Trivializing Law School: A course in writing can't make up for law schools' purging of essential legal doctrine.

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> [*Editor's note: This article is a reply to Jan M. Levine's response to an earlier article by this author. The Rounds-Levine-Rounds exchange was published on line by The John William Pope Center for Higher Educations* (http://www.popecenter.org/) *Rounds is the author of 18 editions of* Loring and Rounds: A Trustee's Handbook].

The trepidation with which I downloaded Professor Jan Levine's critique of my article *Bad Sociology, Not Law* was unfounded. He seems to agree with me that the gutting of the traditional core law school curriculum, particularly the marginalization of the agency and trust relationships and the fiduciary principle generally, has been unfortunate and that the American legal academy now has way too many frivolous upper-level electives.

He does not, however, agree with me that the proliferation of expensive labor-intensive "skills" programs is exacerbating the de-professionalization of the American legal academy, or that perversely there may even be a correlation between the growth of the legal research and writing establishment and the continuing decline in the ability of newly-minted lawyers to write coherently. The proof of the pudding, however, is in the eating.

In his spirited and earnest defense of law school legal research and writing programs, which I perhaps intemperately characterized as at best pedagogically inefficient and at worst pedagogically cancerous, Professor Levine suggests that writing a single brief in a course in legal writing can somehow substitute for the pedagogical marginalization, if not outright purging, of critical Anglo-American legal doctrine, particularly, although not exclusively, doctrine that is Equity-based.

Here is a brief Equity primer for our non-lawyer readers. In England in the fifteenth century and for four hundred years thereafter there were separate courts of law and equity, the latter having evolved from the custom of referring petitions that had received short shrift in the courts of law to the Lord Chancellor. The body of law that grew out of

the decisions of the courts of chancery is known as Equity. (That I am responding to the comments of a legal writing professor is not without its ironies: It is said that the genealogy of modern English "goes back to Chancery, not Chaucer.")

In any case, we can thank Equity for the expansiveness of the Anglo-American fiduciary principle. The Anglo-American concept of the trust is an invention of Equity. A breach of fiduciary duty in the agency context is subject to equitable remedies, of which the injunction is one. The law of Restitution, a relatively recent invention, is essentially a fusion of the law of quasi-contracts, which is law-based, and the law of constructive trusts, which is Equity-based.

Is Equity a totally separate body of law? I for one endorse the view of the great Cambridge University legal historian and comparatist Frederic W. Maitland, namely that Equity is a gloss on the common law, not a free-standing regime. I also endorse Professor Maitland's view that the trust's elasticity and protean nature make it English jurisprudence's greatest achievement. Here I employ the term common law in its broadest sense, as distinguished from the continental civil law code regimes that prevail in such jurisdictions as France and Germany.

One could go on and on with examples of how equitable concepts, such as the fiduciary principle, are marbled throughout our jurisprudence, and the society, for that matter. Anglo-American mutual funds are generally structured as trusts. The trust has been the vehicle of choice for securitizing mortgages, including sub-prime mortgages. The trust's commercial applications are infinite; it is not just an estate planning vehicle. And then there is the agency. A lawyer is first and foremost his or her client's agent-fiduciary; an investment manager is an agent-fiduciary. While in most states there are no longer separate courts of law and equity, Equity itself has not gone away.

Does Prof. Levine truly believe that writing a single appellate brief addressing a problem about a psychiatrist's duty to warn third persons about a foreseeably dangerous patient, an issue that only remotely and tangentially implicates all this critical marginalized Equity-based doctrine, can adequately provide law students with the basic analytical tools they need to "connect the dots" once they get out in the real world? A course in torts does not a lawyer make. And certainly one appellate brief does not a compleat lawyer make, even a fledgling one. If only it were that easy.

I also quibble with his suggestion that there is no correlation between the gutting of the core curriculum and the explosion of expensive legal writing programs. Only five years ago law schools were still downgrading Agency and Trusts from required to elective status in order to expand their legal writing programs. I know this from first-hand experience.

So where do we go from here? He and I can go back and forth with personal anecdotes *ad infinitum*. I suggest that a truly independent cadre of senior seasoned practitioners having no affiliation with the ABA, the AALS, or the legal academy generally; who received the benefit of a classical legal education; and who recognize puffery, especially academic

puffery, when they see it, that is to say, a cadre of the few compleat lawyers remaining among us, take a good hard look at what is and is not being taught these days in their alma maters and issue a report on their findings. There is no time to lose.