

IMPROVING LEARNING IN THE LAW SCHOOL CLASSROOM BY ENCOURAGING STUDENTS TO FORM COMMUNITIES OF PRACTICE

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Legal educators have avoided core curriculum reform despite continual calls for change. This position is untenable for most law schools given current market conditions that have resulted in a severe decline in law school enrollment. This paper argues that legal educators should use learning theory when making reform decisions. Researchers who have studied how learning occurs in traditional apprenticeships recognize that informal learning occurs in industrialized society through groups called “communities of practice.” Law professors can stimulate student learning by implementing communities of practice in their classrooms. This paper begins by discussing the learning theories that support and define this pedagogical tool. It also explains how using communities of practice in the law school classroom is consistent with the recent calls for legal education reform from the Clinical Legal Education Association and the Carnegie Foundation. The paper then borrows ideas from the successful implementation of communities of practice in corporate and government organizations and makes suggestions for their use in different types of law school courses. It concludes by explaining how communities of practice can be used as a vehicle to increase learning and teach practice-based skills. This small scale reform can inform, and be part of, the larger contemporary law school reform movement.

INTRODUCTION

Former law students are often able to recall in vivid detail being called on to recite information for the first time in a large law school classroom. Even if proud of having survived the experience, most would not characterize it as their preferred method of learning. If asked to recall a positive learning experience in law school, they would likely describe a setting where the dialogue occurred in a less stressful environment, perhaps in a study group, a clinical course, or a seminar. Given current market pressures, law schools are beginning

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to respond to the call for legal education reform. In the spirit of reform, this paper proposes a technique for creating a positive learning environment in all courses. It is based on research about learning in apprenticeships.

Initially, aspiring lawyers received their legal training as apprentices.¹ In the seventeenth century, legal education began its move away from apprenticeships to the university setting.² Thereafter, at Harvard Law School, Professor Christopher Columbus Langdell created the popular case method of instruction that focused on learning law by analyzing appellate court decisions. Langdell believed that the development of common law principles could be studied in the university as a scientific process.³ Law schools still use this model today.⁴ Although legal education moved away from practice-based apprenticeships to theoretical study in the academy, many aspiring lawyers still experienced a form of apprenticeship at work when they were mentored by more experienced practitioners.⁵

The current economic downturn, however, has caused changes in client spending, reducing clients' willingness to finance new associates learning on the job and reducing the time experienced lawyers have to mentor new attorneys.⁶ Law firm apprenticeships no longer exist to

¹ Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 77 (2010).

² Beth A. Wright, *Preserving the Social Contract: Translating Academic Education into Professional Practice Through Contemporary Cognitive Theories*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 17, 25-26 (2009).

At the end of the seventeenth century, the study of law was experiencing an identity crisis. The first formal law schools, most notably Harvard, were eager to distance themselves from the stigma of the trade school, so epitomized by industrial-age economist Thorstein Veblen's memorable barb, "the law school belongs in the modern university no more than a school of fencing or dancing."

Kowalski, *supra* note 1 at 78.

³ Kowalski, *supra* note 1, at 78; David A. Garvin, *Making the Case: Professional Education for the World of Practice*, HARV. MAG., Sept.-Oct. 2003, at 58.

⁴ Richard K. Neumann, Jr., *Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education*, 10 LEGAL COMM. & RHETORIC: JALWD 170-171 (2013).

⁵ This training has been described as "'not sequential but simultaneous 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.'" Brook K. Baker, *Practice-Based Learning: Emphasizing Practice and Offering Critical Perspectives on the Dangers of "Co-op"tation*, 56 N.Y. L. SCH. L. REV. 619, 627 n.18 (2011-12) (citing Michael Meltsner, *Healing the Breach: Harmonizing Legal Practice and Education*, 11 VT. L. REV. 377, 384-85 (1986)).

⁶ Melissa H. Weresh, *I'll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 385 (2009); Sherri Lee Keene, *One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the "Practice-Ready" Law School Curriculum*, 65 MERCER L. REV. (forthcoming Winter 2014) (manuscript on file with author); David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <http://www.nytimes.com/2011/11/20/business/after->

the extent necessary to compensate for the lack of skills-based training in the traditional law school model.⁷ Even prior to the economic downturn, many argued that legal education fails to prepare students for the practice of law.⁸ The current calls for reform address these concerns, in part, by emphasizing the importance of the social aspects of learning and learning in the apprenticeship model.⁹ Specifically, in 2007, the Carnegie Foundation published a book containing its recommendations for reform in legal education.¹⁰ It frames its advice in terms of apprenticeships, calling for law schools to focus on doctrinal/analytical, expert/practical, and identity/value apprenticeships.¹¹

This paper proposes embracing thinking in the fields of organizational psychology and learning theory that also advocate an apprenticeship approach. In particular, it proposes that professors facilitate students participating in “communities of practice.” Researchers Jean Lave¹² and Etienne Wenger,¹³ based on their field work investigating how learning occurs in apprenticeships, determined that informal learning occurs in industrialized society through what they call “communities of practice.”¹⁴ As described by Wenger,

law-school-associates-learn-to-be-lawyers.html?pagewanted=all.

⁷ Bar associations recognize this change in new attorney training and have started attorney mentor programs or new attorney training programs. For example, the states of Georgia, South Carolina, and Utah require that new attorneys have mentors. Charles R. Toy, *Episodic Mentorship: A Professionalism Tool We Can Sharpen*, MICH. B.J., Dec. 2009, at 14, 14.

⁸ In the Introduction to *Best Practices for Legal Education*, published by the Clinical Legal Education Association, the authors state that the United States’ model of legal education has been criticized since its inception. ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 1* (2007). The authors then state, “In the history of legal education in the United States, there is no record of any concerted effort to consider what new lawyers should know or be able to do on their first day in practice or to design a program of instruction to achieve those goals.” *Id.* at 2. “Law schools are not adequately preparing most students for practice . . .” *Id.* at 210.

⁹ WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WENGER, LLOYD BOND, & LEE S. SHULMAN, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *SUMMARY OF THE FINDINGS AND RECOMMENDATIONS FROM EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 28* (2007). *Best Practices* also encourages learning through active participation in groups. STUCKEY ET AL., *supra* note 8, at 118-20, 124.

¹⁰ SULLIVAN ET AL., *supra* note 9.

¹¹ *Id.* at 28. See also *infra* Part I.B (discussing the *Carnegie Report*).

¹² Jean Lave is a social anthropologist currently working as a professor at University of California Berkeley School of Information. Her research is concentrated on learning in everyday life through social practices. JEAN LAVE: SCHOOL OF INFORMATION, <http://www.ischool.berkeley.edu/people/faculty/jeanlave> (last visited Aug. 5, 2013).

¹³ Etienne Wenger has a Ph.D. in artificial intelligence from University of California Irving and is currently an independent researcher and consultant specializing in developing communities of practice in all types of organizations. ETIENNE WENGER: BIOGRAPHICAL INFORMATION, <http://www.ewenger.com/bio/index.htm> (last visited Aug. 5, 2013).

¹⁴ Etienne Wenger, *Communities of Practice and Social Learning Systems*, 2000 ORGANIZATION 225, 229 (2000). See also *infra* Part II.B.

[s]ince the beginning of history, human beings have formed communities that share cultural practices reflecting their collective learning: from a tribe around a cave fire, to a medieval guild, to a group of nurses in a ward, to a street gang, to a community of engineers interested in brake design. Participating in these ‘communities of practice’ is essential to our learning. It is at the very core of what makes us human beings capable of meaningful knowing.¹⁵

Communities of practice consist of groups of people who associate on a regular basis at work, school, church, or through some other activity or hobby. The group may not have a name, but the regular interaction among the individuals leads to an informal sharing of relevant information.¹⁶ In a legal context, new law firm associates who routinely get together during the work day for lunch, or after work, share information about the law firm and can be viewed as a community of practice. Study groups in law schools can be viewed as communities of practice. In any organization, whether it is police officers, claims processors, or repair technicians, people often form communities of practice to share information regarding how to succeed within the organization.¹⁷

Consistent with Wenger’s recommendations for cultivating communities of practice in organizational settings¹⁸ and with learning theory that advocates social interaction as a method of learning,¹⁹ this paper calls for creating communities of practice in law school classrooms. Under the communities of practice model, novice students would learn by interacting with the professor as an expert and other novice or more advanced student members of the community to master course material.²⁰ Professors can introduce an inclusive form of communities of practice in the classroom to help students learn the course materials more thoroughly and as a pedagogical tool for teaching other skills needed to practice law.

Part I of the paper discusses recent calls for reform in legal edu-

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ ETIENNE WENGER, RICHARD McDERMOTT & WILLIAM M. SNYDER, *CULTIVATING COMMUNITIES OF PRACTICE: A GUIDE TO MANAGING KNOWLEDGE* (2002).

¹⁹ See *infra* Part II.B. Current learning theory suggests that instructors change the focus in the classroom from one where students receive information only from the teacher to one where students also receive information from, and create meaning with, each other. Karen Barton, Patricia McKellar & Paul Maharg, *Authentic Fictions: Simulation, Professionalism, and Legal Learning*, 14 *CLIN. L. REV.* 143, 144 (2007). Situated cognition involves the idea that “knowledge is created or negotiated through the interactions of the learner with others and the environment.” David Stein, *Situated Learning in Adult Education*, ERIC DIG. NO. 195 (1998), available at <http://ericae.net/edo/ed418250.htm>.

²⁰ Jean Lave, *Situating Learning in Communities of Practice*, in *PERSPECTIVES ON SOCIALLY SHARED COGNITION* 63, 64 (Lauren B. Resnick et al. eds., 1991).

cation. Part II sets forth the learning theory that led to the communities of practice model and that influenced these calls for reform in legal education. Part III addresses creating communities of practice in law school classrooms. This section initially discusses how Wenger's seven steps for successfully cultivating communities of practice in organizations can be adapted to create communities of practice in law school courses. It then provides additional suggestions for implementing communities of practice in specific types of law school courses. This paper concludes by explaining how teaching in the community of practice model facilitates learning and can be used to accomplish objectives suggested in the calls for legal education reform.

I. THE STATE OF LEGAL EDUCATION AND THE CALL FOR CHANGE

A. *The State of Legal Education*

The call for legal education reform is not new.²¹ Despite continual calls for reform, the major restructuring in legal education has occurred at the periphery while the core curriculum has remained largely the same. In the 1970s, there was a clinical movement that resulted in all United States law schools having at least one clinic today.²² In the 1950s, there were only about twenty-five law schools that offered courses through a clinic program. From 1959-1965, the National Council of Legal Education (NCLC), funded by the Ford Foundation, issued \$500,000 in grants to nineteen law schools for clinical programs.²³ In 1968, the Council on Legal Education for Professional Responsibility was created, and the Ford Foundation then committed twelve million dollars over a ten-year period to "incorporate clinical education as an integral part of the curriculum of the country's law schools."²⁴ In the 1970s, the vast majority of the United States law schools created and built their law school clinical programs. Although clinical education is a vital part of law school education, it is not yet a graduation requirement at most law schools.²⁵

²¹ See, e.g., ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

²² J.P. Ogilvy, Catholic Univ. of Am., Address at the Association of American Law Schools' Workshop for New Clinical Law Teachers: History of Clinical Legal Education 15 (June 27, 2004), available at <http://www.aals.org/nlt2004/ogilvy.pdf>.

²³ *Id.* at 17.

²⁴ *Id.* at 17. University of Detroit Mercy School of Law's Urban Law Program was funded by a \$250,000 grant from the U.S. Office of Economic Opportunity in 1965. *UDM Law Clinics*, DOCKET: UNIV. OF DETROIT MERCY SCH. OF L. MAG., Spring 2012, at 3, 5.

²⁵ Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLIN. L. REV. 1, 49 (2000). Some schools, such as The

In the 1990s, a movement also took place in the field of legal writing, although it was not spurred by funding. This movement found support in an ABA task force report commonly referred to as “The MacCrate Report.” In 1992, the American Bar Association’s section of Legal Education and Admission to the Bar issued a report by a task force chaired by Robert MacCrate, titled “The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap.”²⁶ The MacCrate Report emphasizes the importance of clinical legal education,²⁷ as well as skills such as legal reasoning and analysis, legal research, and communication, which are traditionally taught in legal writing courses.²⁸ The MacCrate Report’s call for an infusion of skills training into the law school curriculum offered support for those seeking to reform their legal writing programs.

It was, however, the visionary legal writing professors who dedicated their time to build a nation-wide network of professors that advanced the legal writing movement. This network generated discussions about issues confronting legal writing and research professors, including those related to their unequal status in the law school hierarchy. The result was the founding of the Legal Writing Institute (LWI)²⁹ and the Association of Legal Writing Directors (ALWD).³⁰ With the MacCrate Report and the information generated by LWI and ALWD, many legal writing programs have moved to a model that allows for more, or expanded, courses in legal writing and more job security for professors of legal writing.³¹

Even with the clinical and the legal writing movements each in-

University of Detroit Mercy School of Law, require a clinical course for graduation. UDM LAW – REQUIRED AND BAR-RELATED COURSES, <http://www.lawschool.udmercy.edu/index.php/academics/required-and-bar-related-courses> (last visited Aug. 5, 2013).

²⁶ AM. BAR ASS’N, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]; Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLIN. L. REV. 109, 113 (2001).

²⁷ Engler, *supra* note 26, at 114.

²⁸ Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 508-509 (1994).

²⁹ See Mary S. Lawrence, *The Legal Writing Institute, The Beginning: Extraordinary Visions, Extraordinary Accomplishments*, 11 LEG. WRITING: J. LEG. WRITING INST. 213 (2005) (describing the development of the Legal Writing Institute).

³⁰ LWI and ALWD each operate as a community of practice due to the generous sharing of information on the LWI list serv, on the LWI website, through the ALWD/LWI annual survey, and during conferences sponsored by both organizations.

³¹ ASSOCIATION OF LEGAL WRITING DIRECTORS & LEGAL WRITING INSTITUTE, REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2012), available at <http://www.lwionline.org/uploads/FileUpload/2012Survey.pdf>. (comparing various teaching models being employed between the years 2008 through 2012).

fusing the law school curriculum with more skills-based learning, the core curriculum remains largely unchanged. It is designed to teach substantive legal material and to develop analytical skills by “delving into complex hypotheticals that test the boundaries of legal rules, policy, and even morals”³² This focus creates a dichotomy within the academy between “doctrine discipline and lawyering-skills curriculum.”³³ Due to the heavy focus on “doctrine discipline,” law schools have excelled at training “law clerks, legal scholars, law review editors and appellate advocates”³⁴ through a method of lecture and problem-based pedagogy. No one questions the importance of law students acquiring a broad knowledge of legal doctrine or developing acute analytical skills. It is the teaching of this material and these skills to the exclusion of other needed fundamental practice-based skills that has been questioned and criticized.³⁵

B. The Recent Calls for Change

In addition to the MacCrate Report, two other comprehensive critiques of legal education were recently published. In 2007, the Clinical Legal Education Association supported the publication of *Best Practices for Legal Education* (Best Practices), and the Carnegie Foundation published its *Report on Legal Education* (Carnegie Report).³⁶ These reports suggest major change is needed within the legal academy.³⁷ Both reports conclude that “law schools should: broaden the range of lessons they teach, reducing doctrinal instruction that

³² Kowalski, *supra* note 1, at 84.

³³ *Id.* at 83.

³⁴ Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDU. 313, 316 (1995).

³⁵ STUCKEY ET AL., *supra* note 8, at 3; SULLIVAN ET AL., *supra* note 9, at 147.

³⁶ The CLEA’s *Best Practices* was authored by Roy Stuckey along with other distinguished professors. *Best Practices* was a collaborative effort as each draft was posted with notice on the University of South Carolina School of Law website, and the authors acknowledged that numerous people drafted sections that were incorporated into the document. STUCKEY ET AL., *supra* note 8, at viii. *The Carnegie Report* was authored by Carnegie senior scholar William M. Sullivan, along with others associated with the Carnegie Foundation, including Judith Welch Wegner, who served as President of the Association of American Law Schools and was a dean at the University of North Carolina, Chapel Hill’s law school. SULLIVAN ET AL., *supra* note 9 at ix-x.

³⁷ A more adequate and properly formative legal education requires a better balance among the cognitive, practical, and ethical-social apprenticeships. To achieve this balance, legal educators will have to do more than shuffle the existing pieces. It demands their careful rethinking of both the existing curriculum and the pedagogies law schools employ to produce a more coherent and integrated initiation into a life in law.

SULLIVAN ET AL., *supra* note 9, at 147. “We agree with the authors of the Carnegie Foundation’s report that the changes we need to make are substantial.” STUCKEY ET AL., *supra* note 8, at 3.

uses the Socratic dialogue and the case method; integrate the teaching of knowledge, skills and values, and not treat them as separate subjects addressed in separate courses; and give much greater attention to instruction in professionalism.”³⁸

Best Practices calls upon “law schools to make a commitment to improve the preparation of their students for practice, clarify and expand their educational objectives, improve and diversify methods of delivering instruction, and give more attention to evaluating the success of their programs of instruction.”³⁹ In this regard, collaboration among students is flagged as an important learning method.⁴⁰ The relevant commentary to the best practice of encouraging collaboration states that there are over 600 studies that prove that “cooperative learning produces higher achievement, more positive relationships among students, and psychologically healthier students than competitive or individualistic learning.”⁴¹ Within this section, further commentary states that “[c]ollaborative learning involves placing students in a wide variety of team projects and group assignments which allows the students to compare and challenge perspectives, add insights, and strengthen their grasp of academic material.”⁴²

Another suggested best practice is for the learning environment to engage teachers and students.⁴³ The relevant commentary states that “[a]ctive learning requires students to share responsibility for acquiring knowledge, skills, and values. . . . Among the many dimensions of active learning are writing, discussion, peer teaching, research, internships, and community experiences. These kinds of active experiences help students understand and integrate new information.”⁴⁴

The Carnegie Report advocates similar changes but uses a different framework for setting forth its recommendations. The Report initially recommends that law schools should offer an integrated, three-part curriculum:

- (1) the teaching of legal doctrine and analysis, which provides the basis for professional growth;
- (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and
- (3) a theoretical and practical emphasis on inculcation of the identity, values, and dispositions conso-

³⁸ STUCKEY ET AL., *supra* note 8, at vii (stating that these premises were the central message of both *Best Practices* and the *Carnegie Report*).

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 88.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 90.

⁴⁴ *Id.* at 91.

nant with the fundamental purposes of the legal profession.⁴⁵

The authors posit that integrating these three parts of legal education would better prepare students for the varied demands of professional legal work.⁴⁶ The authors of the Carnegie Report view the three-part curriculum as three apprenticeships: a doctrinal/analytical apprenticeship, expert/practice apprenticeship, and an identity/value apprenticeship.⁴⁷

The Carnegie Report recognizes that, as is typical in a university setting, law schools are proficient at educating students through a doctrinal/analytical apprenticeship and teaching students to engage in “analytical reasoning, argument, and research.”⁴⁸ The Report also determines, however, that law schools focus almost exclusively on the doctrinal/analytical apprenticeship,⁴⁹ and pay far too little attention to the expert/practice apprenticeship wherein “students learn by taking part in simulated practice situations, as in case studies, or in actual clinical experience with real clients.”⁵⁰

Its authors were equally dismayed at the lack of attention to the identity/value apprenticeship which should “introduce[] students to the purposes and attitudes that are guided by the values of which the professional community is responsible.”⁵¹ Thus, the Report recommends integrating practice experience and professionalism into the curriculum from the start. “[T]he existing common core of legal education needs to be expanded to encompass substantial experience with practice, as well as opportunities to wrestle with the issues of professionalism.”⁵²

While Best Practices cites numerous authorities in support of the best practices it recommends, as a rule, it did not reference the learning theory that supports these best practices. Conversely, the Carnegie Report references the theoretical underpinnings for its recommendations. Relevant to communities of practice, the Carnegie Report uses apprenticeships as the framework for its recommendations. The authors conclude:

[L]earning happens best when an expert is able to model performance in such a way that the learner can imitate the performance while the expert provides feedback to guide the learner in making the activity his or her own. . . . Expertise, however, is always shared

⁴⁵ SULLIVAN ET AL., *supra* note 9, at 194.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 28.

⁴⁹ *Id.* at 87.

⁵⁰ *Id.* at 28.

⁵¹ *Id.*

⁵² *Id.* at 195.

among members of a community who have mastered certain practices. When such communities organize ways of transmitting this expertise to new members, they create apprenticeships. A great contribution of modern cognitive psychology has been to place apprenticeship, so understood, once again at the heart of education.⁵³

In this regard, the Report references the term, “cognitive apprenticeship,” defining it as “an educational experience focused on teaching beginners and journeymen the more advanced knowledge of the domain. The emphasis is not on acquiring information, as such; rather, it is on learning the concepts and procedures that enable the expert to use knowledge to solve problems.”⁵⁴

Some schools have historically operated under an educational model that incorporates these ideals. For example, Northeastern University School of Law bases its curriculum on “cooperative legal education,” which provides students “four quarters of full-time employment.”⁵⁵ After their first year, students “begin alternating quarters as a full-time student with quarters as a full-time legal professional.”⁵⁶ There are other law schools that have restructured their curriculum to improve their delivery of instruction. For example, University of Detroit Mercy School of Law (UDM Law) started a writing-across-the-curriculum and ethics-across-the-curriculum program.⁵⁷ Additionally, UDM Law committed to providing each student with a clinical experience, and consequently, a clinical course is required for graduation. Significantly, UDM Law has further helped bridge the gap between legal theory and practice by creating “The Law Firm Program.” In the Law Firm Program, often under the guidance of practicing attorneys, students handle simulated or real legal transactions as though they were associates in a law firm or members of a corporate

⁵³ *Id.* at 26.

⁵⁴ *Id.* These concepts and procedures are “the informal, interpersonal kind of knowledge transmission typical of apprenticeship” *Id.*

⁵⁵ ABOUT NORTHEASTERN UNIVERSITY SCHOOL OF LAW, <http://www.northeastern.edu/law/about/index.html> (last visited Aug. 5, 2013). Another example is City University of New York whose focus is preparing students to practice law and to “serve the underprivileged and disempowered.” ABOUT – CUNY SCHOOL OF LAW, <http://www.law.cuny.edu/about.html> (last visited Aug. 5, 2013). “All third-year students at CUNY Law represent clients under the supervision of attorneys” *Id.*

⁵⁶ *Experiential Learning/Co-op*, NE. UNIV. SCH. OF LAW, <http://www.northeastern.edu/law/experience/co-op/index.html> (last visited Aug. 5, 2013).

⁵⁷ UDM Law’s writing-across-the-curriculum program provides students in required courses an opportunity to learn a topic in more depth by working on discipline-specific problems and drafting documents that practitioners in that area of law would complete. It is a graded assignment. UDM Law’s ethics-across-the-curriculum program requires professors to incorporate discussions of ethical issues in their courses. UNIVERSITY OF DETROIT MERCY SCHOOL OF LAW, STUDENT HANDBOOK: FALL 2012 12, 13 (2012), available at <http://www.law.udmercy.edu/udm/images/academics/studenthandbook2011.pdf>.

legal department.

Although UDM Law's curricular changes focused on the second and third year, other schools have also restructured the first-year curriculum. For example, Harvard Law School revamped its first-year curriculum, "adding courses in legislation and regulation and international and comparative law," along with a "problem-solving workshop" in which students "grapple with real-world challenges involving complex fact patterns and encompassing diverse bodies of law."⁵⁸ These reforms indicate exciting new horizons for legal education.

II. LEARNING THEORY

As recognized by the Carnegie Foundation, learning theory should inform current legal education reform. One recent area of pedagogical study, however, has received little attention in such conversations—that is communities of practice. Instituting communities of practice in the law school classroom to facilitate learning offers particular promise for the legal academy. This section briefly discusses learning theory. It begins with cognitivism as a foundational learning theory and then discusses the more recent situated cognition theory and moves to communities of practice as a key element of that theory.⁵⁹

A. *Cognitivism*⁶⁰

Cognitivism focuses on how the mind processes information.⁶¹ Central to cognitivism is the understanding that an individual processes information by attuning it to information structures in the mind.⁶² Two theories, information processing theory and schema the-

⁵⁸ *J.D. Program*, HARVARD LAW SCH., <http://www.law.harvard.edu/academics/degrees/jd/index.html> (last visited Aug. 5, 2013).

⁵⁹ This section is meant to offer a general overview tailored to an audience of legal professionals that are most often not learning theorists.

⁶⁰ This section on cognitivism relies heavily on research for an article that was co-authored with Pamela Lysaght. This earlier article provides a more in-depth discussion of this theory. Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 *Legal Comm. & Rhetoric: JALWD* 73, 78-92 (2004).

⁶¹ B.R. HERGENHAHN, *AN INTRODUCTION TO THEORIES OF LEARNING* 355 (1976); Lysaght & Lockwood, *supra* note 60, at 83; John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 *J. LEG. EDUC.* 275, 277 (1989); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 *SAN DIEGO L. REV.* 347, 372 (2001); Alice M. Thomas, *Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy*, 6 *WIDENER L. SYMP. J.* 49, 104 (2000).

⁶² "[T]he exclusive focus on measurable stimuli and responses, connected only by reflex or operant conditioning, was (largely) abandoned in favor of rich descriptions of mental

ory, interact to explain this phenomenon.

1. *Information Processing Theory*

The information processing theory focuses on how information is processed through memory. There are three types of memory: sensory memory, short-term memory, and long-term memory.⁶³ Initially, individuals register information through their senses, and this information goes into sensory memory.⁶⁴ Information that an individual acknowledges moves to short-term memory.⁶⁵ To be remembered subsequently, this information must be encoded in long-term memory. Short-term memory holds five to nine pieces of information,⁶⁶ while long-term memory has infinite storage capacity.⁶⁷

2. *Schema Theory*

Schema theory explains that individuals store information in long-term memory in a meaningful way based on existing cognitive structures or schema.⁶⁸ “Learning occurs when the learner modifies

processes. The payoff in terms of much subtler and more variegated models of human behavior is widely accepted and applauded today.” *Preface, in SITUATED COGNITION: SOCIAL, SEMIOTIC, AND PSYCHOLOGICAL PERSPECTIVES* vii (David Kirshner & James A. Whitson eds., 1997) [hereinafter *SITUATED COGNITION*].

⁶³ MARCY P. DRISCOLL, *PSYCHOLOGY OF LEARNING FOR INSTRUCTION* 74-75 (3d ed., 2005).

⁶⁴ DALE H. SCHUNK, *LEARNING THEORIES: AN EDUCATIONAL PERSPECTIVE* 134 (2000); Schwartz, *supra* note 61, at 372. Studies have shown that “information from the various senses is ‘registered’ in more or less complete form for a few hundredth of a second.” ROBERT M. GAGNE, *THE CONDITIONS OF LEARNING* 52 (3d ed. 1977); MARGARET E. GREDLER, *LEARNING AND INSTRUCTION INTO PRACTICE* 170-71 (2001) (information is registered in sensory memory for .5-2.0 seconds). “Sensory memory represents the first stage of information processing. Associated with senses (vision, hearing, etc.), it functions to hold information in memory very briefly, just long enough for the information to be processed further.” DRISCOLL, *supra* note 63, at 74.

⁶⁵ GREDLER, *supra* note 64, at 170; SCHUNK, *supra* note 64, at 139; Schwartz, *supra* note 61, at 372. “Essentially, this process is known as selective perception, and depends upon the learner’s ability to attend to certain features of the content of the sensory register, while ignoring others Attending therefore accomplishes a transformation which forms a new kind of input to the short-term memory.” GAGNE, *supra* note 64, at 53 (citations omitted).

⁶⁶ GREDLER, *supra* note 64, at 183; SCHUNK, *supra* note 64, at 140; Schwartz, *supra* note 61, at 372-73. George A. Miller is credited with determining this capacity of short-term memory. Paul Thagard, *Cognitive Science*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Winter 2002 ed.), <http://plato.stanford.edu/archives/win2002/entries/cognitive-science/>.

⁶⁷ DRISCOLL, *supra* note 63, at 75.

⁶⁸ GAGNE, *supra* note 64, at 54-55. “A schema is a structure that organizes large amounts of information into a meaningful system.” SCHUNK, *supra* note 64, at 145. “Schemata are like models of the world; they embody prototypical expectations about objects, situations, and actions.” Blasi, *supra* note 34, at 337.

or creates new cognitive structures or schema for new information.”⁶⁹ Individuals will seek to assimilate new information into existing cognitive structures.⁷⁰ If the new information cannot be assimilated, then individuals will modify or create new schema to accommodate that new information.⁷¹

3. *Reflection and Metacognition*

Reflection facilitates the creation of schema and the encoding of information into long-term memory.⁷² It has been called the “cardinal virtue” of adult education.⁷³ Students can reflect on their learning processes as well as on the information they are learning. Reflection on one’s learning process is known as “metacognition.” Metacognition is thinking about one’s thinking.⁷⁴ Reflection through metacognition involves students monitoring and reflecting on their learning processes to determine if they are effective.⁷⁵ Learning is enhanced when individuals routinely focus on using effective learning processes to encode information.⁷⁶

⁶⁹ Lysaght & Lockwood, *supra* note 60, at 86 (citing HERBERT P. GINSBURG & SYLVIA OPPER, *PIAGET’S THEORY OF INTELLECTUAL DEVELOPMENT* 243 (3d ed., 1988)).

⁷⁰ A cognitive system uses schemata as its knowledge representation processes information by matching schemata to the incoming information. Information is understood, or an interpretation of it is developed, if it can be matched to a schema or a configuration of schema. Thus, we have not only memories of particular episodes . . . , but a structured set of expectations based on those memories
Blasi, *supra* note 34, at 337.

⁷¹ “In the process of organizing his activities the individual assimilates novel events into preexisting structures, and at the same time accommodates preexisting structures to meet the demands of the new situation.” Ginsburg & Opper, *supra* note 69, at 243.

⁷² “In recent years, at the confluence of streams of experiential education and humanistic psychology, the central role of reflection in learning has emerged.” Baker, *supra* note 5, at 647 (citing PHILIP C. CANDY, *SELF-DIRECTION FOR LIFE-LONG LEARNING: A COMPREHENSIVE GUIDE TO THEORY AND PRACTICE* 390 (1991)).

⁷³ *Id.* at 650 (citing JACK MEZIROW, *TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING* 111, 117 (1991)).

⁷⁴ Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 142 (1994).

⁷⁵ Professors should encourage students to think about setting goals for completing the required school work, to think about what motivates them to study, to think about what types of study environments and what learning methods produce productive results. Lynn C. Herndon, *Help You, Help Me: Why Law Students Need Peer Teaching*, 78 UMKC L. REV. 809, 824 (2010) (citing Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulating Learners*, 2003 L. REV. MICH. ST. UNIV. DETROIT C.L. 447, 488 (2003)). For a discussion of how different study methods lead to different results, see Nancy Millich, *Building Blocks of Analysis: Using Simple “Sesame Street Skills” and Sophisticated Educational Learning Theories in Teaching a Seminar in Legal Analysis and Writing*, 34 SANTA CLARA L. REV. 1127, 1151 (1994).

⁷⁶ The idea is that heightened awareness will help the brain to encode new knowledge . . . making it easier to recall and adapt the information later. Theorists also believe that this mindfulness during the learning process will help the learner to see similarities between contexts, allowing her existing schema to evolve and encompass new

Students can also reflect on the information they are learning.⁷⁷ They can critically think about the material they are learning, questioning the social structures and other premises that may predefine the material.⁷⁸ Students can reflect alone or in groups, with or without teacher involvement.⁷⁹ Further, students can use story-telling as a method of reflection. The story can be told to encourage dialogue among participants about the information they learned or the learning processes they employed. Crafting and telling stories, along with listening to relevant stories can “ignite reflection,”⁸⁰ “stimulate critical thinking,”⁸¹ and facilitate encoding of information.⁸² It has been repeatedly said and proven that humans learn best through stories.⁸³ Research in cognitive neuroscience demonstrates that “[t]he brain is structure, or “wired” to detect patterns[] and that stories are a better way than simply the conveyance of facts to “encourage . . . the recognition of new patterns and relationships among objects and ideas.”⁸⁴

Cognitivism thus encompasses theories that focus on how an individual’s mind processes information. Some theories concern the mechanics of the individual’s mental process, such as the information processing theory and schema theory, while other related theories concern how those individual mental processes can be enhanced. Cognitivism focuses on the individual’s learning processes,⁸⁵ but learning often occurs in conjunction with others. Situated cognition involves understanding how the context in which learning occurs affects

information.

Kowalski, *supra* note 1, at 74.

⁷⁷ Baker, *supra* note 5, at 647-48.

⁷⁸ *Id.*

⁷⁹ Ideally, the instructor would reflect while practicing, meaning “[t]he 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.” *Id.* at 646.

⁸⁰ Jo A. Tyler & Faith Mullen, *Telling Tales in School: Storytelling for Self-Reflection and Pedagogical Improvement in Clinical Legal Education*, 18 CLIN. L. REV. 283, 293 (2011).

⁸¹ *Id.* at 291. “Stories . . . may be an ideal medium for cognitively playing out alternative courses of action and endings.” *Id.*

⁸² *Id.* at 289.

⁸³ *Id.* at 289 n.20 (citing Nancy Levit, *Legal Storytelling: The Theory and the Practice – Reflective Writing Across the Curriculum*, 15 LEG. WRITING: J. LEG. WRITING INST. 253, 276-77 (2009)).

⁸⁴ Tyler & Mullen, *supra* note 80, at 289 n.20.

⁸⁵ “[C]ognitive science has most frequently taken a correspondence view of representation, a retrieval view of memory, and an individualistic view of meaning,’ and that ‘these views minimize the need to consider social and neurological processes jointly.’” James A. Whitson, *Cognition as a Semiotic Process: From Situated Mediation to Critical Reflective Transcendence*, in SITUATED COGNITION, *supra* note 62, at 100.

acquiring knowledge.⁸⁶

B. *Situated Cognition and Communities of Practice*

Under situated learning theory, “the explanatory principle of learning shifts from mental associations or processes to tangible social relations.”⁸⁷ Situated learning theorists believe that knowledge should not be treated as independent of the situations in which it is learned and used.⁸⁸ This theory⁸⁹ arose in the 1980s, in part, due to problems in creating artificial intelligence systems. These problems demonstrated that “*context* is vital to understanding, learning and practice, and that knowledge is not just ‘acquired’ in a mechanical way.”⁹⁰ It is based on Lev Vygotsky’s theory of learning regarding “how cultures reproduce themselves across generational boundaries”⁹¹ Vygotsky stated “[t]he child’s higher psychological function, his higher attributes which are specific to humans, originally manifest themselves as forms of the child’s collective behaviour, as a form of co-operation with other people, and it is only afterwards that they become the internal individual functions of the child himself.”⁹² His theory is built on the premise that an individual’s cognitive development is dependent on social interaction with “people who are more skilled in the intellectual technologies of a culture. . . .”⁹³ These skilled individuals include adults and “more capable peers.”⁹⁴ It is

⁸⁶ “[T]he opportunity to explore learning and knowledge as processes that occur in a local, subjective, and socially constructed world is severely limited by both behaviorists and cognitivists paradigms.” *Preface*, in *SITUATED COGNITION*, *supra* note 62, at vii.

⁸⁷ Dorothy H. Evensen, *To Group or Not to Group: Students’ Perceptions of Collaborative Learning Activities in Law School*, 28 S. ILL. U.L.J. 343, 355 (2004).

⁸⁸ DRISCOLL, *supra* note 63, at 155-56.

⁸⁹ Situated learning theory has been described as “a general theoretical perspective that generates interconnected theories of perception, cognition, language, learning, agency, the social world, and their interrelations.” Lave, *supra* note 20, at 66.

⁹⁰ Karen Handley, Andrew Sturdy, Robin Fincham & Timothy Clark, *Within and Beyond Communities of Practice: Making Sense of Learning Through Participation, Identity and Practice*, 43 J. MGMT. STUD. 641, 643 (2006).

⁹¹ David Kirshner & James A. Whitson, *Editors’ Introduction to Situated Cognition: Social, Semiotic, and Psychological Perspectives*, in *SITUATED COGNITION*, *supra* note 62, at 1, 5. “[I]t is . . . the novice’s incorrect usage that provides a crucial opportunity for the novice to reconfigure his or her understanding; alternatively, the culture may acquire new meanings and methods from the individual’s variations.” *Id.*

⁹² 3 LEV VYGOTSKY: CRITICAL ASSESSMENTS X (Peter Lloyd & Charles Fernyhough eds., 1999). He theorized that “there is an inherent relationship between external and internal activity, but it is a *genetic* relationship in which the major issue is how internal mental processes are *created* as a result of the child’s exposure to what Vygotsky called ‘mature cultural forms of behavior.’” Kirshner & Whitson, *supra* note 91, at 8.

⁹³ Jonathan Tudge & Barbara Rogoff, *Peer Influences on Cognitive Development: Piagetian and Vygotskian Perspectives*, in 3 LEV VYGOTSKY: CRITICAL ASSESSMENTS, *supra* note 92, at 32.

⁹⁴ L.S. VYGOTSKY, *MIND IN SOCIETY: DEVELOPMENT OF HIGHER PSYCHOLOGICAL*

this idea of social development proceeding and influencing learning that is the basis for situated learning theory.

Consistent with Vygotsky's emphasis on development through enculturation, situated learning theory envisions learning as encompassing both the learning of the explicit information being taught and the learning of the implicit information generated by the social engagement during the learning activity.⁹⁵ As applied to the classroom, these theorists believe there is more to be learned than the doctrine that the teacher is espousing.⁹⁶ The students are, for example, learning by watching the teacher's professional interaction with other teachers and other students and by observing how classmates learn from and respond to the teacher's instruction. They also absorb other subtle or intangible discipline-specific information.⁹⁷ The importance of knowledge generated by the social and cultural is in contrast to cognitivism, which is based on the idea of individuals acquiring decontextualized, abstract information stored in the mind.⁹⁸

Jean Lave and Etienne Wenger, who subscribe to the situated learning movement, conducted research in apprenticeships to better understand how learning occurs in social contexts.⁹⁹ They believe that the process of learning by moving from a new-comer/apprentice to an old-timer/master¹⁰⁰ within apprenticeships provides important insights

PROCESS 86 (1978); Tudge & Rogoff, *supra* note 93, at 39. However, Vygotsky also recognized that learning and development could be detrimentally affected if the peer instruction is not correct. *Id.* at 40.

⁹⁵ Stein, *supra* note 19.

[C]reat[ing] the conditions in which participants will experience the complexity and ambiguity of learning in the real world. Participants will create their own knowledge out of the raw materials of experience, i.e. the relationships with other participants, the activities, the environmental cues, and the social organization that the community develops and maintains.

Id.

⁹⁶ *Id.* "In situated learning, students learn content through activities rather than acquiring information in discrete packages organized by the instructors." *Id.*

⁹⁷ *Id.* Etienne Wenger has described such information as "a certain way of behaving, a perspective on problems and ideas, a thinking style and even in many cases an ethical stance." WENGER ET AL., *supra* note 18, at 39.

⁹⁸ Wright, *supra* note 2, at 35. "What situated cognition theory promises as a next step is a model for dealing with knowledge and learning as fundamentally social and cultural, rather than as artifacts of an individual's journey through an impersonal and objective world." *Preface*, in SITUATED COGNITION, *supra* note 62, at viii.

⁹⁹ Lave and Wenger studied the apprenticeships of Yucatec midwives, Vac and Gola tailors, naval quartermasters, meat cutters, and nondrinking alcoholics. JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION 59-84 (1991).

¹⁰⁰ The literature on communities of practice often use the terms new-comer, as opposed to novice or apprentice, and old-timer, as opposed to expert or master to avoid definitions associated with those words. In this paper concerning communities of practice in a professional school, I will use the terms, novice and expert because they embody the ideas that I am attempting to convey.

on how learning occurs. They theorize that a novice learns by the identity-creating movement within communities of practice that initially involves interacting at the periphery of the community as a novice but subsequently can involve following a trajectory to mastering the skills through becoming more involved in the practice and interaction at the core of the community.¹⁰¹ The novice learns by participating in, and watching masters handle, the ever-changing, everyday experiences in that activity.¹⁰²

The learning Lave and Wenger witnessed in the apprenticeships they studied led them to recognize that, despite the emergence of formal schooling in industrial nations, learning still occurs in an apprentice form through what they call “communities of practice.”¹⁰³ “Communities of practice are groups of people who share a concern, a set of problems, or a passion about a topic, and who deepen their knowledge and expertise in this area by interacting on an ongoing basis.”¹⁰⁴ Most individuals belong to communities of practice. Individual participation levels may differ in the various communities of practices in which the individual is a member. In some communities of practice, an individual may be a core member, and in others, the individual may only marginally participate. Further, community of practice membership and participation levels may change over time. Lave and Wenger offer Alcoholics Anonymous as one example of a community of practice.¹⁰⁵ Newcomers initially acting at the periphery of the community attend meetings to establish their identity as non-drinking alcoholics. They regularly attend the meetings to learn skills and receive support in their new identity from core members who have attended meetings and been nondrinking alcoholics for a longer period of time.¹⁰⁶

1. *Elements of Communities of Practice*

Communities of practice have three elements: domain, commu-

¹⁰¹ Lave, *supra* note 20, at 64. “Learning so defined is an interplay between social competence and personal experience. It is a dynamic, two-way relationship between people and the social learning systems in which they participate. It combines personal transformation with the evolution of social structures.” Wenger, *supra* note 14, at 227. Under this theory, knowledge is “a matter of displaying competences defined in social communities.” *Id.* at 226.

¹⁰² Lave, *supra* note 20, at 68.

¹⁰³ Wenger, *supra* note 14, at 229.

¹⁰⁴ WENGER ET AL., *supra* note 18, at 4.

¹⁰⁵ LAVE & WENGER, *supra* note 99, at 79. Other communities of practice that Lave and Wenger studied and referenced include Xerox repairmen, *see* WENGER ET AL., *supra* note 18, at 39, and claims processors. ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 18-34 (1998).

¹⁰⁶ LAVE & WENGER, *supra* note 99, at 79-84.

nity, and practice.¹⁰⁷ First, *domain* is created when members of a community of practice decide the purpose of their community.¹⁰⁸ They create a “common ground and sense of common identity.”¹⁰⁹ “A domain is not an abstract area of interest, but consists of key issues or problems that members commonly experience.”¹¹⁰ It is an area of interest that should inspire participation and guide what information will be developed within the community of practice.¹¹¹

Community is the second and critical element of a community of practice.¹¹² Community involves member interaction.¹¹³ “[A] group of people who interact, learn together, build relationships, . . . in the process develop a sense of belonging and mutual commitment.”¹¹⁴ This interaction generates knowledge: “Having others who share your overall view of the domain and yet bring their individual perspectives on any given problem creates a social learning system that goes beyond the sum of its parts.”¹¹⁵ In the process of continued dialogue, the community seeks to build respect and trust so that members freely express new and creative ideas, all of which is essential to the growth of the community. Conflict will inevitably occur and should not be stifled.¹¹⁶ The resolution of conflict among the members may further the dialogue and generate new ideas.¹¹⁷

For the community to be successful, participation should not be coerced. The community can be encouraged, and it can “be self-selected or assigned, but the actual level of engagement is a personal matter.”¹¹⁸ Certain participation is necessary. Generally, in large communities, there must be a leader or distribution of leadership through core members of the community.¹¹⁹ More capable members might take some form of leadership role, but there are many roles within the community, such as “thought leaders, pioneers, administra-

¹⁰⁷ WENGER ET AL., *supra* note 18, at 27. In earlier works, these three elements were joint enterprise, mutuality, and shared repertoire. Wenger, *supra* note 14, at 230.

¹⁰⁸ WENGER ET AL., *supra* note 18, at 27.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 32.

¹¹¹ *Id.* at 28.

¹¹² *Id.* at 34.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 37.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 36.

¹¹⁹ “Good community architecture invites many different levels of participation. . . . Alive communities, whether planned or spontaneous, have a ‘coordinator’ who organizes events and connects the community members” *Id.* at 55. “Community coordinators and thought leaders are key to community success.” *Id.* at 78.

tors, and boundary spanners.”¹²⁰ Anyone willing to participate beyond the periphery can be assigned a role.

Third, communities of practice develop and share *practices*, which include “a variety of knowledge types: cases and stories, theories, rules, framework, models, principles, tools, experts, articles, lessons learned, best practices, and heuristics. They include both the tacit and explicit aspects of the community’s knowledge.”¹²¹ The members of the community develop common methods of interacting within the domain chosen and in the process create practices and knowledge.¹²²

The practices of the community are “collective.”¹²³ They are an integration of all of the members’ work.¹²⁴ As identified above, members must interact to learn and create knowledge.¹²⁵ Whether that knowledge is documented and retained, and how it is acknowledged and shared are decisions that the members of the community will jointly decide.¹²⁶

2. *Identity Development in Communities of Practice*

In addition to the three elements of a community of practice, Wenger explains that developing one’s identity occurs simultaneously with developing competence (i.e. learning) through interaction in

¹²⁰ *Id.* at 36. See *infra* notes 145-47 & 185 and accompanying text for a further discussion of these roles.

¹²¹ WENGER ET AL., *supra* note 18, at 38.

The practice includes the books, articles, knowledge bases, Web sites, and other repositories that members share. It also embodies a certain way of behaving, a perspective on problems and ideas, a thinking style and even in many cases an ethical stance. In this sense, a practice is a sort of mini-culture that binds the community together.

Id. at 39.

¹²² *Id.* at 38.

¹²³ *Id.* at 39.

¹²⁴ *Id.*

Each community has a specific way of making its practice visible through the ways that it develops and shares knowledge. Some use stories. Traditional midwives in the Yucatan discuss how to proceed with a birth by sharing stories relevant to each decision. Similarly, Xerox repair technicians tell war stories to communicate their insights and to help solve difficult encounters with recalcitrant machines. Some document formulas and procedures in articles, as do scientists and researchers. . . . In each case, the mode of communicating and capturing knowledge matches the demands of actual use.

Id.

¹²⁵ Within a community of practice, there will be “a baseline of common knowledge that can be assumed on the part of each full member.” *Id.* at 38. “To be competent is to have access to this repertoire and to be able to use it appropriately.” Wenger, *supra* note 14, at 229.

¹²⁶ WENGER ET AL., *supra* note 18, at 40. “Documentation is not a goal in itself, but an integral part of the life of the community.” *Id.* at 39.

communities of practice.¹²⁷ Because developing identity is part of developing competence,¹²⁸ it is important to understand the relationship between identity and learning in communities of practice.

Wenger defines identity as “a lived experience of belonging (or not belonging). A strong identity involves deep connections with others through shared histories and experiences, reciprocity, affection, and mutual commitments.”¹²⁹ Identity, according to Wenger, has certain characteristics. First, identity is formed through negotiation.¹³⁰ Individuals negotiate and define their identities through their interaction with others and in relation to others.¹³¹ Second and relatedly, individuals’ identity is defined by their community membership. An individual’s competence in a community or inability to operate in other communities defines that individual.¹³²

Third, identity is not a constant¹³³ but continually evolves through what Wenger calls “learning trajectories.”¹³⁴ This idea of trajectory metaphorically sets forth Wenger’s belief that identity is continually developing based on what an individual has previously experienced and learned, what the individual is currently experiencing and learning, and what the individual anticipates he or she will experience and learn through communities of practice.¹³⁵ Thus, identity is a work in progress defined by the social contexts of the “interaction of multiple convergent and divergent trajectories” within various communities of practice.¹³⁶

¹²⁷ WENGER, *supra* note 105, at 215.

¹²⁸ *Id.*

¹²⁹ Wenger, *supra* note 14, at 239.

¹³⁰ An identity, then, is a layering of events of participation and reification by which our experience and its social interpretation inform each other. As we encounter our effects on the world and develop our relations with others, these layers build upon each other to produce our identity as a very complex interweaving of participative experience and reificative projections.

WENGER, *supra* note 105, at 151.

¹³¹ *Id.* at 145. “We define who we are by the ways we experience our selves through participation as well as by the ways we and other reify our selves.” *Id.* at 149.

¹³² *Id.* at 152. “[W]e know who we *are* by what is familiar and by what we can negotiate and make use of, and that we know who we are *not* by what is unfamiliar, unwieldy, and out of our purview.” *Id.* at 164.

¹³³ “In the same way that meaning exists in its negotiation, identity exists—not as an object in and of itself—but in the constant work of negotiating the self.” *Id.* at 151.

¹³⁴ “As trajectories, our identities incorporate the past and the future in the very process of negotiating the present.” *Id.* at 155. Wenger uses the term, “nexus of multimembership,” for the idea that an individual’s learning trajectories from each community of practice do not operate to define separate identities, but that each trajectory informs an individual’s identity. *Id.* at 159.

¹³⁵ *Id.* at 149. “We are always simultaneously dealing with specific situations, participating in the histories of certain practices, and involved in becoming certain persons.” *Id.* at 155.

¹³⁶ *Id.* at 154.

Accordingly, Wenger posits that learning in a community of practice does not only involve acquiring knowledge and skills, but it simultaneously involves defining one's identity.¹³⁷ The authors of the Carnegie Report agree. They recognize that as a law student learns that individual is developing an identity as a future member of the legal community.¹³⁸ The Report emphasizes the need for law professors to guide law students' identity development by introducing and teaching students the professional values of the legal community.¹³⁹

3. *Boundaries of Communities of Practice*

Boundaries are another important aspect of communities of practice. Wegner has observed that communities of practice create boundaries when the members define the domain,¹⁴⁰ and when the members interact and create specialized practices unique to that community of practice.¹⁴¹ These boundaries may not be intentional or formal, but they exist. Wenger provides compelling proof with a vignette, which also helps one envision how identity is defined by community membership. He suggests the following: Imagine sitting "for lunch by a group of high-energy particle physicists and you know about boundary, not because they intend to exclude you, but because you cannot figure out why they are so excited. Shared practice by its very nature creates boundaries."¹⁴²

Wenger believes, however, that learning can occur where confrontation with the boundary might expand an individual's understanding.¹⁴³ "A discipline such as psychoneuroimmunology still bears witness in its name to its origin at the boundary between practices."¹⁴⁴ "Boundary brokering" can create learning experiences at the boundaries of communities of practice. Brokering occurs through "connections provided by people who can introduce elements of one practice into another."¹⁴⁵ An individual is a member of multiple communities

¹³⁷ "Because learning transforms who we are and what we can do, it is an experience of identity. It is not just an accumulation of skills and information, but a process of becoming—to become a certain person or conversely, to avoid becoming a certain person." *Id.* at 215.

¹³⁸ SULLIVAN ET AL., *supra* note 9, at 28.

¹³⁹ *Id.*

¹⁴⁰ WENGER ET AL., *supra* note 18, at 151.

¹⁴¹ "Different practices entail different vocabularies, styles, sets of experiences, and standards of performance." *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 153

¹⁴⁴ *Id.* "Something very creative can take place in the meeting of perspectives at these boundaries when participants make a genuine effort to listen to each other or to solve a common problem. So boundaries are learning assets in their own right." *Id.*

¹⁴⁵ WENGER, *supra* note 105, at 105.

of practice. Brokers are those individuals who can offer something to one community from another. “Brokers are able to make new connections across communities of practice, enable coordination, and—if they are good brokers—open new possibilities for meaning.”¹⁴⁶ Brokering requires enough legitimacy to access information and to align and encourage consideration of differing perspectives.¹⁴⁷

Where boundary brokering is limited and where a boundary, whether explicit or implicit,¹⁴⁸ excludes new member participation, the community can stagnate from lack of participation, lack of questioning established norms, or lack of new ideas. Communities of practice are meant to be inclusive within the scope of their domain, and their success in part depends on new energy and ideas from new members.

If a community becomes too large for day to day operations, then members can decide to create subcommunities within the boundaries of the original community.¹⁴⁹ The communities that law students form during law school are a subset of the larger law school community. The law school community is a part of the larger legal community, often called the legal discourse community, of which most students will eventually be members. There will be and should be subcommunities of larger communities. Thus, communities of practice are defined by their domain and practices, both of which create boundaries. These boundaries, however, should be permeable, allowing interaction between all interested individuals and resulting in new participants developing competence while simultaneously developing their identities as members of the community of practice.

Importantly, as an overall matter, Lave and Wenger are not proposing that communities of practice are the only site for learning to the exclusion of “cognitive science’s traditional focus on the individual’s mind/brain”¹⁵⁰ Further, they are not proposing that educa-

¹⁴⁶ *Id.* at 109.

¹⁴⁷ *Id.*

¹⁴⁸ In some cases, the boundary of a community of practice is reified with explicit markers of membership, such as titles, dress, tattoos, degrees, or initiation rites. Of course, the degree to which these markers actually act as boundary depends on their effect on participation. Moreover, the absence of obvious markers does not imply the absence . . . of boundaries. The status of outsider can be reified in subtle and not so subtle ways—through barriers to participation—without a reification of the boundary itself. . . . The nuances and the jargon of a professional group distinguish the inside from the outside as much as do certifications. . . . A ‘glass ceiling’ is sometimes more impenetrable in practice than any office policy or entrance requirement. . . . At the same time, however, participation and reification can also create continuities across boundaries

Id. at 104.

¹⁴⁹ WENGER ET AL., *supra* note 18, at 35-36.

¹⁵⁰ *Preface, in SITUATED COGNITION, supra* note 62, at viii.

tion should revert back to apprenticeships,¹⁵¹ such that learning must be located in the “lived world of daily experiences, sacrificing the opportunities that schools provide for abstractive and reflective activity”¹⁵² Instead, communities of practice are a framework to better understand how learning occurs and can be facilitated.

4. *Communities of Practice in Education*

“Community of learners” is an educational model that incorporates communities of practice. Under this model, teachers create a learning environment where “everyone is involved in a collective effort of understanding,” with the goal of “advanc[ing] the collective knowledge of the community” in a manner that “helps individual students learn.”¹⁵³ Some schools, such as Evergreen State College, advertise that students learn in an environment specifically organized to facilitate learning through communities of practice.¹⁵⁴ Wegner has also advocated the restructuring of grade school education to facilitate learning through communities of practice.¹⁵⁵ The legal academy, however, has avoided change to the core curriculum.¹⁵⁶ Reform is beginning to take place, but it has been reform that operates in the three-year, large classroom, legal education model. Thus, this paper does not advocate restructuring the law school curriculum to allow for learning in communities of practice. Instead, it explores what can be done within individual law school courses to facilitate learning.

As previously noted, cognitive apprenticeship is a form of learning based on the apprenticeship model that is being used in the classroom.¹⁵⁷ It focuses on teaching students how experts approach a problem by making the experts’ cognitive skills and processes visible to students through teacher modeling and also by making the students aware of their cognitive processes through student reflection.¹⁵⁸ The

¹⁵¹ “None of the researchers who have explored this approach is suggesting that it would be a good idea, or even possible, to borrow some form of craft apprenticeship from China or medieval Europe, or for that matter from Liberia in the 1970s, and transplant it into contemporary school classrooms.” Jean Lave, *The Culture of Acquisition and the Practice of Understanding*, in *SITUATED COGNITION*, *supra* note 62, at 19.

¹⁵² *Preface*, in *SITUATED COGNITION*, *supra* note 62, at viii.

¹⁵³ Allan Collins, *Cognitive Apprenticeship*, in *THE CAMBRIDGE HANDBOOK OF THE LEARNING SCIENCES* 54-55 (R. Keith Sawyer ed., 2006).

¹⁵⁴ Students do not take classes but enroll in programs that are team taught by faculty from different subject areas and include lectures, readings, seminars, field study, and/or research projects. *What’s a Program?*, EVERGREEN STATE COLLEGE, <http://www.evergreen.edu/academics/programs.htm> (last visited Aug. 5, 2013).

¹⁵⁵ Penelope Eckert, Shelley Goldman & Etienne Wenger, *The School as a Community of Engaged Learners* (1997), <http://www.stanford.edu/~eckert/PDF/SasCEL.pdf>.

¹⁵⁶ See *supra* notes 21-33 and accompanying text.

¹⁵⁷ See *supra* notes 53-54 and accompanying text.

¹⁵⁸ Collins, *supra* note 153, at 48. The key elements of a cognitive apprenticeship are

Carnegie Report concluded that where professors are skillful, law schools are effectively using cognitive apprenticeships¹⁵⁹ with the Socratic, case-dialogue method.¹⁶⁰ The professors use the basic features of cognitive apprenticeships when the professors engage the students “through a process of continuously testing, using hypothetical facts patterns or contrasting examples to clarify the scope of rules and reasoning”¹⁶¹

However, recent law graduates who were surveyed about helpful aspects of law school did not believe that the case-dialogue method prepared them for practice.¹⁶² Ultimately, the Carnegie Report concluded that the cognitive apprenticeship approach needed to be supplemented with practical and professional apprenticeships.¹⁶³ Clinical education is one method law schools can employ to effectuate such a goal.¹⁶⁴ Integrating the social aspect of the practice of law into legal education through communities of practice is another.¹⁶⁵ Thus, this paper proposes implementing communities of practice in law school courses by adapting Wegner’s approach to creating communities of practice within corporate and government organizational structures.

III. INSTITUTING COMMUNITIES OF PRACTICE IN THE LAW SCHOOL CLASSROOM

Wenger, by the following quote, makes an important point that helps explain the emergence of situated learning theory as a supple-

modeling, coaching, scaffolding, articulation, reflection, and exploration. *Id.* at 50. These elements are an expansion of the elements of “observation, coaching, and practice” that Jean Lave determined, through her “study of tailor shops in Africa,” were necessary to traditional apprenticeships. *Id.* at 48.

¹⁵⁹ In other sections of the paper, I use the term “doctrinal/analytical apprenticeship” instead of what the Carnegie Report calls “cognitive apprenticeship” to avoid confusion with the term “cognitive apprenticeship,” used in learning theory literature.

¹⁶⁰ SULLIVAN ET AL., *supra* note 9, at 74-75.

¹⁶¹ *Id.* at 75.

¹⁶² *Id.* at 76 (citing RONIT DINOVTZER ET AL., NAT’L ASS’N FOR LAW PLACEMENT FOUND. FOR LAW CAREER RESEARCH AND EDUC. & AM. BAR. FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS (2004)).

¹⁶³ SULLIVAN ET AL., *supra* note 9, at 77. These three types of apprenticeships have previously been referred to as a doctrinal/analytical apprenticeship, an expert/practice apprenticeship, and an identity/value apprenticeship. *See supra* notes 45-52 accompanying text.

¹⁶⁴ SULLIVAN ET AL., *supra* note 9, at 145. “In high-quality legal clinics, expert performance is modeled by supervisory faculty, students enact a wide array of skills, and faculty coach them toward improved performance through continuous feedback.” *Id.*

¹⁶⁵ Cognitive apprenticeships of any kind, whether analytical, practical, or ethical work best in relatively small classes with extensive teacher interaction. Otherwise, it is difficult for “teachers to discern errors and misunderstandings that may be occurring in students’ minds.” *Id.* at 61. It is not realistic to expect all classes in law school to be small enough to effectively use the cognitive apprenticeship approach.

ment to cognitivism and demonstrates why the lecture method of teaching should consequently be supplemented with active group interaction.

If we believe, for instance, that knowledge consists of pieces of information explicitly stored in the brain, then it makes sense to package this information in well-designed units, to assemble prospective recipients of this information in a classroom where they are perfectly still and isolated from any distraction, and to deliver this information to them as succinctly and articulately as possible. From that perspective, what has come to stand for the epitome of a learning event makes sense: a teacher lecturing a class But if we believe that information stored in explicit ways is only a small part of knowing, and that knowing involves primarily active participation in social communities, then the traditional format does not look so productive.¹⁶⁶

Thus, employing communities of practice to facilitate learning requires rethinking traditional educational models. It requires moving away from the idea that creating meaning is solely an individual event—that it is only after one consults with others and outside material that one is able to then create meaning inside of one’s own mind. Consistent with cognitivism, meaning is and can be created by an individual from study and reflection,¹⁶⁷ but not to the exclusion of learning and meaning created through social processes.

A. Creating Communities of Practice

Foundationally, the professor must accept that learning does not only occur when the professor stands at the front of the classroom and lectures. Instead, the professor needs to embrace learning through social processes and be willing to incorporate group activities within the classroom as is recommended by Best Practices and the Carnegie Report.¹⁶⁸

Accepting this foundational premise, it is then possible to create communities of practice in the law school classroom by implementing Etienne Wenger’s seven-step process for creating communities of practice in organizations. These steps are “1) design for evolution; 2) open a dialogue between inside and outside perspectives; 3) invite different levels of participation; 4) develop both public and private community spaces; 5) focus on value; 6) combine familiarity and excitement; 7) create a rhythm for the community.”¹⁶⁹ This section

¹⁶⁶ WENGER, *supra* note 105, at 10.

¹⁶⁷ See *supra* notes 61-84 and accompanying text.

¹⁶⁸ See *supra* notes 40-42 & 50 and accompanying text for a discussion of possible group activities.

¹⁶⁹ WENGER ET AL., *supra* note 18, at 51.

addresses these seven steps and sets forth ideas for implementing the steps in law school classrooms.

1. *Design for Evolution*

First, Wenger recommends designing communities of practice for evolution. He states that there are four types of communities of practice. There are helping communities, best-practices communities, knowledge-stewarding communities, and innovation communities.¹⁷⁰ Generally, the law school classroom would operate as a helping community, defined as a community where members create mechanisms “to help each other solve everyday problems and share ideas, . . . decid[ing] for themselves what knowledge to share, how to assess its value, and how to disseminate good ideas to the rest of the community.”¹⁷¹ The other types of communities are focused on the creation and dissemination of knowledge for members outside of the community.¹⁷² Designing the helping community for evolution involves creating and facilitating the three elements of the community of practice: domain, community, and practice.¹⁷³

In the law school classroom, the domain is largely predefined. Law students in that particular course will work together to develop strategies for learning the material and the skills for successful completion of the learning objectives for that course.¹⁷⁴

The critical component of the helping community is building relationships between members. For learning to occur in the community of practice, the members must interact.¹⁷⁵ The professor will need to provide opportunities for the students in the community of practice to engage in dialogue in the classroom and outside of the classroom, both face-to-face and online. However, even in small courses, it is inevitable that given students’ complicated schedules and often distant homes, smaller subcommunities will need to form to allow the interaction that will occur inside and outside of the classroom. The professor should monitor the development of these subcommunities ensuring

¹⁷⁰ *Id.* at 76-77.

¹⁷¹ *Id.* at 76.

¹⁷² *Id.* However, subsumed within the helping community is the idea that the members will develop practices that may generate documents for the community’s use. *Id.*

¹⁷³ *Id.* at 73.

¹⁷⁴ Others have recommended viewing the law school as a community of practice. Kristin Booth Glen, *The Law School In and As Community*, 35 U. TOL. L. REV. 63 (2003).

¹⁷⁵ Communities, unlike teams and other structures, need to invite the interaction that makes them alive. . . . [A] well-designed community of practice allows for participating in group discussion, having one-on-one conversation, reading about new ideas, or watching experts duel over cutting-edge issues. Even though communities are voluntary and organic good community design can invite, even evoke, aliveness.

WENGER ET AL., *supra* note 18, at 50.

everyone is included. The professor should refrain from structuring the subcommunities. All students should be included, but they should be allowed to form their own subcommunities. Initially, the professor may choose to predefine the minimum and maximum size of a subcommunity. Within those boundaries, students should be free to move between subcommunities, and thus students should anticipate that group membership may change.

Within the subcommunity, the dialogue content will be important. The professor will need to help subcommunities define relevant problems or issues that they can discuss and for which they can seek solutions. Although communities of practice are informal learning structures that succeed when the individuals independently determine how they will operate, at this critical juncture the professor will want to suggest the myriad of possibilities for the communities.

As broad examples, the professor could encourage subcommunities to meet during or after class and discuss which part of the class they understood and which part of the instruction was not as clear to them. A subcommunity could decide to create a joint outline. More immediately, a subcommunity could decide to work together on tasks that are assigned as homework. Working together in small groups is consistent with both Best Practice's and the Carnegie Report's recommendations to "reduce[] doctrinal instruction that uses the Socratic dialogue and the case method,"¹⁷⁶ and specifically, the best practice to "encourage collaboration,"¹⁷⁷ and "active learning."¹⁷⁸ These recommendations are based on the over 600 studies referenced by Best Practices that advocate cooperative learning¹⁷⁹ and likely based on situated learning theory that advocates learning in conjunction with others.¹⁸⁰ The professor should allow each subcommunity to decide how the subcommunity will meet the professor's requirements.¹⁸¹

In helping to create the community, the professor might want to encourage or require students to hand in a preliminary design for the subcommunity. This design "might include a description of its scope, hot topics, structure, roles, knowledge-sharing processes, and names

¹⁷⁶ STUCKEY ET AL., *supra* note 8, at vii (stating that these premises were the central message of both *Best Practices* and the *Carnegie Report*).

¹⁷⁷ See *supra* notes 40-42 and accompanying text.

¹⁷⁸ See *supra* notes 43-44 and accompanying text.

¹⁷⁹ STUCKEY ET AL., *supra* note 8, at 88 .

¹⁸⁰ See *supra* note 101 and accompanying text.

¹⁸¹ "The goal of community design is to bring out the community's own internal direction, character, and energy." Etienne Wenger, et al., *Cultivating Communities of Practice: A Guide to Managing Knowledge - Seven Principles for Cultivating Communities of Practice*, HARV. BUS. SCH. WORKING KNOWLEDGE (Mar. 25, 2002), <http://hbswk.hbs.edu/archive/2855.html>.

of . . . members.”¹⁸² It might include what strengths each member brings to the group and how best to utilize these strengths. It could also include a statement regarding how the class can function as a community of practice and how that would be different from, or the same as, how the subcommunity would function. Members might also share how working in communities of practice might be the same or different from group work they have previously experienced. The professor can explain that this design document is simply a tool to help students get started and that change to the plan should be welcomed and encouraged as the community progresses.

2. *Open a Dialogue Between Inside and Outside Perspectives*

Second, the subcommunity should be encouraged to seek outside information. Wenger suggests seeking an inside and an outside perspective. The subcommunity should be responsible for determining what information the group has based on the skills and expertise of its members and what other outside information may be beneficial. The professor may have suggestions about helpful outside information, such as recommended reading¹⁸³ and about what outside information not to use, such as canned outlines.

3. *Invite Different Levels of Participation*

Under the third step, the professor should instruct students that different levels of participation are acceptable and anticipated. Again, the group can determine how participation will occur, but large communities or subcommunities will require a coordinator for the group. Certainly, individuals can rotate as coordinators, but some students naturally gravitate to such organizational positions. A good coordinator is important to the success of the group.¹⁸⁴ A professor could opt to award participation points for students who engage in the role of coordinator or institute a rotating procedure for this task.

There are many different roles available within the community of practice. In addition to coordinator and administrator, there is a role for a “thought leader,” who can generate ideas and help facilitate the discussion of ideas.¹⁸⁵ Someone can be a “boundary broker” who

¹⁸² WENGER ET AL., *supra* note 18, at 79-80.

¹⁸³ “Good community design brings information from outside the community into the dialogue about what the community could achieve.” *Id.* at 54.

¹⁸⁴ *Id.* at 78. “Good community architecture invites many different levels of participation. . . . Alive communities, whether planned or spontaneous, have a ‘coordinator’ who organizes events and connects the community members . . .” *Id.* at 55. However, in my experience, where the course is small and the subcommunities are small, for example, three members, then an official coordinator is not needed.

¹⁸⁵ *Id.* at 78.

helps generate new ideas and information from other communities. Further, students can create roles based on the goals to be accomplished.

4. *Develop Both Private and Public Community Space*

The fourth step in cultivating communities of practice is to encourage both public and private community or subcommunity events. Communities of practice center on private interaction, but the professor can orchestrate public events where the community or subcommunity presents its findings either in class or to a larger audience.¹⁸⁶

5. *Focus on Value*

As the fifth step, the professor should explain the value in learning through communities of practice. Students schooled in the traditional method are often resistant, if not angry, about the requirement to work in groups. Adult learning theory suggests involving the adult learner in the learning process and explaining the relevance of the educational pedagogy chosen.¹⁸⁷ Initially, the professor should explain how learning theory supports learning in a social environment through communities of practice. The professor should mention that students will engage in the sharing of ideas, information, and strategies with one another because studies demonstrate that student learning is enhanced when students learn in groups. Contributing ideas help students “focus and articulate their thoughts.”¹⁸⁸ Moreover, sharing knowledge better encodes that knowledge. Individuals learn material by being able to teach it to others. Thus, in fostering the learning of fellow students in the classroom or subcommunity, the student acting as a teacher will enhance her own learning.

Convincing students of the value of learning in a community of practice model may be an uphill struggle. Learning passively is a well-entrenched norm. The professor must explain the value of this teaching methodology early on¹⁸⁹ and routinely re-enforce the values and benefits until the communities of practice are underway. Communi-

¹⁸⁶ “The heart of the community is the web or relationships among community members, and much of the day-to-day occurs in one-on-one exchanges” whether face-to-face or electronically. *Id.* at 58. “The key to designing community spaces is to orchestrate activities in both public and private spaces that use the strength of individual relationships to enrich events and use events to strengthen individual relationships.” *Id.* at 59.

¹⁸⁷ Timothy W. Floyd, Oren R. Griffin & Karen J. Sneddon, *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 264 (2011).

¹⁸⁸ WENGER ET AL., *supra* note 18, at 86.

¹⁸⁹ *Id.* at 85. Building a case for membership, usually involves “building a two-pronged case for membership: the benefits of contributing and the value of learning from others’ experience.” *Id.*

ties of practice involvement requires the students' time. There is a limited amount of time that students will be willing to invest to see if there will be value.¹⁹⁰ If students do not recognize the value, then they will not participate.

The professor should further inform students that participation in communities of practice will not only enhance learning of substantive material, but will help hone skills they will need to practice law successfully. Legal employers value prospective employees who can work well with others because attorneys must work cooperatively.¹⁹¹ Participation in communities of practice requires students to work cooperatively. Further, the professor as the expert can model and discuss good group behavior which includes “‘listening actively, taking turns talking, not interrupting, encouraging others, cooperating, sharing results, being open-minded, giving constructive feedback, tactfully defending one’s views, compromising, and showing respect for others.’”¹⁹² The students, based on the professor exemplifying these traits in the classroom and based on their participation in the community of practice, should then better understand the skills needed to work successfully with others.

Recognizing that communities of practice exist and understanding how they function—specifically that they involve “valuing another’s expertise and trying to see how it might enhance your expertise and interest”¹⁹³—is another valuable skill. The professor can explain that students who become familiar with communities of practice in the classroom will be able to recognize existing communities of practice in the workplace. Having participated in communities of practice, students will be better equipped to work effectively in any community of practice. Law school and the practice of law are competitive. Learning to work civilly and cooperatively in a competitive environment is an important transferable and required skill for the

¹⁹⁰ *Id.* at 17.

¹⁹¹ “Lawyers spend much of their time working collaboratively with others in ‘brainstorming, group decisionmaking, engaging in complex multitask projects, and editing and being edited.’” Clifford S. Zimmerman, *Thinking Beyond My Own Interpretation*, 31 ARIZ. ST. L.J. 957, 960 n.8 (1999) (citing Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 15 (1995)).

¹⁹² Robert K. Thyfault & Kathryn Fehrman, *Interactive Group Learning in the Legal Writing Classroom: An International Primer on Student Collaboration and Cooperation in Large Classrooms*, 3 J. MARSHALL L.J. 135, 145 (2009) (citing LINDA B. NILSON, TEACHING AT ITS BEST: A RESEARCH-BASED RESOURCE FOR COLLEGE INSTRUCTORS 129-33 (2003)).

¹⁹³ Catherine A. Monaghan, *Communities of Practice: Learning Opportunities in Adult and Higher Education Classrooms* 18 (2006), available at http://ahea.org/files/pro2006_monaghan.pdf.

successful practice of law.¹⁹⁴

There is also value to the student because cooperative learning promotes a more positive learning environment. The students' contribution will be valuable to the community of practice as a whole.¹⁹⁵ The competitive nature of law school, generated by a mandatory curve and class rank, can be tempered when the professor encourages students to help each other and operate in communities of practice. Law students who come to law school with the idea of promoting justice and helping others can start by helping their fellow students. The by-product of community participation can be a more positive learning environment.

6. *Combine Familiarity and Excitement*

Wenger further suggests combining familiarity and excitement. Familiarity will come with continued interaction. However, "too much community can be counterproductive"¹⁹⁶ when it prevents or limits the expansive exploring of issues and results in exclusion of new members or new ideas.¹⁹⁷ Communities of practice should not be romanticized.¹⁹⁸ They "reflect all the strengths, weaknesses, and complex interrelationships of their human members."¹⁹⁹ Thus, it is the professor's responsibility to ensure that the group is interactive, and that all members believe that they can contribute ideas without censorship or ridicule. The professor, however, should not to resolve all conflicts within the community or subcommunity. Learning often occurs in the community through the tension of its members and their conflicting ideas. Thus, communities of practice should work towards familiarity, operating organically, knowing that there will be tensions and conflict. Where the professor detects or is told about a member's exclusion, the professor should work to resolve the underlying reasons that this exclusion is occurring or, if needed, encourage the student to join a different, perhaps more suitable, subcommunity.

Excitement will be generated through meaningful exchanges on relevant topics and by students learning through the communities of practice model. Excitement can also come from designating someone as a boundary broker. Members of the community of practice will need to decide if there are other communities or subcommunities with

¹⁹⁴ Model Rules of Professional Conduct 3.4, 3.5, and 4.1 require civil conduct of attorneys interacting with the court and with other attorneys. MODEL RULES OF PROF'L CONDUCT R. 3.4, 3.5, 4.1 (2012).

¹⁹⁵ WENGER ET AL., *supra* note 18, at 59.

¹⁹⁶ *Id.* at 144.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 139.

¹⁹⁹ *Id.*

which they want to interact, how that interaction should occur, whether the information will be shared, and to what extent.²⁰⁰ Having made these decisions, boundary brokers can be in charge of gathering new information at the boundaries to foster learning within their own community.²⁰¹

7. *Create a Rhythm*

The seventh step is to create a rhythm for the community. Implementation of the fundamentals required for successful groups would aid in creating a rhythm for the community. Initially, the community members will need to know the other member's names, exchange phone numbers and email addresses, discuss the best time to contact each person, set up times that are convenient for the group to meet, and establish where the group will meet. Professors should encourage students to set a regular meeting time. The classroom setting acts as a whole community meeting on a regular basis but there can, and should be, smaller subcommunity gatherings.²⁰² Regularly providing time in class for subcommunity meetings and regularly providing subcommunity tasks would help to create a rhythm for the communities of practice.

Wenger's steps for cultivating communities of practice in organizations correspond with ideas previously set forth for successful cooperative learning in law school. Summarily, these ideas are that the professor should ensure 1) the group has a well-defined task or tasks; 2) the group members trust each other, communicate effectively with each other, and accept responsibility for and support each other in the context of the group work; 3) each group member accepts individual responsibility for the group's success; and 4) the group is able to resolve conflicts constructively.²⁰³ Wenger's seven steps encompass these ideas. Implementation of these criteria, as discussed more concretely in the next section, should create an environment that will result in successful communities of practice.

²⁰⁰ *Id.* at 153-54.

²⁰¹ *Id.* at 153.

²⁰² *Id.* at 63. "A combination of whole-community and small-group gatherings creates a balance between the thrill of exposure to many different ideas and the comfort of more intimate relationships. A mix of idea-sharing forums and tool-building projects fosters both casual connections and directed community action." *Id.*

²⁰³ Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 235-59 (2000).

B. *Communities of Practice in Different Courses*

1. *First-year Legal Writing Course and Upper-level Skills Courses*

The first-year legal writing course and upper-level, skills-training courses, including clinics, lend themselves to implementation of communities of practice because they are interactive and generally supervised by a professor who is an expert in the practice area. The domain is creating strategies for learning the information being taught in the skills-based course with the students interacting and creating practices under the tutelage of the expert professor.

As discussed above, the professor should initially explain learning in the community of practice model, the supporting learning theory, and the benefits of learning through a community of practice. The professor should then provide students with the opportunity to get to know each other.²⁰⁴ Recognizing the power of narrative, the professor can encourage the students to tell stories about themselves as a means of learning about each other. Professors showing an interest in their students as people with lives outside of law school can humanize the law school experience and consequently make it more positive.²⁰⁵ Additionally, students who know a little about each other may begin to trust each other, may begin to interact, and may feel more comfortable putting forth ideas. When students have some information about each other, the professor can have the students form subcommunities, exchange information, and establish parameters necessary for the subcommunity to function.

Recognizing that some students will have prior experiences that provide a level of competence in a particular skill, the students should assess the expertise and skills of the subcommunity members. Adult learners bring different types of experience to the classroom. Some students may have been paralegals or have some other legal-type experience. Some students may have been amateur or professional writers. Thus, even when the community is only comprised of first-year

²⁰⁴ “As members build connections, they coalesce into a community.” WENGER, ET AL., *supra* note 18, at 68. Catherine Monaghan had students share a joy and concern. She then had students group themselves according to an interest in a specific topic. They introduced themselves to each other and explained why they were interested in that topic. This was a fifteen minute exercise. Monaghan, *supra* note 193, at 19.

²⁰⁵ The Humanizing Movement arose because “[m]any scholars believe that traditional legal pedagogy causes significant psychological distress in students that continues into the practice of law.” Randall, *supra* note 203, at 209 (citing as an example B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 628 (1991)). The Humanizing Movement argues that members of the law school ought to “identify negative stressors in the law school environment, reduce or eliminate those as much as is possible, and help the students to manage those that can not be eliminated.” Michael Hunter Schwartz, *Humanizing Legal Education: An Introduction to a Symposium Whose Time Came*, 47 WASHBURN L.J. 235, 239-40 (2008).

students, the students should still consider the skills that each member brings to the community. The students can then decide how the community will function and assign roles within the community based on that expertise. If time allows, the professor can have the students create a design plan for the subcommunity.

With the foundation for the subcommunity in place, the professor should make suggestions or require activities for the community outside of class. The students could work together to draft documents or sections of a document required for the course, or work on a required presentation, or conduct a mock interview or mock oral argument. As a helping community, the students should discuss any problems they encounter in transferring the information they acquired through their readings or lecture to these practical skills.

Creating an interactive dynamic in the law school classroom can involve any of many different types of group activities. An example in a first-year legal writing course would be having the subcommunities draft a section of a memorandum. A goal of legal writing courses is to teach students how to draft a memorandum. Most courses break down this task into discrete units; for example, requiring students to draft a question presented, then an introduction, a statement of facts, a discussion section, and a conclusion. The professors then give feedback on each discrete task. Thus, a community of practice exercise in the legal writing course could involve drafting a question presented. The students could initially work alone to draft a question presented and then could be given time in class to work with their subcommunities to draft a model question presented to be shared with the class.

The initial solo work is important. Having thought through the exercise alone, the students should be more prepared to discuss the assignment. They will learn when they compare their understanding to the understanding and approach of other community members. During the class presentation, students can discuss what they understood was to be accomplished by drafting the question presented. They can explain the process employed to draft the question presented, specifying what choices worked in the drafting and editing process and what did not work. During the presentation, the professor, as the expert, should provide insights and instruction to teach the students how to effectively draft a good question presented. The professor can give feedback on the student's narrative information, on the drafting process the student used, and on the question presented itself. The student's narrative may not only help other students but would serve as a good vehicle for teaching the student the importance of reflection on the student's learning process.

A similar activity could be used for any of the smaller tasks that

are required in upper-level, skills-based courses. Interaction through the communities of practice model would be particularly beneficial where the professor provides students with problems or simulations that mimic the ill-structured nature of problems that occur in law practice or where students engage in practical experiences in the clinic. The community or subcommunity members can learn from each other as they collaboratively problem-solve and create synergistic solutions. Further, students benefit from the supervision of the professor offering advice through the process.

Through in-class and out-of-class, face-to-face and online meetings, the students will learn, as they interact with each other and the professor, strategies to master the skills being taught in the course. The goal is for the students through continued interaction to become comfortable enough with the other members of their community such that they can openly share ideas and create knowledge, and also such that they develop a sense of camaraderie that creates a desire to help the community members succeed.

Importantly, the activity chosen to encourage interaction should raise issues of professional values and force students to confront ethical dilemmas. Professional ethical norms are determined by the members of the profession.²⁰⁶ Acting professionally and ethically, in part, involves “conformity with expectations of peers”²⁰⁷ Thus, the professor should facilitate students exploring with each other through narrative how they handled a challenging situation. The students can discuss whether they were satisfied with the decisions they made, and what practices they might have chosen to better handle the situation. The professor’s contribution is to mandate high standards of professional and ethical behavior as students are forming their identities as future members of the legal community. These discussions reflecting on the dilemma will assist learning how one’s peers or an expert would handle a challenging situation. Problem solving these dilemmas in the classroom should help students who are subsequently faced with such a decision to choose, despite the hardships that might befall them, the higher ground.

Also regardless of the activity chosen, with the professor’s help, the students should discuss with their subcommunity how the particular skill being learned is relevant to their future identity as attorneys and how it will be used later in their law school careers. Such discussions will help students transfer learned material and skills. Although

²⁰⁶ Weresh, *supra* note 6, at 346.

²⁰⁷ *Id.* at 345. It is not peer expectations alone that determine ethical or professional behavior, as attorneys are required to abide by any governing set of ethical and professional rules. *Id.*

there are many views regarding how to facilitate transfer of learned information,²⁰⁸ a review of the literature leads to several conclusions. First, transfer does not automatically occur.²⁰⁹ Everyone has, at some point in time, struggled to recall information they have previously learned. Second, practices that enhance learning also help transfer of the learned knowledge. Such a conclusion is consistent with schema theory that postulates that the better the information is encoded the more effective the recall.²¹⁰ Third, student discussions about how learned information might be used in the future, including how it is relevant to a future class or a future job, facilitates transfer.²¹¹ Thus, students should discuss how skills they are learning in their legal writing courses will be used in second and third year courses and in practice. A similar dialogue about the relevance to practice of skills learned in the upper-level, skills courses should also occur. Adult learning theory posits that adults are more receptive to learning tasks when the professor explains how the tasks are relevant to the adult students for their future professional career.²¹²

One problem in implementing communities of practice in law school is that most students do not aspire to be law school professors. Thus, this situation is unlike a traditional apprenticeship, where the novice seeks to learn and develop the same identity as the master. The same situation presents itself in organizations as well. Yet communities of practice in organizations thrive because the novice members on the periphery may not want the core member's specific job title, but simply to belong to a community that generates information beneficial to the novice's job in that field.²¹³ The same is true for law

²⁰⁸ Kowalski, *supra* note 1, at 59-61.

²⁰⁹ Blasi, *supra* note 34, at 357-58.

²¹⁰ See *supra* notes 68-71 and accompanying text.

²¹¹ Baker, *supra* note 5, at 637; Kowalski, *supra* note 1, at 56, 63-64.

²¹² Floyd, et al., *supra* note 187, at 264.

²¹³ Communities of practice in organizations have been successful and are thriving also because the organization has a substantial interest in harnessing and preserving the information that can be created by these communities of practice. WENGER ET AL., *supra* note 18 at 6.

Companies at the forefront of the knowledge economy are succeeding on the basis of communities of practice, whatever they call them. The World Bank delivers on its vision of fighting poverty with knowledge as well as money by relying on communities of practice that include employees, clients, and external partners. Shell Oil relies on communities of practice to preserve technical excellence across its multiple business units, geographical regions, and project teams. McKinney & Company counts on its communities of practice to maintain its world-class expertise in topics important to clients who are themselves becoming smarter and more demanding. The list could go on and on. In all industries, companies are discovering that communities of practice are critical to mastering increasing difficult knowledge challenges. They are learning to recognize and cultivate these communities. More over, once these communities find a legitimate place in the organization, they offer new

students. Although law students may not want to become law professors, they are seeking legitimacy in the field of legal professionals and to learn from the professor's knowledge and experiences. Thus, novice law students will initially operate at the periphery of the community but at some point move on a trajectory toward becoming a more skilled, accomplished member of the community without necessarily taking on the specific identity or job title of the expert professor.

2. *High Enrollment Courses*

Often survey courses or case-book courses are taught by one professor to a large number of students. A large number of students can inhibit the intimacy and community necessary to build successful communities of practice. Although the domain is the same and practices will evolve if the community is successful, it is generating that sense of community that can be difficult in heavily-populated classrooms. All professors want their class to coalesce as a well-working learning unit. Most professors have had good classes and bad classes in that regard. It may be that allowing students to participate in subcommunities is even more of a necessity in the large classroom to prevent students from disengaging from the classroom learning experience.

Fundamentally, the professor will need to move from the traditional lecture-based model to incorporating group learning. As with skills-based courses, the professor will need to explain the community of practice model, the supporting learning theory, and the benefits of learning through a community of practice. If it is a large upper-level course, students may already know each other and can form subcommunities without class time devoted to allowing students to get to know each other. This would not be true for a large first-year course, but the professor can use an exercise that will foster learning of the subject area. For example, in a Torts class, the professor can have each student tell a story involving a personal injury case in which they were involved. If the students have not been involved in a personal injury case, they could discuss a current case in the news and what they thought of that case. Any discussion involving personal experiences and the subject matter would work.²¹⁴ The exercise can be used to introduce the course fundamentals; for example, the professor

possibilities—many yet undiscovered—for weaving the organization around knowledge, connecting people, solving problems, and creating business opportunists. And because communities of practice are not confined by institutional affiliation, their potential value extends beyond the boundaries of any single organization.

Id. at 3-4.

²¹⁴ I have successfully used the McDonald's hot coffee case to generate discussion. See *Liebeck v. McDonald's Restaurants, P.T.S.*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994).

can ask the students in the class questions such as: Do you believe the person's actions were intentional or negligent?

In moving away from a lecture-based model for a portion of the class, the professor can encourage interaction by initiating group activities. Professors Thyfault and Fehrman have suggested many types of group activities that could be productive in a large classroom. Among other activities, they have suggested panel discussions, knowledge mapping, debates, visual lists, and what they call "modified fish bowl."²¹⁵ In each exercise, the professor would instruct the group to research a particular issue. Subsequently, in a panel discussion activity, each group member would present in class on the topic as part of a panel and field questions from the remainder of the class and professor.²¹⁶ In a debate structure, two groups would each be assigned different sides of an issue and engage in a structured debate of the issue.²¹⁷

The visual list activity accomplishes the same goal as the debate by asking the group to generate a comprehensive list of the pros and cons of an issue that the students post on a WIKI, write on the board, or send to the professor for the professor to share with the class.²¹⁸ Similar to a visual list is a knowledge map. Students are given a topic and must create a visual aid to help others understand the topic.²¹⁹ The topic could focus on one case²²⁰ or perhaps several cases that together explain the scope of the rule. The goal of the "modified fish bowl" activity is to allow the professor to address topics students identify as difficult. Each student writes down a question that arose from the day's class session and puts it in a "fish bowl" or other container. The students then pick a (different) question out of the container. The subcommittee then selects one or two questions and presents answers during the next class.²²¹ The professor can implement these ideas to facilitate communication and camaraderie within the subcommunities, as well as create a sense of responsibility for other subcommunity members.

Alternatively, the professor could have problems or discussion points that facilitate small group discussion and interaction. Case book and teachers' manuals often provide problems that the professor can use as a basis for small group work. Alternatively, the professor could give the students, before class, the questions or general types of

²¹⁵ Thyfault & Fehrman, *supra* note 192, at 160-63.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 160.

²¹⁹ *Id.* at 162.

²²⁰ *Id.*

²²¹ *Id.* at 163.

questions that the professor plans to ask about cases in the text book. Students can work through the questions or problems on their own, then have an informed group discussion in their subcommunities and subsequently present the information in class.

Unlike skills-based courses, presentations are not a routine pedagogical tool in most high enrollment courses. However, presentations need not be long. Instead, a revolving role within the subcommunity could be “presenter” and a representative member of the subcommunity could present information to the class on behalf of the subcommunity. The professor may instead decide to require the same information to be shared among subcommunities as opposed to the entire class. All members of the subcommunities then act as boundary brokers.

Some subcommunities may falter if the students are not sure what they should be doing together. It is helpful, especially in the beginning of the course, if the professor regularly provides activities, discussion points, questions, or problems for the subcommittee to complete inside or outside of class so that the members coalesce. Regardless of the activity, it is fostering the subcommunity interaction that will lead to the benefits of the students learning in communities of practice.

The professor will likely have a harder time, however, convincing the students in a large class of the value of the community of practice framework. Students come to a large class with certain expectations. One expectation, most certainly, is that for the majority of class time the student will not be answering questions or presenting to the entire class. The student is able to “hide.” The professor will need to plan and have thought through how communities of practice will function in her course and explain that to the adult learners in the course. Students may be skeptical given past bad group experiences with “free loaders,” where a student did little to no work but reaped the benefits of the group work. To counter this problem, the professor should emphasize that consistent with learning theory, students who engage with other students to learn the material will be exposed to new and different viewpoints that will create new insights and likely result in a deeper understanding.²²² The professor can also explain that he is using the communities of practice structure as a vehicle to implement other activities beneficial to the students’ law school learning experience. Such activities would include using the communities of practice framework to allow students to discuss professional and ethical issues, to apply learned material to realistic problems and collectively create

²²² Herndon, *supra* note 75, at 818 (explaining benefits of peer teaching).

solutions, to reflect with others on the material and their learning processes, and to facilitate transfer of learned information.

Still, it will be harder in a large class for the professor to manage the groups to ensure equal work load and participation. If the professor requires frequent presentations and sits in with the groups and discusses strategies on a regular basis, these steps should help resolve the problem. In this way, the professor is a boundary broker, working with each group, and sharing ideas that the group might not have otherwise implemented. The professor facilitates and guides the discussion based on his expertise while monitoring subcommunity dynamics. To help with the free-loader problem, the professor may have members of the group sign a document indicating their participation in any group work.²²³ A student's signature would represent that the student "fully participated" in the group discussion, group work, and final product.²²⁴

Another problem inhibiting successful collaborative work is the traditional assessment model of a final exam worth 100% of the final grade. Professor Evensen surveyed students who had participated in group work and concluded that where the final exam determined the entire grade, law students focused on learning what they needed to know for the exam.²²⁵ Consequently, the surveyed students stated that they were not interested in group work unless it was related to the exam.²²⁶ Understanding this sentiment, professors can create activities related to the exam. For example, the professor could decide to have subcommunities create possible exam questions and answers with the understanding that the professor will select one or two for the final exam or have the subcommunities work on representative exam essay questions. Alternatively, the professor could explain how collaborative learning of the material is relevant to the professor's assessment of the students' performance in the course. The professor, however, should emphasize that the exam is only a reflection of a portion of what the student has learned. Instead, the student's focus should be the acquisition of knowledge. Consistent with learning theory, students participating in communities of practice and consequently engaging in reflection, problem solving, and conflict resolution with others increase their knowledge and skills base.

I have had success implementing communities of practice in several courses. Importantly, students across the curriculum recognized that the community of practice concept was different from regular

²²³ Randall, *supra* note 203, at 253.

²²⁴ *Id.*

²²⁵ Evensen, *supra* note 87, at 366.

²²⁶ *Id.* at 379.

group work. Students were expected to work together in and outside of class on a continual basis and to help, and be responsible for, other members of their group beyond a single class period or assignment. My expectation was that the students would communicate with each other regarding the assigned material and regarding methods of how to succeed in the course. These communications can extend to everyone in the class not just to other members of the student's subcommunity. As one example, when students have questions outside of class hours, I ask them to post those questions to an online discussion forum as opposed to emailing me. Other students often post answers to those questions before I get a chance. Such behavior is community of practice in action.

CONCLUSION

In these times of legal education reform, professors should consider creating communities of practice in their law school courses to enhance learning and create a positive learning environment for the students. The educational model used in the majority of law school courses does not foster social learning. Learning in law school is a competitive process that often has negative consequences for its members.²²⁷ The legal academy, in light of the serious and consistent criticism of the traditional legal education model, has recently begun to entertain the idea of changes to the core curriculum. The communities of practice ideal should inform these changes. Implementing communities of practice in the law school classroom encourages collaboration and active learning among students as recommended by Best Practices and the Carnegie Report. Such practices can enhance learning of the course material and practice-based skills. The overall goal is to create knowledge and enhance learning in a positive classroom environment. A positive law school experience benefits the students, the professors, and the institution.

²²⁷ See *supra* note 205 and accompanying text.

