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Practice-Based Learning: Emphasizing Practice and Offering Critical Perspectives on the Dangers of "Co-Op"tation

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I. INTRODUCTION

My purpose in this article is to present a strong thesis—that practice is the primary site of legal learning and that it should be recognized and valued as such. Although this may sound like a trivial or obvious proposition within the ranks of clinical legal education, I hope to make this proposition strange, perhaps even outrageous. However, I also argue that practice might be too good a teacher and that there is a real danger that law students and other novices will become acculturated to substandard and even unethical norms of practice. In other words, law students may be co-opted during their apprenticeship to practice. To help counteract this risk, I explore ways that law schools and sites of law practice can encourage and nurture a more critical process of acculturation and arm law students with role choices and frames of exploration that might enable them to transform legal norms and legal culture towards more progressive ends.

Although there is little doubt that law schools do an excellent job of turning law school applicants into classroom students and beginning the process of cognitive and role acculturation, contextualized practice does an infinitely better job of inculcating the understandings, skills, and dispositions that comprise competence in the real world, be it a job, a profession, or a service activity. Likewise, although there may be a useful synergy or complementarity between the classroom and practice, that mutual reinforcement occurs only if practice is placed in the foreground. In reaching this conclusion, that performance activities in actual practice settings are crucial to ecological learning, I draw principal support from researchers who propose that apprenticeship-like experiences are a cornerstone of effective learning even during formal schooling.[1]

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1. For an extended discussion of a theory of ecological learning which I summarize in this section, see Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 Ariz. L. Rev. 287 (1994) [hereinafter Baker, *Beyond MacCrate*]; Brook K. Baker, *"Self"-Directed Learning Post-Modernized: The Role of Autonomy, Self, and Self-Realization in Law Student Work Experience* (2001) (manuscript on file with the author) [hereinafter Baker, *"Self"-Directed Learning*]; Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 Clin. L. Rev. 1 (1999) [hereinafter Baker, *Guided Participation*]; Daniel J. Givelber, Brook K. Baker, Jack McDevitt, & Robyn Miliano, *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. Legal Educ. 1 (1995). All four of these articles cite to multiple sources including most prominently, Jerome Bruner, Acts of Meaning (1990); John Dewey, Experience and Education (Collier Books 1963) (1938); Gerald M. Edelman, Bright Air, Brilliant Fire: On the Matter of the Mind (1992); Howard Gardner, The Unschooled Mind: How Children Think and How Schools Should Teach (1991); Diane Gillespie, The Mind's We: Contextualism in Cognitive Psychology (1993); George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal about the Mind (1987); Jean Lave, Cognition in Practice: Mind, Mathematics and Culture in Everyday Life (1988); Jean Lave & Etienne Wenger, Situated Learning: Legitimate Peripheral Participation (1991); Barbara Rogoff, Apprenticeship in Thinking: Cognitive Development in Social Context (1990); Donald A. Schön, Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions (1987); Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action (1983); Francisco J. Varela et al., The Embodied Mind: Cognitive Science and Human Experience (1991); The Psychology of Expertise: Cognitive Research and Empirical AI (Robert R. Hoffman ed., 1992) [hereinafter Psychology of Expertise].

I came to the proposition favoring practice-based learning as an experience-based article of faith. My father went to Northeastern University in the 1940s, I went to the law school in the 1970s, and I have taught there for nearly thirty years, and thus have directly experienced the law school's unique co-operative education program (four upper-level academic quarters, alternating with four, full-time co-op placements in legal settings under the supervision of a lawyer) first hand. Since 1993, I have written extensively about practice-based learning for law students to test my faith and to discover whether co-op really is the engine of learning I believed it to be. I started with three orientations toward my research. First, that student-centered learning is more important than educator-centered teaching and thus, that it is critical to explore recent cognitive research about humans' interactive engagement with the world and about the cognitive legacies of that engagement, what we call learning. Second, that learning should be relatively "self"-directed and identity focused—that university students, as maturing human beings, most of them poised between the play and educational regimes of childhood and the social roles and responsibilities of adulthood, are searching for increased autonomy, identity, and self-realization—a new sense of self, of self-reliance, and of personal competence. Third, that learning is primarily social, not solo. It is not something that occurs just in the head but that it arises out of social practice, out of coordinated action within a community of mentors and peers that is organized to provide vertical and lateral support to new members as they jointly undertake the authentic activities of their practice domain.

In the course of my research and out of these orientations, I discovered three major misconceptions about learning in dominant forms of classroom teaching in law schools: first, that learning is informational/theoretical rather than contextual/experiential; second, that learning should be controlled and relatively selfless or disinterested rather than self-directed, identity-focused, and self-actualizing; and third, that learning is solitary rather than social. In Part II, I will address each of these misapprehensions in order, identifying related misconceptions in the process. Part II will also recapitulate my theory of ecological learning and the search for practice-based competencies.

Part III explores critical perspectives on practice-based learning starting with concerns about the satisficing lessons of practice and the sub-standard guidance of certain workplace supervisors—a danger of all-too-easy fitting in that I call "co-op"tation. Part III also reviews and challenges over-wrought claims about the superiority of clinical and classroom based pedagogies of critical reflexivity, though it still proposes that the typical subconscious and conscious cognitive habits of reflecting on practice during practice should be supplemented with school-based opportunities to reflect upon and critique the students' experiences with the legal system and the forms of legal practice to which they have been exposed. Part IV concludes with a call to action for legal educators. We have an ethical, moral, and educational duty to encourage our students to maintain a critical perspective on their process of acculturation *before*, *during*, and *after* their practice-based experiences. We should help them explore forms of accommodation and resistance to legal practice that nurture their commitment to progressive law reform and their ability to engage constructively in needed social change.

II. A THEORY OF ECOLOGICAL LEARNING: EMPHASIZNG PRACTICE

A. *Three Misconceptions About Learning: Why Co-Locate Learning in Practice?*

Pursuant to the first major misconception, teaching in the classroom is based on the assumption that humans' highest cognitive attainment is their ability to assimilate abstract knowledge and to think propositionally to apply that knowledge in the real world. The more knowledge you absorb and the more abstract that knowledge is, the better prepared students are to confront real life problems in the future. However, human cognition is primarily contextual or situational rather than abstract or theory-based. Humans do not confront a particular place and time, a local field of action, with a predetermined set of responses, with a theory that unproblematically tells them how to proceed. Although their responses are funded by the past—by their cultures of origin, by expectancies drawn from prior experiences, by intuited patterns and fully formed theories, and by processes of script, analogy, and metaphor—situational responses are also constituted by the present, the people, tools, and institutional arrangements that structure a context, that literally generate or call forth a response. In particular, when confronted with a novel problem, the human mind does not ordinarily respond by picking the appropriate theory off the shelf. Instead, the primary resources humans bring to bear are exemplars of past practice—memories of comparable dilemmas solved poorly or well. These exemplars are typically derived from practice only secondarily from classroom investigations, and then only if anchored in authentic, if virtual, dilemmas.

In addition to misapprehending the cognitive resources constructed as memory, there are several other ways in which the typical knowledge-based pedagogy of the classroom misrepresents cognitive realities. First, most classroom pedagogy is ploddingly textual and logical, emphasizing the primacy of conscious thought and abstract legal doctrine. However, the studies of contextualist cognitivists emphasize the predominance, simultaneity, and holism of subconscious processes.[2] Cognition springs forth from multiple subconscious wells; it is certainly more spontaneous than planned. Second, classical classroom pedagogy is organized around an ethic of objectivity, even disengagement, or perhaps more accurately positional agnosticism. Learning is purer if it is unencumbered by representational responsibilities or normative commitments. Contextualist cognition, on the other hand, recognizes the synergies of functional engagement, of being deeply involved in a real or virtually real activity.[3] Third, classroom pedagogy, particularly for beginners, is often organized around simplicity, around a building-block theory of intelligence (why otherwise would we have students read a steady stream of common law cases over and over and over again?). However, recent cognitive studies reveal that complexity elicits a far more robust cognitive response.[4] In particular it elicits a form of cognitive multiplicity that is far more resourceful and solution-oriented. Fourth, classroom pedagogy is geared

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2.   *See* Baker, *Beyond MacCrate*, *supra* note 1, at 299–302 and sources cited.

3.   *Id.* at 305–06.

4.   *Id*. at 314 n.108.

towards unifying explanations and understandings—a grand theory of one kind or another, often the one favored by the instructor even if it is a post-modernist anti-theory. Contextualist cognition in contrast is pluralistic both in the pragmatism of the cognitive resources it considers and in the babble of solutions it weighs.[5]

Just as there is confusion in the classroom about the processes of human cognition, there is confusion about the presumed limits of experience. One reason experience is devalued in the classroom is that it is considered to be particularistic, unexamined, and deformed by subjectivity. However, there are features of experience that make it more or less useful to learning, e.g., continuity (connectedness with past experience), interactiveness (the intensity of engagement), staging (working within the zone of proximal development), repetition and variety (opportunities for both familiar and plural experience), and finally value (the internal and external signals that make the experience "worth it").

The second major assumption of the classroom pedagogy is that educators need to control learning because of their greater expertise and that students should be kept in a relatively dependent and suspended social status, as a student, in order for them to gain cultural literacy. Thus, the classroom regime, from a student's perspective, is primarily one of assigned readings, teacher-dictated assignments, and passive observation of professorial performance in the classroom.[6] In contrast, we should look at students as people with motivational desires and developmental tasks, as people who want to discard the restrictive and passive roles of the classroom for the more autonomous, more career and service-focused, and more self-actualizing and rewarding roles of adulthood. In particular, students want some freedom to decide— some goal-setting of their own, some exploratory opportunities that they have selected. It is not just that they want to be free from the classroom (though there is some of that); they want choice about the collectives they join, the activities they undertake, and the people they associate with.

Part of that freedom entails freedom to explore a new social identity—an identity that is necessarily forged in a field of practice.[7] Students can develop imaginary identities about what it might mean to be a nurse or a lawyer or a manager based on cultural messages, but their *personal* sense of what it means *for them* to be a certain kind of professional, a certain kind of worker, or a certain kind of social activist, can only be learned by engaging authentically in that role and being exposed to the lived identities of other co-participants. Thus, students look forward to co-ops, clinical placements, externships, and even part-time legal work as ways to investigate and confirm, or sometimes to reject, a new way of life, a new cohort of colleagues, and a new sense of self and of social identity. From their exposure to others, students experience an array of

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5.   *Id*. at 306–10 and sources cited.

6.   These roles are admittedly expanded and improved when students are asked to construct meaning—as in "hard" research and writing assignments or when they are engaged in rich legal simulations or engaging clinical practices.

7.   Etienne Wenger, Communities of Practice: Learning, Meaning, and Identity 143–221 (1998).

possible life trajectories for themselves,[8] some paradigmatic but others iconoclastic. In the classroom, students are ordinarily limited to being students, but in legal internships or in a co-op they can be apprentice trial lawyers, regulators, lobbyists, and judges. They can begin to align themselves to norms and modes of practice, for better or worse.[9]

Despite praising practice-based settings as a site of identity formation and self-realization, it is important to remember that some students, particularly women, students of color, and gay and lesbian students, might experience workplace discrimination and alienation, thereby producing fractured identities in the workplace. In addition to external constraints, students also experience internal constraints on their participation, and thus their sense of self, because of their lack of confidence or reluctance to fully engage. However, there is reason to imagine that the classroom imposes its own analogous outsider regimes and internal senses of alienation.[10]

The third major misconception of current classroom practice is its presumption that learning is lonely—that students need to read, research, and write largely on their own. Because, in this view, learning is dependent on what a student ends up with in his or her head, individual knowledge is privileged under what Lave calls a "culture of acquisition."[11] Social practice theory extends the student out of her head and beyond herself, to emphasize the social content of learning, the interpersonal ecology of practice. In this interpersonal ecology, the student learns laterally through collaborative interaction with an entire array of workers and peers and vertically through the central, fluid dyad involving the supervisor/expert and the student/novice. Through the metaphor of guided participation, we can explore the elaborate web of interpersonal relationships that compose the workplace, a social field rich with connection and interdependency. Within this interpersonal ecology, the practice-based student and her coworkers enact multiple and evolving relationships and interactions including role-modeling and emulation, collaboration and mentoring, and supervision and feedback. Most importantly, however, is the idea of guided participation, working shoulder-to-shoulder on a common project.

By focusing on guided participation, we see that learning is social and performative. We see that learners learn not by receiving pre-digested wisdom but by moving performatively from the fringes of a practice community to its core. This trajectory of performance and membership is aided by a complex network of institutional arrangements, human resources, practice routines, coordinated action, tools, and shoptalk. Thus, students can perform competently in practice because most practice is structured to facilitate their participation and to provide them guidance and support, implicitly and explicitly, as they are needed, most especially

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8. *Id.* at 156.

9. *Id.* at 158–81.

10. *See* Brook K. Baker, *Language Acculturation Processes and Resistance to In"doctrine"ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. Marshall L. Rev. 131, 157 (2000).

11. *See* Jean Lave, *The Culture of Acquisition and the Practice of Understanding, in* Situation Cognition: Social, Semiotic, and Psychological Perspectives 17, 18 (David Kirshner & James A. Whitson eds., 1988).

during performance itself. Joint performance with more senior practitioners and with workplace peers facilitates the communication of an elaborate system of performance clues, feedback signals, and explicit and implicit messages of support and guidance that help calibrate the student's fledgling performance. Although newcomers may start with peripheral and less complex tasks, as they become more familiar with ways of being and ways of doing, they are given more and more responsibility. As they learn to fit in, as the value of their work increases, novices are usually given more complex undertakings. These more complex undertakings in turn increase novices' familiarity with the multiple dimensions of the domain and gives them increased opportunities to confront their naïve approaches with more genuine understandings.

When educators think about learning, they tend to overvalue the role of theory before the fact and the role of reflection after the fact, both of which are ordinarily controlled by the educator. They do so based on misunderstandings about both theory and reflection. First, contrary to prevailing assumptions about the ease of remembering and applying theory, people can rarely recall, let alone articulate, an applicable theory in advance of contextual experience because the immediate context and the imminent experience both elicit and interactively reconfigure all cognitive resources, including theory. Memory is not a filing system—it is a mutating resource that may or may not materialize to guide the present depending on contextual exigencies. Second, reflection after the fact is quite likely to be substantially inaccurate because of the relative inscrutability of conscious thought and the complete invisibility of preconscious and tacit processes. We simply cannot honestly report on the vast majority of our actual cognitive processes. Third, rather than rely on theory to problem solve, there is a strong cognitive preference for reasoning by pattern and exemplar. Patterns emerge pre-reflexively from repeat experiences. Likewise, exemplars of and from practice model possible approaches both positively and negatively and thus are the prime ingredients of actual problem-solving in a domain. Fourth, the most important location of cognition, including the pragmatic deployment of reflection and theory, is in action, when the learner is fully engaged, when learners might use intuited patterns, exemplars of practice, and improvisational theory/themes as world-making resources to address destabilizing dilemmas. This is why it is so important to locate guidance in action during the time when the learner is most willing to utilize all available resources, theory and reflection included, to resolve a real puzzle.

Despite extolling the virtues of practice, I do not mean to suggest that the classroom fails to add to the student's cognitive and participatory resources. Expert theory and reflection can help novices in at least four ways: (1) it can map the cognitive, affective, and performative dimensions of the expert domain, (2) it can describe expert heuristics and metacognitive skills, (3) it can facilitate the transfer of otherwise context-bound skills from one setting or problem to another, and (4) it can introduce the discourse practices of the domain so that the novice may communicate meaningfully with others. Similarly, theory and reflection can help to thematize patterns in experience and they can become usefully encapsulated within reflectively enhanced, practice exemplars. Finally, conscious theory-and-reflection-in-action can to some extent countermand subconscious processes and map more expert heuristics over less efficient, "naïve"

cognitive strategies; it can also challenge political and social norms and unethical cultural demands, thereby potentiating resistance and transformation. But, in none of these instances does theory and reflection overpower the primacy of subconscious processes, the evocative power of context, and the centrality of experience itself. Thus, even though I agree that critical reflection about the law, legal norms, and legal culture is important in the classroom, before and after practice-based experience, in my view it is more important that it is nurtured *in* practice. I will return to this theme in the last section of this article, which addresses the dangers of "co-op"tation.

B. Achieving Practice–Based Competence

As argued above, placing learning in practice encourages students to enter a participatory and cognitive apprenticeship with senior practitioners where they can collaborate to resolve authentic dilemmas and while they can reconceptualize the workplace as an organic place of learning.[12] Contextualizing learning in the workplace also permits the development of relational skills and situation assessment skills that thereafter permit the adaptation, transfer, and deployment of performance competencies to new and unfamiliar tasks. The end result of repeat experience in the field of practice is a full repertoire of collaborative skill enablements called competence[13]—capacities to investigate, think, and act appropriately by oneself and with others.[14] The path to practical competence and domain expertise rests ultimately on increasingly flexible and coordinated forms of participation[15] and on the repeated confrontation of naïve heuristics with the more genuine understandings of the domain. Although virtually everyone recommends a confrontation between naïve and expert heuristics in the classroom, the evolving, evocative ecology of practice may be preferable to the decontextualized, intellectualized order of the classroom,[16] even in the most challenging disciplinary settings such as law.[17] "The surprising thing is that, as a world culture, we

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12. *See* John S. Brown et al., *Situated Cognition and the Culture of Learning*, 18 Educ. Researcher 32, 39 (1989); Jean Lave, *The Practice of Learning*, *in* Understanding Practice: Perspectives on Activity and Context 3, 5–6 (Seth Chaiklin & Jean Lave eds., 1993) ("It is difficult, when looking closely at everyday activity . . . to avoid the conclusion that learning is ubiquitous in ongoing activity, though often unrecognized as such. . . . We have come to the conclusion . . . that there is no such thing as 'learning' sui generis, but only changing participation in the culturally designed settings of everyday life.").

13. *See* Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 Wash. L. Rev. 527, 530 (1994) ("The foundations for the qualities necessary to the lawyer's craft lie in character traits and deep knowledge that one would not characterize as 'skills' at all—personal integrity, an inner moral compass, and a perception of one's work as embedded in broad social, economic, political, historical, and for some, spiritual contexts.").

14. *See* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. Legal Educ. 313, 358–60 (1995).

15. *See id.* at 386–89; Lave & Wenger, *supra* note 1, at 20 ("[T]he skillful learner acquires something more like the ability to play various roles in various fields of participation.").

16. *See* Gardner, *supra* note 1, at 179.

17. *Id.* at 123–24 ("Even in the most advanced industrialized countries, certain trades and professions are best learned by working alongside a master, observing what he does, and passing through a graded set of challenges and opportunities. . . . Many vocations and avocations . . . are profitably approached through

have sensed part of the answer [to cultivating genuine understanding] all along. The kinds of environments called apprenticeships have for millennia fused the available forms of knowing in a rich and contextualized way."[18]

To achieve practice-based competence, students must develop a set of skills that differ in important ways from traditional conceptions of instrumentalist skills carried unproblematically from one context to another. Relational skills, situation skills, gap-closing skills,[19] and transfer skills all emerge in the context of guided problem-solving activities; these skills are learned best through repeated collaborative experience—through more and more social practice. "Quite simply, if learning is about increased access to performance, then the way to maximize learning is to perform, not to talk

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apprenticeship techniques. . . . And revealingly, some of the most demanding pursuits in the society, from graduate study at the university to medical internships to the role of a senior aide in a political or business environment, amount to apprenticeship arrangements"); *cf.* Stephen F. Hamilton, Apprenticeship for Adulthood: Preparing Youth for the Future (1990) (recommending an expanded system of apprenticeship primarily for non-college bound students).

18. Gardner, *supra* note 1, at 181. Gardner proceeds to catalogue the multiple reasons why apprenticeships are such powerful contexts for learning.

> Why do apprenticeships work effectively? . . . They provide rich information, nearly all of which pertains in some readily recognizable way to final performances and products of demonstrable importance within a society. They permit aspiring youngsters to work directly alongside accomplished professionals, hence establishing personal bonds . . . . Frequently they also feature interim steps of accomplishment . . . . Peers and others of slightly differing competences can often help and instruct one another. Apprenticeships often are highly motivating; youngsters enter directly into the excitement that surrounds an important, complex, and sometimes mysterious undertaking, where the stakes for success (and the costs of failure) may be high. Finally, apprenticeships embody centuries of lore about how best to accomplish the task at hand, and this lore can be invoked or exemplified at the precise moment when it is needed, rather than at some arbitrary location in a lecture, text, or syllabus.

Id. at 124. Gardner's account of the strengths of apprenticeships is remarkably similar to that of my colleague Michael Meltsner.

> When lawyers learned their trade in the law office, the gap between theory and practice was smaller than it is today. The new lawyer's training was not sequential but simultaneous and thus doctrine and desire, money and ethics, words and music, had to be sorted, balanced and resolved in a single process of professional commitment. The perspective of clients was part of the very fabric of discovering and analyzing doctrine. The neophyte received prompt feedback about his performance from the environment in which he worked. Lessons in human relations, fact gathering, interviewing, counseling and negotiation, in blood and guts if you will, were among the first rather than the last learned by the new practitioner and they were learned when the young lawyer was on the line. A result of the shift to academic preparation is that young lawyers and their seniors lost the apprentice-master relationship that was the key to the way law was learned in the law office.

Michael Meltsner, *Healing the Breach: Harmonizing Legal Practice and Education*, 11 Vt. L. Rev. 377, 384–85 (1986).

19. *See* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 45 (1994) (discussing the role of writing as a gap-closing procedure, a cognitive process of investigation and discovery, as well as a way to communicate intended meaning. They note that "writing is an integral part of thinking and cognitive development.").

about it."[20] Thus, a pedagogy that empowers our students to develop genuine understandings must be primarily contextual rather than didactic and prescriptive. Rather than instruction, there is conversation, guidance, and feedback—forms of social support that draw the novice into more meaningful and effective participation in the full range of activities within a social practice domain.[21]

Although there are clearly skeptics of apprentice-like approaches, even friendly skeptics who urge the utilization of more educator-centric practicums,[22] it is nonetheless crucial to examine the evolution of practice-based competence since so many university students work with practitioners who are not educational specialists on co-ops, in internships, in community service learning, and in clinical placements. In exploring the cognitive and performative foundations of competence, what might be called ecological skills, four points are worth emphasizing: (1) learning disciplinary skills is more a matter of enculturation than of cognitive development; thus contextualizing learning in the workplace permits both a cognitive apprenticeship and a life-long perspective on work as a learning opportunity; (2) recognizing skills to be relational, interactive, and contingent permits us to focus more on the entire social network rather than on any single strand of relationships; (3) learning in the workplace helps develop situation-assessment skills as well as performance and transfer skills; and (4) learning in the workplace promotes confrontation of ineffective heuristics and their replacement with genuine understandings.

1. Learning as Enculturation—Contextualizing Skills Development in the Workplace

Rather than being conceived as the acquisition of abstract knowledge, learning is best conceived as a process of enculturation.[23]

> Expertise does not exist in a vacuum; it is a social construct. The concept of expertise cannot exist independently of a community of knowledge. The knowledge about which one is considered by others to be expert is developed, defined, evaluated, maintained, and transmitted by those in the community who are qualified to make judgments about what counts as expertise. If that is so, then we acquire expertise not in a vacuum, but as novices who must be socialized into a community of knowledge. . . . The process of becoming an expert is at least as much a social process as an exercise of individual effort and intellect. Put this way, expert thinking is successful socialization.[24]

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20. LAVE & WENGER, *supra* note 1, at 22; *see* Brest & Krieger, *supra* note 13, at 559 ("Perhaps even more than most skills, problem solving and judgment are developed largely through trial and error in practice. Such is the case with any art, craft, or profession."). *See generally* LAVE, *supra* note 1.

21. *See* GARDNER, *supra* note 1, at 21; LAVE & WENGER, *supra* note 1, at 109.

22. *See* SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER, *supra* note 1, at 37, 157–73 (urging studio-like practicums as an intermediate "virtual reality").

23. Brown et al., *supra* note 12, at 33–34.

24. Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 13 (1991).

If it is true that learning is based on enculturation, then it makes sense to ask how long one must stay in an educational waiting room. Although we might agree that university is an important, perhaps even essential step in learning certain forms of analysis, there is no compelling defense of the academy's claim to be the *primary* locus of learning. Any reasonable view of education/enculturation would permit, indeed encourage, exposure to other actors besides professors and to social participations and activities other than reading books, sitting in classrooms, and working in educator-dominated laboratories.

In addition to fostering enculturation, practice-based opportunities also permit learning to be contextualized. Ample evidence shows that most skills development is contextual and interpersonal—that learning skills occurs as a result of transactions with one's environment, as a result of interactions with a myriad others in that environment, and as a result of adaptation to contextual circumstances.[25]

> Knowledge—perhaps better called *knowing*—is not an invariant property of an individual, something that he or she has in any situation. Instead, knowing is a property that is relative to situations, an ability to interact with things and other people in various ways. . . . In the view of situated cognition, we need to characterize knowing, reasoning, understanding, and so on as relations between cognitive agents and situations . . . .[26]

These situational opportunities are highly motivational[27] precisely because they occur

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25. *See* Lave & Wenger, *supra* note 1; James G. Greeno et al., *Transfer of Situated Learning*, *in* Transfer on Trial: Intelligence, Cognition, and Instruction 99 (Douglas K. Detterman & Robert J. Sternberg eds., 1993); Rogoff, *supra* note 1; Lave, *supra* note 12; Brown et al., *supra* note 12.

26. Greeno et al., *supra* note 25, at 99–100.

27. According to Gardner and others, one of the most fundamental advantages of contextual placement in the "real world" of doing valued work is motivational—its ability to engage and harness the learner's intentions. *See* Gardner, *supra* note 1, at 124. There is little doubt that motivation greatly enhances the learning process. Peter Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 Ariz. St. L.J. 277, 287 ("The assumption of responsibility for another's welfare, the novelty of the situation, the scrutiny of the teacher, clients, judges, and lawyers, and the perception that the students' success in the clinic directly reflects on future professional success all contribute to . . . a 'need to know.'"); Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. Rev. 287, 315 (1989) ("Many law students appear motivated to do their best in a *real law office*. There is, indeed, a difference between 'hothouse' growth, and growth in a real world environment."); *see also* Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. Rev. 211, 222–24 (1989); see Stephen Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 Neb. L. Rev. 537, 596 n.194 (1990) ("[f]rom the students' point of view, field experience serves as yardstick, laboratory, escape, gap-filler, career compass, and, most importantly, as the means by which they are able to become active in relation to their own learning and educational development." (quoting D. Schön, Field Experience and Professional Education in M.I.T.'s School of Architecture and Planning 53–54 (1974))). Not only do students want to escape the constraints of intellectualizing about a system they have not yet experienced, they also want to put on grownup clothes and reverse the infantilization that so many students undergo in school. *Id*. at 563 n.83 ("Although they cater to academically gifted students, law schools do not treat most students as adults. Faculty, with varying degrees of intensity, view many students as ignorant, unmotivated, insincere, selfish, materialistic, and unwilling and unable to take greater responsibility for their professional growth and development." (quoting Steven D. Pepe, *Clinical Legal Education: Is Taking Rites Seriously a Fantasy, Folly, or Failure?*, 18 U. Mich. J.L. Reform 307, 323 (1985))).

in the organic swampland of practice.[28] "[T]he reasons for the various procedures being taught are generally evident, because the master is in the process of producing goods or services for which there exist an explicit demand and an evident use."[29]

Other theorists agree that knowledge and skill development are enhanced by a contextualized learning environment which: (1) accommodates the constructive nature of learning; (2) integrates the acquisition of domain-specific knowledge and more general and thus transferable cognitive skills; (3) takes into account individual differences in knowledge, intention, ability, and approaches between learners; and (4) embeds learning in realistic contexts involving functional activities and interactions with others.[30] These conditions combine to create an authentic, "cognitive apprenticeship" where perception, performance, and thought coalesce.[31] These conditions also foster a student's appreciation of the learning potential in the workplace.[32] Rather than see work as a place of drudgery or routine performance,

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28. *See* Schön, Educating the Reflective Practitioner, *supra* note 1, at 3.

29. Gardner, *supra* note 1, at 122.

30. *See* Lave, *supra* note 1, at 41–43; Erik De Corte, *Fostering the Acquisition and Transfer of Intellectual Skills, in* Learning Across the Lifespan 95, 96 (Albert Tuijnman & Max van der Kamp eds., 1992) ("[R]ecent research points to the need to anchor learning in more realistic and authentic situations."). This movement towards contextualized learning and cognitive apprenticeships coincides with a historical shift, especially in Europe, of centering more life-long learning in the workplace. *See generally* Hamilton, *supra* note 17 (discussing German efforts in particular); Albert C. Tuijnman, *Paradigm Shifts in Adult Education, in* Learning Across the Lifespan, *supra* at 205, 209 (this shift has been occasioned in part by influential studies "which on the whole seem to indicate that the private rates of return to training [on the job] tend to be very high compared with the rate of return to formal schooling . . . ." (citing Market Failure in Training: New Economic Analysis and Evidence on Training of Adult Employees (D. Stern & J.M.M. Ritzen eds., 1991))). It is not obvious that these studies of European educational and work-training systems can be directly compared to an analysis of legal education in the United States.

31. Brown et al., *supra* note 12 (urging cognitive apprenticeships, embedding learning in authentic activity that makes use of the social and physical context). "[T]he term *apprenticeship* helps to emphasize the centrality of activity in learning and knowledge and highlights the inherently context dependent, situational, and enculturing nature of learning." *Id.* at 39.

> The recently introduced situated cognition paradigm stresses precisely the importance of contextualized learning, and puts forward the 'cognitive apprenticeship' view of learning and instruction as an approach embracing the basic characteristics of situated acquisition of knowledge and skills. . . . Cognitive apprenticeship methods try to enculturate students into authentic practices through activity and social interaction in a way similar to that evident - and evidently successful - in craft apprenticeship. In other words, constructive learning processes should be embedded in contexts that are rich in resources and learning materials, that offer opportunities for social interaction, and that are representative of the kinds of tasks and problems to which the learners will have to apply their knowledge and skill in future.

De Corte, *supra* note 30, at 96–97.

32. *See* Mechthild U. Hart, Working and Educating for Life: Feminist and International Perspectives on Adult Education (1992).

> Looking at work from the perspective of its learning potential is fundamentally different from looking at it simply in terms of skills needed in order to perform well on the job. The latter view reduces work from a rich, multi-layered experience to a one-dimensional

recognizing the learning potential of work empowers the learner to take a life-long perspective on continuing to develop expertise.

2. A Relational Theory of Skills

Expanding on earlier "dimensional" views of power and drawing on his own maturing philosophy of social constructionism, Steven Winter has proposed a four-dimensional view of power.[33] In doing so, he articulates a dynamic of reciprocal social relationships that is equally adaptable to other interpersonal and social phenomenon, even to the concept of skills. This four-dimensional view radically restructures our thinking about the nature of skills, their sources and routines. In particular, this view challenges the instrumentalist conception of readily transferable skill modules, e.g., the interviewing, counseling, negotiation, and fact investigation skills of lawyers. It also challenges the standard conception of a powerful autonomous professional who imposes his abilities and skills on a compliant social universe.

In Winter's view, power is not a thing, a possession, a capacity, or even an inherently hierarchical structure. Power is not a personal capacity amassed and possessed by an individual, let alone a force unilaterally imposed as a matter of applied agency upon compliant and subservient others. Instead, power is relational; it is a distributed social phenomenon that emerges from continuous and pervasive social interdependencies,

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means-ends relationship between worker and skills, where workers need to acquire certain skills in order to become employable and to contribute to an increase in productivity.

Id. at 12. *See generally* Victoria J. Marsick & Karen E. Watkins, Informal and Incidental Learning in the Workplace (1990); Development in the Workplace (Jack Demick & Patrice M. Miller eds., 1993).

33. *See* Steven L. Winter, *The "Power" Thing*, 82 Va. L. Rev. 721 (1996). I have previously used Winter's power theory in another context to discuss a transformative ethic of client empowerment; this section borrows heavily on that previous analysis. *See* Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 New Eng. L. Rev. 809, 867–73 (2000). According to Winter, the four different "dimensional" metaphors of power might be summarized as follows:

> One-dimensional view: A has power over B to the extent A can get B to do something that B would not otherwise do.

> Two-dimensional view: A not only gets to exert power vis-à-vis contested issues, but also gets to set the agenda by insuring inaction on issues otherwise important to B.

> Three-dimensional view: A may exercise control not only vis-à-vis contested issues and by setting the agenda, but by affecting, influencing, shaping, or determining B's very wants and desires. Under this view, the sheer weight of institutional practices and social norms structures peoples' experience and interpretations of the world.

> Four-dimensional view: "Power is a machine in which everyone is caught, those who exercise power just as much as those over whom it is exercised."

Winter, *supra* at 799-800 (quoting Michel Foucault, The Eye of Power, *in* Power/Knowledge 146, 156 (1980)); *see id.* at 868 n.220 (citing Winter, *The "Power" Thing*, 82 Va. L. Rev. 721, 764–65 (1996)). Power can only be understood as the product of a dynamic system, one that is both historically grounded but contingent and mutable as well. *See* Steven L. Winter, *The "Power" Thing*, 82 Va. L. Rev. 721, 799–800 (1996).

social processes, and institutional arrangements.[34] Thus, according to Winter, power "is a contingent product of common ways of understanding and living in a social world, a function of reciprocally enacted roles, routines, institutions and understandings."[35] In this sense, power "is not so much a capacity owned as a process shared."[36] "In principle, then, power is always open to challenge and renegotiation. Because the role must be personified in each and every case, each enactment is also a potential reconstruction."[37] Fundamentally, according to Winter, "power is an *interpretive institution*. Like all social institutions, it exists only so long as the actors who constitute it continue to reproduce their respective roles and routines."[38]

In the interpersonal ecology of practice, skills, abilities, competencies, or enablements—whatever you want to call the effective performances of a social practice domain—are likewise emergent social phenomena. To be most useful, these terms should connote the interactive, highly social ability to operate within and to influence relationships, understandings, and events within an institutional or practice context. Rather than thinking of these skills as self-sponsored and univalent, however, we should understand that all of our performances are essentially reciprocal. Lawyers cannot "interview" a "client" unless another human joins them in a particular social relationship whereby legal knowledge and expertise is somehow enlisted on that person's behalf and unless that person constructs and reveals facts, attitudes, and interpretations about his or her life events in a way that permits the lawyer to structure a legally coherent account. For example, if a person came to a law office and started into a long description of her family squabbles and then began to dictate a letter about a particular grievance her mother had with her sister, we would clearly doubt whether we were in a *legal* interview. For a lawyer to be skillful, both the attorney and the client must adopt familiar roles. Furthermore, they must adopt a particular family of communicative strategies to have anything that we might meaningfully describe as a legal interview.

Dangling within and constituted by a particular subset of relational roles and engaging in particular kinds of communicative practices and social acts, disciplinary experts attempt to subtly rearrange the social world in desirable ways—but can do so only with the joint participation and cooperation of other social actors. These efforts and the efficacy of their performances are frequently called skills, but they are much more fruitfully considered collaborative enterprises. People respond individually, and institutions[39] respond collectively, as a result of their reciprocal sensitivity and

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34. Winter, *supra* note 33, at 728. "Power is not a property of an actor who exercises domination over another; it is the emergent quality of a reciprocal social relation. Just as its assertion enacts power, deference can generate or sustain it." *Id.* at 741.

35. *Id.* at 742.

36. *Id.* at 799.

37. *Id.* at 810.

38. *Id.* at 831.

39. "[A]n institution is nothing more (or less) than the practices, reward structure, and attendant processes of socialization that successfully reproduce a set of roles, values, and routines in an ever-changing group of people who constitute the institution's 'personnel.'" *Id.* at 775.

agreement, tacit and explicit, with the vibration of the web that they have initiated together. These responses are rarely singular—act begets act. Instead, a series of gestures, moves, and words elicit contingent social responses, which in turn subtly change the field of exchange. Provisional plans mutate, new tactics spring forth, and in the process socially meaningful ends might (or might not) emerge from the social/relational field. If dependents, adversaries, and decision makers all interact according to socially meaningful ends, in a way that is pleasing, we are said to have been skillful or competent or to have had ability. And yet, this attribution of a unilateral and one dimensional agency and efficacy clearly misrepresents that which has been a profoundly contingent, variable, and interpretive process and even more so misrepresents that which has been irreducibly interactive. Such an individualistic formulation also over-privileges planning, prediction, intention, and control[40] at the expense of contextual awareness, interpersonal sensitivity, creativity, and reciprocity. There may be much cognitive and emotional work that precedes a certain vibration in the web, but the ultimate effective act is a shared, social one arising from a particular cultural context and from within a continuum of historical interactions. [41]

3. Fostering Situation Skills, Skill Enablements, and Transfer Skills as the Route to Practical Competence

Contextualizing skills as an outcome of enculturation and recognizing the social/relational roots of skills highlights the importance of situation assessment skills which are necessary precursors to the deployment of task performance skills. Only by immersion in a functional context can a novice appreciate, develop, and utilize situation skills at the same time she emulates the conventional performance skills of practitioners. The combination of the two kinds of skills eventually leads to a state of enablement called practical competence wherein skills learned in one context or one type of complex problem are adaptable and transferable resources for exploring analogous problems in less familiar contexts.

Rather than seeing performance skills as abstract, decontextualized, readily transferable, instrumentalist recipes, it would be better to see the relationship between general capacities to act and the specific contexts or situations where those competencies might be enacted. "Activity psychology and modern cognitive theory stress that skills should be analyzed as competences or 'capacities to act,' and that these competences are 'situated.'"[42] This knowing is not primarily cognitive in the sense of a formal,

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40. "[A]ny intentions developed during the course of an established activity or role are, in an important sense, prescripted by the purposes and possibilities that constitute that particular endeavor *as an* endeavor." *Id.* at 811.

41. "Because efficacy and effect are contingent on a variety of contextual factors both internal and external . . . the strategy that emerges may be very different than the calculated tactic that gave it birth." *Id.* at 812.

42. Jeroen Onstenk, *Skills Needed in the Workplace, in* Learning Across the Lifespan, *supra* note 30, at 137, 140 (citations omitted). For example, using thinking-aloud protocols, Linda Flower and John Hayes have shown how expert writers continue to develop and transform their understanding of a writing dilemma and their rhetorical strategies throughout a multi-stage writing process. Linda Flower & John R. Hayes, *The Cognition of Discovery: Defining a Rhetorical Problem*, 31 C. Composition &

reified mental representation carried unproblematically from one situation to another.[43] Instead, situational knowing, in law and in other forms of practice, is predominately social and as such it is distributed between and among the joint participants in a social practice setting.[44] Accordingly, to deploy skills in a practice setting involves more than expert knowledge about conventions of practice, it requires the ability to react to and utilize the resources and constraints of a particular environment; it requires situational skills. Because "[e]ach task and work environment is characterized by a degree, however small, of uncertainty, uniqueness or conflict" and because of the uncertainties and situational constraints of interpersonal relations and organizational norms, people need to develop situational competencies as well as technical proficiencies.[45] These situational competencies include both strategic effectiveness in obtaining results in a field of constraint and opportunity, and social/communication skills in dealing with, learning from, and cooperating with others.[46]

One of the consequences of domain specificity and of the situational anchoring of knowledge is recognition of the difficulty in transferring or applying skills and knowledge from one context to another.[47] Most investigators believe that expertise is inbred rather than hybrid, and that it is difficult to transfer or adapt expert thinking over long "distances."[48] "Thinking at its most effective depends on specific, context-based skills and units of knowledge that have little application to other domains. To the extent that transfer does take place, it is highly specific and must be cued, primed, and guided; it seldom occurs spontaneously."[49]

Comm. 21 (1980), *reprinted in* The Writing Teacher's Sourcebook 92 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988).

43.   Lave, *supra* note 1, at 23–44, 142, 175. Rideout and Ramsfield have the same understanding about legal writing skills. "Legal writing, in this view, is not a unitary, idealized, universalized practice, but rather one that shifts with the topic, [purpose,] or audience, and also with the setting." Rideout & Ramsfield, *supra* note 19, at 97.

44.   William F. Hanks, *Foreword*, *in* Lave & Wenger, *supra* note 1, at 13, 17.

45.   Onstenk, *supra* note 42, at 148.

46.   *Id.*

47.   Baker, *Beyond MacCrate*, *supra* note 1, at 318–24.

48.   *Id.* at 321; Williams, *supra* note 24, at 11.

49.   D.N. Perkins & Gavriel Salomon, *Are Cognitive Skills Context-Bound?*, 18 Educ. Researcher 16, 19 (1989). "[G]eneral cognitive skills can be thought of as general gripping devices for retrieving and wielding domain-specific knowledge . . . ." *Id.* at 23. In contrast to this limited-transfer view, other investigators conclude that expert thinking is in fact a blend of specialized knowledge/skills and more general cognitive abilities that are routinely adapted to novel settings. *See supra* note 1. These general cognitive skills might include: problem decomposition, inferencing, hypothesis generation, end-means thinking, and planning as well as metacognitive abilities to reflect on and double-check one's strategies. Stephen T. Peverly, *Problems with Knowledge-Based Explanations of Memory and Development*, 61 Rev. Educ. Res. 71, 83–84 (1991). The availability of these general cognitive skills would suggest that training for transfer is a relatively easy form of instruction.

The practical importance of this debate about degrees of transferability for legal educators is three-fold: (1) are the alleged cognitive skills developed in law school significantly more general, accessible, and transferable than the skill enablements acquired in a practice context; (2) can learners be trained to

A more radical critique of transfer theory suggests that it is fundamentally flawed to the extent that it proposes that experience must be or can be systematically abstracted and that the resulting abstraction is routinely accessible, adaptable, and employable in confronting subsequent dilemmas.[50] One of the flaws in transfer theory is the assumption that problems are well defined by a problem-giver or even by an expert problem diagnostician. In practice, diagnosticians, e.g., medical, legal, and math practitioners, are investigators exploring multiple problem definitions under conditions of uncertainty and confusion. In other words, dilemmas are explored through chronological activity and ongoing interpretation. In that process, problems are discovered, created, recreated, and transformed[51] through "gap-closing" procedures and processes of discovery, exploration, and improvisation[52] rather than through abstract "problem solving" and deployment of standardized instrumental skills. Likewise, goals are not always "givens" external to the problem being constituted. Instead, goals are identified and created out of the inherent conflicts of the dilemma.[53]

Likewise, transfer theory is flawed by the assumption that similarity between conditions or problems "exist" when in fact human actors "create" or "establish relations of similarity" through their interpretative processes, their activity within a problem space, and their collection/deployment of resources. People do not find analogies, they create them, intuitively and otherwise, by constructing both similarities and dissimilarities.[54]

The final problem with transfer theory is the assumption that abstraction or theory is the principle resource from the past,[55] that abstraction can be accomplished

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enhance their transfer skills whether those skills are learned in school or in practice, and (3) is that training, if possible, better done in authentic practice contexts or in school-based learning? The first question involves one of the longest lasting and most intense debates of modern education—does a liberal arts education, and its law school counterpart, prepare learners with a predicate set of general intellectual skills which are routinely remembered and adapted to local conditions as the need arise? As previously established, the exaggerated claims of the academy about the nature of theoretical knowledge, its easy transmission, ready accessibility, and routine applicability have all been substantially discredited. *See generally* Baker, *Beyond MacCrate*, *supra* note 1, at 332–48. As discussed in the following text, answers to the second and third questions suggest students can learn transfer skills ecologically in a practice context.

50.   *See* Baker, *Beyond MacCrate*, *supra* note 1, at 323–24.

51.   *See* Lave, *supra* note 1, at 23–44.

52.   *Id.* at 142. "Gap-closing processes unite means and ends, transforming both in the process . . . ." *Id.* at 175.

53.   *Id.*

54.   *See* Blasi, *supra* note 14, at 355–61.

55.   The ideology of formal solutions—theory—and the algorithms of formal solutions reverberate in the discourse activities of a domain. Humans who have been subjected to schooling and to the ideology of rational thought, reflection, and theory refer back to that ideology when discussing and explaining their practice. However, rather than being implemented in dilemma resolving activities as such, theory and formal solutions are much more likely to be used in a required justificatory, i.e., ideological, discourse within the domain. In other words, practitioners may, through convention or otherwise, speak theory even though they do not do theory. *See* Lave, *supra* note 1, at 176. "An alternative account of the orderly

early and effectively, and that conscious, verbally explicit strategies improve problem-solving. Social practice theory and research confirm that repeated opportunities to confront and resolve dilemmas are the more effective means of shaping knowledge and realizing its usages.[56] In other words, more practice, not just more talk, is likely to resolve deficiencies or crises in performance.[57] The end result of these reiterative experiences is not ordinarily a blueprint for future practice,[58] but a set of exemplars, individual and shared,[59] which create expectations[60] to be enacted, explored, and transformed under local conditions of constraint, opportunity, and resource. The repertoire of historical exemplars of practice help create a personal field of action, a

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and (un)remarkably effective character of practice may be found in the complex constitution of structuring resources inventively employed in gap-closing, sense-making processes." *Id.*

    As an example of the justificatory uses of theory and its relative absence in practice, Lave and Wenger report that "the verbal instruction provided by health officials has the effect of teaching midwives how to talk in biomedical terms when required. Such talk only serves to give them 'face validity' in the eyes of others who believe in the authoritative character of biomedicine." Lave & Wenger, *supra* note 1, at 107. Ironically, however, this biomedical discourse practice seems to have "no effect" on midwives' existing practice. *Id.*

56. Lave, *supra* note 1, at 44.

57. *See id.* at 182. "Discursive commentaries about experience . . . are [commonly] believed to be necessary conditions for *learning* abstract and general notions, but there is an alternative to this view, when direct experience is taken to be the more basic condition of learning." *Id.* at 183. This observation does not suggest that social discourse cannot prove effective or that guidance from others is illusory. It does mean that the ultimate test of discourse and guidance is the opportunity for continuing performance in which advice will be accessed (perhaps) as one additional resource in constituting and resolving the present dilemma.

    Perhaps parents can relate best to the following example. During the summer vacation, I had difficulty (again) convincing my teenage son to take out the garbage and to clear the table. The standard disapproving and exhortatory lectures were not working—in fact they increased resentment on both sides. A friend ultimately proposed more responsibility, i.e., more activity, instead of more moral persuasion. She recommended that he make supper rather than merely clean up afterwards. On a few glorious occasions that advice actually worked.

58. "[I]nformation and skills are not transmitted but are transformed in the process of appropriation [and use]. Social activity serves not as a template for individual participation but as a stepping stone, guiding the path taken but not determining it. For as individuals participate in social activity, they choose some aspects for attention and ignore others, and they transform what is available to fit their uses." Rogoff, *supra* note 1, at 197.

59. One's repertoire of exemplars can derive from personal, individualist activity, but much more commonly it results from shared activity and joint participation. Rogoff proposes "learning" through appropriation of shared, not just individual, activity rather than internalization of external activity or of distal, propositional discourse. *See id.* at 195.

60. There is some degree of regularity of expectations, of social continuity, in historically structured practice domains, e.g., lawyering. That regularity or continuity ordinarily emerges when repeated activity within a domain permits one to reproduce similarity from one occasion to another. The resulting legacy of such activities is central and routine exemplars of activities-in-setting, congruent with canonical exemplars and the patterned in personal performance, which are given priority confronting current dilemmas. "Continuity may be thought of as an active production of the reproduction of settings, activities and selves. It is achieved through change and improvisation, partly subjectively and partly through the reproduction of the constitutive order." Lave, *supra* note 1, at 187.

set of expectancies which give rise to familiarity, routine, and practical competence—to adaptable and applicable lessons.

Assuming that transfer of some enablements is an attainable goal, some investigators are optimistic about the ability to train for transfer, subject to constraints. "[T]ransfer effects do not occur spontaneously, and are even difficult to obtain deliberately," given the importance of well-organized, domain-specific knowledge and experience.[61] Nonetheless, transfer proponents cite growing evidence that the ability to transfer can be enhanced through the following methods: (1) increasing metacognitive, or self-monitoring skills; (2) mindful abstraction of skills to be transferred and purposeful reapplication of those same skills; and (3) partial decontextualization of the skills through framing and recontextualization through bridging.[62] Metacognitive skills focus on being alert to the possibility of transfer— being mindful of its possibility and alert for opportunities.[63] Mindful abstraction of skills is aided by using problem-based learning where the heuristics of diagnosis, information search, and solution are used over and over again and thereafter reflected upon.[64] The prescription for framing or integration is related to the call for mindful abstraction and involves abstracting one heuristic behavior to a broader problem-solving framework, i.e. recognizing that ends-means thinking can be one form of planning alternative approaches based on a desired outcome.[65] Bridging, on the other hand, involves consciously drawing connections between processes used in a past contextual dilemma and similar processes adaptable to the present context.[66] Bridging may have the most universal application since it relies on the cognitive preference of looking for, creating, and employing analogies.[67]

The possibility of training for transfer leads to the question of whether transfer skills, assuming they exist, are learned better in the classroom or in the field. As described above, most of what might be called transfer skills require the development of situation sense, a sense that evolves only in practice.[68] Likewise, developing transfer skills requires the opportunity to practice transfer using a particular substrate of knowledge resources—again, an opportunity best enacted in the context of repeated authentic dilemmas. Finally, research has consistently shown that it is difficult to

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61. De Corte, *supra* note 30, at 101.

62. *See id.* at 102–04. The possibility of *mindful* abstraction and decontextualization is the most problematic feature of this theory.

63. David Perkins, Smart Schools: Better Thinking and Learning for Every Child 125 (1992).

64. *See id.* at 127 (citing John D. Bransford et al., *New Approaches to Instruction: Because Wisdom Can't be Told*, *in* Similarity and Analogical Reasoning 470 (Stella Vosniadou & Andrew Ortony eds., 1989)).

65. De Corte, *supra* note 30, at 104.

66. *Id.*; *see* Blasi, *supra* note 14, at 360–61.

67. *See* Perkins, *supra* note 63, at 125 (citing Ann L. Brown, *Analogical Learning and Transfer: What Develops?*, *in* Similarity and Analogical Reasoning, *supra* note 64, at 369); Blasi, *supra* note 14, at 355–61.

68. Onstenk, *supra* note 42, at 151 (explaining that to be able to transfer skills from one setting to another, people "need to recognize them [comparable skills], to be able to perform complex processes of decontextualization and recontextualization, and to be able to respond flexibly").

transfer theory from the classroom to the job, "since people depend on cues in their normal work environment to understand and solve problems."[69] Accordingly, "it is more natural to start by helping people analyze the context in which they experience a problem and then to help them look at the solutions they identify in light of [more abstract] principles which might help them do their work differently."[70] These findings do not doom the possibility of learning some transfer skills in the classroom, but they do strongly suggest that transfer is learned just as well or better in practice settings, especially when one varies and repeats the setting and the activities.

4.   *Confronting Naïve Understandings with Expert Heuristics*

Students developing new skills experience mind-clash, the confrontation between what they already know and the skills they already have and the situational, cognitive, and performative requirements of a novel dilemma. Whenever humans confront an unfamiliar task, our initial impulse it to apply, consciously and unconsciously, the patterns of thought and repertoire of skills that have worked previously. However, these previous problem-solving strategies are often situationally inappropriate—they are the wrong tools for an under defined problem—we reach with them, but the tools will not grasp. Fortunately, a cognitive apprenticeship is a particularly apt medium for managing cognitive confrontation between naïve understandings from the past and the more genuine understandings of the present. These practice-based experiences build naturally on intuitive childhood or novice understandings even as they confront, challenge, and modify those intuitions with more expert understandings.

> Indeed, apprenticeships may well be the means of instruction that builds most effectively on the ways in which most young people learn. . . . To the extent that they feature more formal notations or concepts, these are introduced to the learner directly in the context in which they are wanted, and the learner sees for himself the ways in which they may be applied. Here the differences from formal schooling are most salient. Of course, the learner's misconceptions and stereotypes may interfere with mastery, but they are perhaps less likely to emerge, and more likely to be counterindicated when they do emerge, because the learner is working closely with a master who may be experienced in meeting and muting such erroneous beliefs and practices.[71]

What we call practical competence is the end result of contextualization, relational skills, situation assessment skills, transfer skills, and cognitive confrontation. Practical competence is characterized by a combination of a specific domain of knowledge and a situated repertoire of capacities to act. Practical competence replaces earlier more naïve and simplistic forms of knowledge and performance with genuine understandings

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69. Marsick & Watkins, *supra* note 32, at 52; Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. Legal Educ. 469, 482 (1993) (discussing a study of how beginning lawyers learned lawyering skills found that "[t]raditional law school classes are not the only, or even the principal, source for the development of legal skills").

70. Marsick & Watkins, *supra* note 32, at 52.

71. Gardner, *supra* note 1, at 124.

and expert heuristics. Practical competence includes the capacity to use the environment in doing the job: tools and physical environment, other actors (supervisors, coworkers, clients), conceptual tools and the professional culture itself contribute to an ability to cope with the key problems of the workplace.[72] Practical competence, therefore, is preferable to any form of purely theory-based competence because it enables the actual expression of skill enablements in their proper, situated forms. [73] As repeatedly stressed, this competence can mature only *in* practice, though skill enablements can be prefigured and perhaps further enriched by particular forms of school-based reflection as described further below (Part III).

III. CRITICAL PERSPECTIVES ON THE DANGERS OF "CO-OP"TATION

Despite my optimism about practice-based learning and despite the apparent success of practice-based learning at Northeastern University School of Law and elsewhere, there are at least three daunting challenges to its maximization. First, if students are not challenged on the job, not given meaningful responsibilities, and not socialized as team members—in other words, if they are given mundane or trivial tasks, if they are asked to perform grunt-work only—then the practice-based experience may not be worth the tuition dollars and opportunity costs they entail. Second, to the extent ecological learning is dependent on high quality participation in a highly competent setting, we must consider the dangers of exposure to substandard and unethical practice that may lead students to uncritical acceptance of inferior standards of performance and to amoral acceptance of unethical conduct. Third, the process of enculturation through participation leads to the danger of uncritical acculturation—of fitting in all too well. This danger includes unreflective acquiescence to oppressive institutional arrangements and cultural norms. For me,

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72. *Id.* at 145–49.

73. After cataloguing the many educational advantages of practice-based learning, Gardner's final argument for contextualized learning in a practice is that apprenticeship may well be the very best way to generate genuine disciplinary understanding.

> An active and sustained participation in an apprenticeship, however, offers a far greater opportunity for understanding [than school]. In such long-term relationships, novices have the opportunity to witness on a daily basis the *reasons* for various skills, procedures, concepts, and symbolic and notational systems. They observe competent adults moving readily and naturally from one external or internal way of representing knowledge to another. They experience firsthand the consequences of a misguided or misconceived analysis, even as they gain pleasure when a well-thought-out procedure works properly. They undergo a transition from a situation in which much of what they do is based on adult models to one in which they are trying out their own approaches, perhaps with some support or criticism from the master. They can discuss alternatives with more accomplished peers, just as they can provide assistance to peers who have recently joined the team. All these options, it seems to me, guide the student toward that state of enablement—exhibiting the capacity to use skills and concepts in an appropriate way— that is the hallmark of an emerging understanding.

> *Id.* at 203 (emphasis in the original). In this account, Gardner emphasizes the length of apprentice-like opportunities, suggesting that brief forays into disciplinary cultures may be insufficient to map relevant norms.

the most compelling question about a theory of ecological learning is whether critique of dominant culture and existing institutions can occur within the context of practice-based experiences. Ultimately, I propose a version of critical reflectiveness that can and should occur in the throes of real-life experience but these same reflective virtues should be nurtured in the legal academy as well.

A. Current and Historical Reservations

Historically, the apprenticeship model has been challenged because of concerns about exploitation[74] and a lack of quality control[75] and more recently because of concerns about differing learning styles, risks of mimicry,[76] and pervasive unreflectiveness.[77] In the legal context, these criticisms led to the near total demise of formal apprenticeship early in the twentieth century[78] and to continuing

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74. *Id.* at 124 ("The clouded reputation of apprenticeships probably arises in significant measure from the fact that they were often seen as exploitative . . . .").

75. *Id.* at 125.

76. Certainly, some students will learn much more readily than others in an apprenticeship situation, either because they have a more appropriate blend of intelligences or because their style of learning happens to be more compatible with the teaching style of the master. Nor do I want to contend that deep understandings will necessarily or automatically emerge; no doubt some masters are happy to accept derivative performances, and some students are content simply to mimic what they see before their eyes. In such a situation, however, it is less likely that a student will radically misconstrue the nature of the desired behaviors, and in general the model is presented in enough different ways, over a sufficiently long period of time, that the learner eventually comes to master the desired skill with some degree of flexibility.

    Id. at 147.

77. *Id.* at 125 ("Apprenticeships may result in adults who are competent but not necessarily articulate or reflective about what they can do.").

78. In colonial America and throughout the nineteenth century, apprenticeship was the predominant form of legal education. *See* 2 Anton-Hermann Chroust, The Rise of the Legal Profession in America 173 (1965); Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s 3, 24 (1983). *See generally* Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. Legal Educ. 124 (1976) (discussing the system of legal education in early Massachusetts as described in the writings of John Adams and others); Charles R. McManis, *A History of First Century American Legal Education: A Revisionist Perspective*, 59 Wash. U. L.Q. 597, 601–06 (1981) (discussing pre-revolutionary legal education); Stephen R. Alton, *Mandatory Prelicensure Legal Internship: An Idea Whose Time Has Come Again?*, 41 U. Kan. L. Rev. 137, 139–43 (1992) (giving a brief history of legal apprenticeship in America). By 1938, however, the legal education establishment succeeded in convincing almost every state that attendance at a law school was the preferable means of access to the profession. *See* Stickgold, *supra* note 27, at 293; *see also* Alfred Z. Reed, Present-Day Law Schools in the United States and Canada 209–23 (1928); Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum: Report of The Task Force on Law Schools and the Profession 103–04 (1992) [hereinafter "MacCrate Report"] (summarizing criticism of apprenticeship training: little training, little time spent with mentor, inadequate teaching, tedious copying, and lack of a theoretical focus); Robert Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36 J. Legal Educ. 45, 73 (1986) ("Apprenticeship trivialized practice instruction by emphasizing mundane information (e.g., where to find the proper form) and mechanical

reservations about legal externship[79] experiences, which are like the co-op, internship, and community service placements used in many undergraduate programs. Even with respect to these university-sponsored, practice-based programs, most clinical commentators recycle a standard litany of reservations about apprentice-like placements: (1) students are not getting anything other than premature exposure to a lifetime of practice; (2) the type and variety of work is low level and trivial; (3) students are completely at the mercy of any substandard practice and ethical hooliganism to which they are exposed; (4) the educational focus and quality of supervision offered by typical practitioners is highly the suspect; and (5) practitioners are unreflective and uncritical about their practice. Each of these concerns is worth serious consideration, both empirically and theoretically, but, in my view, the concern about critique is most compelling and requires extended discussion. My basic conclusion is that no matter how pervasive deficiencies in practice may be, most students have the latent ability to recognize, critique, and reject outrageous and unjust practices, but that the university retains an important role to encourage, sustain, and deepen that critique.

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skills (e.g., arrangement for service of process). Students were used as mere resources, or often forgotten altogether for large parts of the time spent in their mentors' offices.").

Ultimately, the professional orthodoxy made it nearly impossible to argue that the apprenticeship system was educationally superior to law school education, proprietary or university-based. "[N]o one would suggest today that training for the range of demands on the profession would be best left to apprenticeship training . . . ." Meltsner, *supra* note 18, at 384. *But see* Alton, *supra* note 78, at 158–63 (discussing, contrary to this pronouncement and the resounding historical critique, that a partial apprenticeship system should be reestablished); James W. Ely, Jr., *Through a Crystal Ball: Legal Education—Its Relation to the Bench, Bar, and University Community*, 21 Tulsa L.J. 650, 657 (1986) (recommending a period of intensive supervision by practicing lawyers).

Despite general approval of the demise of the apprentice system, some commentators have lamented its loss. Roscoe Pound lamented "a loss that . . . has broken the continuity of the professional tradition, the tradition of what is done and what is not done by the good lawyer . . . ." Roscoe Pound, *The University and the Legal Profession*, 7 Ohio St. L.J. 3, 26 (1941). Similarly, my colleague, Mike Meltsner has observed, "[w]hen the legal academy split from legal practice, we lost the context in which the process of working out the relationship between getting the job done, learning the trade, training for the profession and mentoring took place." Meltsner, *supra* note 18, at 387.

79. Although there is no universally accepted definition of externships, common features are: (1) a law school course given for credit, (2) in which the student works in a law-related placement outside of the law school, e.g., with a judge or in a law firm, government agency, legal service office, or advocacy organization, (3) doing legal work with or for the placement supervisor. *See* Leah Wortham, *American Bar Association Externship Standards: Regulation in Search of a Theory* 2 (1991) (unpublished manuscript on file with the author). Beyond these core common features, pedagogical goals of externships, placement settings, student commitment, and oversight by the law school vary widely from program to program. Although externships are now widespread, the planning for externships has been either incoherent or at least uncommunicated until quite recently. *See* Stickgold, *supra* note 27, at 321; Roger C. Cramton, *Change and Continuity in Legal Education*, 79 Mich. L. Rev. 460, 464 (1981) ("[T]he extracurricular growth of apprenticeship experiences has been largely unplanned."). The cost of this incoherence is quite troubling to some. "So long as the critical role of practice-based learning is allowed to remain invisible and unplanned, the learning that comes out of this relationship will be ad hoc and capricious." Meltsner, *supra* note 18, at 385.

1. Critiques of the Work Itself—It is Premature and Mundane

A common criticism of part-time employment, internship programs, clinical education, and, indeed, skills training in general is that the student gains no real benefit—all the student is doing is gaining premature experience, the same she will have when she graduates and becomes a worker. According to these critics, "What's the rush?" Students should take the brief opportunity they have in school to broaden and deepen their understanding before they smother their intellectual spark in the drudgery of routine practice.[80] This critique is made quite strenuously in multiple sectors of the university, particularly by proponents of a liberal arts education who believe that broad exposure to the academy's cultural/intellectual capital is preferable to premature exposure to a rapidly mutating practice. Rather than postulating that this experience is premature, however, the theory of ecological learning suggests that practice-based experience is an essential cognitive resource, one that interacts constructively with the more crystalline forms of knowledge taught in school. Indeed, there may be complementarity between theory and experience, a synergy between the classroom and practice that offers a superior model of higher education. In particular, schools may help to structure early experiences to intensify and deepen students' participation and capacity to engage and perform. "The fact that placement occurs as part of an academic program provides the school with opportunities to provide the students with structure, guidance, and insight that they would not have if they had the same experience for the first time in practice."[81]

If not premature, then the work is said to be mundane—low level and trivial. In the legal context, anecdotal horror stories abound about students who double check footnotes, Shepardize endless cases, summarize meaningless depositions, messenger documents to far off locations, irradiate themselves at Xerox machines, or simply idle away their "free time" with trash novels and summer romances.[82] In addition to triviality, some commentators worry that work assignments are too repetitive, too narrow, and too acontextual.[83] However, these "concerns about students not being involved in worthwhile activities tend to ignore the fact that students can and usually do object to being given menial tasks."[84]

More serious is a criticism about a "free help" psychology, which allegedly plagues some internship programs. This psychology supposedly leads to work that is inappropriate for an educational experience—"work which can be done easily with

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80. *See, e.g.*, Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577, 590 (1987) (making the softer point that clinical courses originally offered little more than "earlier acquisition of real life experience").

81. Maher, *supra* note 27, at 569.

82. *See* Stickgold, *supra* note 27, at 319–20. Nonetheless, these anecdotes became the legislative facts for regulation. *See generally* Maher, *supra* note 27, at 541 (describing "trial-by-anecdote"), 586 n.172 ("[T]he stereotype has apparently made a significant impact on regulators.").

83. *See* Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 Nova L. Rev. 95, 104–05 (1987).

84. Maher, *supra* note 27, at 586–87.

little training or supervision, work which is repetitive, or work which the student already knows how to perform."[85] This danger of inappropriate work assignments is allegedly exacerbated by students' timidity in selecting a placement, by the danger of student passivity, and by the desire of students to "look good" by doing only that which they can already do. Students are said "to select work which we know we can perform and which, therefore, is comfortable"[86]—in other words, students are not educational risk takers.

> A person who considers herself an employee will be less likely to ask questions, to take risks, to insist upon proper supervision and feedback, to request more challenging assignments, to take time from "producing" in order to observe a deposition or trial, to ask to sit in on a client interview, or to take the time to read an entire case file rather than look up a narrow point of law for the attorney.[87]

Although this question about the prevalence of low level work is essentially empirical, not theoretical, our research at Northeastern University shows that students are typically given appropriately challenging and varied work. However, when they are not given appropriate assignments or when they cannot get clarification or when they are left idle, their learning suffers.[88]

2. *Critiques of Workplace Supervisors and Their Practice*

In addition to criticizing the work that students are often asked to do in practice-based settings, critics also worry about substandard performance and ethical hooliganism in the workplace and about the quality of supervision students receive. "[T]he world of law office practice, like any social system, has its vulgarities, mistaken skill notions, and untrustworthy exemplars, and experiencing it in an unexpurgated or uninterpreted form sometimes can teach the wrong lessons."[89] In particular, there is the danger of satisficing: "[s]tudents do not invariably learn effective practice skills working in outside law offices; sometimes they just 'practice their mistakes,' and those of their offices."[90] Thus, the critique goes, if students are exposed to substandard practice, the risk is that they will internalize those inferior standards, that they will learn to be content with mediocrity or worse. However, the fear that students will be seduced by bad practice seems somewhat exaggerated. Students are not one-day-old ducks who "imprint" with the first large animal to whom they are exposed. Moreover, students are ordinarily exposed to more than a single performance and more than a single performer. As discussed further below, they also have reflective and dialogic

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85. Motley, *supra* note 27, at 214.

86. *Id.* at 215.

87. *Id.* at 227.

88. *See* Givelber et al., *supra* note 1, at 41–42.

89. Robert Condlin, *Learning From Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 Clinical L. Rev. 337, 343–44 (1997).

90. *Id.* at 345.

capacity for evaluation and critique. If bad performances poisoned the possibility of learning, how could we explain how so many survive or even flourish despite bad parenting and/or bad teaching?

However, the critique of practice is not just that it may be sub-competent, but that students are routinely exposed to unethical or immoral practice.[91] For example, based on anecdotal journal evidence collected by students working in legal externships, Professor Hellman estimates that the majority of law students are exposed to varying degrees of professional impropriety during a one semester, part-time externship program. "In their practice environments, many students are exposed to unprofessional conduct by attorneys that shocks them in terms of its frequency and seriousness."[92] "Many students saw a lawyer lie, cheat, steal, or disserve a client, frequently doing so as if this were 'business as usual' in the legal profession."[93] The net effect of this exposure may be a lessening of students' moral standards—a socialization to degraded norms of practice—and a profound sense of disillusionment.[94] To correct for the immorality of practice, Hellman recommends more exposure to clinicians or other legal educators who would boost students' ability to withstand the contaminated world of practice.[95] "Perhaps openly confronting the students—in a protected setting—about the reactions we now know many of them are having to their first encounters with the practice environment could help to 'cushion' the 'wall of disillusionment' and diminish the likelihood that students will react to this 'collision' by lowering their personal standards."[96]

Even if there is no problem in the work that the students perform or in the standards of performance to which they are exposed, critics argue that there is a fundamental flaw in the educational focus and quality of supervision in most practice settings—in the ability of students and placement supervisors to structure a supervisory relationship, to portray an appropriate array of enviable behaviors, and to prioritize student learning.

> First, it is difficult to find outside placements for students in which the supervising attorneys are good teachers. Most lawyers who practice are not really interested in teaching, and even when they are, they often are not able to take sufficient time to give students adequate instruction in the broader issues relevant to their areas of practice. Second, in almost every outside

91. *See* Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 Geo. J. Legal Ethics 537 (1991).

92. *Id.* at 543.

93. *Id.* at 575.

94. *Id.* at 605.

95. *Id.* at 610 ("The analysis of the journals presented here also supports the notion that to optimize the educational and professionalizing impact of student field placement programs, such programs should include a law school component designed to parry the nonconstructive influences to which many students are subjected in the field.").

96. *Id.* at 607–08, *see also* Kate E. Bloch, *Subjunctive Lawyering and Other Clinical Extern Paradigms*, 3 Clinical L. Rev. 259 (1997) (discussing three models which externships clinicians might utilize in responding to ethical dilemmas students experience in practice).

placement there arises an irreconcilable tension between the demands of clients and the educational needs of students.[97]

Another legal clinician expresses similar concerns: "[i]n any externship, the student runs the risk of being assigned to a supervisor . . . who is not primarily concerned with the student's education or who perceives the student's greatest value as a researcher rather than an involved participant."[98] These same concerns are expressed in non-legal settings as well: "most offices, factories, firms, and clinics are not set up for the demanding tasks of initiation and education. Pressures for performance tend to be high; time, at a premium; and mistakes, costly."[99] Because of these alleged inherent defects in workplace supervision, most legal clinicians argue that school-based clinics and supervision by clinician/educators are inherently superior to any conceivable externship program.[100] However, assuming that only clinical legal educators can predictably supply quality supervision and then articulate or model

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97. Stephen Wizner & Dennis Curtis, *Here's What We Do: Some Notes About Clinical Legal Education*, 29 Clev. St. L. Rev. 673, 681 (1980). What Wizner and Curtis said in 1980, in-house clinicians have repeated up to the present. "While a practitioner might be a superb lawyer, she would be unlikely to have the training, experience, or time to devote to the teaching role that a full-time clinical teacher would." Subcomm. on Pedagogical Goals of In-House, Live-Client Clinics, *Section One: Report of the Committee on the Future of the In-House Clinic*, 42 J. Legal Educ. 508, 511 (1992), *see also* Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Legal Education*, 19 N.M. L. Rev. 185, 198–99 (1989); Rose, *supra* note 83, at 104–05; Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 How. L.J. 31, 39 (1993).

98. Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 Clinical L. Rev. 1, 31 (1996). In addition to being concerned about the absence of an educational focus, Caplow is concerned about the variability of fieldwork supervision. "[T]his experience highlights the vagaries of externships that rely on the good will, interest, and teaching skills of field supervisors. Differences of temperament, workload, and values among supervisors portend erratic experiences." *Id.* at 31–32.

99. Schön, Educating the Reflective Practitioner, *supra* note 1, at 37.

100. *See* Gary Laser, *Significant Curricular Developments: The MacCrate Report and Beyond*, 1 Clinical L. Rev. 425, 437 (1994) ("An externship cannot substitute for an in-house live-client clinical experience, even if combined . . . with simulation courses . . . . It is well known that during law school a student's professional identity is shaped. The power of a professional identity is that it sets the standard for future practice. In an externship, the role model for that first practice experience is an outside lawyer whose primary interests and training are not in education. In the in-house clinic, the role model is an educator who has been selected for the high quality of his skills, values, and artistry."), *see also* Caplow, *supra* note 98, at 30 ("Despite having sent hundreds of students into the world to be supervised by attorneys and judges, and having witnessed the growing acceptance of extern clinics by clinical teachers, I remain unconvinced that these programs provide as good an academic experience as real-client clinics."). Echoing the scholars, legal regulators seem equally concerned about the quality of supervision and the lack of involvement of a professional legal educator in supervising the student's work experience.

> A significant problem with credit-bearing externships is that the quality of supervision varies considerably depending on the experience of the field placement supervisor and the amount of time he or she is able to devote to such supervision. . . . Further steps should be taken to require faculty involvement in the design, supervision and evaluation of every program of extern experience, and to emphasize the critical importance of faculty responsibility for overseeing extern programs.

MacCrate Report, *supra* note 78, at 271.

appropriate norms of professional practice, reveals a form of "academic arrogance."[101] Indeed, there are multiple factors impacting and impelling the placement supervisor to highly prize the student's educational priorities, e.g., getting more and better work from the student, recruiting and training students for permanent placement, relieving the tedium of practice, or giving in to an inclination to teach or to mentor.[102]

Once again, the overall quality of standards, ethics, and supervision in practice is an empirical question with few answers. With respect to the general quality of work-based supervisory experiences, our research shows that two-thirds of students are generally satisfied with the quality of their co-op supervision.[103] However, this finding does not directly answer the question whether high quality supervision itself is essential to learning. Indeed, when investigating this question, we were surprised to learn that the quality of supervision was not significantly correlated with students' assessment of the quality of their co-op as a learning experience.[104]

B. A Special Concern for Reflection and Critique

1. A New Pedagogy of Critical Reflexivity

For the most part, critics of practice-based learning assume that reflection is absolutely necessary to learning and that students and practitioners are incapable of reflection on their own.[105] According to this critique, the expert should, but usually does not, expose

> the analysis that goes into every decision and judgment; the supervisor must think out loud. The supervisor must then remove herself from the task at hand and consider her choice of actions, reflecting on its effectiveness and conformity to normative models and previously defined goals. She must engage the student in the effort, opening herself to the same kind of critical examination that the student is expected to develop from his own performance in traditional clinical experiences.[106]

Unfortunately, according to the critics, practitioners rarely, if ever, achieve this ideal.

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101. Maher, *supra* note 27, at 584.

102. *See id.* at 586.

103. Givelber et al., *supra* note 1, at 25.

104. *Id.* at 41.

105. *See, e.g.*, Kotkin, *supra* note 97, at 198–99; Rose, *supra* note 83, at 104–05.

106. Kotkin, *supra* note 97, at 200–01. I have questioned the first assumption, *see* Baker, *Beyond MacCrate*, *supra* note 1, at 332–48, and others have refuted the second. "Practitioners do not inevitably fail to reflect on or generalize from their experiences, and they do not necessarily teach students shortcuts, bad practice, or to maintain the status quo." Maher, *supra* note 27, at 582. Some externship directors have attempted to respond to the criticism of lack of reflectiveness by structuring elaborate mechanisms to encourage student reflection. *See, e.g.*, Liz Ryan Cole, *Lessons From a Semester in Practice*, 1 Clinical L. Rev. 173 (1994) (describing a number of mechanisms designed to make her semester-in-practice students "reflective" including an orientation program, daily journals, conversations with the school-based instructor, group discussions, a twenty-page paper, and a formal plan for additional learning).

The call to reflection in clinical legal education has echoed a broader call throughout higher education. "In recent years, at the confluence of streams in experiential education and humanistic psychology, the central role of reflection in learning has emerged."[107] From being a neglected stepchild at the fringes of adult learning theory, reflectiveness, and its esteemed sibling critical reflectiveness, have emerged as central players in a developmental theory of learning.[108] Not only is critical reflection eulogized with respect to formal schooling, it is proposed for informal community action groups[109] and the workplace as well.[110]

Even within reflectiveness, however, there is a familiar hierarchy of respectability favoring conscious reflection and theory, proposed most cogently by Jack Mezirow. At the lower end of the spectrum, not even within the meritocracy of reflectiveness, is thoughtful action—cognition-in-practice—merely drawing on what one already knows in order to act.[111] Conscious reflection, next highest on the pecking order, can occur during-the-fact to reassess what one is doing or after-the-fact to evaluate what one has done, including a critical appraisal of assumptions about the contours of the problem and the process of selecting resources and reaching a solution.[112] The highest

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107. Philip C. Candy, Self-Direction for Lifelong Learning: A Comprehensive Guide to Theory and Practice 390 (1991). "Boyd and Fales define reflective learning as 'the process of internally examining and exploring an issue of concern, triggered by an experience, which creates and clarifies meaning in terms of self, and which results in a changed conceptual perspective.'" *Id.* (citation omitted).

108. *See* Jack Mezirow, Transformative Dimensions of Adult Learning (1991); Fostering Critical Reflection in Adulthood: A Guide to Transformative and Emancipatory Learning 1, 4 (Jack Mezirow & Associates eds., 1990) [hereinafter Fostering Critical Reflection in Adulthood]; Hart, *supra* note 32; Stephen D. Brookfield, Developing Critical Thinkers: Challenging Adults to Explore Alternative Ways of Thinking and Acting (1987) (urging a critical perspective at home, at work, and about the media); David Deshler, *Metaphor Analysis: Exorcising Social Ghosts, in* Fostering Critical Reflection in Adulthood, *supra* (urging that people exorcise the ghosts of socialization and that they freely choose meaning and action); Peter Jarvis, Paradoxes of Learning: On Becoming an Individual in Society 94–97, 113–15 (1992) (also urging a critical perspective as the highest attainment of learning). Of course, the call to reflectiveness is not brand new —John Dewey urged reflection to assess the grounds and implications of one's beliefs way back in 1933. John Dewey, How We Think 9 (1933). Paulo Freire urged a reflective and transformative pedagogy in the early 1970's. Paulo Freire, Pedagogy of the Oppressed 202 (1970). Mezirow, in particular, draws heavily on Jurgen Habermas in constructing his recent theory of transformative education. *See* Mezirow, *supra* at 64–68, 71–72, 86–88. Mezirow has added a developmental twist that critical reflectivity is a developmental stage through which most adult learners pass as the ultimate stage of a developmental process.

109. Thomas W. Heaney & Aimee I. Horton, *Reflective Engagement for Social Change, in* Fostering Critical Reflection in Adulthood, *supra* note 108, at 74.

110. Victoria J. Marsick, *Action Learning and Reflection in the Workplace, in* Fostering Critical Reflection in Adulthood, *supra* note 108, at 23.

111. *See* Jack Mezirow, *How Critical Reflection Triggers Transformative Learning, in* Fostering Critical Reflection in Adulthood, *supra* note 108, at 1, 4.

112. *Id.* Mezirow defines reflection as "the process of critically assessing the content, process, or premise(s) of our efforts to interpret and give meaning to an experience." Mezirow, *supra* note 108, at 104. "Reflection is the central dynamic in intentional learning, problem solving, and validity testing through rational discourse." *Id.* at 99.

form of reflection, however, is critical reflection where the learner surfaces, reflects upon, and challenges underlying premises—the products of socialization, personal ideology, and systems of meaning-making which were used to frame the problem and to describe the learner's implicit social role and activity.[113] Hart proposes a further and sharper terminal level of critique than that proposed by Mezirow:

> the very meaning of 'critique' or 'critical' refers to the process of questioning the reality and validity of a social consensus concerning beliefs, values, and assumptions. In particular, critique aims at the illumination of a false consensus which, within a hierarchically organized, divided, and stratified society, is but the consensus of an élite.[114]

Unlike regular reflection, which can occur in the commotion of experience, critical reflection, according to Mezirow, requires "a hiatus;"[115] thus, it necessarily takes place after-the-fact, in moments of calm. Even though critical reflection requires a time out, it ordinarily entails a potentially threatening reappraisal of fundamental premises, even of one's conception of self.[116] Mezirow proposes that perspective transformation can occur through accretion of minor schematic destabilizations that challenge more foundational perspectives or in response to major disorienting dilemmas of life.[117] Since perspective transformation[118] is ordinarily the response most valued by reflectionists, individual or collective transformation is the highest attainment of critical reflection. According to Mezirow, this transformation of perspective is initially facilitated by creating a dialogic community that engages in rational discourse to challenge, to investigate, and to validate or reformulate ideas;

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113. *See* Mezirow, *supra* note 111, at 6–7, 12–18. "[B]ecoming critically aware of our own presuppositions involves challenging our established and habitual patterns of expectation, the meaning perspectives with which we have made sense out of our encounters with the world, others, and ourselves." *Id.* at 12. Mezirow refers to critical self-reflection as "[b]y far the most significant learning experiences in adulthood." *Id.* at 13.

    Mezirow proposes that the distorted premises might be of three types: epistemic, concerning the nature and use of knowledge; sociocultural, concerning dominant ideologies of power and social privilege; and psychic, resulting from unwarranted childhood anxieties or other traumas. *Id.* at 15–17. Developmental changes in epistemological premises is discussed at greater length in Karen S. Kitchener & Patricia M. King, *The Reflective Judgment Model: Transforming Assumptions About Knowing, in* Fostering Critical Reflection in Adulthood, *supra* note 108, at 159. Challenges to sociocultural ideologies are discussed in Mechthild U. Hart, *Liberation Through Consciousness Raising, in* Fostering Critical Reflection in Adulthood, *supra* note 108, at 47; Hart, *supra* note 32; Heaney & Horton, *supra* note 109. A therapeutic computer program used to challenge psychic premises is discussed in Roger L. Gould, *The Therapeutic Learning Program, in* Fostering Critical Reflection in Adulthood, *supra* note 108, at 134.

114. Hart, *supra* note 32, at 66.

115. Mezirow, *supra* note 111, at 13.

116. *Id.* at 12–13.

117. *Id.* at 13–14.

118. Perspective transformation is the process of becoming critically aware of how and why our presuppositions have come to constrain the way we perceive, understand, and feel about our world; of reformulating these assumptions to permit a more inclusive, discriminating, permeable, and integrative perspective; and of making decisions or otherwise acting upon these new understandings. *Id.* at 14.

after transformation of ideas, the next step may be to transfer vision into action, nurturing the will to act individually and collectively.[119]

Mezirow clearly urges a change in praxis, though, according to him, it cannot be forced. Nonetheless, Mezirow believes that educators have a moral and pedagogical obligation to facilitate and precipitate transformative practice. "[E]very adult educator has a responsibility for fostering critical self-reflection and helping learners plan to take action."[120] The responsibility is neither one of indoctrination nor of engineering a favored action.[121] It is, however, a role of being an "empathetic provocateur."[122] As an educator, however, Mezirow is content to leave that ultimate decision, whether to enact transformation, to the learner.

However, Mezirow is criticized for not being more proactive about existing social relations and urging an explicit program of social change. "Despite a vocabulary of reflection, participation, and empowerment, underlying structures of a hierarchical and unequitable organization and distribution of work remain intact."[123] In contrast to Mezirow's cognitive and social process theory of transformation, Hart has a substantive vision of social change, arguing that "we can arrive at a notion of 'good work' which is not constructed from the privileged, exclusive reality of a male-identified élite, thus freeing the notion of success from its bond with an inherently unjust, stratified social reality, characterized by an unequal system of rewards and privileges."[124] Hart urges actual social transformation. "The effort of truth-seeking is a profoundly transformative one, where knowledge about one's self and about the world is constantly recreated in view of a future society."[125] "Above all, it makes visible 'the key phenomena of social and economic injustice' which are otherwise considered mere exceptions [to the prevailing social order]."[126] In this explicit call to the praxis of social action and transformation, Hart joins Paulo Freire, who likewise urges critical awareness in the cause of social change.[127]

2.   *Reformulating Claims About Reflectiveness*

According to Mezirow's "reflective" learning theory, without reflectiveness experience remains inert, devoid of new meaning, consisting solely of the ritualistic reenactments of habit. Without reflection, humans allegedly become marionettes in the hands of powerful social puppeteers; without reflection, humans allegedly march

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119. Jack Mezirow, *Conclusion: Toward Transformative Learning and Emancipatory Education, in* Fostering Critical Reflection in Adulthood, *supra* note 111, at 354, 354–55.

120. *Id.* at 357.

121. *Id.* at 360–63.

122. *Id.* at 360.

123. Hart, *supra* note 32, at 63.

124. *Id.* at 64.

125. *Id.* at 198.

126. *Id.* at 202 (citation omitted).

127. *See* Freire, *supra* note 108.

forward lockstep with the quiet, subconscious steamroller of acculturation. To avoid these dehumanizing possibilities, reflectionists insist that learners and novices must learn to reflect. Only through reflection can change occur and only through change can we measure what these educators call learning.[128] Accordingly, reflective learning is the "cardinal virtue" of adult education.[129]

Of course, there is a strange circularity in the elevation of reflectiveness when adult-learning theorists, like Mezirow, define learning only as "conscious" learning. Using this definition, Mezirow defines away the possibility of subconscious, sub-propositional learning and of purposeful but un-self-aware practice. He defines away the accretion of experience and the intuitive, instantaneous emergence of pattern. He also defines away gestalt coherence, metaphor, and intuitive leaps. He further defines away the evocative particularity of setting and self and the pulsing web of connection and social discourse which, in themselves, transactionally transform phenomenological experience, its interpretation, and its social explication. He similarly defines away the dialectical relation[130] of social arena, human actor, and situational dilemma, which construct a field of action,[131] not through propositional rules but through subtle dynamics of tension, conflict, and ambiguity.

Likewise, once Mezirow defines learning as dependant on change,[132] he defines away the "learning value" of preserving adaptive, even optimally adaptive, responses. He defines away the possibility that inventing the wheel once may be preferable to reinventing it every time you have to go someplace. He ignores or downplays many of the virtues of cognitive economy, gestalt coherence, reduced anxiety, routine

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128. Mezirow, *supra* note 111, at 5 ("Much of what we learn involves making new interpretations that enable us to elaborate, further differentiate, and reinforce our long-established frames of reference or to create new meaning schemes.").

129. Mezirow, *supra* note 108, at 111, 117.

130. In simplest terms, a dialectical relationship is more than cause and effect between two or more terms; it is a relation where the terms are brought into being only in conjunction with and in conflict with each other, thereafter structuring many potential and actual resting points or resolutions. *See* Lave, *supra* note 1, at 145–46 (using the example that shelf displays and shoppers' choices in a grocery market stand is a dialectical relationship in grocery shopping). Dialectical relations are rarely symmetrical and thus the possibilities of routine reproduction, modest transformation, or radical change will vary from practice setting to practice setting, from activity to activity, and from human actor to human actor. *See id.* at 147–48.

131. In discussing the social organization of human activity, Lave speaks of the constitutive order of cultural semiotic systems and the material, social world of political economy and social structure; this constitutive order helps structure social arenas which in turn help structure settings, i.e. fields of action. *See id.* at 178–80.

132. "Learning may be understood as the process of using a prior interpretation to construe a new or a revised interpretation of the meaning of one's experiences in order to guide future action." Mezirow, *supra* note 108, at 12. Admittedly, Mezirow, does not think that all reflective learning requires transformation of premises—"Reflective learning can be either confirmative or transformative." *Id.* at 111. Nonetheless, he does argue that reflection on underlying premises ordinarily "leads to more fully developed meaning perspectives . . . ." *Id.*

performance, and some degree of social continuity and convention.[133] Mezirow, in his conception of conscious change, also overestimates the monolithic reproduction of culture. His conception of cultural uniformity suggests the smooth reproduction of a single culture from one generation to the next and far too little variation of experience based on cultural difference, pluralism, rebellion, and change.[134]

Finally, Mezirow assumes that reflection and self-examination are accurate, that when one reflects on experience and interprets it linguistically one extracts its true meaning and thus its only valuable lesson, e.g., learning. This assumption has been routinely disproven by researchers in the lab and in the field.[135] Not only does Mezirow assume that reflection extracts truth from experience and from the mind itself, he also assumes that the resulting interpretative "truth" is ordinarily unitary and definitive, even if temporarily provisional. Rather than suggesting that reflection might produce multiple meanings, Mezirow suggests instead that the old, bad, habituated, and implicit meaning of experience is replaced by the higher, deeper, truer, conscious meaning discovered through reflection. Mezirow valorizes reflection further by calling this new meaning theory—theory distilled from crude experience, past and present, through the heat of reflection.[136]

On the more positive side, Mezirow's reflectionist theory assumes, correctly I think, that critical reflectiveness, as a disposition, happens—people are capable of criticizing their culture. Moreover, he is right that critical reflection seems to be developmental—something that adults can ordinarily do as the result of their multiple experiences and that children can ordinarily not do.[137] However, his analysis also assumes, incorrectly I

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133. Given our biological imperative for conserving energy, including cognitive energy, given our biological imperative to reduce chaos and anxiety, and given our biological preference for action-readiness, coherence, and closure, it is especially odd to systematically privilege slow consciousness over instantaneous patterned coherence. Moreover, the very existence of a social system necessarily imposes some degree of continuity. "The constitutive order and everyday practice together reflect and constitute the distribution of power and interest such that, in general, reproduction of activity in setting is much more likely than its transformation or change." Lave, *supra* note 1, at 188–89.

134. *Id.* at 10. In particular the concept of cultural uniformity "legislates away major questions about social diversity, inequality, conflict, complementarity, cooperation and differences of power and knowledge . . . ." *Id.*

135. *See* Baker, *Beyond MacCrate*, *supra* note 1, at 338–40 and sources cited.

136. Mezirow, *supra* note 111, at 360.

> Implicit throughout this book is the finding that theory building may derive from encounter and challenge in either the context of social action or in an educational setting with significant learning experiences as points of departure. . . . [A]nalysis of incidents from different perspectives leads to critical assessment, this leads to interpretation, which, in turn, leads to explanation and the formulation of theory . . . .

> *Id.*

137. Mezirow, *supra* note 108, at 155 ("It should be clear that a strong case can be made for calling perspective transformation the central process of adult development."); *see also* Kitchener & King, *supra* note 113, at 159 (proposing this developmental perspective in their study of epistemological presumptions). This part of the analysis may be correct simply because children ordinarily lack a depth of experience and because critical reflectiveness is not frequently displayed to them in the autocratic rule of adults. *Id.*

think, that adults can be deeply critical about that with which they are unfamiliar simply because they have learned to be critical somewhere else. Mezirow assumes that critical reflexivity is a transferable cognitive skill and one that is easily and routinely enacted regardless of impoverished experience or situational constraint.

An equally plausible explanation, however, and one that is quite consistent with existing data, is that people might become more critically reflective about the wide range of practices and the culture of a domain only after a sufficient degree of experience with a particular context or form of practice. For example, Hart recommends a learning rhythm "which alternates between short-term learning processes where information is gathered and accumulated and technical skills and abilities are shaped, and long-term learning processes where one's sense of self, one's meaning perspective, and the parameters of experience itself are transformed."[138] Otherwise, the critic is merely repeating a pro forma or "structural" critique born in a different cultural context, but potentially ill adapted and uninformed in the present context—the critique risks being lifeless and abstract.

Despite delays in meaningfully critiquing the culture of a domain until one has amassed some experience, novices are nonetheless capable and cognitively predisposed to criticize their process of acculturation, even their unconscious, osmotic acculturation.[139] Since cognition is highly attuned to the novel and the problematic, this form of reflection on acculturation remains a vital resource when entering a new knowledge or practice domain. Accordingly, my image of social participation and of critical enculturation within a practice domain is that one must enter the "donut" of context from the outside via repeated functional experience in order for meaningful substantive reflection to occur. Once inside, however, and once one is habituated to the activities, landmarks, and canons of donut-land, one might use critical reflection and critical dialogue to find the hole in the donut and thereby gain a different and valuable perspective—to become post-conventional in forms of practice and transformational in social vision. Whether this critical reflectiveness emerges organically from the well-springs of patterned experience or whether it needs to be learned, facilitated, and prompted remains to be seen, though I suspect that it emerges both through our longing for coherence and through our interactive social imperative to communicate and validate our experiences with others, an imperative that can occur both within and outside of the classroom.[140]

Thus, it might be better to interpret reflection, even critical reflection, as a kind of mental habit, one with evolutionary benefit,[141] that acts as an additional cognitive,

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138. HART, *supra* note 32, at 214.

139. *See* Baker, *Beyond MacCrate*, *supra* note 1, at 348.

140. This conclusion is not much different from Mezirow's developmental thesis.

141. Mezirow also seems to recognize the evolutionary benefit of critical reflectiveness.

> Our need to make and transform meaning appears to be orthogenetic in nature—that is, to imitate inevitable patterns of biological development. Each transformation of a meaning scheme or perspective makes more efficient use of energy and generates its own reinforcement because the resulting behavioral pattern is better integrated and more open to new ideas, which provides for greater adaptational efficiency.

affective, and dispositional heuristic facilitating both coherence and change.[142] Under this conception, conscious reflection is not the only form of cognition that we might privilege with the label "learning." Reflection would not be the only source of coherence, but rather one of many, nothing more than a "normal" feature of consciousness and sociability. Nonetheless, a transformative vision, whether "natural" or facilitated, must be complemented with an imperative for transformational practice.[143] This emphasizes the praxis of social change, taking critique beyond the mind and the world of talk. Transformational practice places critique in the world of action, in the difficult practicalities and judgments of an actual social setting. A perspective of transformational practice asks not just what you think and say, but what you can and should do.

3. Proposals for Critique from the Law School

The legal writers who urge a critical perspective on the law are, like Mezirow, for the most part, legal progressives who uses the intellectual tools of Marxism, structuralism, and postmodernism to destabilize support for the status quo. Critical legal studies, critical feminism, critical race theory, and queer theory all point to abhorrent social conditions and codified power imbalances which privilege some and radically disadvantage others. They distrust formalistic conceptions of the rule of law and they question legal institutions, prevailing forms of legal practice, and legal culture; at the same time, they advocate resistance and interstitial change. These critics recommend using reflective spaces within the legal academy for students to criticize the basic assumptions and practices of the American legal system.[144]

A growing number of commentators are also urging critique, radical critique, as one of the primary justifications for practical legal experience during law school; they

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Mezirow, *supra* note 108, at 193.

142. Reflection would be a *cognitive heuristic* because it would require you to double-check a patterned response that might be suboptimal in responding to the present dilemma. In this view, even though your reflection might not be entirely accurate in accessing and interpreting preconscious processes, it would permit an opportunity to reinterpret the sociocultural setting, the problem-space, the problem itself, the potential solutions considered, the solution enacted, and the observed outcome. Reflection would be a *social heuristic* because it would permit you to articulate and communicate with others the meaning you have provisionally made of your experience, actual or anticipated. That dialogue can expose you, even through the stilted, decontextualism of language, to alternative meanings and perspectives that might expand or deepen your horizons of coherence about past, present, and future experience.

143. Hart, *supra* note 32, at 64.

144. *See, e.g.*, Gary Minda, *Jurisprudence at Century's End*, 43 J. Legal Educ. 27 (1993). The call to criticism has not gone unopposed and the strongest opponents have chastised "nihilists" who threaten both legal education and society at large. *See, e.g.*, Paul D. Carrington, *Of Law and the River*, 34 J. Legal Educ. 222 (1984). Dean Carrington's attack on "nihilist" critique, in turn, calls forth a spirited rebuttal. *See, e.g.*, Gary Minda, *Of Law, the River, and Legal Education*, 10 Nova L. Rev. 705 (1986). I must resist any urge to accurately summarize and footnote the extensive critical legal literature urging "critique" as the highest value of human thought. Clearly, this literature exists in abundance. For a thoughtful article applying critical ethnography to education as a whole, see Gary L. Anderson, *Critical Ethnography in Education: Origins, Current Status, and New Directions*, 59 Rev. Educ. Res. 249 (1989).

want critique to occur in and about law offices as well as within the calm classrooms of the academy.[145] One of the early proponents of a critical perspective and of the special opportunity for critique in externship programs was Robert Condlin, who like many clinicians, put critique at or near the top of the hierarchy of goals for clinical legal education.[146] One aspect of this critique is an ethical dialogue; another concerns alternative visions of lawyering roles and client decisionmaking; yet another aspect of critique is more substantive and concerns power.[147] The net impact of this critical perspective is that legal culture and society at large need deconstruction and reconstruction—dismantling privilege and hoarded wealth, reconfiguring respectful human relations, and increasing racial, social, and economic justice.

Even when one credits the value or centrality of critique, there are many questions still waiting to be answered. Is the value of critique best achieved by focusing on individual practices[148] or should the students/novices reflect on the practices of others so that they are less defensive and can have a broader range of vicarious experiences to explore? Are externships and other practice-based opportunities a good place for students to gain the nut of experience for critique[149] or would students be better off

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145. In many ways, critique was one of the generative forces for the clinical movement. It was the social and political activists of the 1960s who both populated the legal service clinics and articulated the rationale for a public-service based clinical opportunity. "Clinical education has been inextricably tied to serving poor people. Although few law schools had clinics before the 1960s, the major stimulus for many programs that developed during the 1960s and early 1970s was the desire to serve the needs of the unrepresented, to sensitize students to their ethical and moral responsibilities to society, to train students in poverty law practice, and to give law schools a role in their communities." Tarr, *supra* note 97, at 32. Certainly, there is an argument that the roots of the clinical movement in the social activism of the 1960s evidences a commitment to "teaching about use of the law as an instrument of social change, awareness of injustices in the treatment of poor people, and legal problems and institutions encountered by poor people." Wortham, *supra* note 79, at 20.

146. Condlin *supra* note 78, at 50. "Political critique is the most important clinical objective for several reasons. . . . Critique is a university's reason for being . . . . Stripped of its critical role, the university is a mere socializing agent, an instrument of prevailing orthodoxy, engaged only in legitimation and control." *Id.* at 50. Other clinicians before and after Condlin have emphasized the importance, even the centrality, of a critical perspective. *See, e.g.*, Wortham, *supra* note 79, at 21; Spiegel, *supra* note 80, at 601; Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Surveying Education*, 4 ANTIOCH L.J. 287, 294–99 (1986). Stanley Fish would accuse these clinicians as hopeless idealists (in both senses) just as he has criticized critical legal studies proponents for their "anti-foundationalist theory hope." *See* Stanley Fish, *Critical Self-Consciousness, Or Can We Know What We Are Doing?*, *in* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 436, 458–65 (1989). Nonetheless, the question of critical reflexivity remains a central concern in education. *See* Anderson, *supra* note 144, at 254–55.

147. *See, e.g.*, Baker, *supra* note 33, at 857–904 and sources cited.

148. Condlin, *supra* note 78, at 47 n.6.

> [I]f one is interested in a moral philosophy of lawyering it is necessary to deal with these questions in the first person. Moral understanding is arrived at by critical reflection on activities that have been experienced pre-reflectively and begun to be internalized as dispositions. . . . Without the experience of acting in lawyer role moral philosophizing will be just so many words.

Id. at 66–67.

149. *See id.* at 47 n.6; Maher, *supra* note 27, at 583–84; Rose, *supra* note 83, at 103.

in the clinic,[150] or in a problem-method or simulation classroom? Can students maintain enough "distance" in the practice setting to be an anthropologist of the law, assuming anthropological distance and neutrality are appropriate?[151] Conversely, if students are unable to engage in critique of practice in the real world,[152] is there little long-lasting advantage to doing it in the classroom?[153] This range of questions does not cause me to question the desirability of critique, social action, and reform, but merely reminds me that we have only tentative theory or data that reliably predicts where critique can most meaningfully occur.[154]

IV. CONCLUSION

A representation of town/gown dilemma in higher education could suggest a simple opposition between law school-based and practice-based learning. Although a stark rendering of an oppositional dilemma might prompt a healthy debate, a simplistic dichotomy cannot capture the complexity of the dilemma(s) that educators,

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150. Condlin's espousal of external placement as a superior setting for receiving the experiential nut for critique was quickly critiqued in turn.

> Structurally, in-house clinics are in some ways better situated to provide critique than are placement programs. The clinical professor is on the scene, whereas placement programs face a substantial problem of retrieval. Unless the student tells the clinical professor about a lie or a rout, these subjects will not be discussed.

Kenney Hegland, *Condlin's Critique of Conventional Clinics: The Case of the Missing Case*, 36 J. Legal Educ. 427, 429 (1986).

151. The critical clinical student is more of (though not completely) an anthropologist than a native. He becomes part of the lawyer society, but also maintains enough emotional and intellectual distance to allow him to analyze that society's practices for their political and moral biases, presuppositions, and effects. He tries to understand why things are done as they are and enlarge his sense of what could be done, rather than internalize as habit what is commonly accepted. Condlin, *supra* note 78, at 53 n.24.

152. Despite Condlin's emphasis on the student's experience and personal critical insights, Condlin envisions an externship law school educator as a central player in an ethical dialogue. Although I agree that law professors should be engaged in ethical and critical dialogue about the practices of others, in fact the only person who can effectively model a realistic ideal of the reflective, critical practitioner is the lawyer, legislator, or judge who is critical and self-critical in day-to-day practice. This practitioner operates under multiple and contradictory constraints which confound and inform her critique and which help her reach that level of accommodation and resistance which defines her present place in legal culture. *See* Anderson, *supra* note 144, at 256–57 (discussing resistance theory).

153. Condlin, *supra* note 78, at 71 (stating that "[i]f it is possible to live a full, critical life of the mind in the practice of law, it must be possible and it is certainly necessary to show how this is done in an actual law office," even if it is done so only infrequently). Some of the limited data to date on the willingness of practicing lawyers to reflect with students on the legal system, the lawyer's work, and ethical issues, suggests that lawyers do so only occasionally. Donald N. Zillman & Vickie R. Gregory, *Law Student Employment and Legal Education*, 36 J. Legal Educ. 390, 394 (1986) (reporting that lawyers discussed legal ethic issues—most of the time (10%), occasionally (42%), never (47%)). Although the frequency with which practicing lawyers discuss critique with their students is obviously less than would be optimally desirable, it would be interesting to compare these results with a study of how frequently classroom teachers engage in serious critique in the classroom.

154. The easiest answer is that critique should occur wherever it can. Karl E. Klare, *The Law-School Curriculum in the 1980s: What's Left?*, 32 J. Legal Educ. 336, 343 (1982).

learners, and practitioners face in understanding and then restructuring classrooms, curricula, and pedagogies and in facilitating, monitoring, and debriefing clinics, internships, co-ops, and service activities. The relation between the legal classroom and law practice is not simply hierarchical, one being more important than the other; the relationship might partly be one of two worlds apart and in other respects it might be collaborative, interactive, synergistic, or mutually constitutive.

In any event, the legal academy is much more familiar with the education-centric and school-based side of the town/gown debate, but is seriously under informed about student learning *in* practice. Through co-ops, internships, clinical placements, community service projects, and part-time employment, law students undergo a dynamic process of acculturation where new roles, group purposes, institutional arrangements, and cultural norms contribute to something clearly identifiable as learning—but university-based educators tend to ignore it. Thus, this article suggests that academics need to consider a more social, more contextual, and more experiential theory of practice-based learning that emphasizes the primacy of practice—a theory that privileges situated learning in practice over decontextualized learning in school.

Despite my strong support for practice-based learning, it has its critics and its dangers. At its worst, practice-based experience, professional and otherwise, can consist of a numbing exposure to mundane and trivial tasks, to the grunt-work underside of business and professional practice. Practice-based settings where students are given peripheral responsibilities, make-work, or, even worse, no work at all are deeply debilitating and certainly not worth the tuition dollars and opportunity costs they entail. Similarly, co-op and other forms of practice-based learning can introduce students to minimally competent and sub-ethical practice. Although there are many superb practitioners in all fields who internalize and enforce high standards, there are other practitioners and placement settings where satisficing is sufficient and where ethical corners are cut to the quick. Many students in such placements may reject the practice model to which they are exposed and can learn by negative example, but others may socialize themselves to lazy and amoral standards. Finally, the world is not an equitable place; institutions reproduce hierarchy and unjust practices abound. In their desire to fit in and through the process of socialization itself, students may not learn how to resist and contest the status quo—students may merely acquiesce and accommodate. Thus, a challenge remains, for students, supervisors, and the academy as well, to foster critical consciousness and catalyze transformation in the academy and in practice.

At the end of my analysis, I remain deeply ambivalent. On the one hand, I am certain that practice-based learning is valuable, perhaps essential, to the development of both understanding and competence. A theory of ecological learning helps explain how and why practice-based learning works. On the other hand, my overall impression is that lawyers, law professors, myself included, and law students are all too complacent about existing legal structures and social arrangements. This complacency extends throughout higher education and throughout all practice domains, though there are always rebels in our midst. It is disturbing that the morally complacent practitioner has both been through school and been immersed in practice (as has his or her

university counterpart). The dangers of uncritical acculturation are all too obvious, but the antidote is not. Accordingly, in order to reduce the dangers of "co-op"tation, we should encourage our students to maintain a critical perspective on their process of acculturation, *before*, *during*, and *after* their practice-based experiences. We should help them explore forms of accommodation and resistance in practice-based activities that encourage and strengthen their commitment to social transformation and their ability to engage constructively in social change.

No discussion of critique in the real world can succeed if we do not analyze the powerful social forces arrayed against change that are deployed to maintain existing legally constituted regimes of power and privilege. Resistors get disciplined, whistleblowers get fired, and reformers get marginalized and repressed. Accordingly, an ethic and practice of individual reflective critique often gets tamed into dinner table rants and mere expression of dissent. Though the topic of actualized critique, of organized resistance is beyond the scope of this article, it will usually be true that lawyers who want to see real progressive social change will have to ally themselves with social movements. How is that for a tall order?