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Function, Form, and Strawberries: Subverting Langdell

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I. Introduction

While many of us are feverishly trying to peg what is the "new normal" in legal education these days, there should be an equally compelling urgency to explore the new normative as well. With "should" as the operative, this notion is itself reflexively normative; but truthfully it is critical that the spirit of pondering over the state of affairs in law schools should unapologetically include experimenting and refining toward enhanced teaching and learning in the legal academy. We should never relegate normativity to an afterthought or a punch line, but rather should always be striving to figure out what law school pedagogy should be, how it best serves our students, and what is next for its development in light of the next new normal of law schools and the next-next new normal after that.

With that idealism in tow, this article turns to addressing an aspect of the law classroom experience that has always come under fire even during the early years of the Langdell case method: the lack of active learning experiences that teach legal reasoning skills in doctrinal courses.[1] Then the article humbly offers a solution. The prevalence of formalism during those early years of American law schools contributed to classroom teaching techniques that limited the

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1. *See* Alfred Z. Reed, Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, with Some Account of Conditions in England and Canada, Bulletin No. 15, 48 (1921) (critiquing how practical training and "even its remnants are not usually regarded by the law schools as worth preserving, now that [law schools] have virtually preempted the entire field of legal education."); *see also* Roy Stuckey et al., Best Practices for Legal Education, A Vision and a Road Map 104 (2007) ("Legal education would be more effective if law teachers used context-based education throughout the curriculum.").

learning of skills on several different levels.[2] What is plainly curious—and ultimately egregious—has been the prevalence of these formalist experiences in our teaching even when movements from legal realism to critical legal studies have rejected formalist thinking.[3] If we no longer subscribe to the formalist tradition and our thinking about the law has progressed since the late 19th century, why do we continue to teach law as if not much has changed?

Sparked by Professor Michele Pistone's efforts toward bringing new ideas to the forefront at her recent LegalED conference, Igniting Law Teaching,[4] I approached answering that question by posing my solution to teaching law differently. The conference, held at American University, Washington College of Law this past April 2014, brought a confluence of teaching and learning ideas together through a new (or at least new to the many of us) presentation format—the TED talk—and, partly because of it, was literally a confrontation with change as we shared our insights.[5] Ultimately, the conference invited innovation in the current crisis in legal education, and this article is just one of a number of fruits of that labor.

Beyond this Part I Introduction, Part II will briefly summarize why the Langdell tradition is at heart a learning model that intrinsically marginalizes active learning and exalts only a limited experience of skills teaching and acquisition and will conclude that the Langdellian tradition creates a hierarchy that juxtaposes knowledge of legal doctrine over skills. Part III will demonstrate a method for law teachers to incorporate skills teaching actively in the classroom, and do so in a way that legitimizes legal reasoning skills and elevates the teaching and learning of skills. Hopefully, as the Conclusion points out, the new normative in law schools should include a continuous engagement with active learning that integrates skills into the doctrinal classroom in a seamless way, rather than a formalist concept of education that isolates and depoliticizes law from practice. Whatever the new normal of law schools looks like now, one thing about the law will not change: The law is a discipline that is brought to life by us and our students through its practice.[6] We cannot ignore that aspect of this field—nor afford to.

2. *See* Steven B. Dow, *There's Madness in the Method: A Commentary on Law, Statistics, and the Nature of Legal Education,* 57 Okla. L. Rev. 579, 580-82 (2004) (discussing legal formalism's influence on the emergence of the case method).

3. *See* Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and After "The Law,"* 60 Vand. L. Rev. 555, 560-76, 580 (2007) (describing the history and influence of American legal movements from Langdell to post-modernists but noting ultimately that" . . . "a major rethinking of legal education has not occurred, really, in over one hundred years.").

4. *See, e.g.*, *'Igniting Law Teaching' a TEDx-style conference*, LegalED (Apr. 4, 2014), http://legaledweb.com/schedule-igniting-law-teaching-april-4th/.

5. *See, e.g.*, Michele Pistone, *Educational Videos for Legal Education*, LegalED Blog (Nov. 11, 2014), http://legaledweb.com/blog/.

6. *See* Menkel-Meadow, *supra* note 3, at 557 ("Law is created by human beings to govern themselves, to create order and social control, and, at its best, to provide justice. So, in my

II. Form Over Function: The Langdellian Hierarchy

For a while the jig has been up; there is no mystery that the case method is an educational model prone to furthering hierarchies. Duncan Kennedy most famously articulated that reality in his Legal Education and the Reproduction of Hierarchy[7] in 1982, and others have followed since then.[8] Pointing out a direct cause-and-effect in law school teaching and hierarchies, Kennedy observed in crit-laden fashion that "[m]uch of what happens is the inculcation through a formal curriculum and the classroom experience of a set of political attitudes toward the economy and society in general, toward law, and toward the possibilities of life in the profession."[9] A recent cadre of law scholars has continued to pronounce the hierarchical potency of Langdell's law school model and examined how such hierarchy "endures"[10]—even after a century and a half since Langdell and the formalists, and since the flaws and inaccuracies in the way the formalists both thought about the law and have taught it have been identified.[11] As Olufunmilayo Arewa, Andrew Morriss, and William Henderson recently articulated, "the development of the current model of legal education [from Langdell] included features that facilitated the establishment of an enduring hierarchy."[12]

Not only is this infiltration of hierarchy historical,[13] but it is also systemic as the categorization between elite and non-elite schools affect significant choices

view, to study how law is made, interpreted, complied with, enforced, or resisted, is to study how law is experienced-by those who make and interpret law, by those who use it and advise others how to use it, and by those who are acted upon by law.").

7. *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Educ. 591 (1982).

8. *See, e.g.*, Philip C. Kissam, The Discipline of Law Schools: The Making of Modern Lawyers 109 (2003) (describing hierarchy in teaching judicial opinions) ("Law professors make many hierarchical observations and normalizing judgments about judicial opinions."); Jay Feinman & Mark Feldman, *Pedagogy and Politics*, 73 Geo. L.J. 875, 896-97 (1984) (describing law school hierarchy in "Darwinian terms") ("The complex hierarchies of law schools, law students, law professors, and lawyers' practice settings are justified as reflecting real differences in the abilities of those stratified. The educational system, from the earliest grades to the law schools, is a process of continually finer sorting of students by natural ability; the function of the system is the selection of talent, rather than the development of talent across the board.").

9. Kennedy, *supra* note 7, at 595.

10. *See* Olufunmilayo B. Arewa et al., *Enduring Hierarchies in American Legal Education*, 89 Ind. L J. 941 (2014).

11. *See, e.g.*, Edward Rubin, *The Real Formalists, the Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 Mich. L. Rev. 863, 879 (2011) ("One problem with the Langdellian approach, as noted above and as Tamanaha's analysis of Formalist legal thought indicates, is that it is less modern than it appears; the classroom dialogue is not intended to teach a skill, but rather an understanding of the judicial process and the common law.").

12. Arewa et al., *supra* note 10, at 949.

13. *See id.* at 945-50.

law schools make including those regarding scholarship,[14] administrative and faculty hiring,[15] and branding and marketing.[16] From another angle, Brian Tamanaha's recent critique of law schools shows the undercurrent of hierarchy that the Langdellian model of American law schools perpetuated.[17] And yet, his proposal to divide law schools into two separate camps—one academic and another vocational—quite possibly shows the susceptibility of dividing the identity of law schools between a hierarchy based on form (academic law schools) over function (vocational law schools).[18]

But the lawyer's penchant for ambiguity and the strategic avoidance of absolutist statements prevent one from saying that Langdell was entirely wrong about legal education. After all, Langdell's efforts were in part addressing the problems of legal education before and up until his time.[19] Even superficially speaking, Langdell's case method was an improvement upon the hit-or-miss training and learning experiences afforded by the apprenticeship model, which eventually led to the conclusion that "reliance on busy practitioners to provide an adequate legal education is an inherently and deeply flawed strategy."[20] Instead, the pedagogical fix that Langdell's model provided was consistency methodologically: "The Langdellian model law school addressed the problem of unmotivated teachers, slowly, by utilizing full-time professors."[21]

More profoundly, other than establishing a more consistent, more readily available professoriate to train lawyers, the Langdellian method was also more steady conceptually and metaphysically. Langdell's view of law as a science became the pedagogy that distinguished the analytical training in

14. *See id.* at 976-90.

15. *See id.* at 990-91.

16. *See id.* at 992-1002.

17. *See, e.g.*, Brian Z. Tamanaha, Failing Law Schools 21-23 (2012). Tamanaha describes the rise of the three-year law school model at Harvard Law School in 1878—presumably at the hands of Langdell—as a process to standardize university-affiliated legal education in order to attract students away from cheaper night law school programs taught by practitioners: "Elite legal professionals who controlled the ABA worried that these new lawyers [from cheaper night law schools] would further tarnish the already sullied reputation of the bar." *Id.* at 21.

18. *See, e.g.*, Robin L. West, Teaching Law: Justice, Politics, and the Demands of Professionalism 20-21 (2014). West critiques Tamanaha's proposal for reforming legal education by deregulating schools into a "bifurcated model" with academic law schools on one level and vocational law schools on another by noting its hierarchical potentials: "[B]ifurcation would lead to a two-tiered and bifurcated legal profession . . . ." *Id.* at 21.

19. *See* Michele R. Pistone & John J. Hoeffner, *No Path But One: Law School Survival in the Age of Disruptive Technology*, 59 Wayne L. Rev. 193, 207-22 (2014) (describing, despite its conceptual flaws, the rise of Langdell's case method for law instruction as a response to remedy the failings of the apprenticeship system of training lawyers).

20. *Id.* at 217.

21. *Id.* at 218.

the academy from legal training done within the apprenticeship model.[22] At the close of the 19th century, it was clear that "[b]y general agreement, the eventual replacement of the law office route by law schools greatly improved the teaching of the analytical skills necessary to a successful career in the law."[23] Thus, the institutionalizing of the legal academy in the 19th century has brought some benefits to educating and training lawyers. Whether it brought an academic legitimacy with all its bells and whistles that greatly improved the apprenticeship model is debatable.[24] The study of law, nevertheless, has been given a methodology.[25] That legacy, and knowing that Langdell was intentionally part of the advance for change in legal education, prompts us to, at least, take some reconciliatory spirit toward improving our teaching as well.

Still, even as we give Langdell his due, the opportunity to reshape the model of legal education is now overdue. Both the nature and concept of modern law have evolved immensely since Langdell's heyday.[26] The body of common law and its accompanying traditions that the modern American legal landscape once inherited now shares the terrain with administrative and regulatory states and the idea of the law's jurisprudential completeness was long abolished when Legal Realism took over.[27] But a strong imprint of Langdell's model, preserved in formalist conceptions, still remains.[28] We see its survival in the way our textbooks are still called "casebooks,"[29] in the way we still conduct our lectures Socratically,[30] in the way we build the content

22. *Id.* at 221-22.

23. *Id.* at 222.

24. *See* Arewa et al., *supra* note 10, at 946-47 (describing Langdell's model at Harvard Law School as the model that emerged successfully after lingering displeasure by legal elites such as Oliver Wendell Holmes, Jr., of previous law school models that resembled trade schools rather than academic institutions).

25. *See* Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 Wis. Int'l L.J. 295, 299-300 (2006) ("As a corollary to Langdell's notion of law as science—that that law is best understood by inductive reasoning from primary sources (appellate decisions)—Langdell introduced the 'case method' of legal instruction.") (citing Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. Legal Educ. 471, 476 (2004)).

26. *See, e.g.*, Menkel-Meadow, *supra* note 3, at 560-76.

27. *See* Rubin, *supra* note 11, at 880 (noting that "common law is no longer the dominant law of the United States" and that "the major part [of the law today] consists of statutes and regulations, the legal machinery of modern regulatory government.").

28. *See* Menkel-Meadow, *supra* note 3, at 580.

29. *See id.* at 563 ("Thousands of law students for many decades were taught essentially with the same methods and from the same casebooks, regardless of region or differing career goals.").

30. *See* Matthew T. Bodie, *Collaboration and Community: The Labor Law Group and the Future of Labor and Employment Casebooks*, 58 St. Louis U. L.J. 61, 62 (2013) ("The Socratic method is still the usual method of instruction.") (citing Edward Rubin, *Should Law School Support Faculty Research?*, 17 J. Contemp. Legal Issues 139, 158 (2008)).

of our courses—especially those in the first year—with canonical cases,[31] in the way we reward a student's ability to analyze cases and reason through analogy and precedence,[32] and in the way we changed the first-year curriculum, usually by adding to the original arrangement of private law courses (torts, contracts, property, etc.) rather than rearranging it for a more transformative set.[33]

Others have attacked the Langdellian law school curriculum, seeing its supposition of the law's autonomy as too hermetic to the point that it excludes other kinds of legal knowledge that would be relevant for law students.[34] Of recent note in the current discourse on the future of legal education, Robin West has articulated that the study of both politics and justice are often overshadowed by the traditional case method and that deficiencies of these kinds of knowledge, despite their actual close relation to the law, in the law classroom present to the current turmoil in law schools.[35] The common law tradition is not as complete as it was once thought. The realists poked holes at the self-proclaimed supremacy of formalism in this way.[36] But over a century, the American legal tradition has also evolved to encompass the vast codification of rules of law and stoke a growing need to study legisprudence and the administrative state in addition to common law traditions.[37] And so if the primary reason to conduct classes Socratically was a belief in the completeness of our inherited body of common law traditions so that a scientific inquiry could be used to study it, and if such an idea about the law is no longer as true

31. *See* Robert W. Gordon, *Simpson's Leading Cases*, 95 Mich. L. Rev. 2044, 2044 (1996) ("Although the ideal of legal science that the 'case method' was supposed to inculcate has faded over the years, the method has spread to every law school in America, and with it the (remarkably durable) repertoire of famous cases that almost every student still encounters in the first year of law study.").

32. *See* R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. Rev. 1515, 1520-21 (2012) (describing how "[t]he case method presumes that lawyers, as social 'scientists,' can study appellate decisions to uncover legal principles, classify and organize these principles, and then develop a structure that will allow them to apply the doctrines to a more general set of facts in order to reach a solution to legal questions" and then noting that "[t]his process of conceptualization and categorization—so heavily emphasized in law schools for the past 150 years—employs an inductive form of reasoning and teaches students to reason from specific examples (i.e., appellate decisions) to universal propositions." (citations omitted)).

33. *See, e.g.*, West, *supra* note 18, at 188-93 (describing changes that would bring teaching of justice and politics into the traditional law school curriculum for more normative results).

34. *See* A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 Wash. & Lee L. Rev. 1949, 2023-24 (2012) (mentioning broadly that "[o]ne consequence of [Langdell's] doctrinal approach is that the study of law is conceptualized as the study of legal rules—a Langdellian innovation—rather than a broader study of legal practice involving the study of legal regulation as a social phenomenon and training in the full array of methods and techniques that legal practitioners must be able to employ." (citations omitted)).

35. *See generally* West, *supra* note 18, at 27-28.

36. *See* Meadow-Menkel, *supra* note 3, at 567.

37. *See* West, *supra* note 18, at 126-28.

as it once was, then the ways in which courses are still taught in that tradition have also been called into question.[38]

Both of these observations often fuel practice-ready criticisms from outside the walls of the academy, and especially from within the profession, because Langdell's formalist concept of the law do not entirely reflect the nature of law practice today.[39] For example, the recent report from the newly formed ABA Task Force on the Future of Legal Education that weighed in on the current turmoil in legal education typifies this practice-oriented criticism by noting that "the core purpose common to all law schools is to prepare individuals to provide legal and related services in a professionally responsible fashion"[40] and that "[t]his elementary fact is often minimized."[41] Consequently, the task force's report prompted a call for more that law schools should do "toward developing the competencies and professionalism required of people who will deliver services to clients."[42] Other examples from the practicing bar have emerged in droves in recent years.[43] Without systemic change, that observation, in the meantime, collides with the traditional case method.[44] Langdell's original obsession with defining a "learned profession" resulted in a model of teaching and learning that reflects the "learned" within the phrase, but often misses

38. *See* Elizabeth Mertz, The Language of Law School: Learning to "Think Like A Lawyer" 26 (2007) (stating that Langdell "linked this method for teaching with an overall substantive theory of law, predicated on the idea that there are foundational legal principles, analogous to scientific law, that are discernable through analysis of the raw data of appellate cases."). Mertz also describes the criticism of the case method: "There have been numerous critiques of Langdell's formalist philosophy and pedagogical system—most notably from the legal realist school of the 1930s, which also pressed for more clinical education in law schools, and more recently from critical scholars within the legal academy. However, despite a number of arguably successful attacks on the substantive underpinnings of Langdell's approach, the method itself appears to have outlasted its theoretical rationale." *Id.* (citations omitted)).

39. *See* Reed, *supra* note 1. The most recently famous of these criticisms from beyond the citadel of the legal academy has been the series of articles that *The New York Times* has written. *See, e.g.*, David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. Times, Nov. 19, 2011 (associating Langdell's case method with lack of practical knowledge taught in law schools: "Mr. Langdell introduced 'case method,' which is the short answer to the question 'What does law school teach you if not how to be a lawyer?' This approach cultivates a student's capacity to reason and all but ignores the particulars of practice.").

40. Final Report, 2014 A.B.A. Task Force on Legal Education 1, 3, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf [hereinafter Task Force Report].

41. *Id.*

42. *Id.*

43. *See, e.g.*, Eunice Park, *Legal Education: Integrating Practical Skills into the Curriculum*, Orange County Law, June 2014, at 16 (2014), *available at* http://papers.ssrn.com/so13/papers/cfm?abstract_id=2446354..

44. *See, e.g.*, Kristen Holmquist, *Challenging Carnegie*, 61 J. Legal Educ. 353, 366 (2011) (arguing that the case method "diminish[es] students' ability to think about the knotty relationship among facts and culture and clients and law.").

the "profession" that the adjective "learned."[45] It also juxtaposes a dichotomy between learned and non-learned.[46] In essence, Langdell's method achieved and delivered us a vision of lawyering, but one that is not receptive to the realities of the profession.[47] So in a very pervasive sense, there is a mismatch.[48]

What would reconcile this mismatch is for the curriculum and pedagogy of law schools to incorporate the transfer of learning legal knowledge—in essence, what is acquired in the course of study—into instrumentality within a life in the law—essentially, practice that would produce the engaged professional.[49] "Transfer of learning" is a concept in education theory representing the process by which we "transfer our previous learning and experience in order to more quickly and efficiently learn a new skill."[50] But, unfortunately, awareness of transfer is exactly what the potential for hierarchies in Langdell's method hinders.[51] In fact, any effort to build transfer of learning into the law school experience is overshadowed by hierarchy because essentially the method and its continuing remnants marginalize the skills teaching that would otherwise be instrumental.[52]

45. *See* Task Force Report, *supra* note 40.

46. *See* Robert Rubinson, *A Theory of Access to Justice*, 29 J. Legal Prof. 89, 124 (2004) (discussing implications of viewing law as learned profession upon accessing justice in poverty contexts).

47. *See* Spencer, *supra* note 34, at 1975 ("Langdell believed that law was a form of natural science in that it consisted of a coherent system of rules derived from general principles that could only be discerned through the study of observable phenomena—the judicial opinions in which the principles were manifested." (citations omitted)); *see also id.* at 2018 ("Indeed, the numerous shortcomings of the American model of legal education have been documented extensively: Law school does not routinely provide training in many of the practice skill areas—such as drafting, counseling, planning, client development, and client management—needed to be a successful practitioner . . . ." (citations omitted)).

48. Unreceptive might be one way to put it. Obtuse might be another. Even a quick and facetious glance at the phrase "think like a lawyer"—utterly Langdellian and emblematic—shows the phrase for what it is: a simile that is slightly removed from what educating lawyers should mean. Others have criticized it in its context as the historical motto for law teaching and/or have replaced it with "what it means to be a lawyer" or at least "what lawyers do" in order to recalibrate or further define the goal of educating and training lawyers. *See, e.g.*, Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. Legal Educ. 48, 58 (2003) ("A better way to understand what lawyers do is to look at the functions lawyers actually perform. If we can define a set of lawyering functions, we can examine them to see what types of skills and knowledge they require. Those clusters of skills and knowledge constitute the functional elements of thinking like a lawyer.").

49. *See* Stuckey et al., *supra* note 1, at 28 ("The school is committed to preparing its students to practice law effectively and responsibly in the contexts they are likely to encounter as new lawyers.").

50. Robert E. Haskell, Transfer of Learning: Cognition, Instruction, and Reasoning 24 (2001).

51. *See* Tonya Kowalski, *True North: Navigating For the Transfer of Learning in Legal Education*, 34 Seattle U. L. Rev. 51, 76-79 (2010) (characterizing Langdell's model for law schools as "a temple of knowledge" that as a consequence imparted little on developing practical skills).

52. Kennedy, *supra* note 7, at 596 ("[T]he teaching of skills in the mystified context of legal

The current incarnation of the case method marginalizes skills most vividly through the way doctrinal courses stack knowledge over skills instruction.[53] For instance, instead of a possibly more egalitarian approach among courses, the first-year curriculum will likely have four or five doctrinal courses—with each course ranging in credits worth three to six units—juxtaposed against one introductory course on legal research and writing that is most often capped at two units worth of credits.[54] Law school curricula are not immune from the phenomenon of the hidden curriculum, where indirect messages about its education model can be extracted from the way the curriculum presents the law school's offerings, whether these messages are deliberate or not.[55] The messages seem clear. After the first year, and when students are left to plan their second- and third-year courses, they enter that part of their law school career already with an ingrained preference for doctrinal courses over skills or experience courses.[56]

Where the traditional law school model does not openly marginalize skills—in moments when it does spotlight them—often it is only a limited set of skills explored in a disconnected way.[57] The typical set of skills explored by

reasoning about utterly connected legal problems means that skills are taught badly, unselfconsciously, to be absorbed by osmosis as picks up the knack of 'thinking like a lawyer.'").

53. *See* Duncan Kennedy, *Introduction*, 73 UMKC L. Rev. 231, 232 (2004) (discussing incidentally the relative perceptions of academic support faculty in ranking among other skills faculties—legal writing in particular—in a more general discussion about the historical hierarchy between casebook/doctrinal faculty versus legal writing).

54. *See* David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. Kan. L. Rev. 105, 135-36 (2003) (noting that a 2002 ALWD survey reported that "first-year required legal writing courses averaged two credits in the fall term and two credits in the spring term–significantly less than the average first-year doctrinal course—and some law schools reported only one credit for each semester.").

55. *See* David M. Moss, *The Hidden Curriculum of Legal Education: Toward a Holistic Model for Reform*, 2013 J. Disp. Resol. 19, 20 (2013) ("The problem with the Langdellian model is not that its subjects or methods are inappropriate, but rather that they convey seriously distorted messages about law and lawyers and therefore fail to convey additional needed information and skills. These messages are mostly implicit in the structure of law school courses, erroneously suggesting that the bulk of what lawyers do is to analyze and argue appellate law and that other functions are less common or important. The implicit nature of these messages, which are repeatedly reinforced in multiple courses, conveys a powerful subliminal lesson." (citations omitted)).

56. *See* Melissa Marlow-Shafer, *Student Evaluation of Teacher Performance and the "Legal Writing Pathology:" Diagnosis Confirmed*, 5 N.Y. City L. Rev. 115, 132 (2002) (drawing a correlation between lower prestige of legal writing courses in law schools and the number of credits assigned to legal writing courses).

57. *See* Deborah Zalesne & David Nadvorney, *Why Don't They Get It?: Academic Intelligence and the Under-Prepared Student As "Other",* 61 J. Legal Educ. 264, 271 (2011) ("Of course, most legal reasoning skills and at least case briefing are taught explicitly at most law schools in separate legal research and writing and 'lawyering' courses. Typically, however, neither faculty nor students consider the skills learned in these courses as transferrable to their doctrinal classes. In addition, some academic skills, such as close case reading and note taking, and some legal

Langdell's case method is one that exemplifies formalist approaches to the law.[58] Viewing the completeness of the common law tradition, in-class inquiry into scientifically discovering the law through the Socratic dialogue often loads the examination with only a limited set of skills, mostly those dominated by analogical and syllogistic reasoning.[59] As Philip Kissam has observed, there is a tendency for "the discipline's subtle promotion of a particular intellectual method at the cost of devaluing other intellectual methods that in legal practices will complement and at times compete with the favored method."[60] According to Kissam, that "favored method is the method of analysis, that is the mental practice and instinct of breaking things down and dividing them into many small discrete and useful parts"[61] and that "[o]ne consequence of the discipline's analytical tendency is the tacit disfavoring of other intellectual methods such as the interpretation or synthesis of complex legal materials and construction of complex or novel legal arguments."[62] Such favoring of one "intellectual method" is read by Kissam as a "devaluation" that he notes as "worrisome."[63]

Similarly, Robin West has also characterized the kind of limited analytical and reasoning skills that law schools teach to the exclusion of others, calling out in particular two types of reasoning–first, "processual fairness," where students recognize processes in the law that utilize a sense of basic fairness to accomplish legal goals,[64] and, second, "horizontal equity," where students learn how to analyze cases analogically to treat like cases alike.[65] Overemphasis of these two types of analysis contributes to the teaching of a kind of "legalism" that West claims is detrimental because it overshadows the ability of students to sense other things about the law, such as justice.[66]

Both Kissam and West's views on the analytical skills taught in the Langdell case method appear as a self-contained (and perhaps overly self-confident) set of skills that cabined by the nature of the case method. West notes openly

reasoning skills, such as issue spotting, tend to be overlooked, even in courses with a skills focus." (citations omitted)).

58. *See generally* Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 McGeorge L. Rev. 7 (2013).

59. *See* Nancy Cook, *Law As Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. Rev. 21, 34 (2012) (describing how "Socratic questioning provides students with opportunities to draw distinctions and analogies, reconcile apparently inconsistent judgments, and make judgments about the soundness of legal reasoning").

60. Kissam, *supra* note 8, at 6.

61. *Id.*

62. *Id.* (citations omitted).

63. *See id.*

64. West, *supra* note 18, at 48-50.

65. *Id.* at 50.

66. *See id.* at 51-55.

that "pedagogically, formalists viewed legal education as an education in the virtues and content of the common law: by reading hundreds of cases in every common law subject, and nothing else, the student would come to learn through immersion, both the content of the law and the art of its interpretation."[67] In this way, Langdell's case method for studying law, as West has hermetically described it, would presuppose that a limited set of analytical skills would prevail even if a student had to take on novel issues in the law.[68] For if all the legal principles and truths required by the law are preserved in the body of cases that we have inherited from the common law, then even disputes arising under cases of first impression, involving never-been-seen-before facts, only need a look back at the right precedence—using the predominant set of analytical skills—for a contemporary resolution.[69] Perhaps this notion is the same "devaluation" that worries Kissam.[70]

Another analytical or critical reasoning skill that is emphasized, perhaps to the exclusion of others, is logic upon which the law is built.[71] The satisfaction of mastery here brings a sense of accomplishment and intellectual rigorousness that exaggeratedly justifies its prominence.[72] But otherwise, the Socratic inquiry and teaching of case law reduces examination of skills from what could be a fuller pantheon of legal reasoning skills that could reflect a modern-day concept of law practice to a formalist bundle of skills that mirror the vogue of former law thinking and an incomplete image of law and law practice.[73]

67. *Id.* at 74 n.70.

68. *See id.*

69. *See id.* at 101-02 (describing how in Langdell's ideals, "Law simply is that body of principles that comes to us from the past, making possible the full resolution of all possible legal questions." and that "[f]or that to be possible, the principles by which novel questions are answered must be a full and complete set, and must be inferable from well-settled texts and those well-settled texts are virtually by necessity common law cases.").

70. *See* Kissam, *supra* note 8, at 6 ("This devaluation appears, for example, in the apparent passion of many lawyers for focusing on the details of things without providing any conceptual or ethical understanding of their actions and statements.").

71. Andrea Kayne Kaufman, *The Logician Versus the Linguist—An Empirical Tale of Functional Discrimination in the Legal Academy*, 8 Mich. J. Gender & L. 247, 252-53 (2001) ("Most law schools emphasize logical intelligence in the evaluation of students as well. Many first-year courses evaluate students using standard bluebook examinations. These timed tests require students to 'issue spot' and apply the holdings of appellate decisions from their case books to a complex set of facts and to use the logic of precedential reasoning to predict possible legal outcomes. This logical testing has been criticized for ignoring the importance of creative synthesis and 'legal imagination,' disregarding 'practical judgments,' and 'not adequately reflect[ing] all the types of intelligence that the successful lawyer needs.' While ignored by a significant proportion of law school education, particularly the first-year courses, the other intelligences are integral to the varied and multifaceted roles of lawyering.") (citing Philip C. Kissam, *Law School Examinations*, 42 Vand. L. Rev. 433, 456-57 (1989)).

72. *See* West, *supra* note 18, at 56 ("Law schools inculcate in students an appreciation for the importance of evenhanded treatment under law[.]").

73. *See* Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 Wash. L. Rev. 593, 595 (1994)

Other than limited analytical skills, Kissam also suggests that law schools teach narrowly the skills peripheral to legal reasoning, such as reading and writing that are fundamental to lawyering: "The discipline teaches instrumentalist habits of reading and writing that both empower and limit future lawyers. These habits consist of quick, productive but often superficial ways of reading legal texts and writing about law[.]"[74] More specifically, Kissam says "[s]tudents must engage in quick if superficial analysis and write precisely but quickly, especially if they hope to obtain one of the few high grades that are allowed by grading curves."[75] Oral rhetoric, as noted by Kissam and others, is another heavily emphasized lawyering skill that is taught at the exclusion of other, more transactional lawyering skills, and that reaffirms the doctrine-skills hierarchy created by the Langdellian preference for case law.[76] Elizabeth Mertz has noted as well the oral rhetoric emphasis and what is conveyed and accomplished by it in law classrooms—all of which filtered directly into our established pedagogical traditions.[77] These different observations of the limited skills set taught in law schools suggest that skills teaching has strong ties to the way in which the case method studies the law, but that focusing too much on such a small set of skills imparts only a partial impression of the experience of law practice.

The lack of awareness of how legal knowledge is transferred to practice in the face of hierarchy of form over skills sets up a faulty (or negligible) dichotomy for law students when they enter into the real world of law firms and clients.[78]

(mentioning "the false dualism of so-called intellectual rigor in legal ideas and 'science' and the presumed 'weakness' of skills training by demonstrating that both theory and skills are 'legal science' and rigorous, and both are also incomplete and partial statements of what a lawyer needs to know.").

74. Kissam, *supra* note 8, at 7.

75. *Id.* at 55.

76. *See id.* at 7 (mentioning how law school discipline emphasize habits indicative of "[t]he law school's distinctive oral culture, which celebrates oral heroism and tacitly devalues complex reading and writing.").

77. *See* Mertz, *supra* note 38, at 94 (summarizing how students in law schools "are being trained to a common language: a new kind of reading, writing, and talking" that is structured in a way that "relies on constant filtering of conflicting stories through the lens of legal-textual authority.").

78. *See* Anne Marie Cavazos, *Next Phase Pedagogy Reform for the Twenty-First Century Legal Education: Delivering Competent Lawyers for a Consumer-Driven Market*, 45 Conn. L. Rev. 1113, 1144-45 (2012) ("Since the late 1800s and early 1900s, legal education has been centered on theoretical and historical education rather than a combination of a theory/history and skill-oriented education model. This focus has produced many problems. When legal education shifted away from apprenticeships, law students were no longer being taught how to apply legal knowledge to resolve practical problems. In addition, law graduates may lack the ability to understand social problems and assist clients holistically by moving away from specialization of subject matter that limits legal education. Cross-training students in legal areas and equipping them to be responsive to the client's non-legal concerns is imperative in today's society. To promote higher competency of law students upon graduation, a skills-oriented pedagogy must be integrated into legal education so that a hands-on or clinical approach is

Making this observation at a time when those examining the new normal are finding that the student competency with skills—even academic skills—are at an all-time low requires a need for transfer of learning to demonstrate and impart skills in the classroom, particularly through active learning experiences.[79] What would result otherwise is a limited engagement with practice in the classroom for our students.

In education theory, scholarly discussion about curricula in different learning settings has included ways to set up curricula that facilitate how knowledge acquired in the classroom transfers into the skills development of outside the classroom.[80] In that regard, the Langdellian model underserves rather than underscores this transfer. If the traditional law school curriculum remains exclusively knowledge-driven,[81] then there will be limited opportunities for transfer of skills development in a career that depends more on the practice than the acquisition of knowledge.[82] It is probably impossible for law schools to accommodate the hyperbolic level of practice-readiness that the profession has demanded.[83] No three-year program can inculcate students for every law practice permutation so that they will be a workforce of covert and seasoned attorneys on their first day of practice, and to buy into this notion is foolhardy.[84]

offered from day one.").

79. *See* Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. Legal Educ. 401, 402 (1999) ("[A]ctive learning is more than a set of techniques. It is also an orientation on the part of students and teachers. It includes a belief that legal education should help students understand legal concepts and theory, improve critical thinking, and develop professional skills and values. It seeks to focus students not only on what they are learning but *how* they are learning as well. Finally, an active learning orientation proceeds from the assumption that students learn best when they take responsibility for their own education." (citations omitted)).

80. *See generally* Kowalski, *supra* note 51, at 68-77 (discussing the different models of learning and their effectiveness in creating transfer of knowledge to the student and how such studies would impact the law school model, which Kowalski identifies as a model that would fall within a classical approach).

81. *See* Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 Ga. L. Rev. 853, 855 (1996) ("At most law schools the curriculum and pedagogy appear to embody a belief in one of two purposes: either to teach students a body of knowledge, that is, the 'law'; or to teach students a certain type of analysis called 'thinking like lawyers.'").

82. *See id.* at 856 ("The basic law school curriculum, however, still largely ignores the practice of law. The current curriculum does not give students much of a picture of the world of law practice.").

83. James E. Moliterno, *A Way Forward for an Ailing Legal Education Model*, 17 Chap. L. Rev. 73, 76 (2013) (in describing reforms at Washington and Lee School of Law the term "practice-ready" is tempered as an end-goal expectation: "The 'practice-ready' term has been thrown around a lot and I think it is too high a hurdle for any law school to expect to leap. It is unrealistic to think that a three-year JD can produce law graduates who are like third-, fourth-, or fifth-year attorneys. That is not going to happen in the time we have and with the resources we have. But we can give students a head start on their development.").

84. Perhaps a more realistic solution to the competency training of students has been the rise of law school incubators, which are still experimental at this time. *See* Genevieve Blake Tung,

However, it is not impossible to help students develop skills of legal reasoning and even gain some practice-based experience that allows them to transition into a life in the law more smoothly—in essence to transfer knowledge into practice. In short, the new normative within legal education, regardless of what model we use, is to invite active learning experiences that coincide both with the theoretical and practical concepts of the law—active learning that evens out the playing field between doctrine and skills.[85]

In writing about transfer of learning in the law school context, Tonya Kowalski draws from educational theories about transfer of learning to observe that to facilitate transfer the instructor must understand that the knowledge imparted in law schools should encompass more than just doctrinal legal knowledge.[86] Kowalski explains that the knowledge we teach should also be procedural, strategic, and conditional, and then she describes them accordingly:[87]

> Procedural knowledge is simply "how-to" knowledge. Students learn how to formulate an IRAC analysis, how to file and serve a complaint, how to brief a case, and even how to outline and study for exams. Strategic knowledge focuses on understanding our own mental processes, such as how to acquire new information and skills. For legal education, this can be expanded to include strategic thinking about research, reasoning, advocacy, negotiation, and client relations. Finally, conditional knowledge is the experience and understanding to know what types of knowledge are called for in varied contexts.[88]

All of these kinds of non-doctrinal knowledge serve functional needs for the law student to become the active professional; and therein lies the importance of transfer.

To accomplish transfer while we still adhere to the Langdellian tradition is to subvert the hierarchy of form over function. It is possible if we can expand the pedagogy of teaching law students to embrace a method that enables transfer of learning that results in students acquiring the law and then knowing what to do with it more effectively.[89] A fundamental transition in the model of law teaching and learning[90] should, of course, strive for actively teaching practice

Academic Law Libraries and the Crisis in Legal Education, 105 Law Libr. J. 275, 297-99 (2013).

85. *See* Stuckey et al., *supra* note 1, at 132-33 (advocating that effective teaching in law schools should be more "multi-modal" and less reliant on Socratic and case method dialogues).

86. *See Kowalski*, *supra* note 51, at 81 ("The required knowledge base includes not only rote and critically reflective understanding, but also other forms of knowledge . . . .").

87. *Id.*

88. *Id.*

89. *See id.* at 64 (proposing that students can reap benefits from seeing the kinds of transferable knowledge and active learning skills that are emphasized in the transfer method of learning).

90. *See* Pistone & Hoeffner, *supra* note 19, at 227 ("Change is coming; the only choice for legal educators is whether they will act early and creatively enough to make the post-Langdellian

alongside teaching knowledge without the impediment of a false hierarchy that marginalizes one component over another in the life of the law.[91] Still for now, while we wait for the new normal to be defined,[92] there are ways of bringing skills acquisition into the law classroom that avoids having to combat institutional grievances head-on and manages to further a *coup d'état* over the dominance of form. The rest of this article will explain such a method.

III. Destablizing The Hierarchy, or Succotash over Steak

On the morning of April 4, 2014, just before the *Igniting Law Teaching* conference was to begin, a colleague from another law school who had sat through my run-through during rehearsal commented on how my idea for expanding active learning in my doctrinal classes reminded her of the sneaky ways a parent would try to hide fruits and vegetables onto a finicky child's dinner plate. Yet skills—like succotash—need not be given a position subordinate to meat or doctrinal knowledge in the balance of all things related to competency. And so, the goal of my method is to elevate skills teaching so that it rises closer to the level of doctrinal teaching while making sure that the elevation escapes detection—resulting in an invisible blend of both so that students, finicky or not, do not realize that they are acquiring skills at the same time they are learning the law, or are not bothered by it if they do. Instead, the blend of both skills and doctrinal knowledge in the classroom should be seamless—lest they figure out what they are getting and then decide, based on their previous biases, to excise skills learning to their yet-unrealized detriments.

To so do, I have taken a page from those who teach law school academic support and deal with the doctrine-skills hierarchy in their jobs daily, but who try to avoid breaking the golden rule of academic support etiquette—a rule that, if it does not exemplify hierarchy, at least displays territoriality. When I began teaching in law school as an academic support instructor, one of the towering rules to obey, for better or worse, was to avoid treading on the domain of the doctrinal law professors as far as what to teach to students in academic support courses.[93] Of course, this rule shows the divide (or hierarchy) between skills

law school an improvement in terms of the quality of education provided—i.e., to make it a law school that finally remedies the deficiencies that Reed and his successors have highlighted for almost a century.").

91. *See* Stuckey et al., *supra* note 1, at 73 ("Law schools cannot prepare students for practice unless they teach doctrine, theory, and practice as part of a unified, coordinated program of instruction." (citation omitted)).

92. *See, e.g.*, Jan Bissett & Margi Heinen, *Facing the New Normal*, 92 Mich. B.J. 52 (2013); Philip J. Weiser, *Professionalism and the New Normal*, 42 Colo. Law. 49 (2013).

93. Ellen Yankiver Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?*, 73 UMKC L. Rev. 497, 504-05 (2004) (describing that in many law schools, "academic support professionals know they must be careful not to appear as if they are encroaching into the domain of the doctrinal faculty, especially avoiding being viewed as attempting to interfere with the classroom of the doctrinal faculty." (citations omitted)).

and knowledge among faculty,[94] but also it reflects pedagogical values as well.[95] In other words, tasked with having to be both complementary and effective, academic support instructors teach skills that deal with the law and not the legal knowledge of it.[96] For this, many professors who teach academic support often build access points in their academic support courses where they leave the doctrine untouched, but instruct on the practice of law or on a skill of legal reasoning to enhance student competency in doctrinal courses.[97] My approach today varies from this restriction to doctrine in a much more liberated sense. What my particular borrowing from academic support practices has rendered is a three-step approach for elevating skills with doctrine in my law courses. It is an approach that has helped me find, examine, and develop those access points and work them into the doctrinal narrative of my courses to facilitate teaching and learning the law alongside skills—or sometimes even through them. In its more or less laboratory incantation, the three steps to elevating skills into the doctrinal classroom require the instructor to (1) find a connection between legal reasoning skills and doctrine (what I call *mimesis*), (2) ensure the relevance of the skill, and (3) build an opportunity in the classroom for students to discover both skills and doctrine. I will explain these steps in detail accordingly.

A. Step One: Discovering Mimesis

The first step in elevating skills seamlessly to match the concentration of doctrinal teaching is to find a particular connection between a certain doctrine and a legal reasoning skill that could be used to practice it. Here the instructor searches for ways that the doctrine displays itself through a particular skill set. I call this *mimesis*—borrowing the term from literary and critical traditions to distill the process of finding a quality in the way the law is presented, whether in its content or context, that has potential to be imitative or "mimetic" of a particular aspect of lawyering—i.e., skill.

The term "mimesis"—without waxing too metaphysically over it—has been defined within aesthetics as a concept in language and art that characterizes

94. *See id.* at 499 ("However, at its core academic support has the potential to threaten existing hierarchies in legal education.") (citing Kristine Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. Legal Educ. 157, 159 (1995)).

95. *See id.* at 500-01 ("While overlap exists between the goals and methods of traditional legal education and academic support, the two models present significant differences in philosophy and approach. Furthermore, in many respects, academic support directly challenges the soundness of much of the pedagogy of traditional legal education as well as the fairness and propriety of making students adapt to one fairly standard model of teaching." (citations omitted)).

96. *See id.* at 504-05.

97. *See, e.g.*, Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 Temp. L. Rev. 69 (2003) (recognizing the "status quo" that is the constructed hierarchy between skills and doctrinal instruction in legal education and advocating for legal writing courses to embrace academic support teaching of exam writing to help further student competency).

both the imitation of nature as object, phenomenon, and process, and more broadly as a form of artistic representation.[98] For this method, I resort to the former definition and not the latter, looking toward the intertextuality between the law that is presented and a skill (or skills) that would usher that law into reality, meaning practice. Because law is fundamentally language-based,[99] and mimesis has been a concept that has partially dealt with the gestures of language in imitating nature,[100] mimesis does have its place in the interpretation of law and in observing the performative aspects of practicing the law,[101] essentially accomplishing what the law represented by language intends to do. In the broadest sense, the performative aspect of the law is easiest to glean from what the law can do to individuals.[102] But the performativity of the law can, as I see it, also have implications for those who practice the law as well.

But theory aside, in this first step, what the law teacher must ask herself in relation to a particular legal doctrine that she is about to teach can be articulated much more simply: *Does the law, or the way it is often presented, exhibit a practical or legal reasoning skill for examination?* In other words, through a discovery of mimesis I consider the nature of a doctrine or how presentation of that doctrine avails itself particularly to showing us some sort of skill. Again, the idea of the law exhibiting some mimetic attributes for instruction should not be entirely unfamiliar–as, arguably, Langdell's idea that the common law tradition was a complete and autonomous system was itself a mimetic observation imprinted into the way Langdell designed law instruction.[103] The difference might be that Langdell's formalist vision might have prompted an outmoded or arguably incomplete characterization that then trickled into the

98. *See* Erich Auerbach, Mimesis: The Representation of Reality in Western Literature 11-12, 23 (Willard Trask trans., Princeton Univ. Press 2003) (1974).

99. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459-60 (1896) ("The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds.").

100. *See* Arne Melberg, Theories of Mimesis 21-23 (1995).

101. *See* Martha Merrill Umphrey, *Law in Drag: Trials and Legal Performativity*, 21 Colum. J. Gender & L. 114 (2011) (discussing performativity in the practice of law).

102. *See generally* Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights (2006).

103. *See* Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 Ind. L. Rev. 353, 360 (1994) (explaining the logical flow of Langdell's ideas about law and legal studies: "If law could be a science, then legal studies could be approached from the 'scientific perspective' required for laboratory experiments testing the validity of a hypothesis. Law professors, following Langdell's vision of legal science, could claim that the law could be analyzed as a system consisting of a set of universal principles, policies, and rules. The reduction of law to scientific concepts systematized by an abstract general method also rendered legal apprenticeship largely obsolete as a means for professional law training, since it was now thought that law students no longer needed to study law as a practice; all that one needed was a classroom, casebooks, and a teacher trained in the Socratic method of instruction." (citations omitted)).

way law has been since taught.[104] By contrast, the method here for identifying mimesis is not infiltrated by that kind of broad ambitious vision, but examines and mines each teachable doctrine microscopically for teachable skills that help bring that doctrine to life in practice and closer to transfer of doctrinal knowledge.

Not only does finding such a pairing help identify the interrelatedness between a particular legal knowledge and some type of lawyerly skill, but it is also the key to knowing where the access points begin for skills. For instance, in Contracts, a complex rule that is presented in statutory form, such as the dreaded section 2-207 of the Uniform Commercial Code[105]—otherwise known as the "battle of the forms,[106] imparts very noticeable opportunities for teaching students the importance of statutory reading and interpretation. The way that section 2-207 is hermetically presented, with its three subsections,[107] while allowing many different scenarios to be reached during the formation of modern commercial deal making, gives the instructor opportunity to teach the doctrine by explicitly teaching skills of statutory interpretation and construction—especially while negotiating among the language of section 2-207, its official comments,[108] and some pertinent fact patterns involving contract making.

In addition, the level of technicality within section 2-207 affords another moment of mimesis for teaching a subsequent lesson, particularly for success

104. *See generally* Menkel-Meadow, *supra* note 3, at 563-68 (describing legal realist responses to Langdell's formalism and case method).

105. "§ 2-207 (1)-(3). Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act. UCC § 2-207(1)-(3)."

106. *See* Colin P. Marks, *Not What, But When Is an Offer: Rehabilitating the Rolling Contract*, 46 Conn. L. Rev. 73, 80-81 (2013) ("Legal realism, also called neo-classicism, abandons contract law as a rigid set of rules in favor of a softer approach that tries to understand how contracts work in the real world. Legal realism is at the heart of provisions such as U.C.C. section 2-207's battle of the forms, which departed from the common law's mirror image rule approach to offers and counter-offers.") (citations omitted).

107. U.C.C. § 2-207 (1)-(3), *supra* note 105.

108. *See* U.C.C. § 2-207, Official Comments (2000).

on law school exams. Such rule-driven technicality with section 2-207 works well for testing the doctrine through multiple-choice questions—since multiple-choice questions lend themselves easily to testing technically dense rules and concepts[109]—and therefore, showing students how to handle multiple-choice exams in law school. Here then, we see the presentation of the law (i.e., statutory material) translates into an opportunity for teaching legal competency skills (i.e., statutory reading and interpretation) that has further potential to be filtered into problem-solving skills for a particular testing format (multiple-choice exams).

The transfer here from legal knowledge to exam taking is reminiscent of the plight of the lawyer who must internalize the law and then practice in various settings, whether in the courtroom, in written analysis, or in transactional situations. Also, this resembles very much the procedural and conditional knowledge in Haskell's transfer theory as Kowalski has articulated.[110] Likewise, a first-year Torts course could also feature a less complicated but a similar example of mimesis by examining section 402A in the Restatement (Second) of Torts, the provision governing strict liability for harm caused by sellers,[111] where the instructor could show students how to break down the two difficult subprovisions into a set of required elements that are more easily manageable for a lawyer to graft onto a set of facts. Instead of teaching multiple-choice test-taking skills here, however, the lesson on 402A here could be used to teach students how to organize and "deconstruct" even complex rule provisions into simpler bite-size pieces for thorough analysis and organization on an essay exam.

Another illustration of mimesis here can be seen in a first-year Criminal Law course, where the use of common law rule for burglary often requires the ability for simple rule synthesis. The element of felonious intent in burglary requires the practitioner to synthesize rules from a felonious crime generally.[112] Two observations for teaching skills can be taught from this illustration. First, the combination of a rule for a property crime has to be paired accurately with a rule for a specific-intent felony for it to be correctly used for issue spotting and analyzing a set of facts for burglary. So a rule synthesis lesson can be given, involving rules for battery and a specific-intent felony and even the use and combination of different case law precedence within those rules. Second, there is also an opportunity for teaching more broadly the complex relationships of rules and cases and the importance of synthesizing rules with demonstrative cases quickly.[113] Although legal writing courses teach rule synthesis explicitly,

109. *See* Janet W. Fisher, *Multiple-Choice: Choosing the Best Options for More Effective and Less Frustrating Law School Testing*, 37 Cap. U. L. Rev. 119, 122-23 (2008) ("Law school multiple-choice questions, by contrast, are intended to test mastery of legal rules and concepts.").

110. *See* Kowalski, *supra* note 51, at 81.

111. Restatement (Second) of Torts § 402A (1965).

112. Charles E. Torcia, 3 Wharton's Criminal Law § 316 (15th ed. 1993).

113. *See, e.g.*, Deborah A. Schmedemann & Christina L. Kunz, Synthesis: Legal Reading,

it helps students to see the same skill working in a doctrinal course to reinforce the importance of acquiring such skills.[114]

Further, the vagueness in the drafting or presentation of a doctrine can also offer several mimetic observations about legal practice and reasoning. For instance, in Torts, the phrase "offensive contact"—an element in a seemingly simple battery rule[115]—offers a lot of opportunity to play with the facts. Students must learn to closely read and argue from a set of facts to see whether a series of events could contextualize an act to become a touching that would be reasonably offensive. Developing a methodology for closely reading facts based on a relatively vague rule could prove helpful. For example:

> A suffers from a heart condition and frequently takes nitroglycerin pills to open his arteries and relieve angina pain. B, A's attendant, seeking to hasten A's death, places a book on A's night table blocking A's view so that he cannot easily find his nitro pills. A awakes in the middle of the night suffering chest pain and cannot locate his pills. Minutes later he suffers a heart attack and dies. Has B committed an intentional tort?[116]

Could the heart attack caused in part by B's act of intentionally placing the book with the desire to hasten death be an offensive touching for battery? Certainly B's moving of the book was an intentional physical act that set in motion some sort of eventual harm (a heart attack, which physiologically could be argued as a contact by persuasively characterizing such symptoms accordingly, or at least an attempt could be made to do so[117]).

Similarly, in Constitutional Law, the vagueness of rules and terms of art and the change from one position to the complete opposite in Supreme Court precedence can show students much about broadening and narrowing holdings, but also much about the interplay between rules and policymaking.[118] A good example could be with some of the canonical civil rights cases such

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Reasoning, and Writing 36-42 (2007).

114. *See* Paul Figley, *Teaching Rule Synthesis with Real Cases*, 61 J. Legal Educ. 245, 245 (2011) (describing the different classroom contexts in which rule synthesis can be used—from doctrinal courses to clinics).

115. Restatement (Second) of Torts § 18 (1965).

116. Aaron D. Twerski et al., Torts: Cases and Materials 67-68 (3d ed. 2012).

117. The Mayo Clinic lists compression in the chest as, *inter alia*, one of the symptoms of a heart attack: "This discomfort or pain can feel like a tight ache, pressure, fullness, or squeezing in your chest lasting more than a few minutes." Mayo Clinic, *Heart Attack Symptoms: Know What's a Medical Emergency,* (Jul. 25, 2014), http://www.mayoclinic.org/diseases-conditions/heart-attack/in-depth/heart-attack-symptoms/art-20047744.

118. *See* Robert C. Power, Strategies and Techniques for Teaching Constitutional Law 14 (2012).

as *Plessy v. Ferguson*[119] and *Brown v. Board of Education*,[120] or *Bowers v. Hardwick*[121] and *Lawrence v. Texas*.[122] The presentation of the law in those cases reflects broader adjudicative and interpretative skills at play.

A final example of identifying mimesis is in the way the professor organizes an entire body of law. The way doctrine and concepts are organized together in a law course affords opportunities for skills development, whether it is acquiring a knack for seeing subjects at the big-picture level or understanding that the ability to conceptualize and organize a body of doctrine for a course helps facilitate issue-spotting skills in practice.[123] If a semester long course in Torts is already organized by levels of culpability from purpose, desire, or substantial certainty to a complete abandonment of intent (i.e., intentional torts, negligence, strict liability, etc.),[124] the topical nature of the course can help a student spot a civil wrong and categorize it according to the appropriate doctrine. A year-long Contracts course could be organized in a way that exemplifies the linearity of contract claims (e.g., formation, breach, and damages) to help students recognize that some bodies of substantive law could be organized and learned within a progressive, linear narrative. In these ways, the presentation of the law transfers mimetically into ways students see such issues arise in reality. This same example translates particularly well for upper-level capstone courses that may yoke two different subjects in an advanced way, such as a course on the law of Remedies, which tries to discuss topics on damages, equity, and restitution within torts and contracts subjects.[125] As we have seen here, the law by the way it is presented through language is very fruitful in showing us the relationships to skills in the mode of practice and demonstrating the critical use of mimesis in potential lessons pairing skills and law.

B. Step Two: Finding Relevance

According to adult learning theory, adult learners tend to capture material more readily and effectively if they find that there is some relevance to the

119. 163 U.S. 537 (1896).

120. 347 U.S. 483 (1954).

121. 478 U.S. 186 (1986).

122. 539 U.S. 558 (2003).

123. *See, e.g.*, Dannye Holley, *Specific Course and Class Planning Ideas: #1 Using the Syllabus as Course Synthesis and Teaching Plan*, *in* Gerald F. Hess & Steven Friedland, Techniques For Teaching Law 29 (1999).

124. *See, e.g.*, Marshall S. Shapo & Richard J. Peltz, Tort and Injury Law vii-xii (3d. ed. 2006). The Table of Contents in Shapo & Peltz organizes the major torts according to culpability standards.

125. *See* Caprice L. Roberts, *Teaching Remedies from Theory to Practice*, 57 St. Louis U. L.J. 713, 713 (2012) ("Remedies is about the intersection of things. Intellectual curiosity has always drawn me to wonder how different, disparate things fit together. The Remedies course provides an analytical framework to explore the varied goals of substantive doctrinal courses. It shows how bodies of law connect.").

material.[126] Examples from literature on legal writing and clinical teaching reiterate how "[a]ccording to adult learning theory, students generally learn more effectively when they understand what they are supposed to be learning and how it will help them achieve personal goals."[127] The concept of incorporating relevance seems intuitive and commonsensical if students understands the "why" part of their learning experience and process and can relate or find the purpose of the lesson useful, then they will receive that instruction and learning with more weight.[128]

With that in mind, the theory behind the second step in my method is to elevate skills acquisition in the doctrinal classroom by exemplifying the relevance of skill to facilitate the previous step's mimesis. In proceeding to step two, I always evaluate whether the mimesis that I have located in step one is helpful to my students currently in their careers in law school—for understanding or learning doctrine or doing well in classes—or relevant for lawyering in general. The prevalence of the millennial generation as law students today, where just-in-time learning overshadows the just-in-case learning habits of previous generations,[129] prompts me to ensure that the legal reasoning skills identified in the first step are timely for teaching to students in my classes. If not, then I may abandon the lesson entirely and look for another mimetic exchange between doctrine and skill, or I may look deeper to find a hidden, subterranean connection to relevance that is not as readily apparent at first glance.

For many introductory first-year courses, students who are caught off-guard by having to deal with the legal gray areas of factual scenarios could easily feel trepidation in classes. Extending the mimesis discussed above to the vagueness of the language in "offensive contact" in a simple battery rule, the student learning to deal with that vagueness would appreciate their relevance if an instructor makes it clear that such gray areas help lawyers make creative arguments. A lesson in Torts that draws on this mimesis and conveys relevance

126. *See* Malcolm S. Knowles et al., The Adult Learner: The Definitive Classic in Adult Education and Human Resource Development 48 (7th ed. 2012) ("*A person learns significantly only those things that he perceives as being involved in the maintenance of, or enhancement of, the structure of self*. This hypothesis underlines the importance of making the learning relevant to the learner, and puts into question the academic tradition of required courses.").

127. Kele Stewart, *How Much Clinic for How Many Students?: Examining the Decision to Offer Clinics for One Semester or An Academic Year*, 5 J. Marshall L.J. 1, 52 (2011).

128. *See* Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 Appalachian J.L. 127, 143 ("According to those who have devoted significant study to effective education, students learn more effectively when they can see how what they are doing will be relevant to achieving their goals. Our students are pragmatic. They are generally willing to work hard if they can see why they must do so and what the benefit is to them. If they must learn specific skills in order to understand more complex tasks, they are willing to do this, as long as we tell them why it is necessary.") (citations omitted).

129. *See* Joan C. Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the MTV/Google Generation,* 54 Loy. L. Rev. 775, 781 (2008).

of the skills taught could involve a doctrinal lesson that shows how the rule for battery extends the requirement of offensive contact to include contact not just directly of a person's body, but of an item closely identified with a person's body, such as a portable but nondescript item, a pen or a plate.[130] What the mimesis here conveys is a need for skills to utilize the vagueness and work through it to resolve a case.[131]

Another lesson in offensive touching of a person might be the ability to use policy arguments to bolster the interpretation of a rule and its application.[132] If the policy behind such a rule is to prevent unwanted violations of personal space,[133] then showing students how to match that policy with the rule to skew the rule more favorably for one side might not only help them acquire a skill of characterizing the law in situations where things could possibly go either way, but also it might be a relevant skill for first-year Torts students who are just starting to understand that part of a lawyer's job is to find ambiguities and then comfortably and creatively resolve them.

The above example of section 2-207 of the U.C.C is also helpful in this part for explaining relevance.[134] In an Evidence course, where a professor might organize the separate legal doctrines as a series of legal threshold hurdles building on each other to ensure the ultimate admissibility of an evidentiary item, such presentation connotes to students a premium on transferring doctrine to practice, and the relevance of that skill for an attorney who must make litigation moves on the fly.[135] In Civil Procedure, a lesson on personal jurisdiction could also coincide with a demonstration of how factor-driven tests are different from elemental rules in the way lawyers use them not only help students learn the factors of "minimum contacts" but also how to use

130. Restatement (Second) of Torts §§ 18, 19 (1965).

131. A classic widely taught case here is Fisher v. Carousel Motor Hotel, 424 S.W. 2d 627 (Tex. 1967) where a restaurant manager's confiscation of a plate from the grip of an African-American engineer at the buffet line paired with epithets was considered an offensive contact with an object that is closely identified with the body.

132. *See id*. at 629-30 (resorting to Restatement (Second) of Torts § 18, Cmt. at 31, to articulate a plausible rationale for characterizing the plate as a closely-identified item with the body).

133. *See id*.

134. Mary Kate Kearney & Mary Jane Kearney, *Reflections on Good (Law) Teaching*, 2001 L. Rev. M.S.U.-D.C.L. 835, 840 (2001) (discussing how skills of statutory reading are "essential" for success in law practice).

135. For an example of a discussion regarding the organization of an Evidence course that has skills implications, *see, e.g.*, Edward J. Imwinkelried, *The Organization of the Evidence Course: The "Preliminaries" to Helping Students Develop the Skill of Identifying Nonhearsay*, 50 St. Louis Univ. L. J. 1047, 1060 (2005) ("[T]he fundamental question is which sequence of coverage makes the most sense pedagogically. The premise of [the] Article is that the most daunting challenge for the Evidence teacher is to help students develop the analytic skill of differentiating between hearsay and nonhearsay. On that premise, it may be wiser to position the hearsay rule a bit later in the course. More specifically, before taking up the hearsay rule, it seems advisable to cover topics which will give the students understandings and skills that will later enable them to more effectively meet the challenge of identifying nonhearsay.").

facts and the law to weigh out factors for one side or other. Such a skills lesson that occurs immediately in time alongside explanation of the doctrine helps students see the relevance for developing an ability to reason with factors that differs from reasoning with elemental requirements.

Finally, not only can the relevance be tied to some aspect pertinent to legal reasoning or lawyering, but the relevance can be associated with an aspect of improvement or success in law school itself.[136] Test-taking skills, such as the example from the previous section using 2-207 to teach multiple-choice testing and studying strategies, would be especially relevant alongside doctrine in the first-semester of law school.[137] Even if the relevance of the skills identified in the mimesis might be remote, one might draw out a relevance that corresponds to student success in the class. One could do this by externalizing how the skill might be useful on an assignment or an exam. But even so, in this example at least, an instructor would be teaching the skill of statutory interpretation that is then distilled into issue spotting and analysis of an exam problem, and there is worthy and relevant legal reasoning practice in that.

C. Step Three: Facilitating Discovery

In Jerome Bruner's well-known and -studied spiral learning theory,[138] Bruner places importance on the moment students discover the material that the instructor intends for students to learn: "Mastery of the fundamental ideas of a field involves not only the grasping of general principles but also the development of an attitude toward learning and inquiry, toward guessing and hunches, toward the possibility of solving problems on one's own."[139] Developing or shaping this attitude toward transfer of knowledge to problem solving or practice is key:

> To instill such attitudes by teaching requires something more than the mere presentation of fundamental ideas. Just what it takes to bring off such teaching is something on which a great deal of research is needed, but it would seem that an important ingredient is a sense of *excitement* about discovery—discovery of regularities of previously unrecognized relations and similarities between ideas, with a resulting sense of self-confidence in one's abilities.[140]

As an example of instilling discovery in this manner, Bruner describes how

> a sixth-grade class, having been through a conventional unit on the social and economic geography of the Southeastern states, was introduced to the North

136. *See* Bohl, *supra* note 129, at 782. Students should be able to find relevance in a skill if it can be tied to goals that align with academic success.

137. *See, e.g.*, William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 Tex. L. Rev. 975, 1045 (2003) (concluding that test-taking speed and ability correlate to success on law school exams and the practice of law).

138. Jerome S. Bruner, The Process of Education 52 (1960).

139. *Id.* at 20.

140. *Id.* (emphasis added).

> Central region by being asked to locate the major cities of the area on a map containing physical features and natural resources, but no place names. The resulting class discussion very rapidly produced a variety of plausible theories concerning the requirements of a city[.][141]

The consequence was not merely the learning of geography per se, but the discovery and learning of the significance of urban planning.[142] This moment of discovery engages students to prod their sense of curiosity for learning something new.

Writing about an exercise for teaching transactional contract drafting in law school, William Foster and Emily Grant similarly note the importance in adult learning theory of setting up a context that invites a sense of discovery:

> Taking into account the students' world of memory, experience, and response often lightens the mental load involved in mastering a new analytical framework or developing a new skill. Professors can better engage adult learners by drawing explicit links between the subject matter at hand and past experiences of the students. By seeing a connection between something familiar and the new material, the students will generally be able to understand the new material more quickly and effectively.[143]

Learning doctrine could be a fairly new and foreign endeavor and so Foster and Grant advocate that "[u]sing familiar nonlegal contexts to teach a particular legal skill or thought process is consistent with the research about how adult students learn[.]"[144] The similarity between Bruner's observations and the perspectives of Foster and Grant on teaching through a context that invites active engagement signals the importance of building those moments in the law classroom. In the quest to elevate skills alongside doctrine, discovery serves to bring excitement to skills learning and to obscure that form-over-function hierarchy. Perhaps this observation was what my colleague at *Igniting Law Teaching* meant by "sneaking in the veggies."

Once mimesis and relevance have been located in a doctrinal lesson that also teaches skills, the moment is ripe for building a particular narrative of discovery in the lesson. Sometimes the cases that we cover in law courses make it extraordinarily easy to drum up a dramatic and inquisitive moment of discovery—cannibalism in *Regina v. Dudley and Stephens*[145] in Criminal Law, or selling a farm while seemingly intoxicated in *Lucy v. Zehmer*[146] in Contracts.

141. *Id.* at 21.

142. *See id.* at 22.

143. William E. Foster & Emily Grant, *Memorializing the Meal: An Analogical Exercise for Transactional Drafting*, 36 U. Haw. L. Rev. 403, 409 (2014).

144. *Id.* at 410.

145. (1884) 14 Q.B.D. 273 (Eng.).

146. 84 S.E.2d 516 (Va. 1954).

Without relying on sensational cases, an effective demonstration of this idea of discovery comes when I teach food defects in Products Liability. After assigning cases and giving students the two pertinent tests in food defect law—the foreign-natural test[147] and the consumer expectation test[148]—I bring in a supermarket birthday cake to class (and on occasion with the premise that it's my birthday). The fact that I bring food into the classroom is inherently jarring. But once I decide to cut into the cake, the discovery of that access point, the mimesis between legal reasoning and law, emerges when I fish out the first item that I have surreptitiously stuffed into the cake—usually an eggshell. At that moment the students are yanked out of a festive expectation of birthday cake into an exercise of reasoning, relying on the tests they have read about and their skills of factual inquiry to determine whether the eggshell, and later the toothpicks (one wooden and one plastic), the shard of broken glass, and a piece of cardboard each individually would make the cake a defective product. Knowing how to reason serves as the immediate relevance.

A less gimmicky or stagey example of discovery could be the use of episodic television cop dramas, such as *Law and Order*, in a course on Criminal Procedure, where often possible constitutional violations of search and seizure, interrogation, police lineups and the like figure into the plot of the shows.[149] The students are allowed through television dramatizations to discover how to use rule synthesis between seminal cases and the Fourth Amendment to then apply to a warrantless search to see if their conclusions match what actually happens on the shows.[150] The interesting take on using episodic crime shows for law classes is that students might have seen the shows prior to law school, but now after being immersed in doctrine and law as law students, they presumably "know better," and so watching examples of criminal procedure gone wrong embodies new meaning.

Referring back to the 2-207 example, I have often taught "battle of the forms" as just that—by playing out the narrative of a fact pattern involving two large corporations unable to make a lucrative contract because their preprinted documents have boilerplate terms that the classic mirror-image rule would not tolerate as mutual assent. The moment of discovery comes when I reveal the realist response with 2-207,[151] but then also I note that in order to use

147. Michael I. Krauss, Principles of Products Liability 102 (Jesse H. Choper et al. eds., 2d ed. 2014).

148. *Id*. at 115.

149. *See* Victoria L. Salzmann, *Here's Hulu: How Popular Culture Helps Teach the New Generation of Lawyers*, 42 McGeorge L. Rev. 297, 309 (2010) (discussing the usefulness of television and films to demonstrate legal issues in courses such as Criminal Law and Procedure).

150. Older episodes of Law & Order (NBC) and NYPD Blue (20th Century Fox) might work better for suspense, since the average law student today would likely have been in infancy during the initial runs of those shows.

151. *See* Corneill A. Stephens, *Escape from the Battle of the Forms: Keep It Simple, Stupid*, 11 Lewis & Clark L. Rev. 233, 240 (2007) (explaining Karl Llwellyn's drafting and influence on the

2-207 effectively to save this deal, we will need to learn its provisions by also learning how to read statutory materials carefully the way that a scrupulous lawyer would—in essence, discover the law through an engagement with skill.

To demonstrate their ideas about building a contextual moment for teaching transactional contract drafting, Foster and Grant have created an exercise by analogizing the process of contract drafting and planning to planning a group dinner party.[152] In doing so, their goal is to "help[] students get comfortable using their 'legal imagination' and adding contingency planning value to documents they draft for clients."[153] As they articulate more specifically, "[t]he basic premise of the exercise is to walk the students through planning a social event in this case, a dinner party. In the course of extracting the information necessary to prudently and thoroughly coordinate the gathering, students will naturally address a wide variety of contingencies that could threaten to ruin the experience."[154] Planning a dinner party in this way and delineating what happens in the case of a ruined experience is not unlike contemplating contingencies in a commercial transaction: "For example, in the exchange section of a stock purchase transaction, the seller may agree to transfer duly executed stock certificates in transferable form. An analogous obligation of a dinner party guest may be to deliver thirty-two ounces of coleslaw."[155] Not only is this exercise creative, but it is designed in part to extend familiarity to tame what could be a daunting skill to learn; it also alerts the student, by analogy, to develop awareness for contingency planning.

Although step three is concerned with student discovery, this step is in some ways also about the creativity of the instructor and ability to tie the connection between law and legal reasoning skills to a memorable moment of student discovery. But no matter what drama it brings into the classroom, step three is always trying to tie the mimesis and relevance to something familiar or something that grabs at the emotional expectation of the students to get them to see how lively the practice of law is through knowledge and skill.

D. Synthesized Example of Mimesis, Relevance, and Discovery Using Strawberries

One of the observations that most law students encounter in their first year is how much factual inquiry plays into the task of lawyering[156]—how much a

U.C.C. and that Section 2-207 "was promulgated to correct and remedy the injustices and inequities caused by the mirror image rule and last shot rule in modern day commercial transactions, and to modernize contract formation in light of present commercial realities.").

152. Foster & Grant, *supra* note 143, at 417-22.

153. *Id.* at 416.

154. *Id.* at 417.

155. *Id.* (citations omitted).

156. *See* Deborah Zalesne & David Nadvorney, *Integrating Academic Skills into First Year Curricula: Using* Wood v. Lucy, Lady Duff-Gordon *to Teach the Role of Facts in Legal Reasoning*, 28 Pace L. Rev. 271, 271-83 (2007) (explaining, in part, the importance of fact sensitivity in legal reasoning and the teaching of it in law school).

lawyer may be asked to play with facts,[157] how many different ways playing with facts can have variations,[158] from simple issue-spotting analyses to large persuasive and analogical challenges.[159] As much about legal knowledge legal education is also very much about the process of lawyering, and being able to play with facts, whether simulated or real-life, bears a significant correlation to lawyerly competency.[160] Thus, I want to develop ways to make expectation of factual inquiry nearly obligatory. And with that notion articulated, I often begin the year of my Contracts course with a lesson on factual inquiry alongside one of the first doctrines I teach my Contracts students: contractual offers.

For the lesson on offers, I used a picture taken at a farmers market in Los Angeles one morning during December 2012. Of course, the picture of a strawberry farmer's fruit display taken from my cellphone seemed rather nondescript: The photograph depicted a particular farmstand table showing off more than a dozen cartons of red strawberries that framed a white cardboard sign reading, "Strawberries 3 Packs for $7," in misspelled shorthand ("Straberri 3 Pak $7"). I had passed by it and would have easily missed it had I not been thinking about the Contracts course that I would be teaching the following semester. Of course, the picture was externally about strawberries, but beneath the surface it could have been about a variety of other things, including an introduction to contract formation.

One of my perceptions of how we commonly misunderstand contract law is how pervasively non-lawyers believe that a contract is literally a formal document with a myriad of terms and conditions in technical lawyer-speak that must be signed by all parties in order for the deal to have effect, instead of merely an agreement, written or not, between parties that the law will enforce.[161] Many new students to Contracts approach the subject with that image in mind and also toss in the misperception that to do well in the course,

157. *See id*. at 274 ("But students are intent on finding rules, doctrine and 'the law' in cases, and very often overlook the wealth of information about how the law works contained in the cases. In fact, their course syllabi tell them to look for the law and not much else." (citations omitted)).

158. *See* Zalesne & Nadvorney, *supra* note 57, at 276 ("We have identified several aspects of issue spotting that teachers can help students with, including the baseline ability to recognize instances of facts triggering issues, dealing with complicated sub-rules, spotting hidden issues, and seeing connections among doctrines within your course and across law school courses.").

159. *See* Zalesne & Nadvorney, *supra* note 57, at 276.

160. *See* Jethro K. Lieberman, *The Art of the Fact*, 5 J. Legal Writing Inst. 25, 25-26 (1999) (arguing that law schools should teach more fact analysis skills because "lawyers spend most of their time … ferreting out the facts.").

161. An even more effective misperception is one in which the same signed contract with all its bells and whistles is affixed onto blue-backing paper, rolled up into a scroll, and sealed with red hot wax. Of course, the signing must have been done with sharp quills and gooseberry ink. For some listed, common non-lawyerly misconceptions about contract law, see generally Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 Wake Forest L. Rev. 843 (2012).

one must also have knowledge about math and economics equivalent to a graduate degree in finance.[162] In some respects, both of those misconceptions draw an unnecessary distance between the law and my students. A law student with a finance or business background might be presumably thrilled with the course at the start and lulled into a sense of perhaps (false) familiarity with Contracts, while the law student with no such experience might shy away from the thought of contracts. Both notions need to be dispelled and everyone needs to be brought onto somewhat equal footing.

Once within the study of the law of contracts, another problem of insight often arises—that some doctrines in contract law were often precise up to a certain point, but much of the hands-on lawyerly application of the same doctrines to some facts required some sensitivity and intuition even when the knowledge of that doctrine had been appropriately mastered.[163] This observation is compounded by the fact that there is no unifying theory of contracts.[164] With the farmer's sign atop the strawberries, we would know if it connoted the beginnings of mutual assent in contract formation only once we knew the rules for offers and preliminary negotiations. But even if we knew those rules in theory, the verbiage and terms of art contained within them—e.g., "manifestations of willingness to enter into a bargain," "power of assent," etc.—bring a level of abstraction to an everyday transaction that distracts students from taking note of the significance of exchanges that happen very quickly between two enterprising parties.

How would we intuit a statement that we deem definite and certain to be a manifestation of willingness to enter into a bargain? In some situations, a lawyer might be able to make an educated assessment and get away with an I-know-it-when-I-see-it remark.[165] However, this nonchalance is reckless and cavalier and does not help my students do well on my exams, nor would it likely help them in their careers when they are drafting motions attacking formation issues in a mortgage suit gone awry or anything else in that vein. So after knowledge of the rules, comes the skill of marshaling facts alongside intuition under what

162. *See generally id.*

163. *See, e.g.*, *Integrating Academic Skills*, *supra* note 156, at 286 (discussing doctrines of good faith and best efforts in contract law as examples of fact-sensitive doctrines suitable for teaching factual analysis skills).

164. *See* Craig Leonard Jackson, *Traditional Contract Theory: Old and New Attacks and Old and New Defenses*, 33 New Eng. L. Rev. 365, 367 (1998) ("Like most subjects of the law, there are grey areas. Contracts, no doubt, ranks among the top. The temptation to explain these grey areas by unifying theory ultimately fails, and scholars in the contracts field have often reacted by trashing the whole exercise.").

165. For a famous example of this iteration, see Justice Potter Stewart's concurrence from *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J., concurring): "I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that." (citations omitted) (emphasis added).

the law would govern as a contractual offer. Here is the moment of mimesis, when the nature of the law surrounding formation of a contract offers me the opportunity to discuss a certain skill in legal reasoning. Here is where the sign over the farmer's strawberries with its price, quantity, and description ends up as a lesson that bears so much fruit for both explaining the muscle and spirit of the law. This lesson on offers would also be a lesson on marshaling facts.

And that skill has practice implications, which makes the elevating of skills with doctrine here a relevant endeavor, since the ability to marshal facts comes up not just in my course but throughout the extent of law practice.[166] Here in Contracts it would be the ability to detect formal rules of contracting in an everyday deal over supermarket goods. In Torts, it might be the ability to see someone's negligence maintaining a factory drainage gutter and be able to articulate effectively about it as res ipsa loquitur[167]; or in Business Associations, in determining why an intricate act of burying certain funds among different corporate entities could be a reason for piercing the corporate veil.[168]

In addition, this lesson's choice of subject matter also had relevance implications. With the strawberries, their ordinariness signals to students that contracts do happen outside the lawyer's office and the corporate boardroom. Contracts happen regardless of the availability of blue-backing paper and wax seals.[169] Deals can be verbal;[170] exchanges can happen without a single word being spoken.[171] And they can involve everything from expensive plots of oceanfront property right down to the sacks of fresh produce that one brings home from the farmers market. The cases we read together in the class—of agreements involving requirement jet fuel contracts,[172] expensive computer equipment for a large company,[173] a mass commercial sale of grocery

166. For an example of the importance of this skill, see Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systemic Approach*, 40 U. Miami L. Rev. 409, 431-38 (1985); *see also* Zalesne & Nadvorney, *supra* note 57, at 276.

167. *See Shelter v. Chiquita Processed Foods, L.L.C.*, 658 N.W.2d 242 (Minn. Ct. App. 2003).

168. *See Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519 (7th Cir. 1991), *as reprinted in* William A. Klein et al., Business Associations: Agency, Partnerships, and Corporations 212-18 (6th ed. 2006).

169. For example, there is an array of implied warranties available under the Uniform Commercial Code. *See, e.g.*, U.C.C. 2-314 (implied warranty of merchantability).

170. *See* John Edward Murray, Jr., Murray on Contracts Ch. 4 § 69 (5th ed. 2011) ("A promise is legally binding though expressed orally or by conduct if the other essentials for contract formation exist. Any requirement that a contract be evidenced by a writing is a statutory requirement.").

171. *Id.*

172. *See Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975), *as reprinted in* Randy E. Barnett, Contracts: Cases and Doctrine 404-05 (5th ed. 2012).

173. *See Step-Saver Data Systems, Inc. v. Wyse Tech.*, 752 F. Supp. 181 (E.D. Pa. 1990), *as reprinted in* Barnett, *supra* note 172, at 814-16.

chickens[174]—are inadvertently deceiving. My goal is to use strawberries here to shore up the intangible distance of contract law for students, and show how hyperbolic that distance really has been.

The instrumental aspects of the photo allow for closer reading of the objects in the image and a different opportunity for students to play with facts than had they been described the contents of the photo in a written fact pattern. The picture is visible and tangible, as live facts are also seen and not read.[175] The sight of the strawberries in their cartons is supposed to remind them of familiar idyllic moments at rural farmstands and open markets, and the sign with its scribbled misspellings directs us to negotiations and beckons us to discuss within the rules and case law who might be the intended recipient of this farmer's sign (someone particular, or a general public?), how definite the sign might be in connoting an offer or, conversely, an invitation to offer, whether the misspellings make a difference, whether the quantity and price help show a manifestation of willingness to enter into a bargain or give the recipient a power to accept, and what would happen if someone reads the sign and tenders exactly seven dollars or responded with a question (*How much for two packs instead?*)—all to decide the legal significance of this image and whether we have the beginnings of an agreement formed. To find whether an offer exists here or not, students must use the facts they are seeing to tease out the law. This endeavor is a sheer example of learning law through skill, learning function—it is hoped—at the same level as form.

The discussion over this picture also tells us how our conventions of consumer behavior in mass retail and commercial settings help shape how we read (or misread) moments of buying and selling things[176]—moments in which contract law figures very firmly as well. Are all the prices and goods one sees on supermarket shelves offers or invitation to offer? How about items at an electronic retail store instead? Can one ever bargain for a lower price on an item at BestBuy?[177] The answers to all of these questions are processed through a careful, methodical entanglement between law and skills, *form and function*—as they should be—that elevates skills alongside doctrinal knowledge.

174. *See Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960), *as reprinted in* Barnett, *supra* note 172, at 389-94.

175. *See* Richard K. Sherwin et al., *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. Sci. & Tech. L. 227, 261 (2006) (discussing the importance of visual literacy in legal education and that what this means is "being able to identify the meanings that pictures leave unsaid and to translate those perceptions into words.").

176. *See* Jackson, *supra* note 164, at 367 ("What makes contracts such a hard course has less to do with the basic logic than the fact that contract law is essentially about human behavior and psychology. It is about trying to decipher what a person did. In trying to discover the identity of an individual's actions, we have to ponder the reasons behind the actions, which means that we have to ponder what was in a person's mind at a given moment.").

177. Incidentally, haggling at BestBuy is possible. *See* Hilary Stout, *More Retailers See Haggling as a Price of Doing Business*, N.Y. Times, Dec. 16, 2013, at A1.

As long as I have adhered to the three-step method, much teaching and learning utility is rendered out of one image that accesses the intersection of those two components essential to practice and furthering the work of the law in life. Despite the historical hierarchy of skills and knowledge, the use of the three steps here (mimesis, relevance, and discovery) contributes to a moment in which a useful and relevant skill of legal reasoning is suddenly given an unspoken but important focus to resolve where the law leaves room for interpretation. As memorable and resonant as my lesson with strawberries has become for both doctrinal and skills competency, the single image here achieves the teaching of skills alongside doctrine with very minimal effort, and all of it is attributable pedagogically to finding the mimesis of law and skill, the relevance of the lesson, and the moment of discovery that can most whet student appetites to learning skill and law together without too much consideration of what is actually happening pedagogically.

IV. Conclusion

In some ways, that picture of strawberries that I have used to demonstrate to my students how to use facts and law to reach a legal conclusion represents not just the method that I developed. The picture also represents my constant quest here at the University of Massachusetts for finding normativity in law teaching. One image, as an objective correlative, singly captures it all.

Until that hierarchy of doctrinal knowledge and skill and other harmful and irrelevant hierarchies are truly abolished in the law school setting, a little subversion of Langdell could prove lasting—at least for our students and for the quality of our teaching. If inequality and hierarchy are what this article has been fixated upon at its broadest angles, then this method for incorporating skills with doctrine resembles careful but subversive assimilationist tendencies rather than something more innocuous, as sneaking in unwanted good-for-you ingredients onto a child's plate. Instead, I hope my method has at least provoked readers as food for thought.