course as well. Thus, legal writing might have been included together in a category called “foundation” courses composed largely though perhaps not entirely of first-year courses.

Thus today, instead of the seemingly opposing categories of “doctrine” and “skills,” legal education might be talking about a trilogy of categories—

198. Ironically, it was Langdell himself who originated the idea of a graduated curriculum. See BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION* 130-40 (2009).

something like foundation courses, bridge courses, and capstone courses.¹⁹⁹ First-year courses would be foundation courses, explicitly using a particular legal subject to teach entry-level lawyering competencies.²⁰⁰ The traditional first-year courses are obvious choices, but not the only possibilities by any means. Almost any case method or statutory course could be taught as a foundation course, simply using the law of a particular area to teach foundational cognitive competencies. The key characteristic of a foundation course is not its subject matter.²⁰¹ Rather, it is the foundational methods and goals used to teach the subject matter.

Typical upper-level courses (bridge courses) would build on these foundation courses. Bridge courses would expand the subject areas taught in foundation courses. For instance, courses in intellectual property, real estate transactions, or wills and trusts would build on the foundational property course. They would also add new subject areas not closely related to those taught in foundational courses, new areas such as employment discrimination, evidence, labor law, family law, or corporations.²⁰² These bridge courses would also build on the cognitive competencies of the first year, now introducing other lawyering activities that require the use of those cognitive competencies, such as interviewing, problem-solving, or negotiating.

Bridge courses also would prepare students for capstone courses, such as clinics, seminars, or advanced courses in specialty areas. Capstone courses, each in their own way, would require students to bring together a broad span of legal knowledge and competence into a kind of gestalt educational experience.²⁰³ The area of legal knowledge and the kind of educational experience would vary, but the common characteristic would be the level of

199. Since many courses could be taught in a variety of ways, individual teachers would decide what legal knowledge their course would cover and which lawyering competencies their course would teach. Much as now, course content would vary both among different professors and over the course of an individual professor's career.

200. For a list of lawyering competencies, see Marjorie Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQUIRY 620 (2011).

201. It is important to note that the choice of which courses to teach as foundational brings its own entailments. For instance, excluding corporations from foundational courses may perpetuate the myth that the economy is still dominated by transactions among individuals. A first-year without exposure to agency regulations may perpetuate the myth that law is made only or even primarily by courts and legislatures. Treating jurisprudence courses as capstone courses and thus postponing them until the second half of legal education may significantly limit students' ability to see the law from a vantage point so different from those inherent in traditional case method courses. The process of deciding which courses to teach as foundational courses thus invites us to notice and ask these typically unasked questions.

202. Of course, any of these courses could be taught as foundation courses if entry-level legal analysis is the primary pedagogical goal. The distinction is not the particular doctrine to be taught but rather the teaching methods and goals to be used.

203. The categories would proceed in order loosely, much as they do now, but they certainly would not match neatly with the three years of law study. They could go a long way, however, toward implementing a vision for the problematic third year of law study.

knowledge and expertise required and the experience of using a breadth of knowledge and a variety of competencies, both cognitive and performance-based.²⁰⁴

Would legal education be better off today if the law faculties of the past had created categories like these? That question requires analyzing the entailments these alternative categories would bring and the particular work they would do.

The Entailments of Foundation, Bridge, and Capstone Courses

The entailments of this set of categories likely would have been quite different from the entailments of the “doctrine” and “skills” categories. Professors teaching contracts, torts, property and criminal law (or whichever courses were selected as foundational) might have been encouraged to think not only about doctrine for its own sake but also to think more precisely about what analytical skills students need and the pedagogies that would teach more of those skills and teach them more directly. They might have intentionally identified the skills required for success on their own final examinations and made sure they were actually teaching those skills. They also might have realized that their final examinations did not test all the analytical skills they had tried to teach. In response, they might have changed their final examinations or added other assessment activities. Since more of those skills would likely be included in a standard legal writing course, their legal writing colleagues could have helped them identify the missing skills and improve analytical assessment for the course.

Inclusion in a “foundation” category might have invited a different substantive development for legal writing as well. If legal writing courses had been included in the same curricular category as other first-year courses, then legal writing faculty might have been included more fully as colleagues of professors teaching the other first-year courses. This group of faculty would have had a lot in common, after all. They would be teaching the same students, and they might have thought of themselves as sharing common pedagogical goals. As newer faculty members, legal writing faculty might have been mentored by property, contracts, and torts colleagues, just as other new faculty often are mentored by more senior faculty teaching subject areas other than their own. Not seeing their course as something so different from existing courses, legal writing faculty might have placed more emphasis on the doctrine of legal method and the scholarship of legal reasoning. In those early years, they might have begun to research the literature of composition and persuasion, looking to assemble the theoretical raw material for their new discipline. They might have been encouraged to produce their own theoretical and doctrinal scholarship from the start.

204. For a progressive curricular plan based on learning theory concepts, see generally Sarah O. Schrup & Susan E. Provenano, *The Conscious Curriculum: From Novice Towards Mastery in Written Legal Analysis and Advocacy*, 108 *Nw. U. L. Rev.* 80 (2013).

These different categorical decisions probably also would have affected legal education as a whole. Integrating the pedagogies of skills and doctrine might have become the norm or at least more common than it is today. These categories could have organically grown the very kind of curriculum planning proposed by Carnegie, Best Practices, and MacCrate—curricular planning in which each course identifies the particular values, skills, and doctrine it will teach. The categories certainly would have facilitated conceiving of the law school curriculum as a progression of learning, just as current proposals recommend.²⁰⁵

Also, since more “doctrinal” courses would have included skills components, more skills education would have been provided for the same number of dollars. The integration would have broadened “doctrinal” scholarship to pay more attention to the ways in which doctrine, theory, and skills interact. Perhaps most important, virtually all faculty members would have found themselves teaching in more than one category—possibly in all three—so their professional identities would not have been so associated with the kinds of pedagogies they used and the subgroup of others who use that same pedagogy. In other words, they would have been less likely to divide into two segregated groups. Hiring processes probably would have placed more value on practice experience in addition to the excellent academic credentials that still would have been required. Better formative and summative assessment techniques would have developed organically rather than as a result of outside pressures on unwilling faculties. Faculty status issues might not have arisen or at least might not have been so serious, for “skills” would not have become, to some, a pejorative term.

Of course we cannot know what today’s legal education would be like if fifty years ago law schools had welcomed “skills” education and organized their curricular categories for integration rather than for exclusion. The rosy picture painted above may be an exercise in extreme optimism. But even accounting for optimism, the current crisis of curricular reform likely would have been less serious. Most important, the process of making today’s necessary reforms would have been more feasible, for the language and categories of legal education would facilitate rather than obstruct those reforms.

As modern metaphor theory has taught us, categorization is already a form of decision-making. The curriculum committees of the past did not make the wisest categorical decisions,²⁰⁶ but it is not too late. Metaphor theory also teaches that categorization is “contingent on cultural conditions and practices

205. Nancy B. Rapoport, *Rethinking U.S. Legal Education: No More “Same Old, Same Old,”* 45 CONN. L. REV. 1409 (2013); Schrup & Provenzano, *supra* note 204, at 85-90. The CARNEGIE REPORT sees legal education as best conceived progressively and recognizes the virtue of “capstone” courses. CARNEGIE REPORT, *supra* note 4, at 195. BEST PRACTICES sees legal education as a three-tier progression. BEST PRACTICES, *supra* note 25, at 276-81.

206. And like the categories of which Llewellyn wrote, those decisions have “persist[ed long] after the fact model from which the concept was once derived has disappeared or changed out of recognition.” Llewellyn, *supra* note 140, at 454.

that are themselves constantly in flux.”²⁰⁷ If it is willing, today’s curriculum committee can choose different terms and categories.

If we were to rethink our categories, we should begin by asking consciously and directly what kinds of entailments we want to encourage. Then we could look for categories that do the work we want them to do rather than categories that further ingrain the work we now regret. So what entailments should we seek? Based on the recommendations of the Carnegie Report, Best Practices, and the MacCrate Report, we should choose categories that identify commonalities across the old categorical lines. To avoid almost inevitable faculty face-offs, there should be more than two categories, but to be workable, there should be no more than three. The new categories should mix particular pedagogies and assessment practices and encourage integration within each course. They should avoid labels that seem to privilege any of the categories. They should encourage learning progressions and encourage legal analysis instruction that meets validity criteria established in the assessment literature. They should encourage broader scholarship across the board. Perhaps most important, the new categories should be structured so that virtually all faculty members would teach courses in more than one category, perhaps even in all categories during a particular year.

No set of criteria can be perfect, but the “foundation,” “bridge,” and “capstone” categories described in the imaginary historical description above would meet the most important criteria. They identify commonalities across existing boundaries. They discourage faculty face-offs by avoiding a dualistic structure. They track the desired curricular progression, mixing pedagogies and assessment practices within each category. They avoid labels likely to create hierarchies. They encourage legal analysis instruction that can meet validity criteria. They encourage broader scholarship. Perhaps most important, most faculty would be members of at least two of the categories, and many would teach, over time, in all three. Course descriptions for courses in each category could identify the particular doctrine they will cover, the theories they will introduce, and the particular skills they will teach. To update their course descriptions, faculty in each category might find themselves talking to each other and sharing ideas. What a novel thought.

As the Carnegie Report aptly notes, curricular integration is most likely to occur and will be most effective if faculty members develop teaching experience in the apprenticeships other than their own.²⁰⁸ The fact remains, however, that faculty members do think of one of the “apprenticeships” as “their own” and of the others as foreign territory. The use of the commonly accepted categories of “doctrinal” and “skills” comes with at least fifty years of emotional and attitudinal baggage. If curricular reform asks the veterans of “skills” wars not only to make peace but also to become teachers partially on the other side of the great wall, the odds of success are significantly reduced.

207. WINTER, *supra* note 1, at 98.

208. CARNEGIE REPORT, *supra* note 4, at 196.

It is time to adopt categories that facilitate the kind of legal education we want to encourage.

Conclusion

As the Carnegie Report correctly observes, refashioning the curriculum will require a change of outlook on the part of many.²⁰⁹ BEST PRACTICES has provided an excellent discussion of some of the reasons this change in outlook is difficult to achieve,²¹⁰ but the advantages of being open to change are great. As Frederick Schauer has observed:

[A]ll disciplines . . . should find it useful to engage in serious self-reflection and self-criticism. Without it, the contingent methods and perspectives of the discipline begin to seem inevitable, making the exploration of alternatives less possible, and the understanding of the discipline itself less rich. When a discipline challenges its own understandings, it takes a step towards deeper appreciation of those understandings themselves. Because [a certain set of ideas is] the norm, there is a risk of forgetting that [those ideas are] contingent and not inevitable.²¹¹

As difficult as this sort of self-reflection undoubtedly is, there is hope. “Crystallized”²¹² categories do not change easily, but categories are never final.²¹³ In addition to teaching us how categories can entrap us, metaphor and category theory offers a way to transcend categorical boundaries. As Lakoff and Johnson have observed, “When the chips are down, meaning is negotiated: you slowly figure out what you have in common, what is safe to talk about, how you can communicate unshared experience or create a shared vision. With enough flexibility in bending your world view and with luck and skill and charity, you may achieve some mutual understanding.”²¹⁴

The Carnegie Report identifies the overarching pedagogical challenge of legal education as making “the invisible visible, both in the mind of the teacher and the mind of the learner.”²¹⁵ Legal education aims to teach students

209. CARNEGIE REPORT, *supra* note 4, at 90.

210. BEST PRACTICES, *supra* note 25, at 283-86; *see also, supra* note 169.

211. Frederick Schauer, *The Authority of Legal Scholarship*, 139 U. PA. L. REV. 1003, 1003 (1991).

212. Llewellyn, *supra* note 140, at 454.

213. AMSTERDAM & BRUNER, *supra* note 11, at 28 & 37.

214. LAKOFF & JOHNSON, *supra* note 10, at 231-32.

215. CARNEGIE REPORT, *supra* note 4, at 59.

to engage in cooperative activity,²¹⁶ to think precisely and strategically,²¹⁷ and to be skilled categorizers.²¹⁸ In discussions about legal education, it is time for us to practice what we teach.

216. CARNEGIE describes effective teaching in language that could just as well be used to describe an integrated faculty without a doctrine/skills dichotomy: “Effective teaching permits students and teachers to approach alignment of understanding. From this springs the possibility of cooperative activity, such as the exploration of ideas or the solving of problems together. . . . Pedagogy is thus at the heart of the wonder of human culture—our species’ capacity to collectively represent our world in ways that permit the sharing and transmitting of understanding, as well as the criticism and improvement of our understanding over time.” *Id.* at 19.

217. *Id.* at 54-55.

218. *Id.* at 54.