

**THEORY WITHOUT PRACTICE IS EMPTY; PRACTICE WITHOUT THEORY IS BLIND:
THE INHERENT INSEPARABILITY OF DOCTRINE AND SKILLS***

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What would we say of a medical school where students were taught surgery solely from the printed page? No one, if he could do otherwise, would teach the art of playing golf by having the teacher talk about golf to the prospective player and having the latter read a book relating to the subject. The same holds for toe-dancing, swimming, automobile-driving, hair-cutting, or cooking wild ducks. Is legal practice more simple?

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I. DEBUNKING THE SO-CALLED THEORY-PRACTICE DIVIDE

We hear much about the so-called theory-practice divide in legal education.² I find this particularly fascinating since no such divide can possibly exist either factually or semantically.

* © Harold Anthony Lloyd 2016. Published in LINDA H. EDWARDS, *THE DOCTRINE SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLECTED WOUND* 77-90 (2017). This chapter title paraphrases Kant's famous remark: "Thoughts without contents are empty, intuitions without concepts are blind." IMMANUEL KANT, *CRITIQUE OF PURE REASON* 45 (F. Max Muller trans., Anchor Books 1966)(1781). Kant also says, "Neither of these qualities [i.e., concepts vs. intuitions or percepts] is preferable to the other. Without sensibility objects would not be given to us, without understanding they would not be thought by us." *Id.*

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¹ Jerome Frank, *A Plea For Lawyer-Schools*, 56 YALE L.J. 1303, 1311 (1947) [hereinafter Frank].

² See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 613, 618 (2d ed. 1985) (noting that law schools are "hybrid institutions" derived from "the historic community of practitioners and "the modern research university"); See also WILLIAM M. SULLIVAN ET AL., *CARNEGIE FOUNDATION, EDUCATING LAWYERS: PREPARATION FOR THE*

In examining the alleged divide, Mark Spiegel provides straightforward preliminary definitions of “theory” and “practice” which I shall also adopt for purposes of this chapter:

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. By “practice” we commonly mean the doing of something. Practice is also associated with the idea of repetition; therefore, practice sometimes is equated with the gaining of skills because one gains skills by repetition.³

As shown below, any alleged sharp “divide” between “theory” and “practice” is an illusory one. Until we dispel this illusion, we cannot sensibly discuss, much less achieve, any proper “balance” of “practice” and “theory” in legal education.

It is easy to see that a sharp doctrine-skills divide is factually false. Will Rhee sets out, among others, four straightforward facts that belie any practice-theory divide:

First, legal practitioners have authored innovative legal scholarship, the supposed bastion of legal theory. Second, legal academics have become renowned legal practitioners. Third, some legal doctrinal concepts currently taken for granted in practical lawmaking were first developed or popularized in legal scholarship Finally, practical lawmaking has inspired new legal theory and academic scholarship.⁴

It is therefore simply not factually true that any sharp practice-theory divide exists.

PROFESSION OF LAW 5 (2007) [hereinafter CARNEGIE SUMMARY 2007] (noting that law schools are “hybrid institutions” derived from “the historic community of practitioners and “the modern research university”); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577, 580 (1987).

³ *Id.*

⁴ Will Rhee, *Law and Practice*, 9 LEGAL COMM. & RHETORIC: JAWLD 273, 280-81 (2012) (Rhee cites a substantial number of examples to support his point). An obvious example of a legal practitioner who has “authored innovative legal scholarship” would of course be Brandeis who introduced the concept of the “Brandeis Brief”; such a brief details underlying facts and actual harm to parties where matters of individual rights are concerned and “where looking at prior legal rules does not really inform [one] about the importance of cases.” See MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 219-21 (2009).

Additionally, semantic problems with claims of a sharp theory-practice divide exist at both a surface and at a deep level. At the surface level, the claim is self-defeating because theory by definition seeks to explain practice.⁵ To remove practice from theory would therefore leave theory empty with nothing to explain.

To grasp the still-deeper semantic problems with claims of a sharp theory-practice divide, we need to understand why the term “meaning” in any useful sense does not permit such a divide. To understand why “meaning” in any such useful sense does not permit a sharp practice-theory divide, we need to know what “meaning” means.

Any workable theory of meaning must involve both sense (the cognitive or mental component of meaning) and reference (that to which the term refers as fact or fiction).⁶ Meaning must have a sense component to account for the different meanings the same person, place, or thing may have. Meaning must also have a reference component to tie meaning to the objective world of experience and to tie together the different meanings that the same person, place, or thing may have.⁷ For example, sense and reference allow a lawyer to refer to the same individual (the reference) as either the “President” or the “Commander In Chief” (with the difference of meaning thereby lying in the different senses of the terms).⁸

In light of the mixed role of sense and reference in meaning, what would be a good definition of meaning? If one understands “experience” to include *both* external

⁵ See Spiegel, *supra* note 2, at 50.

⁶ See WINFRIED NOTH, HANDBOOK OF SEMIOTICS 92-99 (1995).

⁷ See *id.*

⁸ See *id.*

experience (i.e., objective or public experience) *and* internal experience (i.e., private⁹ experience such as thoughts and memories), the following modified version of Charles Saunders Peirce’s pragmatic notion of meaning as a common-sense¹⁰ solution works well:

Consider what actual or possible¹¹ experiential effects we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.¹²

This definition of meaning easily squares with how we use “meaning” in everyday life, in law school, and in law practice. If one asks good lawyers what a certain statute means, for example, such lawyers would “flesh it out,” would describe how the statute would play out in practice. If one asks good law professors what a fictional contract means, they would do the same. For example, if asked to explain a fictional indemnity agreement, a good law professor would include specific scenarios that could play out under the terms as written. Thus, if the agreement contained a cap of one hundred dollars on the indemnitor’s liability, the explanation would include a statement

⁹ By private experience I mean experience private to the individual such as a thought or pleasant or painful sensation.

¹⁰ I use this term both as commonly understood and as recognizing the shared or common “sense” of thought and action.

¹¹ Again, this can include private experience.

¹² Peirce’s formula reads: “Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.” CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 5.402 (Charles Hartshorne & Paul Weiss eds., 1963). To the extent Peirce’s formula focuses only on objective experience and therefore results in beliefs being synonymous if they cause the same habits, I would disagree. *See* JOHN P. MURPHY, PRAGMATISM FROM PEIRCE TO DAVIDSON 25-26 (1990). For example, I could have a habit of walking from my desk to the front door in just the same manner whether I believe that the postman is at the door or whether I believe that my neighbor is at the door.

that in no scenario would the indemnitor be required to pay more than that amount. If a term were vague or ambiguous, the explanation would include tales of how various persons might read the term and how such tales might or likely would turn out.

This common sense notion of “meaning” also fits well within the findings of modern cognitive research suggesting that meaning is embodied. As Lakoff puts it:

Thought is carried out in the brain by the same neural structures that govern vision, action, and emotion. Language is made meaningful via the sensory-motor and emotional systems, which define goals and imagine, recognize, and carry out actions. Now, at the beginning of the twenty-first century, the evidence is in. . . . [that the] mind is embodied.¹³

This embodied approach recognizes that meaning comes “via the sensory-motor and emotional systems, which define goals and imagine, recognize, and carry out actions.”¹⁴ It also recognizes that shortly after we hear or read words, “we engage our vision and motor systems to recreate the non-present visions and actions that are described.”¹⁵ Interestingly, when we perform these recreations, we do not take a purely-theoretical or “God’s eye” or “canonical” view; instead, “we mentally simulate them from the perspective of someone actually experiencing the scene.”¹⁶ This involves motor simulation which is

intrinsically about projecting oneself into a body—often someone else’s—and, when [one simulates] what it would be like to do things someone is described as doing, [one is] taking their perspective, not merely in a visual way, but in terms of

¹³ George Lakoff, *Foreward* to BENJAMIN K. BERGEN, *LOUDER THAN WORDS*, at x (2012).

¹⁴ *Id.*

¹⁵ *Id.* at 223.

¹⁶ *Id.* at 71; *see also* GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 132-133 (2003) [hereinafter *METAPHORS WE LIVE BY*] (on the “canonical person.”).

what it would be like to control their actions. Understanding language, in multimodal ways, is a lot like being there.¹⁷

Such projections obviously have negative implications for those who would teach law as a purely “theoretical” or “canonical” discipline. Learning law like everything else must involve simulations that are “a lot like being there,” i.e., like being in practice.¹⁸

The existence of abstract concepts does not provide a counter example here. To the extent these simulations involve abstract concepts, we may translate them metaphorically into more concrete terms.¹⁹ For example, “consideration” can become concrete when defined as “something of value (such as forty dollars) given in exchange for a promise to do something (such as mowing one’s yard).²⁰

In fact, embodied recreations serve more than just pure semantic purposes. We can actually do practice mental recreations to improve performance.²¹ For example, bowlers performed better when they visualized proper bowling techniques.²² Not surprisingly, the reverse also holds true: when bowlers visualized improper techniques,

¹⁷ *Id.* at 70. “Being there” does not necessarily always mean conscious simulation. Something already done many times may not require simulation before action. *See id.* at 239. *See also* Harold Anthony Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 *FIRST AMEND. L. REV.* 237, 251-52 (2013) (discussing the distinction between signs and signals).

¹⁸ *See* BERGEN, *supra* note 13, at 70.

¹⁹ GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 45 (1999) (1999) [hereinafter *PHILOSOPHY IN THE FLESH*].

²⁰ Consistent with this, Frank also notes (unfortunately crudely) that “Abstract theory divorced from concrete practical interests is usually dull. Montessori discovered that to teach half-witted children arithmetic became easy if they were given practical activities, interesting to them, in which adding, subtracting and multiplying were necessary aids to the desired specific achievements. They learned by ‘doing.’ If that method is good for half-wits, why not for law students (who are presumably whole-wits)?” Frank, *supra* note 1, at 1317.

²¹ BERGEN, *supra* note 13, at 25.

²² *Id.*

their actual performance became worse.²³ Linguists call such knowledge of how to interact in practice with an object (whether a bowling ball or a contract) “affordances” of that object.²⁴

Such research on improving affordance knowledge (i.e., “knowledge of how to interact with an object”) has obvious implications for the law school classroom. Time in class presents an invaluable opportunity for students to blend “theory” with simulation of lawyering that will translate into better actual performance.²⁵ The bowling research also shows how important it is for law professors to get the simulation opportunities right: good simulations lead to good results and bad simulations lead to gutter balls instead of strikes.²⁶ Thus, an understanding of embodied meaning highlights the importance of having students see, for example, actual contracts in contract class, actual complaints in civil procedure, “video or audio presentations of excellent advocacy,” and of course sample exam questions and answers if there is to be an exam.²⁷

To be clear here, my conception of embodied meaning is not that meaning and the mind equate to brain and body functions. This is false on its face. For example, the aromatic cup of coffee that I smell and see twelve inches away from me on my desk cannot be in my brain or body. Things cannot be in two places at once. Furthermore, the sight and smell and any connotations that I associate with them are on their face qualitatively different from the cells that make up my brain and sensory systems.

²³ *Id.*

²⁴ *See id.*, at 84.

²⁵ *See id.*, at 25.

²⁶ *Id.*

²⁷ *See* Christine N. Coughlin, Lisa T. McElroy & Sandy C. Patrick, *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361, 379-80 (2010).

Additionally, the meaning of “brain” cannot be just the brain since we can have different understandings of what brains are and how they work.²⁸

For me, embodied meaning simply means that “the peculiar nature of our bodies shapes our very possibilities for conceptualization and categorization.”²⁹ That is, embodied meaning depends upon the specific structure of our bodies, including our sensory and motor systems.³⁰ In other words, “the very properties of concepts are created as a result of the way the brain and body are structured and the way they function in interpersonal relations and the physical world.”³¹ For example, if we were “uniform stationary spheres floating in some medium and perceiving equally in all directions,” what would we mean by front and back or right and left?³²

Thus, when meaning is properly understood, legal theory becomes inseparable from practice because meaning itself must involve interaction with the world of experience.³³ To give a concrete legal example, we cannot talk about a lease in purely theoretical terms. First, even if for some strange reason we wished to teach leasing

²⁸ For example, we might think of the brain as a living computer whose processes are mathematical calculations or we may think of the brain as some kind of living container. See PHILOSOPHY IN THE FLESH, *supra* note 19, at 51, 405.

²⁹ *Id.* at 19.

³⁰ *See id.*

³¹ *Id.* at 37.

³² *Id.* at 34. Consistent with this, Lakoff and Johnson distinguish between “neural embodiment” and “phenomenological embodiment,” (*Id.* at 36), and address phenomenological or cognitively-conscious, cognitively unconscious, and neural levels of meaning. *Id.* at 102-04, 108-09. *See also id.* at 112, 570. All of these various sorts of meaning are, again, interactional and are thus inconsistent with disembodied approaches that take “two intertwined and inseparable dimensions of all experience—the awareness of the experiencing organism and the stable entities and structures it encounters—and erects them as separate and distinct entities called subjects and objects.” *Id.* at 93. Embodied meaning, by the way, is not uniquely human. How our pets and other living creatures categorize also “depends upon their sensing apparatus and their ability to move themselves and to manipulate objects.” *Id.* at 17.

³³ *See, e.g., id.* at 37.

without ever looking at a lease, all of the “theoretical” terms we would use tie back into experience and are understood through experience. If we discuss “rent,” for example, we have to say what that means in terms of experience. This is true even if we merely define “rent” as “something paid in exchange for usage of land.” In addition to how the terms “usage” and “land” do or could play out in experience, “something paid” also involves the world of experience, albeit at a very imprecise level of description. Someone interested in the subject of leasing would want to know more, would want to know what forms this “something paid” actually takes. Someone interested in the subject of leasing would also want to know the possible ways of documenting this obligation to pay “something” as rent since that documentation (to the extent it exists) cannot be separated as a practical matter from the obligation to pay rent itself. Again, even if for some reason one wished to teach leasing without looking at actual lease provisions such as rent provisions, the answer to this documentation question would require descriptions of how this documentation might be done in the world of experience. Thus, there can be no pure theory here, only degrees of myopia to the extent hands-on experience is omitted. Any so-called sharp theory-practice divide is therefore a chimera.

Such blindness of pure theory is of course not unique to law. One must, for example, distinguish between the study of sailing and the mere study of sailboats. To learn to sail, a serious student would not just read books and talk about boats under the tutelage of someone who had never sailed a boat. Who would rationally take charge of a sailboat with just such an “education”? To learn sailing, one must actually sail a boat. Again, linguists call such knowledge of how to interact with an object “affordances” of

that object.³⁴ Using that terminology, how could someone planning to sail a boat for a living afford not to acquire good affordance knowledge of sailing boats in actual water?

Nothing changes here *even if* one somehow believes that an education in sailing should be “purely theoretical” with the actual practice taught by others after graduation. The examination above of the nature of meaning shows that the very “theoretical” concepts involved in such a “purely-theoretical” course are inseparable from practice: if meaning itself requires us to consider the experiential effects we conceive the object of our conception to have, even a so-called “purely-theoretical” concept cannot be divorced from experience and thus practice. Thus, even just studying sailboats as opposed to sailing cannot be divorced from practice. Much like the lease and rent example discussed above, one cannot, for example, have a good notion of what “a sail” means without having seen and touched one and without having otherwise seen the ways a sail works in the actual world.³⁵

In addition to the errors discussed above, it is also hard to see how any alleged divide between theory and practice does not suffer from the same kinds of problems that afflict Cartesian dualism.³⁶ Descartes believed that mind is an inherently different substance from body, with the former essentially involving thought or consciousness and

³⁴ BERGEN, *supra* note 13, at 84.

³⁵ The art historian, “scientist, or “connoisseur” who is not an artist himself can demonstrate this point as well. For example, in the latter part of the twentieth century, art historians determined that a “sculpture” made by three teenagers with a “chisel, a screwdriver, and a Black and Decker drill” was an original Modigliani. Charles Hope, *The Art of the Phony*, N.Y. REVIEW OF BOOKS, August 15, 2013, at 51. Though “connoisseurs and scientists can often be the forger’s best friends,” one might expect better of the affordance knowledge that erudite actual sculptors would bring to reviewing works for authenticity. *See id.*

³⁶ *See also* Harold Anthony Lloyd, *Raising the Bar, Razing Langdell*, 51 WAKE FOREST L. REV. 240-241 (2016).

the latter essentially involving bulk or spatial extension.³⁷ Although he believed minds and bodies were causally interrelated, he not surprisingly could never clearly explain how this worked.³⁸ How can dimensionless thought even touch, much less move something physical? The very notion seems to involve a contradiction: though thought has no dimensions it can nonetheless somehow take hold of and move a body? Gilbert Ryle famously mocked this notion with his “ghost in the machine” label—the mind is somehow a nonphysical ghost that resides in and operates the body.³⁹

Any purported theory-practice divide raises similar questions. If theory is essentially different from practice, how can the two interrelate? How does dimensionless theory grab hold of practice? In a way, this seems even more confusing than the Cartesian mind-body problem. There, at least, the ghost was purportedly in the machine—here it is not clear where the ghost could or should reside.

Returning to our experiential notion of meaning removes these Cartesian quandaries. Again, if one understands “experience” to include *both* external experience (i.e., objective or public experience) *and* internal experience (i.e., private experience such as thoughts and memories), these problems evaporate. Both mind and body and theory and practice are defined in terms of the same thing: how they play out in experience.⁴⁰

³⁷ THE OXFORD COMPANION TO PHILOSOPHY 579 (Ted Honderich, Ed. 1995).

³⁸ *See id.*

³⁹ *See id.* at 312-313.

⁴⁰ The more monistic approach I suggest of course raises its own questions and I lack the space to explore them in detail here. For purposes of this article, suffice it to say that, with some caveats, I am generally in sympathy with William James who, as Graham Bird puts it, distinguishes “ordinary mental experiences and physical items . . . by the contextual relations among pure experiences.” GRAHAM BIRD, WILLIAM JAMES 120 (Routledge & Kegan Paul 1986). As to the first caveat, I would tend to agree with James that “purity” of experience here is relative to the “unverbalised sensation it embodies” and that adults in ordinary circumstances do not experience such purity. *See id.* at 99. I

II. BEYOND THE DEBUNKED DIVIDE

If we reject the alleged theory-practice divide, where does this leave us? First, we should be honest about the kinds of degrees we offer. Like students of sails, students of sales (and other areas of the law) need to be clear on their educational goals. Thus, law schools should be clear on the possible multiple meanings of “legal education.” The study of law in its broadest sense includes the study of law as a craft as well as any “empirical description” of the law and of what lawyers and judges do.⁴¹ Do such students wish to study law in this broadest sense or do they simply wish to study descriptions of laws and what judges and lawyers do? If the former, an examination of the nature of meaning shows us that this requires hands-on practice. If the latter, a narrower course of study should be recognized as a separate and distinct course of study though even here a purely-theoretical approach would be blind for the reasons discussed above.⁴² Law schools are beginning to recognize the need for additional degree types and are beginning to offer non-J.D. degrees such as Masters of Studies in Law.⁴³

would therefore speak in terms of the relations among experiences, not just pure experiences. Second, I am sympathetic with James’s belief, as Graham puts it, that experience has “a certain character of ‘self-transcendence’ but this is not to make a reference to some inexperiencable [sic], independent reality but only to other accessible parts of experience itself.” *Id.* at 111. Finally, I am also sympathetic with Peirce’s three categories of experience as shedding further light on the nature of experience and the various ways it functions. *See, for e.g.*, CHRISTOPHER HOOKWAY, PEIRCE 106 (Routledge & Kegan Paul 1985). I hope to explore these lines further some future day.

⁴¹ *See, e.g.*, Spiegel, *supra* note 2, at 587-589 (discussing Llewellyn’s division of legal theory into (1) “the study of the ends and values involved in law (legal philosophy),” (2) “the use of empirical description (legal science),” and (3) “the study of the craft aspects of law, such as the machinery of justice and the methods of lawyers and judges (jurisprudence).”).

⁴² By study of law, I mean the common notion that one studies to be a lawyer in much the same sense as the study of medicine means that one studies to become a doctor. A skills component is involved in both. *See* Robert I. Reis, *Law Schools Under Siege: The Challenge to Enhance Knowledge, Creativity, and Skill Training*, 38 OHIO N.U. L. REV.

Second, rejecting the divide allows us to see the importance of embracing the humanities in legal education, especially by recognizing the ubiquitous roles of metaphor in law. Metaphor operates as “understanding and experiencing one kind of thing in terms of another.”⁴⁴ For example, if we say that Greenacre is a square, we have used metaphor by framing Greenacre as a geometric space involving perfect lines, angles and points that of course do not exist in the real world.⁴⁵ In fact, we speak metaphorically even if we just speak of Greenacre itself, since plots of land that we delineate and our notions of fee

855, 879 (2012) (discussing the skills component of medical school as well as the skills component of schools of dentistry, pharmacology, and architecture and environmental design). *See also* CARNEGIE SUMMARY 2007, *supra* note 2, at 4 (noting that “law schools could also benefit from the approaches used in education of physicians, teachers, nurses, engineers and clergy, as well as from research on learning.”).

⁴³ Students may wish to take this course of action, for example, because they believe that such an acquaintance with various laws and the way lawyers think and reason will help them in their specific jobs. *See, e.g., Master of Studies in Law: About the MSL Program*, WAKE FOREST, <http://msl.law.wfu.edu/about/> (last visited July 24, 2013) (describing areas where a Masters of Studies in Law degree might be appropriate).

However, even for these students, the very nature of meaning shows us that a good deal of hands-on practice remains required. Even though they may not wish to practice law, non-J.D. students wishing to learn sales laws cannot have a good notion of what these laws mean unless they have reviewed documents and hypothetical situations to which these laws apply. Any sharp theory-practice divide is thus as much a chimera at the non-J.D. level as it is at the J.D. level.

⁴⁴ METAPHORS WE LIVE BY, *supra* note 16, at 5. Similarly, Lanham includes the following as one of his definitions of “metaphor”: [A]ssertion of identity rather than, as with Simile, likeness.” RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 100 (2d ed. 1991). The critical point here is that metaphor says that something is what it is not. For example, Lakoff explores the different conceptual implications of the metaphor “argument is war” as opposed to the metaphor “argument is a dance.” METAPHORS WE LIVE BY, *supra* note 16, at 4-5. A lawyer who takes the former view of “argument” will likely have a quite different practice from a lawyer who takes the latter view. For the distinction between metaphor and metonymy (i.e., the use “of one entity to refer to another that is related to it” such as when a server refers to a customer as “the ham sandwich” because of what he ordered), *see id* at 35-40.

⁴⁵ Robert J. Rovetto, *The Shape of Shapes: An Ontological Exploration*, 1 <http://ceur-ws.org/Vol-812/paper9.pdf> (last visited July 30, 2013) (explaining the difference between geometric and physical shapes).

simple do not actually exist in nature itself.⁴⁶ Because concepts such as Greenacre metaphorically characterize something else in terms of that concept, our “ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature.”⁴⁷ It is the humanities that teach us the critically important ability to recognize and handle metaphors.

Furthermore, legal categories themselves are metaphors. Categories are “sets of things” “treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other,”⁴⁸ Categories are thus metaphors because they treat things as if they were other things.⁴⁹ Lawyers (and all other thinkers) use such categories to organize experience in ways that make such experience easier to handle.⁵⁰ By categorizing experiences together, lawyers do not have to debate every new experience but can treat “similar” experiences in ways they have already decided.

Since even “natural” itself is a conceptual term depending upon how we define nature, there are no natural categories apart from our definitional systems.⁵¹ Categories, in other words, come from us and not from some other world in itself.⁵² Of course, for these categories to be good ones, they must work “well enough for [the user] to function.”⁵³ To the extent we need to create and debate legal categories, a larger stock of philosophical, literary, historical, and other knowledge will provide a richer source of

⁴⁶ See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 27-28 (2002) [hereinafter AMSTERDAM & BRUNER].

⁴⁷ *METAPHORS WE LIVE BY*, *supra* note 16, at 3.

⁴⁸ AMSTERDAM & BRUNER, *supra* note 46, at 20

⁴⁹ See *supra* note 48.

⁵⁰ AMSTERDAM & BRUNER, *supra* note 46 at 21-26.

⁵¹ See *id.*, at 50.

⁵² See *id.* at 27.

⁵³ *PHILOSOPHY IN THE FLESH*, *supra* note 19, at 21.

potential metaphors.⁵⁴ A good legal education therefore requires good knowledge of the liberal arts and humanities.⁵⁵

Third, we must re-think the form of the good, post-divide law school course book. Good course books are not case centered unless the subject itself is case centered and cannot be presented in a more thorough and efficient manner.⁵⁶ Good course books provide explanations of the law comparable to the quality and level of hornbooks, especially given the importance of legal categorization. Good course books (or their supplements) contain the primary public and private materials needed to acquire reasonable student-level affordance knowledge of the subject.⁵⁷ Good course books contain good problem sets for each day of class. Students can answer questions in IRAC form,⁵⁸ can discuss them in class, and can otherwise be evaluated regularly on their answers. And good course books should have a shelf-life well beyond the course; they should be books the student would wish to keep for continued use.

⁵⁴ Categories also come in large part from stories, theories, and religion or other normative sources. *See id.* at 29-32.

⁵⁵ The humanities are “those branches of knowledge, such as literature and art, that are concerned with human thought and culture.” *Humanities*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2007).

⁵⁶ Constitutional law quickly comes to mind as one qualifying example. The Supreme Court’s Constitutional cases as a practical matter vie at any given point in time with the text of the Constitution itself. The texts of Constitutional cases can therefore require the same careful parsing as the text of the Constitution itself.

⁵⁷ For example, a good course book on contracts (either in itself or in a supplement) includes relevant statutes (such as relevant portions of the Uniform Commercial Code) as well actual contracts to begin teaching both the embodied meaning and affordance knowledge of contract law.

⁵⁸ This requires the student to spot the issue(s), identify the rule(s), apply the rule(s), and reach a conclusion—in other words it requires them to put their thoughts in the form of a good thought.

Fourth and finally, we must re-think faculty hiring standards. Since practice cannot be separated from theory, a well-rounded legal scholar needs significant practice experience.⁵⁹ In the words of Jerome Frank,

Who would learn golf from a golf instructor, contenting himself with sitting in the locker-room analyzing newspaper accounts of important golf-matches that had been played by someone else several years before? Why should law professors be like Tomlinson? “This I have read in a book” he said, “and this was told to me, and this I have thought that another man thought of a Prince in Muscovy.”⁶⁰

Of course, we should not throw out the baby with the bathwater. Not all faculty members must meet this standard. A historian, philosopher, or linguist, for example, might well bring humanities skills of great benefit to a law school.⁶¹ But a person lacking substantial practice experience who is hired solely to teach purely-legal courses does not fit within the mold of such an exception.

⁵⁹ It is hard to see how “significant practice experience” can mean less than three years of solid practice experience. Almost half of the law firms in one recent survey have had clients who have refused to pay for time billed by associates with fewer than three years of experience. David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=2& (noting that a recent American Lawyer survey “found that 47 percent of law firms had a client say, in effect, ‘We don’t want to see the names of first- or second-year associates on our bills.’”). Why should law students paying for a legal education expect less experience than clients paying for legal services? For reasons previously given, I would set the minimum bar at five to ten years of significant practice experience. See Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice and the Humanities*, 49 WAKE FOREST L. REV. 1242 (2014).

⁶⁰ Frank, *supra* note 1, at 1311-1312. The reference is to Kipling’s poem “Tomlinson.” See RUDYARD KIPLING, *BALLADS AND BARRACK-ROOM BALLADS* 129 (1895). For a chilling actual example of Frank’s point at both the national and international levels, see Lawrence Rosenthal, *Those Who Can, Teach: What the Legal Career of John Yoo Tells Us About Who Should Be Teaching Law*, 80 MISS. L.J. 1563 (discussing the incompetent analysis of a legal “scholar” in the Bush torture memos).

⁶¹ Ironically, there appears to be a view among at least some potential law professor candidates that “the further away you get from the humanities the better.” *Id.*

III. CONCLUSION

Having debunked the illusory theory-practice divide, I would stress in closing that good lawyers and good law students seek good affordance knowledge as well as a good liberal education. More precisely, they understand that good legal education, good affordance knowledge, and a good liberal education are in fact inseparable. Good lawyers and law students do not seek the impossible void of theory divorced from practice any more than they seek the impossible gibberish of practice without theory. To paraphrase Kant again, they understand that theory without practice is empty while practice without theory is blind.⁶² They also therefore understand that any approach purporting to elevate theory over practice (or the reverse, should that ever occur) has no place in legal education.

For those worried about the prestige of law school compared to other graduate schools,⁶³ embracing reform does not taint prestige. In fact, it does just the opposite. It elevates law schools academically. Again, as discussed above, practice cannot sensibly be severed from theory since theory cannot sensibly be severed from experience. A law school eschewing any attempt at such severance is thus by definition more academically rigorous than a law school which purports to do the reverse. Additionally, just as winning at the game of chess involves vaster intellectual prowess than merely memorizing the rules of chess and how others have played the game, successful law practice involves vaster intellectual prowess than reading cases and applying them to hypotheticals. Finally, because schools also teaching practice knowledge teach more

⁶² See *supra*, note 18.

⁶³ Spiegel, *supra* note 2, at 610 n.13.

than schools which purport not to teach such knowledge, by definition the former are more demanding than the latter. Where is the shame in that?

To be clear, law schools cannot turn out fully-practice-ready graduates in only three years. Practice-ready graduates would have to be competent attorneys from day one. If competency in the professional sphere is “the ability to perform the activities within an occupation or function to the standards expected in employment,”⁶⁴ no one can reasonably contend that a graduate who has never practiced before can meet the standards expected of a practicing attorney. A three-year law school should impart an excellent familiarity with the core of what lawyers actually do, but this goal should not be confused with competence⁶⁵ or therefore with proficiency or expertise.⁶⁶

Not only can law firms therefore have no reasonable expectation of fully-practice-ready graduates straight out of law school,⁶⁷ they, too, must play their instructional part. Law firms and individual members of the bar should embrace their moral and practical obligation to mentor and train new law graduates. Not only is helping others morally right, it is in the practical interests of the practicing bar for new members to make the bar

⁶⁴ MICHAEL ERAUT, DEVELOPING PROFESSIONAL KNOWLEDGE AND COMPETENCE 187 (1994). Although it is beyond the scope of this chapter to discuss in detail the various definitions of skills acquisition levels, Eraut discusses, among others, the common “Dreyfus Model of Skills Acquisition” which includes five levels: novice, advanced beginner, competent, proficient, and expert. *Id.* at 124.

⁶⁵ *Id.* at 187.

⁶⁶ *Id.* at 124. A detailed discussion of core “familiarities” that good law schools should impart is beyond the scope of this chapter. For a sampling of such proposed core lawyering skills and knowledge, *see, e.g.*, ROBERT MACCRATE ET AL., REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138-141 (ABA 1992) (outlining “Fundamental Lawyering Skills” and “Fundamental Values of the Profession”).

⁶⁷ *See* Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PENN. ST. L. REV. 1119 (2012) (noting that “most senior lawyers bemoan the ability of recent law graduates to ‘hit the ground running.’”).

better and not to make it worse.⁶⁸ Thus, doctrine and skills, practice and theory, merge yet again.

⁶⁸ Bar mentoring programs, for example, recognize this duty. *See, e.g., State Bar Lawyer Mentoring Program*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html (last visited July 25, 2013).