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## TEACHING REMEDIES AS A CAPSTONE COURSE

RUSSELL L. WEAVER\* AND DAVID F. PARTLETT\*\*

The debate about the divide between the legal academy and the legal profession is perennial and, in times of economic stress, of increasing urgency.<sup>1</sup> Historically, law school critics have portrayed law professors as living their lives, and teaching their classes, from “ivory towers” that are divorced from the day-to-day realities of law practice. While law professors might teach students how to read cases and analyze precedent, so the critique went, they did little to teach students how to function like practicing lawyers.<sup>2</sup>

The *Carnegie Report* has thrown down the gauntlet to law schools to reform curricula in order to better educate lawyers for today’s challenges.<sup>3</sup> Law schools have done some things right, such as rigorously training students

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1. Herma Hill Kay, former President of the Association of American Law Schools, summarized the situation as follows: “Judge Harry Edwards warned us at the Annual Meeting in 1988 that, given the existence of ‘major structural problems that threaten to alter the basic fabric of legal systems . . . we can no longer afford law schools isolated in a world of their own.’” Herma Hill Kay, *President’s Message: Lawyers and Law Teachers: Are We in the Same Profession?*, ASS’N AM. L. SCH. NEWSL., Dec. 1989, at 1.

2. Cf. David R. Brink, *Sartor Resartus—The Professor Takes the Exam*, 32 J. LEGAL EDUC. 362, 363 (1982) (“[T]o those who say the purpose [of legal education] is also to prepare legal scholars, judges, house counsel, public servants, and civic and business leaders, I say that the training of those students is also incomplete unless they have learned what a practicing lawyer must know.”); see also Robert L. Doyel, *The Clinical Lawyer School: Has Jerome Frank Prevailed?*, 18 NEW ENG. L. REV. 577, 578–79 (1983) (arguing that law schools should educate law students to act like lawyers). One practitioner related the following anecdote:

[L]aw school had me very well-schooled to do research with a large firm and had me moderately well-schooled to argue cases on appeal, but did not have me schooled at all to talk to clients, to answer questions, or even to know the questions to ask. How embarrassing it was when I first went down to the District Clerk’s office to ask, “How do I do so-and-so?” and was told, “Well, you need to ask a lawyer about that!”

James E. Brill, *Teaching and Testing Clinical Skills*, in LEGAL EDUCATION AND LAWYER COMPETENCY: CURRICULA FOR CHANGE 37, 38 (Fernand N. Dutilleul ed., 1981); see also WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNegie REPORT] (examining legal education and recommending improvements).

3. See CARNegie REPORT, *supra* note 2.

to think like lawyers. But they have failed to employ the latest pedagogical methods to equip graduates with either the ability to cope with the world in which they will practice law, or the set of skills that will enhance their role as professionals.<sup>4</sup> The *Carnegie Report* came at a time when the model of legal education was resistant to changes, but it eventually came under an acid test born of a severe decline in the demand for graduates. Thus, the marketplace has added a great impetus to the need for reform. Those law schools most vulnerable to the rigors of the market have responded with greater alacrity.<sup>5</sup> Those at the top of the pyramid have also felt the need to look again at their curricula and to offer a richer menu of courses.<sup>6</sup> And, indeed, law schools have developed and implemented a variety of so-called “skill courses,” such as legal writing, trial practice, negotiations, legal drafting, appellate practice, and client counseling, designed to give students simulated practical experience. Moreover, most law schools now offer students the opportunity to work in live-client clinics, and some schools offer several different types of clinics ranging from representation of indigent clients to entrepreneurial law. Some law schools, most notably Washington and Lee, in an attempt to carry skills training even farther, have developed a special third-year “experiential learning” program.<sup>7</sup> Students spend the entirety of their third year engaged in

4. *See id.* at 24.

5. As a result of the *MacCrate Report*, AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992), which urged a greater concentration on skills training in law schools, some law schools accented their curricula to that purpose, e.g., the University of Richmond School of Law. *See Skills Training and Pro Bono Opportunities*, U. RICH. SCH. L., [law.richmond.edu/academics/skills/index.html](http://law.richmond.edu/academics/skills/index.html) (last visited Jan. 31, 2013).

6. For instance, Vanderbilt University Law School has recently added a dual-degree program in law and economics in 2006. *See* Joni Hersch & W. Kip Viscusi, *Law and Economics as a Pillar of Legal Education* i (Vanderbilt Univ. Law Sch.: Law & Econ., Working Paper No. 11-35, 2011), available at [http://ssrn.com/abstract\\_id=1907760](http://ssrn.com/abstract_id=1907760). The authors note that almost one third of the professors in the top thirteen law schools have Ph.D.s. *Id.* at 4.

7. *See* Russell L. Weaver & Michael B. Kelly, *Teaching and Learning Law in the United States: New Paradigms and Approaches*, in AMERICAN LAW TODAY (Pascal Mbongo & Russell L. Weaver eds., forthcoming 2013); *see also* Lyman Johnson, Robert Danforth & David Millon, *Washington and Lee University School of Law: Reforming the Third Year of Law School*, in REFORMING LEGAL EDUCATION: LAW SCHOOLS AT THE CROSSROADS 11 (David M. Moss & Debra Moss Curtis eds., 2012) (describing the third-year curriculum at Washington and Lee). The call here is to utilize as fully as possible the third year of the J.D. degree. It may be noted that some, including Judge Richard Posner, have called for a serious consideration of the shortening of the law degree to two years. Already Northwestern University Law School offers an accelerated two-year degree to select students. It may be noted that the degree requires an early start in the summer before and work during the summer between the first and second years. The tuition is the same as that charged for the three-year degree. *See Accelerated JD*, NW. L., <http://www.law.northwestern.edu/academics/ajd/> (last visited Feb. 4, 2013); *see also* Debra Cassens Weiss, *Two-Year Law School Was a Good Idea in 1970, and It’s a Good Idea Now*, *Prof*

“experiential” learning that emphasizes lawyering activities through live-client clinics, practicum courses designed to simulate actual law practice, and externships in law offices and judicial chambers.<sup>8</sup> The fall semester begins with a two-week course that provides students with an intensive introduction to litigation skills, and the spring semester begins with a two-week intensive transactional skills course.<sup>9</sup> The purpose of these courses is to provide students with the lawyering skills that they will need to participate in clinics, practicums, and externships.<sup>10</sup> Other law schools have not been as thoroughgoing with their reforms, opting for interstitial changes such as transactional law streams of course offerings.<sup>11</sup>

Although, as the foregoing suggests, the ivory tower is not as insular as it once was, there nevertheless remains a considerable gap, some would say a chasm, between the academy and the profession. The structure of the normal law school within the university and patterns of faculty recruitment make American law schools highly conservative institutions relatively impervious to the call for skills reform.<sup>12</sup> Accordingly, most classes still strongly trend towards the academic rather than the practical. Still rings the clarion call for change.<sup>13</sup>

In this short Article, we suggest how the Remedies course can be used as a “capstone course” that will help prepare students to deal with the “practical” side of law as well as achieve a significant intellectual end in tying up the unraveled sleeves of earlier discrete courses in a coherent whole. We believe that the Remedies course offers students a unique and valuable opportunity to integrate the theoretical with the practical and to learn practical skills in the context of a substantive course. The net effect is that students can take their overall understanding of the law to a much deeper level, and can do so in ways that cannot be accomplished in skills courses alone. In other words, the

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*Tells ABA Task Force*, ABA J. (Feb. 9, 2013, 7:36 PM), <http://www.abajournal.com/news/article/two-year-law-school-was-a-good-idea-in-1970-and-its-a-good-idea-now/> (detailing Duke University law professor Paul Carrington’s support of a two-year legal education).

8. See Johnson et al., *supra* note 7, at 39.

9. *Id.* at 24–25.

10. *Id.* at 23.

11. Tina Stark has been an advocate for helping students “think like . . . *deal* lawyer[s],” developing transactional programs at Emory University and Boston University. For her overview of such a program, see Tina L. Stark, *Conference Introduction: My Fantasy Curriculum & Other Almost Random Thoughts*, 2009 TRANSACTIONS: TENN. J. BUS. L. 3 (emphasis added).

12. See David F. Partlett, *The Eras of American Legal Scholarship: The Making of a Priesthood*, in AMERICAN LAW TODAY (Pascal Mbongo & Russell L. Weaver eds., forthcoming 2013) (manuscript at 28–29) (on file with authors).

13. See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Wayne S. Hyatt, *A Lawyer’s Lament: Law Schools and the Profession of Law*, 60 VAND. L. REV. 385 (2007).

Remedies course provides one way to help bridge the gap between law school and practice. It builds a competence that provides knowledge of the interlocking nature of the law, and its capacity for change. Through a series of well-developed problems, students can gain confidence in applying skills to the changing workplace in which they will find themselves during their professional lives. Before we embark on the description of the capstone Remedies course, we want to set the scene that makes American law schools what they are today. We concede at the outset that the law school, as it has evolved, has served the nation well. But that does not imply that we should be content with its present form.

I. LANGDELL AND THE DIVIDE BETWEEN THE “ACADEMIC” AND THE  
“PRACTICAL” SIDES OF LAW<sup>14</sup>

The gap between the academy and the profession did not always exist. During the colonial era, law was not generally taught in a university setting. Instead, prospective lawyers would apprentice themselves to practicing lawyers so that they could “learn by doing.”<sup>15</sup> During this period, the practice of law was regarded as a trade, like blacksmithing or carpentry, that could be best learned by working with those who were accomplished in the profession, and the focus was on the practical rather than the theoretical.<sup>16</sup> Apprenticeship was so common that “[f]ive signers of the Declaration of Independence and six members of the Constitutional Convention obtained their legal education in this manner.”<sup>17</sup> A few lawyers were trained through the English Inns of Court.<sup>18</sup> But that training was designed to inculcate professional standards and the folkways of the profession.<sup>19</sup> The university’s place in legal education came late in the home of the common law. Most English lawyers were classically educated, and then trained through the Inns of Court, despite chairs

14. Portions of this section rely heavily on Professor Weaver’s prior publication, Russell L. Weaver, *Langdell’s Legacy: Living with the Case Method*, 36 VILL. L. REV. 517 (1991). This use has been approved by the *Villanova Law Review*.

15. See ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 18–19 (1953); JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 7 (1914); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 3 (1983); J. H. Landman, *The Problem Method of Studying Law*, 5 J. LEGAL EDUC. 500, 501 (1953).

16. See Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 444–45 (1981).

17. *Id.* at 439–40.

18. *Id.*

19. See *id.* at 436.

in law and jurisprudence at Oxford.<sup>20</sup> It was to arrive earlier in America but not in a straight and obvious path.

Although law schools had existed for some time, the early U.S. law schools were proprietary in nature,<sup>21</sup> and most universities offered legal study only through chairs in law, if at all.<sup>22</sup> University-based law schools did not begin appearing until the early nineteenth century.<sup>23</sup> These early university-based law schools struggled for their existence. During “the first twelve years of its existence, the Harvard Law School averaged less than nine students a year, and the few who enrolled attended irregularly.”<sup>24</sup> The school’s fortunes improved in 1829 with the appointment of Mr. Justice Story as the first Dane Professor of Law.<sup>25</sup> Enrollment immediately jumped to twenty-four students,

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20. See Partlett, *supra* note 12, at 5. As John Baker points out, while students may attend readings at universities, they learned “their common law by self-help.” JOHN BAKER, *LEGAL EDUCATION IN LONDON 1250–1850*, at 11–12 (2007).

21. The first law school is believed to have been the Litchfield Law School, which was founded in 1784 by Tapping Reeve, later Chief Justice of Connecticut and author of a treatise on domestic relations. See MARIAN C. MCKENNA, *TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL* 59 (1986); REDLICH, *supra* note 15, at 7. Litchfield students did outside reading and attended lectures. More than 1000 students attended during the school’s fifty-year existence, and many went on to illustrious careers. See HARNO, *supra* note 15, at 28–32 (stating that Litchfield produced 101 members of Congress, twenty-eight U.S. Senators, three U.S. Supreme Court Justices, six cabinet members, thirty-four state supreme court justices, fourteen state governors, and ten lieutenant governors). The second law school was located at Northampton, Massachusetts, and was also a proprietary school. See Louis D. Brandeis, *The Harvard Law School*, 1 GREEN BAG 10, 11 (1889).

22. The first chair, established at William and Mary College by Thomas Jefferson and initially filled by George Wythe, was dedicated to the study of “Law and Police.” See HARNO, *supra* note 15, at 23; Stein, *supra* note 16, at 441–42. Other universities soon established chairs as well. See STEVENS, *supra* note 15, at 4; Brandeis, *supra* note 21, at 11; Brainerd Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 350 (1951) (“In 1790 James Wilson was appointed professor of law at the College of Philadelphia. In 1793 James Kent was appointed professor of law at Columbia. Finally, in 1799, Transylvania University appointed George Nicholas . . . [as] ‘Professor of Law and Politics.’” (footnotes omitted)).

23. Harvard Law School was established in 1817. See Henry Wade Rogers, Section Chairman, Address at the A.B.A. Section of Legal Education Annual Meeting (Aug. 22, 1894), in 17 REP. A.B.A. 389, 396 (1894) [hereinafter Address by Henry Wade Rogers]. Yale Law School began in 1824 by taking over a proprietary school, and the University of Virginia School of Law began the next year. *Id.* There is debate about whether the College of William and Mary’s Marshall-Wythe School of Law was created in the eighteenth century. Compare ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA* 44 (1921) (stating that William and Mary Law School was founded in 1779), with HARNO, *supra* note 15, at 23 (asserting that William and Mary merely founded a chair of law in 1779).

24. HARNO, *supra* note 15, at 40.

25. *Id.* at 41.

and by 1844 it had reached 163.<sup>26</sup> Nevertheless, throughout much of this period, many questioned whether law was a discipline that could or should be taught in a university environment. Many regarded the practice of law as a “craft” that could best be learned through the apprenticeship method.<sup>27</sup> This view was shared by many would-be lawyers, a significant percentage of which chose to receive their training as apprentices.<sup>28</sup>

At the early law schools, law teaching was primarily lecture oriented.<sup>29</sup> Some law schools used a “text and lecture” method, whereby students were asked to read “texts” or other learned discussions as a prelude to attending lectures.<sup>30</sup> Until instructors began writing their own texts, students commonly studied Sir William Blackstone’s *Commentaries*.<sup>31</sup> There were some variances in approach. For example, George Wythe of William and Mary lectured but also “held practice courts in the Virginia state capital.”<sup>32</sup> Columbia innovated by adopting the “Dwight method,”<sup>33</sup> developed by Professor Theodore W. Dwight, which incorporated student recitations into the lecture method.<sup>34</sup> After Dwight would summarize and critique a section of Blackstone, he would ask students questions about the material during the next class.<sup>35</sup> For a while, the Dwight method provided the foundation of instruction at most law schools and was the sole method of instruction at a few schools.<sup>36</sup> Under the various versions of the lecture method, cases were not entirely ignored. Faculty would

26. *Id.* at 47.

27. *See, e.g.*, THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA* 211 (1918) (“[T]he law school belongs in the modern university no more than a school of fencing or dancing.”); John Henry Schlegel, *Langdell’s Legacy or, the Case of the Empty Envelope*, 36 *STAN. L. REV.* 1517, 1517 (1984) (book review).

28. *See* HARNO, *supra* note 15, at 39 (“[L]egal education was nothing more than the mastering of a craft, the skills for which had to be passed on from the practitioner to the novice.”); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 264 (1950); Currie, *supra* note 22, at 344 (“In this country also legal education was regarded generally as training in an art, to be acquired by apprenticeship—a conception which is unfriendly to the thesis that higher learning is essential.”).

29. *See* REDLICH, *supra* note 15, at 7; Brandeis, *supra* note 21, at 11–16; Wayne L. Morse, *Changing Trends in Legal Education*, 11 *OR. L. REV.* 39, 41 (1931).

30. *See* REDLICH, *supra* note 15, at 7; Courtney Kenny, *The Case-Method of Teaching Law*, 16 *J. SOC’Y COMP. LEGIS.* 182, 185 (1916); Address by Henry Wade Rogers, *supra* note 23, at 404.

31. *See* Kenny, *supra* note 30, at 184.

32. Stein, *supra* note 16, at 442.

33. *See* REDLICH, *supra* note 15, at 8; Rosamond Parma, *The Origin, History and Compilation of the Case-Book*, 14 *L. LIBR. J.* 14, 16 (1921).

34. Address by Henry Wade Rogers, *supra* note 23, at 404–05.

35. Kenny, *supra* note 30, at 185–86.

36. *See* Comm. on Legal Educ., *Proper Course of Study for American Law Schools*, 26 *AM. L. REV.* 705, 705 (1892).

lecture about them, and texts would discuss them, but cases were not the primary emphasis of the approach.<sup>37</sup>

Legal education underwent a dramatic transition with the appointment of Christopher Columbus Langdell as Harvard's dean in 1870.<sup>38</sup> Langdell's innovation was the introduction of the case method of teaching which involved student examination of judicial decisions coupled with Socratic-style analysis.<sup>39</sup> Langdell's "case method" was quite different from other teaching methods.<sup>40</sup> He did not lecture students about the meaning of judicial decisions.<sup>41</sup> Instead, he asked students to read the decisions, and to decide for themselves what the decisions meant.<sup>42</sup> Professors interacted with students through the "Socratic method," guiding students in their evaluation of judicial decisions.<sup>43</sup> Langdell would ask students to "tell what the facts were, how the litigation developed, what point was at issue, what the court had decided, and the court's reasoning."<sup>44</sup> Langdell would then solicit the students' opinions and reactions to the cases.<sup>45</sup> Finally, Langdell would inquire as to "whether the case followed others which the class had read, or was inconsistent; whether it could be 'distinguished'; and so on."<sup>46</sup>

37. See Simeon E. Baldwin, Remarks at the A.B.A. Section of Legal Education Annual Meeting (Aug. 22, 1894), in 17 REP. A.B.A. 351, 375–76 (1894).

38. See HARNO, *supra* note 15, at 55, 59; STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS 718 (2d ed. 1989); STEVENS, *supra* note 15, at 36–37; ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817–1967, at 162 (1967); Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 598 (1981); Stein, *supra* note 16, at 448–53.

39. See REED, *supra* note 23, at 369.

40. See Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 498–500 (1920).

41. See Samuel F. Batchelder, *Christopher C. Langdell*, 18 GREEN BAG 437, 440 (1906); Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 332 (1979); Fessenden, *supra* note 40, at 498–99.

42. See REDLICH, *supra* note 15, at 12–13; Brandeis, *supra* note 21, at 19; Tom C. Clark, *Some Thoughts on Legal Education*, 12 AM. U. L. REV. 125, 127 (1963); Sydney G. Fisher, *The Teaching of Law by the Case System*, 27 AM. L. REG. 416, 416–17 (1888); Kenny, *supra* note 30, at 187; Robert Stevens, *Legal Education: The Challenge of the Past*, 30 N.Y.L. SCH. L. REV. 475, 479 (1985); Eugene Wambaugh, *Professor Langdell—A View of His Career*, 20 HARV. L. REV. 1, 2 (1906).

43. See Amasa M. Eaton, Remarks at the A.B.A. Section of Legal Education Annual Meeting (Aug. 22, 1894), in 17 REP. A.B.A. 351, 378 (1894).

44. SUTHERLAND, *supra* note 38, at 179; see also REDLICH, *supra* note 15, at 12 ("Langdell began his actual teaching by having each of the cases, which the students had to study carefully in preparation for the class, briefly analyzed by one of them with respect to the facts and the law contained in it.").

45. See SUTHERLAND, *supra* note 38, at 179.

46. *Id.*



The case method rapidly gained acceptance and ultimately became the dominant method of teaching law in the United States.<sup>47</sup> As Dean of the Harvard Law School, Langdell had the opportunity “to shape the whole program of a leading school to a new technique, and thence both to redirect and to warp the course of law training in the United States.”<sup>48</sup> Langdell seized that opportunity and radically altered legal education.<sup>49</sup> Those who did not use the case method employed other methods, such as the problem method, that evolved from it.

However, the case method also came with baggage associated with the environment in which it was created and introduced. Langdell had very limited conceptions of law that ultimately drove his implementation of the case method. In the style of the period, Langdell viewed law as a “science,”<sup>50</sup> and believed that it should be studied by scientific methods.<sup>51</sup> In his view, scientific method involved an examination of “original sources”<sup>52</sup>—the printed reports of

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47. See ASS'N OF AM. LAW SCH., 1943 HANDBOOK 166 (1944); HARNO, *supra* note 15, at 137; Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 224 (1974); Currie, *supra* note 22, at 332; Stein, *supra* note 16, at 452; Bill Blum & Gina Lobaco, *The Case Against the Case System*, CAL. LAW., Mar. 1984, at 30, 31.

48. HURST, *supra* note 28, at 261.

49. See REDLICH, *supra* note 15, at 9; James Barr Ames, *Professor Langdell—His Services to Legal Education*, 20 HARV. L. REV. 12, 13 (1906). But see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977) (“[I]f Langdell had not existed, we would have had to invent him . . . . Langdell’s idea evidently corresponded to the felt necessities of the time.”); McManis, *supra* note 38, at 598 (“Credit—or blame—for the development of the narrow professional model of American legal education has traditionally gone to Christopher Columbus Langdell . . .”).

50. See Christopher Columbus Langdell, Address to Harvard Law School Association (Nov. 5, 1886), in 2 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 374 (1908) [hereinafter Address by Dean Langdell]; see also HARNO, *supra* note 15, at 56; HURST, *supra* note 28, at 262; WARREN, *supra*, at 361; Batchelder, *supra* note 41, at 438; Brandeis, *supra* note 21, at 19; Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1304 (1947); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983); Landman, *supra* note 15, at 502; Stein, *supra* note 16, at 449.

51. See Batchelder, *supra* note 41, at 439; Frank, *supra* note 50, at 1304; Landman, *supra* note 15, at 502; Stein, *supra* note 16, at 449–50; Wambaugh, *supra* note 42, at 2. Langdell was a product of his times. Many believed that law was susceptible to scientific analysis. See HARNO, *supra* note 15, at 61–62; REDLICH, *supra* note 15, at 16; Comm. on Legal Educ., *supra* note 36, at 707; Edward Fry, *Some Aspects of Law Teaching*, 9 L. Q. REV. 115, 127 (1893); William A. Keener, *The Inductive Method in Legal Education*, in 17 REP. A.B.A. 473, 475 (1894); Address by Henry Wade Rogers, *supra* note 23, at 394–95; Christopher G. Tiedeman, *Methods of Legal Education III*, 1 YALE L.J. 150, 153 (1892).

52. See Batchelder, *supra* note 41, at 439; Stein, *supra* note 16, at 449; Wambaugh, *supra* note 42, at 2.

cases<sup>53</sup>—from which students should seek to uncover the fundamental rules and principles of law:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases . . . .<sup>54</sup>

It is doubtful Langdell really believed that law was a “science” in the same sense as the physical sciences (e.g., two parts of hydrogen and one part of oxygen always produces water); it was much more a description of a body of knowledge that could be reduced to principles. Recall that the Whiggish spirit of the times was imbued by the sense that society was evolving through ineluctable forces to its betterment.<sup>55</sup> Moreover, Langdell had a strategic reason for viewing law as “science”: early law schools struggled for their survival against skeptics who viewed law as a craft, believed that law could best be learned by apprenticeship, and questioned whether it was appropriate to teach this craft in a university setting.<sup>56</sup> These attitudes were not new. Blackstone had previously encountered them in his unsuccessful effort to establish a college of law at Oxford.<sup>57</sup> Langdell’s view of law as a “science” altered the terms of the debate. If law really was a science, then it deserved serious academic study. James Bradley Thayer, one of Langdell’s colleagues and contemporaries, outlined the nature of the debate when he remarked, “If our law be not a science worthy and requiring to be thus studied and thus taught, then, as a distinguished lawyer has remarked, ‘A University will best consult its own dignity in declining to teach it.’”<sup>58</sup> Langdell, the “distinguished lawyer” being quoted, stated further, “If [the law] be not a science, it is a

53. See HARNØ, *supra* note 15, at 56, 58; HURST, *supra* note 28, at 262; Batchelder, *supra* note 41, at 439; Brandeis, *supra* note 21, at 19–20; Fessenden, *supra* note 40, at 498; Stein, *supra* note 16, at 449–50.

54. C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

55. See, e.g., THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II (Philadelphia, Porter & Coates n.d.) (providing a representative and respected example of “Whig history”).

56. See HARNØ, *supra* note 15, at 39; Currie, *supra* note 22, at 356, 360–61 (detailing difficulties at Harvard during the first twelve years and at the University of Virginia).

57. See James Bradley Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169, 171–72 (1895).

58. *Id.* at 173; see also Keener, *supra* note 51, at 475 (“If law is a science—and if it is not a science it has no place in the curriculum of a university—all will agree that the most scientific method should be adopted in teaching law.”).

species of handicraft, and may best be learned by serving an apprenticeship to one who practices it.”<sup>59</sup> Langdell vociferously argued that law was a “science” worthy of being taught at a university.<sup>60</sup>

Langdell’s scientific view of law led to a distancing of university-based law teaching from the practicing bar. Whereas prior law teachers had been distinguished practitioners or jurists, who imparted their wisdom and experience to their students, Langdell began hiring law teachers with little or no practical experience.<sup>61</sup> If law was a “science” and not a “craft,” and was to be learned by academic study, there was no need to have active practitioners teach it.<sup>62</sup> As a result, law schools began to consciously distance themselves from the practicing bar.

Of course, the premises for Langdell’s theory ultimately did not survive. Through the sustained attacks of the Realists,<sup>63</sup> American academics eventually came to totally reject Langdell’s idea that law is a “science” in the same sense as the natural sciences.<sup>64</sup> As one commentator noted, the “case method threw tremendous emphasis on particular cases and particular facts, and created the erroneous impression that a science of law would eventually emerge from this mass of material.”<sup>65</sup> Professor Grant Gilmore, one of Langdell’s harshest and acerbic critics, dismissed Langdell as “an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius.”<sup>66</sup> Gilmore was especially critical of Langdell’s belief that law is a science: “The jurisprudential premise of Langdell and his followers was that there is such a thing as the one true rule of law which, being discovered, will endure, without change, forever. This strange idea colored, explicitly or implicitly, all the vast literature which the Langdellians produced.”<sup>67</sup>

59. Address by Dean Langdell, *supra* note 50, at 374.

60. *See id.*

61. *See* Batchelder, *supra* note 41, at 441; Joseph H. Beale, *James Barr Ames—His Life and Character*, 23 HARV. L. REV. 325, 326 (1910); Chase, *supra* note 41, at 338; Charles W. Eliot, *James Barr Ames*, 23 HARV. L. REV. 321, 321–22 (1910).

62. *See* HURST, *supra* note 28, at 263–64; Batchelder, *supra* note 41, at 439; Charles W. Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 520–21 (1920); Fessenden, *supra* note 40, at 512; Thayer, *supra* note 57, at 174–75.

63. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62–120 (1960).

64. *See* Boyer & Cramton, *supra* note 47, at 225.

65. Robert Maynard Hutchins, *Legal Education*, 4 U. CHI. L. REV. 357, 357 (1937).

66. GILMORE, *supra* note 49, at 42.

67. *Id.* at 43; *see also* Frank, *supra* note 50, at 1313 (criticizing Langdell’s “neurotic wizardry”); Landman, *supra* note 15, at 504 (“It is a matter for derision to expect an immature and inexperienced student to elicit the rule of law from one case and call that scientific induction.”); Stephen Wizner, *What is a Law School?*, 38 EMORY L.J. 701, 709 (1989) (describing Professor Jerome Frank’s critiques of the case method).

Despite the debunking of Langdell's premises at the hands of realists like Gilmore, the case method itself survived and even prospered. The case method would become the primary method of instruction in U.S. law schools and every U.S. law school eventually adopted it.<sup>68</sup> Although new forms of teaching, such as the problem method, evolved from the case method, they were consistent with Langdell's basic assumptions about how law should be taught: students should examine primary source materials, whether statutes or cases, and should reach their own conclusions about how problems should be resolved.<sup>69</sup> The professor's function is to stimulate student thought in a Socratic fashion. Although Langdell may have been ridiculed, his law school thrived and his view of legal education became a model for professional education within the university.<sup>70</sup> More telling than the idea of the study of law as a science was Langdell's success in securing the position of the law school in the pantheon of schools that make up the fabric of the modern American university. Thus the American law school assumed a place well before the establishment of university-based law schools elsewhere in the common law world.<sup>71</sup> In order to secure firmly the mooring to the university, Langdell lured to his faculty former students who had little grounding in the profession but were academically brilliant and hewed to his ideas of law teaching. Moreover, the way in which the law was taught was financially attractive to the university. Large classes and small faculties were a bonanza. The model stood in stark contrast to medical schools that placed much more emphasis on practical training after the *Flexner Report*.<sup>72</sup> Thus the twig was bent<sup>73</sup> in the law

68. See Address by Henry Wade Rogers, *supra* note 23, at 404–05.

69. The problem today is that many new law professors, disconnected from practice and profession, produce interdisciplinary work that treats either legal doctrine or social science in a superficial way. It is not clear that this interdisciplinary perspective can help in teaching the doctrinal and functional complexity of the problems facing modern lawyers. See Partlett, *supra* note 12, at 23.

70. See Lee C. Bollinger, *Statement on the Future of Journalism Education*, COLUM. U. REC., Apr. 25, 2003, at 8. President Bollinger of Columbia University holds up law school as a model for the academic and professional development of journalism programs. For comment, see Felicity Barringer, *At Columbia, Journalists and the Faculty Rewrite a Journalism Curriculum*, N.Y. TIMES, Feb. 22, 2003, at B3.

71. David Ibbetson speculates that the European *ius commune* and the continental, university model of legal education did not make headway in England because England already had a professional system of legal education and practice at the time that the Roman Law swept through Europe. Even in the common law's throes, caused by Francis Bacon's criticisms and suggestion of codification, most English lawyers viewed the hypertrophy of the civil law and grimaced. See David Ibbetson, Regius Professor of Civil Law, Cambridge, Selden Society Lecture (July 20, 2000), in *COMMON LAW AND IUS COMMUNE* 20–21, 26–27 (2001).

72. See ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (1910).

73. "[A]s the twig is bent the tree's inclin'd." ALEXANDER POPE, *Epistle I: Of the Knowledge and Characters of Men*, in *THE COMPLETE POETICAL WORKS OF ALEXANDER POPE*

curriculum and in the nature of the faculty whose responsibility it was to equip and prepare generations of law students for the practice of law. As a consequence, the profession had the task of taking the academically qualified graduate and training him in the practice of the law.<sup>74</sup> This was not an unwelcome task in the day when the margins in law firms' profits could comfortably subsidize the training. To shift the cost of this training to the law schools, however, while much talked about, faced, and continues to face, severe obstacles. The faculty of law schools were directed even more to the academic mission and the practical was anathema. This was encouraged by a puissant force to bring scholarship into the fold of the university with its emphasis on its standing in the social sciences.<sup>75</sup> Dean Roscoe Pound had fought for the law faculty to have its place in the university and outside the profession.<sup>76</sup> It is a battle that he resoundingly won. While shaping legal education down to the present day, it ill fits today with the flagging finances of law schools.<sup>77</sup> From cash cows, they have become claimants within the university. This meant that bridging the gap between law school and practice by, for example, expanding to provide new clinical programs for skills training, became economically infeasible.<sup>78</sup>

The history of the American law school and its success stands in the way of a radical change in the way lawyers are trained. Even though some law schools may initiate reform, usually for reasons to do with their posture in the competitive market for students, it is unlikely that those in the elite category will be minded to make changes except at the margin. To be sure, as noted, numerous attempts have been made to fill the divide between the academy and the bar, with many law schools establishing "skills courses" or live-client clinics. However, such changes are more tolerated than embraced by mainstream faculty who guard their tenured prerogatives against invasion by

157, 159 (Henry W. Boynton ed., 1903). This is a simple version of path dependence upon which so many of our social institutions have evolved. See, e.g., Cristiano Antonelli, *The Economics of Path-Dependence in Industrial Organization*, 15 INT'L J. INDUS. ORG. 643 (1997).

74. See MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 13 (2008) (suggesting that test scores and GPA taken alone were not sufficient indicators of lawyering success), available at <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

75. For an early example of this in the work of Roscoe Pound, see N. E. H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 67 (1997).

76. See *id.* at 92–93.

77. See David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 252–53; Phillip J. Closius, *The Incredible Shrinking Law School*, 31 U. TOL. L. REV. 581, 584 (2000). In discussing the University of Toledo College of Law's finances, the former dean of the school, Phillip Closius, said "income flow generated by the law [school had] diminished, given the rising costs of technology, student scholarships, and expensive pedagogical programs (e.g. skills training and legal writing)[.]" as well as downsizing in admissions. *Id.*

78. See Partlett, *supra* note 12, at 29.

clinician and skills-training teachers. The lack of prestige accorded to non-doctrinal faculty is reflected in the fact that these “other” teachers may be on contract, rather than on tenure track, and may be granted fewer voting privileges than doctrinal faculty. The governance of law faculties guarantees the sustenance of this bias.

We do not attribute to Langdell all of the discontents of the modern law school. The foundations he created were built upon by others like Roscoe Pound and Karl Llewellyn to create the dynamic modern American law school.<sup>79</sup> We should not lose sight of its power and great contributions to the fabric of the law. We may trace the law review to Langdell and indeed its strange form in assigning students the function of editing the work of law professors.<sup>80</sup> The law review was designed to further the scientific discovery of the law by students.<sup>81</sup>

Another Langdellian innovation further distanced the academy from the profession. In adopting the case method, Langdell could have sent his students to the library to read cases on their own, but Langdell viewed that solution as impractical. There were too many cases. Moreover, Langdell did not believe that it was necessary for students to review all or even most of the cases on a given subject. On the contrary, he thought that a systematic review would be detrimental because the vast majority of cases were of no value.<sup>82</sup> Students should only review “sound” or “good” decisions—as selected by their professors. Langdell solved this problem by creating a casebook containing selected cases that were worthy of examination.<sup>83</sup> Of course, by refusing to include decisions that were not sufficiently faithful to the “fundamental” rules and doctrines, Langdell’s casebooks depicted a very limited and inaccurate view of law. The implication was that, in a given case, lawyers and judges were searching for the one true rule. Of course, the difficulty is that decisions that do not adhere to “fundamental rules” are as much a part of the law as those that are faithful to the “fundamental rules,” and they must be considered if one is to understand the law. These other decisions have much to teach about the lawyer’s role and function.

Modern casebooks all too often continue in the Langdellian tradition. Instead of examining an entire body of case law from a single jurisdiction, which would reveal inconsistencies in doctrine, students examine law through

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79. See HULL, *supra* note 75, at 339–42.

80. See Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 770–78 (1985).

81. See *id.* at 776.

82. See LANGDELL, *supra* note 54, at vi; see also HARNO, *supra* note 15, at 58; REDLICH, *supra* note 15, at 11; Kenny, *supra* note 30, at 186–87.

83. See LANGDELL, *supra* note 54, at vii; Kenny, *supra* note 30, at 187; cf. E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 SW. L.J. 903, 907–08 (1988) (calling the case collection process a “true gathering of flowers”).

the prism of casebooks that often value doctrinal consistency. Casebook authors select decisions, primarily from this country with a smattering from England and the Commonwealth, and these decisions are arranged in doctrinal fashion. For nearly a century, cases have been selected for many reasons: they were important to the law's development; they illustrate the purposes and policies behind the law; they stimulate student thought about whether a rule is sound or unsound; or they demonstrate a rule's application. While doctrinal organization may be both logical and necessary, it contributes to the overemphasis on legal principles and on the way that law operates in society. A critical part of this is but the passing reference to how lawyers function. The casebooks are themselves limited tools, especially in basic courses, where they cannot be expected to cover the broad terrain offered here.

## II. REMEDIES: A CAPSTONE COURSE THAT CAN INTEGRATE DOCTRINE, THEORY, AND PRACTICE

We suggest that reforms to the law curriculum should begin with a touchstone. They should recognize the inherent strengths of American law school education and its traditions and the economic constraints that make brave, whole-canvas reforms too utopian. Thus we propose a capstone course in Remedies that involves a significant step towards showing our students how their early doctrinal learning can be integrated, and how they, as future lawyers, can operate in the changing and unpredictable world of practice. It is a parsimonious suggestion for reform and thus is more likely to find success in the modern law school.<sup>84</sup>

So, how does a Remedies course help bridge the divide between theory and practice? In terms of doctrine, Remedies as a course is unique, and daunting for the teacher, because it cuts across the boundaries of the law school curriculum. Instead of dealing with a defined legal subject, Remedies teachers are challenged to wade into the content of a range of Torts, Contracts, Property, Constitutional, Criminal, and Administrative Law courses (as well as a host of other subjects) during a single class. Public law is conjoined with private law. Why? When equitable remedies are sought, for example, it is not uncommon to ask certain fundamental questions: What legal remedy is available to the plaintiff? Is that remedy adequate or inadequate? In order to answer such questions, the professor and the student must necessarily think about possible causes of action and the remedies that those causes of action

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84. Parsimony refers to a logical principle, if the philosophers will permit the crude rendition of a lawyer: when you are trying to explain reality, the simpler explanation that accounts for everything is the more rational, and more likely to be truthful. See Alan Baker, *Simplicity*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/sum2011/entries/simplicity/> (last updated Feb. 25, 2010). As for reform in law schools, we may not need a philosopher to tell us that a simpler program of reform is more likely to succeed.

might produce. Over the course of a semester, a Remedies teacher will have touched upon a large number of subjects. For a young Remedies teacher, this aspect of the Remedies course can be trying. For students, this aspect of the course is enlightening and invigorating, and it helps them bring together their legal education. The University of Melbourne Law School has given a careful and convincing rationale for its compulsory course in Remedies.<sup>85</sup>

Because of the multi-doctrinal nature of Remedies, a course in Remedies provides a way to integrate both theory and practical skills into a single class and to teach theory through both academic and practical lenses. In our view, this is the best way to teach law. Students need to acquire both doctrine and skills, but there is no essential or critical reason why skills should be taught in specialized classes. Practicing lawyers rarely have the luxury of choosing to focus on just “theory” or just “practical skills.” Necessarily, as they practice law, they utilize both doctrine and skills. A Remedies course is a powerful antidote to the artificial division of theory and practice; it allows the teacher to provide both doctrine and skills training simultaneously.

One skill that students can learn in a Remedies class is how to evaluate a case. Part of the problem with legal education is that students focus on particular subjects, and view the law through the lenses of those subjects.<sup>86</sup> Torts teachers focus on tort principles and tort remedies. Contracts and Property teachers likewise focus on their own principles and remedies. Thus, when students take a Torts final exam, they know that they are expected to apply torts principles. Contracts and Property students know that their final exams require application of contracts and property principles, respectively. The practice of law is never so neat or tidy. In most instances, when a client comes to see a lawyer, the lawyer does not have a complete understanding of the law and the facts, and therefore does not pigeonhole the case into a particular legal category (e.g., I have a torts case involving assumption of the risk). Except when a lawyer is dealing with a highly sophisticated client (e.g., a corporate client who approaches him through in-house counsel), the actual practice of law can be a lot messier. A client may come to a lawyer with a pitiful story and dump a pile of facts on the lawyer’s desk. Sometimes, the lawyer’s analysis can be complicated by the fact that the client expresses a great deal of emotion. The lawyer’s task is to sift through the facts and decide how to proceed. What causes of action are possible? What remedies do those causes of action produce? Perhaps, indeed, the remedy may be extra-judicial

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85. See *Handbook*, U. MELB., <https://handbook.unimelb.edu.au/view/2012/LAWS50036> (last updated Jan. 22, 2009).

86. Of course this goes back to the old treatises culminating in Blackstone that compartmentalized the law to make it usable and understandable. See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 638–41 (1981).



given the inefficiencies of the judicial remedy. Self-help is the most ancient of remedies and, as students learn early, may be the most efficient provided that social peace is not disturbed.

In the process of answering these questions, students can be taught many practical skills. For example, an essential skill is fact development and investigation. Most law students find this foreign. Students are hardly at fault. Throughout much of their law school career, students study law through the Langdellian prism of appellate opinions. While appellate opinions have value, especially as a way to analyze and understand the law's development, they present an artificial view of the practice of law because the facts in those opinions have been distilled and synthesized by the lawyers, the trial court, and the appellate court.<sup>87</sup> Moreover, as judges write their opinions, their desire to be persuasive causes them to include or omit facts depending on whether they support or detract from the judge's conclusions.<sup>88</sup> As a result, newly-minted lawyers are not prepared to deal with a client who comes in and dumps a large quantity of facts on their desks. So, one thing that we try to do in Remedies is to help students understand the importance of fact investigation.

Of course, students need to learn to "walk" before they learn how to "run." We often spend the first part of the semester giving our students a comprehensive understanding of the history of equity, and more particularly equitable remedies, and the relationship between equitable remedies and legal remedies.<sup>89</sup> We also talk about issues such as enforcement of remedies.<sup>90</sup> While students will sometimes know something about equity from their first-

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87. See Weaver, *supra* note 14, at 570–71; see also HARNO, *supra* note 15, at 152 ("The appellate decisions the student reads have fact situations, to be sure, but they do not involve facts 'in the raw' such as the lawyer must struggle with. 'The facts as reported in the published decision have often gone through a triple process of distillation: unorganized "real" facts are reduced to the facts proved in court; the facts proved in court may be reduced still further to the facts appearing in the written record on appeal; finally the facts of the written record are reduced to the facts reported by judge or reporter in the published decision.'"); Albert S. Osborn, *A Case Book on Thought and Reasoning*, 11 VA. L. REV. 89, 90 (1924) ("The finding, presenting, proving, discussing and interpreting of certain facts make up a large part, perhaps four-fifths or even nine-tenths, of trials at law, so-called.").

88. See Weaver, *supra* note 14, at 571–72. Perhaps the most notable example of a judicial statement of facts in the tendentious tradition is Justice Cardozo's rendition of the accident in the famous torts decision of *Palsgraf*. See VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 327 (12th ed. 2010). This rendition of the facts was critical to his famous holding about the nature of the duty of care; it is the facts that answer the question of whether a duty was owed to Mrs. Palsgraf herself. The duty is relative. See Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 Harv. L. Rev. 1757, 1767 (2012).

89. See RUSSELL L. WEAVER, DAVID F. PARTLETT, MICHAEL B. KELLY & W. JONATHAN CARDI, REMEDIES: CASES, PRACTICAL PROBLEMS AND EXERCISES 6–81 (2d ed. 2010).

90. *Id.* at 82–140.

year courses, particularly Contracts, the knowledge is fragmentary and ineffective in informing them of how equitable remedies relate to legal remedies, as well as the differences in enforcement. Most especially, they do not understand how those differences affect lawyers in the litigation of cases. We then spend some time talking about injunctions,<sup>91</sup> and making sure that students have a thorough grounding in restitution.<sup>92</sup> As with equitable remedies and equitable enforcement issues, while students may have been introduced to these matters in other classes, they usually have had but a passing introduction to the topics.

Once students have this basic knowledge, the Remedies course offers students the opportunity to work with the law in context. Particularly effective are problems that take the student to a set of facts that have no predetermined categorical boundaries. At the end of the semester, either in class or in a final exam, it is possible to give students problems that force them to actively engage themselves in a case. For example, students can be presented with hypothetical facts:

Your client owns an heirloom pocket watch that was given to him by his father as a graduation present. The watch is stolen by Jonathan Baird (Baird broke into your client's home and took the watch along with other things). What remedies are available to the client?

The answer to the problem may seem obvious. Since the watch is an heirloom, one might assume the client would like to have the watch back, and therefore the student might have a tendency to focus on restorative remedies. Of course, even a case like this provides the teacher with the opportunity to discuss the lawyer's role, and the fact that the lawyer is charged with achieving the client's objectives. If (as one might guess) the client wants the watch back, the lawyer will have several options available to him/her. On the other hand, if the client prefers damages, the case might proceed in an entirely different way. In a final exam context, we will sometimes offer our students the opportunity to do practical things, such as interviewing the client. This can come in the form of a traditional sit-down interview, or could be done simply by email in which the lawyer asks the client (with, perhaps, the professor serving as a surrogate for the hypothetical client) questions about the facts, as well as about his/her desires related to the outcome of the case.

Of course, the next step for a lawyer is to ascertain the facts, and to decide how to litigate the case. The case might be litigated under any of a variety of theories. For one thing, if the client has not already done so, a decision must be made regarding whether to press criminal charges against the thief. However, if the client wants to regain the watch, the lawyer might consider bringing a

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91. *Id.* at 141–369.

92. *Id.* at 370–445.

replevin action (or whatever the modern equivalent of replevin is called in his or her jurisdiction), or even seeking an injunction. On the other hand, if the client seeks damages, the attorney might think about the possibility of bringing the case on a tort (conversion) theory, or even on a restitution theory.

Of course, a full decision about how to proceed requires a level of fact investigation. As noted earlier, one of the problems with legal education is that students are used to being presented with pre-synthesized facts, and are rarely taught to engage in fact investigation. The stolen watch problem can give students the opportunity to work with fact development. If, for example, the client wants the watch back, the client must attempt to find out who has the watch and where it is located. The thief might still have the watch, but the thief might have given or sold the watch to someone else. It might have been accidentally destroyed. Even if the client wants damages, discovery will be necessary. Suppose that the thief is insolvent, but the thief sold the watch to a pawnshop or another individual. It might be helpful to know whether the purchaser paid value for the watch, and whether the purchaser bought the watch with notice of the theft.

The answers to these questions may control or limit the causes of action and remedies available to the client, and they may drive the client in quite different directions depending on the answers. For example, if the watch has been destroyed and thrown away, there may be no hope of retrieving it, and the only available option may be damages. So, the lawyer may be forced to think about possible defendants (if the watch was sold before it was destroyed, it might be possible to sue the purchaser), including the solvency of those defendants, and the possible remedies that might be sought from them. If the thief is insolvent, there may be no point in suing him. On the other hand, if he has money, damages are potentially recoverable. Of course, the purchaser can probably be sued on a conversion theory, and a possible bona fide purchaser ("BFP") defense would be unavailable. Alternatively, if the purchaser is a BFP, a restitution theory might not be wise (at least, against the BFP). Indeed, depending on what the thief did with any payment received, it might be possible to trace the proceeds into other forms, and to impose either a constructive trust or equitable lien on those proceeds. Of course, the facts might push the attorney in a quite different direction. Suppose that the client wants the watch back. Presumably, the lawyer might resort to the modern equivalent of replevin, or seek injunctive relief, and perhaps could utilize the police to help retrieve stolen property.

The range of scenarios and the range of possible actions are endless. Much depends on what the client wants and how the facts play out. As a result, an essential next step in a Remedies course is to give students the opportunity for fact investigation. As part of a class exercise or a final exam, students can be given the opportunity to send questions or "interrogatories" to their client or to opposing parties. Since this is a simulation, the questions can simply be sent to

the professor who will provide the answers, and the students might have an endless array of questions. What happened to the watch? Does Baird still have it? If not, who does? If the watch was acquired, how was it acquired? Did the purchaser buy it? Did the purchaser have notice of the theft? Was it a gift? What did Baird do with the proceeds? Is Baird solvent (or, for that matter, well-off)? What about the purchaser? Of course, the answers to these questions may lead to other questions. What did Baird do with the proceeds? Can they be traced into other forms as to which a constructive trust or equitable lien may be asserted?

Of course, as part of this process, students can be asked to prepare the necessary legal documents. If they intend to seek damages, they can draft the legal complaint. If they wish to seek injunctive relief or the modern equivalent of replevin, students can be asked to draft the petition and the request for injunctive relief. If they wish to seek temporary relief as well, they can produce the necessary additional documents. If the factual investigation suggests that students need to alter or amend their complaints, or their requests for relief, they can be asked to amend their original documents.

#### CONCLUSION

In this short Article, we have tried to suggest how Remedies can function as a capstone course that integrates substantive doctrine and skills and allows students to view law in an integrated manner that crosses doctrinal boundaries. It can also allow students to develop their skills, both client interviewing and fact investigation. Finally, the course gives students the chance to draft documents. Of course, it's possible to carry the skills component even further. For example, if students wish to seek temporary injunctive relief on behalf of their clients, they can be allowed to argue the case. In other words, in multiple ways, a course in Remedies can be viewed as a capstone course that allows students to view law in an integrated way, to develop practical skills, and to deal with skills and doctrine in an integrated way.<sup>93</sup>

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93. Thinking about the place of Remedies in a law curriculum has reached a maturity in other common law systems. The famous paper is Peter Birks's Blackstone Lecture. See Peter Birks, *Rights, Wrongs, and Remedies*, 20 O.J.L.S. 1 (2000). Another influential article is S. M. Waddams, *Remedies as a Legal Subject*, 3 O.J.L.S. 113 (1983). For a recent and comprehensive piece, see Jeffrey Berryman, *The Law of Remedies: A Prospectus for Teaching and Scholarship*, 10 OXFORD U. COMMONWEALTH L.J. 123 (2010). The field has been given a boost through the scholarship of Michael Tilbury whose casebook, MICHAEL TILBURY, MICHAEL GILLOOLY, ELISE BANT & NORMANN WITZLEB, *REMEDIES: COMMENTARY AND MATERIALS* (5th ed. 2011), is widely used in the Commonwealth. It is noteworthy that the Remedies course has failed to gain traction in the UK likely because of the strong English tradition of viewing the world through obligations. To be sure, however, English law students obtain a more formal and thorough grounding in Equity.

An intellectual skill of no modest moment is the ability of the Remedies course to give students a keen appreciation of the energy of the common law. The classifications are not closed. Thus in Remedies, students will be taken to equity to appreciate the open-textured nature of the common law. A cause of action in nuisance may be available, but what should be the remedy? The fundamental ideas about property and liability rules are examined rigorously in *Boomer v. Atlantic Cement Co.*<sup>94</sup> and in the cases that follow it when crafting a remedy that is fair and efficient. A new vista is opened.

In covering restitution the same dynamism may be seen. This field is now finding its feet again through the estimable *Restatement of Restitution* recently published by the American Law Institute.<sup>95</sup> Alongside better-known causes of action, restitution will likely gain traction as a remedial engine with the force of the *Restatement* and the acceptance and strong momentum of the action elsewhere in the common law world. In the bankruptcy following the Madoff Ponzi scheme, the puzzle was seen as statutory.<sup>96</sup> Yet, a proper appreciation of the restitution claims of claimants adds an important arrow in the quiver of remedies.<sup>97</sup> The same is true when looking afield at the compensation claims of victims of the BP oil spill. To view the claims not solely through the lens of class actions in tort, but also through restitution, provides a valuable perspective.<sup>98</sup> It is not surprising that Remedies is required on the California Bar Exam.<sup>99</sup> It is also to be found as a compulsory course in the curriculums of several leading Anglo-American law schools.<sup>100</sup>

94. 257 N.E.2d 870 (N.Y. 1970). This case is an antidote to a rigid notion of “right” in tort law. A court will account for third-party interests in granting a remedy. See Gregory C. Keating, *Nuisance as a Strict Liability Wrong* 42 (Univ. of S. Cal. Law & Econ. Working Paper Series, Paper No. 134, 2011) (asserting that *Boomer* shows that tort liability is not bilateral), available at <http://law.bepress.com/usclwps-lewps/art134>. Thus, the remedy reveals the nature of the tort.

95. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011).

96. See Andrew Kull, *Common-Law Restitution and the Madoff Liquidation*, 92 B.U. L. REV. 939, 940 (2012) (noting that the Madoff cases adhered to bankruptcy legislation for resolution). It is likely that jurisdictions in the Anglo-American orbit will take close note of the developments in restitution in the United States. For a comprehensive statement of English restitution law, see ANDREW BURROWS, A RESTATEMENT OF THE ENGLISH LAW OF UNJUST ENRICHMENT (2012).

97. Professor Andrew Kull, reporter of the *Restatement of Restitution*, takes to task the published opinions on the Madoff cases, arguing that the decisions in these cases turn on schemes that are “textbook restitution issues,” in perhaps “the greatest restitution case in history.” See *id.*

98. See David F. Partlett & Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68 WASH. & LEE L. REV. 1341, 1363–75 (2011) (describing the structure and advantages of a restitutionary scheme for resolving these claims).

99. See *Subjects Tested on the California Bar Examination*, USC GOULD SCH. L., <http://weblaw.usc.edu/why/academics/bar/subjectsTested.cfm%20> (last visited Aug. 23, 2012).

100. Five Australian university law schools require it: the University of Melbourne, the University of Notre Dame, the University of Queensland, Macquarie University, and the University of Western Sydney. See *The Melbourne JD: Compulsory Subjects*, U. MELB.,

More fundamentally, the Remedies course brings to bear three years of education on problems that oblige law students to see the law's fabric as a whole. Perhaps for the first time in their legal careers, students will be able to see how discrete areas of the law interact with each other. Tort and constitutional law find common cause in remedies for invasions of privacy. Tort and contract interact in pre-contractual negotiations. How are the purposive inconsistencies in the divisions of law to be resolved? Outside a Remedies capstone course, the student will not have a chance to think across the boundaries of these substantive categories.

We wish at the end to point out that the Remedies course touches an essential aspect of practice in a globalizing world. The course should recognize that the practice of law reaches beyond national boundaries. A defamation judgment granted in an English court may have limits on its enforceability elsewhere.<sup>101</sup> An injunction to prevent an invasion of privacy or confidentiality may have little chance of enforcement in other courts.<sup>102</sup> The public policies vary and students will be challenged in the way that the best legal education does, delving into the function of legal rules and helping students acquire a set of intellectual skills that will set their compass for decades of a life in the law. Undoubtedly, such training will help law school graduates deal with the changes brought on by globalization, some of which will be seismic in nature, and will help them deal with the changes that come hand-in-hand with lawyers functioning as social engineers.<sup>103</sup> The scope of the lawyer's role may range

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<http://www.law.unimelb.edu.au/jd/course-and-subjects/the-course/compulsory-subjects> (last visited Feb. 9, 2013); *Compulsory Units in the LLB as a Single or Double Degree*, U. NOTRE DAME, <http://www.nd.edu.au/units/lw.shtml> (last visited Feb. 9, 2013); *Bachelor of Laws Compulsory Course List*, U. QUEENSL. AUSTL., <http://www.law.uq.edu.au/llb-compulsory-course-list> (last visited Feb. 9, 2013); *Bachelor of Laws: What You Will Study*, MACQUARIE U., <http://courses.mq.edu.au/undergraduate/degree/bachelor-of-laws> (last visited Feb. 9, 2013); *Admission and Unit Information—Bachelor of Laws (Non-Graduate Entry)*, U. W. SYDNEY, [http://future.uws.edu.au/future\\_students\\_home/ug/law/non\\_grad\\_entry/admission\\_and\\_unit\\_information\\_bachelor\\_of\\_laws\\_non-graduate\\_entry](http://future.uws.edu.au/future_students_home/ug/law/non_grad_entry/admission_and_unit_information_bachelor_of_laws_non-graduate_entry) (last visited Feb. 9, 2013).

101. See, e.g., David Partlett & Barbara McDonald, *International Publications and Protection of Reputation: A Margin of Appreciation but Not Subsistence?*, 62 ALA. L. REV. 477 (2011) (providing a look at traditions in defamation that quite literally compete, as strong American constitutional values travel abroad and are contested at home); see also Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507 (2012) (surveying the comparative law and American response and joining the debate on appropriate solutions to the issues).

102. See SCHWARTZ, KELLY & PARTLETT, *supra* note 88, at 1008 (discussing the *Spycatcher* litigation, where the British government attempted to suppress, in Australian courts, the publication of a memoir written by an M.I.5 agent, and ended up “wag[ing] a global campaign”). The students will perceive that the law is polyphonic in its function, speaking with different and sometimes conflicting voices, at the levels of the state, the nation, the regional organization, and the transnational tribunal.

103. We recognize that this is a term now out of favor in postmodern society, but in our view the well-trained lawyer provides the oil to the gears of a modern complex society. Note most

from business deals to human rights enforcement. An investment in training the best lawyers pays its social dividends here. Here the task of legal education is to provide not an education bounded by today's challenges but one commensurate with the unknowns of tomorrow.

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recently the Apple/Samsung patent litigation where the issues of remedies will prove central and crucial. *See* Hiroko Tabuchi & Nick Wingfield, *Tokyo Court Hands Win to Samsung Over Apple*, N.Y. TIMES, Sept. 1, 2012, at B1. Where the law is seen as utilitarian as it generally is, the social purpose of legal norms calls lawyers to the task of renewing and reforming law according to those utilitarian purposes. *See* Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383, 412 (2012) (arguing that tort law is “an exercise in social engineering”).